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BEFORE THE HEARING EXAMINER  
FOR THURSTON COUNTY

In the Matter of the Appeal of:	)	Appeal No. 16-106159 VE
	)	Case No. 2014108800
Patrick Townsend, Kathryn Townsend, and	)	
Anneke Jensen	)	APPLICANT’S RESPONSE
	)	BRIEF
of the May 3, 2016 Mitigated Determination of	)	
Non-Significance in the request of ChangMook	)	
Sohn for Substantial Shoreline Development	)	
Permit for an Intertidal Geoduck Aquaculture	)	
Operation	)	

**I. INTRODUCTION**

Appellants’ Closing Memorandum (“Appellants’ Brief”) fails to demonstrate that Thurston County’s issuance of a mitigated determination of nonsignificance (“MDNS”) for Applicant Pacific Northwest Aquaculture, LLC/ChangMook Sohn’s (“Applicant’s”) proposed geoduck farm (“Farm”) is clearly erroneous. Appellants’ Brief is replete with unsupported assertion and, in fact, does not contain a single reference to a hearing exhibit. The reason is clear: the evidence does not support Appellants’ case.

On the other hand, as discussed in Applicant’s Closing Brief (“Applicant’s Brief”), Thurston County’s Closing Argument (“County’s Brief”), and below, Applicant and the County provided extensive evidence at hearing demonstrating the County issued the

1 MDNS in compliance with applicable regulations and that the Farm will not have  
2 significant environmental impacts with respect to eelgrass, plastics, recreation, or  
3 aesthetics. For these reasons, the Hearing Examiner should affirm the MDNS.

## 4 II. FACTS

5 Applicant incorporates by reference the facts presented in Applicant's Brief, as  
6 further supplemented by the facts presented in section III below.

## 7 III. ANALYSIS

### 8 A. The MDNS Complies with All Applicable Laws and Regulations

9 Appellants contend that, for the MDNS to survive scrutiny, the record must  
10 demonstrate the County's decision to issue the MDNS was based on sufficient  
11 information and environmental factors were adequately considered to establish prima  
12 facie compliance with the State Environmental Policy Act ("SEPA"), chapter 43.21C  
13 RCW. Appellants' Brief, at 3. Appellants also claim that the MDNS fails to comply with  
14 WAC 197-11-330(3). *Id.*, at 2-3. Appellants provide no detailed argument or evidence  
15 demonstrating the record before the County is insufficient, that environmental factors  
16 were inadequately considered to establish prima facie compliance with SEPA, or that the  
17 MDNS violates WAC 197-11-330(3), and thus these claims should be disregarded.  
18 *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

19 On the other hand, the County and Applicant clearly demonstrated the County  
20 carefully considered the potential environmental impacts associated with the Farm in a  
21 manner sufficient to comply with SEPA and applicable regulations. Prior to issuing the  
22 MDNS, the County analyzed the Farm for nearly 18 months, read extensive literature  
23 including site-specific reports, solicited public comments, reviewed Applicant's detailed  
24 response to comments, and sought input from other appropriate agencies. Kantas

1 Testimony; Sohn Testimony; Exs. C-1, at 1-5, C-1-M, at 1-6. And at hearing, the  
2 Applicant and County provided numerous witnesses and exhibits demonstrating that  
3 Appellants' claims are not simply unsupported, but contradicted by the record evidence  
4 demonstrating the Farm does not have probable and significant unmitigated impacts.  
5 Applicant's Brief, at 3-15; County's Brief, at 2-5. Accordingly, the County demonstrated  
6 it followed proper procedures and adequately considered environmental impacts, and  
7 Applicant showed the MDNS complies with all applicable regulations. *Id.*; Rules of  
8 Procedure for Proceedings Before the Hearings Examiner of Thurston County,  
9 Washington, Ch. 1, § 7.6(a).

10 Appellants concede that, to overturn a MDNS, “[a]n appellant must establish that  
11 the proposal will have probable, significant, adverse environmental impacts . . . An  
12 appellant must also prove that the MDNS was clearly erroneous in the face of the  
13 deference due to the SEPA Responsible Official's determination . . .” Appellants' Brief,  
14 at 3. As discussed in the Applicant's Brief, the County's Brief, and below, Appellants  
15 failed to prove the MDNS is clearly erroneous and that the Farm has probable significant  
16 impacts. Accordingly, the MDNS must be affirmed.

17 **B. The Farm Will Not Adversely Impact Eelgrass (Issue A)**

18 Issue A fails for two reasons: (1) no eelgrass exists on or near the Farm site; and  
19 (2) even if eelgrass did exist, there is no evidence that the Farm has probable significant  
20 impacts to eelgrass. Applicant's Brief, at 5-9; County's Brief, at 2.

21 Appellants' Brief fails to cite any evidence that eelgrass exists on or near the Farm  
22 site. Appellants discuss the eelgrass restoration test site located over 300 feet from the  
23 Farm, but they do not contest Applicant's expert testimony that this test site suffered a  
24 complete die-off in 2016 and its future status is uncertain. Bloch Testimony. Instead,  
25

1 Appellants speculate “eelgrass *could* reappear on Applicant’s tideland.” Appellants’ Brief  
2 (emphasis added). Appellants provide no evidence that eelgrass will, in fact, be present  
3 on or near the site, and Applicant’s expert testified there are numerous reasons why  
4 eelgrass may not successfully establish in the area. Bloch Testimony. The MDNS cannot  
5 be overturned based on Appellants’ speculation that eelgrass could hypothetically be  
6 present in the future. WAC 197-11-782.

7 It is also inaccurate for Appellants to claim that eelgrass could “reappear” on the  
8 Farm site, implying that eelgrass existed on the site previously. The evidence at hearing  
9 demonstrated eelgrass was previously found off, not on, the Farm site. Bloch Testimony;  
10 Ex. S-32.

11 Appellants’ Brief also fails to cite any evidence that the Farm will adversely  
12 impact eelgrass, including at the restoration test site (assuming the test site is successful).  
13 David Batker stated the Farm would transport “significant” sediment to the test site, but he  
14 provided no calculation or information to support this assertion, and he has no training,  
15 education, or experience in geoduck aquaculture. Batker Testimony; Applicant’s Brief, at  
16 p. 6. In contrast, Applicant offered expert testimony and evidence that the Farm would  
17 transport and deposit, at most, negligible amounts of sediment over the test site in levels  
18 that are below background conditions and insufficient to effect eelgrass at the test site.  
19 Osborne Testimony; Bloch Testimony; Exs. S-1, 2, 4, 9, 11, 37; Applicant’s Brief, at 6-8.

20 Instead of attempting to demonstrate how the Farm will allegedly impact eelgrass,  
21 Appellants’ Brief makes numerous misguided, unsupported, and false assertions. For  
22 example, Appellants claim the County failed to consider the effects of the Farm on  
23 eelgrass and the test site, but the MDNS clearly documents that the County considered this  
24 potential impact and determined it to be insignificant based on numerous studies.  
25 Appellants’ Brief, at 6; Ex. C-1-M, at 5-6.

1 Appellants also allege the MDNS is erroneous because a cumulative impact  
2 analysis has not been performed for all shellfish farms in Puget Sound. Appellants' Brief,  
3 at 7-9. Appellants did not raise this issue in their Notice of Appeal, and courts hold  
4 cumulative impacts need only be analyzed under SEPA when the subject project is  
5 dependent on other projects, which is not the case here. *Gebbers v. Okanogan County*  
6 *Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 386, 183 P.3d 324 (2008). Moreover, federal  
7 regulatory agencies have, in fact, recently completed a cumulative impact analysis of  
8 existing and potential new shellfish activities throughout Washington State, and that  
9 analysis concluded a 16-foot buffer for eelgrass from new farms is adequately protective.  
10 Bloch Testimony; Exs. S-30, at 33, S-31, at 12.

11 Appellants further argue that a prior Shorelines Hearings Board ("SHB") decision,  
12 *Garrison v. Pierce County*, SHB No. 13-016c (Findings of Fact, Conclusions of Law, and  
13 Order, Jan. 22, 2014) ("*de Tienne*"), supports their appeal. Appellants are wrong, and *de*  
14 *Tienne* is distinguishable for numerous reasons. The MDNS for the *de Tienne* farm was  
15 not appealed, so SEPA was not at issue in that case; an eelgrass bed was located on the  
16 middle of the *de Tienne* farm and the shoreline permit included 10-foot buffers with  
17 adaptive management that the SHB found inadequate; the *de Tienne* farm site was located  
18 on a shoreline of statewide significance; the *de Tienne* decision pre-dated the recent  
19 cumulative assessment by federal agencies and the completion of other, recent studies; the  
20 *de Tienne* farm was mostly subtidal; and the SHB found no experts testified on sediment  
21 transport and eelgrass biology to verify the 10-foot buffer was adequate. SHB No. 13-  
22 016c, at FF 11, 52, 56. Under these unique facts, the SHB held the decision to deviate  
23 from the original, proposed buffer of two vertical feet or 180 horizontal feet in the  
24 application materials for that farm was not supported. Even if a 180-foot buffer was the  
25 current, applicable buffer, and even if the eelgrass test site were to be successful, the Farm

1 would easily meet this standard—it is located 330 feet from the test site. Bloch  
2 Testimony.

3 Because the record evidence clearly demonstrates the Farm will have no impact on  
4 eelgrass, Issue A has no merit and cannot form a basis for overturning the MDNS.

5 **C. The Farm’s Plastics Will Not Cause Adverse Impacts (Issue C)**

6 Appellants’ Brief contains no argument or analysis with respect to the claims  
7 related to plastics in their Notice of Appeal. Appellants therefore waive Issue C. *Cowiche*  
8 *Canyon Conservancy*, 118 Wn.2d at 809. Appellants’ Brief, at 11-13. As discussed in  
9 Applicant’s Brief, the evidence at hearing demonstrated the Farm’s gear will not result in  
10 the harm alleged in the Notice of Appeal and does not pose a significant risk of degrading  
11 into microplastics. Applicant’s Brief, at 9-10.

12 Rather than addressing the issues raised in their Notice of Appeal, Appellants’  
13 Brief raises a concern with respect to marine debris, but it fails to demonstrate that the  
14 conditions in the MDNS are inadequate to address this concern. The MDNS contains  
15 numerous measures to ensure the Farm’s gear is properly deployed, maintained, and  
16 accounted for, and Brian Phipps testified that area netting does not come free and is very  
17 effective at securing any PVC tubes that may start to come loose through weather events.  
18 Ex. C-1-M, at 6-7; Phipps Testimony. Appellants also allege that the County does not  
19 monitor the MDNS, but the MDNS does, in fact, contain reporting requirements, and  
20 County staff testified that they would respond to complaints regarding the Farm, similar to  
21 enforcement for any other proposal. Appellants’ Brief, at 11; Kantas Testimony; Ex. C-1-  
22 M. Finally, Appellants raise concerns in the “Plastics” section of their brief concerning  
23 recreation and aesthetics, and those concerns are discussed in the sections below.  
24 Appellants’ Brief, at 11-13.

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1           Because Appellants waived their original claims with respect to plastics and failed  
2 to prove the Farm’s plastics will cause probable significant impacts in any other respect,  
3 Issue C has no merit and cannot provide a basis for overturning the MDNS.

4           **D. The Farm Does Not Have Adverse Recreational Impacts (Issue D)**

5           Appellants’ Brief contains no information or analysis demonstrating the Farm will  
6 have any, let alone probable significant, impacts to recreation. Appellants’ Brief, at 9-10.  
7 For example, Appellants state their witnesses “expressed concerns regarding the safety of  
8 future recreation in the water.” *Id.*, at 9. But Appellants provided no evidence at hearing  
9 that there would be such impacts, and numerous witnesses for Applicant, who have  
10 decades of experience managing and overseeing geoduck farms, presented uncontroverted  
11 testimony and evidence contradicting Appellants’ claims. Applicant’s Brief, at 11-12.  
12 Appellants and some of their neighbors may have general concerns with and opposition to  
13 the Farm, but these are inadequate grounds for overturning the MDNS. *Anderson v.*  
14 *Pierce County*, 86 Wn. App. 290, 305, 936 P.2d 432 (1997).

15           Appellants also inappropriately rely on the SHB’s *de Tienne* decision. Appellants’  
16 Brief, at 13. The *de Tienne* decision is distinguishable on numerous grounds, as discussed  
17 above. *Supra*, at 5-6. In addition, with respect to recreation, the SHB found the *de Tienne*  
18 farm site had particularly high winds and waves that made it a prime windsurfing location,  
19 and witnesses testified to prior incidents of adverse interactions in that area. SHB No. 13-  
20 016c, at FF 59-60. None of these circumstances are present with the subject Farm.  
21 Moreover, the SHB in *de Tienne* did not hold that the proposed farm would have a  
22 significant impact under SEPA. It simply found that, if the applicant were to submit a  
23 future application, the permit should include additional conditions to address the unique  
24 site-specific circumstances present in that case. SHB No. 13-016c, at FF 62.

1 The MDNS for Applicant's Farm contains numerous conditions to mitigate and  
2 minimize potential negative recreational impacts. Ex. C-1-M, at 6-7. Appellants have  
3 failed to demonstrate there will be significant impacts in light of these conditions or to  
4 identify any additional conditions that should have been imposed to address their  
5 concerns. Accordingly, the MDNS cannot be overturned on the basis of Issue D.

6 **E. The Farm Does Not Have Significant Aesthetic Impacts (Issue E)**

7 Appellants state they have "concern with aesthetics" but fail to demonstrate that  
8 the Farm will have significant aesthetic impacts. Appellants' Brief, at 10. Appellants do  
9 not contest any of the key facts presented by Applicant's witnesses, including that the  
10 Farm will be completely submerged for roughly 94 percent of the daylight hours during  
11 the culture cycle, and that a substantial majority of the Farm will almost never be visible.  
12 Applicant's Brief, at 13. Instead, Appellants falsely state that Applicant's expert, Marlene  
13 Meaders, presented "misleading and deceptive" information by averaging the number of  
14 daylight hours that gear will be visible over the year. Appellants' Brief, at 11. In fact,  
15 Ms. Meaders clearly presented a visibility analysis that provided information with respect  
16 to the entire culture cycle, an entire year when gear is present, and each month of the year  
17 when gear is present. Ex. S-34; Meaders Testimony. Ms. Meaders further explained that  
18 Appellants provided a skewed analysis of the actual aesthetic impacts by focusing only on  
19 a certain portion of the year and reporting each exposure as a full day. Meaders  
20 Testimony. Appellants repeat this error in their closing brief. Appellants' Brief, at 14.

21 Finally, as explained in both the County's Brief and Applicant's Brief, the County  
22 carefully considered the potential aesthetic impacts of the Farm and imposed numerous  
23 conditions in the MDNS to mitigate these concerns. County's Brief, at 3-4; Applicant's  
24 Brief at 13-14; Ex. C-1-M, at 6-7. Appellants failed to demonstrate the Farm has probable  
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1 significant aesthetic impacts in light of these conditions or to identify additional  
2 conditions to address their concerns. In fact, in discussing aesthetics, Appellants admit  
3 “Applicant cannot mitigate these concerns.” Appellants’ Brief, at 10. This confirms the  
4 crux of Appellants’ case—they are adamantly opposed to the Farm, and there is nothing  
5 additional the County or Applicant can do to address their concerns. While Appellants  
6 have the right to voice opposition to the Farm, the MDNS cannot be overturned on the  
7 basis of community displeasure and generalized concerns. *Anderson*, 86 Wn. App. at 305.  
8 Accordingly, the MDNS cannot be overturned on the basis of Issue E.

9 **IV. CONCLUSION**

10 The arguments provided by Appellants prove no more than that they are  
11 intransigently opposed to the Farm and have several generalized, but undocumented,  
12 concerns. This is an inadequate basis to overturn the MDNS. In contrast, the County and  
13 Applicant provided clear and convincing evidence that the County followed all applicable  
14 regulations in issuing the MDNS and that the Farm, as mitigated, does not have probable  
15 significant adverse environmental impacts. For these reasons, the Hearing Examiner  
16 should affirm the MDNS.

17 DATED this 27th day of January, 2017.

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