

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Appeal of Henry Jameson and
Annette Skinner regarding a shoreline
permit exemption granted to

AMERICAN GOLD SEAFOODS, LLC

SSDE12425CC

by the Director, Planning and Community
Development, for replacement net pens
at the Ft. Ward aquaculture facility

INTRODUCTION

The Applicant, American Gold Seafoods, sought an exemption from the Shoreline Substantial Development Permit requirements for replacement of net pens at its fish farm operation within the City's shoreline aquatic environment. The Director's decision to grant the requested exemption was appealed by Henry Jameson and Annette Skinner.

The appeal hearing was held on November 29, 2007 and continued on December 6, 2007. Parties were represented at the hearing as follows: the Director, Planning and Community Development Department (PCD), by Rosemary Larson, attorney for the City of Bainbridge Island; the Applicant, American Gold Seafoods, LLC (AGS), by Richard Elliot, attorney-at-law; and, the Appellants, Henry Jameson and Annette Skinner, by Henry Jameson, attorney-at-law.

The PCD Staff Report, Exhibit 3, has more than a dozen attachments; each identified by letter (cited herein as "Exhibit 3A" through "Exhibit 3R"). Exhibit 5, the Applicant's prehearing brief, distinguishes its numerous attachments by number (cited herein as "AGS-1" through "AGS-11"). Similarly, individual documents in Exhibit 6, the Appellants' exhibit notebook, have separate numbers (cited herein as "App-1" through "App-22").

After due consideration of all the evidence in the record, the following shall constitute the findings of fact, conclusions of law, and decision of the Hearing Examiner on this appeal. All evidence admitted in to the record was considered in making this decision. References to exhibits and testimony that are shown in brackets denote some of the evidence relied upon; these references are not intended as exclusive or exhaustive.

FINDINGS

BACKGROUND

1. American Gold Seafoods, LLC (AGS), is the owner and operator of the Fort Ward floating aquaculture facility. The Fort Ward facility (addressed as 9507 South Beach Drive), is located in Rich Passage at the southern end of Bainbridge Island about

500 ft. from shore. AGS also operates two other such facilities in this vicinity: Orchard Rocks (approximately 1,000 ft. from shore) and Clam Bay (approximately 1,300 ft. from shore). [Exhibits 3 and 9; AGS-11; see relative locations in APP-1 through APP-3.]

2. In addition to the net pens, the fish farm operation includes the Ft. Ward pier that extends from the shore directly south of the intersection of South Beach Road and Fort Ward Hill Road. The pier has a variety of structures on its deck, including storage and warehouse buildings. [AGS-9]

3. The zoning is residential (R-2: residential with two units per acre). The City's Shoreline Master Program designates the upland portion of the site "Semi-Rural" and there is an "Aquatic" designation over water. The Comprehensive Plan designation is Open Space Residential, two units per acre. [Staff Report, Exhibit 3, page 1]

4. As noted in the Director's Staff Report [Exhibit 3, page 1], aquaculture (fish farming) activity has been taking place at this location for over 30 years. There have been several owner-operators and changes in corporate identity during that time. American Gold Seafoods, LLC is the current owner-operator; others include "Domesea Farms", "NW Sea Farms", "Pan Fish USA Ltd", and "Cypress Island Inc." Chronology of shoreline permit activity includes:

- 1973 Area leased for aquaculture (18 pens at end of Ft Ward pier) [AGS-4A]
- 1988 County approves SCUP/SSDP for 28 new pens [AGS-4A & AGS-8]
- 1997 PCD exemption for new cages rejected by HE on appeal [APP-15]
- 2000 Exemption for repair "by replacement" with Procean pens [AGS-4A]
(Corps authorizes replacement as "Maintenance" [AGS-4A])
- 2004 SSDP/SCUP 12425 approved for new feeder machines, etc. [AGS-9]

5. In December 2004, extreme tidal conditions caused legitimate concern that the net pens could break up, come loose from the anchors, and/or fish could be released. In response, the pens were towed two miles south to a safe location and kept under tow until all the fish could be harvested. These actions avoided release of fish and significant damage to the net pens. An emergency exemption for repair was granted for the removal and reinstallation of the net pens. [Exhibit 9]

6. Both the old net pens (installed under the permit issued in 2000) and the replacement sought here are manufactured by "Procean North America, Inc." The Procean "cage system" is a system of floating fish rearing pens (cages) built of "interhinged, fully welded steel sections" with pontoon (or "catamaran") floatation. Nets are secured to the steel frame to create individual pens. Procean literature claims that the system will last at least 20 years; the warranty is for 12 years. [AGS-4A, AGS-6, APP-14; Testimony of Bright] (Note: the terms "net pens", "pens", "cages", "net pen system" and "cage system" have been used interchangeably in this decision.)

EXEMPTION DETERMINATION

7. In March 2006, AGS notified PCD that it was "temporarily removing the Ft. Ward net pens from their moorings and towing them out of the area" [Exhibit 3N]. The nets were returned to Pan Fish Canada, Ltd., the owner of the cages. AGS maintained that it was having "new replacement Pro-Ocean cages built...identical in design" to those

being removed. In November 2006, PCD advised AGS that the replacement must occur within two years of removal or a Shoreline Substantial Development Permit would be required [Exhibit 3F].

8. On July 11, 2007, AGS filed application for exemption from the Shoreline Substantial Development Permit (SSDP) process for the replacement net pens. The application states that the “replacement pens” would be of the same design and in the same location as the old net pens, using “mooring system components” (e.g., anchors, chains, and buoys) that had remained at the site when the old cages had been removed. [Exhibit 3A]

9. The Director originally published notice of the AGS exemption application on July 28, 2007. To correct for the original notice having not been posted on-site, a revised notice was issued (and properly posted and distributed) on August 17, 2007. [Exhibit 3, page 2; 3J-3L] The reissued notice with required posting, resolved the defect in the original notice.

10. The Director received a number of public comments in response to the notice of application, including several from nearby residents. The Staff Report [Exhibit 3, pages 2-3], summarizes the concerns: expanding a non-conforming use; improper notice; industrial noise; potential return of noisy sea lions; pollution; pens removed too long ago to be ‘reinstalled’; and, increased traffic dangers from more large trucks. Copies of the comments are attached to the Staff Report as attachments [Exhibit 3: Fletcher, I-1; Cruickshank, I-2; Jameson, I-3 & I-6; Detrick, I-4; Skinner, I-5 & I-7.]

11. On October 10, 2007, the Director gave notice of the granting of the requested exemption [Exhibit 3R]; the Staff Report [Exhibit 3] was issued at the same time.

APPEAL AND HEARING

12. Henry Jameson and Annette Skinner timely filed an appeal of the Director’s decision to grant the exemption [Exhibit 1]. The appeal asserts that the proposed action (cage replacement) is not “normal maintenance” or “normal repair” within the terms of the exemption provisions of BIMC 16.12.030 and WAC 173-27-040(2)(b). The SEPA threshold determination is challenged for considering “existing conditions” to be those before use of the old pens was discontinued.

13. Notice of the appeal hearing was properly given [Exhibit 2] and the hearing which began on November 29, 2007, was continued and completed on December 6, 2007. During the hearing the Appellant, Applicant, and the Director each presented witness testimony and other evidence. One person, John Steiner, a longtime resident and fish farmer, provided public comment [Testimony of Steiner; see also Exhibit 8].

Environmental Impacts

14. Until removal of the old net pens, they could be seen from nearby shoreline residential properties. After the removal in March 2006, prospective purchasers of waterfront lots northeast of pier on South Beach Drive, would still have notice of the presence of the “fish farming and processing facilities” and associated “noise, odor, traffic” by reading the “Notice to Property Owners” on the recorded plat documents of

the Rich Passage Olympic Mt. View subdivision, recorded in 1991. [AGS-1, Sheet 3; Exhibit 3, I-1 through I-7; APP-1; Testimony Jameson and Skinner]

15. Appellants assert that with the net pens replaced, there would be an increase in the number of feed deliveries to the pier which, due to the large size of the (18-wheel) trucks and their lack of maneuverability, would increase the potential for traffic accidents on Ft. Ward Hill Road. Appellants' photographs [APP-7 through 9], showing a feed truck occupying both lanes in order to navigate the sharp turns on the narrow roadway, corroborate credible testimony [Jameson] and written comments [see Exhibit 3-I], that the feed trucks can create dangerous traffic conditions.

16. Of particular concern was that possibility that the delivery trucks could conflict with the school buses which regularly use the road to bring children to and from school. In 2000, a previous owner-operator, Northwest Sea Farms, began instructing the feed delivery companies to restrict deliveries to the middle of the day when school buses were not normally present. Apparently this practice has not been continued by AGS. [AGS-4A, Elliot letter, page 5; Testimony Jameson, Bright, and Blankenship]

17. The trucks deliver feed at the pier for the Orchard Rocks and Cypress Island facilities, as well as for Ft. Ward. Deliveries in recent years have ranged from 20 to 25 trucks per month (2004: 20 trucks; 2005: 21 trucks; 2006: 25 trucks; 2007: 21 trucks). The size of the fish, not the number of pens in use, determines the amount of feed needed. In 2004, when the Ft. Ward pens were in use, there were fewer truck trips and less feed delivered than in either 2005 or 2006, when the pens were not being used. [Exhibit 13; Testimony of Blankenship]

18. No evidence was presented to support the notion that replacement net pens would cause impacts (noise, water pollution, etc.) that would differ from those associated with the use of the old net pens.

Exemption Issues

19. Evidence presented at hearing [including survey information, plan drawings from the 2004 SSDP, aerial photos, and witness testimony] confirms that the replacement cages would be the same number, type, and configuration, made by the same manufacturer, and reinstalled in the same location, as those removed in March 2006. The surface appearance, having a somewhat smaller "footprint", but with the same shape and configuration, would be very similar. [Exhibit 3, 3A and 3P; AGS-6; APP-1 through APP-4; Exhibit 11; Testimony of Bright and Miller]

20. Due to the unavailability of smolts and other production considerations, the Ft. Ward pens were left "fallow" (unused) in 2005 and 2006. "Fallowing" is a common practice and it is not unusual for a site to be left fallow for a year or more (*e.g.*, through the 1½ year growth cycle of a generation of fish). [APP-20 and APP-22; Testimony Bright, Miller, Steiner, and Hilton] Leaving Ft. Ward "fallow" in 2005 and 2006 was not an abandonment or discontinuation of the use.

21. As can be seen in the Applicant's photographs [Exhibits 12A-12C], there was conspicuous rust and corrosion on the steel frame of the old net pens. The sand blasting, grinding, welding, and recoating/repainting necessary to repair this condition would be

expensive (and difficult with the pens in place). [Testimony of Bright, Miller, Steiner, and Blankenship]

22. Signs of damage below the water's surface were not documented by photographs, but credible testimony indicates that wear and tear occurs at an accelerated rate at the "high energy" Ft. Ward facility and that the 2004 towing incident [see Finding 5] resulted in damage not initially detected. Nearly 70% of a "cage system" is underwater and thorough inspection requires haul out. On-site inspection at the time the net pens were removed, gave indication that pipe frames, bridges, and mooring connections needed repair and that there were stress fracture cracks and fatigue points in the steel. [AGS-6, AGS-7, and AGS-11; Testimony of Bright, Miller and Blankenship]

23. AGS terminated the lease on the old cage system when it was towed back to the owner in Canada in March 2006. The old cage system was not "falling apart", but it could be reasonably concluded that considerable repair would be needed to restore it to original condition [see Findings 21 and 22]. It appears that it could have been more economical to buy new pens, than to continue to lease the old pens and fix the damage. [Testimony Miller]

24. Replacement by repair is normal in the aquaculture industry. Replacement as repair occurred at Ft. Ward and Orchard Rocks in 2000, occurs regularly in Canada, and has been done recently in the region (e.g., San Juans, Anacortes, Hope Island). The manufacturer points out that repair on a "component by component" basis is sometimes "not practical, feasible or safe" and when the structural steel becomes "worn out", the entire system should be replaced. The previous replacement of net pens at Ft. Ward was considered by the Army Corps in 2000 to be "maintenance". Witnesses, with collective experience of 80 years in aquaculture, uniformly testified that replacement by repair is a standard practice in the industry. [AGS-5, AGS-6, AGS-7; Testimony of Bright, Miller, Blankenship, Steiner]

BAINBRIDGE ISLAND MUNICIPAL CODE (BIMC)

25. The Shoreline Master Program, BIMC Chap. 16.12, regulates development in the shoreline. Certain developments, uses, and activities are exempt; not considered "*substantial development*" for permit purposes. BIMC 16.12.360B directs that: "*No exempt development, use or activity shall be undertaken...unless a statement of exemption is obtained from the director.*"

26. WAC 173-14-040(1) provides that:

a) Exemptions shall be construed narrowly. Only those developments that meet the precise terms of one or more of the listed exemptions may be granted exemption from the substantial development permit process.

(b) An exemption from the substantial development permit process is not an exemption from compliance with the act or the local master program, nor from any other regulatory requirements...

(c) The burden of proof that a development or use is exempt from the permit process is on the applicant.

(d) If any part of a proposed development is not eligible for exemption, then a substantial development permit is required for the entire proposed development project.

(e) Local government may attach conditions to the approval of exempted developments and/or uses as necessary to assure consistency of the project with the act and the local master program.

27. There is an exemption for “Normal maintenance or repair” provided in WAC 173-14-040(2):

(b) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements. “Normal maintenance” includes those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition. “Normal repair” means to restore a development to a state comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction, except where repair causes substantial adverse effects to shoreline resource or environment. Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance and the replacement does not cause substantial adverse effects to shoreline resources or environment;

28. Definitions in the City’s shoreline master program [see BIMC 16.12.030] include:

70. “Exemption” means certain developments are exempt from the definition of substantial developments and, therefore, are exempt from the substantial development permit process of the Shoreline Management Act...

122. “Normal maintenance” means those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition. (WAC 173-14-040(1)(b) or its successor.) See “Normal repair.”

124. “Normal repair” means to restore a development to a state comparable to its original condition within a reasonable period after decay or partial destruction, except where repair involves total replacement which is not common practice, or causes substantial adverse effects to the shoreline resource or environment. (WAC 173-14-040(1)(b) or its successor.) See “Normal maintenance.”

178. “Substantial development” means any development...except as specifically exempted pursuant to RCW 90.58.030(3)(e) or its successor and WAC 173-14-040 or its successor. See definitions for “Development” and “Exemption.”

29. WAC 173-14-040(2) does not specify what is a “reasonable period” for exempt repair. In light of the two year limit that the Shoreline Code allows for reconstruction of non-conforming structures [see BIMC 16.12.390A.1.c], the Director considers two years to be this “reasonable period”. Appellants presented no alternative standard or a basis for finding the Director erroneous for using a two-year limit.

30. The Director’s decision to grant an exemption is not a shoreline permit decision (*i.e.*, exempt development is expressly not subject to the permit process). The exemption determination is an “*administrative land use decision*” [see BIMC 2.16.025A] to be

processed in accordance with BIMC 2.16.095. The Director's SEPA threshold determinations are also appealable to the Hearing Examiner [BIMC 16.04.170].

31. BIMC 2.16.095 authorizes the Hearing Examiner to hear and decide appeals of administrative decisions using the procedures of BIMC 2.16.130. These procedures direct that the Hearing Examiner, after conducting an open record appeal hearing, issue a decision that: affirms the Director's decision, affirms it with modifications, reverses it, or remands it to the Director for further consideration.

32. Appeal to and decision by the Hearing Examiner is part of the City's administrative process [Chapter 2.16, BIMC]. The Hearing Examiner's decision on the appeal is based upon consideration of the whole record developed in the appeal proceedings [see Hearing Examiner Rules, Chapter III, Rule 10.1 and 11.1]; that decision is not limited to that information available to and/or used by the Director in making the decision being appealed.

CONCLUSIONS

1. The Hearing Examiner has jurisdiction to hear and decide this matter.
2. BIMC 2.16.130F requires that in making a decision on appeal, the Hearing Examiner give the Director's decision "*substantial weight*". Under this standard of review, it must be shown - on consideration of the entire record - that the Director's decision is clearly erroneous. That is, the Hearing Examiner must be left with the definite and firm conviction that a mistake has been made.

MDNS APPEAL

3. The SEPA challenge focused on traffic safety problems on Ft. Ward Hill Road. It was asserted that use of the replacement net pens would cause an increase in the number of feed truck trips, with a corresponding increase in dangers due to that traffic. This argument, which relies upon the assumption that the number of feed truck deliveries directly correlates to the number of pens in use, is not supported by the record. The amount of feed (and number truck trips needed to deliver it) is a function of the various stages of maturity of fish at the three facilities, not the number of net pens in use at Ft. Ward. [See Findings 15-18.] In addition, the feed truck trips associated with the operation of the Ft. Ward facility are properly considered "existing" trips, not "new" trips that would occur due to replacing the net pen system.

4. No significant adverse impacts have been shown to be the probable result of the replacement of the net pens. However, evidence does show that the large feed trucks can create unsafe conditions as they travel the narrow roadway to and from the pier. It is reasonable to require that AGS resume the practice of requiring the feed delivery companies to restrict deliveries to the times when school buses are not normally present [see AGS-4A, Staff Report, page 8].

SHORELINE EXEMPTION APPEAL

5. The subject of this appeal is the Director's determination that the replacement of the Ft. Ward net pen system is exempt from the shoreline permit process. Replacing the

net pen system is not an expansion of the aquaculture operation at Ft. Ward, nor is the aquaculture use itself (at Ft. Ward or in general), under review. The question on appeal is whether or not the Director's determination that the replacement is exempt within the meaning of "normal maintenance or repair" in WAC 173-14-040(2), is clearly erroneous.

6. WAC 173-14-040(2)(b) provides an exemption for repair of damage, including that caused by "accident, fire or elements". "Decay or partial destruction" is mentioned, but no degree or extent of "damage" is set out as a guide to making exemption determinations. Instead, WAC 173-14-040(2)(b) explains "normal repair" in terms of comparability. That is, to be "exempt repair", the development after repair must be comparable to the original (including, but not limited to, "size, shape, configuration, location, and external appearance").

7. In 1997, the City Hearing Examiner rejected a repair exemption by for new pens at Ft. Ward because they were "not like the old net pens" (had different technology, design, anchoring system, and increased surface area). Similarly, in the several examples cited where the Shoreline Hearings Board found "repairs" to not be exempt [see AGS-A4, Elliott letter, pages 7-8], the Board's judgment was explained in terms of lack of comparability to the original (with respect to design, materials, size, *etc.*).

8. Regarding the replacement of the net pen system at Ft. Ward meeting the terms of WAC 173-14-040(2)(b), the record supports the following conclusions:

- a) The old net pen system had been damaged by the "elements" and considerable repairs were needed. [Finding 21 and 22]
- b) The replacement net pen system would be "comparable" in all meaningful respects to that which was removed in March 2006: the function, number, size, material, configuration, exterior appearance, and location would be the same. [Finding 19]
- c) The Director's use of two years as a "reasonable period" for exempt repair was not in error. [Finding 29]
- d) It is common practice in the aquaculture industry to repair a damaged net pen system by replacement. [Finding 24]

9. The Director's grant of the exemption here is not clearly erroneous. The replacement of the net pen system at Ft. Ward is "normal repair" within the terms of the repair exemption and the Director's decision should be affirmed.

DECISION

The Director's statement of exemption and the associated MDNS regarding the proposal of American Gold Seafoods, LLC to replace the net pen system at its Fort Ward facility, is **AFFIRMED AS MODIFIED** to add Condition 8, as follows, to the Director's conditions:

8. The Applicant shall advise all feed delivery vendors in writing that, due to traffic safety concerns, feed delivery via large trucks is to be restricted to those times when school buses are not normally present on Ft. Ward Road. The Applicant shall contact the

school district for bus schedule information and coordinate and update the feed delivery schedule with the vendor(s) as necessary to effectively implement this restriction.

Entered this 7th day of January 2008.

signed in original
Meredith A. Getches
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

Request for judicial review of this decision by a person with standing can be made by filing a land use petition in superior court within 21 days in accordance with the Land Use Petition Act, Revised Code of Washington (RCW), Chapter 36.70C [see also BIMC 2.16.130F.6].