

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF BAINBRIDGE ISLAND**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

SUMMARY

- Applicant:** Washington State Department of Natural Resources
C/O: Celia Barton
1111 Washington Street SE
P. O. Box 47027
Olympia, WA 98504
- File No:** SSDP/CUP15615
- Request:** Shoreline Substantial Development and Conditional Use Permit
- Location:** Approximately 709 acres of subtidal bedlands in four general areas around the perimeter of Bainbridge Island: Battle PointNorth/Manzanita (306 acres), Restoration Point (141 acres), Murden Cove (222 acres), and Skiff Point (40 acres).
- Shoreline Environment:** Aquatic/Shorelines of Statewide Significance
- Summary of Proposal:** To harvest wild geoducks from state owned subtidal bedlands bordered by elevations -18 to -70 feet below 0 tide. Harvest areas will be leased to commercial harvesters who use boats between 25 and 70 feet long with a normal crew of two divers and a tender. Harvesting is requested to occur between 8:00 a.m. and 4:30 p.m. Monday through Friday, except for state holidays. Permission to harvest is sought on a year around basis, but will generally be carried out in a 60 day harvest window in any area, predominantly in the fall or winter. Communications between divers and vessels will primarily use a new low volume in-ear system. Deck speakers employed in the past will be used only as a backup. Noise from boats will be limited to 50 dBA at 200 yards from the source. The permit will expire in five years.
- Public Hearing:** The Hearing Examiner conducted a public hearing on due notice on September 17, 2009.
- Decision:** The application is approved, subject to conditions.

FINDINGS OF FACT

1. The Washington State Department of Natural Resources (DNR) seeks a Shoreline Substantial Development and Conditional Use Permit to authorize the harvesting of wild geoducks from state-owned tidelands around Bainbridge Island for a period of five years.
2. The harvesting will take place on four subtidal tracts totaling approximately 709 acres. They are: Battle Point North/Manzanita (306 acres), Restoration Point (141 acres), Skiff Point (40 acres), and Murden Cove (222 acres).¹
3. Although the permit seeks permission for harvest year- around, harvesting will likely be predominantly confined to the fall and winter seasons. Generally a 60-day harvest window will be used in each area. Harvesting will not occur in all five areas in any one year.
4. Harvesting will be conducted by commercial operators who secure leases from DNS to operate in the assigned harvest areas. Harvesting hours will be during weekdays (exclusive of state holidays) between the hours of 8:00 p.m. and 4:30 p.m. Boats involved in the harvest operations will generally be between 25 and 70 feet long and the operations will normally involve three persons – two divers and a tender. The boats will anchor at least 200 yards offshore.
5. Harvest operations will take place underwater from subtidal lands between -18 and -70 feet below 0 tide. Compressors on board will supply oxygen to the divers and will power water jets. The water jets, approximately 18-24 inches long with a 5/8 inch diameter nozzle, will be used to liquefy the substrate around a geoduck. Up to 800 geoducks per day can be harvested on a high-density commercial tract under good digging conditions.
6. The uplands adjacent to the harvest areas are in residential zones. In the past, harvest operations have generated noise complaints. Under the present harvest proposal, communications between diver and boat will be via a new type of radio system that transmits to in-ear receivers. Deck mounted speakers will be allowed only as a back up system. For shoreline residents, this should eliminate the sound of the rhythmic breathing of divers which has been disturbing to some in the past. Harvest vessels are required to use motor noise dampening devices. Noise from boats, compressors and pumps may not exceed 50 dBA at 200 yards. The State will monitor the site to insure that the noise limits are being met.

¹ Harvest in Murden Cove began in 1996 and is on-going. Because of prior harvesting activity, harvest in Murden Cove under the subject permit will be limited and may not occur at all. The Port Madison Tract was originally part of the application but has been removed and placed in recovery status.

7. The maximum number of vessels allowed at any one time shall be 15 for the combined Kitsap County and Bainbridge Island harvest area in Agate Passage. No more than 12 harvest vessels shall be permitted on the combined harvest areas on either the east or on the west side of Bainbridge Island at any one time.

8. The harvested geoducks will be reported and weighed in the presence of DNR staff members. Unloading will occur at pre-approved marinas or boat ramps. No processing will take place onboard the harvest boats. The geoducks will be transported from the boats to processors or to market.² Moorage for harvest vessels will be at locations other than harvest areas. No upland development is proposed or associated with the proposed harvest operations.

9. The overall geoduck harvest is managed by both the State and various Tribal resource managers, under a Harvest Management Plan that currently runs through March 31, 2010. The Tribes are entitled to take 50 percent of the harvestable geoducks within their usual and accustomed grounds and stations. An allocation model agreed to by the State and Tribes allows an annual harvest rate of 2.7 percent of the total commercial biomass. The commercial biomass consists of 27 percent of the total geoduck biomass in Washington State. The 2.7% harvest is predicted to preserve 35-40% of the remaining spawning potential of the population.

10. Geoducks are allowed to regenerate naturally and, as managed, the geoduck population is expected to sustain itself at historic levels. The harvest is rotated around the Puget Sound from year to year. Once a site is harvested, it will not be harvested again until surveys show that it has regenerated.

11. The instant permit application relates only to the State-managed portion of the harvest. The State geoduck harvest program is operated cooperatively by the DNR and the Washington State Department of Fish and Wildlife (DFW). In general, DFW handles the biological evaluation of sites and DNR manages the leasing of the subtidal beds and policing of operations.

12. The State commercial geoduck fishery harvested between 1.7 and 2.2 million pounds of geoducks annually between 2000 and 2006, while taking less than the State's share of the 2.7%. The harvest has generated an average of about \$8 million in annual revenue for the State, which has been used for, among other things, recreation and aquatic lands enhancement. One of the programs funded by geoduck revenues involves the enhancement and protection of eelgrass beds.

13. Environmental review for the subject applications has been exhaustive. A Final Supplemental Environmental Impact Statement for the State Commercial Geoduck Fishery was issued by DNR and DFS in 2001. The SEIS was not appealed. The City of Bainbridge Island (City) adopted this document in its review of the subject application on August 8, 2009.

² Most of the geoduck harvested are sold live to buyers in Asia,

14. The DFW performs three separate surveys of each harvest area. An initial survey is done to identify subtidal beds suitable for geoduck harvest and to locate eelgrass beds and other sensitive areas. A second survey about a year before harvest inventories the geoduck population, studies the substrate, and identifies the other features of the biota. The first two surveys provide information for establishing fishing boundaries and harvest times. A third survey occurs after each harvest is completed, re-inventorying the geoduck populations and looking at effects on other plants and animals.

15. For the subject permit, a separate Environmental Assessment was prepared for each of the harvest areas proposed. These were derived from biological field work by scuba divers who systematically explored the seabed, transect by transect. The work included counts and samples from which the density and average weight of geoducks were derived, observations of the substrate types, and identification of the other plants and animals in each area.

16. The Environmental Assessments led to an overall conclusion that no significant adverse impacts are expected from the proposed harvest in any of the areas studied. In general, the habitat for geoducks and pelagic fish are distinct. No interaction between the harvest activity and salmon is expected because the harvest areas are deeper than juvenile rearing areas and migratory corridors. Some herring spawning areas were identified in the Skiff Point and Manzanita tracts, and limitations will be instituted there to prevent conflicts. In herring spawning areas geoducks may not be taken above -25 feet at any time and not above -35 feet during spawning. Eelgrass beds are excluded from geoduck harvest areas. A buffer of two vertical feet (or around 180 horizontal feet) is established around eelgrass, meaning that geoduck harvest may occur only in areas two feet deeper than the deepest eelgrass. Dungeness crabs occur in parts of three of the proposed harvest tracts, but it is predicted that crabs will not be significantly disturbed by the harvest activities. No adverse impacts on marine mammals and sea birds are expected.

17. The Washington State Department of Health (DOH) conducts a separate review to ensure that State and Federal water quality standards are met and that harvested geoducks are safe for human consumption. Prior to harvest each of the tracts must be certified as "approved" by DOH.

18. Harvest areas will be marked with orange buoys prior to harvesting activities. DNR enforcement personnel will closely monitor the activities. Each harvest vessel will receive permission to go out. DNR will observe anchor changes and ensure that harvest occurs only within the marked areas at appropriate depths. DNR will have divers on site with underwater cameras. As noted, noise levels will also be monitored.

19. Under the local shoreline master program (SMP), the general regulations for avoidance of environmental impacts require protection of water quality, control of pollutant discharges, control of hazardous material releases, minimizing of adverse impacts to fish and wildlife, non-interference with natural shoreline processes,

minimizing adverse impacts on surrounding land uses, and avoidance of hazards to public health and safety. See BIMC 16.12.140. On the record made, the proposed activities comply with these requirements. Disturbance of water quality will be limited to temporary sediment plumes associated with harvesting. These will rapidly settle out. Pollutant discharges and chemical releases are not proposed or permitted. They are unlikely to occur. Comprehensive surveys disclose little likelihood of adverse impacts to fish and wildlife. Natural shore processes will be unaffected. Noise controls should prevent adverse impacts to residences in the vicinity. DOH monitoring will insure that public health is protected.

20. All of the harvest tracts are within the Aquatic Environment under the SMP. Management policies for this environment prohibit non water dependent structures and uses, encourage aquaculture on suitable beds, encourage protection of fishing and water recreation, and call for minimizing interference with surface navigation and fish migration. See BIMC 16.12.140. On the record made, the proposed activities comply with these requirements. No structures are proposed. Harvest areas have been carefully selected by experts. Multiple use of the areas may continue. Surface interference with navigation will be minimal.

21. The harvest activities are a form of aquaculture. As such, harvesting is allowed as a shoreline conditional use in the Aquatic Environment. Detailed requirements for the contents of aquaculture applications have all been complied with. Substantive requirements for aquacultural development have likewise been met. See BIMC 16.12.170. The approval of this application will not result in damage to any established aquacultural enterprise. No wildlife refuges or habitats of significance for birds or mammals have been identified within the areas of proposed harvest. Harvesting is not proposed in existing kelp beds or eelgrass beds. Temporary disruption of the substrate will repair itself and not result in significant adverse impacts.

22. Shoreline conditional use criteria require that uses be consistent with the policies of the Shoreline Management Act and the policies of the SMP; that proposed uses not interfere with normal public use of public shorelines; that proposed uses be compatible with other permitted uses in the area; that the proposed uses cause no reasonable adverse impacts to the shoreline environment designation; that the public interest suffers no substantial detriment; and that the proposed use is consistent with the provisions of the applicable zoning ordinance and Comprehensive Plan. See BIMC 16.12.380. On the record made, the proposal meets these criteria. Compatibility is shown by the minimal impact on navigation, residential uses, recreation and the existing biota. The public interest is served by the generation of income for both the State and private enterprises.

23. The Staff Report contains a thorough review of the proposed activities in light of the Comprehensive Plan's goals and policies, concluding that the proposal is consistent with the Plan. (See Staff Report, pages 10-12.) The Hearing Examiner concurs with this analysis and adopts the same. The Staff Report is by this reference incorporated herein as though fully set forth.

24. By definition water lying seaward of the line of extreme low tide are classified as Shorelines of Statewide Significance. Under the policies of RCW 90.58.020 and the SMP, preference shall be given to uses on such shorelines, in the following order of preference: (1) Recognize and protect the state-wide interest over local interest; (2) Preserve the natural character of the shoreline; (3) Result in long term over short term benefit; (4) Protect the resources and ecology of the shoreline; (5) Increase public access to publicly owned areas of the shorelines; (6) Increase recreational opportunities for the public in the shoreline.

25. On the record made, the proposal affirmatively conforms to the top four of these preferences and does not cause interference with the lower ranked two. The permit fits into a statewide program of geoduck management through a minimally invasive harvesting program that effectively preserves natural features. Over the long term the benefit is the sustainable maintenance of a renewable resource. The ecology of the shoreline will not be seriously disturbed.

26. At the hearing six citizens testified to their concerns about the proposed geoduck harvesting operations. Principally they were concerned with noise, enforcement, duration of operations, sustainability of the resource, and impacts on birds, mammals and marine life. The program experts testifying for DNR and DFW effectively answered these concerns. They pointed out that the harvesting program of the Tribes is under separate jurisdiction and not covered by the subject permit. A list of numbers of call to report enforcement complaints was distributed. The probable annual duration of operations was explained. Information on sustainability and impacts was reiterated. Noise was discussed specifically and, it was emphasized that the latest communications equipment does not use deck mounted speakers.

27. DNR has stated that geoduck harvest has been conducted in the State for over 30 years without significant adverse environmental impact. Taking the instant record as a whole, the Examiner finds that the subject harvest operations have been meticulously planned and that, on the whole, the activity proposed is likely to be environmentally benign. The Examiner finds that noise concerns have been addressed adequately through provisions for new equipment, the setting of standards, and the commitment to monitoring.

28. The Staff recommends approval of the application with a permit duration of five years – the normal time for a completion of a shoreline development. They point out that prior permits for such harvest activities have been granted by the City and that the experience under these permits has, in general, been good. The City has recommended fourteen conditions of approval which the Examiner has decided to adopt.

29. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over this proceeding.
2. The requirements of SEPA have been met.
3. The proposed harvest activity is a substantial development under the Shoreline Management Act. RCW 90.58.030(3)(e). As such, it requires a Shoreline Substantial Development Permit. By virtue of the SMP it also requires approval as a shoreline conditional use. BIMC 16.12.170.
4. A substantial development can be permitted when consistent with the applicable master program, the policies of the Shoreline Management Act, and the permit rules of the Department of Ecology. See WAC 173-27-150. The instant proposal meets these criteria.
5. In the instant case, the SMP for Bainbridge Island satisfactorily implements the policies of the statute. Under the facts found above, the proposal, as conditioned, is consistent with this local SMP, including provisions for Shorelines of Statewide Significance. No inconsistency with provisions of Ecology's permit regulations has been identified. Accordingly, the proposal, as conditioned, meets the requirements for issuance of a Shoreline Substantial Development Permit.
5. Under the facts found above, the proposal, as conditioned, is consistent with the criteria of BIMC 16.12.380 and therefore meets the requirements for the issuance of a Shoreline Conditional Use Permit.
6. Any finding herein which may be deemed a conclusion is hereby adopted as such.

CONDITIONS

1. Harvest within an equilibrium harvest rate.
 - a. The Washington State Department of Natural Resources (DNR) and Washington State Department of Fish and Wildlife (DFW) shall make continuing information regarding geoduck surveys and biomass available to the City of Bainbridge Island when such information is generated and published.
 - b. The equilibrium harvest rate for statewide management of geoduck clams is 2.7 percent of fishable geoduck stocks per year. DFW is investigating the regeneration rate of geoduck beds and may produce data that changes the statewide yield (or quota), either on a statewide rate, or with rates applicable to biological regions of the state. If DFW determines a different harvest rate on a statewide basis, then future DNR geoduck sales on a statewide basis shall not exceed the changed statewide yield

(or quota). If DFW determines geoduck yield for different biological regions, then further DNR geoduck sales on a regional basis shall not exceed the appropriate regional yield (or quota).;

2. Maximum harvest from each bed.
 - a. No more than 80 percent of the geoduck population shall be harvested from each tract.
 - b. Monthly statistics on the number of geoducks harvested from the harvest areas shall be available to the City upon request.
3. Contract compliance by DNR. DNR shall maintain its current daily monitoring of geoduck harvesting to enforce terms of its contract with harvesters, to enforce the boundary of harvest areas and to enforce the noise control requirement of its contract. The shallow water boundary of any tract shall be no less than -18 feet (below 0 water) and the deepwater boundary shall be -70 feet (below 0 water).
 - a. Regardless of any depth restrictions, vessels conducting operations must remain seaward of a line two-hundred (200) yards from and parallel to the ordinary high tide. Divers may harvest up to the shallow water boundary as determined by DFW.
 - b. DNR will require a non hailer diver-to-tender communication system. The hailer system shall be used only in cases of emergency failure. Vessels shall not be allowed to return to harvest until the primary non hailer system is functional.
 - c. DNR shall not reduce its contract compliance program in the City of Bainbridge Island except after consultation and agreement with the City of Bainbridge Island.
4. Phone contact. DNS shall maintain a cellular phone on its contract compliance vessel and publicize appropriate phone numbers to allow shoreline residents to contact DNR and its compliance vessel and the DFW patrol.
5. Log complaints and compliance. DNR shall keep a log of all complaints and compliance activity regarding harvest activities in the City of Bainbridge Island and make such information available to the City upon request.
6. Eelgrass. DNR shall not sell harvest rights to take geoduck clams on any land that DVW has identified as an eelgrass bed.
 - a. In geoduck areas with adjacent eelgrass beds, the shoreward boundary of the area shall be not shallower than that set by RCW 77.60.070 and

no shallower than two (2) vertical feet seaward of the deepest eelgrass present.

b. Because eelgrass exists between Skiff Point and Fay Bainbridge State Park, the shoreward harvest boundary in this area shall be no shallower than the -22 foot contour (MLLW).

7. Herring spawning/Habitat Protection

a. For all tracts – shoreward boundaries of -18 feet mean lower low water (MLLW).

b. For all tracts – where eelgrass extends deeper than -16 feet (MLLW), a protection boundary of two (2) vertical feet deeper than the deepest occurrence of eelgrass on the tract.

c. For tracts in documented herring spawning grounds –having the tract either closed to harvest, or harvest restricted to deeper than -35 feet during the timing window for the herring spawning season.

d. For tracts in documented herring spawning grounds – shoreward boundaries of -25 feet (MLLW), or where the extent of marine algae coverage is determined by survey, a protection boundary of two vertical feet beyond the deepest occurrence of preferred marine algae within the tract.

e. DNR will provide for all habitat protection requirements as identified by DFW in the Environmental Assessment reports for each tract.

f. DNR will manage the fishery to meet ESA habitat protection measures required by the National Marine Fisheries Service Permit 1608 and the United States Fish and Wildlife Service Permit PRT-TE187810-0.

8. The Washington State Department of Health (DOH). No harvesting shall occur in any area not duly certified by the State Department of Health.

9. Noise control. DNR shall include contract requirements that geoduck harvesting vessels not exceed 50 dBA measured 600 feet from the vessel.

10. Time of harvest. Harvest shall not exceed eight working hours per day, and those eight hours shall be between 8 a.m. and 4:30 p.m. No harvesting shall be allowed on Saturdays, Sundays or State holidays.


11. Expiration. The Shoreline Substantial Development and Conditional Use Permit shall expire five years from the date of issuance. A new permit shall be required for continued geoduck harvesting.

12. Maximum number of harvest vessels on the harvest areas.
 - a. No more than 15 harvest vessels shall be permitted on the combined Kitsap County and Bainbridge Island harvest areas in Agate Passage at any one time.
 - b. No more than 12 harvest vessels shall be permitted on the combined harvest areas on either the east or on the west side of Bainbridge Island at any one time.
13. The release of oil, chemicals, or other hazardous materials onto or into the water is prohibited. Equipment for transportation, storage, handling, or application of such materials shall be maintained in a safe and leak-proof condition. If there is evidence of leakage, the further use of such equipment shall be suspended until the deficiency has been satisfactorily corrected. DNR shall maintain an Oil Spill Response Plan which shall be available to the City on request.
14. The use of public ramps, docks and marinas as off-loading locations shall not cause conflicts with the normal use and operation of the public facilities.

DECISION

The requested Shoreline Substantial Development and Conditional Use Permit is approved, subject to the conditions set forth above.

DONE this 8th day of October, 2009



Wick Dufford, Hearing Examiner Pro Tempore

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.