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No. 64326-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

CHRIS HUGHES, dba ADMINISTRATORS & CONSULTANTS, LLC,

Respondent,

v.

FRIENDS OF THE SAN JUANS,

Appellant,

and

SAN JUAN COUNTY, a political subdivision of the State of Washington;
SHORELINES HEARINGS BOARD, an agency of the State of
Washington,

Necessary Parties.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Assignments of Error

The trial court erred when it entered its October 2, 2009 order overturning the Board's denial of the dock permit.

Issues Pertaining to Assignments of Error

1. Did the Board correctly find that the dock would adversely impact eelgrass, a sensitive marine ecosystem?
2. Did the Board correctly conclude that the single-user dock was inconsistent with San Juan County's SMP, including its finding that the dock applicant had adequate and feasible means for accessing his property without the dock?
3. Did the Board correctly conclude that eelgrass loss at the proposed dock site would be contrary to SMA policies and that the cumulative impacts of such actions would not protect the public's interest against adverse effects?
4. Did the Board correctly conclude that it did not have sufficient legal or factual criteria to allow it to determine whether off-site mitigation adequately responded to impacts of the proposed dock?
5. Did the Board correctly conclude that the proposed dock contravenes the following priorities established by the SMA: (1) protection of statewide interests over local interests; (2) preservation of the

natural character of the shoreline or protection of the resources and ecology of the shoreline; and (3) favoring long term benefits over short term benefits?

B. STATEMENT OF THE CASE

On August 25, 2008, the Board issued a thirty-page decision (“Decision”) reversing San Juan County’s (“County”) approval of shoreline substantial development permit (“SSDP”) no. 05SJ013. *Friends of the San Juans v. San Juan County*, SHB No. 08-005 (Aug. 25, 2008). That permit would have allowed Hughes to construct a single-user dock over eelgrass at the west end of Pearl Island, a small island just off-shore from Roche Harbor resort, San Juan Island. The Board held that:

- the single-user dock did not satisfy the dock criteria established under the SMP to limit dock proliferation;
- the eelgrass loss at the proposed dock site would contravene SMA environmental protection policies, and the cumulative impacts of such actions would fail to protect the public’s interest against adverse effects;
- the evidence did not offer criteria for evaluating whether proposed off-site mitigation addressed likely impacts; and
- the Dock contravened SMA priorities for: (1) protection of statewide interests over local interests; (2) preservation of the natural character of the shoreline or protect the resources and ecology of the shoreline; and (3) long-term benefit over short-term benefit.

After presiding over two full days of hearing, receiving testimony from twelve witnesses, and reviewing over sixty-five (65) exhibits, the Board concluded that “[o]n balance, Mr. Hughes’ desire for convenience does not outweigh the public’s interest in preservation of fragile off-shore environment.” Decision, at 30.

On October 2, 2009, the San Juan County Superior Court reversed the Decision. That opinion, however, failed to give adequate deference to the Board both in its role as the initial finder of fact and its capacity as the agency with special expertise interpreting the SMA and SMP. Friends of the San Juans (“Friends”) now respectfully requests that this Court reinstate that well-reasoned, well-supported decision.

1. Procedural History.

On August 24, 2005, Hughes submitted an application to the San Juan County (“County”) Community Development and Planning Department (“CDPD”) for a permit to construct a single-user pier, ramp, and float (“Dock”) over eelgrass adjacent to property (“Property”) at the west end of the Pearl Island subdivision. *See* Petitioner’s Exhibit (“Exh.”) P-A at 1-14. Pearl Island is a small, less than a half-mile long, island lying just off-shore from the village of Roche Harbor. *Id.*; Exh. P-III. Its shorelines, like all San Juan County shorelines, are designated “shorelines of statewide significance” under the SMA. RCW 90.58.030(2)(e).

In February 2006, the County Hearing Examiner (“Hearing Examiner”) denied the Dock on the grounds that the applicant had not satisfied San Juan County's environmentally-sensitive areas ordinance because he had not considered a dinghy dock or mooring buoy to access his property. Exh. P-D at 8. In addition, the Dock did not meet SMP requirements that: (1) it be associated with a single-family residence; and (2) the applicant show the inadequacy and infeasibility of other means of access (here, a barge landing and easement). Exh. P-D at 9. The Hearing Examiner also expressed a concern with the cumulative impacts of docks built over eelgrass in the absence of joint use or pressing need. *Id.* at 9-10.

On October 27, 2006, following Hughes’ first of two appeals to the Board, the Hearing Examiner evaluated a settlement between Hughes and the County and expressed concern that the dock was to be constructed in exchange for an unspecified off-site mitigation project capped at \$7,500. Exh. R-Q-16. Hughes suggested several mitigation possibilities at that hearing: (1) seafloor garbage pick-up; (2) removal of creosote pilings at deserted dock sites; (3) assistance with removal of a swimming pool in the shoreline; and (4) a check for \$7,500. *Id.* In a foreshadowing of things to come, the Hearing Examiner noted that the mitigation proposals failed to first analyze impacts and then propose mitigation to address those impacts. *Id.* The Hearing Examiner also found that “San Juan County has adopted

no methodology for addressing off-site mitigation” and noted that although the applicant had suggested the Army Corps of Engineers’ mitigation point system, that system applied only when a project extended no closer than 26 feet from eelgrass, rather than directly over eelgrass. Exh. R-Q (unnumbered page between R-Q-16 and R-Q-17). The Hearing Examiner withheld settlement approval until the parties identified a specific mitigation project. Exh. R-Q-17-R-Q-18.

On February 1, 2008, the County signed a permit for Hughes and submitted that permit to the Washington Department of Ecology. That permit required off-site mitigation in the form of the removal of a derelict, unpermitted mooring buoy 1.3 miles from the Dock. Exh. R-Q; Exh. R-X. Friends subsequently appealed that permit to the Board, leading to the appeal now before this court.

2. The Record Demonstrates that The Dock Would Be Built Amidst Expansive, Undeveloped Views.

The Property lies alongside the principal entry to Roche Harbor on a natural, undeveloped shoreline at the northwest tip of Pearl Island. Decision, Finding of Fact (“FOF”) No. 3 (finding that there are currently no docks on the northwestern tip of Pearl Island, or along the sandy northern shore that stretches east from the northwest tip.); Exh. P-III; Transcript of Proceedings, Shorelines Hearings Board Hearing (July 1, 2,

& 10) (hereafter “TR”) at 51:24-52:24; TR at 92:11-19 (Exh. P-JJJ at 1 (photo directly east to location of proposed dock), 3 (view beyond Property to outer islands), 4 (view from Roche Harbor to outer islands with Property on right)); TR at 50:7-21 (testimony of O. Fausko regarding access to Roche Harbor). Because the Dock would be the only overwater structure visible on that end of the island, extending nearly 100 feet directly west, it would impact the view of Roche Harbor and the view toward the outer islands as boaters entered and exited Roche Harbor. *Id.*; *also* FOF No. 3 (finding that, in contrast to busy harbor views from the south and eastern lots on Pearl Island, the view from Hughes’ lot encompasses undeveloped and undisturbed islands to the north and east, as well as expansive water views).

3. The Record Demonstrates That Hughes Possesses Both Moorage for a Boat and Access To The Property.

Hughes requested a permanent dock to access the Property on an anticipated infrequent basis and already has moorage for a substantial boat along docks he owns near Roche Harbor. Decision, FOF No. 8; TR at 448:13-18 (testimony of C. Hughes noting that he visits another vacation home on Armadale Road, near Roche Harbor, San Juan Island, approximately “once a month in the winter months and twice a month in the summer, spring and fall,” and so might be likely to visit the Pearl

Island property just as infrequently). He has existing moorage at the Armadale property with a home and an approximately 90-foot float, about $\frac{3}{4}$ of a mile across the harbor from the proposed dock site. TR at 423:25-424:6; Exh. P-III. He and his brother also own a third property along Armadale Road with well over 100 feet of moorage at a dock that also lies about $\frac{3}{4}$ of a mile across the harbor from the Property. TR at 445:22-446:12; Exh. P-III. Both of the docks extend into an eelgrass shoreline. Exh. P-III. Hughes did not dispute that he has adequate and feasible moorage at the hearing, instead alleging a lack of reasonable access to the Property. Because he can moor a larger boat just across Roche Harbor from the Property, he would be able to access the Property via dinghy. See TR at 425:10-18; Exh P-III.

- a. The record demonstrates that Hughes has accessed the Property via its shoreline.

Hughes currently possesses several means for accessing his property on Pearl Island. According to the Joint Aquatic Resources Permit Application (“JARPA”) Form he signed on August 23, 2005, he has accessed the Property by landing a small boat on the medium bank rocky shoreline of that property; he confirmed at the Hearing that under certain conditions he can access his property in that manner. Exh. P-A, at 16 (Joint Aquatic Resources Permit Application Form ¶ 6); TR at 431:6-9,

448:8-10. Odd Fausko, a full-time Pearl Island resident also testified that it would be safe to access the Property directly by dinghy. TR at 61:6-11.

- b. The record demonstrates that Hughes can access the Property via private boat and joint use dock or mooring buoy.

The Board also found that Hughes can access his property via private boat and joint-user docks or mooring buoys. Decision, FOF No. 5. Mr. Fausko testified at the Hearing that using a mooring buoy is “about the safest thing we can do” for mooring a boat at Pearl Island.” TR at 39:1. Hughes can also moor a boat at one of his docks on San Juan Island. TR at 423:25-424:6; TR at 445:22–446:12; Exh. P-III.

The Board also found that it could be possible for Hughes to land a dinghy at one of several neighbors’ docks through a joint use agreement or by permission. *Id.* at FOF No. 6; TR at 440:13-441:9 (testimony of Hughes that asked owners of only three docks on Pearl Island for joint use). Pearl Island is composed solely of shoreline lots surrounding an open common area that extends down the center of the island and connects all of the lots in a rudimentary road. Decision, at FOF No. 4; Exh. P-III. Once he arrived at any parcel on the island, Hughes could reach the Property by traveling along that community area to the Property. Decision, FOF No. 6; TR at 41:15-24 (testimony of O. Fausko noting that anyone can use the easement in the center of the island); Exh. P-III; Exh.

P-V (Hughes' real estate listing noting this access easement). In the past, Hughes has accessed the Property through a dock that his brother owns at a separate property on Pearl Island, and this community lot. Exh. P-D at 3 (Hearing Examiner decision noting past access to the island via another dock, presumably that belonging to Hughes' brother, and then the easement). Although Hughes' brother now refuses him access to his approximately 90-foot dock during the spring, summer, and fall, he has agreed to allow Hughes to use his dock during the winter months. Decision, FOF No. 6; TR at 429:14-22 (Hughes testimony that brother will allow winter access). And although his brother shares that 90-foot dock with two other parcels, those parcels are held in common ownership, and hence add only one user to that dock other than Hughes' brother. TR at 47:7-9 (testimony of O. Fausko estimating size of dock as approximately 90 feet); TR at 447:5-11 (testimony of C. Hughes noting that the joint user of his brother's dock owns the two lots adjacent to his brother's parcel). In addition to the easement, an informal footpath encircles the island. Decision, FOF No. 5; Exhs. R-C, P-JJJ.

- c. Hughes testified that he can access the Property via the Pearl Island barge landing and access easement.

Hughes also testified that he can access the Property via barge landing at the southeastern corner of Pearl Island and the community

easement. Decision, FOF No. 6; TR at 423:13-16; Exh. P-III. Hughes testified that “[i]f it is feasible, could I go over there and get ashore at a 4 or 5-plus tide, something like that, and walk up the middle of the island to the property? Sure. I could do that.” TR at 423:13-16.

In addition to the possibility of landing a dinghy at the Pearl Island barge landing, Hughes can use a barge service like other Pearl Islanders for the 4-5 minute trip from Roche Harbor resort to Pearl Island. Decision, FOF No. 6; TR at 420:13. Testimony at the Hearing demonstrated that at least two families regularly use the barge landing to access Pearl Island for non-construction purposes. TR at 61:24-63:9. Pearl Island residents also use the barge and access easement to transport equipment, building materials, vehicles, and other large items onto the island. TR at 420:21-421:1. And some residents use golf carts to navigate the access easement. *Id.* at FOF No. 5; TR at 42:4-5.

The barge can land at Pearl Island at most tides and, unlike the Washington Ferry System, can be scheduled to meet one’s unique timing needs. The record demonstrates that Humpback Hauling, which operates a freight and passenger barge service out of Roche Harbor resort, can access Pearl Island at tides of zero (0) or greater. CP at 3, item 20 (Declaration of Stephanie Buffum Field in Support of Petitioner’s Reply ¶2 (May 2, 2008)) (conversation with R.W. Miller Enterprises, Inc., dba Humpback

Hauling). From May through September of 2008, tides below zero occurred only on approximately half of the days, and for only a duration of an average of four (4) hours. Exhs. KKK, LLL (sample tidetables showing period of time that tides reach above zero tide); *also* Appendix at A-22 (Declaration of Kyle A. Loring in Support of Petitioner’s Reply ¶ 3 (May 2, 2008)) (not listed in Board Hearing Index). The barge service was estimated at \$100 to \$200 per hour, comparing favorably to dock construction costs. TR at 66:16-18 (testimony of Odd Fausko).

Moreover, Hughes’ testimony at the Hearing indicates that the barge landing may provide better access than a dock. He stated that “there have been plenty of times on Pearl Island when you cannot get off the dock or get on the dock, you cannot get to those docks. That’s how severe the weather gets out here. It’s happened many times.” TR 432:13-16.

- d. The record demonstrates that Hughes did not explore all options for joint use.

The record demonstrates that Hughes requested use from at most owners of only three (3) of the eleven (11) docks on Pearl Island. TR at 440:22–441:13. In addition, although Hughes invited the Thorpes and Romanos, joint users of an existing dock, to share in the use of his dock, he did not ask whether they would be willing to permit him dinghy access to their beaches for his infrequent visits to the Property. TR at 443:9-12.

He likewise did not ask his brother for dinghy access via his beach. TR at 448:4-7. He also did not ask his directly adjacent neighbor whether he would be willing to permit him to land a dinghy on his beach. *See* Exh. P-JJJ at 3 (photo depicting neighbor's beach at right). Because each property on the island opens onto the community easement, a joint user of any dock on Pearl Island can connect to any other property.

Finally, in addition to Hughes' limited requests for joint use of other docks, he did not fully explore several other potential means of access, such as a dinghy dock, shorter dock, or hydraulic boat lift. TR at 284:1-285:4 (testimony of A. Leitman that shorter dock removing float from eelgrass would be very functional); TR at 432:22-433:18 (testimony of C. Hughes that did not seriously consider shorter dock because boat moored there would run aground at some point during certain days).

4. There Is No Residence on Hughes' Pearl Island Property.

Hughes currently lives in Seattle. TR at 415:16. As noted above, he owns a vacation home near Roche Harbor and jointly owns another vacation home in that vicinity with his brother. Hughes had not applied for a building permit at the time he requested his dock permit. *See* Exh. P-A, at 47 (noting intent to construct single-family residence on site "at some unknown time in the future"). Instead, Hughes had listed the

Property for sale, and had identified as attributes of the Property a pending dock permit and an “access easement.” Decision, FOF No. 4; Exh. P-V. Shortly before the Hearing, on May 21, 2008, Hughes submitted a request for a building permit, and did not know when its processing would be complete. Decision, at FOF No. 9; TR at 437:9-13.

5. The Dock Likely Will Adversely Impact Eelgrass

The record demonstrates that the Dock is likely to impact eelgrass. *E.g.*, Exh. P-H (Friday Harbor Laboratories comment letter stating that “[l]oss of eelgrass is the expected outcome of installation of grated floats”). Eelgrass is particularly vulnerable to human-induced disturbances, such as overwater structures, and is currently declining worldwide at a rate that experts characterize as a global crisis. Decision, FOF No. 17, TR at 86:8-87:3; Exh. P-H; Exh. P-W; Exh. P-X at 1. Even with light-pervious grating, docks are likely to affect eelgrass density by shading them from sunlight necessary for growth. Decision, FOF No. 17, Exh. P-X at 7.

Dock impacts to eelgrass beds are not limited to shading from the dock. Decision, FOF No. 19; Exh. P-H. Eelgrass impacts also result from shading by moored boats, the introduction of chemical and biological contaminants from boats, disruption of the surrounding waters from the use of boats by people, and scouring along the seabed from the churning

of water by propellers. Decision, FOF No. 19; Exh. P-H. The only way to ensure that a dock will not impact eelgrass is to avoid constructing it over eelgrass. Exh. P-X at 2.

As the number of docks has proliferated in Puget Sound, studies have documented a significant resulting decline in eelgrass densities, including in some instances the total loss of eelgrass beds. Decision, FOF No. 17, Exh. P-X at 2. Indeed, despite strict State and County criteria for eelgrass protection, eelgrass declines have occurred in multiple shorelines in the County, with the most dramatic losses in Westcott Bay, Garrison Bay, and Mitchell Bay on San Juan Island. Exh. P-EE at 2-5 (identifying losses of more than thirty-five (35) acres of eelgrass in documented Pacific herring spawning sites).

State agencies have designated eelgrass a saltwater habitat of special concern in recognition of its importance in providing a number of functions and values in the marine environment. Decision, FOF No. 15 (citing WAC 220-110-250). Eelgrass serves essential functions in the developmental life history of fish and shellfish, such as refugia and shelter for fish and invertebrates, food for marine animals and birds, and habitat for red algae and other marine plants. Decision, FOF No. 15; Exhs. P-Y at 6, P-WW at 3-5. Eelgrass also provides physical stabilization for the nearshore area by baffling wave and tidal energy, and protecting subtidal

sediments and shorelines from erosion. Decision, FOF No. 15, Exh. P-WW at 3-5. Protection of eelgrass safeguards species richness, biodiversity, ecosystem structure, and many ecological processes. Decision, FOF No. 15, Exhs. P-Y, P-WW.

The functions and values provided by eelgrass are largely place specific. Decision, FOF No. 15; Exh. P-WW. Consequently, protection of eelgrass beds is preferable to replacement of beds because the surrounding environment loses the functions and values that the destroyed eelgrass beds provide. Decision, FOF No. 18; TR at 87:11-88:14. In addition to lost functions and values at the impact site, eelgrass patching can fragment the whole plant community, contributing to the eventual decline of an entire eelgrass bed. Decision, FOF No. 18; Exh. P-EE.

It is undisputed that the Dock's over water coverage will be approximately 543 square feet, at least 233 square feet of which consist of floats that will directly cover dense eelgrass, which the San Juan County Code ("Code") designates as a sensitive marine habitat area.¹ Decision,

¹ While a portion of the floats will incorporate some form of light grating material, the author of Hughes' mitigation plan, Chris Fairbanks, testified that the grating will compose only approximately 40% of the square footage of the floats. TR at 326:10. Notwithstanding that Mr. Fairbanks designed the mitigation plan, he conceded that he did not know what type of grating would be used for the dock, and hence the extent of its shading impacts. TR at 354:15-355:1; Exh. P-JJJ at 5 (example of ineffective grating employed for recent dock in San Juan County); Exh. R-Q-12.

FOF No. 11; Exh. R-Q-12. In response to the dock's eelgrass coverage, the University of Friday Harbor Laboratories submitted a comment letter opining that it likely would result in the loss of eelgrass. Exh. P-H. Hughes' own expert witnesses, Chris Fairbanks and Brian Williams (WDFW), conceded that the dock would adversely impact eelgrass but could not state with certainty the extent of the impact. Mr. Fairbanks testified that "I do not believe it will be eliminated. I believe that there may be an impact. My hypothesis is that there might be a diminished density of eelgrass or some component of the eelgrass may change, but eelgrass will not be eliminated." TR 327:16-20. Likewise, Brian Williams testified that it was his opinion merely that the dock would not displace all of the eelgrass underneath it. TR 159:9-12. In addition, Hughes' mitigation plan relied on the assumption that the dock would eliminate all of the eelgrass beneath it. TR at 207:12-17.

6. The Off-Site Mitigation Is Not Permitted by the Code, Does Not Address Impacts From the Proposed Dock, and Is Not Guided By Any Legal Standards.

The off-site mitigation offered to compensate for eelgrass loss consists of the removal of an unpermitted, derelict mooring buoy anchored in eelgrass 1.3 miles away. Decision, FOF Nos. 20-21; Exh. R-X (facts stipulated to at hearing). The buoy became available for removal when the County and WDFW granted the buoy owners their own dock over

eelgrass. TR at 322:1-323:25; 357:16-358:13. Oddly, neither WDFW nor the County required those dock owners to remove the buoy to mitigate for impacts of that dock, and Chris Fairbanks, the author of the mitigation plan for that dock (paid for by Hughes), did not suggest to those dock owners that they remove their buoy. TR at 357:16-358:13; 382-18-383:24; 384:15-385:7. In addition, Brian Williams, the WDFW biologist advocating for the Dock, indicated that he did not contact the Washington Department of Natural Resources to enforce against that buoy's unauthorized trespass on public aquatic lands.² TR at 189:6-191:5; Decision, FOF No. 21. Indeed, Mr. Williams testified that he would continue to allow the construction of docks over eelgrass in exchange for the removal of unpermitted mooring buoys. TR at 192:2-192:18.³

² WDFW has a duty to require identified trespassers to either obtain approval for their use of aquatic lands or remove the improvement. WAC 332-30-127.

³ Mr. Williams testified that he has never denied a permit. TR at 196:15-17. Mr. Williams also testified that he does not consider the Hydraulic Code Rules, Chapter 220-110 WAC, to be mandatory authority for his activities at WDFW. TR at 169:19-170:4. Here, WDFW justified the Dock approval on the grounds that the Dock would participate in an "experimental dock program," whereby WDFW would permit a variety of docks over eelgrass and then examine the amount and rate of eelgrass loss caused by those docks. Exh. P-A at 31; Exh. P-F; TR 137:17-138:25. Just over a year after this approval, the San Juan County Marine Resources Committee recommended that the San Juan County Council request that WDFW terminate the experimental dock program on the grounds that it directly conflicted with County and State eelgrass and shoreline protection policies and regulations, and that less destructive methods could be used to determine the impacts of docks on eelgrass. Exh. P-CC. WDFW responded to the County's request by terminating the program, expressly noting that where WDFW practices conflict with those of local jurisdictions, "particularly when local regulations are more protective," WDFW should seek approaches that are supportive of those regulations. *See* Exh. R-H at 4.

Unlike WDFW or Corps provisions that address eelgrass impacts, or San Juan County Code provisions for wetland impacts, the Code does not allow compensation for eelgrass harm by off-site mitigation. SJCC 18.30.160. Nothing in the Code establishes off-site mitigation as an option for eelgrass impacts; on the contrary, it identifies only mitigation options that can occur within the vicinity of the impact. TR at 304:8-25; Exh. P-UU. At hearing, Laura Arnold, the County Planning Director who shepherded the creation of the environmentally-sensitive areas ordinance in 1998, testified that the County did not contemplate off-site mitigation for eelgrass impacts when it enacted those regulations. TR at 305:2-305:14. Ms. Arnold testified in contrast that the wetland regulations expressly identify off-site mitigation as a compensatory mechanism and list criteria for evaluating such proposals, including compensation ratios. TR at 303:24-304:17.

Even if the Code did permit off-site mitigation, the project here did not attempt to replace eelgrass function and values similar to those likely to be lost under the Dock. TR at 270:16-22, 280:3-283:9 (testimony of A. Leitman opining that mitigating for buoy impacts 1.3 miles from site of impact does not replace function lost in fragmented bed). It did not analyze the respective habitat values at the mitigation site versus the dock site, or consider the cumulative effect of multiple docks around Pearl

Island and the resulting fragmentation of the eelgrass beds that surround the island. *Id.*; TR at 279:17-21; TR at 355:16-357:15 (testimony of C. Fairbanks); Decision, FOF NO. 21. And pre-project surveys indicated that the eelgrass recovery would be deemed successful upon reaching only approximately 25% of the eelgrass density at the Dock site.⁴ This much less dense eelgrass would not serve the same functions as the eelgrass to be lost because denser eelgrass provides better services such as forage, whereas less dense eelgrass subjects organisms, such as juvenile salmon, to greater predation. *See* TR at 286:6-287:2 (testimony of A. Leitman that dense eelgrass beds provide important role for juvenile salmon in areas of high current, including preventing them from being swept further from shore). Indeed, Chris Fairbanks agreed that the eelgrass beneath the proposed dock provided “better services” than the eelgrass at the mooring

⁴ According to the Settlement, Respondent Hughes’ buoy removal project succeeds once the eelgrass density in the buoy scour area recovers to a density 80% that of a neighboring reference site. Exh. R-Q at 4-6. The Agreement does not require the recovery of eelgrass at a density comparable to that at the Dock site. This is particularly significant because Hughes’ surveys performed on September 21, 2007 identified an average eelgrass density at the Dock site of 44 shoots per square meter, while the average density at the reference site was 13.8 shoots per square meter. Consequently, using the September 21, 2007 survey figures, Hughes will comply with the Settlement by showing a recovery density of 11.04 shoots per square meter (80% of 13.8 shoots/m²), or approximately 25% of the density measured at the Dock during the same time. Moreover, there is substantial variability between the methods used for the eelgrass surveys at the mitigation site, leading to questions about the accuracy of the results. TR 230:12-236:3.

buoy site, at least for certain species such as juvenile salmon. TR at 396:2-9. Brian Williams, further noted that “a dense bed potentially has different functions than a sparse bed in its function within the ecosystem or in the basin, but we do not have data that specifically specifies or outlines what those differences are.” TR at 189:1-5.

Finally, the mitigation project does not permanently ensure the recovery of eelgrass. Exh. R-Q. Although Respondent Hughes must monitor the area for three years, or until eelgrass density recovers to 80% of the reference density, he is not required to ensure that future mooring buoys or other disturbances do not impact the scour area. Exh. R-Q (permit does not prevent placement of mooring buoy in scour area at future date).

7. Cumulative Impacts of the Dock Would Be Significant.

The record demonstrates that increasing the number of docks, such as the proposed Dock, throughout San Juan County, or in the vicinity of Pearl Island, would have substantial cumulative aesthetic and ecological impacts. *E.g.*, Exh. P-FFF; Exh. P-X. When initially platted, Pearl Island could be accessed through a community dock intended to serve all of the properties. TR at 31:14-32:8 (testimony of O. Fausko). This small island has now departed from this initial goal with the construction of eleven

docks, including one recently permitted over eelgrass in 2007. *Id.*; TR at 322:10-13 (testimony of C. Fairbanks).

The loss of eelgrass under a proposed dock has implications for cumulative effects beyond the mere number of shoots that will immediately disappear because thinning can lead to fragmenting of the entire eelgrass bed. Decision, at FOF No. 19; Exh. P-X. “The cumulative impact of small residential piers, docks, and floats is a particular concern because large numbers of such structures are typically aggregated in areas with seagrass.” Exh. P-X at 1.

In addition, the cumulative impacts of allowing single-user docks over eelgrass throughout San Juan County are substantial. There are currently 2,841 parcels in San Juan County with eelgrass, and 293 of those parcels also have a dock. Exh. P-FFF at 6. While these eelgrass parcels may not all have eelgrass extending along their entire shorelines, or may not all be developed with docks, the potentially substantial number of future docks on parcels with eelgrass, in addition to the significant number of docks currently over eelgrass, would magnify light, substrate, and wave energy impacts throughout the San Juan Islands. In addition, the SMP does not absolutely prohibit existing joint users from later applying for individual docks.

C. SUMMARY OF THE ARGUMENT

The Board relied on its ability to weigh the credibility of the testimony and its special expertise interpreting the SMA and SMP when it reversed the Dock permit. The basic facts were undisputed at the Hearing-
-the applicant had access to his property via barge, buoy, shoreline, brother's dock, and other unexplored means. The dock would impact eelgrass, a valuable marine ecosystem that is sensitive to disturbance, and which has declined rapidly in recent years, both globally and locally. And the SMA and SMP did not provide guidance to determine whether the removal of an unlawful mooring buoy more than a mile away from the impact and in an eelgrass bed of different quality compensated for anticipated eelgrass impacts.

Based on these facts, the SMA and SMP could not support approval of the Dock. The SMP could not allow a dock where alternative moorage and existing facilities are adequate and feasible. Neither the SMA nor the SMP could allow a dock where the cumulative impacts throughout the nearshore environment, both on Pearl Island and throughout the San Juans, are likely to lead to substantial loss of critical habitat. The cobbled-together off-site mitigation, instead of assessing likely impacts and seeking a solution to specifically address them, found an old, unused mooring buoy that could easily be removed. And the

increased convenience afforded by the dock for occasional outings to Pearl Island could not meet the SMA policies enacted to protect shorelines of statewide significance.

D. ARGUMENT

1. Standard of Review.

The court below reversed the Decision pursuant to the Washington Administrative Procedure Act (“APA”) on the grounds that the Board erroneously interpreted or applied the law regarding mitigation of impacts to eelgrass, that several findings of fact were not supported by substantial evidence, and that the Decision was generally arbitrary and capricious. *Hughes v. Shorelines Hearings Bd.*, No. 08-2-05185-5 (August 28, 2009) (letter opinion). However, the court neither cited to nor evaluated any Washington court or Board jurisprudence on the application of the SMA and SMP. *Id.* A review of the Decision through the proper lens of deference to the finder of fact and deference to an administrative agency interpreting an area of law within its special expertise leads to the inescapable conclusion that it must be reinstated. *See* RCW 34.05.570; *Lund v. Dep’t of Ecology*, 93 Wn. App. 329, 333, 969 P.2d 1072 (1998) (citing *Batchelder v. City of Seattle*, 77 Wn. App. 154, 158, 890 P.2d 25, rev. denied 127 Wn.2d 1022 (1995)); *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, rev. denied 109 Wn.2d 1008 (1987) (concluding that

“[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal.”).

2. The Board’s Decision is Supported By Substantial Evidence.

The Board’s Decision cannot be reversed for want of substantial evidence where it is supported by a quantum of evidence “sufficient to persuade a fair-minded person of the truth of the declared premises.” *Wash. State Attorney Gen.’s Office v. Wash. Utils. and Transp. Comm.*, 128 Wn. App. 818, 827, 116 P.3d 1064 (2005). The findings do not need to contain extensive analysis in order to constitute substantial evidence. *Id.* In addition, the inquiry does not focus on a balancing test whereby a reviewing court may overturn a Board decision merely because it believes that a greater amount of evidence supports the appellant below. *See, e.g., Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 674, 929 P.2d 510 (1997) (noting that although the appellant had “presented a huge amount of testimony in support of his claim...,” “the Board and the Chief had before them competent evidence to the contrary.”). Instead, the question is whether any fair-minded person could have reached the same ruling as the administrative agency based on the evidence in support of that ruling. *See id.* at 676 n.9. The record here reflects ample evidence sufficient to persuade a fair-minded person of the truth of the declared premises.

In a similar decision nearly a decade ago, *Bellevue Farms Owners Association v. San Juan County, et al.*, the court deemed the following evidence substantial enough to support the Board's finding that additional docks in Westcott Bay would have a negative impact: (a) written testimony from the Department of Fish and Wildlife regarding eelgrass; (b) evidence of the existence of eelgrass in Westcott Bay; (c) drawings of the proposed dock; (d) eelgrass studies; (e) aerial views of Westcott Bay; (f) tide information; (g) testimony from a resident of that area; and (h) scientific testimony regarding the biological diversity of Westcott Bay. 100 Wn. App. 341, 364, 997 P.2d 380 (2000). Likewise, the record in the present matter contains much of the same information identifying the significance of eelgrass, the impacts of the proposed dock generally, the inadequacy of the proposed mitigation project, and the availability of alternative means for access and moorage. *See id.*

In particular, as demonstrated at subsection B.5 above, the record contains substantial evidence that the dock will damage eelgrass, and that docks generally cause such impacts. *See e.g.*, Exh. P-H; Exh. P-W; Exh. P-X (noting that the only certain method of protecting eelgrass is to avoid it when siting overwater structures). The Board found that it was undisputed that the dock would "eliminate at least a portion of the eelgrass bed surrounding Pearl Island," and that it would "damage and eliminate

eelgrass.” Decision, FOF No. 11, COL No. 11 (respectively). Indeed, Hughes conceded during the dock application process that the dock could adversely impact underlying eelgrass, and proposed to conduct on-site and off-site mitigation to compensate for that impact. Exh. R-M at 4 (Habitat Management Plan (July 10, 2007)). Further, Hughes’ own expert witnesses, Chris Fairbanks and Brian Williams, conceded that the dock would adversely impact eelgrass, but could not quantify the impact. TR at 327:16-20 (testimony of C. Fairbanks); TR at 159:9-12 (testimony of B. Williams).

3. The Board Correctly Interpreted and Applied the SMA and SMP.

The Board’s interpretation of the SMA or SMP is a question of law that must be upheld where the Board did not “engage[] in unlawful procedure or decision-making process, or...faile[] to follow a prescribed procedure;...[or]...erroneously interpret[] or apply the law.” *Bellevue Farm Owners Ass’n*, 100 Wn. App. at 351 (quoting *Batchelder*, 77 Wn. App. at 158). Further, substantial weight is granted to Board legal interpretations because the Board possesses specialized expertise in hearing shoreline cases. *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 515, 137 P.3d 31 (2007); *Bellevue Farm Owners Ass’n*, 100 Wn. App. at 351. The Board correctly interpreted the SMA

and SMP in light of their language, controlling state court caselaw, and its own voluminous precedent interpreting the SMP, and the Decision therefore must be affirmed.

In 1971, the Washington State legislature enacted the SMA in response to the “recognition that the shorelines are fragile and that the increasing pressure of additional uses being placed on them necessitated increased coordination in their management and development.” RCW 90.58.020; *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). Consequently, the primary purpose of the SMA is “to protect the state shorelines as fully as possible.” *Lund*, 93 Wn. App. at 336-37 (quoting *Buechel*, 125 Wn.2d at 203).

The SMA establishes a policy that “contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally the public right of navigation and corollary rights incidental thereto.” *Buechel*, 125 Wn.2d at 203 (citing RCW 90.58.020); *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987). To comply with that policy, all shoreline development must conform to the SMA, which “is to be broadly construed in order to protect the state shorelines as fully as possible.” RCW 90.58.900; *Buechel*, 125 Wn.2d at 203.

Moreover, “the public’s opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally.” *Id.* “To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state’s shoreline.” *Id.* Finally, although the SMA contemplates that alterations of the natural condition of the shorelines will occur, and gives priority to single-family residences in those circumstances, the SMA declares that such alterations will be authorized only in limited instances. *Id.*

In addition to protections that apply generally to all Washington shorelines, the SMA establishes heightened protections for shorelines of statewide significance, which include all shorelines surrounding San Juan County. RCW 90.58.020. For these shorelines, the SMA prefers uses that, in the following order: (1) recognize and protect the statewide 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; and (7) proved for any other element as defined in RCW 90.58.100 deemed appropriate or necessary. *Id.*

- a. The Board correctly concluded that the proposed single-user dock is inconsistent with the SMP.

To spare San Juan County from the so-called “porcupine effect” created by dozens of individual private docks and piers on the same shoreline, the SMP establishes a preferential hierarchy to limit the number and size of boating facilities. Comprehensive Plan § 3.5.C.11; *Shorett v. San Juan County*, SHB No. 06-038 (June 7, 2007) (Findings of Fact, Conclusions of Law and Order) (COL No. 3).⁵ Generally, multiple use and expansion of existing facilities is preferred over construction of new facilities. SJCC 18.50.190.C.; *see Shorett*, SHB No. 06-038 at COL No. 3. Then, mooring buoys and floats are preferred over docks and piers. SJCC 18.50.190.C; Comp. Plan § 3.5.C.6.; *see Shorett*, SHB No. 06-038 at COL No. 3. Lastly, joint-use docks are preferred to single use docks. SJCC 18.50.190.C.; *see Shorett*, SHB No. 06-038 at COL No. 3. This preferential hierarchy is also intended to preclude further reductions in usable water surface. *Calver v. San Juan County*, SHB No. 98-39, 6 (Feb. 9, 1999) (Final Findings of Fact, Conclusions of Law and Order).

⁵ This Appeal Brief relies for support on the Board’s extensive history of decisions where they constitute the sole written analysis of SMA and SMP language.

The Dock would conflict with the purposes of the County's joint-user policy. *See Culver*, SHB No. 98-39 at 6. The proposed single-user dock would exacerbate any porcupine effect around Pearl Island by adding the only dock extending directly west of the island, while existing docks are currently limited primarily to the eastern and southern shores of the island. Comp. Plan § 3.5.C.11. In addition, the Dock would further reduce the usable water surface by constraining access through the principal waterway to Roche Harbor, a significant marine destination.

The Decision also correctly interpreted and applied the SMP criteria to conclude that Hughes did not meet his burden of demonstrating a lack of adequate and feasible alternative moorage and existing facilities. Decision, COL Nos. 6-10; SJCC 18.50.190.G.5.a.; *Holley v. San Juan County*, SHB 00-001, FOF No. 11 (July 31, 2000) (Final Findings of Fact, Conclusions of Law and Order) (recognizing that the SMP "requires all applicants for single-family residential docks to show that alternative moorage is not adequate and feasible"); *Culver*, SHB No. 98-39 at 7 (stating that under the County's general regulatory criteria for docks, the applicant shoulders the burden of showing that neither existing facilities nor alternative moorage are adequate or feasible). The Code prohibits approval of a dock in the absence of such a showing. *Id.* The Code does not establish a less stringent joint-user preference on non-ferry served

islands like Pearl Island, which lies just a short distance from residences and docks that Hughes owns on San Juan Island.

Although neither the SMA nor the County's SMP define "adequate" or "feasible," the Board has held that "adequate" means "enough or good enough for what is required or needed" or "barely satisfactory." *Culver*, SHB No. 98-39 at 7 (citing Webster's New World Dictionary, 2d ed., 510 (1972)). In addition, the Board in *Culver* defined "feasible" as "suitable" or "capable of being used." *Id.*

(1) Existing facilities are adequate and feasible.

The Board correctly concluded that Hughes did not meet his burden of proving that existing facilities are not satisfactory or capable of being used. In the context of tiny Pearl Island, where an easement connects all property owners, an application does not demonstrate the absence of adequate and feasible moorage unless it requests such moorage island-wide. In its review of permit issuance for a community dock in *Mineral Heights Association, Inc. v. San Juan County*, where that dock was proposed for a site approximately seven (7) miles northwest of Friday Harbor, the Board's feasible alternative moorage inquiry led it to assess moorage at all public facilities across San Juan Island--Friday Harbor, Roche Harbor, and Snug Harbor. SHB No. 77-25 (Sept. 29, 1977) (Final Findings of Fact, Conclusions of Law and Order). Consequently, the

Board correctly concluded here that an inquiry into use of only three of the eleven docks existing on Pearl Island, and none of the beachy shorelines, did not satisfy the requirement to seek out and use existing joint-user facilities.

In addition, as noted above, Hughes can access the Property via his brother's dock in the winter. Exh. P-D, at 3. And Hughes' testimony and the JARPA concede that Hughes can land a dinghy on his own shoreline. Exh. P-A, at 16. In *Culver*, the applicant had access to his property that was good enough and capable of being used even though he had to drag his dinghy over thick mud at various tides. SHB No. 98-39 at FOF No. 6. There, the Board evaluated whether access across thick, muddy tidal flats, and then a primitive dock and mooring float at low tide, were adequate and feasible facilities for reaching Henry Island, a non-ferry served island. *Id.* The Board noted that the residents there had adapted to those conditions by either launching small boats at higher tides or dragging dinghies across the mudflats at lower tides, and that the applicant had been able to use those adaptations and a primitive dock and mooring float to access his property six months out of the year. *Id.* The Board concluded that existing facilities were "good enough for what is needed" and "capable of being used." *Id.* Just as the applicant in *Culver* adapted to the conditions of accessing his property on Henry Island, a non-ferry served

island, Hughes' access via a dinghy indicates that he has likewise adapted to accessing the Property. *See id.*

Hughes has two additional existing facilities to aid his access to the Property. He can access the Property by taking the barge service to Pearl Island's barge landing and then traveling down the access easement, as do other Pearl Island residents. TR at 61:24-63:9. He could also place a mooring buoy along the south side of Pearl Island.

The Board's determination here is consistent with past decisions denying permits to applicants on similar islands where those applicants had alternative moorage and access to their parcels. In *Harrison v. San Juan County*, the Board upheld the County's denial of a joint-user dock proposed for Brown Island, a small non-ferry served island just off the shores of Friday Harbor. SHB No. 83-7, 2 (Sept. 16, 1983) (Final Findings of Fact, Conclusions of Law & Order). Just like Pearl Island, Brown Island's (identified as Friday Island in the *Harrison* decision) developers platted the ¾ mile long island before the County established its SMP. *Id.* A community dock and facilities provide access to a wooded common area and a gravel road leading to each of 60 waterfront lots. *Id.* The applicants' parcels were approximately 0.4 miles from the access. *Id.* Unlike Hughes' proposed dock, the dock in *Harrison* was not alleged to cause adverse environmental impacts. *Id.* at 3. The Board recognized,

however that the cumulative impacts of similar docks could be adverse. *Id.* Because the applicants had available moorage at the community dock, the Board concluded that the applicant had not met the burden of proving that existing facilities were not adequate and feasible. *Id.* Likewise, Hughes can land at the barge landing approximately ½ mile from the Property and then access his property via the community area.

(2) Alternative moorage is adequate and feasible.

In addition to Hughes' adequate and feasible existing facilities, he possesses adequate and feasible alternative moorage on his dock across Roche Harbor on San Juan Island and via a mooring buoy. *See Holley*, SHB No. 00-001. As the Hearing Examiner found in his February 2006 decision, "Roche Harbor Marina is close enough that a dinghy at the property could reasonably be used to reach a larger powerboat or sailboat located there," and Hughes' own dock is closer to the Property than the Roche Harbor marina Exh. P-D, at FOF No. 17; Exh. P-III. Odd Fausko, a Pearl Island resident, testified that he uses a mooring buoy and that other residents on the island who own property on the north side use a mooring buoy off the shore of the south side of the island, in Roche Harbor. TR at 38:19-39:25. The January 6, 2006 County staff report stated that "since the site has low bank access, a mooring buoy is likely feasible." Exh. P-G (San Juan County Staff Report 05SJ013, 3 (Dec. 30, 2006)). In *Holley*,

the Board declared that “[t]he existence of mooring buoys lying in the cove, strongly suggests mooring buoys are a viable option for mooring boats in the area.” *Id.* at FOF 13. The existence of mooring buoys in Roche Harbor similarly indicates that a mooring buoy would provide adequate and feasible moorage. *See id.*

(3) Improved convenience does not render existing facilities or alternative moorage inadequate and infeasible.

Although the Dock might provide more convenient access to the Property, “[a]n applicant for a permit does not meet [Code] criteria by showing that a private dock is more convenient to access and use than other facilities in the area.” *Stanford v. San Juan County*, SHB No. 06-004 (Sept. 20, 2006) (Findings of Fact, Conclusions of Law, and Decision). Thirty years of Board interpretations of the Code support this position that convenience is not an element of the adequate and feasible analysis. *See, e.g., Dagg*, SHB 99-021 at 5; *Christoffersen v. San Juan County*, SHB 97-07, 97-08, 3 (July 31, 1997) (Order Granting Summary Judgment and Dismissal); *Mineral Heights Ass’n, Inc. v. San Juan County*, SHB No. 77-25 (Sept. 29, 1977) (Final Findings of Fact, Conclusions of Law and Order). Indeed, the Board concluded in *Kettering v. San Juan County* that “[i]f convenience alone were sufficient to override the San Juan County Shoreline Master Program, the County’s carefully planned

approach to piers and docks would be essentially gutted.” SHB No. 89-10 (Oct. 11, 1989) (COL No. 6). In addition, “[d]oing so would conflict with State Shoreline Management Act’s policy to foster planned use of the shoreline.” *Id.* The Board concluded that the dock would increase the convenience for Hughes to access his property, and properly reversed the permit on the grounds that increased convenience does not outweigh San Juan County’s strict policies against dock proliferation.

4. The Board Correctly Concluded That the Dock’s Direct and Cumulative Impacts Are Inconsistent with the Preservation of Ecological Functions Required by the SMA and SMP.

a. The Dock is inconsistent with SMA and SMP policies.

The Board evaluated the SMA and SMP goals and policies and concluded that “both state law and the SJSMP require that its decision in this case assure the protection and preservation of the natural resources that characterize Pearl Island and its surrounding marine habitat.” Decision, at COL No. 4. Thus, the Board contemplated preservation of the functions and values that eelgrass render to the Pearl Island shoreline, as well as the eelgrass itself.

The Board correctly based this conclusion on several SMA and SMP goals and policies. First, the Board cited Comprehensive Plan Section 3.4.F., which establishes policies that mirror the SMA policies for

shorelines of statewide significance, and foster: (1) recognizing and protecting the statewide interest over the local interest; (2) preserving the natural character; (3) using the shorelines in ways that will produce long term benefits as opposed to short term benefits or conveniences in accordance with the following: (a) actions that would commit resources to irreversible uses or would detrimentally alter natural conditions characteristic of such shorelines should be severely limited, (b) the short term economic gain or convenience associated with a proposed development should be evaluated in relationship to long term and potentially costly impairments to the natural environment, and (c) the visual impact of every proposed project should be thoroughly evaluated and adverse impacts should be minimized; and (4) protection of the natural resources and systems, *and the mandate to leave undeveloped those areas containing unusual or fragile natural resources or systems.* Comprehensive Plan § 3.4.F. (emphasis added). Indeed, the Comprehensive Plan declares that “uses which are not generally consistent with these policies should not be permitted on such shorelines.” Comprehensive Plan § 3.4.F..

The Board also relied on the SMP’s policies to protect environmentally sensitive areas, which include fish and wildlife habitat such as the eelgrass beneath the area proposed for the Dock.

Comprehensive Plan § 3.4.D. These policies include: (1) the preservation of unique, rare and fragile shoreline resources; (2) protection of areas with unique and/or fragile geological or biological characteristics, from incompatible physical public access; and (3) discouraging of development on shorelines that are identified as hazardous for or sensitive to development or at least a limitation on their development in a manner that minimizes environmental damage. Comprehensive Plan § 3.4.D.

To achieve the preservation of these environmentally sensitive areas, the SMP establishes a conservation goal “[t]o assure the preservation of scenic and non-renewable natural resources and to assure the conservation of renewable natural resources for the benefit of existing and future generations.” Comprehensive Plan § 3.2.F. The SMP identifies policies such as the following to facilitate that goal: (1) assure the preservation, reclamation, rehabilitation, and where possible, the enhancement of unusual, fragile and/or scenic elements, and of non-renewable natural resources; and (2) preserve critical marine and terrestrial wildlife habitats; (3) encourage the preservation scenic views, open space and vistas. *Id.*

Finally, the SMP establishes strict policies to limit boating facilities, including docks and piers, to protect shoreline resources. Comprehensive Plan § 3.5.C. Boating facilities should be located,

designed, and constructed “to minimize adverse effects upon, and to protect all forms of aquatic, littoral or terrestrial life including animals, fish, shellfish, birds and plants, their habitats and their migratory routes.” Comprehensive Plan § 3.5.C.1. “The location, design, configuration and height of boathouses, piers, ramps, and docks should both accommodate the proposed use and minimize obstructions to views from the surrounding area.” Comprehensive Plan § 3.5.C.3. And “[t]he capacity of the shoreline site to absorb the impacts of waste discharges from boats and gas and oil spills should be considered in evaluating every proposed dock or pier.” Comprehensive Plan § 3.5.C.13.

SJCC 18.50.070 expressly addresses environmental impacts in the shoreline environment and dictates in pertinent part that: (1) all shoreline uses and activities shall be located, designed, constructed, and managed in a manner that minimizes adverse impacts to surrounding land and water uses and must be aesthetically compatible with the affected area; and (2) all shoreline uses and activities must be located, designed, constructed, and managed to avoid disturbance of and minimize adverse impacts to fish and wildlife resources, including spawning, nesting, rearing and habitat areas, and migratory routes. SJCC 18.50.070.D.,F.

The Dock is also inconsistent with SMP regulations that prohibit unnecessary intrusions into visual access of public areas. SJCC 18.50.140.

The Code states that “[i]n order to limit interference with views from surrounding properties to the shoreline and adjoining waters, development on or over the water shall be constructed only as far seaward as necessary for the intended use.” SJCC 18.50.140.D.. Here, the Dock would impose on expansive views of outer islands beyond Pearl Island while exiting Roche Harbor.

The SMP further establishes the following goals and policies for shoreline use: (1) “[f]oster uses which protect the long-term benefits to the public against *compromise for reasons of short-term economic gain or convenience;*” and (2) accommodate preferred shoreline uses (water-dependent, water-related and water-enjoyment uses and single-family residential uses) *while protecting and preserving shoreline resources and avoiding hazardous or sensitive areas.* Comprehensive Plan § 3.2.A. (emphasis added).

A review of these policies demonstrates that the Dock is not consistent with the SMA or the SMP goals. The Dock addresses adverse impacts, but does not minimize impacts to eelgrass as would the alternative means of access identified above. It is also aesthetically incompatible with the natural western shoreline of Pearl Island that currently remains undeveloped. Exh. P-JJJ. The Dock does not avoid adverse impacts to fish and wildlife resources. Moreover, the Dock and its

adverse impacts to eelgrass and the viewshed violate the preservation policies established for shorelines of statewide significance.

- b. The cumulative impacts of single-user docks over eelgrass like the Dock would be inconsistent with the SMA and SMP.

The Board correctly interpreted the law when it determined that the cumulative impacts of single-user docks such as Hughes' would be inconsistent with the SMA and SMP. The Washington State legislature enacted the SMA to prevent the "uncoordinated and piecemeal development of the state's shorelines." RCW 90.58.020. To achieve that policy, it is essential to evaluate the potential cumulative impacts associated with individual permits, particularly those that impact such critical resources as those found in environmentally-sensitive areas. *See Skagit County v. Dep't of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 115 (1980); *Lund*, 100 Wn. App. at 361-62. State court caselaw and several Board decisions support the propriety of a cumulative impacts analysis of shoreline substantial development permits. *See, e.g., Hayes v. Yount*, 87 Wn.2d 280, 552 P.2d 1038 (1976) (holding that legislature recognized the necessity of controlling the cumulative adverse effect of piecemeal development of the state's shorelines when it promulgated the SMA); *Bellevue Farm Owners*, 100 Wn. App. at 361-62. As the Washington State Supreme Court stated in *Skagit County v. Department of Ecology*,

“[l]ogic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together.” 93 Wn.2d 742, 750, 613 P.2d 115 (1980).

The Board correctly found that the cumulative impacts of the dock would lead to a ring of docks around Pearl Island. By adding a dock to the western shore of the island, the Dock would complete a visual ring around the island. Exh. R-A. It would also publicly announce that single-user docks would be permitted over eelgrass, a position that conflicts with the current public understanding in the County, and would establish the first modern approval of a single-user dock over eelgrass. TR at 37:2-5 (testimony of O. Fausko that “the county would never approve” docks over eelgrass).

In addition, the cumulative aesthetic and biological impacts of additional docks around Pearl Island could be significant. Although the other docks around Pearl Island are currently joint-user docks, circumstances could change, leading those users to request single-user docks, particularly if Hughes establishes a precedent here for such single-use docks. For example, there is no evidence that current joint-users operate under enforceable joint use agreements, or that their owners would not be permitted single-use docks if they breached such agreements.

5. The Board Correctly Concluded It Did Not Have Sufficient Criteria To Determine Whether Off-site Mitigation Adequately Addresses Dock impacts.

Nothing in the SMP permits off-site mitigation such as that proposed for the Dock. *See* SJCC 18.30.160. The plain language, context, and statutory structure of the Code's habitat area mitigation provisions likewise permit only compensatory mitigation in the vicinity of the impact. *See Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007) (a statute's plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole). Nothing in SJCC 18.30.160 addresses off-site mitigation, in marked contrast to SJCC 18.30.150, which allows both on-site and off-site mitigation for wetland impacts. SJCC 18.30.150; .160.

SJCC 18.30.160 establishes marine habitat protection standards and a mitigation sequence to prevent harm to sensitive areas. That mitigation sequence requires exploration of mitigation possibilities in the following order: (1) avoiding the impact; (2) minimizing impacts; (3) restoring the affected environment; (4) reducing impacts over time; and (5) compensating for the impact by replacing or providing substitute resources or environments. SJCC 18.30.160.B. Compensatory mitigation may require a habitat management plan, which identifies possible

mitigation measures that would only occur in the vicinity of the impact: (1) establishing a buffer zone; (2) preserving critically important vegetation; (3) limiting access to the habitat area; (4) seasonally restricting construction activities; and (5) establishing a timetable for periodic review of the plan. SJCC 18.30.160.D.3. Thus, SJCC 18.30.160 does not permit off-site mitigation.

In contrast, SJCC 18.30.150 establishes an identical mitigation sequence, yet expressly allows “off-site” compensation for impacts to wetlands and establishes criteria for determining when it may be used. SJCC 18.30.150.H.3. “Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.” *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). Thus, because the Code expressly incorporates off-site mitigation for wetlands but omits such language for marine habitat mitigation, San Juan County did not intend to permit off-site mitigation. Indeed, Laura Arnold, the County Planning Director who oversaw the creation of the fish and wildlife mitigation provisions, testified at hearing that the County did not intend to permit off-site mitigation. TR at 305:2-305:14

The impermissibility of off-site mitigation for marine areas is bolstered by the Code's omission of marine areas from its definition for "off-site compensation." SJCC 18.20.150. The Code defines "off-site compensation" as the "replacement of a **wetland** on a site different from the site on which a **wetland** has been or will be impacted by a regulated activity, or as a consequence of and in compensation for unavoidable adverse impact to **wetlands**, the protection of similar but unprotected **wetlands** in another location." *Id.* (emphasis added).

Even if the Code did permit off-site mitigation, the Board relied on its shoreline expertise, legal authority focusing on ecosystem functions and values, and the evidence presented by Friends, to conclude that the recovery of a certain number of eelgrass shoots did not, as a matter of law, equate with the replacement of the functions and values lost for eelgrass under the dock site. Decision, COL No. 16. Indeed, the record demonstrates that the mitigation plan was not designed to replace the ecological functions likely to be lost due to the Dock. TR at 280:3-283:9 (testimony of A. Leitman); TR at 355:16-357:15 (testimony of C. Fairbanks).

On the contrary, Hughes learned of a derelict, unpermitted mooring buoy approximately 1.3 miles from the proposed dock, paid the owner to purchase and for the right to remove the buoy, and removed the

mooring buoy. TR at 497:9-499:159 (testimony of T. Starkovich, property manager for C. Hughes). Hughes did not ensure that the buoy removal would result in recovery of an eelgrass bed that provided similar functions and values in the nearshore environment. TR at 356:9-13 (testimony of C. Fairbanks, the author of Hughes' mitigation plan, that he did not perform a biological evaluation for this project); TR at 279:17-21 (testimony of A. Leitman that mitigation project "didn't really discuss functions very thoroughly," but instead "talked mostly about numbers and density of eelgrass and not really about what it was mitigating for"). Hughes also did not ensure that the mitigation would benefit the same species as those likely to be impacted by the dock. TR at 287:11-17. Mr. Fairbanks conceded in his testimony that the denser eelgrass bed near the dock site along Pearl Island provided "better services" than the sparser eelgrass at the mitigation site. TR at 395:13-396:9. In addition, Amy Leitman opined regarding the importance of maintaining a contiguous band of eelgrass around Pearl Island. TR at 287:22-288:17.

In contrast to the reverse engineering approach that Hughes attempted to use to mitigate for the dock's eelgrass impacts, Ms. Leitman provided expert testimony regarding the steps that a proper mitigation plan would follow to assure that the functions and values to be lost at the project site are understood and that mitigation is found to respond to those

impacts. She opined that federal agencies typically require an initial biological evaluation for dock projects to identify physical conditions, such as slope and substrate, as well as biological conditions, such as plants and animals, to assess the functions and values of an ecosystem and the impact of the proposal. TR at 280:11-281:19. As noted above, no such biological evaluation occurred for Hughes' dock. Instead, Ms. Leitman testified that the mitigation plan offered by Hughes did not analyze the impacts of the dock or the necessity for causing those impacts, and she affirmed the Board's statement that she did not see "a connection between the mitigation that is offered and the functions and habitat issues that that [sic] would normally be studied in a situation like this." TR at 282:7-19. She stated that this was the first time in her experience, including nine years and 350 projects, that NOAA fisheries "just sign[ed] off on something over almost a thousand shoots of eelgrass." TR at 283:2-5. She stated that, conversely, she had worked on projects where a significant amount of negotiation was required to obtain approval to impact 50 shoots of eelgrass. TR at 283:5-9.

Ms. Leitman also testified that the replacement of eelgrass near Henry Island would not compensate for lost eelgrass at the Dock site. TR at 286:6-288:17. In response to questioning from the Board, Ms. Leitman opined that the denser bed of eelgrass near higher currents in the vicinity

of the proposed dock provided significant protection for juvenile salmon during their migration by protecting the salmon from being swept further out toward larger predators, particularly as compared with lower current areas at the mitigation site. TR at 286:15-287:2. She also stated that the differences between the mitigation site and the dock site would not serve all of the same animal populations. TR at 287, lines 8-17.

6. The Board Correctly Concluded That the Proposed Dock Contravenes SMA and SMP Policy Priorities.

In ascertaining the proposed dock's inconsistency with the SMA and SMP, the Board was required to assure the protection and preservation of the natural resources that characterize Pearl Island and its surrounding marine habitat. Decision, at COL No. 4. Policies 2, 3, and 4 of the SMA's shorelines of statewide significance provisions amply demonstrate the importance that the state legislators placed on actions that: "(2) preserve the natural character of the shoreline; (3) result in long term over short term benefit; [and] (4) protect the resources and ecology of the shoreline." RCW 90.58.020. And the SMP likewise states that actions inconsistent with its very similar policies should not be permitted along the County's shorelines. Comp. Plan § 3.4.F.

As the Board concluded in its Decision, the proposed dock here is inconsistent with these policies. Because the Dock would extend over

eelgrass, which is a critical marine habitat recognized by both state and local law for the essential role it plays in the development of commercially and ecologically valuable species, it would not protect against adverse effects to the land and its vegetation and wildlife or the waters of their state and their aquatic wildlife. It would also extend into the primary access route to Roche Harbor and thus mar the aesthetics of that approach.

7. The Board's Decision Is Not Arbitrary or Capricious.

The Board's reasoned decision cannot be interpreted as arbitrary and capricious. A decision is arbitrary and capricious only if it is "willful and unreasoning action in disregard of facts and circumstances." *Buechel*, 125 Wn.2d at 202. Even if the Court believed that the Board could have reached a different conclusion, it cannot overturn the decision where there is room for two opinions. *Id.* "Action is not arbitrary and capricious when exercised honestly and upon due consideration." *Id.* In addition, "[n]either the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an decision arbitrary and capricious." *Wash. State Attorney General's Office*, 128 Wn. App. at 824. There is no evidence in the record that the Board issued its decision in the absence of honest exercise of its authority, or in a willful or unreasoning manner that disregarded the facts and circumstances of the matter at hand.

E. CONCLUSION

For the reasons stated above, Friends respectfully requests reversal of the Superior Court Order and reinstatement of the Board's Decision.

DATED this 4th day of January, 2010.

Respectfully submitted,



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FRIENDS OF THE SAN JUANS

F. APPENDIX

1. Shoreline Management Act excerpt.

RCW 90.58.020. Legislative findings — State policy enunciated
— Use preference

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the statewide 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;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and shorelands of the state shall be recognized by the department. Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and shorelands of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter 90.58 RCW.

Permitted uses in the shorelines of the state shall be designed and

conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

[1995 c 347 § 301; 1992 c 105 § 1; 1982 1st ex.s. c 13 § 1; 1971 ex.s. c 286 § 2.]

2. San Juan County Code Excerpts:

- a. Definition of off-site compensation. SJCC 18.20.150.

“Off-site compensation” means:

1. Replacement of a wetland on a site different from the site on which a wetland has been or will be impacted by a regulated activity, or
2. As a consequence of and in compensation for unavoidable adverse impact to wetlands, the protection of similar but unprotected wetlands in another location.

- b. Off-site mitigation regulation excerpts from SJCC 18.30.150 Wetlands.

H. Mitigation. The overall goal of mitigation shall be no net loss of wetland function, value, and acreage.

1. Mitigation Sequence. Mitigation includes avoiding, minimizing, or compensating for adverse impacts to regulated wetlands or their buffers. When a proposed use or development activity poses potentially significant adverse impacts to a regulated wetland or its buffer, the preferred sequence of mitigation as defined below shall be followed unless the applicant demonstrates that an overriding public benefit would warrant an exception to this preferred sequence.

- a. Avoiding the impact altogether by not taking a certain action or parts of actions on that portion of the site which contains the regulated wetland or its buffer;
- b. Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

- c. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- d. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or
- e. Compensating for the impact by replacing, enhancing, or providing substitute resources or environments.

2. Compensatory Mitigation – General Requirements. As a condition of any permit or other approval allowing alteration which results in the loss or degradation of regulated wetlands, or as an enforcement action pursuant to Chapter 18.100 SJCC, compensatory mitigation shall be required to offset impacts resulting from the actions of the applicant or any code violator.

a. Except persons exempt under SJCC 18.30.110(E), any person who alters or proposes to alter regulated wetlands shall restore or create areas of wetland equivalent to or larger than those altered in order to compensate for wetland losses. The following Table 3.6 specifies the ratios that apply to creation or restoration which is in-kind, on-site, and is accomplished prior to or concurrently with alteration:

Table 3.6. Required replacement ratios for compensatory wetland mitigation.

Wetland Category	Replacement Ratio(1)
I	6 : 1
II or III	
• Forested	3 : 1
• Scrub-Shrub	2 : 1
• Emergent	1.5 : 1
IV	1.25 : 1

Note:

1. The first number in the ratio specifies the acreage of wetlands to be created, and the second number specifies the acreage of wetlands proposed to be altered or lost.

b. Enhancement of existing wetlands, other than Category I and Category II wetlands, may be considered as compensation; but above ratios must then be doubled.

c. Compensation must be completed prior to wetland destruction, where possible.

d. Compensatory mitigation must follow an approved compensatory mitigation plan pursuant to subsection (G)(3) of this section, with the replacement ratios as specified above.

e. Compensatory mitigation must be conducted on property which will be protected and managed to avoid further development or degradation. The applicant or code violator must provide for long-term preservation of the compensation area.

f. The applicant shall demonstrate sufficient scientific expertise, supervisory capability, and financial resources, including bonding in accordance with Appendix C* (Performance and Maintenance Bonding for Wetlands), to carry out the project. The applicant must demonstrate the capability for monitoring the site and making corrections if the project fails to meet projected goals.

3. Compensatory Mitigation – Type, Location, and Timing.

a. Priority will be given to in-kind, on-site compensation if feasible and if the wetland to be lost has a moderate to high functional value.

b. When the wetland to be impacted is of a limited functional value and is degraded, compensation may be of the wetland community type most likely to succeed with the highest functional value possible.

c. Out-of-kind compensation may be allowed when out-of-kind replacement will best meet identified goals (for example, replacement of historically diminished wetland types). Where out-of-kind replacement is accepted, greater acreage replacement ratios may be required to compensate for lost functional values.

d. Off-site compensation can be allowed only if:

- i. On-site compensation is not feasible due to hydrology, soils, waves, or other factors;
- ii. On-site compensation is not practical due to probable adverse impacts from surrounding land uses;
- iii. Potential functional values at the site of the proposed restoration are significantly greater than the lost wetland functional values; or
- iv. Off-site compensation will be conducted in accordance with subsection (H)(4) of this section, cooperative compensation projects.
- e. Except in the case of cooperative compensation projects, off-site compensation must occur within the same watershed where the wetland loss occurs; provided, that Category IV wetlands may be replaced outside of the watershed if there is no reasonable technical alternative. The stormwater storage function provided by Category IV wetlands must be provided for within the design of the development project.
- f. Except in the case of cooperative compensation projects, in selecting compensation sites applicants must pursue locations in the following order of preference:
 - i. Filled, drained, or cleared sites which were formerly wetlands and where appropriate hydrology exists; and
 - ii. Upland sites, adjacent to wetlands, if the upland is significantly disturbed and does not contain a mature forested or shrub community of native species, and where the appropriate natural hydrology exists.
- g. Construction of compensation projects must be timed to reduce impacts to existing wildlife and flora. Construction must be timed to assure that grading and soil movement occurs during the dry season. Planting of vegetation must be specifically timed to the needs of the target species.

4. Cooperative Compensation Projects. The County may encourage, facilitate, and approve cooperative projects where one or more applicants, or an organization with demonstrated capability, may undertake a compensation project if it is demonstrated that:

- a. Creation of one or several larger wetlands may be preferable to many small wetlands;

- b. The group demonstrates the organizational and fiscal capability to act cooperatively;
 - c. The group demonstrates that long term management of the compensation area can and will be provided; and
 - d. There is a clear potential for success of the proposed compensation at the identified compensation site. Conducting compensation as part of a cooperative process does not reduce or eliminate the required replacement ratios outlined in subsection (H)(2) of this section. (Ord. 7-2005 §§ 6, 7, 8; Ord. 14-2000 § 7 (CCC); Ord. 11-2000 § 4; Ord. 2-1998 Exh. B § 3.6.8)
- * Appendices referenced in this section are attached to Ord. 2-1998 and are on file in the office of the clerk of the board.

c. SJCC 18.30.160. Fish and wildlife habitat conservation areas.

B. Protection Standards.

1. General Habitat Protection Standards. The following performance standards shall be met for development permits or approvals located inside of or within 300 feet of a habitat classified in this section, except for Upland Category III:

- a. The proposal must mitigate to the maximum extent feasible any significant adverse impacts to habitat functions and values and to habitat buffers. Mitigation actions by an applicant or property owner shall occur in the following preferred sequence, unless the applicant demonstrates that an overriding public benefit would warrant an exception:
 - i. Avoiding the impact by not taking a certain action or parts of actions on that portion of the site which contains the habitat area or its buffer;
 - ii. Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
 - iii. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
 - iv. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or

v. Compensating for the impact by replacing or providing substitute resources or environments. This may require preparation of a habitat management plan in accordance with subsection (D) of this section.

b. Where impacts cannot be avoided, the applicant must seek to implement other appropriate mitigation actions in compliance with the intent, standards, and criteria of this section. In an individual case, these actions may include consideration of alternative site plans and layouts and reductions in the density or scope of the proposal.

c. Temporary and permanent erosion and sedimentation controls must be provided to prevent the introduction of sediments or pollutants to water bodies or water courses within the habitat area.

d. Clearing and grading must be limited to that necessary for establishment of the use or development and must be conducted so as to avoid significant adverse impacts and to minimize the alteration of the volume, rate, or temperature of freshwater flows to or within the habitat area and any buffer specified in this section.

e. The proposal will not introduce hazardous substances to the habitat areas that would have significant adverse impacts on that area, including but not limited to fertilizers, herbicides, pesticides, fuel and waste oil, and human or livestock fecal matter.

f. Stream flows must be protected from changes to the normal flow, temperature, turbidity, and discharge to the maximum extent practicable.

2. Habitat-Specific Standards. The following performance standards apply within specific habitat areas. Exceptions to these standards may be allowed if a special report, prepared by a qualified wildlife biologist, habitat management consultant, botanist, or marine biologist demonstrates that such exception would not have a significant adverse impact on the habitat area.

a. Freshwater Habitats: Septic drainfields and a 100 percent repair area must be at least 100 feet from the edge of the habitat area.

b. Marine Habitats:

i. Septic drainfields and a 100 percent repair area must be at least 100 feet from the edge of the habitat area.

ii. Uses and developments in or over water must minimize changes to natural water circulation and must be designed and operated in a manner that minimizes the introduction of contaminants and debris.

iii. Uses and developments must minimize disruption of the substrate, and the location and design of structures and activities must minimize obstruction of light in the habitat area.

c. Upland Habitats:

i. Category I habitats must be protected pursuant to the Washington State Bald Eagle Protection Rules (WAC 232-12-292). A cooperative site management plan will be developed whenever activities that alter habitat are proposed near a verified nest territory or communal roost.

ii. Category II habitats will be protected in accordance with the County's determination of appropriate conditions considering the site-specific recommendations of the Washington Department of Fish and Wildlife, Nongame Division, and the Washington Department of Natural Resources, Natural Heritage Program, and site-specific information supplied by the applicant and conservation organizations. Possible conditions may include, but are not limited to, the following:

- A. Establishment of buffer zones;
- B. Preservation of critically important vegetation;
- C. Limitation of access to the habitat area; and
- D. Seasonal restriction of construction activities.

iii. Proposals located within 1,300 feet of an Upland Category II habitat will be reviewed by the County for potential habitat impacts, considering the recommendations of the Washington Department of Fish and Wildlife, the Washington Department of Natural Resources, Natural Heritage Program, and site-specific information supplied by the applicant and conservation organizations.

iv. If it is likely that a proposed project will have a significant adverse effect on a Category II habitat, the applicant shall complete a habitat management plan pursuant to subsection (D) of this section.

D. Habitat Management Plans.

1. Any habitat management plan required shall identify how the impacts of the proposed use or development will be mitigated.
2. The habitat management plan must contain the following information at a minimum:
 - a. Map(s) prepared at a scale no smaller than one inch = 200 feet showing:
 - i. The location of the proposed development site;
 - ii. The relationship of the site to surrounding topographic and cultural features;
 - iii. The nature and density of the proposed development or land use change;
 - iv. Proposed building locations and arrangements;
 - v. A legend which includes:
 - A. A complete and accurate legal description and the total acreage of the parcel;
 - B. Title, scale and north arrow;
 - C. Date, including revision dates if applicable; and
 - D. Certificates, by a professional biologist as appropriate.
 - vi. Existing structures and landscape features, including the name and location of all water courses, ponds, and other bodies of water.
 - b. A report which contains:
 - i. A description of the nature, density, and intensity of the proposed development in sufficient detail to allow analysis of the impact of such land use change on the habitat;
 - ii. An analysis of the effect of the proposed development, activity, or land use change on the classified habitat;
 - iii. A plan for the mitigation of any adverse impacts to wildlife habitats classified in this section posed by the project; and
 - iv. An evaluation by the Washington Department of Fish and Wildlife, the Washington Department of Natural Resources, Natural Heritage Program,

or a qualified wildlife expert regarding the effectiveness of any proposed mitigating measures or programs, including recommendations as appropriate.

3. Possible mitigation measures may include the following:

- a. Establishment of buffer zones;
- b. Preservation of critically important vegetation;
- c. Limitation of access to the habitat area;
- d. Seasonal restriction of construction activities; and
- e. Establishment of a timetable for periodic review of the plan and performance or maintenance bonding in accordance with Appendix C*.

4. This plan will be prepared by a wildlife biologist, habitat management consultant, marine biologist, or botanist, with a combination of relevant education and experience sufficient to perform the tasks described above. (Ord. 12-2001 § 4; Ord. 2-1998 Exh. B § 3.6.9)

* Appendices referenced in this section are attached to Ord. 2-1998 and are on file in the office of the clerk of the board.

d. San Juan County Shoreline Master Program regulations. Chapter 18.50 SJCC

18.50.010 General.

C. Authority.

1. The provisions of this section are adopted pursuant to RCW 90.58.140(3) and 90.58.200, the Shoreline Management Act of 1971 (“SMA”), Chapters 173-26 and 173-27 WAC, Element 3 of the Comprehensive Plan, and this Chapter 18.50 SJCC, the San Juan County Shoreline Master Program.

2. Liberal Construction. As provided in RCW 90.58.900, the SMA is exempted from the rule of strict construction, and it and the Shoreline Master Program shall be liberally construed to give full effect to the

purposes, goals, objectives, and policies for which the SMA and this program were enacted and adopted, respectively.

3. **Conflicting Policies or Regulations.** The SMA and the Shoreline Master Program comprise the basic state and local law regulating the use of shorelines in the County. Unless specifically provided otherwise, in the event that provisions of the Shoreline Master Program conflict with other applicable state or local policies or regulations, the SMA and Shoreline Master Program shall control. Where the Shoreline Master Program is more restrictive than other applicable state or local policies or regulations, the SMA and Shoreline Master Program shall control. Where other applicable state or local policies or regulations are more restrictive than the SMA and/or Shoreline Master Program, such policies or regulations control.

18.50.070 Environmental impacts.

A. The location, design, construction, and management of all shoreline uses and activities must protect the quality and quantity of surface and ground water adjacent to the site and must adhere to the policies, standards, and regulations of applicable water quality management programs and related regulatory agencies.

D. All shoreline uses and activities shall be located, designed, constructed, and managed in a manner that minimizes adverse impacts to surrounding land and water uses and must be aesthetically compatible with the affected area.

F. All shoreline uses and activities must be located, designed, constructed, and managed to avoid disturbance of and minimize adverse impacts to fish and wildlife resources, including spawning, nesting, rearing and habitat areas, and migratory routes.

18.50.080 Environmentally sensitive areas.

When located in an environmentally sensitive area overlay district or its buffer, shoreline uses and activities must be located, designed, constructed, and managed in accordance with the applicable requirements of SJCC 18.30.110 through 18.30.160, environmentally sensitive areas. (Ord. 2-1998 Ex. B § 5.4.5)

18.50.140 View protection.

A. Shoreline uses and activities must be designed and operated to avoid blocking or adversely interfering with visual access from public areas to the water and shorelines except as provided for in SJCC 18.50.130.

B. The vacation of public road ends and rights-of-way which provide visual access to the water and shoreline may be allowed only in accordance with RCW 36.87.130 and local rules.

C. In providing visual access to the shoreline, the natural vegetation shall not be excessively removed either by clearing or by topping.

D. In order to limit interference with views from surrounding properties to the shoreline and adjoining waters, development on or over the water shall be constructed only as far seaward as necessary for the intended use.

E. Development on or over the water must be constructed of materials that are compatible in color with the surrounding area.

F. Visual shoreline access must be maintained, enhanced, and preserved on public road ends and rights-of-way. (Ord. 2-1998 Exh. B § 5.4.11)

18.50.190 Boating facilities (including docks, piers, and recreational floats).

Notwithstanding any other provision of this code, all docks, floats, piers or other moorage structures in village and hamlet activity centers, including any breakwater attendant to such moorage structures, except those regulated under subsection (G) of this section (residential docks) shall be prohibited. This provision shall not affect the ability of an applicant to obtain required approvals to repair, replace, enhance, modify, or enlarge any existing dock, float, pier or other moorage structure in a manner consistent with existing law.

B. General Regulations.

1. Boating facilities shall be designed to minimize adverse impacts on marine life and the shore process corridor and its operating systems.

2. Boating facilities shall be designed to make use of the natural site configuration to the greatest possible degree.

3. All boating facilities shall comply with the design criteria established by the State Department of Fish and Wildlife relative to disruption of currents, restrictions of tidal prisms, flushing characteristics, and fish passage to the extent that those criteria are consistent with protection of the shore process corridor and its operating systems.

4. Areas with poor flushing action shall not be considered for overnight or long term moorage facilities.

5. In general, only one form of moorage or other structure for boat access to the water shall be allowed on a single parcel: a dock or a marine railway or a boat launch ramp may be permitted subject to the applicable provisions of this code. (A mooring buoy may be allowed in conjunction with another form of moorage.) However, multiple forms of moorage or other structures for boat access to the water may be allowed on a single parcel if:

a. Each form of boat access to water serves a public or commercial recreational use, provides public access, is a part of a marina facility, or serves an historic camp or historic resort; or

b. The location proposed for multiple boat access structures is common area owned by or dedicated by easement to the joint use of the owners of at least 10 waterfront parcels.

6. Structures on piers and docks shall be prohibited, except as provided for marinas in subsection (H) of this section.

C. General Regulations – Docks, Piers, and Recreational Floats.

1. Multiple use and expansion of existing facilities are preferred over construction of new docks and piers.

2. Mooring buoys shall be preferred over docks and piers on all marine shorelines except in the cases of port, commercial, or industrial development in the urban environment.

3. Moorage floats, unattached to a pier or floating dock, are preferred over docks and piers.

4. Every application for a substantial development permit for dock or pier construction shall be evaluated on the basis of multiple considerations, including but not necessarily limited to the potential impacts on littoral

drift, sand movement, water circulation and quality, fish and wildlife, navigation, scenic views, and public access to the shoreline.

5. Docks or piers which can reasonably be expected to interfere with the normal erosion-accretion process associated with feeder bluffs shall not be permitted.

6. Abandoned or unsafe docks and piers shall be removed or repaired promptly by the owner. Where any such structure constitutes a hazard to the public, the County may, following notice to the owner, abate the structure if the owner fails to do so within a reasonable time and may impose a lien on the related shoreline property in an amount equal to the cost of the abatement.

7. Unless otherwise approved by shoreline conditional use permit, boats moored at residential docks shall not be used for commercial overnight accommodations.

8. Use of a dock for regular float plane access and moorage shall be allowed only by shoreline conditional use permit and shall be allowed only at commercial or public moorage facilities or at private community docks.

G. Regulations – Residential Docks.

1. New Shoreline Subdivisions. New subdivisions with shoreline frontage shall be required to provide community docks rather than individual, private docks, if any docks are proposed, as set forth in subsection (E) of this section.

2. Size and Dimensions of Docks, Piers, and Floats.

a. The maximum dimensions for a dock (including the pier, ramp, and float) associated with a single-family residence shall not exceed 700 total square feet in area. In addition, the length of the dock (including the pier, ramp, and float) may not extend more than 115 feet in length seaward of the ordinary high water mark. Docks exceeding these dimensions may only be authorized by variance.

b. The maximum dimensions for a joint-use dock (including the pier, ramp, and float) associated with two single-family residences shall not exceed 1,400 square feet in area. In addition, the length of the dock (including the pier, ramp, and float) may not extend more than 200 feet in

length seaward of the ordinary high water mark. Docks exceeding these dimensions may only be authorized by variance.

c. The maximum dimensions for a joint-use community dock (including the pier, ramp, and float) associated with more than two single-family residences shall not exceed 2,000 square feet in total area. In addition, the length of the dock (including the pier, ramp, and float) may not extend more than 300 feet in length seaward of the ordinary high water mark. If a variance is granted to allow a dock exceeding these dimensions, its construction may only be authorized subject to the regulations for a marina.

d. Maximum length and width of a ramp, pier or dock shall be the minimum necessary to accomplish moorage for the intended boating use.

3. Side Yard Setbacks. Docks shall be set back a minimum of 10 feet from side property lines. However, a joint use community dock may be located adjacent to or upon a side property line when mutually agreed to by contract or by covenant with the owners of the adjacent property. A copy of such covenant or contract must be recorded with the County auditor and filed with the approved permit to run with the title to both properties involved.

4. Development of a dock on a lot intended for single-family residential purposes shall require a shoreline substantial development permit or a statement of exemption issued by the County.

5. Applications for nonexempt docks and piers associated with single-family residences shall not be approved until:

a. It can be shown by the applicant that existing facilities are not adequate or feasible for use;

b. Alternative moorage is not adequate or feasible; and

c. The applicant shall have the burden of providing the information requested for in subsections (A) and (B) of this section, and shall provide this information in a manner prescribed by the administrator.

4. San Juan County Comprehensive Plan Excerpts

3.2 OVERALL GOALS AND POLICIES

This section addresses seven general subjects required by the SMA: Shoreline Use; Economic Development; Public Access; Recreation; Circulation; Conservation; Historic and Cultural Resources; and Administration.

3.2.A Shoreline Use

Goal: To assure protection of the unique character of San Juan County with its many islands while providing for uses of the shorelines which do not needlessly diminish the quality of the shoreline environment by reserving shoreline areas for water-oriented uses and discouraging non-water-oriented uses other than single-family residential uses, and to assure the optimum opportunity for participation by County residents in the decision making processes that may affect that character.

Policies (3.2.A.1-8):

1. Foster uses which protect the potential long-term benefits to the public against compromise for reasons of short-term economic gain or convenience.
2. Allow only uses which would not adversely alter the shoreline, or conflict with or preempt waterdependent uses.
3. Accommodate preferred shoreline uses (water-dependent, water-related and water-enjoyment uses and single-family residential uses) while protecting and preserving shoreline resources and avoiding hazardous or sensitive areas.
4. Encourage studies of the physical and economic aspects of shoreline systems in order to provide a continuously updated information base against which the impact of any proposed shoreline use can be measured.
5. Restrict over-water development to those uses which are *water-dependent*.
6. Recognize the unique suitability of certain areas to accommodate preferred shoreline uses such as deep water ports and other boating facilities.
7. All shoreline uses should conform to the applicable policies of this Master Program and to the goals and policies of other elements in the *Comprehensive Plan*.
8. Ensure that the location, density, configuration, setback, and other aspects of all shoreline developments are appropriate to the site and vicinity and respond to the physical limitations of the site.

3.2.F Conservation (Prior Code: 16.40.307)

Goal: To assure the preservation of scenic and non-renewable natural resources and to assure the conservation of renewable natural resources for the benefit of existing and future generations.

Policies (3.2.F.1-11):

1. Assure the preservation, reclamation, rehabilitation, and where possible, the enhancement of unusual, fragile and/or scenic elements, and of non-renewable natural resources.
2. Preserve critical marine and terrestrial wildlife habitats. These areas should include, but should not be limited to, breeding grounds, resting and feeding areas for migratory birds, nursery areas, and habitats of endangered species. Tidal marsh areas should be considered non-renewable resources and should be protected from development.
3. Natural, dynamic processes of shoreline formation and change should not be interfered with except for urgent reasons of public necessity or benefit.
4. Preservation of scenic views, open space and vistas should be encouraged.
5. Establish regulations to address critical habitats, erosion and runoff, and maintenance of visual quality, for sustainable commercial harvesting of trees within the shoreline jurisdiction.
6. Removal of flora and fauna from shorelines must be in compliance with RCW 28B.20.320–324, an act relating to the establishment of a marine biological preserve in San Juan County waters.
7. Fresh water along the shoreline should be considered a renewable resource of critical importance and its use should be controlled to prevent the intrusion or spread of salt water into vital aquifers and stream beds.
8. Encourage and accept appropriate conservation easements on the shoreline.
9. Recognize the importance of solar energy and renewable energy resources and support efforts to provide or facilitate solar orientation for building sites in new subdivisions and non-exempt developments.
10. Commercial timber harvesting within the shoreline area should be limited to selective harvest of no more than thirty percent of merchantable trees in any ten-year period and should not be allowed within seventy-five feet of the OHWM. Merchantable timber within this buffer area may be included in the thirty percent calculation for the shoreline area but no commercial harvest should be allowed within the buffer. Clearcutting on shorelines should be prohibited unless

specifically allowed by an approved conversion option harvest plan or Class IV General forest practices permit.

11. Use of natural resources should minimize adverse impacts to natural systems and the quality of the shoreline environment.

3.4.D Environmentally Sensitive Areas

Purpose:

Environmentally sensitive areas are those areas with especially fragile or hazardous biophysical characteristics and/or with significant environmental resources as identified by the County in the Environmentally Sensitive Area Overlay District (*see* Land Use Element Section 2.5.B) or by a scientifically documented inventory accomplished as part of the SEPA/NEPA process or other recognized assessment.

Environmentally sensitive areas include: Geologically Hazardous Areas; Frequently Flooded Areas; Critical Aquifer Recharge Areas; Wetlands; and Fish and Wildlife Habitat.

Policies (3.4.D.1-4):

1. Preserve unique, rare and fragile shoreline resources, including, but not limited to, critical aquifer recharge areas, wetlands, streams, unstable slopes and tidal inlets and associated native plant communities.
2. Protect areas with unique and/or fragile geological or biological characteristics, from incompatible physical public access (*e.g.*, wetlands, dunes, unstable bluffs, shoregrass, *etc.*).
3. Discourage development on shorelines which are identified as hazardous for or sensitive to development or limit their development in a manner to avoid hazards to life and property or to minimize environmental damage.
4. Restoration of shorelines degraded by natural or manmade causes or for the purpose of habitat enhancement should use techniques to arrest the processes of erosion, sedimentation and flooding.

3.4.F Shorelines of Statewide Significance

Purpose:

The legislature has designated all salt water surrounding the islands of San Juan County, seaward from the line of extreme low tide, as shorelines of statewide significance (RCW 90.58.030,2-e). The Final Guidelines of the Shoreline Management Act establish a number of policies which are to

govern the use of shorelines of statewide significance (WAC 173-16-040[5]). The intent of this section is to incorporate these policies into the Shoreline Master Program to be consistent with state law. Uses which are consistent with the following policies, cited in the order of preference, should be given preference. Conversely, uses which are not generally consistent with these policies should not be permitted on such shorelines.

Policies (3.4.F.1-6):

1. Recognize and protect the statewide interest over the local interest on shorelines of statewide significance.
2. Preserve the natural character of shorelines of statewide significance.
3. Use shorelines of statewide significance in ways which will produce long term benefits as opposed to short term benefits or conveniences in accordance with the following:
 - a. Actions that would commit resources to irreversible uses or would detrimentally alter natural conditions characteristic of such shorelines should be severely limited.
 - b. The short term economic gain or convenience associated with a proposed development should be evaluated in relationship to long term and potentially costly impairments to the natural environment.
 - c. The visual impact of every proposed project should be thoroughly evaluated and adverse impacts should be minimized.
4. Protect the natural resources and systems of shorelines of statewide significance. Areas containing unusual or fragile natural resources or systems should be left undeveloped.
5. Increase public access to publicly owned areas of shorelines of statewide significance.
6. Increase recreational opportunities for the public on shorelines of statewide significance.

3.5.C Boating Facilities

Purpose:

Boating facilities include marinas, boat launches, covered moorage, boat houses, docks and piers, recreational floats, mooring buoys, marine travel lifts and railways, and retrieval systems. The different forms of boating facilities provide needed access to the water for marine craft appropriate to different situations. They also can interfere with public use of public waters and tidelands and some can affect wave action, act as driftway barriers, disrupt aquatic and intertidal

habitats, and affect water quality. Location and design considerations are important to minimize adverse impacts. These facilities may be used for a variety of commercial, industrial, recreational, and other purposes. Such facilities are subject to requirements for the type of use to be served as well as to the provisions of this section and to the provisions in Section 3.6, Shoreline Modification.

Policies (3.5.C.1-23):

General

1. Locate, design and construct boating facilities to minimize adverse effects upon, and to protect all forms of aquatic, littoral or terrestrial life including animals, fish, shellfish, birds and plants, their habitats and their migratory routes. *(Prior Code 16.40 513)*
2. Protect beneficial shoreline features and processes including erosion, littoral or riparian transport and accretion shoreforms, as well as scarce and valuable shore features including riparian habitat and wetlands.
3. The location, design, configuration and height of boathouses, piers, ramps, and docks should both accommodate the proposed use and minimize obstructions to views from the surrounding area.
4. Boating facilities should be designed to optimize the trade-offs between the number of boats served and the impacts on the natural and visual environments.
5. In providing boating facilities, the capacity of the shoreline site to absorb the impact should be considered.

Docks and Piers

6. The use of mooring buoys should be encouraged in preference to either piers or floating docks. *(Prior Code: 16.40.508, Policy 1)*
7. The use of floating docks should be encouraged in those areas where scenic values are high and where serious conflicts with recreational boaters and fishermen will not be created. *(Prior Code: 16.40.508, Policy 2)*
8. Piers should be encouraged where there is significant littoral drift and where scenic values will not be impaired. *(Prior Code: 16.40.508, Policy 3)*
9. In many cases, a combination of fixed and floating structures on the same dock may be desirable given tidal currents, habitat protection and topography, and should be considered. *(Prior Code: 16.40.508, Policy 4)*
10. The County should attempt to identify those shorelines where littoral drift is a significant factor and where, consequently, fixed piers probably would be preferable to floating docks. *(Prior Code: 16.40.508, Policy 5)*

11. To spare San Juan County from the so-called “porcupine effect” created by dozens of individual private docks and piers on the same shoreline, preference should be given to the joint use of a single structure by several waterfront property owners, as opposed to the construction of several individual structures. *(Prior Code: 16.40.508, Policy 6)*

12. Preference should be given in waterfront subdivisions or multi-family residential development to the joint use of a single moorage facility by the owners of the subdivision lots or units, or by the homeowners association for that subdivision or development, rather than construction of individual moorage facilities. Individual docks and piers should be prohibited, provided that the

county may authorize more than one moorage facility if a single facility would be inappropriate or undesirable given the specific site and marine conditions. Such developments should include identification of a site for a joint-use moorage facility and the dedication of legal access to it for each lot or unit. However, it should be recognized that identification of a site for a common moorage facility does not imply suitability for moorage or that moorage development will be approved.

13. The capacity of the shoreline site to absorb the impacts of waste discharges from boats and gas and oil spills should be considered in evaluating every proposed dock or pier.

14. Expansion or repair of existing facilities should be encouraged over construction of new docks and piers.

15. To reduce the demand for single-user docks, multiple-user docks should be encouraged through construction and dimensional incentives.

5. Declaration of Kyle A. Loring in Support of Petitioner’s Reply.

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SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF THE SAN JUANS, a)
Washington not-for-profit corporation,)
)
 Petitioner,)
)
 v.)
)
 SAN JUAN COUNTY, a political)
 subdivision and charter county of the)
 State of Washington;)
 ADMINISTRATORS & CONSULTANTS,)
 LLC, a Washington Limited Liability)
 Company, Chris Hughes, Registered)
 Agent and Applicant; and the)
 WASHINGTON STATE DEPARTMENT)
 OF ECOLOGY,)
)
 Respondents.)

SHB No. 08-005
DECLARATION OF KYLE A.
LORING IN SUPPORT
OF PETITIONER'S REPLY

I, KYLE A. LORING, declare as follows:

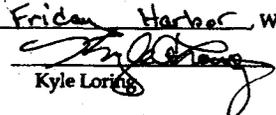
1. I am the Staff Attorney for Friends of the San Juans, am over the age of eighteen years, have personal knowledge of the facts set forth herein, and am otherwise competent to make this Declaration.
2. A true and correct excerpt from Respondent Hughes' ("Respondent") answers to Petitioner's interrogatories is attached hereto as Exhibit A. That excerpt contains the

LORING DECLARATION IN SUPPORT
OF PETITIONER'S REPLY - 1

Friends of the San Juans
P.O. Box 1344
Friday Harbor, WA 98250
360.378.2319

1 face sheet for the interrogatories, the page on which Respondent answered
2 Interrogatory No. 17, and Respondent's signature page.
3 3. On May 1, 2008, I reviewed a tide chart for Port Townsend tides, which correlate
4 roughly with tides in the vicinity of Roche Harbor, and found that during the month of
5 May, 2008, tides below 0 occur during approximately seventeen days and for a
6 maximum of approximately four hours during any of those days. During the month of
7 June, 2008, there are approximately nineteen days with tides below 0, with the
8 maximum length of the low tide lasting approximately four to five hours. During July,
9 2008, approximately twenty-one days see tides below 0, with the maximum length of
10 those low tides lasting approximately four to five hours. During August, 2008, tides
11 below 0 occur during approximately fifteen days for an average maximum duration of
12 two hours. During September, 2008, tides below 0 occur during approximately six days
13 for an average maximum duration of two to three hours.

14
15 I declare under penalty of perjury under the laws of the State of Washington that
16 the foregoing is true and correct.

17 EXECUTED this 2nd day of May, 2008 at Friday Harbor, WA.
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19 Kyle Loring
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LORING DECLARATION IN SUPPORT
OF PETITIONER'S REPLY - 2

Friends of the San Juans
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