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No. 64326-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
FOR 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.

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Christopher Hughes grew up in Seattle, but spent every summer of his boyhood years playing on the shores of Pearl Island, across the bay from Roche Harbor Resort. RP 416-417. The Hughes family bought two properties on Pearl in the early 1960's. RP 424. The family home is now owned by Chris' big brother John. RP 429. Lot 23, located on the west end of Pearl, belongs to Chris Hughes. The lot abuts a 1300' wide channel and the primary entrance to Roche Harbor. Ex P-III, RP 430.

In 2005 Chris Hughes first began his quest to build a dock on Pearl. Chris Hughes seeks safe and practical access to enable him to utilize his Pearl Island property. RP 427- 432

Quite a few parts must be assembled prior to submission of an SSDP application for a dock. Ex. P-A. First, the applicant must explore joint use. Ex. R-G:1-2 Next, the applicant must hire a biologist to dive the proposed site, map the bottomland topography, and ascertain whether or not there is eelgrass. Ex. P-A:13-14. If the dock site cannot be moved to avoid eelgrass, the applicant must hire qualified professionals to design an environmentally friendly dock. Ex. P-A:7-12. RP 454-460. San Juan County's CAO requires mitigation

of any disturbance to critical areas, including eelgrass. SJCC 18.30.110(B), 18.30.160(B).

Eelgrass is present along the entire coast of Pearl Island. Ex R-H-1. The Hughes dock was designed to be as small and environmentally friendly as possible: the 50' aluminum pier is fully grated, as is the ramp, and the 30' float is only 6' wide but has 50% grating to allow light in. RP 326. The float is oriented N -S to allow maximum light to the seafloor. Although the experts do not believe eelgrass will be eliminated under the dock, the maximum area of eelgrass under the float which could be lost is 233 square feet, or 955 shoots. Ex. R-S:4. Hughes proposed to mitigate by restoring a nearly 3000 square-foot eelgrass bed which had been badly scoured and damaged across the bay. RP 324. The mitigation is now complete. Ex.R-S 40 et seq.

San Juan County approved the compensatory off-site mitigation plan on September 4, 2007. Ex. R-P:1. It was not appealed. San Juan County issued the SSDP for the Hughes dock on February 1, 2008. Ex. R-Q: 1-20. FOSJ appealed the SSDP.

The SHB concluded that, although designed as environmentally friendly as possible, the Hughes dock would damage and eliminate eelgrass. FOF 11. The Board discounted the Habitat

Management Plan created under the County's CAO. SJCC

18.30.160D. The SHB concluded that the Hughes dock did not qualify as a single-family residential dock, as there was no residence built yet. COL 8. The SHB concluded that FOSJ had met its burden to show that Hughes failed to meet the "adequate or feasible" test of SJCC 18.50.190G(5).

To aid the court in the navigation of this complicated series of events, the salient facts are presented in chronological order:

A. April 12, 2005: Hughes contacts adjacent property owners Hietbrink, requesting to share the Heitbrink dock. Heitbrinks declined. (Exhibit R-G-1)

B. April 12, 2005: Hughes contacts adjacent property owners Thorp, asking to share a dock. Thorps declined. (Exhibit R-G-2)

C. August 22, 2005: Hughes first submits an application for a 664 square foot dock, utilizing state of the art mitigation to compensate for a potential loss of 233 square feet of eelgrass under the dock. (Exhibit P-A)

D. October 3, 2005: WDFW approved the Hughes dock design as a part of the Experimental Dock Program. The initial dock design had the float pointing north-south (to allow maximum light under the

float), and incorporated 480 square feet (73%) of grated area into a total square footage of 654. (Exhibit R-H-9)

E. March 3, 2006: Hearing Examiner denied the permit. Hughes appeals to SHB. (SHB No. 06-012)

F. July 21, 2006: Settlement was reached between San Juan County and Hughes under which Hughes agreed:

- 1) to reduce the size of his dock to 557 square feet,
- 2) to obtain a building permit for his house prior to construction of the dock, and
- 3) to undertake **off-site eelgrass mitigation** to off-set potential on-site eelgrass impacts. (Exhibit P-F)

G. October 27, 2006: Hearing Examiner approved the parties' agreement to pursue off-site mitigation under Section 18.30.160(D) of the San Juan County Code (SJCC). Hughes was directed to have a Habitat Management Plan prepared by an experienced marine biologist. The HEX stated that the effectiveness of the Plan "*must be evaluated by outside expert*". WDFW was specifically cited by the HEX as the entity who could provide such an evaluation. (Exhibit R-Q-14)

H. July 16, 2007: After **nine months** of searching for an appropriate off-site eelgrass mitigation plan, Hughes submitted a

Habitat Management Plan to the San Juan County Prosecuting Attorney's Office for review. The off-site mitigation plan, produced by Fairbanks Environmental Services, was prepared under the tutelage of WDFW, and was indeed evaluated and approved by WDFW. (Exhibit R-M-1)

I. September 4, 2007: CDPD Director Ron Henrickson issued an Administrative Determination approving the mitigation plan but required that the mitigation project be completed and be deemed successful prior to *issuance* of an SSDP. This would have taken up to another three years. (Exhibit R-P-1)

J. September 21, 2007: Hughes appealed Director's decision. (Exhibit R-P-2) Also on this date Fairbanks Environmental removes the Henry Island buoy and chain, and takes a baseline survey of disturbed eelgrass bed.

K. January 14, 2008: San Juan County and Hughes entered into a settlement agreement. (Exhibit R-Q: 4-13)

L. February 1, 2008: San Juan County issued the Hughes SSDP. The 50' pier and ramp are fully grated and the 30' float is 50% grated to allow sunlight to get to the 233 square feet of eelgrass located below the float. The float will be removed in the winter. Hughes agreed to mitigate the potential loss of 233 square

feet of eelgrass habitat by removing an antiquated but grandfathered buoy which has scoured and damaged a large Henry Island eelgrass bed. Hughes is precluded from constructing his dock until he proves that the eelgrass in the buoy scour area has recovered to at least 60% of the density of the adjacent eelgrass control area. Under the Plan, the mitigation is considered 100% successful once the eelgrass in the buoy scour area has recovered to 80% of the density in the control area. (Exhibit R-Q-1)

M. February 25, 2008: FOSJ appealed to SHB. (SHB 08-005).

N. May 21, 2008: Hughes submits a building permit application for a single family home on his Pearl Island property. (Exhibit R-O).

O. June 26, 2008: Order on Summary Judgment. SHB rules that the "No Net Loss" policy contained in WAC 173-26-241, (i.e. Ecology rules addressing the *adoption and content* of master programs), gave the Board authority to determine whether the SSDP would cause a net loss of ecological functions.

P. June 27, 2008: Fairbanks Environmental issues its year one survey results at site of Henry Island buoy removal. The scoured eelgrass bed has recovered. The mitigation is determined successful. (Exhibit R-S-32)

Q. July 2 and 3, 2008: SHB holds hearing at Roche Harbor Resort. The hearing was completed in Lacey WA on July 10, 2008.

SHB 08-005

R. August 25, 2008: SHB overturns San Juan County and denies the SSDP. (SHB 08-005)

S. Hughes appealed. (San Juan County Superior Court Cause No. 08-2-05185-5)

T. February 13, 2009: the parties argued their case in San Juan County Superior Court before the Honorable John O. Linde.

U. August 28, 2009: The late Judge Linde issued a Letter Opinion, reversing the Shorelines Hearings Board decision and reinstating the SSDP issued by San Juan County. Judge Linde reversed the SHB on the grounds that a) the SHB erroneously interpreted and/or applied the law, b) the Order was not supported by substantial evidence and c) was arbitrary and capricious.

II. SUMMARY OF ARGUMENT

“The SHB decision overturning the permit issued by the County and disregarding the mitigation plan developed in conjunction with WDFW was arbitrary and capricious and failed to properly interpret and apply the law. The SHB Order is not supported by evidence that is substantial when viewed in light of the whole record before the court. The Court is convinced that the Board erred in light of the policies of the

SMP and SMA and has erroneously interpreted and/or applied the law.”

*Honorable John O. Linde
August 31, 2009*

The evidence presented to the SHB during the three-day hearing which ended July 10, 2008, was voluminous. Unfortunately, it appears the Board did not take the time to accurately review the testimony or the exhibits before issuing the decision on August 25, 2008. Judge Linde, (a seasoned SJC land use attorney prior to taking the bench in January 2008), took over six months to review the record before he issued his well-reasoned decision.

The decision of the SHB was end-based. The three members of this short board clearly did not want to grant this permit, so they found a number of reasons to deny it. The Board first made a decision to deny the permit, and followed with their justification.

The Hughes dock meets the criteria for dock approval under the SMA and the San Juan County SMP 18.50.190. The Hughes dock is not a convenience. It is a necessity. Without a dock Hughes cannot feasibly use and enjoy his Pearl Island property.

III. STANDARD OF REVIEW

In May 2009 the Court of Appeals issued its decision in *May v. Robertson* 218 P.3d 211, 218 (2009), overturning the SHB and reinstating a permit for a similar dock project in Pierce County.

The Court of Appeals concurred with the superior court that the Board erred and the permit should issue. The *May* court succinctly outline the standard of review:

1. Issues of Law

The Court reviews the Board's interpretation of the Shoreline Management Act and local government shoreline regulations de novo because they involve questions of law. *Preserve Our Island v. Shorelines Hearings Board*, 133 Wn. App.. at 515, 137 P.3d 31 (2007). "The proper interpretation of a master program provision is likewise a question of law." *Jefferson County v. Seattle Yacht Club*, 73 Wn. App.. 576, 589, 870 P.2d 987(1994). Although an agency's interpretation of the law is not binding, we generally accord deference to its legal conclusions. *Seattle Yacht Club*, 73 Wn. App.. at 589, 870 P.2d 987. But, when necessary to ensure that a proposed project complies with the Shoreline Management Act, we may substitute our own judgment for an agency's legal determinations. *May v. Robertson* 218 P.3d 211, 219 (2009)

2. Issues of Fact

With regard to issues of fact, this court reviews the evidence submitted to determine whether it constituted substantial evidence to support the factual findings of the agency. RCW 34.05.570(3)(e). Substantial evidence is that which is sufficient “ to persuade a fair-minded person of the truth of the declared premises’.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, 909 P.2d 1294 (1995)

“Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.” Seattle Yacht Club, 73 Wn. App.. at 588, 870 P.2d 987. May v. Robertson 218 P.3d 211, 219 (2009)

IV. RESPONSE TO APPELLANT’S ISSUES

A. The Board’s finding that the dock would result in a significant amount of lost eelgrass around Pearl Island was not supported by evidence which is substantial when viewed in light of the whole record.

B. The Board’s conclusion that the single-user dock was inconsistent with the local SMP is an incorrect application of the law.

C. The Board's conclusion that any eelgrass loss at the site would contravene SMA policies and that approval would result in cumulative adverse impacts is an erroneous interpretation of the law.

D. The Board's conclusion that off-site mitigation did not adequately respond to the impacts of the proposed dock is an incorrect application of the law to the facts and is outside the scope of the Board's jurisdiction.

E. The Board's conclusion that the Hughes dock contravenes the SMA priorities found in RCW 90.58.020 is an erroneous interpretation of the law.

V. BURDEN OF PROOF

A. At the county level, the burden of proof was on Hughes to show that his project meets the criteria for issuance of an SSDP. SJCC 18.50.190G(5). Hughes met his burden and the permit issued.

B. At the SHB level, the burden of proof was on the FOSJ to establish that the SSDP approval was inconsistent with the requirements of the SMA or the San Juan County Shoreline Master Program. RCW 90.58.140(7), WAC 461-08-500(3).

C. At the Superior Court level, the burden of proof was on Hughes to establish that the SHB erroneously interpreted or applied the law, that the SHB decision was not supported by evidence that is substantial when viewed in light of the whole record, and/or, and/or that the order was arbitrary and capricious. RCW 34.05.570(3)(e)(d) and (i).

VI. ARGUMENT

The SHB denied the dock for three primary reasons: A. Eelgrass, B. Single User Dock, and C. Feasible Alternatives.

A. Eelgrass

1. **There is not substantial evidence to uphold a finding that eelgrass will be lost at the site.**

The SHB acknowledged in its decision that there is no provision in the San Juan County SMP that requires adherence to a no-net-loss standard. Yet, the SHB expends a considerable amount of time in the decision discussing the ramifications and impacts of the possible loss of eelgrass at the site.

In its decision, the Board devotes an extensive amount of space to instruct on the virtues of eelgrass, a seagrass which is prevalent in the San Juan Islands. Under a section entitled B. Preservation of Ecological Functions and Potential Cumulative

Effects, the Board concludes that *if* eelgrass at the site were eliminated, it *could* contribute to the potential decline of the eelgrass bed which *would* represent a significant loss of an environmental resource, contrary to the policies expressed in RCW 90.58.020.

But the evidence provided at the hearing does not support the conclusion that there is any certainty that eelgrass will be lost at the site, nor does it follow that even if there was a loss of 233 square feet of eelgrass, this would be a *significant* loss of an environmental resource, particularly in light of the fact that Hughes was mitigating the possible loss by and through a mitigation plan which promised a net gain of three times the potential loss.

The SHB acknowledged that the design of the dock “would be as favorable to the environment as is possible under available current technology...” , yet the Board denied the permit, in part, because, they concluded, the dock would eliminate “at least a portion” of the eelgrass bed surrounding Pearl Island. FOF 11. The evidence does not support this conclusion.

The “evidence” FOSJ cites in support of this finding is not on point, and consists of testimony regarding “a global crisis in eelgrass loss”, and two articles dealing with the same topic. No

evidence supports the finding that eelgrass will be eliminated or lost at the Hughes site.

The testimony of Brian Williams, WDFW Habitat Biologist for San Juan County, and of Chris Fairbanks, Biologist, is that the new Hughes dock design, coupled with the seasonal removal of the float, will be the key to retaining the eelgrass under the dock. RP 158-159, 325-326. Biologist Chris Fairbanks does not believe eelgrass will be eliminated under the dock. RP 327, 338. Brian Williams believes that due to the on-site design mitigation measures, there is a low probability of impact to the eelgrass. RP 158:22, 159:21-22.

The SHB's finding that dock would cause damage and elimination of a "significant amount of eelgrass." (COL 11, 17, FOF11) is not supported by evidence which is substantial in light of the whole record before it.

2. County Code does not prohibit docks over eelgrass.

In FOF 14, the Board erroneously found that the county requires horizontal and vertical setback separation from eelgrass. This is simply not the case. The Exhibit cited by the Board (P-A: 24), was taken from an application submittal to the US Army Corps of Engineers (USACE). In addition to a county permit, any dock

applicant must obtain permits from USACE and WDFW. USACE issues an applicant a RGP (Regional General Permit) IF the applicant can meet the 25' setback found in the RGP standards. If the applicant cannot, the Corps requires a "Section 7" review, which in this case, it did. After reviewing the biological information submitted, USACE issues a determination under ESA as to whether the project is likely or not likely to impact ESA's and critical area habitat. USFWS and NOAA concurred with USACE that the Hughes project is "*not likely to affect*" critical habitat." (R-N 10-19). There are no horizontal or vertical setbacks required from eelgrass under the San Juan County Code.

The Board's conclusion that the dock should be denied because of a potential loss of eelgrass under the dock effectively adds a new standard to the code. Nowhere in state or local law is there a prohibition against constructing over eelgrass.

The Shoreline Hearings Board erred by refusing to acknowledge past practices of San Juan County. San Juan County has recently issued permits for at least four docks over eelgrass on Henry Island, Crane Island and on Pearl Island. RP 472, 476, Ex P-TT-SSDP for dock over eelgrass on Henry). Pearl Island has 11 (9 with permits) docks, but Pearl Island is encircled by eelgrass. RP

466, Ex P-III, Ex R-W. Ignoring the local practical application of the SMP by San Juan County usurps local authority.

The SMA guidelines found in RCW 90.58.020 urge counties to protect the shoreline and its resources, and San Juan County Shoreline regulations (SJCC 18.50.190(B.1-4), as well as the San Juan County Critical Area Ordinance (SJCC 18.30.160) require an applicant to take steps to *minimize* potential damage to the environment. Mr. Hughes went to great lengths to minimize potential damage to the environment by providing extensive on-site and off-site mitigation.

The SHB effectively “legislated from the bench” by applying the precautionary principle and concluding that state and/or local shoreline regulations provides for an absolute prohibition of construction of a dock over eelgrass.

3. The Board had no jurisdiction to substantively review or pass judgment on the off-site mitigation plan created under the county CAO.

“...this Board has no jurisdiction over local land use regulations, including critical areas ordinances, unless they have been specifically and clearly incorporated into an SMP and Ecology has approved the incorporated provisions as part of the jurisdiction’s SMP.” Kailin v. Clallam County & Ecology, SHB 07-025 See also Toskey v. City of Sammamish, Ecology, SHB 07-008.

Kailin was appealed. The Court of Appeals affirmed that the SHB had no subject matter jurisdiction to address the reasonable use exception found in the Clallam County CAO. Likewise, the SHB had no subject matter jurisdiction to review the Hughes Habitat Management Plan. Any appeal of the plan, which was approved under the County CAO on 9/4/07 should have been made to superior court under the LUPA.

The sole issue in this case is whether the shorelines hearings board has subject matter jurisdiction to review conditions to a substantial development permit where those conditions arise from Clallam County's critical areas ordinance. Because the critical areas ordinance is not a part of the County's shoreline master program, the shorelines hearings board lacks jurisdiction to consider issues regarding that ordinance. Kailin v. Clallam County 152 Wn. App.. 974, 976, 220 P.3d 222, (2009)

The SHB, however, considered and applied the standards of the County CAO to the permit.

...The Board therefore concludes that it can consider the standards incorporated into the permit from other provisions of the SJCC, including those mentioned above. Hughes SHB 08-005 Order on Summary Judgment - 11

Even though the Board has no subject matter jurisdiction over County CAO's (as it was not adopted as a part of the SMA) (FOF 23), the Board denied the permit on the grounds that Hughes had not proved to their satisfaction that the eelgrass bed he

repaired mitigated the same functions and values as those which *might be or could be* lost at the dock site. The Board substantively delved into a territory over which they had no jurisdiction. The Board should have accepted the mitigation as a verity in their analysis.

4. Hughes provided substitute resources to compensate for a possible impact.

The County CAO calls for mitigation sequencing. SJCC 18.30.160B. Since the entire Hughes coast is covered with eelgrass, the project could not be avoided. Impacts were mitigated through extensive design considerations. Hughes prepared a Habitat Management Plan under SJCC 18.30.160B(1)(a)(v).

WDFW habitat biologist Brian Williams, approved the plan, and acknowledged the mitigation site was in the same geographical basin and used by the same migratory species as those which would visit the Hughes dock site

"So when we looked at this project, Pearl Island, Henry Island are within a geographic area a distance that our migratory species, our salmonids, our herring, our bait fish, surf smelt, our Dungeness crab, those species, the mobile species are clearly able to use and are using this whole geographic basin here. So that's where we made the determination that the Henry Island site was within an appropriate distance to the Pearl Island site." RP 136, 210:1-9.

FOSJ witness Dr. Sandy Wylie-Echeveria, who is a noted expert on eelgrass, lives and works on San Juan Island, but who

did not dive the site, acknowledged that he could not tell whether the mitigated eelgrass bed at Henry Island provided different functions and values that the eelgrass at Pearl Island.

“Do eelgrass densities or different eelgrass densities provide different services in the nearshore environment?”

“We really only have limited data to answer that question. So, I would be hesitant to say that----... (RP 114:22, 115:4, 116:4-7)

FOSJ argue their point by referring to the testimony of Biologist Amy Leitman, who a) never dived the site, and b) has only worked in the San Juans on two occasions. Ms. Lietman’s testimony was vague. She testified that there were general functions and values associated with eelgrass, and tried to cast doubt on the premise that the Hughes mitigation was restoring the same type of eelgrass which might be lost at the dock site. However, she testified that she believed it was “absolutely” a positive thing that the buoy scour area had replenished an area with almost 2000 new shoots of eelgrass. (Tr.271 line 2- 272 line 4).

The more credible evidence comes from Brian Williams and Chris Fairbanks, both whom have extensive experience in the San Juan Islands.

Chris Fairbanks, the only biologist to dive the site, testified that both sites provided holding habitat for herring to congregate before they spawned. RP 391.

SJC 18.30.160B1(a)(v) specifically allows mitigation to “provide substitute resources” to compensate for an impact to eelgrass. Hughes met his burden under the SJC CAO that he had followed the mitigation sequencing, and compensated for any possible impact to eelgrass. Accepting the logic of the Board, which is that the mitigation might not provide as good of habitat as that which might be lost, would be the kiss of death for any eelgrass mitigation project, now or in the future.

5. The off-site mitigation has been proven successful.

Hughes provided uncontroverted evidence that the completed mitigation plan actually resulted in a net gain of eelgrass. RP 341.

Hughes and his biologists spent over a year investigating and planning an off-site mitigation plan. RP 151-160. EX R-L, R-M,

R-S. He did so with the guidance, evaluation and the approval of WDFW, as directed by HEX Wick Dufford. WDFW endorsed finding a damaged eelgrass bed to repair.RP158. Hughes indeed did find a very large damaged eelgrass bed, and he repaired it. Contrary to the presentation of FOSJ, the Henry Island buoy was a legal use, installed in the 1960's, prior to the adoption of the SMA and the SMP and their attendant permitting requirements. RP 189, Ex R-L-21. While the old buoy would not be permitted under today's state and local codes, due to its scouring nature, it was legally installed and is a grandfathered nonconforming use.

Chris Fairbanks, the principal biologist of Fairbanks Environmental, testified that one year after the buoy was removed, using the criteria established under the settlement agreement with the county, the mitigation was a success. RP 342

"The results of the year 1 survey, June 2008, showed that the scour area has recovered and has – the increased number of shoots exceeded 955, exceeded the mitigation ratio of 1.25 to 1 . . . 1,900 new shoots". RP 338: 25, and RP 339:1-3, 5 and 12-15, 341: 12-14, R-S 41-58, RP165:10-15

The state regulatory agency with the expertise on eelgrass is the Washington State Department of Fisheries. When asked to look

at the year 1 results for the off-site mitigation plan, Mr. Williams confirmed that the mitigation worked:

"It tells me that the buoy area is in recovery mode, that the density of eelgrass shoots at the site are increasing." (Tr. p. 165, lines 10 -15)

"It says that in June 2007, there were 8.3 shoots per square meter, and then in June 2008, there were 20.4 shoots per square meter. It tells me that the strategy of removing the buoy is allowing the eelgrass to recover in the disturbance area, and that was the objective of the plan as put forward."... (Tr. p. 166, lines 1-17)

WDFW and San Juan County correctly applied both state and local standards of mitigation sequencing to this project, and approved the Hughes dock. The off-site mitigation is complete and has provided twice the substitute resources. Ex. R-S:40-58.

6. It was an erroneous application of the law to shift the burden to Hughes.

Mr. Hughes agreed with San Juan County that he would provide a Habitat Management Plan as required under the County CAO (SJCC 18.30.160(D)) for this project. He completed the Plan, which was reviewed and approved by San Juan County. The mitigation was deemed completed and a success by Judge John O. Linde. That determination was not assigned error in the present appeal filed by the Friends of the San Juans. In that the SHB had

no jurisdiction to make any substantive conclusion involving the county CAO, the court's finding should not be disturbed on appeal. Findings of fact supported by substantial evidence are verities on appeal. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

In COL 16, the SHB stated as follows: that it had

"no factual basis upon which to determine or evaluate whether the loss of eelgrass, with its attendant biological functions is, in fact, mitigated to any degree by the proposed off-site mitigation".

Dr. Wylie-Echeveria was asked and asked and asked again about the differing functions and values associated with eelgrass beds in different locales. The closest he came to answering the question the way FOSJ wanted was when asked *"Would an eelgrass at a greater density biomass provide different functions than eelgrass at a less dense biomass?"* He replied, *"It's possible"*. Tr 116 line 4-7.

"It's possible" is not proof. The Shoreline Hearings Board had no facts to conclude that the repaired eelgrass bed was not as good as the eelgrass bed which might possibly be disturbed, so the Board stated that Hughes had not met his burden of proving the eelgrass mitigation would do the job.

The SHB acknowledged in its decision that a no “no-net-loss” standard does not exist in either the San Juan County SMP or in the SMA, yet the Board assumed there would be eelgrass lost at the dock site. The Board further refused to acknowledge the success of the off-site mitigation which resulted in 1950 new eelgrass shoots in the same geographic basin as the 955 shoots under which might be affected. When the Board concluded that the mitigation plan, approved by WDFW and San Juan County could not be evaluated due to a lack of “criteria”, the Board effectively prohibited off-site mitigation and applied a new standard of “no-loss” to the local and state law.

After taking that position, the Board declared Hughes had not met his burden to prove the dock would be consistent with state and local law requiring protection of marine resources. But the burden of proof should have been on FOSJ to prove that the mitigation would not compensate. RCW 90.58.140(7); WAC 461-08-500(3). It was an erroneous application of the law to shift the burden to Hughes.

B. SINGLE USER DOCK

1. The dock is “*associated with a single-family residence*”.

The Board conclusion that Hughes did not qualify for a dock because no residence was yet built on his lot was an erroneous application of the law. COL 8. The Board again ignored the practical application of county regulations by its governing authority.

Under 18.50.190G(4) of the San Juan County Code, development of a dock on a lot intended for single-family residential purposes requires a SSDP or a statement of exemption. The maximum dimensions for a dock associated with a single family residence may not exceed 700 total square feet. 18.50.190G(2)(a).

San Juan County is a county of islands. Of the 176 named islands, only four are served by a ferry. Residents and property owners of the “outer islands”, as we call them, must rely on access by private plane or boat. Pearl Island has no community dock, nor does it have an airstrip. Ex R-W. As such, a dock is a necessity.

As Judge Linde stated in page 10 of his opinion, *“It is clear that a dock is a permissible structure when associated with a single family residence.”* The code does not require that a residence be built first.

If the county wants to prohibit sole use residential docks, it can do so legislatively. See *Samson v. City of Bainbridge Island* 149 Wn. App.. 33, 46, 202 P.3d 334, 341 (2009).

The record reflects that at the time of the SHB hearing, Mr. Hughes had prepared and submitted a permit application to build a residence on his Pearl island property. (Exhibit R-O) Judge Linde noted that at the time of the court argument, the building permit had been issued.

Hughes proved to the county's satisfaction that his dock would indeed be "associated with a single family residence". In order to access his home safely and reliably, Hughes needs a dock. (RP 427) It was error for the Board to construe the local SMP to require a residence to be built on a lot before a permit is issued for a dock. The decision not only contravenes past county practices, but past Board decisions as well.

"San Juan County has long interpreted its shoreline program to require either the presence of a residential structure or imminent construction of a residential structure." Moss v. San Juan County SHB 07-009

The *Moss* Board decision upheld the county requirement that Moss obtain a building permit before constructing his dock. Hughes was also required to obtain a building permit, and did.

2. Hughes tried to share

The Board's justification for denial, i.e. that Hughes "*had not exhausted all efforts at joint use,*" was an erroneous application of the SMP. (COL8). Again, we point out that the burden of proof in this case was on FOSJ. Hughes had met his initial burden with the county, and at the SHB hearing, the burden was on FOSJ to show that the issuance of the permit was inconsistent with state or local law.

The SMA says absolutely nothing about joint-use docks, so the joint-use issue must be reviewed under the local San Juan County regulations. There *is* no mandate under the local code for joint use. While SJCC 18.50.190(C) (1) states that multiple docks are *preferred* over single-user docks, the precise language of the code allows single family residential docks. SJCC 18.60.190. The Board erred in its interpretation of county law by setting a higher bar than historically required by the county.

The rule is that when a statute is ambiguous, the construction placed upon the rule by the administrative agency charged with its administration and enforcement should be given great weight in determining legislative intent. Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441, 448, 536 P.2d 157, 161 (1975). Cowiche Canyon Conservancy v. Bosley 118 Wn.2d 801, 813-814, 828 P.2d 549, 556 (1992)

The Code does not include a joint-use requirement. The fact of the matter is that Hughes was simply unable to find someone to share with him in a new dock. He would have welcomed a joint user – but there were no takers. The evidence at hearing was that Hughes asked the owners of at least ten properties if they wanted to share their dock or share in a new dock. He had no takers. Ex R-G-1,2,3. Hughes testified that he would be willing to share with another lot owner, and that he never sought out to build a single-user dock. He remains willing to share with anybody:

Testimony of Chris Hughes:

We contacted people along the north side, which was Thorpe, and I think after Thorpe was Romano, but we went down five one side and -- four on the north side, five on the south side.

Would you be willing to share your dock with another lot owner should they come forward at this time?

Absolutely, absolutely.

So you've never sought out simply to build your own single-use dock?

Absolutely not.

You are willing to share your dock or you were willing to --

With anybody on the island, I don't care who it is, that's fine.

And you are also willing to go on another person's dock?

Yes.

But you've been unsuccessful in obtaining permission to do that?

That's right. (RP p 438, lines 8 – 25; p. 439, lines 1 – 24)

When asked what the practice of San Juan County has been with regard to joint use, land use planner Francine Shaw testified:

In my experience with San Juan County, what has been required over the past five years is that the immediate property owners are contacted to either invite joint use or share joint use. (Tr. p. 459, lines 14 – 25)

Ms. Shaw described what is meant by immediate property owners as the immediate property owner to the right and the immediate property owner to the left and not beyond that. (Tr. p. 460, lines 3 – 5) The Board, nevertheless, concluded that Hughes had not exhausted all efforts at joint use and therefore not met his burden. COL 7. For the Board to add a new standard to the code was an erroneous interpretation and application of the law.

Judge Linde recognized that Hughes had offered to share his dock with another lot owner should they come forward, and ordered that this commitment be made a part of the permit. Letter

Opinion page 9. This directive was not assigned error and should remain a condition of issuance of the permit.

3. The Boards' conclusion "There is a danger the entire island will be encircled by docks" (COL13) is not supported by substantial evidence.

This is another example of the fact that the Board did not take the time to digest the evidence. Exhibit R-W was painstakingly put together by Hughes to show a) the location of the eleven docks on Pearl Island, b) the property owners entitled to use of each, c) the permits obtained for each and d) which properties did not have access to a dock.

There are four property owners and only a handful of properties which have no dock access. With the exception of Hughes, the only dockless properties are located along the west side of the north side of Pearl, an area which is so shallow at low tide, one can walk across the tide flats to Posey Island. (RP 455:11-15, RP 418:1-18, RP 468-469, RP 37: 2-5, Ex R-C-1,3,4; R-W).

The testimony of neighbor Odd Fausko, another FOSJ witness, confirms this:

"There was no place to get a dock (on the north side of Pearl Island) . . . because of the shallowness and the eelgrass and the situation with the north side." (Tr. p. 37 lines 2 -5)

The evidence was that there is only one remaining spot on Pearl Island for a dock, and that is in front of Chris Hughes property on Lot 23.

The SHB finding that if Hughes gets his dock, the entire island will be encircled with docks, resulting in a negative cumulative impact, is not supported by substantial evidence in light of the entire record before the Court.

4. Views

FOSJ argue that this court should conclude that the Hughes dock should be denied on the grounds of view impairment. While the Board acknowledged that Roche Harbor is a residential town and a busy destination area (FOF 1), it concluded that the Hughes dock would cause permanent changes to a natural shoreline. COL 20. FOSJ argues that the dock will negatively affect these views. The Court of Appeals recently distinguished this same argument from practical reality. *May v. Robertson* 218 P.3d 211, 223 (2009), overturning the SHB on this issue.

“...the Board failed to establish how-and to what extent-the joint-use pier would “unduly impair” this view or otherwise affect the views from neighboring residences. Id. Using the logic of the Board, no dock would or could ever be approved.”

Hughes proved to the satisfaction of San Juan County, the local jurisdiction charged with the primary responsibility of implementing its own code, that neither alternative moorage nor existing facilities are adequate or feasible for his needs.

C. ADEQUATE OR FEASIBLE ALTERNATIVES

The Board decided that because Mr. Hughes happens to own a property on the other side of Roche Harbor, he *“could quickly access Pearl Island through other means. Access to the island or the property via the barge, or through the use of a buoy and small craft, is possible and reasonable.” FOF 10*

The SHB FOF 10 is not supported by substantial evidence. For anyone who has lived, visited or worked in the islands, that is laughable. You cannot drive a car to Pearl Island. You cannot swim to Pearl Island. It isn't reasonable to expect a property owner to row a boat across Roche Harbor to Pearl Island with suitcases, family and supplies. Even if one could access Lot 23 on Pearl with a row boat or small skiff, the rocky shore on the Hughes site prohibits storage of the dinghy. Site visits with county personnel convinced the decision makers that there were no feasible

alternatives. This was ignored by the visiting Board who decided the outcome first, then sought justification.

As the appellant at the SHB level, FOSJ had the burden to show that the Hughes SSDP was inconsistent with San Juan County Code and/or state law. However, they effectively shifted the burden to Hughes, stating;

“The proposal fails to meet the “adequate or feasible” test, as Hughes can access Pearl Island via the barge landing, or through the use of a buoy and small craft.” (FOF 6, COL 10)

The facts do not support this holding.

Clearly the members of the Board did not like the county's interpretation of its own code. By ignoring the county's own interpretation of its own code and inserting their own subjective application of the law to the facts, the Board turns the local SMP on its head, and prevents a local applicant from any chance of applying the code predictably. Hughes proved to the county's satisfaction that neither alternative moorage nor existing facilities are adequate or feasible.

1. The barge landing is not adequate or feasible.

The Board concluded that it was feasible for Hughes to access his property via the Lot 22 community barge landing site on

the far east side of Pearl Island. Lot 22 is the community common area composed of the entire center section of the island which extends down to the common beach, through a 40' wide strip of land. Hughes has no legal right to regularly access Pearl Island via the 40' strip of Lot 22 which is now known as the "barge landing site" as its use is restricted under the express terms of the plat to a "Utility and Park Area". (Ex R-D-1-2).

The use of the barge landing is also not adequate or feasible as a practical matter. The barge landing is only accessible during certain tides, which would have prevented its use up to five hours per day for each of 21 of the 30 days in July 2008. (See Loring Declaration.) Large rocks prevent the physical storage of dinghies on this 40 foot area. Further, necessity would dictate that there would need to be a place to store a vehicle to travel the half mile back to the Hughes lot, which there is not. (RP 55, 1-2; 66: 3-10) Finally, even if the tides were right, it would be unreasonable and cost prohibitive at \$200 per hour to hire an actual barge to use as a regular taxi service to bring Hughes and his family to the island. Barge service is not available on any regular basis to Pearl Island. It is wholly impractical to argue that it is feasible for Hughes to use or rely on a \$200 per hour barge service for his needs – which

include the need to get on and off the island quickly – be it to obtain food and supplies, pick up family and friends, haul suitcases and family or get to the doctor for a medical emergency.

The testimony at the hearing confirmed that the barge landing site was exactly that – a site where barges land to bring supplies to the islanders on Pearl. It is not designed for individual access. There are no cars on Pearl Island.

Part time Pearl Island resident Odd Fausko acknowledged the physical restraints of the barge landing site. RP 50: 12-16.

Mr. Fausko stated that no one stores a golf cart at the barge landing. (Tr. p. 66, lines 1 - 2)

Mr. Fausko stated that no one stores a dinghy at the barge landing.

Mr. Fausko testified that while one could make room to store a golf cart at the barge landing, it could possibly get in the way of the landing of a barge. (Tr. p. 66, lines 3 - 10)

Mr. Fausko acknowledged the physical restraints of the barge landing site:

“Yes. You witnessed that today on our real tour is that one boat tried to go the other way and he got stuck, you saw the sailboat out there, he hit the bottom because the other side of the passage going out of

there on this particular tide is too shallow.” (Tr. p. 50, lines 12 -16)

So did Chris Hughes:

“To my knowledge, has ever used, as was discussed yesterday, this (Pearl Island) barge landing as regular access to their property even when it was a community dock, which was the reason the community dock was taken away, it was a liability; it had fallen apart, the dock was sinking and there were no railings on the fixed pier portion.” (Tr. p. 417, lines 1 – 7)

When asked if there is any room within the 40 foot barge landing to pull up a dinghy with a motor on it, Mr. Hughes testified,

“I think you could pull one up on there, but whether it would be impacted -- I don't know if we are allowed to do it in the first place, but whether it may impact people coming and going on the boat ramp, the trucks, heavy trucks -- when people do construction on the island, there's a lot of heavy trucks that come up off the barges, a lot larger barges than what we were on yesterday.” (Tr. p 420, lines 13 – 20)

Mr. Hughes testified that the barge landing is not accessible at all times. He stated,

“No, it is not. In fact, there is a big rock in front of it, so it's only accessible, I don't know what the numbers are, but you saw it, the rock was almost breaking the surface yesterday right in the middle of the ramp.” (Tr. p. 421, lines 2 –8)

There is no testimony to support the finding that the barge landing is an adequate or feasible alternative to the Hughes dock.

2. Buoy would be hazardous/No room for a dinghy on the beach

The Hughes property abuts one of the busiest channels in San Juan County. It is an impossibility to put a buoy out in front of the Hughes property, due to the boat traffic. Even if a buoy were possible, it would be impossible to row a skiff to shore safely.

There is nowhere to store a skiff due to the rocks. RP 427:6– 20

Testimony of Chris Hughes:

“What I need is a safe and reliable access, and from my experience on Pearl Island and the years that I have been up here, winter and summer, the dock is the only safe reliable way to get to that property. That's really my criteria is it's safe and reliable. And I don't think that having access for a couple hours a day is reliable, and I think in having boats go aground because -- we did look at pulling a dock in and looked at the impact how reliable and realistic that would be based on tides and time of the year of use and it was -- it was to the point of almost being unusable. There were certain portions of time if you timed everything just right and everything was perfect and nothing ever went wrong, that maybe you could make that work, but it was not a safe and reliable solution.” (Tr. p 427, lines 6 – 20)

“Well, fortunately, you have heard from other people besides me about the -- I think the words that -- who was it yesterday used the term devastating to describe the tidal currents and boat wakes out there. That is the main passage into Roche Harbor for all large boats... It's the only one (channel) that is consistently safe and deep. That s a very heavily trafficked area with extreme wake problems and a strong current. So, you have heard that from people other than me, but that is absolutely the truth. It would not be safe in my opinion, except for glass calm conditions with no wind or tide, to

utilize a buoy on a regular basis for tendering to shore.”
RP430: 2 - 25

D. SMA POLICIES

In addition to all else, the Board made a broad-brush conclusion, as it did in *May*, that approval of the Hughes dock would not be in line with the policies of the Shoreline Management Act. (COL 20)

The SMA recognizes the shorelines' fragile nature, the increased demand for their use, and the necessity of a coordinated state and local effort to manage and to protect this resource. *Buechel v. Department of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). Underlying this policy is the state's goal to manage shorelines “by planning for and fostering all ‘reasonable and appropriate uses.’ *Id.* Alterations of the natural shoreline for single-family residential uses are a priority. RCW 90.58.020.

While construction is subject to substantial regulation and control, the installation of private docks on residential property is recognized as a beneficial use of the state's shorelines. *Caminiti v. Boyle*, 107 Wn.2d at 673-74, 732 P.2d 989 (1987). RCW 90.58.020 requires shoreline structures to be designed to minimize damage to the ecology. Shoreline permitting requires a balance.

The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development....As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks. Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 697, 169 P.3d 14 (2007). Samson v. City of Bainbridge Island 149 Wn. App.. 33, 46, 202 P.3d 334, 341 (2009)

Hughes' property is zoned for residential use. It is reasonable and appropriate that Hughes should be able to get to his property and use it. A reasonable use may be determined by reviewing an allowed use under the site's zoning. *Preserve our Islands v. Shorelines Hearings Board*, 133 Wn. App. 503, 507, 137 P.3d 31, 48-49 (2007).

This is in line with the Court of Appeal's interpretation of "reasonable and appropriate".

It is a reasonable and appropriate use of that shoreline because it enables Glacier to use its site consistent with the site's designated use under the GMA, Comprehensive Plan, and Zoning Code. Preserve Our Islands v. Shorelines Hearings Bd. 133 Wn. App. 503, 537, 137 P.3d 31, 48 - 49 (2007)

The Shoreline Management Act does not prohibit development of the state's shorelines. Rather, it calls for "coordinated planning" that recognizes and protects private property rights consistent with the public interest. *Nisqually Delta*

Ass'n, 103 Wn.2d at 726, 696 P.2d 1222. *May v. Robertson* 218 P.3d 211, 228 (2009)

Just as in *May*, FOSJ argued that the Hughes dock would conflict with the Shoreline Management Act's policies, yet they offered no concrete examples about how it would impair public use or cause harm to the surrounding environment. Just as the court found in *May*, the Hughes dock also complies with the Act's policy of minimizing environmental damage and prioritizing "recreational use." *Id.*

It was an erroneous interpretation of the law for the SHB to conclude that issuance of an SSDP is contrary to the priorities and purposes of the SMP and the SMA, RCW 90.58.020. State and local law require balance, and minimization of impacts, not prohibition.

E. PUBLIC POLICY REQUIRES COGENT, PREDICTABLE RULES

Washington has a "strong public policy favoring administrative finality in land use decisions." *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d at 48, 26 P.3d 241 (2001). Also, see *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 5, 829 P.2d 765 (1992) (concluding that a "body of cogent, workable rules

upon which regulators and landowners alike can rely” is essential to resolving land use regulation disputes). We have stated that “ ‘[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property.’ ” *Skamania County*, 144 Wn.2d at 49, 26 P.3d 241(1974)).

Samuel's Furniture, Inc. v. State, Dept. of Ecology 147 Wn.2d 440, 458, 54 P.3d 1194, 1203 (2002).

Under the SMA, it is the local government which has the exclusive power to administer the permit system. RCW 90.58.140(3). It was in error of the Shorelines Hearings Board to ignore past application by San Juan County of the provisions of its own code, and instead apply the member’s own subjective interpretation of how the code should be implemented or what the code should now be read to say. The right to review a case de novo does not give the Board the right to impose new unwritten meaning to a local jurisdiction’s regulations. The SHB should have deferred to SJC’s past application of its code. To do otherwise prevents the application by a county of cogent and predictable rules. It is fundamentally unfair to subject citizens to a body of “moving-target” regulations, interpreted differently by the local government and the SHB.

F. ARBITRARY AND CAPRICIOUS

In light of the SJCC dock regulations, and in light of the manner in which they have been traditionally applied to the citizens of San Juan County, the decision of the SHB denying the dock was arbitrary and capricious. A decision is arbitrary and capricious if it is “willful and unreasoning action in disregard of [the] facts and circumstances.’ ” *Buechel*, 125 Wn.2d at 202, 884 P.2d 910 (quoting *Skagit County v. Department of Ecology*, 93 Wn.2d 742, 749, 613 P.2d 115 (1980)). *May v. Robertson* 218 P.3d 211, 219 (2009)

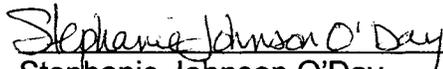
The SHB legislated from the bench, trying to make our local code into something it is not. While the SHB reviews a Shoreline appeal de novo, it is charged with the responsibility of applying the local code to the facts at hand, and to make a determination as to whether the project meets the criteria found in the local master program. The right to review a shoreline proposal de novo does not give the SHB the right to ignore past precedent, policy and application by the local jurisdiction of its own code. The SHB acted arbitrarily and capriciously in its denial of the Hughes dock. The denial was willful and unreasoning in light of the facts and circumstances.

VI. CONCLUSION

Christopher Hughes now respectfully requests that the Court of Appeals reverse the decision of the Shorelines Hearings Board and affirm the decision of Judge Linde and reinstate the Hughes SSDP.

DATED this 3rd day of February, 2010.

LAW OFFICES OF
STEPHANIE JOHNSON O'DAY, PLLC


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WSBA #17266
Attorney for Christopher Hughes

VII. APPENDIX

A. RCW 34.5.570 Review of Agency Orders in Adjudicative Proceedings

APA RCW 34.05.570
Review of Agency Orders in Adjudicative Proceedings

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

VII. APPENDIX

B. San Juan County Code Excerpts

San Juan County SMP

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.

A. Exemptions. Docks, as specified in SJCC 18.50.020(F), are exempt from the requirement for a shoreline substantial development permit pursuant to RCW 90.58.030(3)(e)(vii) and WAC 173-27-040(2)(h).

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.

D. Regulations – General Design and Construction Standards.

1. Pilings must be structurally sound prior to placement in the water.

2. Chemically treated or coated piles, floats, or other structural members in direct contact with the water shall be as approved by the Environmental Protection Agency.

3. Pilings employed in piers or any other structure shall have a minimum vertical clearance of one foot above extreme high water.

4. All floats shall include stops which serve to keep the bottom off tidelands at low tide.

5. When plastics or other nonbiodegradable materials are used in float, pier, or dock construction, full containment features in the design of the structures shall be required.

6. Overhead wiring or plumbing is not permitted on piers or docks.

7. New boathouses or covered moorages are prohibited on floats, piers, and docks. Other structures on floats, piers, and docks shall be limited to three feet in height.

8. A pier shall not extend offshore farther than 50 feet beyond the extreme low tide contour, and shall not exceed a height of three feet above the dock surface.

10. All construction-related debris shall be disposed of properly and legally. Any debris that enters the water shall be removed promptly. Where feasible, floats shall be secured with anchored cables in place of pilings.

11. Materials used in dock construction shall be of a color and finish that will blend visually with the background.

E. Regulations – Joint-Use Community Piers, Docks, and Floats.

1. No more than one moorage facility shall be allowed as an accessory to any hotel, motel, multifamily residential development, or similar development.

2. Proposals for joint-use community piers and docks shall demonstrate and document that adequate maintenance of the structure and the associated upland area will be provided by identified responsible parties.

3. Recreational floats shall be placed offshore no farther than 200 feet beyond extreme low tide, the minus-3 fathom contour, or the line of navigation, whichever is closest to shore (WAC 332-30-148(2)).

4. All waterfront subdivisions approved after the adoption of this SMP shall include or provide for construction of a single joint-use moorage facility by the lot owners if moorage is desired by the owners, in a designated, reserved area of the waterfront. Identification of a moorage site shall not be construed to indicate that a shoreline permit will be granted for that site. Subdivisions located where it would be physically impossible to construct such a facility shall be exempt from this provision. Individual docks and piers shall be prohibited; however, 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. A legal easement must be dedicated to all lot owners for access to joint-use facilities.

5. The dimensional standards in subsection (G)(2) of this section shall apply.

F. Regulations – Commercial/Industrial Docks. (NA)

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.

San Juan County CAO

18.30.160 Fish and wildlife habitat conservation areas.

A. Classification.

1. Upland Category I. (NA)
2. Upland Category II. (NA)
3. Upland Category III. (NA)
4. Freshwater Habitat Areas. (NA)
5. Marine Habitat Areas. These areas include the following:
 - a. All kelp and eelgrass beds;
 - b. Priority shellfish areas as follows:
 - i. All public and private tidelands or bedlands which are approved or conditionally approved by the Washington Department of Health for shellfish harvest;
 - ii. Any shellfish protection districts created under Chapter 90.72 RCW;and
 - iii. Areas with all of the following attributes: broad intertidal areas, bays with geographically restricted wave action and circulation, poor or limited flushing, warmer water temperatures, seasonally reduced salinities, and increased potential for algae bloom; and
 - c. All identified smelt spawning 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:NA

C. Nomination of Species of Local Concern. (NA)

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)

VII. APPENDIX

C. Order Reversing Decision of Shorelines Hearings Board with attached *Letter Opinion* from Judge John O. Linde

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**IN THE SUPERIOR COURT OF WASHINGTON
FOR SAN JUAN COUNTY**

CHRIS HUGHES, dba ADMINISTRATORS & CONSULTANTS, LLC) Cause No. 08-2-05185-5
)
Petitioner,)
v.)
)
SHORELINES HEARINGS BOARD, an agency of the state of Washington, and DEPARTMENT OF ECOLOGY, an agency of the state of Washington,) ORDER REVERSING) DECISION OF SHORELINES) HEARINGS BOARD
)
Respondents.)
)
SAN JUAN COUNTY, a political subdivision and charter county of the state of Washington; and FRIENDS OF THE SAN JUANS, a Washington non-profit corporation,)
)
Necessary Parties.)

This matter came on for hearing before the Court on February 13, 2009, pursuant to the Petitioner's petition for review of the Shorelines Hearings Board's (SHB) August 25, 2008, Findings of Fact and Conclusions of Law and Order in SHB No. 08-005. The petitioners appeared by and through their attorney, Stephanie Johnson O'Day. Respondents Friends of the San Juans appeared by and through its attorney Kyle A. Loring. San Juan County appeared by and through its attorney, Deputy Prosecuting Attorney Karen E. Vedder.

The standards of review of the SHB's decision are set out in RCW 34.05.570. The Court considered the record produced by the SHB, together with the pleadings and

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1 memoranda herein, and the arguments of the parties. Being fully advised, the Court has
2 determined, for the reasons stated in the attached letter opinion, that:

3 1. The SHB's decision is not in violation of constitutional provisions on its face or
4 as applied; and

5 2. The SHB's decision is not outside the statutory authority or jurisdiction of the
6 SHB; and

7 3. The SHB's decision is not supported by substantial evidence; and

8 4. The SHB has erroneously interpreted or applied the law.

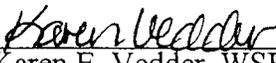
9 Therefore, it is hereby ORDERED AND ADJUDGED that the Petition for Review
10 is GRANTED and the permit issued by the San Juan County Hearings Examiner is
11 reinstated subject to all conditions, limitations and mitigation requirement.

12 DONE IN OPEN COURT this 2nd day of OCTOBER 2009.

13
14 
15 JUDGE JOHN O. LINDE

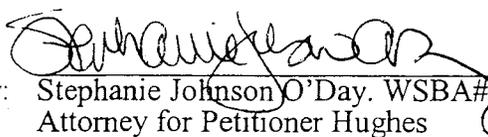
16 Presented by:

17 **RANDALL K. GAYLORD**
18 **PROSECUTING ATTORNEY**

19 By: 
20 Karen E. Vedder, WSBA #16951
21 Deputy Prosecuting Attorney
22 Attorney for Necessary Party,
23 San Juan County

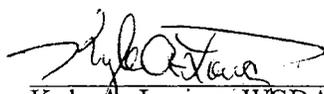
24 Approved as to form:

25 **STEPHANIE JOHNSON O'DAY**

26 By: 
27 Stephanie Johnson O'Day, WSBA #17266
28 Attorney for Petitioner Hughes

Approved as to form:

FRIENDS OF THE SAN JUANS

By: 
Kyle A. Loring, WSBA #34603
Attorney for Necessary Party,
Friends of the San Juans

Dear Counsel:

This matter came on before the Court, from an appeal by Petitioner, of the decision of the Shoreline Hearings Board (SHB) that overturned San Juan County's issuance of a Shoreline Substantial Development Permit to build a private dock. The Court took the matter under advisement in order to review the transcript of the SHB's proceedings, including all evidence introduced and admitted by the Board.

Statement of Facts

In April of 2005 Petitioner, after first seeking permission to use an adjoining lot owner's dock and then contacting an adjoining property owner seeking a potential joint user, submitted an application for a Shoreline Substantial Development Permit for a single use dock, serving an undeveloped residential lot on Pearl Island in San Juan County. In October of 2005, the Washington State Department of Fish and Wildlife (WDFW) issued an HPA approving the dock design as part of an experimental dock program.

In March of 2006, the San Juan County Hearing Examiner denied Petitioner's permit application, at which time Petitioner filed an appeal with the Shoreline Hearings Board (SHB). During the pendency of that appeal, the Petitioner reached an agreement with San Juan County whereby the size of the dock was to be reduced to a total of 557 square feet, and the Petitioner was to obtain a building permit for a single-family residence on the adjacent uplands, prior to construction of any dock. In addition, the Petitioner was to undertake an off-site eelgrass mitigation to address potential on-site adverse impacts to eelgrass existing in the area of the proposed dock.

The proposed settlement agreement was remanded to the San Juan County Hearing Examiner for further public hearings. On October 27, 2006, the Hearing Examiner issued an order approving of the parties' agreement to pursue an off-site mitigation as provided for in San Juan County Code 18.30.160(D), as a Habitat Management Plan. The Hearing Examiner required that the Habitat Management Plan be prepared by qualified marine biologists and that the success of the plan be evaluated by WDFW.

The Friends of the San Juans (FOSJ) filed an appeal with the SHB, which appeal was dismissed as premature in January 2007.

In July 2007, Petitioner submitted a Habitat Management Plan for view by the San Juan County Prosecuting Attorney's Office. That plan outlined an off-site eelgrass mitigation plan previously approved by WDFW. WDFW issued a new HPA formally approving of the off-site mitigation plan.

On September 4, 2007, San Juan County Community Development and Planning Department (CD/PD) issued an administrative determination, approving of the off-site mitigation plan requiring that mitigation be completed and proven successful prior to issuance of the Shoreline Substantial Development Permit. The Petitioner filed an appeal of the new conditions imposed by CD/PD.

In January of 2008, the Petitioner and San Juan County reached a second settlement agreement. The SHB dismisses the first Hughes appeal at Hughes' request.

In February 2008, following receipt by the Department of Ecology of the Hughes' Shoreline Substantial Development Permit, the FOSJ files its appeal. On August 25th 2008, the SHB issues its Findings of Fact, Conclusions of Law, and Order reversing the Hughes' Shoreline Substantial Development Permit. The Petitioner appeals the SHB decision and requests that this Court reinstate the Shoreline Substantial Development Permit as previously issued by San Juan County.

Petitioner owns Lot 23, Plat of Pearl Island. Pearl Island is located north of San Juan Island and borders Roche Harbor. The subdivision consists of 44 residential lots, each of which borders the shoreline. The lots are designated as rural residential by San Juan County. The plat was completed prior to the adoption of the State Shoreline Management Act and the San Juan County Shoreline Master Plan. Pearl Island is not served by Washington State ferries and has no airstrip or other form of public access. A utility and park area extends the entire length of the island and provides a 40 foot wide shoreline access which is utilized for barge landing. There is no community dock, as the plat predates the County requirement that "New subdivisions with shoreline frontage shall be required to provide community docks rather than individual, private docks..." SJCC 18.50.190G(1).

There are currently eleven private docks on Pearl Island, each providing access to one or more lots. Petitioners have no right of joint use of other existing docks. There are seven other residential lots along the north shore of Pearl Island that have no joint use rights.

A bed of eelgrass encircles Pearl Island. Eelgrass beds provide critical habitat for small fishes and marine animals. Petitioner's proposed dock would extend over eelgrass beds bordering the western end of Pearl Island. At the time of Petitioner's application to build the subject dock, WDFW was conducting an experimental program in San Juan County to study the effects of various types of docks and floats on marine habitat and eelgrass in particular. The dock and float design approved by San Juan County for Petitioner was included in that program. It incorporated design features in terms of width, orientation, and grating, to minimize or limit the effect the dock and float would have on eelgrass. WDFW biologist, Brian Williams, could not guarantee with certainty that there would be no impact on eelgrass beneath the dock, but did testify that "There is a low probability of impact there" in part due to the design requirements imposed by the permit. Mr. Williams required that the permit include an approved mitigation plan and monitoring of the site following construction to, as he put it, "cover our bases" should an adverse impact occur.

The mitigation plan approved by WDFW is an "off-site" mitigation plan located approximately 1 mile from the dock site.

The permit, as-issued, included provisions for the off-site mitigation and future inspections required by WDFW. Dock construction was not allowed until a Residential Building Permit was issued and the mitigation plan proven to be a success based upon quantifiable standards. A building permit has been issued and the off-site mitigation plan has been shown to be a success based upon the standards established by WDFW and San Juan County.

Standard of Review

Under the Administrative Procedure Act (APA), a party challenging an agency action bears the burden of demonstrating the invalidity of that action, RCW 34.05.570 (1) (a). The Court's review of agency action is based on the record before the SHB. Interpretation of the SMA and local San Juan County Shoreline Regulations involves questions of law which this Court reviews de novo.

In reviewing matters of law, the Court may reverse the Board's decision only if the Board "engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure...or has erroneously interpreted or applied the law." The Board's decision may be overturned if it is arbitrary or capricious or when "The order is not supported by evidence that it is substantial when viewed in light of the whole record before the court."

In its appeal, Petitioner has cited RCW 34.05.570(3) (a), (b), (d), (e), and (i) as providing a basis for which the SHB decision should be reversed. The Court will attempt to address each of those issues in the opinion that follows.

Discussion

This Court grants relief only if the party asserting invalidity of the Board action establishes the existence of one of the nine criteria set forth in RCW 34.05.570(3). The Petitioner has argued that Subsections (a), (b), (d), (e), and (i) provide a basis for this Court to overturn the decision of the SHB.

- (a) The Order issued by the SHB is not in violation of constitutional provisions, either on its face or as applied. [RCW 34.05.570(3) (a).] An equal protection claim must assert a governmental classification that allegedly treats a person in a manner different from others who are similarly situated. The appeal fails to allege that a specific statute establishes a classification that violates Hughes' rights under the Equal Protection Clause. Citizens are protected against unreasonable or irrational laws that would deprive individuals of "life, liberty, or property." There can be no substantive due process violation in the absence of a right. Property rights protected under the Due Process Clause include only vested rights.

The permitting of docks in San Juan County is subject to conditions imposed by SJCC 18.50.190. The regulations as written are aimed at achieving a legitimate

public purpose. They employ means reasonably necessary to achieve that purpose and the regulations are not unduly oppressive. The Shoreline Management Act limits adverse impacts to the public health, land, vegetation, wildlife and waters of the state, while protecting the public right of navigation, while fostering all reasonable and appropriate uses. Docks can be an appropriate use under the SMA but are subject to reasonable controls.

SJCC 18.50.190 is not constitutionally void for vagueness. A duly-enacted ordinance is presumed to be constitutional. To be void for vagueness, it must be such that “persons of common intelligence must necessarily guess at its meaning and differ as to its application.” The County Code clearly permits residential docks under certain circumstances and conditions. The question is whether or not the dock permit in question complies with the conditions and limitations imposed by law and regulation.

- (b) The order is not outside the statutory authority or jurisdiction of the SHB. [RCW 34.05.570(3) (b)]. The legislature has authorized the SHB to hear appeals, from granting, denying, or rescinding permits on shorelines of the state. (RCW 90.58.180). A “Short Board” of three is authorized to hear appeals involving a dock or pier designed to serve a single-family residence. (RCW 90.58.185). The appeal before the Board dealt with a single-family residential dock proposed for Pearl Island, a shoreline within the State of Washington. The appeal was heard by a panel of three SHB members.
- (d) The SHB has erroneously interpreted or applied the law. After finding that San Juan County implements a requirement to separate over-water structures from vegetation, both vertically and horizontally (FOF 14), the Board then concludes the County’s Critical Areas Ordinance has not been incorporated into its Shoreline Master Program or approved by the Department of Ecology. There is, therefore, no present County ordinance or provision of the County SMP that makes over-water construction within an area impacted by eelgrass illegal. The Critical Areas Ordinance in question, if applicable, provides for mitigation, which is precisely what WDFW and San Juan County required to mitigate the unknown but potential impact of the overwater structure to eelgrass.

The Master Program adopted by San Juan County, once approved by the Department of Ecology, constitutes use regulations for the County’s shorelines. (RCW 90.58.100) Neither the County SMP nor the State SMA prohibits development of shorelines, even those designated shorelines of state-wide significance, as in the case of Pearl Island, but calls instead for “coordinated planning...recognizing and protecting private property rights consistent with the public interest.” (RCW 90.58.020). The SMA embodies a legislatively determined and voter-approved balance between protection and development.

The Board further concludes that the mitigation plan required by WDFW and incorporated by San Juan County into the permit requirements cannot be

evaluated by the Board due to a lack of “criteria or ascertainable standards” by which the Board can evaluate the mitigation. The Board thus precludes the use of off-site mitigation despite any law or regulation providing for the same. The SHB discounted entirely the WDFW definition of a successful off-site mitigation in this case (comparing the number of shoots of eelgrass in the two locations) despite expert testimony submitted by Dr. Wyllie-Acheverria who, when asked if different eelgrass densities provide different services in the “near-shore environment,” answered “We really have only limited data to answer that question...It would be too general of a statement to go one way or the other.” He went on to state, “We’ve done some only pilot work in that area, so it’s really too premature to say whether epibenthic organisms are affected by different densities of eelgrass.”

SJCC 18.50.190 addresses boating facilities, including docks, piers and recreational floats. A preferential hierarchy for docks, piers and floats is established. Each application must be evaluated on the basis of multiple considerations which include potential impacts on littoral drift, sand movement, water circulation and quality, fish and wildlife, navigation, scenic views and public access to the shoreline.

Residential docks are permitted (SJCC 18.50.190 G) with specific dimensions and gross area established. Development of a dock for single-family residential use requires a Shoreline Substantial Development Permit or an exemption issued by the County. Applications for permits are subject to requirements addressing adequacy of existing facilities, and alternative moorage must be met prior to county approval. In addition, the applicant must comply with SJCC 18.50.190 B, which establishes the “general regulations” applicable to boating facilities.

SJCC 18.50.190 B (3) is of particular relevance to the Petitioner’s appeal in that it provides that “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.” The design and alignment of the proposed dock has been achieved in part due to its inclusion in a study being undertaken by WDFW.

The off-site mitigation plan was likewise determined in consultation with WDFW and its success made subject to review and approval by WDFW prior to any construction beginning. The permit provided that should the mitigation plan not be successful, a subsequent mitigation plan that “would ensure that the total amount of eelgrass recovery be equal to the amount (initially) required.”

By discounting and ultimately finding inappropriate the mitigation measures proposed by WDFW, the County and Petitioner, the SHB has failed to properly interpret and apply San Juan County SMP and state SMA.

Protection standards for the marine habitat in San Juan County are addressed in SJCC 18.30.160. While not intended to be exclusive, the code lists possible mitigation measures.

General habitat protection requires mitigation to the maximum extent feasible for significant impacts to habitat functions and values. A “preferred” sequence of mitigation ranges from avoiding the impact by not taking any action that would cause a significant adverse impact, to compensating for an identified impact by replacing or providing substitute resources or environments for the protected area, including the possibility of requiring a Habitat Management Plan. The San Juan County Code, (SJCC) dealing with marine habitat provides that “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.” [SJCC 18.30.160B (2) (b) (iii)]. The Habitat Management Plan required of the applicant requires follow-up reports, including an evaluation by WDFW or some other entity regarding the effectiveness of any proposed mitigation measures.

There is no finding, nor is there any testimony, which would support the conclusion that the mitigation required in this case failed to meet the requirements of WDFW and therefore the provisions of the San Juan County SMP.

- (e) The Order is not supported by evidence that is substantial when viewed in light of the whole record before the Court.

(1) Eelgrass

Recognizing that the testimony shows a genuine concern over any potential adverse impact to the eelgrass that’s surrounding Pearl Island, the evidence establishes that the WDFW, the Army Corp of Engineers, the County and the Petitioner have made a significant effort to identify and follow the mitigation sequence provided for in SJCC 18.30.160B (1). The mitigation measures incorporated in the permit are applied to “avoid, minimize, lessen or compensate for adverse impacts.” The County Code provides for the reduction of adverse impacts, rather than the requirement that all negative impacts be eliminated. The record establishes and the SHB confirmed that the proposed dock is “as favorable to the environment as is possible under available current technology.”

The record discloses that many experts have looked at Plaintiff’s proposed dock. Both State and Federal resource agencies have concluded that the project will likely have negligible adverse impacts with the mitigation plan in place. The County concurred. The evidence in the record indicates that the proposed docks likely impact on the project area resources does not

violate the requirements for protecting marine life in either the SMP or Marine Habitat Regulations.

(2) Off-Site Mitigation

The WDFW representative testified that he worked with the Petitioner to identify an off-site mitigation site. Mr. Williams concluded that the site was an appropriate opportunity to mitigate the impacts that he concluded would be negligible at the project site. WDFW, through Mr. Williams, helped to negotiate the level of recovery required in the off-site area in order for the off-site mitigation to be deemed successful. The Petitioner undertook mitigation and successfully met the standards set by the WDFW. In reversing the County's issuance of the Shorelines Substantial Development Permit, the SHB acknowledged that it had no standards or criteria with which to evaluate the proposed mitigation, then proceeded to decline to approve it without evidentiary support.

(3) Alternative Moorage

The SMP requires that docks not be approved if alternative moorage is adequate or feasible. There are no existing facilities on Pearl Island. There is no community dock in the area described as a Barge Landing Area. It is only 40 feet in width and does not provide adequate on-shore storage for private dingies. The generally-accepted alternative to a dock is a mooring buoy. A mooring buoy, however, is not appropriate for this location, as it could impose an impediment to navigation. Given the severely limited infrastructure on Pearl Island, private boats are the only practical means of access and without dock access, all people and supplies must be brought ashore by dingy. This is more than inconvenient. It is dangerous, given the location of the Petitioner's lot and its rocky shoreline.

As shown by the off-site mitigation area, the use of a buoy can damage eelgrass beds when the chain connecting the anchor to the buoy line drags on the bottom, scouring the area and destroying eelgrass.

(4) Joint Use

San Juan County has a clear preference for joint use docks over private docks. Subsequent to the creation of the subdivision that is Pearl Island, the County enacted legislation that requires waterfront plats to provide for a community dock to aid in its effort to avoid the "porcupine effect." The County Code, however, other than providing for a ranking of preferences, does not spell out what is required to constitute an appropriate effort at joint use. The evidence shows that lots on both sides of the Petitioner are parties to a joint-use dock that serves four lots. The

Petitioner requested of that dock owner that he be allowed to be a joint user. That request was denied. A witness testifying for FOSJ, who himself has a dock, was asked if he would be willing to share the dock with Petitioner, and he was unwilling to answer that question before the Board. All the evidence shows that Petitioner asked the owners of three nearby docks if he could be a joint user with them, and that he asked the owners of five nearby lots if they wanted to be a joint user on a dock being built by him. In every case, the answer he received was in the negative. The evidence is clear that he made a significant effort toward one form or the other of joint use and that Petitioner did not begin his quest for a dock seeking a single-use dock. The Petitioner testified that he was willing to share the dock with another lot owner should they come forward. That commitment should be made a part of the permit in order to provide one or more of the lot owners along the north shore of Pearl Island, who have no dock access, an opportunity to share in the proposed dock.

There is no evidence that supports a finding that the applicant in any way failed to properly seek one form or another of joint use.

(5) Cumulative Impacts

The testimony indicates that there are eight lots along the north shore of Pearl Island that have no dock access. All of the other lots, with the exception of the Petitioner's lot, either have joint use or a private dock. Testimony indicated that the eight lots border on shallow waters that could not accommodate a dock, thus indicating that there is little likelihood of any further docks being built on Pearl Island. The eleven docks that currently serve Pearl Island all, to some extent or another, impact the band of eelgrass that surrounds the Island. There was no evidence presented, however, that indicated that those existing docks have caused any significant loss of eelgrass or that an insignificant loss has spread and resulted in a fragmentation of the eelgrass bed. Thus there is no evidence in the record regarding negative cumulative impacts.

(6) Protecting Statewide Interests over Local Interests

The SHB concludes that the dock fails to protect statewide interests over local interests, fails to preserve the natural character of the shoreline or protect the resources and the ecology of the shoreline, and favors short-term benefit over long-term benefit "because the proposed dock will result in destruction of fragile and ecologically important eelgrass beds." The evidence in the record does not support the conclusion that the proposed dock will result in "destruction of fragile and ecologically important eelgrass beds." The evidence was insufficient for the Board to determine with any certainty the extent and long-term consequence of any damage that might result from this project. Even the experts were unsure

of the extent of loss that would occur. The SHB decision effectively concludes that the law as it currently exists precludes construction of docks over eelgrass. While it is possible that the County, WDFW or the legislature could do so, that is not the state of the law as it is today.

The policies for shorelines of statewide significance that emphasize the broader public interest over local or private interest and the avoidance of long-term harm for short-term gain are not violated where the harm, if any, is shown to be speculative and not significant.

(7) Associated with a Single-family Residence

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. (SJCC 18.50.190 G (4)). The maximum dimensions for a dock associated with a single-family residence shall not exceed 700 total square feet in area. (SJCC 18.50.190 G (2) (a)). It is clear that a dock is a permissible structure when associated with a single-family residence. The code does not require that the residence be constructed first. The evidence before the Board and in the record indicates that a single-family residential building permit was applied for, to satisfy a requirement of the Shoreline Substantial Development Permit and that the Residential Building Permit has been issued. Thus the County requirements regarding single-family residential dock construction have been met.

Summary

The SMA embodies a legislatively determined and voter approved balance between protection of state shorelines and development. Property owners are allowed to construct water-dependent facilities, such as single-family residences, bulkheads and docks. RCW 90.58.100 provides "The master programs provided for in this chapter, when adopted or approved by the department, shall constitute use regulations for the various shorelines of the state." San Juan County adopted its SMP and the same was approved by the department and adopted as a state regulation. The area of the shoreline involved in this case has been designated as a shoreline of statewide significance. The SMA does not prohibit development of the state shorelines, but rather calls for coordinated planning, recognizing and protecting private property rights, consistent with public interest.

The Court concludes that the Shoreline Substantial Development Permit authorizing Petitioner to construct the residential dock on Pearl Island, subject to the construction and use provisions set forth in the permit issued by San Juan County and approved by the County Hearing Examiner, complies with the SMA and County SMP. The Petitioner has complied

VII. APPENDIX

D. Exhibits

HUGHES TIMELINE

- 8/24/05 Hughes submits dock application
40' float 60' pier
- 10/3/05 HPA issued. Dock is in experimental dock program, using approved maximum mitigation design. Requires base line survey and three years monitoring

Biological Evaluation prepared for USACE. BE sent to NMFS for review
- 3/3/06 HEX denies dock permit, partially on the grounds that the design mitigation of the dock does not satisfy the requirements of ESA
- 3/29/06 Hughes appeals to SHB
- 7/21/06 San Juan County and Hughes enter into a settlement agreement. Hughes agrees to downsize the dock, build a home on the property and do "off-site" eelgrass mitigation.
- 9/26/06 HEX public hearing on settlement
- 10/27/06 HEX Order Approving Settlement. HEX remands to county to work with applicant to work out details of mitigation plan. The applicant is directed to have a Habitat Management Plan prepared by an experienced marine biologist. The HEX stated that the effectiveness of the Plan must be evaluated by outside expert. WDFW was cited as the entity who could provide such an evaluation.
- October 2006-July 2007: Hughes searches for an acceptable off-site mitigation plan.
- Clean up of Reid Harbor
 - Eelgrass planting by Battelle laboratories
 - Chris Betcher
 - Chris Fairbank and Henry Island buoys
- December 2006 Friends of the San Juans files a lawsuit AND a SHB appeal to fight the settlement. Both the court and the SHB dismiss the appeals.
- 12/31/06 HPA expires. Hughes requests an extension
- 1/2/07 WDFW writes to Hughes stating that Hughes will need to submit an eelgrass mitigation plan outlining specific eelgrass mitigation that would be implemented in the event the eelgrass under the dock is damaged.
- 1/22/07 WDFW (State level) writes to San Juan County agreeing to pull its experimental dock program.

EXHIBIT R-B1

1/25/07 Hughes agent meets with Ron Henrickson and UW Labs to discuss off-site eelgrass mitigation. Met with hostility and no assistance.

February 2007 WDFW is again consulted with regard to off-site eelgrass mitigation. Williams suggests hiring a local diver/biologist who knows the county waters and may know the location of structures or impediments to eelgrass which could be removed. Chris Betcher is hired, but after two months cannot find a suitable off-site mitigation project.

April 2007 Chris Fairbank is hired. Fairbanks determines that a buoy sitting in an eelgrass bed at Henry Island could be removed, allowing eelgrass bed to rejuvenate.

WDFW endorses and approves concept.

June 2007 Fairbank Construction performs a baseline eelgrass dive to determine extent of eelgrass damage. Prepares Eelgrass Mitigation Plan for WDFW. Fairbanks also prepares Habitat Management Plan for San Juan County.

7/20/07 WDFW issues new HPA, approving mitigation plan. HPA requires implementation of the plan only if on-site dock mitigation is found not to work. Hughes agrees to implement plan anyway.

9/4/07 San Juan County issues letter approving mitigation plan on the basis that a) Hughes prepares a baseline survey using CDPD protocols (which do not exist), b) Hughes pays CDPD for a baseline survey three years after buoy is removed, and c) after three years, if Hughes can prove the entire mitigation area has recovered to 90% of the control area, THEN the county will issue a dock permit.

9/17/07 Hughes appeals the conditional approval, primarily because it would cause unnecessary delay in construction of his dock.

9/21/07 Fairbank Construction removes buoy and performs second baseline survey for off-site mitigation area, as well as baseline survey for Hughes dock.

11/27/07 FOSJ comment letter to HEX urges him to deny appeal and uphold County conditional approval of Hughes dock.

12/12/07 HEX scheduled/cancelled/San Juan County and Hughes negotiate a settlement with their experts.

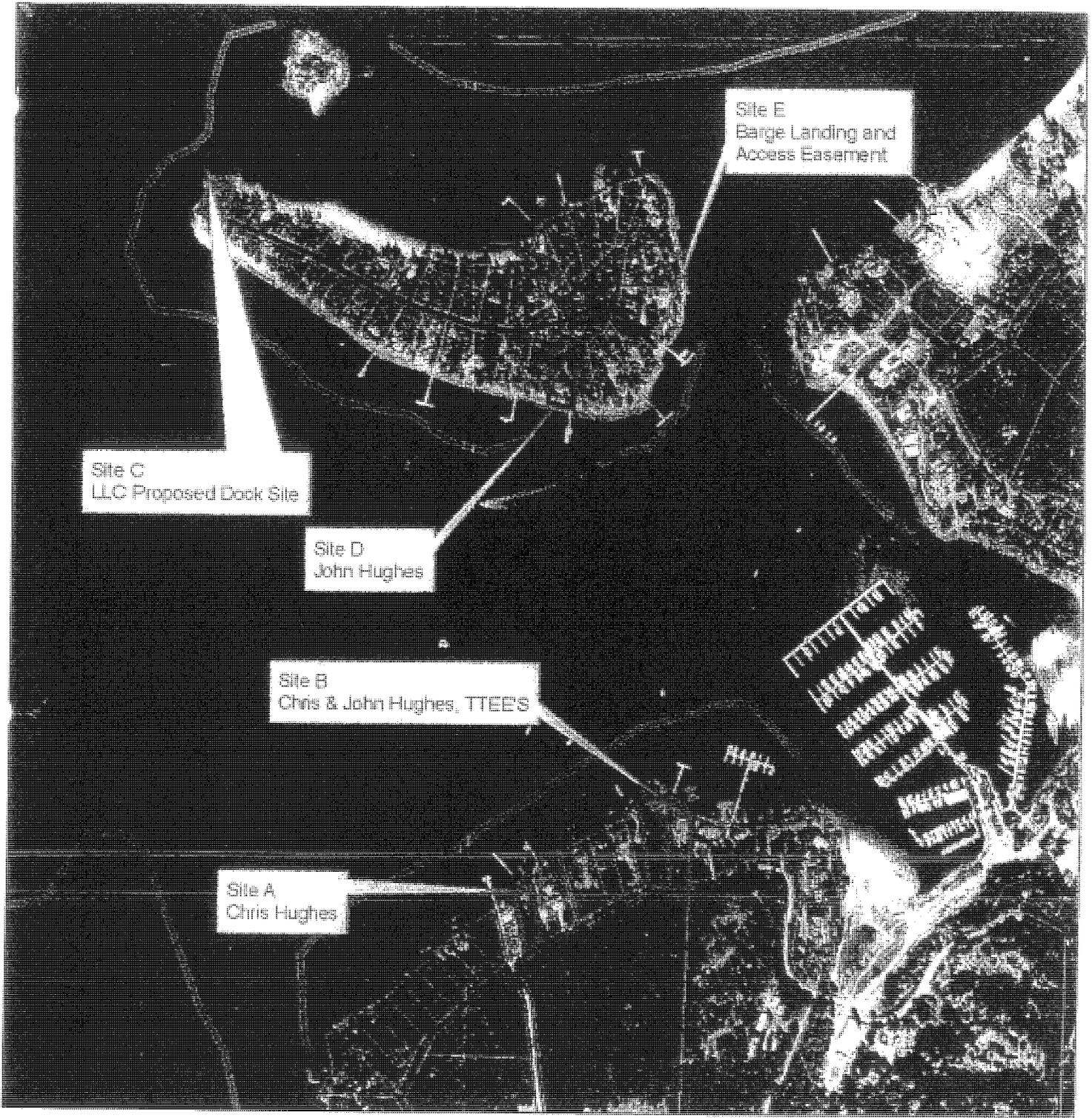
1/14/08 Revised Settlement Agreement between
San Juan County and Hughes

2/1/08 SSDP Issued for Hughes Dock

3/21/08 Pearl Island Private Use Dock Eelgrass Mitigation Plan issued

CHS RBZ

4/14/08 UW Labs comments to Mitigation Plan
4/24/08 Fairbank response to UW Labs
5/2/08 Final Mitigation Plan with comments submitted to San Juan County.
5/21/08 Hughes submits for a building permit application
6/17/07 Fairbanks letter results for year 1 eelgrass dive
6/27/08 Fairbanks Year-1 Eelgrass Survey June 10, 2008



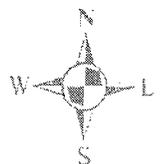
Hughes Dock Proposal Area Map

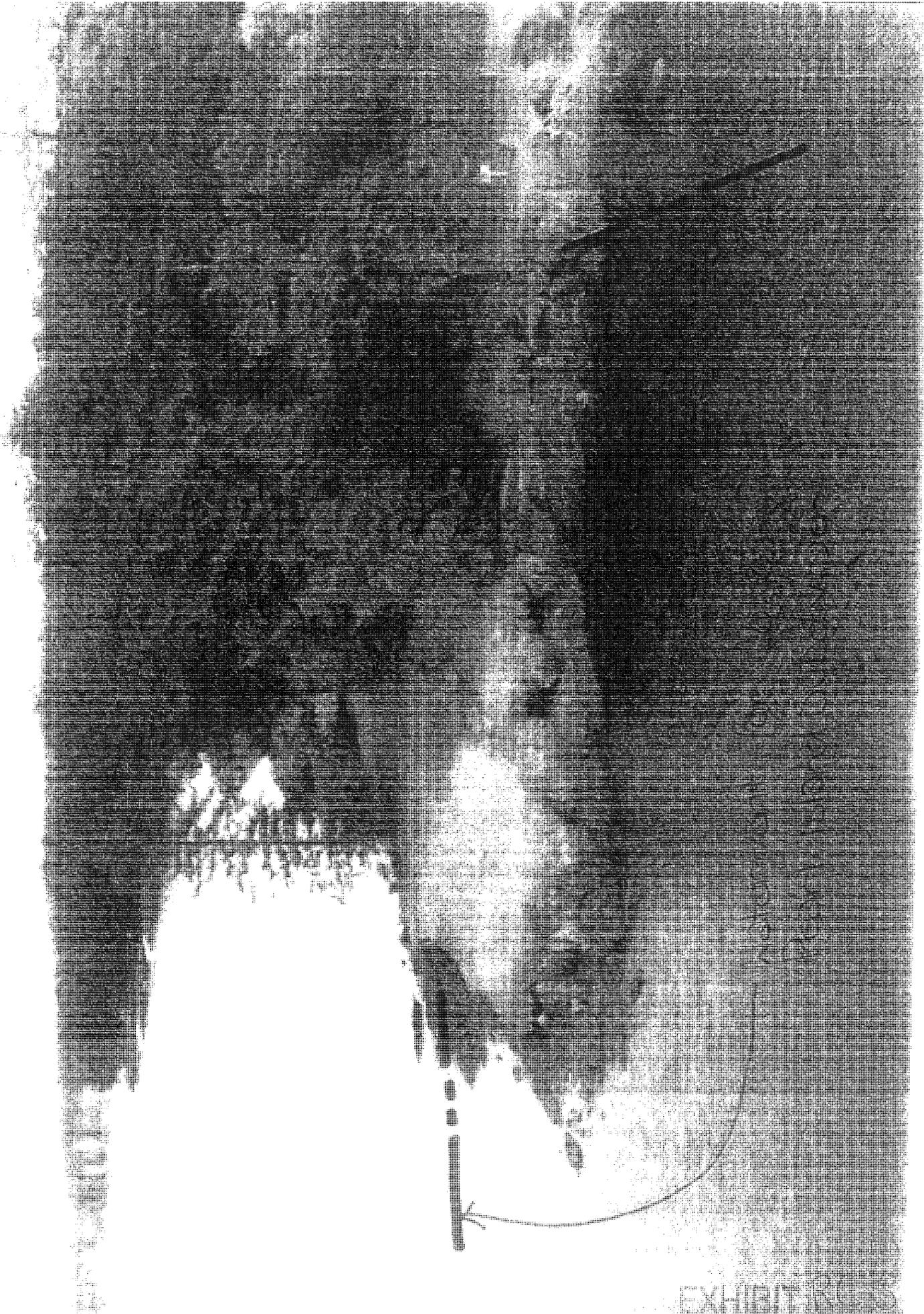


Legend

 Hughes Properties

 Outerline of Eelgrass Bed

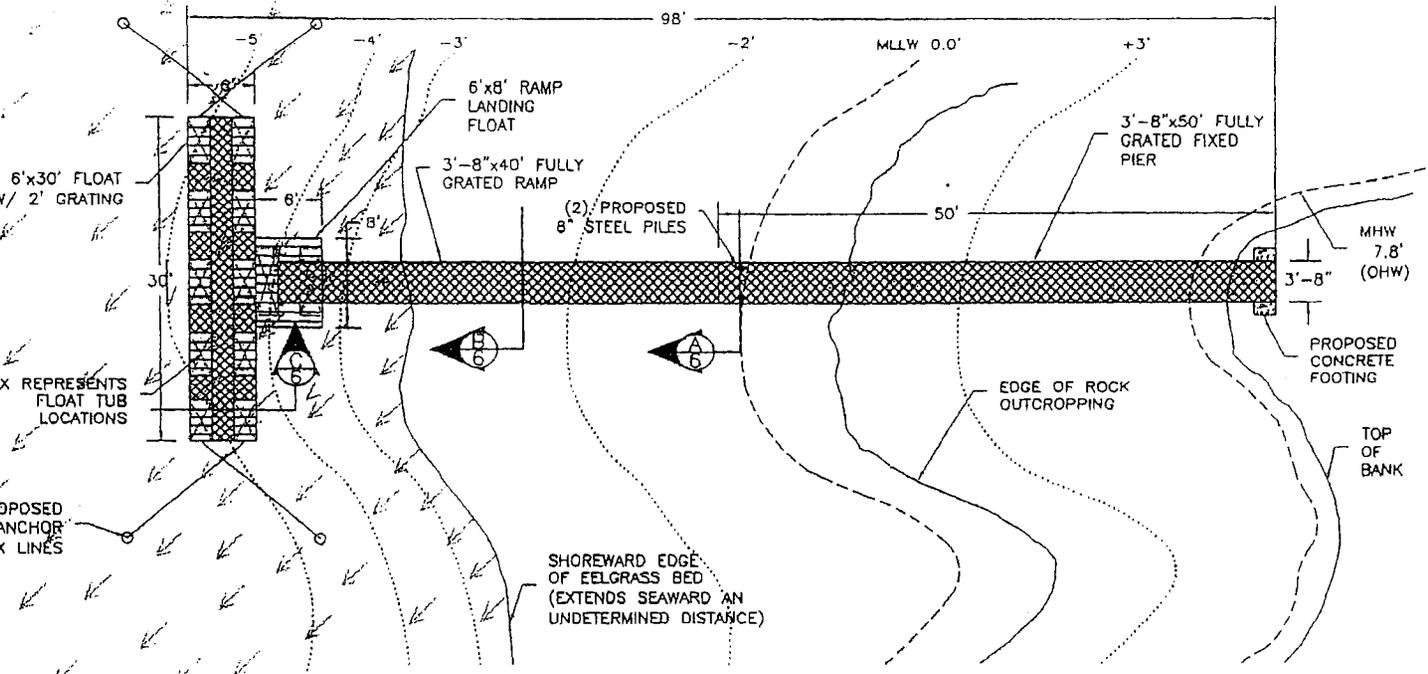




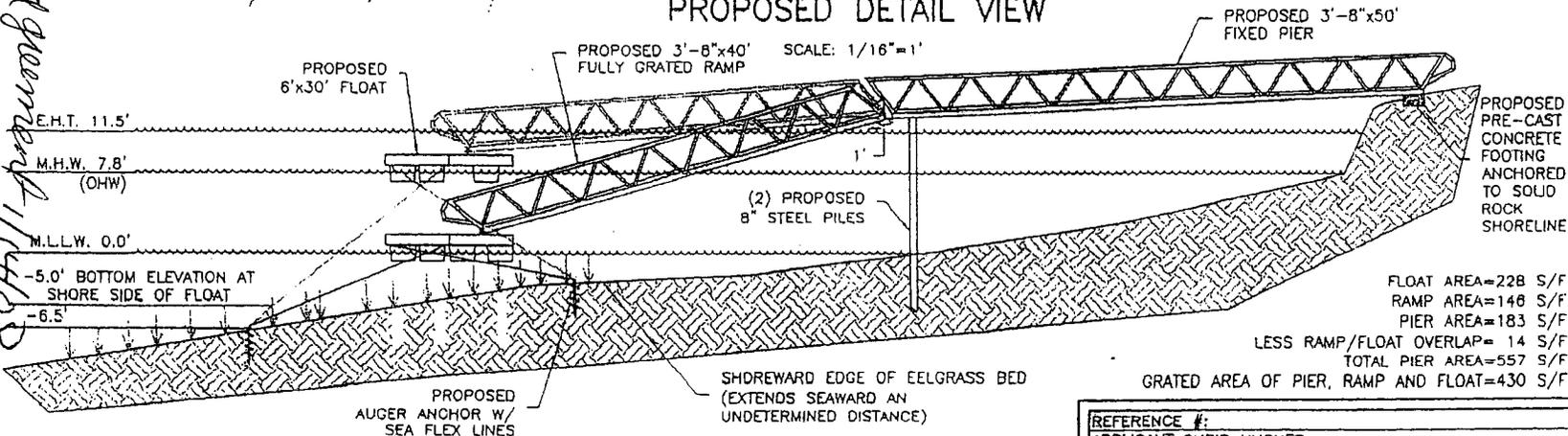
A-31

EXHIBIT

SAN JUAN COUNTY
COMMUNITY DEVELOPMENT & PLANNING
APPROVED SITE PLAN
 Subject to terms and conditions of
 Permit No. 0553013
 Approved by: Hex 10/27/06 Date 10/27/06 *Dave Galtman and a quarant 11/14/08*



PROPOSED DETAIL VIEW

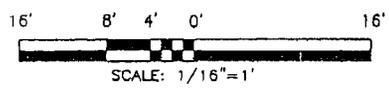


PROPOSED ELEVATION VIEW

FLOAT AREA=228 S/F
 RAMP AREA=146 S/F
 PIER AREA=183 S/F
 LESS RAMP/FLOAT OVERLAP= 14 S/F
 TOTAL PIER AREA=557 S/F
 GRATED AREA OF PIER, RAMP AND FLOAT=430 S/F

CONSTRUCT A FULLY GRATED 3'-8"x50' FIXED PIER, A 3'-8"x40' FULLY GRATED RAMP, A 6'x8' RAMP LANDING FLOAT ATTACHED AND A 6'x30' MODRAGE FLOAT WITH 2' STRIP OF GRATING.

REVISED
6-27-06



REFERENCE #:	
APPLICANT: CHRIS HUGHES	
PROPOSED: CONSTRUCT A NEW FIXED PIER, RAMP, AND A FLOATING PIER.	
NEAR/AT: PEARL ISLAND, WA	
SHEET: 5	OF: 6
DATE: 8-29-05	DWG#: 05-3030-A.5-1 AUGER

A-32

R-0-12

5.2 Performance Standards

Success of this mitigation plan will be based on both the gain of habitat area and gain of eelgrass shoots. These criteria will depend on:

1. The impact of the dock which will be measured by the difference of eelgrass shoot density under the dock and the eelgrass density at the reference site.
2. The recovery of the buoy scour area will be measured by the difference between the eelgrass shoot density at the buoy scour area and the buoy scour reference site compared with the baseline survey conducted on June 9, 2007 (Appendix C).

The goal of this mitigation project is to document an increase of habitat area and the number of eelgrass shoots by a ratio of not less than 1.25:1. This ratio is consistent with WDFW guidelines for mitigation of impacts to eelgrass beds when mitigation action is initiated in advance or concurrent with the proposed action. Table 3 lists the potential loss of eelgrass shoots under the proposed float and the mitigation requirement based the pre-project survey data completed on September 21, 2007 (Appendix B) and assuming all eelgrass shoots are lost from under the dock.

Table 3. Example of mitigation requirement based on pre-project survey data.

Potential loss (Table 1)	955 shoots
Mitigation ratio (WDFW mitigation guidelines)	1:1.25
Mitigation requirement (potential loss X 1.25)	1,194 shoots

5.3 Methods

Monitoring of the buoy scour area and the floating dock study area will be conducted using the same methods used in the pre-project baseline surveys modified with the WDFW post-project monitoring guidelines updated in 2008. Three surveys will be conducted using the same transects and stations to document changes in the eelgrass density over a period of three years. The surveys will be conducted on the following schedule:

1. Baseline survey
 - a. Proposed dock area: *completed September 21, 2007*
 - b. Mooring buoy scour area: *completed June 9, 2007*
2. Year 1 Monitoring; between June 1 and October 1, 2008
Or;
Year 2 Monitoring; between June 1 and October 1, 2009

And;
3. Year 3 Monitoring; between June 1 and October 1, 2010

FAIRBANKS ENVIRONMENTAL SERVICES, INC.

Ms. Stephanie Johnson-O'Day
PO Box 2112
Friday Harbor, WA 98250

June 17, 2008

RE: Pearl Island private-use dock

Dear Ms. Johnson O'Day,

An eelgrass survey of the mitigation area for the Hughes project was conducted on June 10, 2008, nine months after the mooring buoy, chain and anchor was removed. In the absence of the physical disturbance caused by the chain dragging on the sea floor, the eelgrass bed is recovering. The density of eelgrass in the mooring buoy scour area has increased from an average of 6.8 shoots per square meter (0.63 shoots/sqft) in June 2007 to 20.8 shoots per square meter (1.93 shoots/sqft) in June 2008 (Table 1). This represents an increase of approximately 1,950 eelgrass shoots in the mitigation area of 1,500 square feet which exceeds the estimated number of eelgrass shoots required to meet the mitigation goal of 1,635 shoots stated in the Mitigation Plan dated March 21, 2008. A report with more detailed analysis of the survey results will be available within two weeks of this letter.

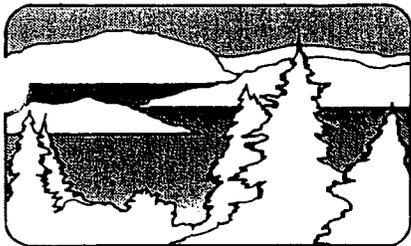
Table 1. Summary results of an eelgrass survey of the buoy scour area conducted June 10, 2006.

	JUNE 2007		JUNE 2008	
	Shoots / sq meter	Shoots / sq foot	Shoots / sq meter	Shoots / sq foot
Buoy Scour Area	8.3	0.63	20.4	1.93

If you have any questions, please contact me.


Chris Fairbanks

Sincerely,



SAN JUAN COUNTY

Community Development & Planning

135 Rhone Street • P.O. Box 947 • Friday Harbor, Washington 98250
(360) 378-2354 • (360) 378-2116 • FAX (360) 378-3922
permits@co.san-juan.wa.us • www.co.san-juan.wa.us

September 4, 2007

Stephanie O'Day
P.O. Box 2112
Friday Harbor, WA 98250

Subject: Hughes Dock Mitigation Plan

Dear Stephanie,

After a thorough review of the proposed mitigation plan, I approve the mitigation plan on the following basis:

1. Preparation of a scientifically prepared baseline survey report of the existing status of eel grass in the proposed mitigation area based on protocols approved by CD&P, as well as in an adjacent control plat where eel grass has not been impacted by the buoy. The report must be able to clearly establish and measure existing conditions.
2. Payment to CD&P of the estimated cost to replicate the above survey report at the end of three years from the date of removal of the buoy.
3. Preparation of a survey report by the applicant at the end of the three year period based on the same protocols, at which time the above payment shall be returned to the applicant. Provided the report certifies that the eel grass in the proposed mitigation area has recovered equal to at least 90% of the density in the control plat, as identified in the first report, a permit for the dock would be issued. In the event the mitigation area fails to reach 90% restoration, no permit would be issued. In the event the applicant elects not to prepare the survey, the County may use the payment noted in number 2 to survey the extent of restoration achieved.

This procedure is based on the belief that mitigation should occur prior to the issuance of the dock permit.

Sincerely,

Ron Henrickson
Community Development and Planning Director

**Pearl Island Private-use Dock Mitigation Site
Baseline Eelgrass Survey
September 21, 2007**

INTRODUCTION

A pre-project eelgrass survey of a private-use dock mitigation site was conducted on September 21, 2007 in Mosquito Pass along the eastern shore of Henry Island in an area that has been scoured by a chain that connects a mooring buoy to its anchor. The purpose for this survey was to determine the area that has been scoured and the relative difference of eelgrass density between the scoured area and an undisturbed area. The buoy, chain, and anchor was removed immediately after the survey was conducted. A conservative estimate of the area scoured by movement of the chain securing a mooring buoy to its anchor is 1,750 square feet. The density of eelgrass within the buoy scour area has been reduced by 40.2 percent. The potential area for mitigation is 703.5 square feet. The potential impact area of the proposed dock is 258 square feet and therefore, the ratio of mitigation area to impact area is 2.7:1.

METHODS

This survey followed the Washington Department of Fish and Wildlife (WDFW) intensive survey guidelines. Nine 50-foot long transects were selected and eelgrass density was documented at 10-foot intervals along each transect giving six stations on each transect. Five of these transects were within the buoy scour area and four reference transects were outside of the buoy scour area. Two reference transects were located 25 feet on both sides of the centerline transect and two additional transects were 30 feet on both sides of the centerline transect. There was a total of 30 stations observed in the buoy scour area and 24 station observed on the reference stations. The transects are described as:

- Transect A: Reference transect-A; 30 feet west of the centerline transect
- Transect B: Reference transect-B; 25 feet west of the centerline transect
- Transect C: ten feet west of the centerline transect
- Transect D: five feet west of the centerline transect
- Transect E: Centerline of the scour area
- Transect F: five feet east of the centerline transect
- Transect G: ten feet east of the centerline transect
- Transect H: Reference transect-H; 25 feet to the east of the centerline transect
- Transect I: Reference transect-I; 30 feet to the east of the centerline transect

At each station, a diver recorded observations of vegetation and habitat characteristics. The number of eelgrass shoots in four ¼-square meter quadrates set at the noon, 3, 6, and 9 o'clock positions relative to the transect line was recorded; depth, substrate, vegetation, and observations

of incidental species were also recorded. The location of semi-permanent markers set at both ends of the centerline transect was recorded using a handheld GPS receiver.

RESULTS

The substrate throughout the study area was silt mixed with sand and gravel. Occasionally a boulder was present and macroalgae was attached. The depth of the study area was between -5.2 feet and -7.5 feet relative to mean lower low water (MLLW). The density of eelgrass on the four reference transects ranged from 3 to 34 shoots per square meter with averages of 12 and 18 shoots per square meter on the two west reference transects and 11 and 14 shoots per square meter on the two east reference transects. The five buoy-scour area transects had a range of eelgrass density of 0 to 24 shoots per square meter and averages ranging from 3 to 11 shoots per square meter. Table 1 lists the observations recorded by the divers for each transect. Figure 2 shows a schematic of the transect positions and the buoy scour area. The eelgrass density in the buoy scour-area was 40.2 percent of the eelgrass density of the reference transects (Table 2).

The buoy scour area was calculated within the perimeter of survey area including stations on reference transects B and H that were scoured (Figure 2). These two stations were used as the extreme points of the scour-area polygon. The north and south ends of the scour-area transects were used as boundaries of the scour-area polygon although, evidence of scour extended beyond the transect ends; the estimated scour-area is less than the actual area scoured by the chain. Table 3 lists the calculations used to estimate the scour area.

DISCUSSION

This survey is the second pre-project survey conducted in the bouy-scour area in Mosquito Pass. The first survey was conducted on June 9, 2007 during the early part of the eelgrass growing season and this second survey was conducted in the later part of the growing season. Both surveys recorded observations along the same transects although the second survey included two additional transects in the scour area and two additional transects outside of the scour area. The results of both surveys document lower eelgrass density in an area scoured by the mooring buoy chain. In June, the density of eelgrass had declined by 63.4 percent, and in September, the decline was 40.2 percent. The difference may be explained by the light use of the buoy during the summer month between the two surveys; the property owners explained that they used the buoy a total of eight times over the summer of 2007. Light usage of the buoy over the summer grow period would minimize scour and allow the eelgrass bed to recover from previous damage.

The potential impact area of the proposed dock has been overestimated in previous reports. The earlier estimates were based on dock designs using a longer float (6 X 40 ft). The current design is shown in revised drawings dated June 27, 2007 that has a smaller float (6 X 30 ft). The estimated potential impact area based on the revised drawings is 233 square feet (Table 4) and

assumes a loss of all eelgrass in the area directly under the proposed float, landing float and six 12-inch guide pilings that are within the eelgrass bed. Figure 3 shows the area included in estimating the potential impact area and Table 4 lists the calculation.

Table 1. Results of an intensive eelgrass survey conducted at the Pearl Island private-use dock mitigation site on September 21, 2007 immediately after removal of buoy, chain and anchor.

Transect A		30 ft west of centerline of scour area				
Station (feet)	Depth MLLW	Substrate	Species	Percent Cover	Shoots per square meter	Comments
0	-5.2	Silt, sand & gravel	<i>Z. marina and Ulva</i>	40	6	
10	-5.2		<i>Z. marina and Ulva</i>	70	34	
20	-5.2		<i>Z. marina and Ulva</i>	60	13	
30	-5.2		<i>Z. marina and Ulva</i>	60	3	
40	-5.2		<i>Z. marina and Ulva</i>	30	10	
50	-5.2		<i>Z. marina and Ulva</i>	50	8	
					Average:	12
Transect B		25 ft west of centerline of scour area				
Station (feet)	Depth MLLW	Substrate	Species	Percent Cover	Shoots per square meter	Comments
0	-5.3	Silt, sand & gravel	<i>Z. marina and Ulva</i>	20	11	
10	-5.3		<i>Z. marina and Ulva</i>	50	24	
20	-5.3		<i>Z. marina and Ulva</i>	40	13	
30	-5.3		<i>Z. marina and Ulva</i>	40	3	inner edge of scour
40	-5.3		<i>Z. marina and Ulva</i>	30	14	
50	-5.3		<i>Z. marina and Ulva</i>	10	27	
					Average:	18 (less scour station)
Transect C		10 ft west of centerline of scour area				
Station (feet)	Depth MLLW	Substrate	Species	Percent Cover	Shoots per square meter	Comments
0	-5.4	Silt, sand & gravel	<i>Z. marina</i>		3	
10	-5.4		<i>Z. marina</i>		12	
20	-4.4		<i>Z. marina</i>		6	
30	-4.4		<i>Z. marina</i>		24	
40	-5.4		<i>Z. marina</i>		3	
50	-5.4		<i>Z. marina</i>		19	
					Average:	11

Transect D		5 ft west of centerline of scour area			Percent	Shoots per	
Station	Depth	Substrate	Species	Cover	square meter	Comments	
(feet)	MLLW						
0	-5.4	Silt, sand & gravel	<i>Z. marina</i>		17		
10	-5.4		<i>Z. marina</i>		14		
20	-5.4		<i>Z. marina</i>		1		
30	-5.4		<i>Z. marina</i>		17		
40	-5.4		<i>Z. marina</i>		14		
50	-5.4		<i>Z. marina</i>		2		
					Average:	11	
Transect E		Centerline of scour area			Percent	Shoots per	
Station	Depth	Substrate	Species	Cover	square meter	Comments	
(feet)	MLLW						
0	-5.5	Silt, sand & gravel	<i>Z. marina</i>		7	UTM: 487348 – 5382951	
10	-5.5				0		
20	-5.5		<i>Z. marina</i>		10		
30	-5.5		<i>Z. marina</i>		19		
40	-5.5		<i>Z. marina</i>		10		
50	-5.5		<i>Z. marina</i>		5	UTM: 487334 – 5382943	
					Average:	9	
Transect F		5 ft East of centerline of scour area			Percent	Shoots per	
Station	Depth	Substrate	Species	Cover	square meter	Comments	
(feet)	MLLW						
0	-5.5	Silt, sand & gravel	<i>Z. marina</i>		9		
10	-5.5		<i>Z. marina</i>		13		
20	-5.5				0		
30	-5.5		<i>Z. marina</i>		13		
40	-5.5		<i>Z. marina</i>		5		
50	-5.5		<i>Z. marina</i>		6		
					Average:	8	
Transect G		10 ft East of centerline of scour area			Percent	Shoots per	
Station	Depth	Substrate	Species	Cover	square meter	Comments	
(feet)	MLLW						
0	-5.5	Silt, sand & gravel	<i>Z. marina and Ulva</i>	30	7		
10	-5.5		<i>Z. marina and Ulva</i>	20	4		
20	-5.5		<i>Z. marina and Ulva</i>	10	0		
30	-5.5		<i>Z. marina and Ulva</i>	5	5		
40	-5.5		<i>Z. marina and Ulva</i>	5	0		
50	-5.5		<i>Z. marina and Ulva</i>	50	3		
					Average:	3	

Transect H		25 ft East of centerline of scour area				
Station (feet)	Depth MLLW	Substrate	Species	Percent Cover	Shoots per square meter	Comments
0	-7.2	Silt, sand & gravel	<i>Z.m. Laminaria & Ulva</i>	30	20	
10	-7.2		<i>Z.m. Laminaria & Ulva</i>	20	9	
20	-7.2		<i>Z.m. Laminaria & Ulva</i>	60	3	
30	-7.2		<i>Z.m. Laminaria & Ulva</i>	50	12	
40	-7.2		<i>Z.m. Laminaria & Ulva</i>	50	0	Corner of scour area
50	-7.2		<i>Z.m. Laminaria & Ulva</i>	70	10	
Average:					11	

Transect I		30 ft East of centerline of scour area				
Station (feet)	Depth MLLW	Substrate	Species	Percent Cover	Shoots per square meter	Comments
0	-7.5	Silt, sand & gravel	<i>Z.m. Laminaria & Ulva</i>	20	20	
10	-7.5		<i>Z.m. Laminaria & Ulva</i>	20	16	
20	-7.5		<i>Z.m. Laminaria & Ulva</i>	10	22	
30	-7.5		<i>Z.m. Laminaria & Ulva</i>	50	9	
40	-7.5		<i>Z.m. Alaria, Gracilaria</i>	40	5	
50	-7.5		<i>Z.m. Laminaria & Ulva</i>	60	7	
Average:					14	

Table 2. Estimated percentage of eelgrass density decline.

Estimated Decline	
Scour transect combined average:	8.3 shoots per square meter
Reference transect combined average:	13.8 shoots per square meter
Percent decline:	40.2 percent

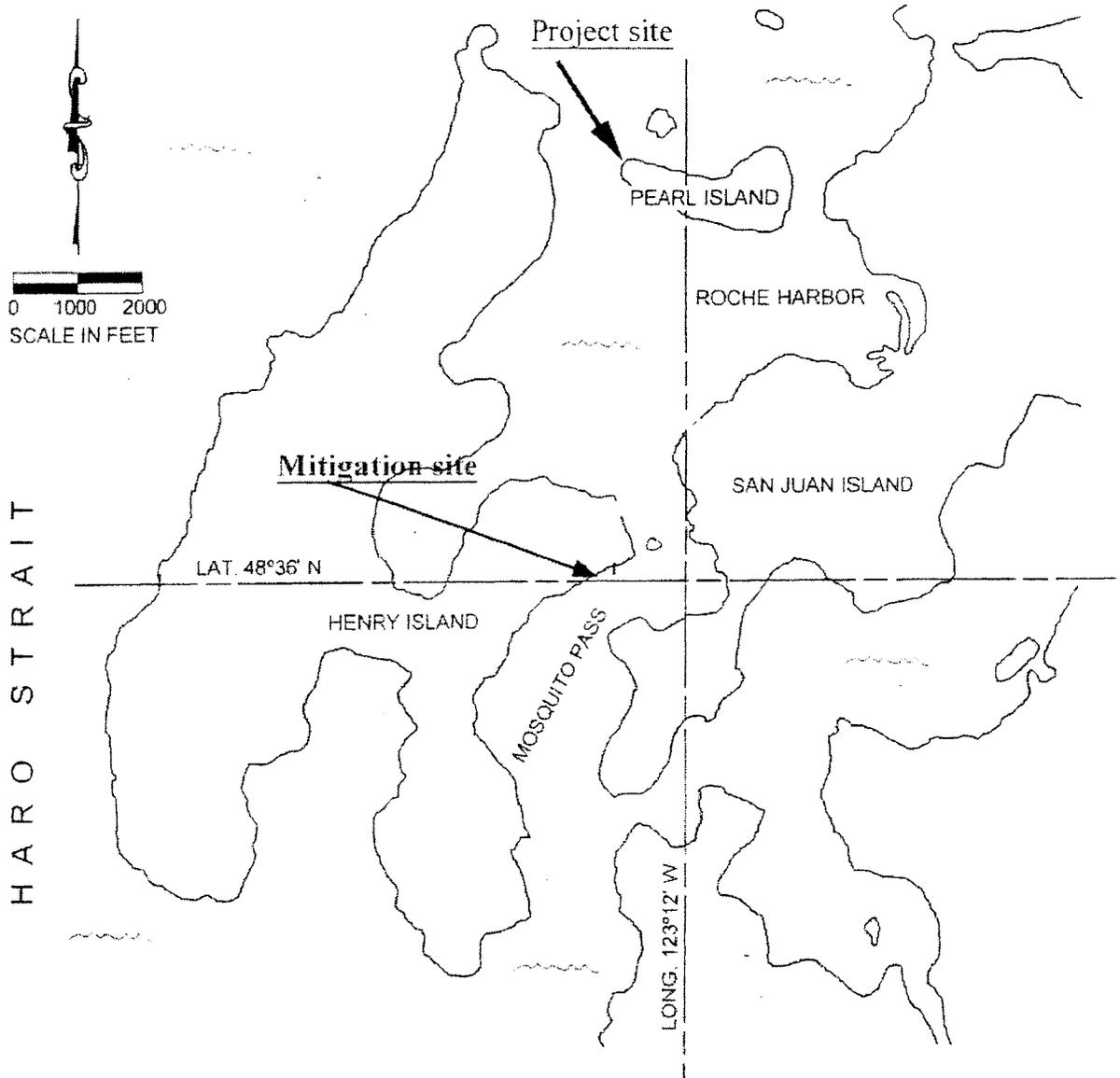


Figure 1. Vicinity map showing both the Project Site and Mitigation Site.

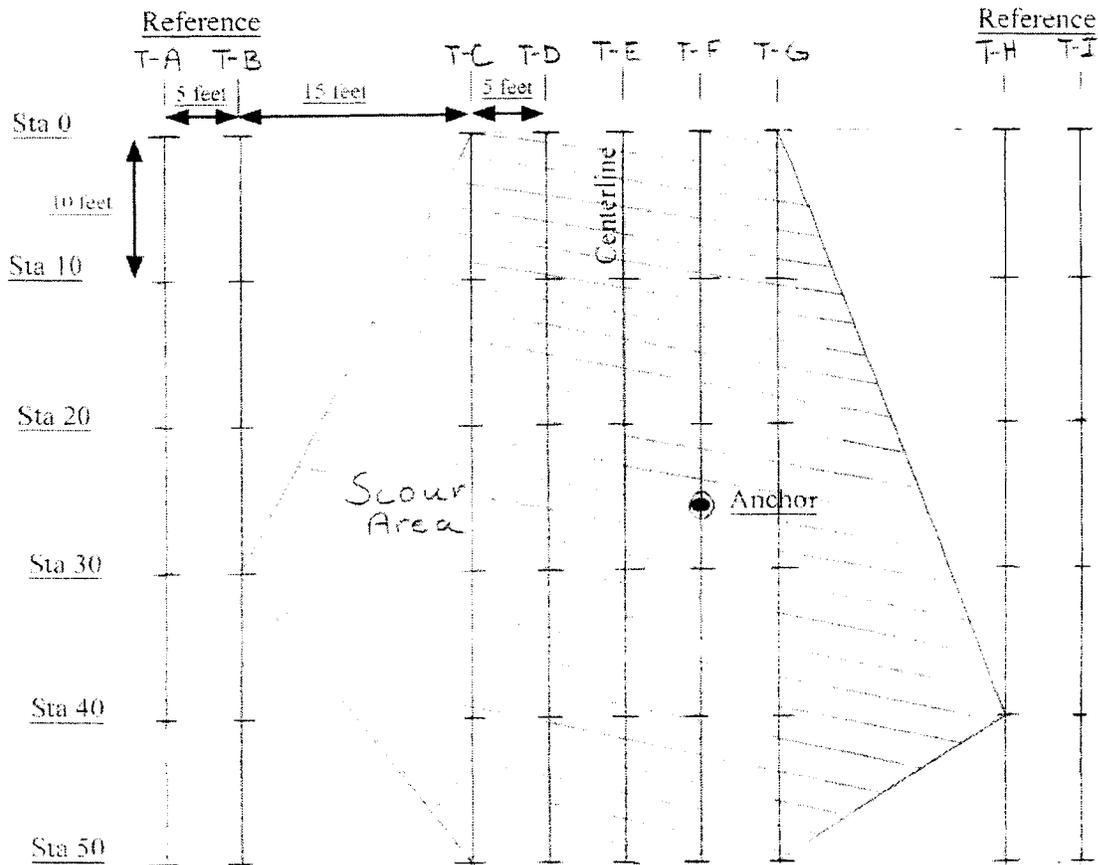


Figure 2. Schematic of mooring buoy scour area surveyed on September 21, 2007.

Table 3. Calculations for estimating the buoy scour area.

Estimated Scour Area		
Area	Dimensions	Area (square feet)
Rectangle between transects C & G	20 feet X 50 feet	1000
Triangle between transects B & C	(15 feet X 30 feet) X 0.5	225
Triangle between transects B & C	(15 feet X 20 feet) X 0.5	150
Triangle between transects G & H	(15 feet X 40 feet) X 0.5	300
Triangle between transects G & H	(15 feet X 10 feet) X 0.5	75
Total:		1,750
Decline:		0.402
Mitigation area:		703.2
Potential Impact Area:		233
Mitigation Ratio:		3:1

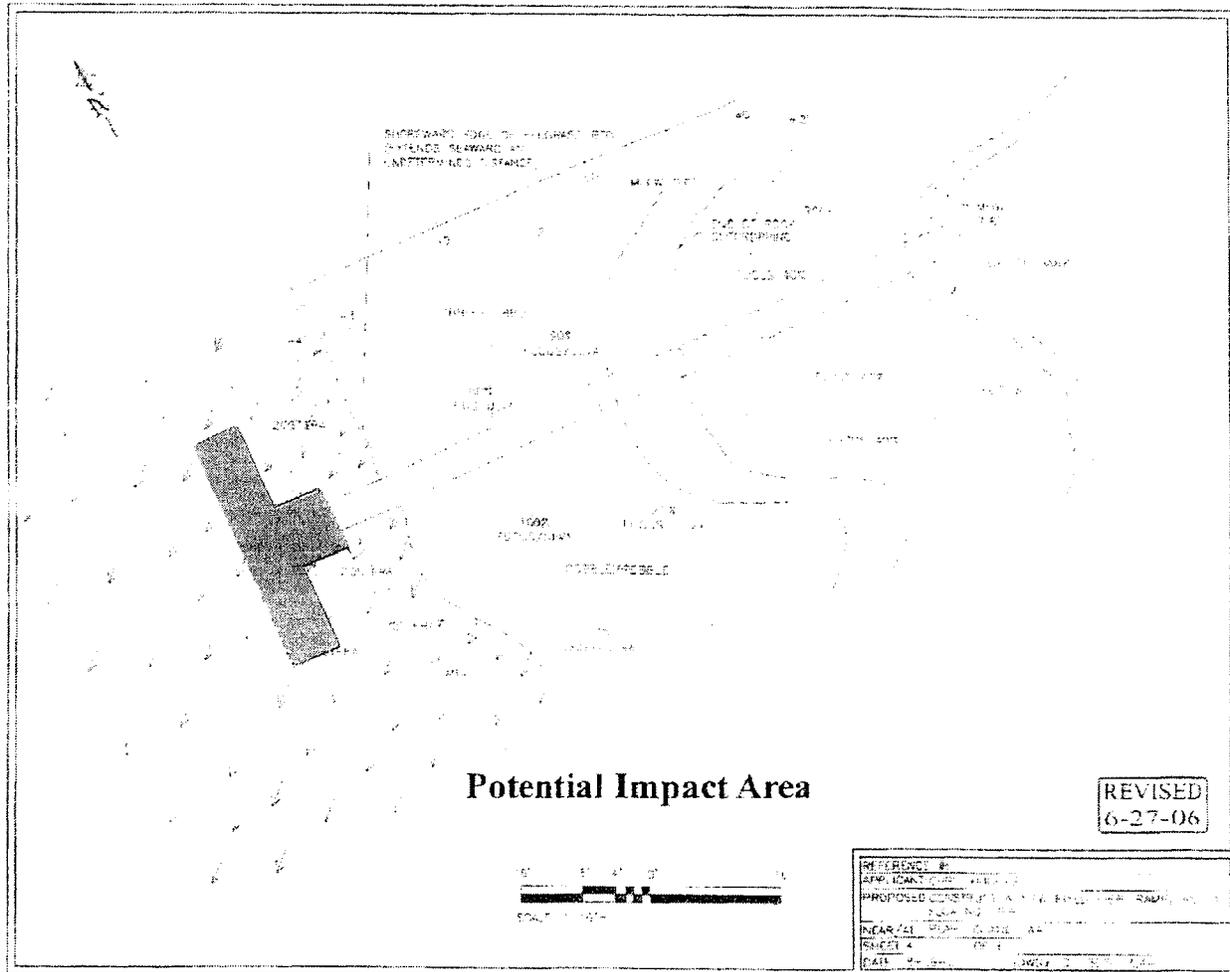


Figure 3. Area of potential impact to the existing eelgrass bed. Shaded area includes: float, landing and six 12-inch support pilings that are within the eelgrass bed.

Table 4. Calculations for estimating the potential impact area.

Structure	Area of potential Impact (square feet)
6 X 30-foot float	180
6 X 8 -foot ramp landing	48
6 12-inch steel pilings	5
Total:	233