SHORELINES HEARINGS
BOARD

FINAL FINDINGS
OF FACT

No. 185 TO ~~234~~
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BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF THE DENIAL BY ISLAND COUNTY OF SHORELINE MANAGEMENT SUBSTANTIAL DEVELOPMENT APPLICATION NO. 74-03 FROM ENGLISH BAY ENTERPRISES, LTD. ENGLISH BAY ENTERPRISES, LTD., Appellant, v. ISLAND COUNTY, Respondent, SAVE SUSAN BAY COMMITTEE, et al., Intervenors.	SHB No. 185 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter was brought before the Shorelines Hearings Board, Chris Smith, Chairman, W. A. Gissberg, Robert E. Beaty, Robert F. Hintz, and Howard Stolaas, on July 31, 1975 at the Board's office in Lacey, Washington. Hearing Examiner David Akana presided.

Appellant, English Bay Enterprises, Ltd., appeared by and through

its attorney, Lewis A. Bell; respondent, Island County, appeared through its attorney, David F. Thiele, Prosecuting Attorney; intervenors, Save Port Susan Bay Committee, et al., were represented by their attorney, Peter L. Buck. Olympia court reporter, Eugene E. Barker, recorded the proceedings.

Having read the stipulated record, having examined the exhibits, and having heard the arguments of counsel, and the Board having received exceptions to its proposed Findings, Conclusions and Order from appellant, and having considered and denied appellant's exceptions on the merits therein; and the Board having received exceptions to its Order from the intervenor, and having considered same and granted in part and denied in part said exceptions; and the Board being fully advised in the premises, makes the following

FINDINGS OF FACT

I.

Appellant is a Canadian corporation engaged in the business of clam harvesting on Camano Island. It seeks a shoreline substantial development permit to continue its operations on platted tidelands located in Livingston Bay and on a northern portion of Port Susan Bay are subject to the jurisdiction of Island County. These tidelands are approximately 5,000 acres in area and, except for several public walkways, are privately owned.

II.

On April 5, 1974, appellant filed a permit application, No. 74-03 with respondent Island County seeking approval to harvest clams from all of its leased private tidelands in Livingston and Port Susan Bays.

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Respondent's Planning Commission, after proper notice, considered appellant's application at four public hearings during which much testimony and many documents were presented both for and against the operation. The Planning Commission recommended approval of the application subject to several conditions.

III.

The Board of County Commissioners considered the matter during hearings on March 17 and 24, 1975. After consideration, the application was denied for the following reasons:

> "1. Noise impact associated with dredge,
>
> 2. The proposed dredge area is located in the Plat of Camano Blue Point Oyster Tracts, Division #1, which includes several public walkways,
>
> 3. Too many unanswered environmental questions,
>
> 4. The economic benefits to Island County are not in proportion to the potential damage to the value of recreational and residential properties in the vicinity." Letter from Sydney W. Glover to Ida Mae Wolfe, March 28, 1975.

Appellant appealed the decision to this Board alleging that its operation was not subject to the Shoreline Management Act of 1971 (SMA), chapter 90.58 RCW. If it was subject thereto, appellant alleged that its project was consistent with the SMA. Additionally, appellant alleged that it has complied with the State Environmental Policy Act (SEPA), chapter 43.21C RCW, and that, therefore, a permit should have issued.

IV.

The tidelands in Port Susan Bay, which are dry during periods of low tide, are, and have been, covered with mud. In these tidelands,

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commercially harvestable soft-shelled clams (Mya arenaria) have been discovered. Although the soft-shelled clams are not commonly marketed in Washington, there is a substantial out-of-state market for them.

V.

Appellant possesses a permit, No. 75-05, from the State Department of Fisheries which permits clam harvesting in 20 acres of tidelands located in the north half of the northwest quarter of the southwest quarter of Section 34, Township 32 north, Range 3 east of the Willamette meridian during the calendar year 1975. To comply with SEPA, the Department of Fisheries issued a negative declaration with respect to an adjacent 80-acre parcel of tideland for a predecessor permit, No. 74-12, which expired on December 31, 1974. The Department of Fisheries then concluded that "clam harvest[ing] under terms of this permit [No. 74-12] is a minor action as the effects are not significant." No negative declaration or further consideration pursuant to SEPA appears to have been made for the now existing Fisheries permit.

VI.

Appellant harvests clams using a mechanical harvester. The particular harvester used in this operation is commonly known as a Hanks type (or conveyor belt type) hydraulic clam harvester. Basically, it is a self-propelled watercraft to which is attached a steel mesh conveyor belt and a cutter head. The cutter head consists of a blade and water nozzles. During operation, the cutter head is lowered to the ocean bed. A jet of water shoots through each nozzle and scours the ocean bed. As the watercraft moves forward, the bottom material is forced over the cutter blade, scooping in the top 12 inches, onto a moving

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conveyor belt. Material of smaller dimension than the belt's mesh openings fall through the belt and back to the ocean floor. The larger material, which may include clams, is conveyed to the surface and sorted. The spoils are dumped into the water and fall to the ocean floor. The mechanical harvester requires two diesel motors, one for propulsion of the craft and the other for harvesting clams. Harvesting occurs only when there is sufficient water upon which to float the mechanical harvester.

VII.

From the above description of the harvester and the harvesting process, it is clear that the particular physical space involved is subject to a direct and violent disruption. Much of the silt which is churned up does not fall back into the trench but remains suspended in the water for a significant amount of time. In addition, space adjacent to the harvested area is subjected to the indirect disruptive effects of the operation, e.g., increases in siltation, biochemical oxygen demand (BOD), turbidity, etc.

VIII.

After an area is harvested, a trench remains visible on the ground. The depth of the trench is dependent, in part, upon the skill of the operator and the conditions at the time of harvesting, as well as upon bottom conditions. Ideally, using proper operating techniques, and assuming proper bottom conditions, the trench should be nearly refilled with the dredging spoils and should not constitute a safety hazard. However, when the harvester is improperly operated and leaves trenches several feet in depth, a safety hazard can arise.

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From its past operations, appellant has left much evidence of improper operating techniques.

IX.

Clam harvesting in the manner proposed by appellant is still experimental in nature.

X.

The Stillaguamish River is, by far, the largest contributor of silt to Port Susan Bay during periods of high water discharge. Occasional winter storms also contribute to silt transportation. The clam harvester does not contribute silt to the bay, but through its operations, redistributes silt to other areas.

During September, 1974, the Stillaguamish River was low and the water clear. Also during this time there were no storms. However, the water in the bay contained suspended silt and silt accumulations were noticed on the beaches. Appellant operated during this period and was the only known cause for the silt during the foregoing period.

XI.

Appellant operated its clam harvesters (SHE-WOLFE and/or DIANA) for short periods of time during 1972, 1973 and 1974. During this aggregate period, at least one clam harvester, besides appellant, conducted operations in the same area.

XII.

Port Susan Bay, and in particular, Juniper Beach, has naturally sandy beaches. The physical attractiveness of the area and water-oriented recreational opportunities have prompted many people to purchase waterfront property in the area. At the present time, Juniper Beach

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and the surrounding vicinity contain several hundred housing units.

Over the past two years and since mechanical harvesting commenced, property owners, represented by the intervenors herein, have noticed, with alarm, an accumulation of silt and organic materials upon what was once clean sand and gravel beaches.

The level of noise from appellant's diesel motors is of such a degree as to disturb many beach residents. This noise occurs during times of operation, seven days per week when there is sufficient water, day or night.

Appellant's operation imperils the aesthetics of the bay.

XIII.

In the 5,000 acre area for which the appellant has requested a substantial development permit, there are populations of snow geese, Canada geese, and dabbling ducks which feed on intertidal marine invertebrates and a variety of plants, including eelgrass (Zostera marina), widgeon grass (Ruppia maritima), and three-square bulrush (Scirpus americanus). Appellant asserts that it would not conduct operations in areas with marine vegetation for its own reason, i.e., that only small numbers of soft-shelled clams are found in such areas. However, appellant's application is not so limited, and we find that the plants and organisms in the entire area under consideration, could be adversely affected by the harvesting operation.

On the particular site for which appellant has a Fisheries permit, except for the soft-shelled clams, there is no aquatic plant life or substantial numbers of sedentary species that would be directly affected by the harvesting operation. Therefore, appellant's operation in that

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area would not now deprive wildlife such as waterfowl, of a source of food nor destroy an important benthic community. Appellant's operation would retard the movement of new plant life into the harvested area, however.

XIV.

The Washington Marine Atlas, Volume 1, prepared by the State Department of Natural Resources, identifies Port Susan Bay as having sea run cutthroat, waterfowl, and eelgrass beds. It is also designated as a scientific research area.

The water in Port Susan-Livingston Bay is classified as a sub-standard O_2 area, meaning that oxygen counts are below the federal standard of six parts per million. By disturbing the buried organic materials on the bottom, and thereby causing a further oxygen demand, the existing problem would be aggravated.

XV.

The Island County Master Program, so far as it can be ascertained at the time of permit application, is found in respondent's Exhibit R-1 and provides in part:

> AQUATIC ENVIRONMENT
>
> A. DEFINITION:
>
> The Aquatic Environment is the water surface together with underlying lands and the water column of all marine waters, all lakes, and all streams; including but not limited to bays, straits, harbor areas, waterways, streamways, tidelands, beds and shorelands.
>
> . . .
>
> B. ENVIRONMENT DEVELOPMENT POLICIES:
>
> . . .

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9. Encourage the development of public Clam or Oyster use areas on public second class tidelands.

10. Give priority to those marine use activities which create the least environmental impact on tidelands.

. . .

14. Aquaculture practices will be encouraged in those tidelands and beds most suitable for such use.

. . .

16. Structures and Uses on Aquatic lands will be designed to provide for safe passage of migrating animals whose life cycle is dependent on such migration.

. . .

19. Filling operations on the shorelines of the State and Aquatic designated tidelands and beds, must be accomplished in such a manner as not to create a substantial environmental impact.

20. When filling on tidelands is permitted, provisions to stabilize fill material will be required. (pp 72-73) (emphasis added).

XVI.

Respondent prepared and used a document entitled "Final Environmental Impact Statement (EIS)" in connection with its consideration of this application.

XVII.

Each of the following categories of appellant's development exceeds $1,000.00: (1) the cost of the dredging equipment; (2) the value of the clams to be harvested in the 20 acres where appellant has its Fisheries permit; and (3) the cost of operating the development.

XVIII.

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

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From these Findings the Shorelines Hearings Board comes to these

CONCLUSIONS OF LAW

I.

"Development" is described in RCW 90.58.030(3)(d):

> "Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level . . . .

These descriptive terms are not further defined in the Act and must, therefore, be used in their plain and ordinary meaning. Glaspey & Sons, Inc. v. Conrad, 83 Wn.2d 707, 711; 521 P.2d 1173 (1974). The Act must be "liberally construed to give full effect to the objectives and purposes for which it was enacted." RCW 90.58.900.

Webster's Third New International Dictionary (Unabridged, 1971) defines a "dredge" as

> "an implement or machine for scooping or digging objects or earth from the bed of a body of water; . . . an oblong iron frame with a bag net attached or a similar apparatus for gathering fish, shellfish, or natural history specimens; . . . a machine for scooping up or removing earth . . . usually by a series of buckets on an endless chain, a pump or a suction tube, or single bucket or grab at the end of an arm . . . ."

The verb to "dredge" means to "excavate with a dredge." Clam harvesting is conducted in the same manner as dredging. When the materials are sorted and clams removed, the spoils are cast overboard. This constitutes "dumping." When the spoils, or any part thereof, fall to the ocean bed, it constitutes "filling."

Clam harvesting in the manner previously described is a "development" which is subject to the requirements of the Shoreline Management

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Act.

II.

"Substantial development" is described in RCW 90.58.030(3)(e):

> "Substantial development" shall mean any development of which the total cost or fair market value exceeds one thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state . . . .

This provision must be liberally construed. RCW 90.58.900.

The record clearly indicates that clam harvesting or the cost of this operation exceeds one thousand dollars. Therefore, a permit is required.

The record also shows that the clam harvesting operation is a development which "materially interferes with the normal public use of the water or shorelines of the state." "Shorelines" include tidelands. RCW 90.58.030(2)(d). The evidence shows that the tidelands in Port Susan Bay will be highly disrupted in operational areas. Also in these and adjacent areas, water quality will be substantially degraded. The net result is the significant lowering of the recreational and aesthetic values for normal public use of both the water and the shoreline.

III.

Appellant's application for a permit pursuant to RCW 90.58.140(2)(a) was denied by respondent. Appellant appealed this decision under the provisions of RCW 90.58.180(1). Upon proper certification of the request for review, this Board obtained jurisdiction over the matter.

IV.

The Board has jurisdiction over the persons and over the subject matter of this proceeding.

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V.

RCW 90.58.140(2)(a) provides that when a master program is not yet effective, a substantial development permit shall be granted:

> [O]nly when the development proposed is consistent with: (i) The policy of RCW 90.58.020; and (ii) . . . the guidelines and regulations of the department [of Ecology]; and (iii) so far as can be ascertained, the master program being developed for the area.

VI.

RCW 90.58.020 provides in part:

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.
>
> . . . .
>
> In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, . . . and . . . industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state . . . .
>
> Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water. (Emphasis added).

The SMA does not prohibit all developments on shorelines. Rather, it mandates planning of reasonable and appropriate uses to prevent harm

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from uncoordinated and piecemeal development of the shorelines. RCW 90.58.020. In so planning, private property rights consistent with the public interest are protected.

Generally speaking, the mechanical harvesting of clams is a "reasonable and appropriate" use of the shoreline. However, to be consistent with the policy of RCW 90.58.020, this use must protect against adverse effect to the public health, the land, and its vegetation and wildlife, the water and its aquatic life, and public rights of navigation. A use which, as proposed, does not adequately protect these concerns may become consistent with the foregoing policy provided appropriate conditions and safeguards are imposed. A use which can never protect these concerns can be prohibited in favor of a consistent alternative use.

In the implementation of the policy of the Act, physical and aesthetic qualities of natural shorelines must be "preserved" unless the greater interest of the state and its people require otherwise. Port Susan Bay is a natural shoreline. However, to "preserve" does not mean banning all development. Preservation can be accomplished by preferring, i.e., limiting, only those uses which control pollution and prevent damage to the natural environment or which are dependent upon the use of the shoreline. Of those preferred uses which must, of necessity, alter the natural condition of the shoreline, priority is given to, inter alia, single family residences and industrial developments particularly dependent on the use of a shoreline.

Because of its dependency upon the shoreline, clam harvesting is a preferred use. Although it alters the natural condition of the shoreline, clam harvesting is given statutory priority to do so. However, even with this priority, this operation must also protect against those adverse

effects of concern in the policy of RCW 90.58.020.

Although the proposed clam harvesting operation is a preferred use, the effects of this use must be weighed against the need for protection and preservation of the shoreline. We conclude that appellant's proposed development does not protect against adverse effects to the land and its wildlife, the waters and its aquatic life, and the public's use of the water at the location and in the manner proposed herein. In particular, appellant's proposed development does not protect the waters of the state, but rather, is an unreasonable use thereof. We further conclude that there is no evidence or assurance that appellant's use has been or will be designed and conducted in a manner so as to minimize damage to the ecology and environment of the shoreline area, and minimize interference with the public's use of the water. Rather, the evidence shows that siltation of the water and beaches and destruction of the ecological balance has occurred and will continue to occur as a result of the operation. Substantial aesthetic and recreational values will be sacrificed with little, if any, public benefit. Although appellant has a property interest in the tidelands, it has no similar interest in the water, which belongs to the people. Preventing the degrading of water quality is a problem which appellant, who has created the problem, must solve.

Appellant has the burden of proof to show that its development is consistent with RCW 90.58.020. It has failed to so prove, or to offer a plan which would show that the foregoing concerns have been adequately addressed.

VII.

The nature of this proposed development is not fully anticipated

in the Department of Ecology guidelines. However, the guidelines do provide keys to particular concerns which various other use activities have in common with the proposed use, e.g., navigational access,[1] aesthetics,[2] priority for water-dependent industry,[3] erosion prevention,[4] water quality,[5] habitat considerations,[6] minimizing damage,[7] and siltation.[8]

The evidence shows that adverse effects of appellant's operation will not be limited to the particular harvesting site. Perhaps design modifications to the harvester, or an entirely new method of harvesting, may be necessary before appellant's operation can be permitted on a continuing basis at the proposed site. Based upon appellant's past operations and the effects thereof, and the identical nature of the proposed operation, we conclude that this development is not consistent with the Department's guidelines. Insofar as Island County's Master Program reflects the same concerns as the guidelines, the same result holds true.

VIII.

Appellant's development, as proposed, is not consistent with the development policies for the Aquatic Environment designation of Island County's Master Program.

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1. WAC 173-16-060(2)(a,c); WAC 173-16-060(14)(d).
2. WAC 173-16-060(2)(b,c).
3. WAC 173-16-060(10)(a); WAC 173-16-060(14)(d).
4. WAC 173-16-060(14)(6).
5. WAC 173-16-060(14(c,d); WAC 173-16-060(16).
6. WAC 173-16-060(14)(d); WAC 173-16-060(16)(b).
7. WAC 173-16-060(14)(a); WAC 173-16-060(16)(a).
8. WAC 173-16-060(6)(a).

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IX.

Appellant's SEPA allegation is without merit. SEPA is supplementary to, and does not replace, those statutory and regulatory obligations which are respondent's. RCW 43.21C.060.

X.

Our holding in this matter does not preclude mechanical clam harvesting on shorelines of the state, but it does require that the concerns in the SMA be properly and adequately addressed. Based upon the record before the Board, however, appellant must fail.

XI.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Shorelines Hearings Board enters this

ORDER

Island County's action denying a substantial development permit to English Bay Enterprises, Ltd. is affirmed.

DONE at Lacey, Washington, this 23d day of October, 1975.

SHORELINES HEARINGS BOARD

Chris Smith

CHRIS SMITH, Chairman

W. A. Gissberg

W. A. GISSBERG, Member

Robert F. Hintz

ROBERT F. HINTZ, Member

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BEATY, CONCURRING:

I concur with the result and the Order of the majority opinion in this instance. However, I cannot agree that the mechanical clam harvester in question was the cause of the silt on beaches that has created at least part of the problems evident in Livingston Bay. It is impossible for me to draw any conclusions from the record in this matter. The appellant has failed to meet the burden of proof required of it either in the record stipulated by the parties or before this Board. Therefore, Island County should be upheld in this matter. I agree with the majority in all other respects.

ROBERT E. BEATY, Member

STOLAAS, CONCURRING WITH BEATY:

HOWARD STOLAAS, Member

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