



SAN JUAN COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT

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STAFF REPORT TO THE HEARING EXAMINER

REPORT DATE: December 13, 2017

HEARING DATE: December 27, 2017

TO: Hearing Examiner

FROM: Erika Shook, AICP, Community Development Director 

RE: PAPL00-17-0012, Appeal of MDNS for PSJ000-17-0003
 TPN 353344008000, 34041103000, 340411005000
 57 Island Marble Lane, San Juan Island

APPELLANTS: Sundberg, Clausen, Allison, Uhlir, Scott, Harvell, Greene, Prentiss, and Morgan
 (Sundberg et al)
 Attn: Kathryn C. Loring
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 PO Box 668,
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APPLICANT: Orca Dreams LLC
 P.O. Box 928
 Friday Harbor, WA 98250

APPLICANT'S AGENT: Law Offices of Stephanie O'Day

SUBMITTED: PAPL00017-0012 was submitted on November 8, 2017

LOCATION: 57 Island Marble Lane, San Juan Island (TPN# 353344008000, 34041103000, 340411005000)

STANDING TO APPEAL: Staff analysis of standing is provided in italics. Pursuant to SJCC 18.80.140.C.3 appeals to the hearing examiner may be initiated by:

1. The applicant;

Page 1 of 6

PAPL00-17-00012 Sundberg et al Appeal of Orca Dreams PSJ000-17-0003

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December 27, 2017 Hearing

The appellant is not the applicant.

2. Any recipient of the notice of application (see SJCC 18.80.030);

Prentiss is an adjacent land owner who received notice of the application.

3. Any person who submitted written comments to the director concerning the application; and

The appellants all submitted written comments to the director concerning the application.

4. Any aggrieved person.

The appellants have standing pursuant to #3 and #4 above.

DECISION BEING APPEALED: Mitigated Determination of Non-Significance for Shoreline Substantial Development Permit PSJ000-17-0003 for a dock and desalination plant issued on October 4, 2017.

STATEMENT OF GROUNDS FOR APPEAL:

Appellants appeal adequacy of the analysis underlying the MDNS issued for the project and the conclusion that the project will not have a probable significant adverse impact on the environment:

The application materials and SEPA checklist provided here by the Applicants have not provided reasonably sufficient information necessary to evaluate the environmental impact of the proposed project to this ecologically rich area. Therefore, under SJCC 18.80.050.G.2.a and WAC 197-11-335, additional information is necessary and no threshold determination should be made until such information is available

Further, given the extensive site-specific and scientific information that was provided by many individuals who commented on the proposed project and the MDNS, there is sufficient information for Respondent to find a reasonable likelihood that the project will have a probable significant adverse impact on an element of the environment, requiring a determination of significance ("DS") and the preparation of an Environmental Impact Statement ("EIS") under SJCC 18.80.050.G.3 and WAC 197-11-330(4).

1. Analysis of Desalination and Discharge of Saline Brine.

The Applicant's 2017 Biological Assessment addresses effects of the RO desalination system's operation starting at page 34. The Assessment states that small organisms and larval stages of marine organisms will likely be impacted at the intake screen of the intake pump pumping 12,068 gallons per day, and the significance of that impacts is "not known." 2017 Biological Assessment at 34. Nonetheless, in the same paragraph, the Assessment concludes 23 without further analysis that the "significance of this impact is likely to be insignificant and undetectable." Id. No analysis is provided as to the location of the discharge of the brine, nor of the impact of attaching the discharge pipeline to the seafloor. Further, the Biological Assessment provides no data as to the estimated mixing of the brine discharge, nor specific analysis of mixing and at what distance the outflow will reach ambient salinity levels. See 2017 Biological Assessment at 35. No data is provided as to currents in the location of the dock and surrounding area.

Yet, the Assessment concludes that the subject DO desalination system "will be in an area of higher velocity currents" than the only two studies of desalination and mixing referenced. Id. Notably, the Applicant is thereby asserting that the current velocity in the pocket bay and surrounding area is higher than the velocity of current at the Cattle Point location referenced in the 2009 Strathmann study. While that seems impossible to believe, because the Applicant has not provided the data, it is not possible to

analyze. The Assessment simply concludes that the "brine return water will likely be diluted to ambient salinity levels within 2 to 3 feet from the discharge pipe." Id. Similarly, while temperature is referenced, and increased temperature of brine is noted, no specific data and analysis is provided in order to analyze potential impacts on the surrounding environment. Id.

The discharge of saline brine has a real potential to impact nearby eelgrass and macro algae, particularly given the enclosed nature of the pocket bay, and the already high level of eelgrass disease noted in this area. (See the False Bay Seagrass Report from the Summer of 2016 authored by Olivia Graham, Morgan Eisenlord, and Drew Harvell, which already has been submitted attached to comments by Drew Harvell), PhD and owner of neighboring property).

Staff response: *The Biological Assessment dated 10-24-2017 (hereinafter referred to as the "BA", Exhibit 6 to PSJ000-17-0003) by Fairbanks Environmental Services addresses the potential impact of discharge of saline brine on pages 39 – 40. The referenced study (Strathman 2009) is attached to this staff report. It includes analysis of several reverse osmosis plants in San Juan County, including analysis of existing impacts. This study includes analysis showing that mixing of currents in the San Juan Islands tend to rapidly reduce salinity. The conclusions of the Biological Assessment indicate that the location of the outfall is located where the tidal currents are relatively strong and will mix the return brine within 2 to 3 feet from the discharge diffuser pipe. The analysis also addresses pooling of saline brine indicating that the seafloor slope is sufficient that brine will not pool. San Juan County staff have recommended a condition requiring that the salinity at a distance of 3 feet from the discharge diffuser pipe be limited to no higher than 29 parts per thousand, and that the salinity at a distance of 3 feet from the discharge pipe be monitored. If salinity is higher than 29 parts per thousand at a distance of 3 feet, then the facility shall cease operation until modified to maintain salinity of 29 parts per thousand at a distance of 3 feet from the discharge pipe. Monitoring results shall be submitted to the Department of Community Development. Reference page 35 of the staff report for PSJ000-017-0003.*

2. Impacts to Eelgrass and Macro Algae.

The Applicant states in the 2017 Biological Assessment (page 11) that three "dive surveys" have been conducted to document marine vegetation. However, the first such survey was in March 2014, outside of the time period recommended by WDFW for conducting eelgrass surveys, and at a time when the dock was proposed to be located in a different location and/or a different orientation (though the materials provided are unclear). Still, the Applicant acknowledges that said survey located marine algae *Ulva*, *Laminaria*, and *Fucus* within the location under the proposed dock. Eelgrass was located "approximately" 25 feet to the south. A Preliminary Eelgrass Survey was conducted in August 2014, at which time a "dense" band of *Laminaria* and *Ulva* were observed "in the area of the proposed dock." In addition, the August 2014 preliminary survey narrative noted "patches" of eelgrass (*zostera marina*) to "the south," but the survey did not document the boundaries of that patch and the location of the dock was not overlaid. While a video survey was conducted in January 2016, that was outside of the months recommended for eelgrass surveys by WDFW because it is outside the prime growing period.

SJCC 18.35.115(8) designates "kelp and eelgrass" as fish and wildlife habitat conservation critical area in San Juan County. SJCC 18.20.110 defines "kelp" as all brown algae of the order Laminariales, generally consisting of a holdfast, a stipe and a float. Despite the acknowledged existence of these San

Juan County designated critical areas within and immediately adjacent to the proposed location of the dock and despite the Applicant acknowledging via its Biological Assessment that dock shading can adversely impact juvenile salmon that frequent the pocket beach, the application materials and SEPA Checklist do not adequately evaluate the likely impacts of shading by the dock or impacts of boats coming to and from the dock. Indeed, at page 32 of the 2017 Biological Assessment, it states simply that "impacts due to shading from the dock will be minimal." The Applicant over-simplifies this issue by relying on the grating of the dock components while ignoring the opaque float tubs, moored boats, and framing that have no light transmission.

In addition, the Applicant fails to adequately address the likely impacts of scouring caused by boating activity, particularly given the very shallow waters in this area and the rocks near the dock location. The dive surveys provided are inadequate in process/format, detail and scope and did not provide sufficient information necessary to evaluate the true impacts of the dock and related boating activity. Further, the assertion that boats will only travel in one designated "clear" channel is unlikely and impossible to enforce. The mooring of boats up to 35' guarantees that eelgrass and macroalgae beds more than 25 feet from the dock will be impacted by prop wash and maneuvering because boats must turn 180 degrees or more in a shallow area to approach and leave the dock. The False Bay Seagrass Report from the Summer of 2016 authored by Olivia Graham, Morgan Eisenlord, and Drew Harvell submitted by Drew Harvell with her comment letter, as well as her supplemental map and comment show that there is a very real possibility of impact to the eelgrass meadow immediately adjacent to the proposed dock. Given the sheltered embayment in which the proposed dock and DO are to be located, and the high levels of seagrass disease found in this same pocket bay, there is a high probability of impact on the nearby eelgrass meadow and kelp beds. DCD should require further analysis, including a complete dive survey conducted pursuant to Washington Department of Fish and Wildlife guidelines, and broad enough in scope to include the entire project and its impacts, including boat traffic, not just the footprint of the dock itself. Further, given the probable significant impacts, an EIS should be required.

Staff Response: *The biological assessment was revised (dated 10-24-2017 and submitted 12-01-2017) to include a fourth dive survey conducted according to WDFW guidelines. The 25 foot buffers from eelgrass together with the proposed operation requirements for the dock contained in the recommended conservation measures on pages 41-43 of the BA are proposed to protect eelgrass beds. Twenty-five (25) foot buffers from eelgrass beds are standard requirements for docks in San Juan County. Because this protection relies on operational standards for boating, San Juan County staff have recommended a condition requiring submittal of a monitoring and mitigation plan to Department of Community Development. The monitoring and mitigation plan must address mitigation in the event that annual monitoring demonstrates that there are impacts to eelgrass and macroalgae. Reference page 35 of the staff report for PSJ000-17-0003.*

3. Impacts on the Pocket Beach, Forage Fish, and Migrating Salmon.

The application materials and SEPA Checklist also did not adequately analyze the likely impact of the proposed dock and increased boat traffic to forage fish and migrating salmon. Significant scientific information has been provided that the dock will likely impact the nearshore feeding habitat and refuge for juvenile salmon, including threatened species Chinook salmon, provided by the pocket beach. The project site has been identified in the Salmon Recovery Strategy for San Juan Island County (WRIA2) as

High Priority Fish Use Region with Medium Probability for supporting juvenile Chinook salmon. Research in the San Juan Islands (Beamer & Fresh 2012) has identified pocket beaches, including the project location, as among the most important shoreline habitats for juvenile Chinook salmon. The shading caused by the dock will likely impact migrating salmon because of delays or disorientation and increased predation. In addition, the proposed dock is likely to cause "sediment pumping" due to its proposed location in shallow water, negatively impacting marine life. Likewise, the prop wash from the projected boat transits will further erode bottom sediments. The Biological Assessment provided by the Applicant acknowledges the potential for these impacts and wholly fails to analyze them with specificity, instead focusing on construction activities and then concluding without analysis that the project is not likely to have these adverse impacts or that impacts will be minimal.

Staff response: *The BA on pages 9, 15, and 44-49 provides an analysis of likely impacts to forage fish, migrating salmon, and the pocket beach and concludes that impacts will be minimal.*

4. Impacts to Southern Resident Killer Whales.

The proposed dock lies within the core summer feeding critical habitat designated for the Southern Resident Killer Whale (SRKW), a listed species under the Endangered Species Act. The SRKW are an iconic wildlife feature of San Juan Island and a frequent visitor to the vicinity of the proposed dock location. Boat motors and other sources of underwater noise caused by the proposed dock, including new boat transits in their critical habitat may have adverse impacts on SRKW, including changes in swimming speed, call duration, unpredictable travel paths, alteration of dive times, movement to open water, and unusual surface pattern behaviors. Because these behaviors affect SRKW feeding, a significant issue affecting their recovery, these are significant impacts to the endangered SRKW and have not been adequately addressed or mitigated. Indeed, solely the construction phase of the project has been considered rather than the continued use and operation of the dock with the associated increased boating activity noted (including whale-watching activity).

Staff response: *The BA on page 16 provides an estimate of boat traffic – average of two round trips per day in the summer- and provides an analysis of the impacts to SRKW. Proposed conservation measures would ensure that there is not a significant impact to SRKW.*

5. Visual and Aesthetic Impacts.

The application materials and SEPA Checklist did not adequately analyze the likely visual and aesthetic. The dock would extend now 260 feet from the shoreline. The 2017 SEPA Checklist at page 28 asserts that there will be "no lighting fixtures." This assertion seems very unlikely given the size of this dock and should be critically analyzed. The 2017 SEPA checklist asserts that the dock will not interfere with views from neighboring properties given the relative distances, yet that ignores that the dock itself will extend 260' into the water and towards nearby properties.

Finally, the proposed dock is especially significant because it will mar a significant natural shoreline along the west coast of San Juan Island that is presently unbroken by the presence of a dock.

Staff response: *The dock may be visible, but due to the high bank nature of the adjacent properties, it will not block views. In addition, it is proposed to have no lighting fixtures and the float will be removed*

during winter months. Both of these will mitigate aesthetic and visual impacts. San Juan County staff have recommended a condition of approval of PSJ000-17-0003 that no lighting fixtures be allowed on the dock or pier. The appellants have failed to provide either the code citation or comprehensive plan policy that they propose to be used to exercise SEPA substantive authority related to visual and aesthetic impacts.

6. Impacts to Navigation and Recreation.

The application materials and SEPA checklist fail to address the impact of the proposed dock on navigation and recreation in the area, which is a very popular area for kayaking, boating, and beach walking.

Staff response: Public access is addressed in the staff report to the Hearing Examiner on page 22 of the staff report. The pier itself is located on private tidelands, so it will not interfere with beach walking. The cove is not normally used by recreational power boaters, and does not contain a recognized navigation channel. Kayakers will have access through the area under the pier at low tide, and around the float at high tide.

7. Potential Alternatives.

Finally, and perhaps most importantly, the application and 2017 SEPA checklist fail to sufficiently address alternatives to the proposed dock and fail to demonstrate a need to moor four or more boats in this location. The application materials assert without any specific explanation that four boats are needed at all times and would need to all be moored at the same facility. Further, the information provided shows that there are some slips available given the sizes needed. For example, moorage for the Applicant's four boats would be readily available by applying to the nearby the Port of Friday Harbor.

Staff response: The staff report for PSJ000-17-0003 on page 22 addresses the needs analysis required by San Juan County code for docks.

RELIEF SOUGHT:

Due to the probable significant adverse impacts resulting from the proposed action, the UW requests that San Juan County withdraw the MDNS that is the subject of this appeal, issue a Determination of Significance, and conduct an EIS of the Project.

FINDINGS AND CONCLUSIONS:

1. The appeal is timely.
2. The appellants have standing pursuant to SJCC 18.80.140.
3. The appellants have not demonstrated that the proposal as mitigated will have a significant adverse environmental impact requiring preparation of an environmental impact statement.

ATTACHMENTS

See Exhibit List for PSJ000-17-0003