

Before Hearing Examiner
Gary N. McLean

**BEFORE THE HEARING EXAMINER
FOR SAN JUAN COUNTY**

In the Matter of two Appeals of a SEPA)
Mitigated Determination of Nonsignificance)
(MDNS) filed by)

UNIVERSITY OF WASHINGTON,)
Appellant,)
and)

KIMBAL SUNDBERG, et al.,)
Appellants,)

Regarding an application for a Shoreline)
Substantial Development Permit for a Dock)
and a Reverse Osmosis (RO) Desalination)
System along and serving waterfront property)
located southeast of the entrance to False Bay)
on the southwest shore of San Juan Island)
adjacent to Haro Strait.)

MDNS issued by the **SAN JUAN COUNTY**)
DEPARTMENT OF COMMUNITY)
DEVELOPMENT,)

Respondent,)

ORCA DREAMS, LLC (DAVE AND)
NANCY HONEYWELL),)

Applicant/Respondent)

File No. PSJ000-17-0003
(Orca Dreams, LLC Shoreline Substantial
Development Permit Application)

File No. PAPL000-17-0010
(UW Appeal of MDNS)

File No. PAPL000-17-0012
(Sundberg, et al., Appeal of MDNS)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION**

S.J.C. DEPARTMENT OF

APR 11 2018

COMMUNITY DEVELOPMENT

I. SUMMARY OF DECISION.

Based on the entire record taken as a whole, the appeals are granted. Insufficient evidence was presented to prove that applying existing laws and regulations and narrow mitigation measures would reduce impacts to an insignificant level. The Examiner is left with a definite and firm conviction that a mistake has been committed. The matter is remanded to the Department for preparation of an Environmental Impact Statement.

**DECISION, UW AND SUNDBERG, ET AL. APPEALS
OF MDNS RE: ORCA DREAMS LLC APPLICATION
FOR SHORELINE PERMIT FOR NEW DOCK AND
DESALINATION SYSTEM – PSJ000-17-0003 (SSDP);
PAPL000-17-0010 AND -0012 (APPEALS)**

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II. APPLICABLE LAW.

Jurisdiction.

Dave and Nancy Honeywell, aka Orca Dreams LLC, have submitted a Shoreline Substantial Development (SSDP) application for a joint use residential dock, a reverse osmosis (RO) residential desalination system, and a navigation buoy. The appellants, University of Washington and Sundberg et.al., separately appeal a Mitigated Determination of Non-significance (MDNS) issued by the County's Department of Community Development Director, regarding the SSDP application.

The Hearing Examiner has jurisdiction to review and issue decisions regarding shoreline substantial development permit applications pursuant to San Juan County Code Sec. 2.22.100(1) and Section 36.70.970 of the Revised Code of Washington. The Examiner is authorized to decide appeals of SEPA threshold determinations, like the challenged MDNS, under SJCC 18.80.140(B)(9), and SJCC 2.22.100(A)(6).

Standing.

There is no dispute that the appellants have standing.

Open-Record Appeal.

As provided in SJCC 18.80.140(A)(3) and (B)(9), appeals to the hearing examiner of SEPA determinations are "open-record" appeals.

Burden of Proof on Appellants, Standard of Review.

SJCC 2.22.210.H provides that "For an administrative decision to be reversed or modified, the appellant has the burden by a preponderance of the evidence to show that the legal decision criteria are erroneously applied by the decision maker".

A "clearly erroneous" standard applies when reviewing SEPA threshold determinations made by local and state governmental entities, such as the MDNS challenged in this matter. *King Cty. v. Washington State Boundary Review Bd. for King Cty.*, 122 Wn. 2d 648, 661, 860 P.2d 1024 (1993). The Hearing Examiner may reverse the challenged MDNS if, although there is evidence to support it, he is left with the definite and firm conviction that a mistake has been committed. *See Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). In reviewing a SEPA threshold determination, the Hearing Examiner must first determine whether "environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Sisley v. San Juan County*, 89

1 Wn.2d 78, 84, 569 P.2d 712 (1977) (quoting *Juanita Bay Valley Com. v. Kirkland*, 9 Wn.
2 App. 59, 73, 510 P.2d 1140 (1973)). Again, the appellants bear the burden of proof in their
3 SEPA appeals.

4 ***Challenged MDNS is entitled to substantial weight and deference.***

5 SJCC 18.80.140(H)(1)(g) expressly provides that, in any appeal of a SEPA DNS,
6 *the determination of the responsible official shall carry substantial weight*. Such deference
7 is further mandated in SJCC 18.10.030(D)(3), which explains that a *challenged*
8 *interpretation of the administrator shall be entitled to substantial weight*; as well as
9 Washington caselaw, including *Anderson v. Pierce County*, 86 Wn. App. 290
10 (1997)(holding that substantial weight is accorded to agency threshold determinations).
11 However, substantial weight, like judicial deference to agency decisions, is neither
12 unlimited nor does it approximate a rubber stamp. See *Swinomish Indian Tribal Cmty. v.*
13 *W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007);
14 and *Concerned Friends of Ferry County v. Ferry County*, 191 Wn. App. 803, 365 P.3d 207
15 (Div. II, 2015). If an environmental impact statement is required by the weight of evidence
16 and if a government agency's SEPA official does not require an environmental impact
17 statement (as it did not here), then the decision is clearly erroneous. *King County*, 122
18 Wn.2d at 667; *Norway Hill*, 87 Wn.2d at 274.

19 **III. RECORD.**

20 The Record for the matter includes all application materials, pre-hearing and post-
21 hearing briefs from the parties, and exhibits marked and numbered during the course of the
22 public hearing. Copies of all materials in the record and digital audio recordings of the pre-
23 hearing conference and the open-record hearing conducted for this appeal are maintained by
24 the Community Development Department during regular business hours.

25 All exhibits included in the Record are numbered and identified as set forth on the
26 Index marked as Exhibit A, a copy of which should be included and maintained as part of
the official record for this Decision. Copies of the expanding list were made available to
the parties throughout the course of the hearing, and the parties conferred in the post-
hearing process to review and agree upon a final index. While the applicant raised a
question about several exhibits and whether they were admitted, as noted at the hearing,
some exhibits were duplicates of materials found in parts of other exhibits, especially public
comment letters, collectively numbered as Exhibit 14, which is sub-indexed 14A through
14III. With the exception of Ex. 70, all other exhibits (numbered 1 through 77B) were
admitted, but the Examiner did not attribute much weight to any exhibit where the author or
some other qualified witness did not testify or offer themselves up for cross examination by

1 other parties on matters discussed in a particular exhibit. This Decision is fully supported
2 by credible, un rebutted evidence contained in the Record, which establishes the scope of
3 issues that were included and excluded from the analysis and environmental information
4 made available to the Examiner to address the requested shoreline permit and the connected
5 appeals of the MDNS issued for such project.

6 All witnesses who appeared at the consolidated open-record hearing offered
7 testimony under oath. Through the hearing process, Applicants Dave and Nancy
8 Honeywell, dba Orca Dreams LLC, were represented by counsel, Stephanie Johnson
9 O'Day; the Respondent, San Juan County Department of Community Development, was
10 represented by Community Development Department Director Erika Shook; Appellant
11 University of Washington was represented by counsel Ray Liaw; and the Neighbor
12 Appellants were represented by counsel, Kathryn C. Loring. During the post-hearing
13 process, Ms. Loring and her firm withdrew as counsel, and the Neighbor Appellants filed a
14 brief pro se, on their own behalf, with Mr. Sundberg as their designated contact.

15 As determined during pre-hearing discussions, the consolidated hearing process
16 involved testimony and evidence regarding the merits of the requested shoreline permit,
17 followed by testimony and evidence regarding the two appeals of the MDNS issued for the
18 proposal.

19 Because the matter originated with the applicant's request for a shoreline permit, the
20 first portion of the hearing was devoted to Applicant's counsel presenting her case in chief
21 through witness testimony and exhibits included in the record, with the County's hearing
22 representative and appellants' attorneys given wide latitude to cross-examine all witnesses
23 or move the topic onto other issues of relevance to their respective positions in this appeal.

24 Following the applicant's case presentation, the appellants were given an
25 opportunity to present their SEPA appeals and call witnesses to support their respective
26 positions in their appeals, and all witnesses were similarly subject to direct, cross-
27 examination and follow-up questions by attorneys or representatives for other parties of
28 record. Parties were permitted an opportunity to call or recall witnesses for rebuttal
29 purposes.

30 Below is a list of individuals who presented testimony under oath at the duly noticed
31 open-record hearing for this matter, held on December 28, 29 & 30, 2017:

32 *In the portion of the hearing devoted to the merits of Applicant's requested Shoreline Substantial
33 Development Permit, the following witnesses provided testimony:*

- 34 1. Erika Shook, Director of the San Juan County Department of Community Development;
- 35 2. Julie Thompson, Planner III, for the San Juan County Department of Community Development;
- 36 3. Nic Rassat, for the applicant, from San Juan Surveying;

37 **DECISION, UW AND SUNDBERG, ET AL. APPEALS**
38 **OF MDNS RE: ORCA DREAMS LLC APPLICATION**
39 **FOR SHORELINE PERMIT FOR NEW DOCK AND**
40 **DESALINATION SYSTEM – PSJ000-17-0003 (SSDP);**
41 **PAPL000-17-0010 AND -0012 (APPEALS)**

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SAN JUAN COUNTY HEARING EXAMINER

- 1 4. Francine Shaw, Applicant's Land Use Planner; and
2 5. Dave Honeywell, Applicant.

3 *The following members of the public spoke in favor of the project:*

- 4 6. Pat O'Day – spouse of the applicant's attorney; testified that he owns a dock on the north end of
5 San Juan Island, with floats that are removed in winter; spoke highly of Applicant's contractor,
6 Waterfront Construction;
7 7. Jim Skoag – caretaker in the area, friends for years with the Elford's, the former caretakers of the
8 old Mar Vista property (now owned by the applicant); he does not believe the project will have any
9 impacts, says there used to be a dock on the site, and that he has never seen a whale there;
10 8. David Wolf – Owned land on Stuart Island 38 years. Fisheries Scientist. Does not believe that the
11 proposed dock and boats will affect eelgrass, asserted that there is a long waiting list at Roche Harbor
12 Marina, can't believe that the proposed desalination system would be bad, because it's just brine;
13 9. Tom Brown – says that forage fish are actually protected by floats. Hauling water to serve a SFR
14 is tough – need 1,500-3,000 gallons of water for each unit, and it's expensive. Blamed Native
15 Americans "using nets to catch salmon in our rivers" as the big problem;
16 10. Dave Brown – fisherman, 50-year county resident, noted that people are "armchair
17 quarterbacking" this application, says the Honeywells are not the reason that fish numbers are down,
18 and that the application meets standards for approval

19 *The following members of the public spoke against the project:*

- 20 11. Janet Thomas – Testified that the west side of San Juan Island is an extremely sensitive
21 environment;
22 12. Hobbs Buchanan – generally stated that shoreline construction is bad for whales and forage fish;
23 13. Paul Harti – Marine Scientist, generally suggested that we should create larger boundaries
24 around coastal developments, and that the applicants' claims of moorage unavailability were not
25 credible;
26 14. Patricia Morse. Retired marine biologist, spoke to the uniqueness of False Bay; testified as to
whales and winds in the area; noted that on 11//14/17 there were winds of 65 mph; explained that
winds were the reason the are no docks in the area;
15 15. Val Veirs – formerly with the local Whale Museum; stands for the whales; wants to protect
16 forage fish, feeder bluffs and reduce fishing and noise; wants an EIS to be prepared; wants NOAA
17 Sec. 7 consultation;
18 16. Kyle Loring – Staff Attorney for Friends of the San Juans. Believes that are other alternatives
19 with fewer impacts, says this is not a joint use dock, the site has space for two buoys, owner
20 convenience should not be a factor, inadequate analysis of the true availability of existing moorage
21 sites around the island, notes that the boats do not even exist, so it's difficult to say space is not
22 available somewhere, cost of moorage is not an issue, referenced the Gordon case to support
23 argument that this is not a joint use dock, says that the environmental impacts of this project are not
24 consistent with SMP or SMA;
25 17. Tina Whitman – Friends of the San Juans member, nearshore habitat biologist, submitted
26 comments included as Ex. 14, says that Chinook salmon use the pocket beach to save energy,
explained that eggs are only found on shorelines for about 10 to 14 days a year, so the likelihood that
any survey would miss them when they are actually there is great, expressed concerns with potential
future armoring of the shoreline for bank stability.

1 *Witnesses called as part of the appellants' SEPA Appeal presentations:*

2 18. Chris Morgan – neighbor who lives inland 1 mile north of project site, FOSJ member.
3 Expressed concern about safety given the wind and wave action, that a torn-off dock would harm the
4 area. Noted that the west side of the island is rough for boats, and that it would be tough to dock a
5 boat on the new dock given winds and waves that happen from time to time;

6 19. Martha Scott – says that she would see the entire dock from her property, objects to development
7 on the Honeywell property, concerned about light she sees on the Honeywell property, FOSJ
8 member;

9 20. Dr. Billie Swalla – Director, UW Friday Harbor Labs. Provided credible, substantial evidence
10 regarding the marine research conducted in the False Bay Preserve area, explained her expertise in
11 the field of marine embryo research (35 years, see resume, included in Record as Ex. 27). Testified
12 that False Bay Preserve is a very significant public resource, and that it has the highest marine
13 diversity in the entire state of Washington. Explained that the proposed dock would be too close to
14 the False Bay Preserve, that oil is very bad for embryos, her written comments are in the record as
15 Ex. 14N. Provided her expert opinion, that if you add a small amount of oil and gas to the area, you
16 can kill embryos. Advocated need for dyes to be put into the water to help show what and how water
17 flows into and out of False Bay. Explained that increased boat traffic at the site will be bad for
18 marine embryos, given oil and gas leaks, even small amounts, particularly in very shallow places
19 which are more sensitive to oil, noting deeper waters allow for more dilution of substances.
20 Explained that her concerns with gas and oil flowing into False Bay are the most extreme and
21 common from the Southeast side of False Bay, i.e. where the Honeywell's new dock would be
22 located.

23 21. Julie Blakeslee – Land Use Planner for UW, has served as the UW SEPA official on projects.
24 Believes the MDNS is inappropriate, issued without adequate information. Says the record does not
25 show that alternatives like moorage somewhere else is not available to the applicants; that this is not
26 a single-user dock; that the analysis and range of potential impacts is not adequate, that the County's
review area/scope was too narrow. Credibly offered how several "practical" impacts were not
studied, including impacts on grassbeds located just over 25 feet away from the proposed dock
project, especially because of inexperienced boaters trying to operate in a difficult area, resulting in
prop wash and other adverse impacts on the area; that the sensitive aspects of the "pocket beach"
owned by the Honeywells was not adequately considered; and she emphasized how she believed that
the County should have taken comments made by NOAA expressing concerns about adverse impacts
on Orcas (the Southern Resident Killer Whales) in the area, much more seriously than they did. She
concluded that even with the revised biological assessment, intended to address some of the public
comments included in the record, she believes that information in the record is insufficient to show
that the project will result in "no net loss" to the functions and values of the affected shoreline
environment, that the record for the MDNS is incomplete for many reasons, and that several
alternatives could lessen or avoid impacts. She noted that there is insufficient information regarding
impacts caused by boats using the dock and the proposed channel, and offered that 'best practices'
should be considered, and information should be provided based on tests of boats and vessels in other
places for effects on the sea floor, noting that there are existing studies from similar areas that could
be helpful in analyzing such impacts;

22 22. Olivia Graham – Cornell University PhD student/candidate; offered extensive testimony about
23 eelgrass beds in the area, near the proposed dock, but outside the 25 foot zone surrounding the dock

1 and channel; explained her research into “Eelgrass Wasting Disease”, and its local effects;
2 Explained that pocket bays, like the Honeywell’s, have higher levels of the disease meaning that
eelgrass in a pocketbay is already at risk, which would only get worse if salinity and turbidity
increases in the area.

3 23. Dr. Catherine Drew Harvell – UW PhD, professor at Cornell University, expertise in the field of
4 health of foundation species in the world’s oceans; her resume is included in the record as Ex. 33;
5 has conducted many studies of eelgrass in the Salish Sea over the years, noted that many eelgrass
6 beds are studied in the False Bay area each year, noting 30/year for 7 years involved 210 transects,
7 meaning that somewhere around 12,000 blades of eelgrass have been looked at. She offered
8 testimony supportive of the observations provided by Ms. Graham, regarding eelgrass, pocket bays,
9 how eelgrass in such areas in more sensitive to hyper saline. Explained that she is a named-
10 appellant, that she owns a property on the shores of False Bay, but claimed that such fact does not
11 change her professional opinions. She lives at False Bay 8 months of the year, and spends October
12 and November in Ithaca, NY. She testified by telephone from Hawaii. She offered that she is a
boater herself, and that she knows the area, noting that boats will be taking all sorts of routes around
the proposed dock, causing turbidity of sediments in the affected area, cloudier water means less
light, silt would get on seagrass. She focused on adverse impacts that will result from hyper-saline
discharged into the area waters, noting that the BA does not adequately assess the effects of salinity,
because it is difficult to tell where, when and how much hyper-saline will be discharged into the area.
She is concerned that hyper-saline water will wash into False Bay and would likely stay there for an
extended period of time, which would cause adverse impacts to the marine environment. Explained
that hydrographics are needed to analyze where and how hyper-salinated pockets of water might
flow. Offered her expert opinion that restoration efforts on eelgrass beds is quite difficult, and that
dock-alternatives like anchoring and buoys would have “vastly less” impacts than a dock.

13 24. Dr. Charles Greene – PhD, professor at Cornell University, also a named-appellant, also owns
14 property along False Bay, testified by telephone from Hawaii. Offered testimony based on his
15 professional research and experiences; his full resume is included in the record as Ex 34. He focused
16 on impacts to the SRKW/Orca whales in the area; expressed concerns with indirect impacts on
17 whales; that new dock could serve as precedent for more docks on the west side of SJ Island which is
18 the core the SRKW feed ground; explained that the proposed dock would increase the probability of
19 disturbing Orcas feeding around False Bay, both short-term and cumulatively, because feeding in the
20 area could be reduced or abandoned. Directed attention to an independently submitted letter from
21 NOAA, Ex. 14AA, which expresses the same concerns about impacts on the SRKW population
22 known to feed in the False Bay area in the morning and evening, because it is now quiet at such
23 times with no boats – whalewatchers and other recreational boats tend to show up mid day, because
24 they must travel to/from marinas or locations miles away from False Bay. Dr. Green explained that
there is a high probability that whales will be impacted by the Honeywell’s proposed dock, due to
boat noise among other things. He has a serious concern that a storm will damage the proposed
dock, causing a fuel spill from boats tied off on the dock. He explained that there is an increased
probability that the new dock will result in an oil spill and cause adverse impacts in the False Bay
Preserve, noting that oil and gas are the most acutely-toxic materials that could be poured into local
waters, attaching to things, flowing into False Bay. He testified that a “Dispersal Study” would be a
very minimal effort to assess fuel-spill-related impacts in the area. He disagrees with the applicant’s
consultant where he suggests that rocks located near the dock will serve to reduce boat noise that
might carry out where whales are known to visit, because “sound is omni-directional” and the site of
the proposed dock is “one of the most exposed sites on San Juan Island”. He concluded by
explaining how the probability of dock-destruction can be studied, and that it should be analyzed,
given that extreme wind and weather events have been shown to occur in the area even during the

“Summer” months, when the dock floats are to be placed in the water.

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25. Kimball Sundberg – one of the “Neighbor-Appellants, now their designated contact; offered credible and substantial evidence regarding the likelihood that winds and waves will pose problems for the proposed new dock and boats trying to use the dock when “gale-force” (35+) winds from the west/southwest are known to hit the area; generated exhibits derived from NOAA data showing that gale force winds hit the area at least once from April-October (Ex. 58), and they can happen in any month. He submitted a video taken in February of 2016, showing the pocket beach/bay with many logs floating and crashing around in the open water, noting that such logs could poke a hole in any fuel tanks on a boat that might encounter such conditions. He offered exhibits illustrating how a boat could ground and move up and down while tied to the dock, and how the problem would be greater when the tide is low and waves are high. He questioned the safety of operating a 35 foot boat in the area, given submerged rocks and other hazards reflected on maps. He explained how any boat trying to use the proposed dock would have to maneuver, and how winds or waves would likely push a boat beyond the 25 foot zone studied in the applicant’s materials, into portions of eelgrass beds located in the False Bay Preserve just north/northwest of the proposed dock. He explained that all boats require an area at least as long as their length to perform a 180° turn, which would be needed to enter via the specially designated “safe channel” and then tie-off such boat onto the new dock, facing the west. This area could be much greater, maybe 2-3 times the boat length, depending on wind conditions, currents, waves, and operator skill.

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26. Dr. Diana Padilla – focused her testimony on her professional research in the False Bay area, and the adverse impacts that would result from hyper-saline discharges that rest on the bottom, or wash into False Bay without mixing or flushing away before damage will occur. She noted that the BA and Staff analysis fails to analyze the “acute” impacts associated with hyper-saline discharges, including the instantaneous effects on organisms exposed to hyper-saline. She described an “orange” study that was performed around False Bay in or about 1993, where real oranges (of the citrus fruit kind) were numbered and released into the False Bay area, and tracked to see where they went or where they stayed. She explained that most oranges stayed in the bay, and that only oranges that were tossed out into the open water currents went away. Based on her experience in the area, she explained that effluent released into shallow water “is not going anywhere” for an extended period of time, stating that the current reports for the project proposal failed to present a complete ecological picture, and inadequate due-diligence to assess the bio-diversity in the area.

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27. Gretchen Allison – one of the named Neighbor Appellants, expressed her general concerns regarding the project.

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Witnesses called to respond to appeal testimony:

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28. Julie Thompson – noted that opposition seems to be the same comments about eelgrass whenever docks are opposed in the county, nothing new; and that she has not heard of any adverse impacts caused by existing desalination systems around San Juan County. Confirmed that she relied mostly on applicant’s regulatory analysis and conditions proposed in the BA and revised BA. There were no 3rd party consultant reviews.

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29. Erika Shook – explained that County codes do not prohibit docks in the Honeywell’s designated shoreline area (RRF); that desalination systems are now allowed for most new developments in the County; that concerns about dilution can be adequately addressed via monitoring, which is a recommended condition of approval, noting that county codes allow monitoring as a way to provide mitigation for projects; stated that she believes the spill prevention plan included in the BA is

1 sufficient to address Dr. Green’s concerns about “Low-Probability, but High Consequence” impacts
2 that would result from boat destruction between April and October, when the application proposed to
3 have the dock floats and boats out in the water.

4 30. Francine Shaw – summarized Exhibits 10 and 11, the applicant’s written responses to both
5 SEPA appeals; showed how most neighbor-appellants are located far away from the proposed dock,
6 so they won’t see the dock, or it will just be very small part of their view from such a distant site.
7 She summarized copies of deeds in the record, trying to clarify what records show for relevant
8 property boundaries.

9 31. Mr. Honeywell – the applicant; in response to appeal testimony, he stated that he is a “by the
10 book” guy, and that he is willing to comply with all recommended monitoring and potential
11 replanting requirements associated with his proposal. In response to what he heard, he explained that
12 he would accept revisions to the conditions of approval that would: require removal of dock-floats
13 and all boats before November of each year (see proposed condition 15); and limit the size of power
14 boats to no more than 30-feet in length, instead of 35-feet. He explained how he believes that
15 physical features shown in Ms. Scott’s photo would make the proposed dock not-viewable.

16 32. Chris Fairbanks – Applicant’s Marine Biologist and author of the two Biological Assessment
17 reports that appear in the record as Exhibits 6 and 8. Explained his process, studies, dive
18 observations, and other work done to generate the BA, and the revised BA intended to address
19 written comments regarding the proposal. Concluded that he heard nothing that would change his
20 revised report conclusions. Confirmed that he did not study or analyze potential impacts upon the
21 False Bay Preserve, and that the BA primarily focused on the project site itself, and 25 feet around
22 the dock.

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25 As noted during the public hearing, the Examiner conducted a site visit to the
26 Honeywell property to prepare for another appeal not included in this matter. During the
site visit the Examiner was able to walk over large logs lying on the sandy beach area
where the proposed dock would be attached, saw the remnants of a wooden platform of
some sort (that appeared to be worn-out, and abandoned in place), and was able to observe
conditions along the shoreline area, and gain an appreciation for rocks out in the water, and
the location of the small island that lies in front of the Honeywell’s beach.

18 Upon consideration of all the evidence, testimony, codes, policies, regulations and
19 other information contained in the file, including without limitation the summaries of
20 testimony and evidence, legal authority and arguments presented in the post-hearing briefs,
21 the undersigned Examiner issues the following Findings, Conclusions, and Decision. As
22 noted in another recent Decision involving some of the same participants on another large
23 appeal hearing process that occurred in the same time period, each matter requires sufficient
24 time for analysis and fair determinations regarding complex issues and voluminous records
25 presented, as this is the final decision of the County regarding the challenged MDNS and
26 requested shoreline permit.

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IV. FINDINGS OF FACT.

1. Any statements of fact, assessments of credibility, or determinations on the weight of evidence, found in any other section of this Decision that are deemed to be findings of fact are hereby incorporated by this reference and adopted as Findings of Fact supporting this Decision. The use of captions is for convenience of the reader, and should not be construed to limit or modify the application of a particular fact to some other topic or issue addressed elsewhere in this or any other portion of this Decision.

Project Description and Application Process.

2. The Staff Report generally summarizes the three main elements the proposal as follows:

A. New Dock: The applicant, Orca Dreams LLC is proposing to place a four-slip dock to serve their three waterfront parcels (353344008, 340433003 and 340411005) and five existing single-family residences. At the hearing, following extensive testimony from appellants and their witnesses, the applicant agreed to limit the number of power-boats using the new dock to no more than two, both of which would be no more than 30 feet in length. *Testimony of Mr. Honeywell.*

B. Navigation Buoy: The applicants are also proposing to install a navigation buoy to mark a rock outcropping located approximately 95 feet seaward of the seaward end of the proposed dock. The buoy is proposed as a measure to help boaters avoid rocks that pose a hazard to boat traffic in the pocket cove area where the dock is proposed.

C. Reverse Osmosis Desalination System: The applicants are also proposing to install a reverse osmosis desalination system capable of providing potable water to six single-family residences, to supplement water supplied by a well, which would otherwise have to come from "hailed water" service.

3. Revised site plans and maps for the entire proposal are included in the Record, marked as Exhibit 5.

4. Details for the proposed new dock are as follows:

A. The proposed four-slip dock would consist of:

- A new 6'-9" X 2' concrete abutment (13.5 sq. ft.) landward of the ordinary high water mark (OHWM) which supports an;
- Existing 10'-6" X 6' wooden pier head shore mount (63 sq. ft.) which remains from the old Mar Vista Resort dock;
- Four fixed 6' X 36' long pier sections totaling 144 feet in length (864 sq. ft. cumulatively) connecting with
- A 4' X 60' long fully grated ramp (240 sq. ft.) attached to the seaward end of the pier and connecting to
- An 8' X 60' long (480 sq. ft.) moorage float with float anchors attaching the seaward end of the

float to the seafloor to keep the float steady;

• Twelve 10" diameter galvanized steel piles (9.42 sq. ft.) (Ex. 5)

B. The total area of the pier, ramp and float will be 1,565 sq. ft. (excluding the 19 sq. ft. ramp-float overlap area, the 6' - 9" concrete abutment and the existing 63 sq. ft. wooden pier shore mount). The total length of the dock will be approximately 260 feet.

C. All decking on the fixed pier, ramp and float will be constructed with what the applicant calls 'state-of-the-art' "Sun Walk" light penetrating grating with 46% open area that allows 69.9% of available light to penetrate to 18" below each panel and 86.2% of available light measured 60" below the panel.

D. The fixed pier will be elevated approximately 5 feet above the beach at the landward end and 17 feet above the seafloor at the waterward end. Eight 10" diameter galvanized steel piles will support the fixed pier.

E. The ramp will be welded aluminum with fiberglass grated decking and will span approximately 60 feet between the fixed pier and the float. Functional grating of the ramp is 96.5%.

F. The float will be constructed with an ACZA treated wood frame with "Sun Walk" molded plastic grated decking and plastic encapsulated, foam-filled float tubs. Four epoxy guide piles and two anchors with elastic cords will hold the float in place. These anchors will be either auger or duckbill type earth anchors.

G. Water and electrical lines would be extended to the dock.

5. Details regarding the proposed Navigation Buoy are as follows:

A. The navigation buoy is proposed to mark a rock outcropping that is located about 95' seaward off the seaward end of the proposed joint-use dock. The rock outcropping is exposed during most tidal elevations but is submerged during high tides which creates a boating hazard to the users of the proposed dock. (Ex. 5)

B. The buoy will consist of a 36" diameter float with mooring ring, attached to a six foot length of chain, and an undetermined length of 1" braided rope (the length will be determined at the time of construction depending on water depth at high tide) and 8" diameter non-compressible mid-line float and helix anchor. (Ex. 6)

6. Details describing the proposed Reverse Osmosis Desalination System are as follows:

A. Orca Dreams also proposes to construct a reverse osmosis (RO) seawater desalination system sized to augment drinking water obtained from Well #1 to serve a total of six residences.

B. The Reverse Osmosis (RO) desalination system will be located on the upland of the Orca Dreams LLC property to serve the three parcels previously listed with only the shore mount valve vault and utility lines (seawater intake, brine discharge and electrical conduit) located within the shoreline jurisdictional area.

1 C. Based on the State Department of Health's requirements, the maximum system demand for
2 six residences, including irrigation around the main house existing on TPN 353344008, will be
3 about 2,310 gallons of water per day. The system will be capable of producing about 3,000
4 gallons of fresh water per day. The current well serving the property is capable of producing 1.1
5 gpm or 1,584 gallons of water per day.

6 D. The reverse osmosis seawater desalination (RO) system is capable of drawing 12,068 gallons
7 of seawater per day from Haro Strait. The seawater will be pumped about 1,030 feet to a
8 treatment room that will be installed within an existing barn located on the northeasterly corner
9 of the property. The seawater will be treated and the resulting product (fresh) water will be
10 pumped about 360 feet to the existing 40,000 gallon concrete storage tank where it will be
11 available for distribution in the water system. **At full capacity, 9,000 gallons of brine water**
12 **will be conveyed back to the shoreline via a dedicated pipe.** The brine will pass through a
13 diffuser before being released into Haro Strait.

14 E. If construction of the dock is authorized and all permits are issued at the same time as the RO
15 desalination system, the applicants would prefer the two projects to be integrated with
16 construction being completed at the same time. On-site construction will consist of driving or
17 drilling the pump and diffuser support piles. Two 6" steel piles will be driven with a vibratory
18 hammer or, where bedrock is encountered, the pilings will be set in drilled holes. The pump
19 support piling will be located at the -7 tidal elevation and the saltwater (brine) diffuser piling
20 will be located at about the -5 tidal elevation, both within the footprint of the proposed joint-use
21 community dock. Once the piles are installed, the contractor will install the pump and diffuser
22 assemblies on the pilings. (The configuration of seawater intake and brine return pipes, and
23 electrical conduit is illustrated on Sheets 4 and 5 of the permit drawings. (Ex. 5) Seawater
24 intake and brine discharge pipes, and electrical conduit will then be connected to the underside
25 of the fixed pier from the head of the pier to the seaward end of the pier. From there, the pipes
26 and conduit will extend to the seafloor on a pier support piling at approximately -3 feet MLLW.
The saltwater (brine) return line will extend about 56-feet seaward to the diffuser support piling
at the -5 tidal elevation and the seawater intake line will then extend about 112-feet seaward
and connected to the pump support piling -7 tidal. The pipelines will then be secured to the
seafloor with earth anchors set 10' on-center. The work will be completed from the deck of a
small boat and/or by divers where appropriate. The 2.5' X 3' pipe trench will be excavated with
a small track hoe when the tide is low so that digging and filling of the trench between MLLW
and MHHW will be completed in one tidal cycle.

F. If the joint-use dock application is not approved or if it is appealed and the desalination
system is permitted separately, then on-site construction will consist of driving or drilling the
pump and diffuser support piles. Two steel piles will be driven with a vibratory hammer or
where bedrock is encountered, the pilings will be set in drilled holes. The pump support piling
will be located at the -7 tidal elevation and the saltwater (brine) diffuser piling will be located at
about the -5 tidal elevation. Once the piles are installed the contractor will install the pump and
diffuser assemblies on the pilings and install the seawater supply pipe, saltwater return pipe and
electrical power conduit on the seafloor extending about 160 feet landward from the
pump/diffuser assembly support pilings then be buried below the seafloor for the remaining 115
feet to the valve vault on the shore. The pipeline will be secured with earth anchors set 10' on-
center where it is exposed above the seafloor. The work will be completed from the deck of a
small boat and/or by divers where appropriate. The near shore (and upland) pipe trench will be
excavated with a small track hoe when the tide is low so that digging and filling of the trench
between MLLW and MHHW will be completed in one tidal cycle.

1 7. The applicant filed its pending application for a Shoreline Substantial Development
2 Permit on or about March 3, 2017, and the County deemed the application materials
3 complete for purposes of vesting a commencement of review on or about May 19, 2017.
Staff Report, page 6.

4 8. The applicant's shoreline permit has been assigned File No. PSJ000-17-003.

5 9. There is no dispute that public notice regarding the application was published,
6 mailed, and posted in accord with applicable regulations, in September and October of
7 2017. *Staff Report, page 7.*

8 10. Following notice of the application, the County received about sixty written
9 comments, some with supporting materials attached, including written comments from
10 several government agencies. Most written comments opposed the new dock for various
11 reasons. *Staff Report, page 9.* Copies of all written comments are included as part of the
12 record, with most, if not all, included as part of Exhibit 14. Several items included as part
13 of Exhibit 14 reappear as separately numbered exhibits, based on presentations made at the
14 public hearing.

15 11. Among the written comments were detailed letters from the University of
16 Washington, the Department of Ecology, the Washington Department of Fish and Wildlife,
17 and many of the "Neighbor Appellants".

18 12. The project now under review is for a dock that would serve just four boats. Several
19 years ago, the same applicant requested approval for a six-boat dock on the same site, under
20 File No. PSJ000-14-0008. At that time, the County had issued an initial MDNS for the
21 proposed six-boat dock, which was withdrawn in October of 2015, based on numerous
22 public comments that raised issues regarding probable significant environmental impacts,
23 including comments from WDFW regarding potential impacts on eelgrass habitat, concerns
24 about long-term impacts of increased boat traffic at the proposed site, and comments by
25 UW Friday Harbor Labs listing several potential adverse impacts, including harm to
26 eelgrass, kelp, the pocket beach, and the marina reserve (False Bay). (*See Ex. 31, Oct. 30,
2015 letter from the then-Director of the San Juan County Department of Community
Development to Applicant's attorney, Ms. O'Day, Re: Orca Dreams Dock MDNS
withdrawal*). Among the comments made by county staff when they withdrew the previous
MDNS, was the following observation, which is still applicable to the proposed new four-
boat dock:

*"While every effort will be made to prevent petroleum product spills if the
dock gets built, there has been no study of dispersal patterns into False Bay
should accidental spills occur. Petroleum products would be carried into*

1 *False Bay on an incoming tide, but may not be completely removed on the*
2 *outgoing tide. A study to understand that pattern should be undertaken.”*
3 *(Ex. 31).*

4 13. In this new application, the applicant made a thorough and good-faith effort to
5 address many of the concerns raised with their previous, six-boat dock proposal. The
6 applicant engaged the services of Mr. Chris Fairbanks, a Marine Biologist, with Fairbanks
7 Environmental Services, who undertook an extensive analysis of many aspects regarding
8 the pending proposal, copies of which are included in the application materials and the
9 Record for this matter. The Fairbanks' reports are frequently referenced in this Record as
10 the initial Biological Assessment (BA), from February of 2017; and the Revised BA, from
11 October of 2017, included in the Record as Exhibits 8 and 6 respectively.

12 14. There is no dispute that the pending application materials, including both versions
13 of Mr. Fairbanks' Biological Assessment reports, did not include a dispersal study, or
14 something similar, to analyze the dispersal patterns in either the pocket cove where the new
15 dock and desalination system outfall are proposed, or to analyze the dispersal patterns for
16 water moving from the project site to and from the False Bay Preserve.

17 15. After considering the applicant's Environmental Checklist, which relied upon the
18 initial BA by Mr. Fairbanks, and some other relevant information, the County's SEPA
19 responsible official issued a mitigated determination of non-significance (MDNS) for the
20 pending proposal on October 4, 2017. (Ex. 4). There is no dispute that the University of
21 Washington and the Neighbor Appellants both submitted timely written appeals of the
22 MDNS, which were then made part of the consolidated hearing process for the requested
23 shoreline permit.

24 16. On or about December 13, the Department issued its Staff Report to the Hearing
25 Examiner, recommending approval of all elements of the Project, subject to conditions.
26 The Staff Recommendation, with its 24 proposed conditions and sub-parts, is provided
below:

STAFF RECOMMENDATION

Staff recommends approval of the proposed community dock, navigation buoy, and reverse osmosis desalination system because it is consistent with the policies and regulations of the Shoreline Master Program in Chapter 18.50 SJCC and the applicable requirements of the UDC, provided the following conditions are met:

1. Eelgrass and macroalgae shall be monitored in years 1, 3 and 5. Applicant shall submit an annual monitoring and mitigation plan to the Department of Community Development. The monitoring should be conducted via a dive survey meeting WDFW guidelines. In the event that annual monitoring demonstrates loss of eelgrass beds surveyed as compared to the

1 conditions surveyed in the Biological Assessment (Exhibit 6), mitigation shall be proposed
2 and implemented pursuant to the requirements of SJCC 18.35040.

- 3
- 4 2. Salinity of brine discharged from the RO desalination system shall not exceed 29 parts per
5 thousand at a distance of three (3) feet from the discharge diffuser pipe. The salinity at a
6 distance of three (3) feet from the discharge pipe shall be monitored by a qualified
7 professional during a neap tide and during a tidal cycle with a minus tide. If salinity is
8 measured higher than 29 parts per thousand at a distance of three (3) feet at any time
9 during monitoring, then the facility shall cease operation until modified to maintain the
10 required salinity levels. Monitoring results shall be submitted to the Department of
11 Community Development. Monitoring shall occur within the first 6 months of operation.
- 12 3. To minimize aesthetic impacts and impacts to fish and wildlife, no lighting fixtures are
13 allowed on the dock.
- 14 4. The dock is a private residential joint-use dock for the benefit of parcel numbers
15 353344008, 340433003 and 340411005. The applicants shall submit a joint use dock
16 agreement to the Department of Community Development for review and approval prior to
17 recording. No commercial use of the dock is allowed.
- 18 5. Future shoreline stabilization, defense works and flood hazard protection are not allowed to
19 protect any portion of the dock or desalination system.
- 20 6. Abandoned or unsafe docks and piers shall be removed or repaired promptly by the owner.
21 Where any such structure constitutes a hazard to the public, the County may, following
22 notice to the owner, abate the structure if the owner fails to do so within a reasonable time
23 and may impose a lien on the related shoreline property in an amount equal to the cost of
24 the abatement.
- 25 7. To ensure that chemicals do not enter the water, RO membranes shall not be cleaned on
26 site. They shall be replaced or sent to off-site to specialized membrane cleaning shops
8. The Conservation Measures listed in the *Orca Dreams Biological Assessment*, prepared by
Fairbanks Environmental Services, dated October 24, 2017, Exhibit 6, shall be implemented
and include:
- 1) Timing limitations:
 - a. In-water work shall only be allowed from September 1 through March 1 for the protection
of salmon and bull trout.
 - b. Work below the ordinary high water line shall not occur from March 2 through August 31 of
any year for the protection of migrating juvenile salmonids.
 - 2) A qualified diver shall mark the margins of the eelgrass beds to ensure that the dock is
positioned with a minimum 25-foot buffer from the eelgrass beds.
 - 3) Pile removal shall follow the EPA Best Management Practices for Pile Removal & Disposal
(EPA 2007).
 - 4) A rubber cushion shall be placed between the vibratory pile driver and the pile to reduce the
generation of both airborne and underwater noise.
 - 5) A collar shall be placed around existing creosote-treated piling prior to removal to capture
sediment and minimize any increase of turbidity associated with pile removal.
 - 6) Observers qualified in identification of marine mammals and seabirds shall be on site during
all pile removal, driving, and drilling operations to watch for presence or absence of killer

whales, other marine mammals, and marbled murrelet within the 1.34-mile action area. During vibratory pile removal and driving, one land-based biologist shall monitor the area from the terminal work site, and one boat with a qualified PSO shall navigate along the boundary of the action area in a semicircular path. A 30-minute preconstruction marine mammal monitoring period shall be required before the first pile driving, pile removal, or drilling activity of the day. A 30-minute post-construction marine mammal monitoring period shall be required after the last pile driving, pile removal, or drilling activity of the day. If the construction personnel take a break between subsequent pile driving, pile removal, or drilling activities for more than 30 minutes, then additional pre-construction marine mammal monitoring shall be required before the next start-up of pile driving, pile removal, or drilling activities. If marine mammals are discovered near or within the action area, observers shall advise operators of their presence in order to abide by the shutdown procedure listed below. All presence/absence of marine mammals will be recorded and reported.

Pre-Construction Procedures:

- a. One observer shall be stationed at the top of the bluff at the promontory just south of the project site.
- b. Two additional observers shall be stationed in a boat and will be cruising in Haro Strait along the boundary of the 1.34-mile action area, or the 0.40-mile monitoring area if drilling operations are occurring.
- c. Observers shall communicate with the contractor with both cellular telephones and VHF radios. Communication check will occur daily.

Shutdown Procedures:

- a. If a killer whale or large whale is observed approaching or within the 1.34-mile action area, all pile driving or pile removal activities shall stop.
 - b. If drilling operations are occurring, if a killer whale or large whale is observed approaching or within the 0.40-mile monitoring zone, drilling operations shall stop.
 - c. If a delay, power down, or shutdown occurs due to southern resident killer whale/s approaching or entering the 1.34-mile action area or 0.40-mile monitoring area for drilling, activities shall not resume until the SRKW (1) is observed to have left the action area or monitoring zone or (2) has not been seen or otherwise detected within the area for 30 minutes.
9. Excavation in the intertidal zone shall be completed 'in the dry' during low-tide events and when the work area is exposed. A small track hoe will be used to dig a trench for placement of pipes and electrical conduit between the valve vault and MLLW. The trench shall be filled before being inundated by the rising tides.
10. The following BMPs described in the Stormwater Management Manual for Western Washington Volume II; construction Stormwater Pollution Prevention (Ecology 2014) shall be followed to minimize the amount of fine sediment from entering marine water due to disturbance of soil in the RO desalination system work corridor.
- a. BMP C101: Preserve Natural Vegetation
 - b. BMP C153: Material Delivery
 - c. BMP C230: Straw Bale Barrier
 - d. BMP C233: Silt Fence
 - e. BMP C235: Straw Wattles
11. The contractor shall have a prepared Spill Control and Countermeasure Plan (SCC Plan) that addresses specific actions to prevent petroleum products from being discharged into

1 surface waters. Biodegradable hydraulic fluid will be used in equipment operating
2 waterward of the OHWM. The contractor shall also have oil-absorbent materials on site to
3 be used in the event of a petroleum product spill and measures to avoid petroleum products
4 or other deleterious materials from entering surface waters shall be taken.

- 5
- 6 12. Eelgrass and macroalgae shall not be adversely impacted due to any project activities:
- 7 a. The construction barge shall not be allowed to ground in the Project area.
 - 8 b. Propwash shall not be directed toward eelgrass beds that are mapped near the Project area.
 - 9 c. Barge anchors and cables will not be placed in the eelgrass bed that is mapped to the south
10 of the dock alignment.
- 11 13. All construction materials shall be removed from the work site and natural material shall be
12 returned to their original position at the end of construction.
- 13 14. Petroleum products shall not be transferred on or near the joint-use dock. Fuel and
14 lubricating oil shall be purchased and transferred at licensed fuel stations.
- 15 15. The float and ramp shall be removed from the site on or near November 1 and reinstalled on
16 or near May 1.
- 17 16. A private navigation buoy shall be installed to mark the location of rocks that are seaward of
18 the proposed float.
- 19 17. Boat operators shall use the clear channel along the southern approach to the proposed
20 dock to prevent collision with submerged rocks and avoid impacts to the False Bay Reserve.
- 21 18. The "Danger Rocks" buoy shall not interfere with navigation and shall be visible in daylight
22 100 yards away. It shall have reflectors for night visibility.
- 23 19. The BMPs in the Orca Dreams Spill Containment, Prevention, and Control Plan shall be
24 strictly followed.
- 25 20. If a leak or spill should occur, all in-water work shall cease until the source of the leak is
26 identified and corrected and the contaminants have been removed from the water.
- 21 21. All construction equipment shall be maintained in good working order to minimize the risk
22 of fuel and fluid leaks or spills.
- 23 22. The project shall comply with all applicable provisions of the Unified Development Code,
24 Title 18 of the San Juan County Code.
- 25 23. All other required permits and easements shall be obtained prior to construction.
- 26 24. If the dock is abandoned or becomes unsafe, it 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 of the related shoreline property in an amount equal
to the cost of the abatement.

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1
2 ***Location, location, location.***

3 17A. Washington's SEPA regulations expressly recognize that: "The same proposal may
4 have a significant adverse impact in one location but not in another location." See WAC
5 197-11-330(3)(a).

6 17B. Regrettably for this applicant, the proposed site is not your average, run of the mill
7 shoreline location. Not every dock application involves a specially-protected, state-
8 designated, biological preserve within a stone's throw, or several boat lengths away,
9 depending on if you use the appellants or the applicant's materials. Under either scenario,
10 the new dock would be very close to the University of Washington's False Bay Biological
11 Preserve.

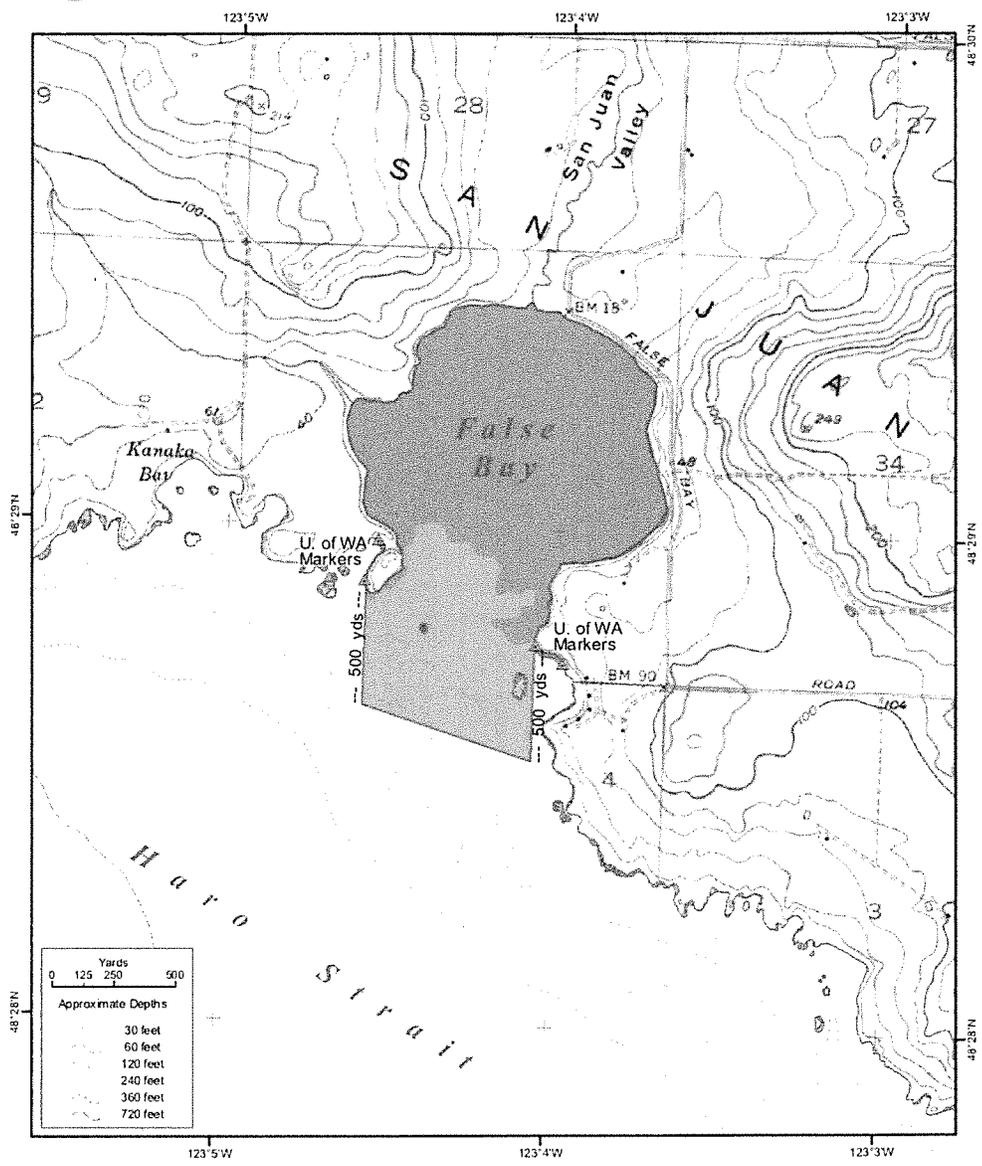
12 17C.1 As shown on several maps included in the Record, the proposed new dock and
13 outfall for the proposed desalination system would both be located in close proximity to the
14 "False Bay Preserve", which is a "Marine Protected Area within Puget Sound," identified at
15 WAC 220-16-440(1) as follows: "The tidelands and bedlands of False Bay on San Juan
16 Island, including all University of Washington-owned tidelands beginning at a marker 400
17 feet east of the east entrance of False Bay and extending to the entrance of False Bay, all
18 University of Washington-owned tidelands and bedlands within a line beginning at the
19 University of Washington marker on the shore at the east entrance of False Bay, projected
20 500 yards offshore, thence northwesterly to a point 500 yards offshore along a line
21 projected from a University of Washington marker on the shore at the west side of a small
22 peninsula at the west entrance of False Bay, thence to shore along said line to the marker,
23 and all University of Washington-owned tidelands west of the marker to a University of
24 Washington marker 600 feet west of the small peninsula." *Effective since 3/31/1990. (For
25 general illustrations showing the 'footprint' for the proposed dock and a 35'-sized boat
26 moored at the dock, and the dock's proximity to UW tidelands, eelgrass beds, and other
marine features that would likely be impact by boats coming and going from the new dock,
See Exs. 69 and 75).*

17C.2 Attached on the next two pages is a copy of a Washington Department of Fish and Wildlife
"Orange Map" that is included in the Record as part of Applicant's Ex. 10, illustrating the location
of the False Bay Preserve, and how it runs out into open waters immediately in front of the
Honeywell's pocket cove area, which is located east of the small island shown to be located in the
southeast portion of the orange-shaded Preserve boundary (black and white copies of this decision
will only show the 'orange' area with gray-tone shading effects); and another vicinity map
referenced during the hearing and in the Staff Report, marked to show the general location of the
Honeywell project in relation to False Bay.

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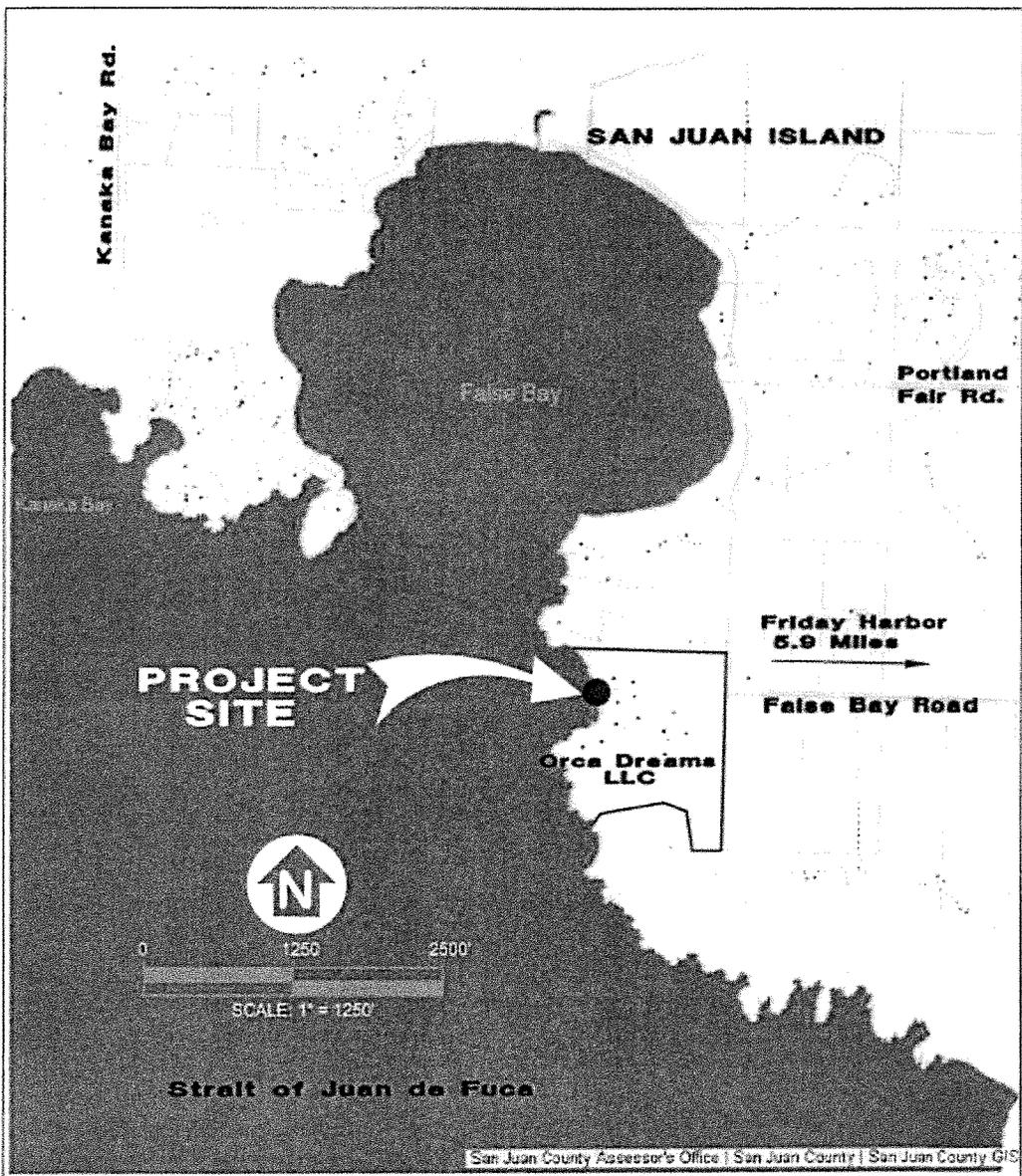
**False Bay
Marine Preserve**
WAC 220-16-440(1)



**DECISION, UW AND SUNDBERG, ET AL. APPEALS
OF MDNS RE: ORCA DREAMS LLC APPLICATION
FOR SHORELINE PERMIT FOR NEW DOCK AND
DESALINATION SYSTEM – PSJ000-17-0003 (SSDP);
PAPL000-17-0010 AND -0012 (APPEALS)**

GARY N. MCLEAN
SAN JUAN COUNTY HEARING EXAMINER

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Vicinity Map #2

DECISION, UW AND SUNDBERG, ET AL. APPEALS
OF MDNS RE: ORCA DREAMS LLC APPLICATION
FOR SHORELINE PERMIT FOR NEW DOCK AND
DESALINATION SYSTEM - PSJ000-17-0003 (SSDP);
PAPL000-17-0010 AND -0012 (APPEALS)

GARY N. MCLEAN
SAN JUAN COUNTY HEARING EXAMINER

1 17D. Maps from the applicant and the appellants differ on the precise location of False
2 Bay Preserve boundaries over water, but there is no meaningful or credible dispute that the
3 Honeywell's project is located very near waters that are protected by state law. Similarly,
4 there is no meaningful or credible dispute that water moves, and that tidal patterns carry
5 materials to and from the Honeywell's pocket beach/bay area and portions of the False Bay
6 Preserve. The Record is absent any meaningful analysis on this subject, which is necessary
7 to properly evaluate the Project in context with its location, as well as any necessary
8 mitigation measures and their relative effectiveness.

9 17E. The revised Biological Assessment prepared by Fairbanks Environmental Services,
10 dated October 24, 2017 (Ex 6), recognizes that the proposed four-slip dock will be located
11 in a small cove that is open to the west and northwest, and it asserts that the new dock
12 would be generally protected by a large rock island from the predominant south and
13 southwest wind and waves along the southwest shore of San Juan Island adjacent to Haro
14 Strait. Several witnesses offered detailed and credible testimony challenging the level of
15 protection that the rocks and small island provide for the Honeywell's beach, and their
16 proposed dock, particularly Mr. Sundberg, who it is undisputed comes to the table with
17 many years of experience and extensive knowledge regarding maritime issues and boating
18 practices. The Examiner finds that the rocks and small island in front of the proposed dock
19 are not the same as a well-placed jetty, and such features do not completely eliminate the
20 likelihood that gale force winds and large waves or swells will occasionally impact the
21 proposed new dock and any boats moored at the dock.

22 17F. The dock and Reverse Osmosis (RO) desalination system would serve three
23 waterfront parcels including TPN 353344008, a 5.04 acre parcel (287 Golden Paintbrush
24 Lane); TPN 340411003, a 10.33 acre parcel (61 Island Marble Lane and 241 Golden
25 Paintbrush Lane); and TPN 340411005, a 25.20 acre parcel (137 Golden Paintbrush Lane
26 and 54 Island Marble Lane), for a total of 40.57 acres.

17G. The majority of the dock would be constructed on the Honeywell's privately owned
tidelands and situated in the same location as the old Mar Vista Resort dock (an existing
wooden shore mount and eight creosote piles as noted in San Juan County Assessor's
records). (Ex 10). However, there is some dispute as to the precise location of tidelands
and underwater boundaries for the adjacent False Bay Preserve. Moving forward, this issue
will need to be resolved, before any permit for installation of piers, and attachments needed
for the desalination system outfall, can be installed or constructed.

17H. The applicant concedes that the shoreline inside the cove where the dock would be
located is a 'pocket beach' that is confined by rock outcrops, which contribute to holding
beach sediment in place in stable conditions. The beach is composed of a mix of gravel and
sand. Large pieces of driftwood and logs have accumulated on the Honeywell's beach.

1 During calm weather periods, it appears as though logs remain piled up against the upper
2 portion of the beach, away from the water, except in higher tide cycles. However, videos
3 included in the record show the obvious – logs float, and occasionally mix with tidal action
in the area where the proposed dock would be constructed. The location is not mapped as a
feeder bluff.

4 17I. The absence of any docks for many miles to the north and south of this location may
5 be an indication that this may not be the best spot to try and build a dock, no matter how
6 dedicated, conscientious, and responsible the applicant appears to be. Several witnesses
7 complimented Applicant’s dock-design firm, Waterfront Construction Inc., noting that they
8 have built quality projects throughout the area. The finest engineers and builders in the
9 county, like Waterfront Construction, could probably build a dock in many challenging
locations, if someone had the money for what it might entail, but the adverse impacts that
could flow from a mishap on a new dock in a vulnerable location, where boats are not now
regularly moored, like the Honeywell’s pocket cove, must be considered.

10 17J. Location is critical in addressing the pending appeals, which both generally allege
11 that the MDNS was issued without sufficient information and that the project will cause
12 significant adverse environmental impacts in the setting and surrounding area where it is
13 proposed. Under WAC 197-11-794: “(1) "Significant" as used in SEPA means a
14 reasonable likelihood of more than a moderate adverse impact on environmental quality;
15 and (2) Significance involves context and intensity (WAC 197-11-330) and does not lend
16 itself to a formula or quantifiable test. The context may vary with the physical setting.
Intensity depends on the magnitude and duration of an impact. The severity of an impact
should be weighed along with the likelihood of its occurrence. An impact may be
significant if its chance of occurrence is not great, but the resulting environmental impact
would be severe if it occurred”.

17 17K. The Longman Dictionary of Contemporary English Online defines the term
18 “Contextualize” to mean considering something together with the situation, events, or
information related to it, rather than alone.

19 17L. As explained below, the BA reports and other evidence offered by the applicant do
20 not provide sufficient information to adequately assess whether adverse impacts are
21 significant given the project location adjacent to the biologically rich UW False Bay
Biological Preserve and within a pocket bay that supports extensive marine habitat.

22 17M. At the hearing, the applicant’s counsel often raised the point in questioning various
23 witnesses if they have ever heard of an EIS prepared for a 4-boat dock, strongly implying
24 that the notion would be absurd. However, any inference at the SEPA appeal hearing that
the scale of the proposed dock, by itself, does not justify preparation of an EIS is
inconsistent with the contextual environmental analysis required of lead agencies under

1 SEPA. Once again, *see*, WAC 197-11-330(3) ("In determining an impact's significance
2 (WAC 197-11-794), the responsible official shall take into account the following, that: (a)
3 The same proposal may have a significant adverse impact in one location but not in another
4 location ... "). The pending application is not for the 14th dock along an industrial shoreline
5 protected by a giant rip-rap jetty. It is also not for reconstruction or replacement of a dock
6 where one is currently up and running, where boats have been moored with regularity for
7 many years.

8 17N. The Applicant's consultant, Mr. Fairbanks, conceded in testimony at hearing that the
9 BA omits analysis of impacts to the adjacent UW Biological Preserve resulting from the
10 Project.

11 17O. Based on credible, substantial, and un rebutted expert studies and testimony included
12 in the Record presented, and while according substantial weight and deference to the
13 Director's challenged determinations, the Examiner is convinced that and expressly finds
14 that **the MDNS Fails to Adequately Characterize Conditions within the Honeywell's
15 Pocket Bay/Cove, where the proposed dock and desalination system outfall will be
16 located; and the MDNS fails to adequately analyze relevant conditions within and
17 impacts to the UW False Bay Biological Preserve.**

18 17P. The pocket bay where the Project would be located is described by Doug Thompson
19 of the State of Washington Department of Fish and Wildlife ("WDFW") as "unique with a
20 rich diversity of flora and fauna." Ex. 14E. Dr. Padilla explained in comments and
21 testimony at hearing that this pocket bay includes at least five species of kelp and over 100
22 species of invertebrate animals that she has documented over the course of several decades.
23 Ex. 14S.

24 17Q. Based on her professional experiences, Dr. Padilla also credibly described changing
25 conditions within the pocket bay over the years where she has conducted research on the
26 tidelands. This includes expansion of eelgrass meadows accompanied by increased loose
sedimentation on the floor of the pocket bay. *Id.* The increased sedimentation has caused
the pocket bay to become significantly more shallow at low tides. *Id.*

17R. Notwithstanding the relatively small size of the Honeywell's pocket bay, the
evidence in the record and presented at hearing demonstrates that the County failed to
adequately consider baseline conditions of the pocket bay prior to issuing the MDNS.
Specifically, reliance on the Applicant's hyper-localized BA, focused on impacts within the
immediate area of the proposed dock and surrounding the proposed "deep safe-channel" to
be used by approaching boats, results in a myopic geographic scope of analysis that masks
probable adverse impacts within the greater pocket bay.

17S. For example, the Applicant's surveys of eelgrass and kelp are limited to 25-feet from

1 where the proposed dock will be located and around the rocks located beyond the proposed
2 float. Ex. 6 at App. B and D. While the Applicant identifies certain locations of bull kelp
3 (mapped by the Friends of San Juans) to propose the location of the "deep safe-channel,"
4 the Applicant omits additional areas of eelgrass that have been mapped within and adjacent
5 to said "deep safe-channel." Compare Ex. 6 at 21 with Exs. 45. Exhibits 44, 45, and 46,
6 presented by the Neighbor Appellants, demonstrate a wide span of bull kelp, eelgrass, and
7 fish habitat throughout the pocket bay, as documented by WDFW, the State of Washington
8 Department of Natural Resources ("DNR"), San Juan County, multiple professional and
9 academic researchers, and Friends of the San Juans. In contrast, the Applicant's observation
10 and mapping of eelgrass and bull kelp within selective portions of the Project area fails to
11 contextualize the diverse marine environment that researchers, like Dr. Padilla and Dr.
12 Harvell, have observed and studied for years within the pocket bay.

13 17T. The latest version of the Applicant's BA, submitted to the County after issuance of
14 the MDNS, adds limited discussion of eelgrass beds located northeast of the Project in both
15 the pocket bay and the UW Biological Preserve; however, the Applicant fails to provide
16 any analysis of impacts resulting from dock construction and introduction of motorized
17 boats to these eelgrass beds. Ex. 6 at 12-13.

18 17U. Instead, the BA appears to confuse the volume of eelgrass beds documented in these
19 well-studied areas with the health of these eelgrass beds, abruptly concluding that "the
20 occurrence of wide scale wasting disease is not necessarily inevitable." *Id.* at 13.
21 According to Dr. Padilla, eelgrass beds have expanded within the pocket bay over the
22 course of her years of research in this area. Ex. 14S. Nevertheless, high levels of wasting
23 disease have been recently observed in the eelgrass beds within the pocket bay by
24 researchers such as Dr. Harvell and Ms. Graham.

25 17V. The BA notes that factors such as salinity, water temperature, sulfide and nutrient
26 concentration, light and epiphytic growth can contribute to wasting disease. *Id.* Increased
salinity, water temperatures, and turbidity in the areas surrounding these eelgrass beds,
(which stirs up sediment, clouding the waters and reducing access to light), are among the
very specific concerns about the Project raised by Dr. Padilla and Dr. Harvell in testimony
at the hearing.

17W. Tidal patterns in both the pocket bay and the UW Biological Preserve could directly
expose these eelgrass beds to sediment, oil, and gas resulting from dock construction and
operation of boats moored at the dock. This was almost entirely omitted from consideration
by the County in issuing the MDNS and by Mr. Fairbanks in preparing the BA. UW argues
that it raised this specific concern repeatedly, both in comments regarding the applicant's
previous six-boat dock proposal, and the current four-boat version of the Project.

17X. Both Dr. Swalla and Dr. Padilla testified that tidal patterns could be readily

1 evaluated through use of dye tests, which the Applicant has not completed to date. As Dr.
2 Padilla further described in prior anecdotal accounts of using oranges to observe tidal
3 patterns in the pocket bay, the oranges floated around the pocket bay unless the oranges
4 were thrown farther out toward the rock outcropping into tidal currents.

5 17Y. SEPA requires that environmental review of the Project consider the complete
6 environment baseline for the entire pocket bay in which the Project is proposed, not just the
7 narrow dock footprint and select areas of the pocket bay where operation of motorized
8 vessels could potentially occur without adverse impact. The Examiner finds and concludes
9 that the MDNS issued for the Project is based on insufficient information and inadequate
10 consideration of environmental conditions within both the UW Biological Preserve and the
11 entirety of the pocket bay, and as such, the threshold determination fails to comply with the
12 process established by the SEPA Rules and necessary to comply with SEPA.

13 ***False Bay Biological Preserve.***

14 18A. The State of Washington has supported on-going efforts to protect the UW
15 Biological Preserve, also known as the False Bay Marine Preserve, by designating the
16 boundaries the UW Biological Preserve and 500 yards off shore as a part of the San Juan
17 Marine Preserve Area. WAC 220-302-100. Washington Department of Fish and Wildlife
18 regulates the entire False Bay Marine Preserve by prohibiting takes of shellfish and many
19 fish species. WAC 220-302-080.

20 18B. Dr. Billie Swalla, Director of the UW Friday Harbor Labs, provided written
21 comment and testimony at hearing that the UW Biological Preserve has served as the site of
22 significant faculty, graduate, and undergraduate research for over 100 years. Ex. 14N.

23 18C. Dr. Swalla credibly explained that the UW acquired the UW Biological Preserve
24 and adjacent tidelands in the 1970s as a means to preserve the biodiversity of and ensure
25 ongoing research within this area of ecological significance. Dr. Swalla testified that the
26 biodiversity found within the UW Biological Preserve is considered to be the highest in the
State and on San Juan Island, with 25 distinct marine animal phyla found within this
sheltered bay. Dr. Swalla also stated that marine animals feed, live, and most importantly
lay eggs around the edges of the UW Biological Preserve. *See also id.* Based on her
professional observations having conducted research around the world, Dr. Swalla testified
there is "no other place in the world like this" from a marine biology standpoint

18D. The significance of the UW Biological Preserve and adjacent tidelands was echoed
by comments and testimony of Dr. Dianna Padilla, a marine ecologist and Professor at
Stony Brook University who has conducted research for nearly 30 years within the UW
Biological Preserve and the adjacent UW tidelands, where she has collected nearly annual
data of invertebrate animals, algae, and sea grass and published 20 studies based on her

1 work in the UW Biological Preserve. Ex. 14S. Additionally, Dr. Catherine Drew Harvell,
2 a marine ecologist and Professor at Cornell University specializing in essential marine
3 habitats, explained that a portion of her extensive research on the health of eelgrass
meadows is based on conditions documented at the UW Biological Preserve and
surrounding areas. Ex. 14CCC.

4 18E. Olivia Graham, a graduate level student who described her recent research in the
5 eelgrass beds in and around the UW Biological Preserve, credibly testified as to frequent
6 observations of harbor seals and whale sightings around and just beyond the rock
7 outcroppings while conducting research. These four academic researchers represent only a
fraction of the academic research and observations of the 100 full-time faculty members
and countless more graduate and undergraduate students who have conducted research at
the UW Biological Preserve throughout the last century.

8 18F. Even though some of the expert testimony was provided by individuals who are also
9 named appellants in this matter, as part of the "Neighbor Appellant" group (i.e. Dr. Harvell
10 and Dr. Greene), the examiner finds that the research conducted and referenced during their
11 testimony was relevant to the issues at hand, and that nothing in the record would support
12 even the slightest suggestion that any of the long-running studies were contrived or "made-
up" in the last few months or years as a means to stifle potential development around False
Bay, including the Honeywell's plans for their property.

13 18G. Notwithstanding the well documented and protected biodiversity in the adjacent
14 UW Biological Preserve, the Applicant's initial BA prepared prior to issuance of the MDNS
15 provided bare mention of the UW Biological Preserve, much less any characterization of
potential impacts from the Project on the UW Biological Preserve. *See generally* Ex. 8.

16 18H. At the hearing, Mr. Fairbanks admitted that the Applicant completed no analysis of
17 tidal currents between the pocket bay and the UW Biological Preserve and failed to analyze
18 the impact of the increased boating operations resulting from the Project in both areas. In
19 contrast, the BA offers a sweeping comparative analysis of increased boat traffic resulting
from the Project to all commercial and recreational vessel traffic along the west side of San
Juan Island. Ex. 6 at 16.

20 18I. Dr. Swalla testified that boats entering the UW Biological Preserve are typically
21 kayaks, while motorized vessels remain in deeper waters exterior to the rocky outcropping
22 at the mouth of the UW Biological Preserve. Those deeper waters dilute potential gas and
23 oil leakage from motorized boats in the vicinity of the UW Biological Preserve. Dr. Swalla
24 testified that waters within the UW Biological Preserve tend to be very shallow even when
the tide is in, limiting the opportunities for motorized boats to enter the UW Biological
Preserve without grounding out.

1 18J. There was no dispute by the Applicant that motorized vessels are not presently
2 moored in or around the UW Biological Preserve, including the pocket bay where the
3 Project is proposed. Oil and gas residue from boats regularly moored at the Project site,
4 lingering in the pocket bay at low tide, could be regularly swept onto the beds and shoreline
5 of the UW Biological Preserve when tides rapidly come in.

6 18K. As Dr. Swalla testified, the UW is not against docks. However, the UW is greatly
7 concerned about siting a dock and operating and maintaining multiple motorized vessels
8 next to this biological preserve which has supported academic marine research for 100
9 years.

10 18L. Additionally, the UW owns the tidelands on the parcel of land immediately north of
11 the Honeywell property. *See Applicant's Tidelands Exhibit, Ex. 19.* It stretches credibility
12 to argue that a next-door-neighbor's tidelands could never be impacted by over-water
13 activities that might occur on or around the Honeywell's dock, or boats using the dock. The
14 new dock would effectively serve as a new point source of potential pollution into the area
15 waters, for months when boats will regularly use the proposed dock, which would be
16 located along a pocket beach very near the entrance to the False Bay Preserve.

17 ***Assignments of error on aesthetic and shading issues.***

18 19A. The record includes credible and substantial evidence to support the MDNS on
19 issues related to aesthetics and shading concerns.

20 19B. Most of the comments and testimony alleging adverse "aesthetic" impacts are
21 analogous to long-time neighbors complaining when someone seeks permits to build the
22 first new homes in a subdivision that complies with all local codes, because the new plat is
23 located upon a beautiful, vacant meadow seen from their back yards for as long as anyone
24 can remember. Zoning and development regulations are the purview of the County
25 Council. There is no dispute that current County regulations do not prohibit docks,
26 desalination systems, and navigation buoys on the site addressed in this matter. Just
because someone seeks to build the first house is not a reason to deny a building permit in a
new subdivision on a long-vacant meadow. Similarly, just because this would be the first
dock for many miles along a portion of shoreline is not a reason, standing alone, to deny a
shoreline permit for the Honeywell's project.

19C. The appellants failed to present credible and sufficient evidence to establish that the
project should be denied or further conditioned based on alleged aesthetic impacts. The
applicant's evidence credibly and substantially demonstrated that most of the neighbor
applicants will not be able to see the new dock from any part of their properties, most of
which are located far away from the pocket beach where the new dock would be located.

1 Only the Prentiss property provides a vista from which the new dock would be seen.
2 County staff credibly explained how the proposed new dock and desalination system would
3 be situated in a manner consistent with applicable county codes and policies regarding
4 aesthetic and physical design issues, and that docks are not prohibited in the shoreline area
5 at issue in this matter. Even where the proposed new dock could be seen, the Examiner
6 finds that its existence and placement will not present any material or undue impairment of
7 views in the vicinity, especially given that it would be limited to a relatively small portion
8 of the total view from any surrounding property.

9 19D. Unlike other specific challenges raised in the two appeals, arguments based on
10 concerns with shading that might be caused by boats and dock materials were not supported
11 by credible and substantial evidence sufficient to sustain appellants' burden of proof,
12 especially given the substantial weight that must be accorded the challenged decision.
13 Comments raised about the issue appeared to be speculative, and were not supported by
14 convincing studies or factual evidence on the subject, unlike other issues raised in the
15 appeals, like the probabilities of adverse impacts that could be caused by petroleum spills
16 and hyper-saline discharges.

17 19E. If aesthetic and shading arguments were the sole bases of the appeals, they would
18 fail. As discussed in other parts of this decision, other alleged errors were raised in each
19 appeal, and evidence was sufficient to satisfy their burden of proof on such issues.

20 ***Cumulative impacts.***

21 20A. Where money is not an obstacle, it is often said that engineers and designers can
22 build most anything. The Record is absent any meaningful analysis regarding the potential
23 impacts that could flow from additional docks that might move forward if this one is
24 approved and constructed. If another property owner is inspired by the new dock, they may
25 believe it is feasible to put one on their shoreline. Innovative features on this dock, and
26 each new dock, makes it more and more likely that someone will seek approval for a dock
along an exposed span of shoreline where waves and weather have long served as reasons
not to build a dock.

20B. "Any port in a storm," is a phrase that is worthy of analysis in this matter, given the
cumulative impacts that could arise if the new dock becomes the port of last resort for
leaking or damaged vessels. There is no dispute that the proposed dock for up to 4 vessels
would be the only dock along the southwest side of San Juan Island, where there are now
ZERO docks for about 14 miles, from the island's southern-tip running north, northwest
along the shoreline to Mitchell Point, at the entrance to Mitchell Bay, where the Snug
Harbor Marina and numerous private docks are located. Prior boating experiences by the
Examiner along the shores of San Juan Island, and several recent flights above the shoreline
at issue, allows for a greater appreciation, and respect, for the fact that there is a complete

1 absence of docks along such a long portion of the island. County codes do not prohibit
2 docks in the area, so there must be other reasons. Testimony in the record credibly and
3 firmly established that winds and waves along the southwest portion of San Juan Island are
4 exceptionally challenging for boats on many occasions throughout the year – so much so,
5 that the applicant has commendably agreed to remove all boats and the surface decking for
6 the dock during the stormiest months of the year. Unfortunately, the record also supports a
7 finding that adverse weather conditions can strike the site of the proposed dock even during
8 the summer months – not regularly, but occasionally. The analysis presented in the current
9 record is insufficient to properly weigh the risk of a boat accident occurring at or near the
10 dock during the summer months, and the degree of any adverse impacts that could result.
11 Obviously, a catastrophic sinking of a 30-foot power-boat would be horrible for all
12 involved, including impacted marine life. The applicant appeared to argue that boats are
13 already in the area throughout the summer months, so the dock would not really present an
14 unacceptable increase of risk or harm beyond the status quo. While this may be true, the
15 record is absent of any analysis of the potential impacts that could result if frightened boat
16 operators, a leaking whale-watching vessel, or some other boater in distress, notices the
17 proposed new dock, and seeks refuge on or near the dock, bringing the expression “any port
18 in a storm” to a very practical, and potentially adverse, reality for the local marine
19 environment. This is another cumulative impact that warrants further analysis – although
20 low probability, it could bring high impacts to the area.

21
22 20C. Similarly, the cumulative impacts on the local Orca whale population, among other
23 things, was not meaningfully studied. The Examiner finds and agrees with some of the UW
24 witnesses, that the NOAA comments that are included in the Record, regarding the
25 potential impacts to local Orca whales, were not adequately considered or analyzed. There
26 was no analysis of impacts caused by the regular presence of boats outside False Bay and
area waters at times of day where the record shows Orcas now feed, i.e. in the morning and
evening when most pleasure craft and whale watching vessels are not present. *(See NOAA
comment letter dated Sept. 20, 2017, and attached Giles study from 2014, that includes
discussion on the effect of vessels on behavior of southern resident killer whales (SRKWs),
included as part of Ex. 14).*

20D. With the new dock, up to 4 boats will be regularly present where they are now only
occasionally present. The simple convenience of having a power boat available to take a
short sunrise or sunset cruise, without having to travel miles away to/from the nearest
marina, makes it more likely that boats will be regularly present in the False Bay area at a
time and location where the record shows they are rarely seen, and this would result in
increased encounters with Orca whales feeding during such times. This was not adequately
studied. The record does not provide an adequate basis to determine whether the dock and
new boat operations will impact SRKW populations, and the type, scale, magnitude, or
severity of such impacts, whether they can be avoided, or if additional mitigation would be
sufficient or capable of being accomplished.

1
2 ***Low Probability/High Consequence Impacts.***

3 21A. The applicant argued and presented evidence along the lines that the proposal is
4 relatively low risk, so further information is not needed. Based on the Record presented,
5 the Examiner finds that extreme harm could befall portions of the protected False Bay
6 Preserve, through ongoing operations of aspects of the project, via boats using the proposed
7 new dock or via unmixed, hyper-salinated water discharged from the desalination system.
8 Even though the probability of such harm might be low, it is probable, and the impacts
9 could be extreme and/or long-term. As noted elsewhere in this Decision, the same new
10 dock and desalination system may be acceptable in many other locations throughout the
11 county, but given the unique location at issue in this matter, it may not be wise in the setting
12 where it is now proposed, and with the limited mitigation measures proposed in the current
13 record.

14 21B. Throughout the hearing process, the applicant argued that the scope of the
15 environmental review was sufficient, even though it was generally limited to a 25-foot area
16 surrounding elements of the project. While the applicant's effort to study the limited area
17 that they chose to study was thorough, and generally responsive to follow-up comments by
18 county staff, it puzzlingly omitted any meaningful or substantive analysis regarding the
19 probability of any adverse impacts that might occur within the pocket cove where the new
20 dock would be located, or in the False Bay Preserve, nor did it provide meaningful
21 information to assess the severity and duration of such impacts.

22 21C. On the other hand, both appellants credibly established that that the degree of any
23 water-exchange by and between waters surrounding the project site and those within the
24 False Bay Preserve boundaries, the patterns in which it occurs, and the ability of potentially
25 harmful materials (like hyper-salinated water discharges, oil or fuel spills and the like) to
26 disperse and pose no adverse impacts within the waters protected as part of the False Bay
Preserve, are important factors to consider in addressing the pending appeals and shoreline
permit application.

21D. As several witnesses testified, and as common sense and simple physics confirm,
boats move, as they float on dynamic bodies of water, such as the pocket cove area at issue
in this matter. Taller boats are prone to movement caused by surface winds, with gusts
using taller features as a "sail" to shift the angle, direction, or location of a boat from an
intended point of reference to some other location, perhaps over rocky sub-surfaces, grass-
beds, or other natural features like those discussed throughout the course of the hearing
process. Similarly, while less of a problem for newer boats, no one disputes the fact that
boats leak, valves wear out, gaskets lose their seals, hoses crack, and people aboard boats of
all kinds tend to spill things. By leak or spill, many substances find their way into

1 surrounding waters as they float out or away from a boat. The most threatening and
2 troublesome types of spills or leaks would be those involving harmful petroleum products
3 or solvents that find their way into local waters. Testimony in the record established,
4 emphasized and reiterated what is common knowledge and accepted fact to all who care
5 about the aquatic environment surrounding all of San Juan County – oil and water don't
6 mix, and petroleum products are harmful to a wide spectrum of marine life in the area.

7
8 21E. Similarly, the physical 'footprint' left by a powerboat includes any turbidity, prop-
9 wash, or cutting caused by propellers or propulsion devices used to maneuver the vessel in
10 and around its intended destination. Swings, inadvertent turns, imprecise routing, are all
11 possibilities as one travels in a boat.

12
13 21F. The pending application materials are based on an assumption that boat operators
14 coming and going from the proposed Honeywell dock will use a safe, specially-designated
15 channel to enter and exit the area, so as to avoid impacts on eel grass beds and other natural
16 features located more than 25 feet away from the dock. There is no meaningful analysis of
17 the probability that some boat operators will not be as vigilant or competent as Mr.
18 Honeywell, resulting in boats swinging into grass-beds, rocks, logs, or other obstacles or
19 natural features in the immediate vicinity of the proposed dock, though perhaps more than
20 25 feet away.

21
22 21G. The record includes ample evidence that any petroleum spills will kill fish eggs that
23 might be in the surrounding area, and that propellers can cut kelp and eelgrass, harming the
24 natural environment. These impacts would be adverse. The record includes credible,
25 expert testimony establishing that eel grass is very difficult to restore, replant, or replace
26 once it is destroyed or damaged. Oil and fuel spills can kill plants and sea creatures. The
appellants argued that SEPA requires more than the record presented. It mandates an
analysis regarding the potential risk of harm and severity of harm presented by a project.

27
28 21H. The Honeywells are all too familiar with the stringent state laws that prevent illegal
29 discharges of oil into the waters of the state. The Examiner takes official notice of
30 Washington State Pollution Control Hearings Board (PCHB) and Shorelines Hearing Board
31 Orders that upheld certain penalties against the Honeywell's arising from extensive,
32 unauthorized tree-cutting on their property at some point in 2013. (PCHB No. 14-080 and
33 SHB No. 14-15). Part of the case involved potential fines for chain-saw oil that may have
34 found its way into the waters surrounding their property. On that topic, the Board found
35 that the Department of Ecology failed to present sufficient evidence that bar oil from the
36 chain saws was discharged into waters of the state. (*Orca Dreams LLC v. Dept. of Ecology*,
37 Findings, Conclusions and Order issued by the Pollution Control Hearings Board,
38 December of 2015, PCHB No. 14-080). While the evidence of oil discharges from
39 chainsaws was not sufficient in that case, the simple fact that such seemingly remote
40 sources and volumes of oil discharges could support substantial penalties for illegal

1 pollution of area waters accentuates the need to adequately analyze the potential for oil
2 spills and discharges that could result from boat operations that will occur within the water
3 itself, around the proposed dock, something that seems far more understandable to a regular
4 person than oil from a chainsaw used on trees located upland from the shoreline.
5 Nevertheless, an adequate analysis of such possibility and the potential severity of impacts
6 caused by any resulting oil spill or improper discharge is not part of this record.

7
8 21I. As Mr. Sundberg and others pointed out what is known to most boaters, fuel tanks
9 are not the only potential source of pollution that could flow out of a boat. Other aspects of
10 most boats that could be sources of unwanted discharges into local waters include sewage
11 holding tanks. And, as every smart boater knows – one should never assume that other
12 boaters are as experienced, safety conscious, or aware as they should be. Countless
13 examples can be provided to refute the saying that “no one would be stupid enough to go
14 near this or that collection of rocks”. Shipwrecks and groundings happen. Boats lose
15 power; boats run out of fuel; winds sometimes howl, even in the most protected locations;
16 and some boaters stay out longer than their skills or conditions warrant.

17
18 22J. The Record is absent any meaningful discussion on precisely how relatively large
19 private boats, at 35 or 30 feet in length, will be able to always stay within the designated
20 safe-channel, without markers or other features. The risk of boat operations that are likely
21 to take place outside the proposed safe-channel should be evaluated, and the impacts on
22 seagrasses and other sensitive features that would occur as a result. Even a 30-foot wide
23 channel only gives a 10-foot wide boat 10 feet on either side to maneuver.

24 *Gas and Oil Residue Impacts.*

25
26 23. As Dr. Swalla testified, gas and oil residue, as well as minor leakage, is commonly
associated with operation of motor boats and any gas-powered vehicles. Exposure to
petroleum products would devastate marine life found within the UW Biological Preserve
and the pocket bay where the Project is proposed. Dr. Swalla, Dr. Harvell, and Dr. Padilla
collectively testified that petroleum is well known to kill eggs, which are found all along
the banks of the adjacent UW Biological Preserve, and would likely cause permanent
damage to eelgrass beds.

24
25 24. The likelihood of exposure to petroleum residue from boats moored and operating
26 within the pocket bay has not been specifically evaluated by the Applicant or the County;
based on evidence in the record, exposure poses a reasonable probability. Mr. Fairbanks
confirmed that the Applicant did not perform any evaluation of tidal patterns in either the
pocket bay or the UW Biological Preserve. Dr. Padilla testified that based on prior
observations of tidal patterns within the pocket bay, deposited materials may not leave the
pocket bay unless and until reaching stronger tidal currents located near the rock
outcroppings. Dr. Swalla testified that currents can swiftly enter the UW Biological

1 Preserve, with the potential to carry gas and oil residue lingering from the adjacent pocket
2 bay. The Project would result in the first motorized boats to be moored and regularly
3 operated within the pocket bay and adjacent to the UW Biological Preserve, as well as the
4 first to be moored within a 14 mile stretch of San Juan Island. The regular presence of
5 motorized boats at the Project site increases both the frequency and proximity of exposure
6 to petroleum products along the shorelines of the UW Biological Preserve and the pocket
7 bay.

8 25. Dr. Charles Greene and Mr. Kimbal Sundberg provided additional testimony
9 regarding catastrophic oil leakage that would have a lower probability of occurrence than
10 typical petroleum residue described above, but even higher impact and possibility of harm
11 to the UW Biological Preserve given documented storm events that occur within the pocket
12 bay and along the west side of San Juan Island. Even if the Applicant's boats are not
13 moored at the Project site during winter months, as Mr. Sundberg testified, spring and fall
14 storm events have been documented to regularly occur during the months of May and
15 October, when the boats would still be moored within the pocket bay. See Exs. 14"O", 58,
16 59. Additionally, summer storms have been documented as well. Id. Given the volume of
17 driftwood documented along the banks of the pocket bay, it would be readily conceivable
18 that a large piece of wood colliding with one of the boats to be moored at the Project would
19 result in leakage of hundreds of gallons of petroleum. See Exs. 14"O", 52-54.

20 26. As several witnesses pointed out, the type of boats that will actually be using the
21 dock is unknown. The applicant has offered to limit the size of powerboats to no more than
22 30 feet in length, but this still sheds insufficient light on how large the fuel tanks, how deep
23 the boat will protrude into the water, and other relevant factors.

24 27. Appellant may very well be the most responsible, competent, and capable boat
25 operator in the area, but that does nothing to change the fact that the dock would be
26 available for use by others with less skill, knowledge, or sensitivity to the surrounding area
27 – especially as years pass. The Applicant's brief reiterates comments made in the public
28 hearing that the 4 boat slips will sometimes be used by an occasional visitor. There is
29 insufficient information in the Record at this time to conclude that adverse impacts will not
30 occur or can be mitigated while the dock is in operation and use, particularly by boaters
31 other than Mr. Honeywell. More information is needed to determine if other conditions
32 could be imposed, such as possibly limiting the sizes or types of vessels allowed to enter
33 the safe channel or use the dock.

34 28. The Spill Control and Countermeasures Plan ("SCCP") prepared by the Applicant
35 fails to provide any measures to address either catastrophic spill or commonly "unnoticed
36 operational residue from gas and oil and minor leakage from boats associated with the
37 Project.

1 *Damage to Marine Vegetation*

2 29. Dr. Harvell testified that physical damage to eelgrass would cause more than just
3 loss of the immediate beds injured by direct hit from a boat or construction of the Project.
4 Because of the common occurrence of wasting disease documented within the eelgrass beds
5 located within the pocket beach adjacent to the Project, physical damage to portions of
6 those eelgrass beds could exacerbate further spread of wasting disease across the beds. The
7 potential for loss of eelgrass beds due to direct damage from boats associated with the
8 Project is highly probable given the evidence and testimony provided by Mr. Sundberg
9 regarding potential operation of 35-foot long Boston Whaler at the Project site. See Exs.
10 14"O", 45-48. Mr. Sundberg has significant experience as a boater, including a U.S. Coast
11 Guard License as a Master with 50/100 ton vessel credentials. Ex. 35.

12 30. Mr. Sundberg credibly testified that the conditions of the pocket bay do not support
13 safe operation of a 35-foot boat in this area, particularly at low tide. There is no evidence to
14 support a finding that 30-foot boats would have a much easier time navigating in the area.

15 31. Mr. Fairbanks admitted that the Applicant had not conducted any form of
16 operational vessel analysis for the Project. Mr. Sundberg testified that length, overall size of
17 the vessel, and tidal conditions would influence whether any certain vessel would be
18 reasonably able to maneuver within the 25-foot buffer around the dock and through the
19 "deep safe-channel" proposed by the Applicant while avoiding impacts to eelgrass beds
20 (including those mapped within the area of the deep channel). Ms. Shook of the County
21 testified that the efficacy of conditions of approval for the Project concerning operation of
22 boats within the pocket bay relies on the skills of the individuals operating boats around the
23 Project site. This increases the probability that an accident and adverse impacts will occur.

24 32. The Applicant has suggested this will be a "joint-user" dock, and Mr. Honeywell
25 testified the dock will support boating opportunities for extended family members. Aside
26 from Mr. Honeywell, there is no evidence as to the boating skills of potential users of this
27 dock.

28 *Turbidity*

29 33. Dr. Harvell and Dr. Padilla testified that increased sediment and turbidity are factors
30 that can contribute to wasting disease and permanent loss of eelgrass beds within the pocket
31 bay. Notwithstanding a proposed condition for vessels to direct prop wash away from
32 eelgrass beds, Dr. Padilla testified that the increasing volume of loose sediment she has
33 observed in the pocket bay would be disturbed regardless of this condition and remain
34 suspended at length. Suspended sediment would be of particular concern during low tides
35 and based on tidal conditions within the pocket bay she has observed during her decades of
36 research.

1 More information is needed to determine if mitigation measures might be possible, to
2 effectively prevent boat operations under certain tidal conditions, or the like.

3 ***Grounding.***

4 34. The potential for grounding moored vessels at the Project site and resulting adverse
5 impact to the marine floor are significant. Tide charts produced by the National Oceanic
6 and Atmospheric Association show the pocket beach as going dry at low tide, and as Mr.
7 Sundberg testified, being relatively non-navigable. See Exs. 60-61. Mr. Sundberg provided
8 testimony and visual analysis as to grounding likely to occur at the proposed dock based on
9 a 35-foot long Boston Whaler due to low tides within False Bay and the size of vessels
10 proposed by the Applicant. Exs. 140, 47, 48. Additionally, Mr. Sundberg testified that
11 navigating the proposed "deep safe-channel" would prove difficult for experienced boaters,
12 posing additional risk for grounding. The Applicant has not yet proposed or purchased
13 specific boats nor undertaken an operational vessel analysis to refute this risk of grounding.

14 35. Mary Huff, who submitted comments on behalf of the DNR, specifically raised
15 similar concerns about grounding and that the only proposed mitigation measures
16 associated with the Project to prevent grounding concerned the float associated with the
17 dock, not the vessels. Ex. 14JJJ at no. 4. DNR further commented that repeated grounding
18 of vessels would crush the biota on the benthos. Id. at no. 8.

19 ***Adverse Impacts from the Reverse Osmosis Desalination System.***

20 36. Testimony presented by the UW, the Neighbor Appellants, and even the Applicant
21 all agree that hyper-salinity and temperatures within the waters of the pocket bay would
22 have significant, adverse impacts to marine invertebrates, critical habitat including eelgrass,
23 and the overall marine environment within the pocket bay. Both Dr. Megan Dethier and
24 Dr. Padilla submitted comment letters detailing toxic impacts to marine organisms due to
25 high-saline waters. See Ex. 14 I and 14S.

26 37. Dr. Padilla observed the Department of Ecology recommends installation of
discharge lines at depths of at least 10 feet at low low tide. See also Ex. 12, Executive
Summary at 7. The reverse osmosis desalination system proposed with the Project has been
designed with effluent at a much shallower depth, between 3-feet and 7-feet below water.

38. Additionally, Dr. Padilla testified sediment has significantly increased within the
pocket bay over the years and are causing tidal depth to become more shallow all the way
to the rocky outcropping. There is no dispute that the weight of the saline brine will sink to
the bottom of the pocket bay. Given the little that has been observed of tidal conditions in
the pocket bay, other than by Dr. Padilla, the evidence indicates that the saline brine will

1 not necessarily dilute at the rate as suggested by the Applicant during low tide conditions
2 found in the summer months.

3 39. Mr. Fairbanks testified that his conclusions as to the supposed rate of dilution for
4 the saline brine output associated with the Project are based on the dilution rates observed
5 in other reverse osmosis desalination systems on San Juan Island. However, Mr. Fairbanks
6 admitted that he did not evaluate the site conditions of those existing systems and compare
7 them to site conditions for the pocket bay where the Project is proposed.

8 40. Additionally, Mr. Fairbanks admitted that he did not specifically analyze the pattern
9 of tidal currents within the pocket bay. The conclusion within the BA that the proposed
10 reverse osmosis desalination system will dilute within two-to-three feet is based on
11 conjecture.

12 41. The Staff Report addresses the County's Shoreline Master Program requirements for
13 facilities such as those proposed in this matter, including without limitation the mandate
14 that the "capacity of the shoreline site to absorb the impacts of waste discharges from boats
15 and gas and oil spills should be considered in evaluating every proposed dock or pier."
16 (San Juan County SMP Policy 3.5.C.13, discussed on page 13 of the Staff Report). The
17 Staff Report notes the following:

18 *The proposal includes a Spill Prevention, Containment and Control Plan in Exhibit 6 at
19 Appendix E. According to that document:*

20 *"This plan has been prepared to set in place measures to avoid and eliminate any pollutants
21 that may be generated by activities on or around the Orca Dreams dock from entering into
22 the False Bay Preserve and the Strait of Juan de Fuca. This Spill prevention, Containment
23 and Control Plan describes the measures to prevent spills and to prevent, control and
24 minimize the effects of the release of petroleum products and polluting materials during
25 and after construction."*

26 *Adherence with that plan is one of the required conservation measures.*

42. The Examiner finds that the record is insufficient to find or conclude that the
"capacity of the shoreline site to absorb the impacts of waste discharges from boats and gas
and oil spills" has been adequately considered in this instance, at this specific location and
the surrounding area, which includes the False Bay Preserve, not just the waters in False
Bay itself, but all protected waters lying the bay, including most all of the water
surrounding the small "shelter" island frequently referenced by the applicant, that is located
immediately west/southwest of the proposed new dock.

1
2 ***General findings, discussion.***

3 43. In this record, there is some information about efforts to prevent accidents, and
4 some information about preparations for responding to accidents should they occur. But
5 there is no information on the probability of their occurrence, nor on how adding a dock
6 and four boats to the area affects that probability.

7 44. Also missing is any information about of the potential environmental consequences
8 of such accidents when they occur. There is a need to describe the potential impacts that all
9 the proposed mitigation measures and best management practices (BMPs) seek to avoid.

10 45. The core of the argument against writing an impact statement is that the probability
11 of any significant, adverse environmental impacts is too remote. Despite the odds,
12 however, all BMPs and recommended mitigation measures intended to address accidental
13 releases indicate a common sense perception that accidents do happen and that the potential
14 consequences of such events are bad enough to justify expenditures on preparedness.

15 46. The applicant has already agreed to reduce the number of boats at the dock from six
16 to four; and at the hearing, he offered to reduce the maximum boat length to 30 feet. The
17 spill-cleanup measures recommended in the BA as well as the limited window of time when
18 the docks would be operational are all evidence that the applicant fully understands that
19 there is a risk of damage to the dock or boats that could be caused by weather or wave
20 events, among other things. On the Record presented, there is inadequate information to
21 determine if other mitigation measures are needed, or if those already recommended will be
22 effective.

23 47. Evaluating the Fairbanks reports, and reviewing Mr. Fairbanks' thoughtful
24 testimony provided during the public hearing, it is clear that his reports, reviews, and
25 recommendations were all based on many presumed "ideal conditions" – including without
26 limitation an assumption that all boat operators will be competent, skilled, and able to use
navigation tools or personal knowledge to maneuver a powerboat into a special-channel
located between rocks and near eelgrass beds as the boat travels to or from open water and
the proposed dock. Nothing in the Fairbanks reports adequately analyzes the potential
problems that could arise under less-than-ideal conditions, which may cause a boat to make
wide turns at some point potentially damaging eel grass, hitting rocks, or stirring up
sediment due to erratic surges in power needed to propel or hold the boat to or in a
particular position. Several witnesses offered credible and convincing evidence regarding
the challenges a boater could face while entering and exiting the special-channel suggested
as the only route to take as they use the proposed dock. There is no credible information in
the record to adequately assess how likely it is that every boat and boater will actually

1 utilize (or be able to use) the special-channel to fully avoid impacting surrounding eel grass
2 and kelp, or scraping onto rocks, among other things. And, there is also a complete absence
3 of information in the record to adequately assess the impacts that "failed boat maneuvers"
4 could have on the affected area, which could include the False Bay Preserve, if boats are
5 blown in that direction, or if a boater less-skilled than the applicant should accidentally drift
6 that direction, due to wind, waves generated by passing cargo ships, or any number of
7 factors noted in Mr. Sundberg's testimony and written exhibits that are included in the
8 record.

9 48. Mr. Fairbanks confirmed that his reports, studies and analyses intentionally did not
10 study the impacts that the regular presence of boats using the proposed dock could have on
11 the False Bay preserve, even though it is located a very short distance from the proposed
12 dock, and credible, unrebutted evidence established that water frequently flows from the
13 pocket beach where the dock would be located, in a northwesterly direction up into the
14 entrance of False Bay. There was no study or analysis of drift-patterns, from the dock area
15 and into the False Bay preserve, meaning there is no information in the record to
16 appropriately assess the potential impacts that an oil spill, or other pollution generated by
17 regular boat traffic using the dock, could have if pollutants from the dock area float into
18 False Bay, and how long such substances might remain in the bay. There is extensive and
19 unrebutted testimony and evidence in the record to establish that petroleum products are
20 fatal to most if not all embryos for marine life that is known to exist in False Bay and the
21 surrounding area.

22 49. As noted in other parts of these findings, the Record includes credible and
23 substantial evidence that establish how the project will result in probable significant adverse
24 impacts to the UW Biological Preserve and the greater pocket bay. Both appellants
25 presented credible and substantial evidence demonstrating that the County's threshold
26 determination for this Project should not be upheld.

50. The Project poses numerous high consequence adverse impacts to endangered
species, critical habitat, macro algae, microalgae, and a vast community of marine
invertebrates, located within an area that contains the most diverse collection of species
within the State of Washington and on San Juan Island. These adverse impacts are
significant under SEPA and demand further analysis through an environmental impact
statement ("EIS"). Even granting deference to the challenged MDNS, the facts presented at
the hearing demonstrate that the MDNS was premature.

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V. CONCLUSIONS OF LAW.

1. Based on testimony and evidence in the Record, including without limitation all findings set forth above – and after reviewing the Record as a whole while according substantial weight to the challenged mitigated determination of non-significance – the Examiner concludes that the challenged MDNS was clearly erroneous because he is left with the definite and firm conviction that a mistake has been committed, even though there is some supporting evidence for the MDNS.

2. The scope of the biological assessment reports provided by the applicant, which formed the basis for almost all of the County’s analysis and recommended conditions reflected in the Staff Report recommending approval of the Shoreline application subject to conditions, failed to consider impacts to readily-identifiable public resources, protected wildlife, and the sensitive marine environment located just beyond an imaginary 25-foot bubble encompassing the project that was used as the carefully-crafted, narrow, focal point for analysis and discussion provided in the Fairbanks’ Biological Assessments and the Staff Report. It is not too much to ask that a safari guide should inform her tour-group that there is a herd of elephants standing just over 25 feet away from a sleeping, cute and cuddly baby elephant that holds everyone’s undivided gaze and attention. In both situations, such a narrow focus can pose risks and result in unintended adverse impacts.

3. The new dock and desalination system are exciting projects for the applicant, and other supporters, but any decision must include adequate information about the specific site as well as the sensitive elements of the environment in the nearby area, including the pocket beach/bay, and the False Bay Marine Preserve. Without such information, no decision maker can make an informed determination regarding the effectiveness of any proposed mitigation measures, or if they are adequate given adverse impacts that will occur outside the 25-foot bubble studied by the applicant’s consultant.

4. The Fairbanks’ reports, and the Staff Report, all fail to consider the potential impacts on the False Bay Preserve. Such information is relevant and necessary for any decision-maker to reach an informed determination regarding the project in context with its location and sensitive areas affected by the proposal. The information is relevant in determining the cumulative impact on the surrounding marine environment, and the effectiveness of any proposed mitigation measures in avoiding, reducing, or otherwise mitigating impacts associated with the project.

5. By way of example, and without limiting the eventual scope of the EIS required for the project, the Record now includes little or no information to determine if any of the fuel-spill response or clean-up measures are reasonable or capable of accomplishment. There is no

1 meaningful discussion of restoration or recovery work, for marine life embryos that would
2 be killed or grassbeds that will be damaged, if and when the project is built and operating –
3 caused by boats trying to use the dock but swinging around the area in less than ideal-
4 conditions, accidental fuel spills or leaks, or a catastrophic grounding or sinking of a boat
5 using the dock; or caused by hyper-saline discharges from the desalination system into local
6 waters at a point and time when currents are relatively shallow and calm, allowing the
7 hyper-saline water to sink to the bottom, or move into False Bay, and remain for an
8 unknown period of time before it is mixed and diluted by the changing tides, potentially
9 damaging marine life, plants and other environmental features wherever the unmixed-
10 hyper-saline water comes to rest long enough to cause damage.

11 6. Virtually all of the recommended conditions address mitigation measures for the
12 construction window, and very few cover “operational” aspects of the project, after
13 construction. More information is needed to determine if other mitigation is necessary for
14 such impacts, which the record shows will occur after the project is built.

15 7. The two appeals challenge a threshold decision under the State Environmental Policy
16 Act (SEPA), Chapter 43.21C RCW. The threshold at issue is whether an Environmental
17 Impact Statement (EIS) needs to be prepared prior to a decision on the Honeywell’s
18 application. The issuance of a Determination of Non-Significance (DNS) was, in effect, a
19 decision that no impact statement is required.

20 8. As noted above, the Hearing Examiner must apply the "clearly erroneous" standard to
21 review of the MDNS. *Norway Hill Preservation and Protection Ass'n v. King County
22 Council*, 87 Wn. 2d 267 (1976). Under this standard, a DNS/MDNS may be reversed if,
23 although there is evidence to support it, the hearing examiner is left with the definite and
24 firm conviction that a mistake has been committed. See *Norway Hill*, 87 Wn.2d at 274.

25 9. The "clearly erroneous standard" requires that the Examiner "consider the public policy
26 and environmental values of SEPA." *Sisley v. San Juan Cty*, 89 Wn.2d 78, 84 (1977).
Included among these are the avoidance of risk to public health and safety. See RCW
43.21C.020.

10 An EIS is needed for proposals for "major actions significantly affecting the quality of
11 the environment." WAC 197-11-330. The key inquiry in deciding whether an impact
12 statement is required is whether the action proposed is significant. "Significant" is defined
13 in the SEPA rules at WAC 197-11-794 as follows:

14 (1) "Significant" as used in SEPA means a reasonable likelihood of more than a moderate
15 adverse impact on environmental quality.

16 (2) Significance involves context and intensity (WAC 197-11-330) and does not lend

1 itself to a formula or quantifiable test. The context may vary with the physical setting.
2 Intensity depends on the magnitude and duration of an impact. (emphasis added).

3 The severity of an impact should be weighed along with the likelihood of its occurrence.
4 An impact may be significant if its chance of occurrence is not great, but the resulting
5 environmental impact would be severe if it occurred.

6 (3) WAC 197-11-330 specifies a process, including criteria and procedures, for
7 determining whether a proposal is likely to have a significant adverse environmental
8 impact.

9 11. This project involves the very situation that the definition of “significant” describes.
10 Considering the context, the activities for which permission is sought present the potential
11 for accidents, spills, discharges, errant prop-wash, inadvertent cutting of seagrass beds by
12 boat propellers, spot-kills of marine life where petroleum or hyper-saline discharges may
13 settle on the bottom, and other low-probability but high impact/long-term-damage events,
14 any of which will result in significant environmental impacts that were not properly
15 analyzed in the record established for this matter. These impacts could occur in
16 environmentally sensitive areas and could result in harm to public health and safety.

17 12. Under WAC 197-11-330, in determining an impact's significance, the decision maker is
18 to take into account, among other things, that a proposal may to a significant degree
19 adversely affect environmentally sensitive or special areas (like the False Bay Preserve); or
20 may affect public health or safety; or that the same proposal may have a significant adverse
21 impact in one location but not in another location. Regrettably for this applicant, the
22 proposed site is not your average, run of the mill shoreline location. Not every dock
23 application involves a specially-protected, state-designated, biological preserve within a
24 stone's throw, or several boat lengths away. The absence of any docks for many miles to
25 the north and south of this location may be an indication that this may not be the best spot
26 to try and build a dock, no matter how dedicated, conscientious, and responsible the
 applicant appears to be. The adverse impacts that could flow from a mishap in this location
 must be considered. The BA reports included in the record do not provide sufficient
 information on the subject.

 13. Even though this proposal includes some aspects that could improve environmental
 conditions, like removal of existing creosote materials, there is insufficient information in
 this record regarding probable significant adverse environmental impacts associated with
 this proposal that may be low probability but would have high, possibly irreversible,
 impacts.

 14. Insufficient evidence was presented to prove that the combined effect of applying
 existing laws and regulations would reduce impacts to an insignificant level at this location.

 15. Again, on the Record made, even after reviewing the Record as a whole while

1 according substantial weight to the challenged mitigated determination of non-significance,
2 the Examiner is left with a definite and firm conviction that a mistake has been committed.
3 The Examiner concludes that the Honeywell's proposal is a major action significantly
affecting the quality of the environment and that an Environmental Impact Statement
should be prepared.

4 16. While most aspects of the proposed desalination system and the construction elements
5 of the entire project appear responsible and sound for the most part, including numerous
6 protection measures designed to protect the surrounding environment while construction
7 activities occur, the Record is absent any meaningful analysis of the project's operational
8 impacts moving forward – when 4 boats will regularly be moored and operated from the
9 new dock (where boats are not currently located for any extended period of time); and when
the desalination system will discharge hyper-saline into the area waters during less than
ideal mixing conditions (when tides might be slack, or waters might be very shallow, or
currents might be carrying the heavier, unmixed hyper-saline discharges up near or into
False Bay, where it may sink and rest for a period of time).

10 17. While not attempting to limit the scope of the necessary Environmental Impact
11 Statement, the Examiner is persuaded that it should address at least the following:

12 a) The potential risks of accidents, spills, discharges, errant prop-wash, inadvertent
13 cutting of seagrass beds by boat propellers, spot-kills of marine life where harmful
14 "heavier than surrounding water" discharges, like petroleum or hyper-saline, may settle
on the bottom, and other low-probability but high impact/long-term-damage events
that could occur after all aspects of the project are constructed and operational;

15 b) The cumulative impact of permitting construction of an innovative new dock along
16 an approximately 14-mile stretch of shoreline where there are no docks, and where
17 endangered Orca whale populations are known to feed during the very season that
18 boats are proposed to be using the new dock at a location where boats are not now
19 regularly located throughout the early morning hours or other hours when local whale
20 populations are known to feed in the area. There is no analysis as to whether the very
21 fact that the dock might be constructed in this location might serve to encourage
22 construction of other, similar docks in an area and along a shoreline where they are not
now present, and the cumulative impacts that such docks and additional, local boat
operations might have on Orca whales, forage fish, and other aspects of the natural
environment in the affected area. There should be a meaningful discussion as to
whether this project will establish a precedent for future, similar actions in the local
area with significant effects;

23 c) Evaluation of the safety and probability of accidents or negative impacts that should
24 be expected while the dock is used during less than ideal conditions, particularly storm
or wave events that the Record shows can and do occur during the same months that
the dock will be "in the water", as well as the risks and probability of accidents or

1 negative impacts that should be expected from boat operations performed by dock-
2 users and visitors who are not as skilled, experienced, conscientious, trained, or aware
3 of safe-boating-practices as the applicants claim to be;

4 d) Information and discussion of the environmental impacts of petroleum/other boat
5 toxics and hyper-saline discharges in context with the project's sensitive environment
6 location, i.e. the pocket beach/bay, and the False Bay reserve;

7 e) Analysis of the anticipated effectiveness of any proposed accident/emergency
8 response mitigation measures to respond to harmful discharges, spills, and the like;

9 f) Analysis of the anticipated effectiveness of any proposed restoration measures
10 intended to remediate adverse impacts associated with ongoing use and operation of
11 the project (both the dock and the desalination system);

12 g) Analysis of alternatives to aspects of the project, i.e. the effectiveness of "hailed
13 water" vs. a desalination system at this location; and the need/purpose of the proposed
14 new dock vs. moorage buoy(s) or moorage slips at existing marinas on San Juan
15 Island;

16 h) Analysis of the potential for boat groundings, bottom-scouring, and boat-damage
17 that will occur during low tide events, large swells, major wind events, and the like, if
18 boats are tied to the dock at such times, expanding upon the illustrations and
19 information provided by Mr. Sundberg, either confirming, modifying, or rebutting
20 same, so as to provide information needed to determine whether additional mitigation
21 measures might be reasonable, effective, and/or capable of accomplishment, like limits
22 on the size of boats, their draft, or time-frames on the tide-calendar when boats will not
23 be permitted to use the dock;

24 i) analysis of the baseline conditions of the pocket bay where the new dock would be
25 located;

26 j) To the extent not covered by items listed above¹:

(i) analysis regarding the effectiveness of any proposed mitigation plans involving
monitoring, replanting, or restoration for eelgrass impacts caused by blade-cutting
or prop scour;

(ii) analysis of the long-term impacts to kelp and other large plants in the
appropriate vicinity of the proposed dock, the designated 'safe channel', and other
areas surrounding such positions in which boat operations/maneuvers/turns can be
reasonably anticipated when the dock is "in-the-water" and boats are regularly
using the dock, i.e. from approximately late April through the end of October,

¹ See Exhibit 31, October 30, 2015 letter from San Juan County to Applicant's attorney, withdrawing a prior MDNS for a previous version of a dock proposal on the site.

1 including the pocket bay/beach, the False Bay Marine Preserve, and the need to
2 protect and repair the infrastructure associated with the project. This means more
3 than just 25-feet away from the dock and channel, so as to include elements of the
4 marine environment over which boats and boat impacts can reasonably be expected
when the dock is operational, leaving the Director with discretion to determine the
area needing analysis, based on information in the Record and/or obtained through
the scoping process for the EIS;

5 (iii) analysis of the dispersal patterns of oil and other project-related contaminants
6 that could enter the waters from parts of the project (like the desalination-outfall
7 point) or boats using the new dock, into the pocket bay and neighboring False Bay.
The “dye-test” dispersal, or some other appropriate testing protocol, should be
conducted, similar to that described by some witnesses, particularly Dr. Swalla;
and

8 (iv) analysis of proposed methods and the effectiveness of protecting the dock and
9 boats from storm events, which could include logs churning and ramming various
10 aspects of the project; as recommended by the Washington Department of Fish and
Wildlife (“WDFW”) and the credible, thoughtful, comment letters submitted by
11 Kyle Loring, Staff Attorney for Friends of the San Juans.

12 18. The Examiner urges that every effort be made to assure that the environmental impact
13 statement provides a truly objective analysis – assigning appropriate weight to impartial
14 sources of relevant information, and noting caution with respect unsupported comments or
input received from parties with demonstrated bias or self-interest.

15 19. Portions of the record demonstrate that this project may contribute to some existing
16 risks presented to the local environment, particularly the False Bay Preserve. Given this
17 circumstance, it may be appropriate to consider cooperative mitigation measures, where the
University of Washington undertakes responsible protection / prevention / accident
18 response measures to which the applicants contribute roughly proportional resources or
actions, because this applicant cannot and should not be required to mitigate impacts that
19 their project did not/will not cause, but may be shown to exist from other point sources, like
existing boat or freighter traffic along Haro Strait, or errant spills of toxic discharges that
20 flow into False Bay from part of its land-side drainage basin to the north. This is not a
requirement, but only a suggestion, derived from expressions of good will from witnesses
21 who genuinely appeared sincere in hoping for a “good-neighbor” relationship moving
forward, (like UW witness Dr. Swalla, who explained that she was not opposed to docks,
22 just the impacts that might need to be addressed; and Mr. Honeywell, who explained his
appreciation for the local environment, and steps that he and his wife have taken to reduce
23 their ‘footprint’ in the area).

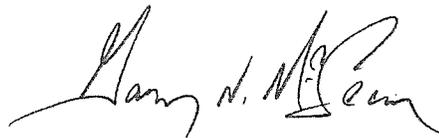
1 20. The appellants both satisfied their burden of proof to prevail in this appeal.
2 Accordingly, the matter must be remanded to the Department for further review and
3 preparation of an Environmental Impact Statement. Instead of denying the requested
4 Shoreline Permit, which could be done based on the Record presented, the Examiner
5 believes it is prudent to await preparation of the EIS and a new Staff Report
6 recommendation that shall address the additional information the impact statement
7 provides. The hearing on the merits of the requested shoreline permit should be continued
8 until such time.

9 21. Any legal conclusions or other statements made in previous or following sections of
10 this document that are deemed conclusions of law are hereby adopted as such, and are
11 incorporated herein by this reference.
12

13 VI. DECISION.

14 Based on evidence included in the record for the two appeals, both appellants
15 satisfied their burden of proof. Accordingly, the pending appeals are granted, and the
16 underlying shoreline project application is remanded to the San Juan County Community
17 Development Department for the preparation of an Environmental Impact Statement. The
18 shoreline permit application for the dock, desalination system, and navigation buoy are held
19 in abeyance until the EIS is prepared and the County has reviewed the application(s) in
20 light of the EIS, including any proposed alternatives or mitigation measures identified
21 therein. When the EIS is complete, a new Staff Report shall be prepared and a
22 recommendation shall be made reflecting the additional information the impact statement
23 provides. The hearing on the merits of the requested shoreline permit is continued until
24 then, at which time it will resume. The EIS scoping process should proceed in accord with
25 WAC 197-11-408.

26 ISSUED this 10th Day of April, 2018



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Gary N. McLean, Hearing Examiner

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Effective Date, Appeals, Valuation Notices

Hearing Examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology, pursuant to RCW 90.58.140, WAC 173-27-130 and/or SJCC 18.80.110.

Decisions of the Hearing Examiner are final and not subject to administrative appeal to the San Juan County Council, unless the County council has adopted, by ordinance, written procedures for the discretionary review of such decisions. See Section 4.50 of the San Juan County Home Rule Charter and SJCC 2.22.100.

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirements may result in dismissal of any appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to promptly review appeal deadlines and procedural requirements and confer with advisors of their choosing, possibly including a private attorney.

Affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation.