

**BEFORE THE HEARING EXAMINER
FOR SAN JUAN COUNTY** S.J.C. DEPARTMENT OF

AUG 07 2019

COMMUNITY DEVELOPMENT

File No. PSJ000-18-0007

In the Matter of a Shoreline Substantial)
Development Permit Application filed by)
EDWARD AND CHRISTY SCRIPPS,)
Applicants,)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION APPROVING SHORELINE
SUBSTANTIAL DEVELOPMENT
PERMIT FOR A REVERSE OSMOSIS
DESALINATION SYSTEM**

PROJECT: *Reverse Osmosis Desalination System to
serve a single-family residence located at 535
MacGinitie Road, tax parcel 353111003, along the
west/southwest shore of San Juan Island.*

I. SUMMARY OF DECISION.

The Shoreline Substantial Development Permit for the Scripps' reverse osmosis desalination system is approved, subject to Conditions of Approval that are based upon evidence in the record and the unchallenged MDNS issued for the project.

II. RELEVANT CODE PROVISIONS.

Shoreline Regulations: The County's Shoreline Master Plan/Program (SMP) is comprised of Chapter 18.50 of the San Juan County Unified Development Code (UDC), together with Element 3 of the County's Comprehensive Plan, the official maps and common descriptions of shoreline designation boundaries that do not follow property lines (Ordinance 1-2016, Exhibit D), Section 2(B) Figures 130-6, 130-7 of the Eastsound Subarea Plan, SJCC 18.30.480, the Eastsound Waterfront Access Plan, and SJCC 18.80.110. (*See SJCC 18.50.020(A)*). The County's current SMP and shoreline regulations took effect on October

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
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SCRIPPS' REVERSE OSMOSIS DESALINATION
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**GARY N. MCLEAN
HEARING EXAMINER
FOR SAN JUAN COUNTY**

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1 30, 2017, and apply for purposes of this application, which was initially filed in November
2 of 2018 and deemed complete for purposes of vesting and review on April 12, 2019. (*Staff
Report, page 4*).

3 ***Circumstances that trigger requirement to obtain a Shoreline Substantial***
4 ***Development Permit:*** “Substantial Development” is defined in RCW 90.58.030(3)(e) and
5 SJCC 18.20.190, and means any development proposed in the shoreline areas of San Juan
6 County of which the total cost, or fair market value, exceeds the dollar threshold established
7 by the Washington State Office of Financial Management (RCW 90.58.030(3)(e)) [currently
8 \$7,047¹] or any development which materially interferes with the normal public use of the
9 water or shorelines of the state, except for the exemptions specified in WAC 173-27-040 or
Chapter 18.50 SJCC. There is no dispute that development and installation of a desalination
water system – with seawater intake and discharge pipes installed in the Haro Strait subtidal
zone extending 200 lineal feet to a depth of -17 feet relative to the Mean Lower Low Water
(MLLW) elevation² – requires a Shoreline Substantial Development Permit.

10 ***Approval Criteria for Shoreline Substantial Development Permits:*** The procedures
11 for review of shoreline permit applications are contained in Chapter 18.80.110 of the county’s
12 code, with the Criteria for Approval of Shoreline Substantial Development Permits found in
13 SJCC 18.80.110(H), which reads as follows:

14 1. A shoreline substantial development permit will be granted by the County if the applicant
15 demonstrates the proposal is:

- 16 a. Consistent with the policies of the SMA, Chapter 90.58 RCW and Chapters 173-26 and 173-
27 WAC, as amended;
- 17 b. Consistent with the policies and regulations of this SMP;
- 18 c. Consistent with other applicable sections of this code; and
- 19 d. Consistent with the goals and policies of the Comprehensive Plan.

20 2. The conditions specified by the hearing examiner to make the proposal consistent with the SMP and
21 to mitigate or avoid adverse impacts to shoreline ecological functions will be attached to the permit.

22 ***Jurisdiction:*** Under SJCC 18.80.110(E)(1), the Hearing Examiner is given the
23 authority to hear and approve, approve with conditions, or deny shoreline substantial
24 development permits following receipt of the recommendations of the director, based upon
25 the criteria found in SJCC 18.80.110(H), as set forth above.

26 ¹ See Washington State Register 17-17-007, Office of Financial Management filing, dated August 3, 2017, explaining that
the figure is adjusted every five years, with most recent update in 2017.

² Ex. 1a, WATEC Revised Submittal, dated Jan. 22, 2019, Project Narrative, at Sec. 1.2.2(b), on page 1-2.

1 **Burden of Proof:** Under SJCC 18.80.010(A), “Shoreline Permits” are specifically
2 listed as “Project Permits” covered by the provisions of SJCC Chapter 18.80 re: application,
3 notice, review and appeal requirements for the County’s Unified Development Code, which
4 is found in Title 18 of the SJCC and includes Chapter 18.50, the County’s Shoreline Master
5 Program. SJCC 18.80.040(B) reads as follows:

6 *“[t]he burden of proof is on the project permit applicant. The project permit
7 application must be supported by evidence that it is consistent with the
8 applicable state law, County development regulations, the Comprehensive
9 Plan, and the applicant meets his burden of proving that any significant
10 adverse environmental impacts have been adequately analyzed and
11 addressed.”*

12 **Standard of Review:** SJCC 2.22.210(H) explains that “for an application to be
13 approved, a preponderance of the evidence presented at the hearing must support the
14 conclusion that the application meets the legal decision criteria that apply.”

15 **Review Criteria for the Department of Ecology:** Finally, if the Examiner approves
16 or denies the Shoreline Permit, such decision must be forwarded to the Department of
17 Ecology and the Attorney General, for state review and any appeals of the Shoreline Permit,
18 in accord with Washington Shoreline Management regulations found in WAC 173-27-130.
19 This Decision is subject to review and approval, approval with conditions, or denial by the
20 Washington Department of Ecology. Ecology’s review criteria for Shoreline Substantial
21 Development Permits is found at WAC 173-27-150³. The San Juan County review criteria
22 for the requested shoreline permit is consistent with and substantially similar to those that
23 will be used by the Department of Ecology.

24 **III. RECORD AND EXHIBITS; SUMMARY OF PUBLIC HEARING.**

25 Exhibits entered into evidence as part of the record, and an audio recording of the

26 ³ WAC 173-27-150

Review criteria for substantial development permits.

(1) A substantial development permit shall be granted only when the development proposed is consistent with:

(a) The policies and procedures of the act;

(b) The provisions of this regulation; and

(c) The applicable master program adopted or approved for the area. Provided, that where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of chapter 173-26 WAC, and to the extent feasible, any draft or approved master program which can be reasonably ascertained as representing the policy of the local government.

(2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

public hearing, are maintained by the San Juan County Department of Community Development, in accord with applicable law.

Exhibits: The comprehensive and credible Staff Report, prepared by Colin Maycock, the designated County Planner, dated May 7, 2019, for the pending application (18 pages), and all Exhibits, numbered 1a – 1k, 2, 3, 4, 5a-5d, and 6 and identified on pages 17 and 18 of the Staff Report, are listed below and included as part of the Record for this matter:

Exhibit No.	Description of Item	Submitted by	Date
1a.	Application, Agent Authorization, Transmittal and Project Description	John Geniuch	November 1, 2018 and Revised January 22, 2019
1b.	Maps and Impervious Surfaces Worksheet	John Geniuch	January 22, 2019
1c.	Project Drawings	John Geniuch	January 22, 2019
1d.	SEPA Checklist	John Geniuch	Revised April 12, 2019
1e.	JARPA Forms	John Geniuch	Revised January 22, 2019
1f.	Driving Directions	John Geniuch	November 1, 2018
1g.	Biological Evaluation	Chris Fairbanks	Revised January 22, 2019
1h.	Macroalgae and Eelgrass Survey	Chris Fairbanks	Revised January 22, 2019
1i.	FWHCA Report	Chris Fairbanks	Revised January 22, 2019
1j.	Spill Prevention, Containment, and Countermeasure Plan	Andy Evers	Revised January 22, 2019
1k.	SEPA Request for Review	Colin Maycock	April 17, 2019
2.	Notice Affidavit	John Geniuch	April 18, 2019
3.	Department of Archaeology and Historic Preservation	Dr. R. Whitlam	January 14, 2019

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Exhibit No.	Description of Item	Submitted by	Date
4.	Applicants response to public comments	Andy Evers	May 6, 2019
5a.	Public Comment	Jane Wentworth	April 23, 2019
5b.	Public Comment	Mary Ferm	April 29, 2019
5c.	Public Comment	Laura Derevensky	April 29, 2019
5d.	Public Comment	Walter and Ruth MacGinitie	May 1, 2019
6.	Stamped Plan	Colin Maycock	May 7, 2019

At the public hearing, and via post-hearing submittals requested by and transmitted to the hearing examiner by County Staff, the following additional exhibits have been added to the record:

7. Pinto Abalone information relevant to the project site, prepared by Chris Fairbanks, the same Biologist who authored the BE/Eelgrass survey/FWHCA reports for the Scripps' application, (Exs. 1g, 1h, and 1i listed above), explaining that the value of the habitat based on dive survey is moderate to poor for abalone, and that sediment conditions along the pipeline route is not the boulder/bedrock substrate preferred by abalone;

8. "Visual Plume" model system data generated using EPA-developed software, explaining that dilution of 'discharge' water (sometimes called hyper-saline water) is achieved at 1.595 inches from the outfall pipe opening, with near-ambient conditions reached just outside the outfall. Also includes empirical data and studies from Lopez Water and Cattle Point facilities in the County, illustrating how mixing of seawater occurs very close to the point of discharge, even for systems with far higher capacity/discharge levels (10x greater than the Scripps' proposed system). Materials were transmitted to county staff the last week of May by the applicants' designated Agent/project designer, engineer, John Geniuch. P.E.;

9. Map of shoreline area, showing adjacent parcels, coves in area. Submitted at the public hearing by Mr. MacGinitie;

10. Corrected map submitted by County Staff, correcting a mislabeled vicinity map illustrated at public hearing which erroneously showed False Bay far closer to the site than reality. In sum, False Bay is located well to the east/southeast of the project site, and there was no testimony in the record suggesting that the proposed desalination

1 system would/could impact such distant areas;

2 11. Post-hearing response materials submitted by Applicants' agent/engineer, Mr.
3 Geniuch, to address general concerns expressed in some comments that water used
4 for irrigation might lead to improper discharges of pollutants into area waters. The
5 response includes an appropriate reference to current county codes, primarily SJCC
6 18.50.120.E, which expressly provides that: "Herbicides and pesticides shall not be
7 applied to, or allowed to directly enter, water bodies or wetlands unless approved for
8 such use by the appropriate agencies;" and

9 12. PowerPoint presentation provided by Linda Kuller, Planning Manager, at the
10 public hearing, as the County Staff representative (due to medical issue that prevented
11 initially-assigned planner, Mr. Maycock – author of Staff Report – from attending the
12 hearing).

13 ***Hearing Testimony, Written Comments:*** The following individuals presented
14 testimony under oath at the duly noticed open record public hearing held on May 22, 2019:

- 15 1. Linda Kuller, Planning Manager for San Juan County, who summarized the Staff
16 Report for the pending application using a PowerPoint presentation (Ex. 12),
17 highlighting key issues and facts addressed in her testimony, including: the
18 proposed desalination system will be used to make potable water from seawater
19 to serve an existing home, because the current well is low-producing and poor
20 quality; that Biological Evaluation (Ex. 1g) concludes that brine discharge will
21 have no effect on ecological functions and processes in the project area; that no
22 adverse impact to ESA listed species or critical habitat are anticipated; that the
23 application and supporting materials demonstrate compliance with the County's
24 SMP and applicable codes; that the SEPA MDNS issued for the project in April
25 of 2019 was not appealed; and that the project meets all shoreline permit approval
26 criteria and merits approval, subject to conditions;
2. John Geniuch, P.E., applicants' Agent, with WATEC (online site describes the
firm as a Water Resource Engineering firm specializing in Desalination). Mr.
Geniuch explained how the project meets all codes and approval criteria, as
explained in the application materials included in the record as Exhibits 1a-1j. He
offered a credible and compelling reason for the desalination system, including
the fact that a de-sal system helps to reduce demand very limited groundwater
(aquifer) resources, and that 'hailed water' requires regular truck-trips, which
entails energy demand of its own, so the de-sal system should have fewer overall

1 environmental impacts. He explained how the mixing zone/dispersal of brine
2 discharge would be very close to the discharge point, supported by his post-
3 hearing submittal, Ex. 8; and how design/construction plans were modified to
4 adequately address comments regarding cultural resources/archaeological issues,
5 resulting in some directional drilling to a deeper level so as to avoid surface
6 artifacts that may be in the area. Mr. Geniuch responded to testimony from the
7 MacGinitie family members, noting that the discharge location is set where the
8 state Dept. of Natural Resources says it should be, and that although the system is
9 designed for a certain capacity, in order to reduce wear and tear, it will not run at
10 peak use most of the time. Further, he noted that his experience with de-sal
11 systems shows that even at highest demand periods, large systems are typically
12 operating at just 30% of maximum capacity;

13 3. Walter MacGinitie, neighboring property owner, longtime resident of the area,
14 shares same last name as road serving the applicants' property; testified that he
15 generally favors the project, but has concerns with coves located to east and west
16 of outfall where he worries discharged (brine) water will settle and not mix, so he
17 would prefer the discharge point to be out 500 feet or so further away from shore.
18 He also expressed general concerns that the water supply could be used for
19 irrigation, which could generate runoff with pesticides and other contaminants;

20 4. Linda MacGinitie, resident of area since the 1980s, shared same concerns as
21 Walter M.;

22 5. Ruth MacGinitie, longtime resident, expressed general concerns with bays on
23 either side of outfall, where she worries currents will pass-by, leaving discharged
24 water standing (unmixed, not dispersed); and

25 6. Andrew Evers, with WATEC (the applicants' de-sal system design firm), offered
26 testimony in response to the MacGinitie family comments, emphasized that
diffusion and dispersion of discharged salt-water into the natural environment
occurs as things move towards equilibrium, and offered his firm, professional
opinion that it is "inaccurate and impossible" to say that salt will collect in bays
to east or west of project site.

No expert testimony was offered to rebut professional opinions and testimony
provided by the applicants' witnesses. No one appealed the SEPA MDNS issued for the
project on April 17, 2019. (*Testimony of Ms. Kuller; Ex. 12, page 9, bottom slide; Ex. 1k,
SEPA MDNS issued for project*).

1
2 The Examiner has had a full and fair opportunity to consider all evidence and
3 testimony submitted as part of the record, has visited the shoreline area where the proposal
4 would occur on several occasions over the last few years, reviewed and researched relevant
5 codes and caselaw, and is fully advised. Accordingly, this Decision is now in order.

6 IV. FINDINGS OF FACT.

7 Based on the Record, the Examiner issues the following findings of fact:

8 1. All statements of fact included in any other section of this Decision, are hereby
9 incorporated by reference and adopted as Findings of Fact supporting this Decision and the
10 attached Conditions of Approval.

11 2. In November of 2018, the above-named applicants submitted materials seeking the
12 requested shoreline permit, which submittal was deemed complete for purposes of vesting
13 and review on or about April 12, 2019. (*Staff Report, page 4*).

14 3. The pending application for a shoreline substantial development permit would
15 authorize development and use of a relatively small-scale Reverse Osmosis Desalination
16 System to generate potable water from seawater, which will serve an existing single-family
17 home with an accessory dwelling unit on the site.

18 4. The applicants are Edward and Christy Scripps, who own the property that would be
19 served by the new desalination system. The Scripps' property is located at 535 MacGinitie
20 Road, tax parcel no. 353111003, along the west/southwest shore of San Juan Island.

21 5. The Scripps' proposed desalination project will include: the reverse osmosis
22 desalination equipment and storage; a valve vault in the rock bluff; and intake and discharge
23 lines, conduits and valves. (*Staff Report, project details summarized on pages 1-3; Ex. 12,*
24 *Ms. Kuller's presentation, slides explaining project and key system components; Ex. 1a,*
25 *application materials, WATEC project narrative and site plans*).

26 6. The Staff Report explains that the maximum production of the reverse osmosis
desalination system will be 4,350 gallons of (potable) water per day (GPD). The production
of 4,350 GPD will require an intake of 13,000 GPD of sea-water and a discharge of 8,650
GPD of brine.

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1 7. For frame of reference, seawater has a salinity of 30 parts per thousand, but the
2 discharged brine will have a salinity of 40 parts per thousand. Obviously, dispersal/mixing
3 of the discharged brine is a key consideration in this application, as reflected in public
4 comments included in the record.

5 8. An existing shed is located 315 feet from the ordinary highwater mark. The shed will
6 house the desalination equipment, including filters, a 5-horsepower pump and storage. The
7 project will involve directionally drilling a conduit to connect the desalination equipment
8 with the intake and discharge valves situated in the valve vault that will be placed adjacent
9 to the top of the rock bluff on the property. The conduit will be drilled at a depth of 48 inches
10 below the ground surface to avoid disturbing potential cultural resources, following specific
11 direction provided by the Washington Department of Archaeology and Historic Preservation
12 (DAHP) (*Exhibit 3*). The conduit will encase both 2-inch intake and discharge High Density
13 Polyethylene (HDPE) lines as well as an electrical cable. (*Staff Report, project details
14 summarized on pages 1-3; Ex. 12, Ms. Kuller's presentation, slides explaining project and
15 key system components; Ex. 1a, application materials, WATEC project narrative and site
16 plans*).

17 9. From the valve vault at the top of the rock bluff, the intake and discharge pipes will
18 extend approximately 200 lineal feet to a depth of minus 17 feet relative to the mean lower
19 low water (MLLW) mark in Haro Strait's subtidal zone. (*Id.; Ex. 12, page 4, top slide*). The
20 discharge and intake pipes will be secured to the bedrock bluff with stainless steel straps and
21 rock anchors. The intake pipe will include filters to prevent marine organisms from being
22 drawn up into the system. The discharge diffuser will be elevated 2 feet above the sea floor.
23 (*Id.*).

24 10. The project requires a lease from the Washington Department of Natural Resources
25 (DNR) for use of affected shorelands.

26 11. One of the most frequently expressed concerns presented in public comments, at the
hearing and in written remarks, focused on the length of the discharge pipe and the outfall
location. The original design envisioned pipes running about 350 lineal feet from shore
resulting in an outfall depth of -30 feet (MLLW). Based on a direct request from Marine
Biologists with the Washington Department of Natural Resources, the project was redesigned
with pipes running 200 linear feet from shore with an outfall depth of -17 feet (MLLW). The
applicants' engineers/designers from WATEC explained that DNR Biologists determined
that because the discharge mixes within 6 inches from the outfall, the modified design will
have less of an impact than would extending the pipe further along the seabed floor. (*Ex. 4,
page 1, WATEC response to comment 3*).

1
2 12a. The Examiner is without jurisdiction or authority to mandate the terms of any DNR
3 lease. Presumably, DNR Marine Biologists have fully considered and researched their
4 position on the subject.

5 12b. In a previous shoreline matter that included a request to approve a desalination system
6 along the south end of San Juan Island, the undersigned examiner heard lengthy and detailed
7 expert testimony that emphasized how the Department of Ecology recommends installation
8 of desalination system discharge lines at depths of at least 10 feet at low-low tide. The reverse
9 osmosis desalination system proposed in the prior project was only designed with effluent at
10 a much shallower depth, between 3-feet and 7-feet below water. That project was not
11 approved. In this instance, the Scripps' proposed outfall – as adjusted to satisfy DNR's
12 preferred placement – would be minus 17 feet at low low tide (MLLW).

13 12c. No one offered any professional studies or expert opinions to support general
14 concerns that the DNR determination on pipe-length and depth of the outfall might be too
15 short/shallow. Conditions of approval have been written so as to accommodate DNR's final
16 determination on the subject, meaning if the final DNR lease for this project mandates a
17 longer pipe and a deeper outfall (similar to the original design presented by the applicants),
18 the project can still go forward.

19 12d. In any event, the DNR-directed depth and placement of the discharge outfall appears
20 to be fully supported by "Visual Plume" model system data generated using EPA-developed
21 software, which indicates that that dilution of 'discharge' water (sometimes called hyper-
22 saline water) will be achieved at 1.595 inches (inches, not feet) from the outfall pipe opening,
23 with near-ambient conditions reached just outside the outfall. (Ex. 8).

24 13. Another common concern expressed in public comments focused on the volume of
25 water that could be generated with the proposed desalination system, and speculation as to
26 what it might be used for besides drinking water (i.e. irrigation), and whether the owners
might fertilize, or spray pesticides in an irrigated landscape area that could cause harmful
materials to runoff the site into marine waters. All of these remarks were speculative and
have no basis in fact or law.

14. For instance, the Staff Report correctly notes that Washington state law expressly
provides an exemption from state permit requirements for domestic water withdrawal of up
to 5,000 gallons per day (GPD) of groundwater from a well. (See RCW 90.44.050, which
provides in relevant part: *"any withdrawal of public groundwaters for stock-watering
purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-*

1 *half acre in area, or for single or group domestic uses in an amount not exceeding five*
2 *thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in*
3 *an amount not exceeding five thousand gallons a day, is and shall be exempt from the*
4 *provisions of this section [requiring permits from the Dept. of Ecology], but, to the extent*
5 *that it is regularly used beneficially, shall be entitled to a right equal to that established by a*
6 *permit issued under the provisions of this chapter...”).*

7 15. The existing house and other legal structures on the site are all now served by a well-
8 water system that draws from the same groundwater supply that serves many other residents
9 on San Juan Island. The well is said to be a low-producing well, and the water supply is said
10 to be poor quality. With upgrades to pipes and pumps, it is conceivable that the property
11 owners could seek to boost their draw on the groundwater supply up to 5,000 GPD. That
12 would not be in the best interests of other Island residents, who share the same water supply
13 source.

14 16. The proposed desalination system will have the capacity to produce up to 4,350 GPD,
15 which is below the state threshold the owners could potentially draw from local groundwater
16 supplies. And, County codes expressly permit desalination systems as the primary water
17 supply for new and existing land divisions or other development projects within the shoreline,
18 subject to specific regulations found in SJCC 18.50.560.B. The most stringent standards
19 apply to systems that have an intake greater than 100,000 GPD. (Id., at subsection B.6). The
20 Scripps' system has an intake of just 13,000 GPD.

21 17. As explained in the Staff Report, on pages 9 and 10, the proposed desalination system
22 fully satisfies all applicable requirements for such systems, as set forth in SJCC 18.50.560.B.
23 For instance: the desalination system will serve as the primary water supply for an existing
24 single family residence and associated facilities on a lawfully developed site; the proposed
25 project, as conditioned, will not result in a net loss of shoreline ecological functions (*Exhibits*
26 *1i, page 10; 1g, page 20; and 1h, page 3*); the system is located and designed to blend in with
the natural surroundings to the extent feasible to reduce visual impacts, noting that the only
visible facets of the proposed system are the intake and discharge lines where they traverse
the bluff to the OHWM, and the location of the intake and discharge lines takes advantage of
available covering vegetation and a natural notch in the shoreline; and the proposed
desalination system will not impede public access to public tidelands or interfere with normal
public use of waters of the state. (*All satisfying applicable requirements found in SJCC*
18.50.560.B(1), (3), (4), and (5)).

18. The Staff Report explains how the proposed desalination system is also designed to
comply with SJCC 18.50.560.B(7)(a) – (f), as republished below, with code language
followed by findings in italics:

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1 a) Intake and discharge lines must be trenched, run, or located together except where
2 necessary to provide adequate separation between intake and discharged water; *Exhibits 1b and*
3 *1c of the proposed project show that the intake and discharge lines will be placed together in*
the conduit between the desalination plant and the valve vault, and subsequently out to the
discharge and intake points.

4 b. Intake and discharge lines must not interfere with normal public use of waters of the state; *The*
5 *intake and discharge lines will not impede normal public use of the waters of the state.*

6 c. The intake point shall not float on the surface; *The intake point will be approximately 200 feet*
7 *waterward of the OHWM and at a depth of minus 17 MLLW.*

8 d. Intake and discharge lines must not be placed through or over any known or discovered
9 archaeological resources, unless the location is approved by DAHP; *The applicants are drilling*
10 *a conduit for the intake and discharge lines at a depth of approximately 48 inches below the*
11 *ground surface to avoid disturbing archaeological resources. The proposal to use directional*
12 *drilling to create the conduit as a means of avoiding adverse impacts on archaeological*
13 *resources has been approved by the DAHP and USACE (Exhibit 3).*

14 e. The use of wells with salt water contamination or intrusion as the intake source for desalination
15 or reverse osmosis systems is prohibited unless specifically authorized by the County department
16 of health and community services; *The proposal is to draw raw seawater directly from the Salish*
17 *sea immediately adjacent to the residence. The applicants intend to use the treated water for*
18 *their household needs. In doing so, the applicants would no longer draw water from the well.*

19 f. When feasible, all cleaning of desalination systems and equipment must take place off site and
20 ensure that cleaning chemicals are not inadvertently introduced into marine waters. *Cleaning the*
21 *desalination system and equipment will take place off site. Contemporary systems contain*
22 *components that are regularly replaced rather than cleaned, further reducing the possibility*
23 *that cleaning chemicals could affect marine waters.*

24 19. The proposed desalination system is entirely consistent with the County's
25 Comprehensive Plan Policies that seek to protect the quality and quantity of groundwater
26 (*Comp. Plan, Sec. B, Element 3, Subsec. 3.2.C. (re: Critical Areas), Goal 5*); and that consider
freshwater along the shoreline a renewable resource of critical importance and control its use
to prevent the intrusion or spread of salt water into vital aquifers (*Id., Policy 9*). The
desalination system will reduce the demand that the current property places on local
groundwater sources.

20. There is no credible dispute that the proposed desalination system satisfies applicable
standards found in current county codes and policies. Aspirations by some written
commenters that would restrict lawn maintenance, or the use of water to irrigate a lawn, are
without a basis in applicable law. County code enforcement staff are fully capable of citing

1 property owners who violate existing anti-pollution regulations.

2 21. In fact, as part of his response to comments made during the public hearing, the
3 applicants' agent, Mr. Geniuch, submitted materials as part of Exhibit 11 that direct attention
4 to SJCC 18.50.120.E, which expressly provides that: "*Herbicides and pesticides shall not be*
5 *applied to, or allowed to directly enter, water bodies or wetlands unless approved for such*
6 *use by the appropriate agencies.*" Simply put, water pollution is already prohibited, whether
7 it results from irrigation, or any other activity. Speculative concerns along these lines provide
8 no basis in fact or law to deny this project.

9 22. The applicant's agent/project engineer, Mr. Geniuch, and project design firm,
10 WATEC, submitted a detailed and credible written summary of the pending application, with
11 specific reference to facts and circumstances that establish how the pending application
12 complies with applicable shoreline regulations and merits approval. (*Ex. 1a, WATEC project*
13 *narrative, maps, site plans, other project details, 'Revised Submittal' dated Jan 22, 2019,*
14 *reflects project modifications made following direction from DNR).*

15 23. The proposed desalination system on the Scripps' property has been carefully
16 designed to determine a specific placement, features, and construction methods that would
17 minimize, prevent, and/or avoid most impacts on the shoreline environment. There is no
18 dispute that the only professional reports and expert testimony included in the record were
19 not rebutted, particularly the findings and conclusions in the Fairbanks' Biological
20 Evaluation prepared for this project to the effect that there will be no net loss of shoreline
21 ecological functions, so long as the new desalination system is placed where proposed and
22 specific BMPs are followed throughout the construction process. (*Ex. 1g; Ex. 12).*

23 24. The applicants' written responses to public comments credibly summarizes
24 environmental reports in the record that establish how the new desalination system is unlikely
25 to cause significant environmental impacts. (*Ex. 4, Applicant responses to written*
26 *comments).*

27 25. The Staff Report and Ms. Kuller's testimony confirm that applicable notice, mailing
28 and publication requirements were satisfied. (*Testimony of Ms. Kuller; Staff Report, page 4;*
29 *Exhibit 2).*

30 ***SEPA review.***

31 26. Following review and consideration of all environmental documentation submitted as
32 part of the application, including a SEPA Checklist (*Ex. 1d*), a Biological Evaluation,
33 Eelgrass Survey, and FWHCA Report prepared by Chris Fairbanks (*Exs. 1g, 1h, 1i*), County
34

35 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND**
36 **DECISION – APPROVING SHORELINE**
SUBSTANTIAL DEVELOPMENT PERMIT FOR THE
SCRIPPS' REVERSE OSMOSIS DESALINATION
SYSTEM ON SAN JUAN ISLAND –
FILE NO. PSJ000-18-0007

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HEARING EXAMINER
FOR SAN JUAN COUNTY

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1 officials issued a SEPA Mitigated Determination of Non-Significance (MDNS) for the
2 proposal on April 17, 2019. (*Exhibit 1k*).

3 27. The MDNS includes 8 (eight) specific mitigation measures that are intended to avoid
4 or minimize potential adverse impacts on the environment, comprised of BMPs, spill-
5 prevention requirements, and an inadvertent discovery plan, among other things. (*See Ex.*
6 *1k, MDNS*).

7 28. The face of the MDNS notification issued by the County specified that the deadline
8 for comments regarding the MDNS was May 1, 2019, and the deadline for any appeals of the
9 MDNS expired on May 22, 2019. (*See Ex. 1k, MDNS*).

10 29. All comments received were considered by staff, addressed by the applicants via
11 written responses issued by their agents, and are included in the record.

12 30. SJCC 18.80.140(A) provides that a SEPA threshold determination like the MDNS
13 issued for this project may be appealed within 21 days of issuance. No one submitted an
14 appeal of the MDNS issued for the project.

15 31. All of the unchallenged mitigation measures included in the MDNS are supported by
16 evidence in the record, reasonable, and capable of being accomplished. Accordingly, they
17 are all included as Conditions of Approval for the pending Shoreline Permit. MDNS
18 mitigation measures 1-8 are substantially included as Conditions of Approval for this permit,
19 numbered as conditions 2 - 10.

20 32. No individual or government agency invited to comment on the project application
21 offered any evidence or information that would rebut or materially challenge the findings and
22 analysis provided in applicant's environmental analysis and project construction
23 recommendations that are included as part of the Record.

24 33. Substantial evidence in the record, including without limitation the application
25 materials, environmental reports, and testimony by Applicant representatives, fully support
26 Staff's conclusions in the Staff Report, explaining that the proposed project satisfactorily
27 complies with applicable county code provisions, and/or can be mitigated through conditions
28 set forth in the MDNS issued for this project, to minimize, reduce, or prevent any probable,
29 significant, adverse, environmental impacts associated with the project.

30 34. For instance, *there is substantial, credible, and un rebutted information in the record*
31 *and application materials to demonstrate that no net loss of shoreline ecological functions*
32 *will occur*. These materials include, without limitation, the Biological Evaluation prepared

1 by Chris Fairbanks for the project. (Ex. 1g, particularly on page 20; also see Exhibits 1i,
2 page 10; and 1h, page 3).

3 35. The findings, recommendations and conclusions provided in the environmental
4 documentation submitted on behalf of the applicants, are credible and well-reasoned
5 summaries of complicated regulations, conditions, possible impacts and appropriate
6 mitigation measures associated with the proposed project. The Applicants' proposal has been
7 designed, planned, and/or conditioned based on input from experts in various fields.

8 36. No one presented any testimony or evidence that would justify denial of the pending
9 shoreline application. Concerns about Pinto Abalone were fully addressed in Exhibit 7,
10 which shows that the value of the habitat available at the project site (based on a site-specific
11 dive survey) is moderate to poor for abalone, and that sediment conditions along the pipeline
12 route is not the boulder/bedrock substrate preferred by abalone. Concerns about noise were
13 rebutted by Mr. Giniuch, who confirmed that the 5-horsepower electric pump will be placed
14 inside a shed building, making it very unlikely that any noise will carry outside. Finally,
15 applicant representatives and county staff both confirmed that all development activity
16 (including clearing and grading work for a possible 3-bay garage) must comply with
17 applicable county codes.

18 ***The Record includes substantial evidence (far more than just a preponderance of evidence)***
19 ***showing that the application meets requirements to approve the Substantial Development***
20 ***Permit.***

21 37. Substantial and credible evidence in the record, including without limitation
22 un rebutted findings and analysis provided in the Staff Report, the Applicant's Project
23 Narrative, included in the Record as part of Exhibit 1a, establishes that the applicants have
24 met their burden to prove that the pending application satisfies all criteria for approval of a
25 Substantial Development Permit, found at SJCC 18.80.110(H). Specifically, the applicant
26 has met its burden to establish that: a) The proposal is consistent with the policies of the
27 Shoreline Management Act and its implementing regulations, Chapter 90.58 RCW and
28 Chapter 173-27 WAC, as amended; b) The proposal is Consistent with the policies and
29 regulations of the Shoreline Master Program in Chapter 18.50 SJCC; c) The proposal is
30 consistent with applicable provisions of SJCC chapter 18.80 and other applicable sections of
31 the SJCC; and d) The proposal is consistent with the goals and policies of the Comprehensive
32 Plan.

33 38. Consistent with SJCC 18.80.110(H)(2), the Examiner has conditioned approval of the
34 project to make the proposal consistent with the shoreline master program and to mitigate or
35 avoid adverse impacts.

36 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND
DECISION - APPROVING SHORELINE
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HEARING EXAMINER
FOR SAN JUAN COUNTY**

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1 39. All findings, statements of fact, and analysis provided in the Staff Report, are
2 incorporated herein as findings of fact by the undersigned hearing examiner, except as
3 modified herein.

4 V. CONCLUSIONS OF LAW.

5 1. The Record, including without limitation the County's Staff Report, and the
6 applicants' environmental and regulatory analysis reports, includes substantial, credible and
7 convincing proof that the Shoreline application satisfies the County's approval criteria.

8 2. The principal purpose of SEPA is to provide decisionmakers and the public with
9 information about potential adverse impacts of a proposed action. *Save our Environment v.*
10 *Snohomish County*, 99 Wash.2d 363, 373 (1983). "SEPA is primarily a procedural statute
11 that requires the disclosure of environmental information. SEPA does not demand a
12 particular substantive result in government decision making; rather it ensures that
13 environmental values are given appropriate consideration." *Glasser v. City of Seattle*, 139
14 Wn. App. 728, 742 (2007). In this matter, the Record includes substantial, credible, and
15 un rebutted evidence to support issuance of the MDNS, and all of the unchallenged mitigation
16 measures that are also included as Conditions of Approval for this permit. The MDNS was
17 not appealed.

18 3. The state's Shoreline Management Act ("SMA") and the regulatory policies established
19 thereunder, including those adopted by San Juan County and approved by the Department of
20 Ecology, does/do not prohibit all development in the shoreline. Rather, its purpose is to allow
21 careful development of shorelines by balancing public access, preservation of shoreline
22 habitat and private property rights through coordinated planning. *Overlake Fund v. Shoreline*
23 *Hearings Bd. (State Report Title: Overlake Fund v. Shorelines Hearings Bd.)*, 90 Wash. App.
24 746, 761, 954 P.2d 304, 312 (1998).

25 4. The SMA clearly contemplates a balancing approach. "[C]oordinated planning is
26 necessary in order to protect the public interest associated with the shorelines of the state
while, at the same time, recognizing and protecting private property rights consistent with the
public interest." RCW 90.58.020. The SMA does not prohibit development but attempts to
ensure that development will occur in such a way to protect the public against "adverse effects
to the public health, the land and its vegetation and wildlife, and the waters of the state and
their aquatic life." *Id.* Lastly, the SMA fosters "all reasonable and appropriate uses" of the
shorelines of the state. *Id.*

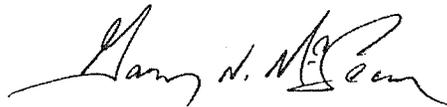
1 5. As shown above, the Record establishes that the proposed desalination system project
2 has been designed and conditioned in a manner that minimizes potential impacts, with
3 modifications made based on professional feedback from DAHP and DNR officials, among
4 others.

5 6. Any finding or other statement contained in a previous section of this Decision that
6 is deemed to be a Conclusion of Law is hereby adopted as such and incorporated by reference.

7
8 **VI. DECISION, CONDITIONS OF APPROVAL.**

9 Based on the record, and for the reasons set forth above, the Shoreline Substantial
10 Development Permit for the Scripps' reverse osmosis desalination system to serve their
11 property on San Juan Island is approved, subject to the following Conditions of Approval,
12 which are attached hereto, and incorporated herein by reference.

13 ISSUED this 6th Day of August, 2019

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15 _____
16 Gary N. McLean
17 Hearing Examiner

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CONDITIONS OF APPROVAL

SCRIPPS REVERSE OSMOSIS DESALINATION PROJECT

Shoreline Substantial Development Permit

File No. PSJ000-18-007

Based on the Record, and under authority of applicable county code provisions, the Examiner imposes the following Conditions of Approval on the above-referenced permit.

1. The Project elements approved by this permit include the proposed reverse osmosis desalination system and associated features, which shall be developed in a manner and design substantially consistent with that described in the Staff Report and application materials (Exhibit 1a), and the Approved Site Plan (Ex. 6). This permit allows for the construction and operation of a reverse osmosis desalination system capable of producing up to 4,350 GPD. The permit will allow for the construction of a desalination plant in an existing shed 315 feet from the top of the bank. The permit will allow for the directional boring of a conduit between the shed and a 2x3x3 valve vault at the top of the bank. The permit will allow the placement of 2 HDPE pipes on the surface of the surface of the earth between the valve vault and the intake and discharge points. The pipes will traverse the OHWM and stretch 200 feet waterward from the OHWM. The permit allows the discharge and intake pipes to be anchored on the seafloor and terminate at a depth of minus 17 MLLW. In the event the Washington Department of Natural Resources (DNR) issues a lease for this project authorizing longer linear pipe distances and deeper discharge/intake pipe depths, the terms of such lease shall control and serve to modify these conditions of approval to match such terms.

2. Although erosion is not expected to occur during the construction process for this Project, adherence to the following best management practices to control runoff is a condition of approval. The following BMPs are required:

- BMP C103: Hi-Visibilty Fencing. High visibility Fencing shall be placed 10 feet beyond the work area and serve as a marking of clearing limits.
- BMP C233: Silt fencing. Silt fencing shall be installed downslope of the location of the boring equipment as well as the vault installation per the BMP.
- BMP C235: Straw wattles. In the event that near surface rock is encountered in the locations for silt fencing, that would preclude proper silt fence installation, use of straw wattles per the BMP listed is an appropriate alternative.

- BMP C123: Plastic covering of soil stock piles. Any excavated (or bored) soils shall be stockpiled and covered with plastic per the BMP when the soils are not being actively worked.
- Straw mulch shall be spread over disturbed areas to stabilize exposed soil and disturbed soils shall be restored.
- Disturbed areas shall be regraded to pre-project conditions and replanted with native shrubs and grasses as needed.
- Native vegetation shall be allowed to grow over the pipes after installation is complete.

3. A qualified archaeologist shall be onsite during the excavation of the valve vault and the directional drilling pit. The applicants must comply with the approved monitoring and approved construction plan.

4. The project shall be consistent with and comply with the conditions of the Department of Fish and Wildlife Hydraulic Project Approval, the US Army Corps of Engineers permit, the Department of Natural Resources lease and the Department of Ecology Water Quality Certification.

5. This Project is subject to the provisions of the spill prevention plan dated October 30, 2018 (Exhibit 1j).

6. The development must be consistent with the stamped approved project plans.

7. Disposal of any remaining excavated materials shall be at an approved upland site.

8. Installation shall take place in daylight hours and within WDFW approved in-water work windows.

9. The applicant shall obtain any associated permit, license, or approval required by any state, federal, or other regulatory body with jurisdiction over aspects of the project; any conditions of regulatory agency permits, licenses, approvals or leases shall be considered conditions of approval for this project.

10. The project shall comply with all applicable provisions of the Unified Development Code, Title 18, San Juan County Code.

11. The project shall comply with all applicable provisions of the Unified Development Code, found in Title 18 of the San Juan County Code.

1 12. Consistent with SJCC 18.80.110.G.5, construction or substantial progress toward
2 construction of this project must be undertaken within two years after WDOE's date of
3 filing. Substantial progress toward construction includes letting bids, making contracts,
4 purchase of materials, utility installation and site preparation, but does not include use or
5 development inconsistent with the SMP or the terms of permit approval. However, the two-
6 year period does not include time when development could not proceed due to related
7 administrative appeals or litigation, nor include time necessary to obtain other required
8 permits for the project from state and federal agencies.

9 13. Consistent with SJCC 18.80.110.G.6, all development authorized by this shoreline
10 permit shall be completed within five years of the WDOE date of filing or the permit shall
11 become null and void. A permittee may request a time extension before the permit expires by
12 making a written request to the Director, stating the reasons. The hearing examiner will
13 review the permit, and upon a finding of good cause:

- 14 a. Extend the permit for a period not to exceed one year; or
15 b. Terminate the permit.

16 14. The applicant shall comply with all professional report conclusions and
17 recommendations submitted in connection with this Shoreline Permit and associated
18 approvals issued by the San Juan County for this project, as approved, referenced, relied-
19 upon, and/or modified by the County. Without limitation, this incorporates all mitigation
20 measures included in the SEPA MDNS issued for this project as conditions of approval for
21 this permit.

22 15. Failure to comply with these Conditions of Approval shall be grounds for rescission
23 of the Shoreline Permit. As provided in SJCC 18.80.110(L), captioned "Rescission of
24 Shoreline Permits," any shoreline permit may be rescinded by the hearing examiner pursuant
25 to RCW 90.58.140(8), upon the finding that the permittee has failed to comply with the terms
26 and conditions thereof. In addition, if the permittee is denied any other permit or
authorization required by a state or federal agency with jurisdiction over aspects of the
Project, the underlying shoreline permit may be rescinded.

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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.