

1 **BEFORE THE HEARING EXAMINER**
2 **FOR THE COUNTY OF SAN JUAN**

3 Phil Olbrechts, Hearing Examiner

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RE: John Pohl and Susan Wycoff Pohl	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION.
Shoreline Substantial Development Permit (PSJ000-12-0009)	

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9 **INTRODUCTION**

10 The applicants have applied for approval of a shoreline substantial development
11 permit to build a dock on Lopez Island. The application also involves an appeal of
12 the issuance of a determination of non-significance (“DNS”) under the Washington
13 State Environmental Protection Act (“SEPA”). The SEPA appeal is sustained and the
14 DNS is reversed. Staff is ordered to issue a Determination of Significance requiring a
15 limited scope environmental impact statement to evaluate aesthetic and eelgrass
impacts. A final decision on the shoreline substantial development permit application
will be issued upon completion of the EIS and a second hearing on the shoreline
permit application.

16 The primary grounds for requiring an EIS for the Pohl’s dock proposal is the
17 significant aesthetic impacts it will have on Davis Bay. The 20 foot bluffs of Davis
18 Bay create an enclave of natural beach scenery that is unadulterated by any prominent
19 structures, including most notably any over-water structures. Homes are set back and
20 largely hidden behind the shoreline banks and accompanying vegetation. The bay is
21 rimmed by sandy beaches that are frequented by the adults and children of the Davis
22 Bay community for swimming, boating, hiking and crabbing. The proposal would
constitute the first significant man made intrusion into this pristine environment,
disrupting the natural character of the shoreline visible from both the beaches and the
waters of the bay. Approval of the proposal would very likely lead to the approval of
several other docks in the bay as well, resulting in significant adverse cumulative
impacts to shoreline views and aesthetics, eelgrass and public recreation/navigation.

23 A secondary impact is potential prop scour and grounding impacts to surrounding
24 eelgrass beds. Shoreline topography and tidal characteristics establish a strong
25 likelihood that the Pohls’ boat will come into close contact with eelgrass beds as it
approaches and departs from the proposed dock. The applicants’ eelgrass experts did
not render any direct opinion on the potential impact to this eelgrass, instead opining
that the Pohl’s dock is already moored in the same area so it would have the same

1 prop and scour impacts. This underlying assumption was not supported by the record
2 and the Pohl dock is in fact currently moored in a location where it would most likely
3 not traverse the eelgrass beds that would be affected by the proposal under
4 consideration.

5 The findings and conclusions of this decision commence on Page 52. The testimony
6 summarized over the next 46 pages is provided as a convenience and reference to
7 those who would like an overview of the evidence presented at the three days of
8 hearings on this application. The testimony section should not be construed as any
9 formal findings of fact and also do not represent what was determined to be important
10 to the final decision.

11 **TESTIMONY**

12 February 13, 2013

13 Public Testimony

14 Lisa Burt stated she bought her property on Skid Road in the 1990s. The lot had been
15 in her family for a number of years prior to her purchasing it. She began building a
16 retirement home on the property in 2012. The home is situated on Davis Bay with a
17 direct view of the proposed dock. The applicants' dock crosses her lot's field of
18 vision and dominates most views from her home including the living room, kitchen,
19 and bedrooms. She added that the dock is planned so that it will not be seen from the
20 Pohl residence. Currently, families utilize the beach where the dock is proposed for
21 recreation. Instead of building a dock, the Pohls should utilize other feasible options
22 such as buoys for moorage and local marinas. Davis Bay residents employ these
23 options, and the Pohls should not be an exception. Personally, Ms. Burt uses a kayak
24 to reach her boat in the bay. Building a dock on Davis Bay, where no other overwater
25 structures, exist will negatively impact the environment and scenery of the otherwise
natural habitat. She submitted her comment letter and photos as part of exhibit 8.

18 Don Burt testified that Rowboat Cove, the site of the planned dock, has been
19 employed as a recreational area for seven generations of his family. In winter
20 months, the southeast winds in the area make it almost impossible to keep a boat on a
21 buoy. Due to the nature of the tidal current in the Cove, the planned dock will block
22 any drift from leaving. The large amount of drift and debris that end up in the Cove
23 is depicted in photographs of November and December, 2012 storms. Winter storms
24 will prevent a dock from staying in place. Instead of constructing a dock, the Pohls
25 should utilize the already existing path and stone stairs to pull their small craft onto
shore. The previous owners of the Pohl property used the existing stairs with success.
During high tide on Davis Bay, there is no beach so boats are stored high.
Additionally, the dock will be visible from all locations on Mr. Burt's property. He
submitted his written comments and photographs as part of exhibit 8.

Marianne Burt Karuza stated that her family has owned property on Davis Bay since
1899. Her children kayak along the shore area and in the bay. Historically, there

1 have never been docks along the bay. Her home, which is to the east of the site, looks
2 directly at the planned dock. Like other neighbors, she utilizes a kayak to reach her
3 boat and brings the kayak up the bank when not in use. The Pohls' south-beach is
4 considered short-bank. There is moorage available at the Galley Dock and the
Islander Marine Center. The shoreline needs to be sustained by not allowing
overwater structures. She submitted her written comments and photographs as part of
exhibit 8.

5 Anthony Burt Karuza testified that he worked as a commercial fisherman in his early
6 twenties. He helped pilot a boat to Alaska, approximately 1,000 miles each way. He
7 worked as a skiff man in Puget Sound and has piloted boats through the Lake
8 Washington cut. Based on his experience, he believes navigating San Juan Channel
9 should be no problem for anyone. He piloted a 65' fishing boat through the channel
10 when he was 15 yrs old. Fisherman's Bay is well-marked and easily navigated. The
11 Islander Marine Center confirmed that 60-80' boats dock in the marina. The Pohls'
12 boat is a model that has good handling. Additionally, the San Juan Channel is used
by kayakers, thus navigating a boat should be no issue. Lopez Island is an exit off a
reliable state highway. A boat is not necessary to live on the island, and the Pohl
home is only 8 minutes from where the ferry docks. Most of the winds in the area
come from the southeast and enter directly into Rowboat Cove. Building a dock in
the Cove will create a dangerous environment.

13 Karin Gandini stated that she has owned property on Davis Bay since 1962. It is
14 unclear why the Pohl family needs a dock when there are moorage buoys and beaches
15 to use as feasible alternatives. The Pohl property has 1,371' of waterfront at the
16 family's disposal. Ms. Gandini's property has 75' of waterfront with a 20' bank, and
17 she has never experienced any trouble leaving her 12' boat on the beach during the
18 summer. She submitted photographs of her shoreline during the winter and summer
19 months (part of exhibit 8). She has previously used the 12' boat to reach larger boats
20 moored farther out in the bay. In the winter, she utilizes the public ramp at Makaye
21 Harbor to launch her boat. During the summer, boats of similar sizes to the Pohl boat
22 are moored from 2 days to 2 weeks in the bay creating a pleasant maritime view, but
having a permanent dock would disrupt views. From her patio, she will have a clear
view of the dock. She noted that many animals such as great blue herons, bald
eagles, golden eagles, king fishers, and river otters inhabit the western corner of
Davis Bay. A realtor once told Ms. Gandini that the Davis Bay area is referred to as
the "Gold Coast" because of its gorgeous views, natural shoreline, and lack of
overwater structure.

23 Pete Kilpatrick, Raven Hill Construction Inc, testified that his company is involved in
24 the construction of a fulltime residence on the lot owned by Drs. Jerry and Ann
25 Powell. The focus of the Powell-home design has been to orient the house so that all
rooms face Davis Bay. The Powell lot is the last one on Skid Road, thus their views
are fairly focused. The location of the dock places it in the center of all the Powell
home views. The home has been designed to allow for the maximum amount of
glass. The Powells have identified views as the priority in the home design, thus they

1 have invested a large amount of capital into achieving the ideal view. The Pohl dock
2 would obstruct these views. Mr. Kilpatrick added that the planned dock would not be
3 visible from the Pohl home. The tradition in Davis Bay is to rely on mooring buoys
for boat access. Allowing this dock would create a precedent for the shoreline use in
Davis Bay.

4 Eric Powell stated he is related to Dr. Jerry Powell and works for Peter Kilpatrick.
5 The community members do not want the dock in front of their homes. The existing
6 docks in Fishermen Bay, and their associated restaurants, are good establishments and
the Pohls should utilize them rather than creating new construction.

7 SEPA APPELLANT TESTIMONY

8 Mr. Eglick noted that the appellants are attempting to keep their SEPA appeal
9 argument succinct in order to provide more time for their argument against the
10 shoreline development permit. This case requires environmental review under SEPA
11 and review under the Shoreline Management Act. Case law shows that a dock can be
12 denied under SEPA without even completing an environmental impact statement.
13 However, the appellants decided to appeal the DNS because the analysis had
14 numerous areas of deficiency. The appellants will call upon an expert in San Juan
County SEPA issues; however, the appellants will not focus on case law because
docks are very fact specific.

14 Mr. Richard Grout

15 Mr. Grout's CV was submitted as exhibit 15. He received a Master's Degree in
16 Urban and Regional Planning from the University of Washington. He retired from
17 the Washington State Department of Ecology in April, 2012. At the DOE, he
18 managed the Bellingham office where he had 20-22 staff under his management. In
19 that position, he was responsible for overseeing water quality management,
20 shorelines, hazardous waste prevention, and toxics cleanup. Prior to this position, he
21 worked as the planning director for 5 years in San Juan County. Prior to that he
22 worked in the private sector and served as the chairman for the County Board of
23 Adjustment (1979-1987). At that time San Juan had a Board of Adjustment instead
24 of a Hearing Examiner. From 1973-1978, Mr. Grout worked as the senior planner
25 for San Juan County. As a planner, he processed numerous shoreline development
permits. As director, he reviewed the work of other planners. He wrote the first
Shoreline Master Program for San Juan County as well as the first Comprehensive
Land Use Plan and Short Subdivision Ordinance. During his employment at the DOE
Bellingham office, he supervised the four northern counties of WA, including San
Juan County. The Department of Ecology has independent authority for shoreline
variances and shoreline conditional use permit. In addition, the DOE is able to appeal
substantial development permits. He has lived in San Juan continually since 1973.
When he first became employed in San Juan, he spent two weeks exploring the island
and its shorelines. When he wrote the first Shoreline Master Program, he oversaw
multiple citizen advisory committees and attended all committee meetings. He has

1 stayed on the southwest part of Lopez Island in both the winter and summer months.
2 Specifically, he has been on the beach at Davis Bay when it was less developed.
3 Several years ago, he kayaked in the bay.

4 Mr. Grout visited Davis Bay on February 12, 2013. On the 12th, he arrived in the bay
5 by boat with Peter Kilpatrick. The boat was moored on a buoy and a smaller boat
6 brought him to shore. He walked the shoreline and a portion of the bluff. Mr. Grout
7 has reviewed the application file for the proposal on two occasions. Additionally, he
8 reviewed the staff recommendation on the permit and DNS appeal. Based on his
9 expertise, the proposal has great potential for an adverse environmental impact. The
10 biggest issue is the precedent approval of this dock would set in the Davis Bay area.
11 Cumulative impacts cannot be ignored in reviewing this proposal. During his time in
12 the San Juan Planning Department, he noticed a clear pattern of when one dock was
13 approved, many dock applications following. Once one dock is allowed, it becomes
14 difficult for regulators to deny subsequent applications. Referencing exhibit 16, Mr.
15 Grout noted that, currently, there are no docks in Davis Bay. He approximated that
16 there are several mile of shoreline in each direction from the Pohl property before
17 there are any docks. Referencing exhibit 18, Mr. Grout stated he had stood on the
18 Powell property where the picture was taken during his February 12th visit. The
19 picture accurately depicts the point on the Pohl property. According to Mr. Grout,
20 exhibit 19 is a photograph of Davis Bay taken from the water with a representation of
21 the dock. He noted that the appellants' architect, James Kauffman, created the
22 rendering using 3D modeling software and the specifications for the dock provided in
23 the Pohl application. The rendering is to scale. This approach is a standard practice
24 in the architectural field; Mr. Grout's staff utilized the method when he worked for
25 the DOE. Exhibit 20 is a photograph of Davis Bay taken by Ms. Kiker, representative
of the appellant, from the Powell property. The photograph in exhibit 20 has an
architectural rendering of the Pohl dock, created in the same way as exhibit 19.
Exhibit 21 is a google earth aerial photo of Davis Bay with architect renderings,
completed by Mr. Kauffman, of four docks over it. The docks depicted in the
photograph are the maximum allowable feet (350) under San Juan County
regulations, spaced appropriately for the number of parcels. Exhibit 21 demonstrates
what Davis Bay could become if the "porcupine" effect occurs.

20 In regard to other potential impacts, Mr. Grout believes the aesthetic impacts are also
21 important to consider. Photos of Davis Bay do not do the site justice. The shoreline
22 and bluff are covered with mature vegetation, and the bay appears pristine because
23 the homes are set back from the bluff. The bay appears undeveloped. A single dock
24 will be out of place in the bay and will have a jarring effect on the view. In addition,
25 Mr. Grout is concerned with the impact on eel grass beds in the bay. Under the
Shoreline Management Act, San Juan County and the DOE have independent
authority to consider impact on natural environment and the shorelines. During his
time working for the DOE, he experienced issues with the Fish and Wildlife
Department because the FWD issued HPAs without proper authority. The DOE used
its independent authority to override these FWD decisions. Mr. Grout noted that he is
not an eel grass expert, but he has reviewed the dive survey and agency comments

1 regarding eel grass. In his opinion, it will be difficult to guarantee that the eel grass
will not be affected by prop wash or grounding.

2 Mr. Eglick noted that, during his time working for San Juan County's Planning
3 Department, Mr. Grout issued numerous SEPA determinations. According to Mr.
4 Grout, a number of these SEPA determinations involved eel grass. Mr. Grout added
5 that when he worked for the DOE, numerous advances in the understanding of eel
6 grass were made. Eel grass is important as a food source for various types of smaller
7 fish that in turn feed the salmon. Salmon decline suggests that food sources are
8 lacking. In the Pohl case, the DNS did not properly explore the eel grass impacts.
9 The eel grass may be spared during construction, but, once the dock is in use, the eel
10 grass could be destroyed. All of the shorelines in San Juan County are shorelines of
statewide significance. The Shoreline Management Act states that the shorelines
given this designation are held to a higher stand in protecting the public interest over
the individual, private interest. In his understanding, Mr. Grout stated, that the Pohl
family can utilize mooring buoys, local marina space, or a boat ramp instead of
building a dock.

11 During his February 12th visit to Davis Bay, Mr. Grout observed the existing Pohl
12 boat ramp from the water. Additionally, he has seen the ramp in numerous photos.
13 The boat ramp could possibly be preserved in some form, if county approval was
14 granted. The ramp could serve the Pohl family in some capacity as access to the
15 water. The Pohl property has a much lower bank than many of the neighboring
16 properties. The boat ramp was not mentioned in the SEPA checklist which is a
17 problem because the presence of a ramp is a material fact. Mr. Ground said he
18 understands that the dock is proposed for year-round use. He cannot imagine a year-
19 round dock existing in Davis Bay do to the wind action and drift. If a boat was kept
20 in the bay year-round, it could potentially be severely damaged in result in a toxic
21 spill in the bay. During his time at the DOE, Mr. Grout experienced several
petroleum-based spills from vessels. These spills can cause significant damage.
Under cross-examination by Tadas Kisielius, Mr. Grout testified that, under SEPA,
cumulative impact is a legitimate inquiry. In his experience, cumulative impact
analysis has been conducted in SEPA review, but he is not overly familiar with the
case law regarding the matter. In his experience, there is a significant precedential
affect. Mr. Grout does not know of any other dock applications pending. In regard to
the boat ramp, it is possible that the county will decide to allow an armored path to
remain on site; however, the bulkhead is problematic.

22 James Kauffman, Kauffman Architects

23 Under examination by Mr. Eglick, Mr. Kauffman stated that he is a licensed architect
24 with the state of California and is accredited with the National Architectural Review
25 Board, allowing him to be registered in Washington. He noted that exhibit 18 depicts
the rocky point shown in all of the surveys provided with the application. In all of the
application documents, there is a point identified on the rock with latitude and
longitudinal coordinates. To create exhibit 20, Mr. Kauffman used a photograph of

1 Davis Bay. Then, he reviewed the Jen-Jay survey and the waterfront construction
2 drawings from the application because they include the information regarding
3 contours, elevations, material callouts, dimensions, and components of the proposed
4 dock in both the staircase and walkway options. Exhibits 19-21 are accurate in terms
5 of perspective and angle in representation of existing conditions. Mr. Kauffman
6 achieved this accuracy by utilizing the 2-dimensional graphs and charts (USGS
7 survey, the county GIS plans w/ contours, the Pohls' application data, and the Jen-Jay
8 Survey) and the plan from the waterfront construction application. By superimposing
9 the two together, the model comes up looking like the 2-dimensional form. The 3-
10 dimensional model in exhibit 19 and 20 are the exact same model, just taken from
11 different points at the bay.

12 Under cross-examination by Tadas Kisielius, Mr. Kauffman noted that when the
13 photographs featured in exhibits 19 and 20 were taken, he recorded the point on the
14 site plan. He knew where the photograph was being taken because of navigation
15 instruments within the boat. Mr. Kauffman took the photograph from exhibit 19. Ms.
16 Kiker took the photograph from exhibit 20. Exhibit 20 was taken from the top of the
17 stairs leading down to the beach on the Powell property, according to Mr. Kauffman.

18 APPLICANT SEPA TESTIMONY

19 John Pohl

20 John Pohl stated that he received a BS in geology from Seattle University and has
21 taken a number of graduate courses in the earth/space sciences and biology programs
22 at the University of Washington. He is a member of the Geological Society and GSA
23 member. His scientific training is in both the inductive and deductive approaches.
24 He is involved in a program that teaches scientific methods to K-12 teachers.
25 Referencing exhibit 23, Mr. Pohl said his property runs to Burt Road and is 17.3
acres. There is 1,371' of waterfront with approximately 396' of low-energy impact
beach, and the rest of the waterfront is sandstone-rock structure. Referencing exhibit
10.2a, Mr. Pohl noted that the exhibit shows four parcels that makeup his property.
Davis Bay is a very open Bay and is surrounded by two islands, Long and Charles
Islands. These surrounding islands provide protection from the southeast. Long
Island is 5,700' from the edge of the Pohl property. The water from the southwest
direction is disturbed from fast-flowing riptides

Mr. Pohl noted he took two graduate courses that pertained to wave action. One
course was titled "Depositional Environments," and the other course was "Geological
Morphology." Both courses dealt with wave and current energy processes and how
beach environments are deposited. He noted that John Harris' "Coastal Pilot"
describes all of the energy water systems in the area. It describes the buffeting of the
land resulting in the swirl of the water. Mr. Pohl took a 3-week field course on
sedimentology and has since investigated Davis Bay. Mr. Pohl stated that he received
his B.S. in geology in 1978. There is no geologist license in the state of Washington.
Mr. Pohl is not a professional geologist. He took classes in the Department of Earth

1 and Space at the University of Washington in 2010. The course he took in 2010 was
2 in paleontology.

3 Under examination by Mr. Kisielius, Mr. Pohl added that a certified geologist from
4 the Strayton group conducted research on the south side of the beach. The research
5 conducted had the same findings as the Pohls' previous surveys. During wave
6 action, wave energy fields and fetch (the distance across an area) result in the heavier
7 stones falling out first. The wave action will leave certain areas more protected based
8 on the energy levels. The wave energy impact in the vicinity of the dock proposal is
9 low, creating a very fine sediment. The entire beach structure features a build-up of
10 logs, but the dock will have protection against log crashing.

11 In regard to the property's boat ramp, Mr. Pohl noted that the boat ramp was illegally
12 built and runs parallel to the beach. Mr. Pohl did not build the ramp; moreover, it was
13 armored by the previous owners, illegally. Waves will eventually undercut the
14 armoring, destroying the path, according to reports. The boat ramp allows for a path
15 with no road across a sensitive archaeological site to reach the bottom of the shore.
16 The path has a 10-15 percent grade. A very small vehicle, such as a golf cart, could
17 possibly back down the path. The path does not back into the water. The path ends
18 up above the beach. It is not functional as a boat ramp. Mr. Pohl has used the path to
19 take kayaks to the water. He utilizes a mechanical wind system to transport the
20 kayaks. In December, 2012, Mr. Pohl received a notice of correction from the county
21 regarding the illegal, armored structure. The county offered the Pohl family two
22 options: (1) apply for an after-the-fact shoreline substantial development permit or
23 (2) restore the beach back to its original state. Mr. Pohl voluntarily opted to restore
24 the beach back to its more natural condition.

25 In regard to the dock location, Mr. Pohl testified that he contacted three companies to
discuss possible locations. After reviewing the wind and wave action, all three
companies concluded that the only place to build the dock was in the protected area
off the rocky point on the Pohl property. Originally, the Pohls wished to build the
dock at the southern point of the property, but this was not a feasible option. The
Pohls did not want the dock built on the beach section of the waterfront because they
wanted the beach to remain completely accessible.

In regard to the view impacts, Mr. Pohl stated that neighbors' viewpoints are all
pointing to the southeast. Referencing exhibit 20, he noted that the Powell residence
has a large structure that is blocking any view of the Pohls' rocky point. Exhibit 10.2d
shows an alignment and orientation of the home. When orientating a home to a
certain view, you build the house on the spine along the specified view-line. The
views of surrounding homes have been built to establish expansive, wide views. The
dock location is far to the right of these views. The neighbors' homes are spined to
look out past the Pohl property. Mr. Pohl observed the views from several
neighboring properties, including the Burts and the Powells. Mr. Pohl took
photographs during these observations. Several of these photographs were submitted
as exhibit 25.

1 Under questioning of foundation by Mr. Eglick, Mr. Pohl said he took the
2 photographs submitted as exhibit 25. He was standing on the western most portion of
3 the Powell residence for photograph a. He also took a photograph standing at the
4 center point of the Powell home on the south side. Additionally, he took a photo
5 outside the center of Don Burt's residence.

6 Under examination by Mr. Kisielius, Mr. Pohl said he used a 25mm digital lens
7 which is equivalent to 1:1 ratio so there is no wide angle impact on the photographs in
8 exhibit 25. Telephoto lenses shorten the depth of field which makes far away objects
9 closer. Mr. Pohl's choice of lens avoided this potential abstraction. When taking the
10 photos, Mr. Pohl stood at the house perpendicular to the angle of the camera. This
11 method ensures the natural viewpoint from the house is depicted in the resulting
12 photos. The photos in exhibit 23 demonstrate that, because the homes are set back
13 from the bluffs, they will not be able to see the total dock area. In the photo taken at
14 the western most portion of the Powell residence, there is no view of the potential
15 dock. In the photo taken at the center of the Powell residence, the tip of the dock
16 would be visible. The view from the Powell deck is the one most likely to feature the
17 dock, but, from the actual Powell home, there is plenty of blockage to prevent view
18 impacts. The proposed dock will be in a heavily shadowed area which means it is
19 less likely to show up in views. From the beach area, the dock would be visible if a
20 person turned and looked to the west. The dock is hidden against a rock structure so
21 will not impact the scenic views. The dock will not be exposed against the horizon
22 because of its design and orientation.

23 In regard to precedent, according to Mr. Pohl, exhibit 10.2e shows that there is
24 already development in the Davis Bay residential area. Homeowners have built stairs
25 and other access ways. Mr. Pohl took a photo from the dock vicinity, looking
towards the north. Mr. Pohl has added arrows to the photograph; these arrows
demonstrate where structures have already been built along the shoreline.
Additionally, the arrows note abandoned structures that have fallen off the cliffs. The
Powell residence has a set of stairs with a deck built out over the bluff. County maps
note that there is beach armoring in the area as well. When deciding where to place
the dock, Mr. Pohl wished to place it where other residential development had
occurred. Mr. Pohl submitted photographs that he took of abandoned wooden
structures on the beach (exhibits 26 and 27). The structure featured in the first photo
(photo 26) is an abandoned deck structure that was overhanging the beach. Exhibit
27 is a photo featuring a structure that comes down onto the beach.

Mr. Pohl added that exhibit 28 is a view of wooden structures at the base of the
Powell residence. In regard to alternatives to the dock, Mr. Pohl referenced a plan for
a boat ramp depicted in 10.2a. The ramp would have been hidden from three
neighbors; however, neighbors commented that they did not wish to have the wrap
around ramp on the beach and asked the Pohls to develop an alternative. Exhibit
10.2f depicts newly built stairs as an alternative. In regard to using a boat ramp, the
Pohls cannot utilize a ramp for their larger boat. Their smaller craft is 205lbs without

1 an engine so it requires multiple people to carry it. If the tide is out, the steep beach
2 makes it difficult to bring up the small craft. If the tide is high, the Pohls have to be
3 careful of rolling logs. The geologist reports suggest that the bulkhead may be lost
4 completely and the ramp is too narrow (only 3') already.

5 Under cross-examination by Mr. Eglick, Mr. Pohl stated that he is not aware of the
6 content of WAC 308-15-030. He added that he is not representing himself as a
7 professional geologist. He is not a licensed geologist and he has not had five years of
8 professional geology experience. Mr. Pohl owns a company called Triple Creek
9 Development which manages offices. Additionally, he is a member of the Burke
10 Museum Association Directors and works with the Discovery GeoSciences Program.
11 His paid work is as an independent. Three firms, Waterfront Construction, a firm on
12 Whidbey Island, and a firm in Friday Harbor reviewed possible dock locations. Mr.
13 Pohl asked these three firms to find the best place to put a dock and if a dock could be
14 placed in front of his home. All three firms said a dock could not be placed in front
15 of his residence. He is unsure if the firms provided written studies discussing their
16 findings. He did not ask any of his neighbors to go inside their homes to take
17 photographs of the views. In August, 2012, Mr. Pohl discussed possible dock
18 locations with the Powells. He did not discuss the dock location or potential view
19 impacts with any other neighbor. The Powells did not tell Mr. Pohl they were
20 concerned about views from their home. According to Mr. Pohl, Dr. Jerry Powell
21 suggested that his wife, Ann, would not be happy with the dock construction. In
22 exhibit 25a, the second photo was taken at the center of the Powell home while Mr.
23 Pohl was standing directly against the house. Mr. Pohl stated that exhibit 20 depicts
24 what would be seen from the top of the Powell's bluff stairs. Mr. Pohl is unaware
25 how long the wooden structure on the Powell's bluff has existed. In addition, he is
not aware what the Powell family plans on doing with the structure. There is a view
from the Powell deck of the Pohl's rocky point. Mr. Pohl has not provided a
photograph of the view from said deck. He is not aware if the deck is illegal or not.
He does not believe the deck is an overwater structure. In regard to exhibit 25b, he
did not present any other photos from the Burt property in his evidence. He does not
believe he took any photo from a closer point to the water on the Burt property. He
enlisted a landscape architect to help with the project; however, he primarily
conducted the view study by himself. Mr. Pohl considers the structure depicted in
exhibit 28 to be an overwater structure. He is unaware who built the structure seen in
exhibit 28, nor how long ago it was constructed. It is not clear how far the wooden
structures are from the edge of the water. The edge of the water can potentially reach
the bluff. In Mr. Pohl's opinion, Davis Bay needs a lot of cleaning up and has not
been designed to meet the Shoreline Management Act's standards.

Under cross-examination by Mr. Eglick, Mr. Pohl testified that he has owned his
property since March, 2011. He owns a ocean-sport boat which he bought before he
owned his property. He purchased the boat in 2008. Mr. Pohl purchased his smaller
craft in 2011 after he bought the property. He placed his dock application after
purchasing the smaller craft. Currently, his large boat is at the Islander Marine Center
waiting for repairs. Normally, the boat is kept in a slot at Elliot Bay Marina. Mr.

1 Pohl has seen the 2009 Cascadia Archaeological Report (exhibit 29) about his boat
2 ramp. He saw the report after December, 2012. He personally knows Steve
3 Kennedy, one of the authors of the Cascadia report. He is not able to comment on
4 Mr. Kennedy's professional qualifications. In his opinion, Mr. Kennedy has a large
5 background in archaeology. The report refers to the structure on Mr. Pohl's property
6 as a boat ramp throughout; however, the reference is made by archaeologists, not
7 engineers. Boat ramp is a common vernacular phrase. Mr. Pohl is not aware up built
8 the wooden structure depicted in exhibit 27. Additionally, he does not know how
9 long the structure has been in place or if there is a permit for it. He is unaware of the
10 ages of the structures depicted in exhibit 26, nor whether these structures have
11 permits. In regard to exhibit 19, the photograph was taken from the water and is not
12 the view of the proposed dock from the neighbors' residences. In regard to exhibit
13 20, the rendering fails to acknowledge that rose bushes will conceal portions of the
14 dock.

9 SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT TESTIMONY

10 Wally Gudgell

11 Mr. Gudgell stated that his expertise is in San Juan County real estate matters. He is
12 a second generation real estate broker in San Juan County. He became a licensed
13 broker in 1976. For nearly every year in the past 30 years, he has been the top-seller
14 in San Juan County. Waterfront transactions make up 75 percent of his dealings, and
15 he has handled at least 1,000 of these transactions. Dock applications are integral
16 parts of waterfront real estate. He is not opposed to dock construction in San Juan
17 County and has helped several clients acquire shoreline substantial development
18 permits. Additionally, he is an experienced mariner and has been part of the Orcas
19 Island Yacht Club for 4 years. He owns a 50ft boat and 2 smaller crafts which are all
20 at his dock in West Sound. He utilizes his boat for both business and pleasure. He
21 has previously testified on behalf of the construction of a joint-use dock in San Juan
22 County Superior Court.

19 In regard to the Pohl property, Mr. Gudgell has navigated into Davis Bay on
20 numerous occasions. In addition, he handled the sale of the property to the Rohlffs in
21 2004. The planned location of the dock is a poor choice, in Mr. Gudgell's opinion.
22 Davis Bay is known for its exposure to strong prevailing southeasterly and
23 southwesterly winds, especially during the colder months. These conditions will
24 make it difficult to maintain a boat on the proposed dock. The dock site is not
25 protected from winds and surges from the southwest and is minimally protected from
the southeast. Additionally, low water and extreme tidal events will cause the docked
vessel to ground-out. The applicants already have two mooring buoys and an existing
boat ramp which has been in place for almost a decade without visible harm to the
beach. The applicants also have separate stairs to the beach. Based on its size, the
applicant's ocean sport requires a slip of over 30'. Mr. Gudgell has walked the Pohl
property at least six times and recently saw the property on a January, 2013 site visit.
The property is comprised of four lots and has always been used as a family

1 compound. Currently, the two western lots are developed with one home and a
2 caretaker's residence. The south point, in front of the main residence, is a highly
3 sloped beach. Additionally, there is a 10' boat ramp on the property which is
4 supported by bulkheads on either side. The two eastern Pohl parcels are smaller than
the western lots. One is a small, narrow lot which is approximately 40' in width. It is
possible that this parcel was intended to be used for access at one time. The other
parcel is a .6 acre lot which is completely exposed.

5 In regard to Davis Bay conditions, Mr. Gudgell testified that there are a number of
6 issues. Fetch, wave amplitude, and wind speed all need to be considered when
7 assessing the construction of structures in the bay. As a general rule, every 10mph
8 wind speed results in 6" of amplitude. Photos provided by other neighbors show
9 swells of 2' of more which push debris along the shoreline. The south fetch of Davis
10 Bay is tens of miles across the Strait of Juan de Fuca. Under these conditions, a boat
11 cannot be kept at a dock. Thus, the Pohl family will have to remove their boat from
12 the dock during the winter months. The dock will obstruct views year-round, but will
13 not provide benefits year-round. If the boat was moored at the dock year-round, the
bay would be in danger of the boat spilling toxic fuels into the waters or escaping the
dock and preventing navigation of the waters. The dive survey conducted has a 2'
margin of error, thus conclusions based on this survey do not demonstrate all possible
consequences of the dock construction and use. Davis Bay is known for low tides, as
evidenced by the Richardson tide charts. Mr. Gudgell noted that the Pohl boat will be
difficult to navigate in tight spaces.

14 Mr. Gudgell summarized his written comments and discussed the specifications of the
15 ocean sport boat owned by the Pohl family. The specifications of the boat could
16 result in greater draft than the applicants expect. The planned dock is not long
17 enough for the Pohl's current boat. He does not understand why the existing ramp
18 cannot be utilized. Mr. Gudgell listed several other alternatives which he provides
19 detail about in his written comments. Additionally, he entered five photos as exhibit
31. The lack of vegetation in photo A demonstrates that high energy waves are
hitting the bank and causing erosion. Photo B shows the fine silk sediment on the
Pohl beach near the boat ramp.

20 Under cross-examination by Mr. Kisielius, Mr. Gudgell testified that he is not an
21 engineer or a geologist nor has he had any graduate courses. He has not used the boat
22 ramp on the Pohl property. Mr. Gudgell said the boat ramp exists and can continue to
exist. He is not aware whether the bulkhead is going to be removed or not.

23 APPLICANT SEPA TESTIMONY

24 Dr. Leo Bodensteiner

25 Dr. Bodensteiner stated that he has a BS in biology, a MS in zoology, and PhD in
zoology, with a minor in physiology and a specialization in physics. His doctoral
training was in fish ecology and aquaculture, and he came to Washington in 1994 to

1 be an Environmental Science professor at Western Washington. His research interest
2 and teaching specializations are in aquatic ecology with particular emphasis on
aquatic habitat issues in relationship to fish.

3 Dr. Bodensteiner identified his CV, which includes the awards he has received as
4 well as his research interests. He stated that he has authored a number of tide, current,
5 and wave studies, including a study on the big lakes in central Wisconsin that looked
6 at what affects shoreline conditions. He has looked at what affects aquatic vegetation.
He has done a near shore study at Griffin Bay. Currently, he is working with the
National Park Services to look at alpine environments as well as at lowland streams.

7 Mr. Kisielius asked whether Dr. Bodensteiner was familiar with the dive survey that
8 was prepared, and Dr. Bodensteiner stated that he was, and he said that he had
9 reviewed the application materials. He stated that he was present for the testimony
about wave energy impact in the Davis Bay vicinity, and he stated that the testimony
Mr. Pohl gave on wave energy impact was accurate, and he had nothing to add to it.

10 Mr. Kisielius asked Dr. Bodensteiner to describe the primary direction of the wave
11 energy impact in Davis Bay using the photographs provided. Dr. Bodensteiner stated
12 that Davis Bay has about a mile exposure to the southeast. As Mr. Gudgell said, wave
13 size is related to wind energy, and maximum wave size is a function of the square
14 root of fetch, which means that with the bottom mile fetch there is some wave action
15 but the biggest waves are coming from the south and from the southwest where there
are islands as well as little underwater promontories that are about two fathoms,
twelve feet deep. There are about twenty miles of fetch that comes off the Strait of
Juan de Fuca.

16 Dr. Bodensteiner testified that there are a number of wind studies to characterize the
17 climate in and around Puget Sound, and Dr. Bodensteiner stated he looked at the
18 Cheekapeake [sp?] one, which was done for Neah Bay. The prevailing winds in the
19 summer are mostly from the west to the southwest, and they switch around in the
winter; the prevailing wind is typically from the east in the winter. But those
prevailing winds, which look like they range about five to fifteen miles an hour, are
not exclusive, and storm winds can come from any direction

20 .
21 Mr. Kisielius asked Dr. Bodensteiner whether he agreed with the conclusion reached
22 in the expert testimony on the impact of the construction of the dock to the eelgrass
23 species, which are in exhibits 4 and 5. Mr. Bodensteiner stated that the dock as
24 currently planned includes a buffer from the eelgrass beds that is at least twenty-five
25 feet, and that is meant to take into account any eelgrass movement, which was a
concern expressed in a letter from the FRIENDS, or any possible inaccuracies in the
survey on a small scale. One issue Mr. Gudgell raised was that prop wash could
potentially scour this, but that require quite a lot of prop wash, and the boat is going
to be there with or without the dock, which means there will be a potential for prop
wash. With the dock, the boat will be in a fixed location and will be as far from the
eelgrass as possible.

1 Dr. Bodensteiner stated that there is some potential variance in the actual lines of
2 depth. Looking at the typical tides for the next few years, the minimum tides are
3 about minus three feet, which would still leave room before bottoming out. He looked
4 at specific tidal dates in 2013, 2014, and 2015, and he did not see any tides going
5 minus four feet.

6 With concern to testimony from the FRIENDS about salmon restoration, Mr.
7 Kisielius asked what Dr. Bodensteiner thought about the impact of the dock on
8 salmon recovery. Dr. Bodensteiner stated that, yes, during construction, juvenile
9 salmon would avoid the site. Once the dock was built, there would be shading. As far
10 as shading effects, there is an ongoing argument in the scientific world about whether
11 shading harbors predators or provides prey refuge, thus this issue is equivocal, but he
12 cannot imagine what near shore predators there would be in this situation that would
13 lie under the dock. He said that there would definitely be soft mud substrate growing
14 on the pilings, which would provide forage items for salmon to eat, thus varying the
15 habitat use in the area. The salmon themselves move a lot, moving among habitats,
16 thus they are not resident in Davis Bay

17 To be more specific about the short-term impact, Dr. Bodensteiner stated that, during
18 the process of putting the piling in, some sediment would be released into the water.
19 This might potentially go into the water column, and salmon being very visual feeders
20 would likely avoid any sediment blooms. The sediment would remain potentially one
21 tidal cycle, and there would not be any real impact on eelgrass from the sediment.

22 Mr. Kisielius asked what flushing meant, and Dr. Bodensteiner explained that
23 flushing is water exchange. In the San Juans, one of the principle examples of lack of
24 flushing is East Sound on Orcus, where there has been a buildup of nutrients, of
25 phytoplankton blooms, turning the water green. There is limited flushing there. East
26 Sound is a long, narrow sound and has a fairly constricted exit to the main Puget
27 Sound, thus there is restricted exchange of water. In this case, Davis Bay is very
28 open, and exchange of water is largely not restricted, which is why he disagrees with
29 the characterization of Davis Bay as an area of poor flushing.

30 Mr. Kisielius asked about logs in the area as indicating poor flushing, and Dr.
31 Bodensteiner stated that logs are evidence of surface phenomenon. They are evidence
32 of wind direction, or of tidal current patterns. They accumulate due to that, and they
33 do not reflect what is going on beneath the surface, which includes flushing.

34 Mr. Eglick started the cross-examination when he asked Dr. Bodensteiner how many
35 times he has been in Davis Bay. Mr. Bodensteiner stated that he was at Davis Bay in
36 April 2002, and his understanding was that the area has not changed much except for
37 some more built out. He has not taken any measurements with regard to currents, and
38 he has not taken any data other than the fish he was sampling in the water in 2002.
39 When Mr. Eglick asked, Dr. Bodensteiner stated that he enjoys boating, but he does
40 not own a boat. He does navigate a boat that the Shannon Point Marine Center lets

1 him use for his research, and he has navigated that boat in Padilla Bay when he had a
2 project there. Mr. Eglick asked whether Dr. Bodensteiner disagreed with the
3 testimony Mr. Gudgell gave about the navigational challenges represented by the
dock. Mr. Kisielius objected to this line of questioning, and the Hearing Examiner
overruled the objection.

4 Mr. Eglick asked him to clarify what he meant when he said that boats would be in
5 the Davis Bay, thus prop wash was going to happen with or without a dock. Dr.
6 Bodensteiner said the earlier evidence shows that there are boats in the bay. Mr.
7 Eglick pointed out that the mooring buoys are in deeper depth, and he asked whether
8 Dr. Bodensteiner thought there would be the same impact on eelgrass from prop wash
9 whether there was a permanent dock in shallower waters or a mooring buoy in deeper
10 water. Dr. Bodensteiner said there could be the same impact, but that depends on the
11 placement of the mooring buoy, on the extent of the eelgrass beds, and on the
12 orientation of the boat. Mr. Eglick asked why, if the impact might possibly be the
13 same, there was a requirement for eelgrass studies for fixed-point docks.

14 Dr. Bodensteiner stated that the eelgrass studies were required to maximize the
15 distance from eelgrass in order to protect eelgrass. Mr. Eglick questioned why this
16 was necessary when, as Dr. Bodensteiner theorized, a permanent dock would not
17 have any different effects than mooring buoys, and Dr. Bodensteiner replied that he
18 stated there would possibly not be any different effects; it depends on the specific site
19 and the specific situation. He stated that he has not himself studied the eelgrass in
20 Davis Bay.

21 Mr. Eglick asked whether Dr. Bodensteiner disagreed with the testimony Mr. Gudgell
22 gave in terms of the draft of the boat with motor down and with his assessment that
23 there would not be a margin of error for prop wash and or for impact on eelgrass. Mr.
24 Kisielius objected to this line of questioning, but the Hearing Examiner overruled the
25 objection. Dr. Bodensteiner stated that he cannot answer the question, because he
does not have any expertise on the draft of the boat or on how close the motors were
going to be to the substrate at various tidal levels.

Mr. Eglick asked him to clarify why he referenced wind data for Neah Bay. Dr.
Bodensteiner stated that this was the closest location to the strait that had enough
wind data collected. He did not know how far away Neah Bay was. He stated that he
does not disagree with anything Mr. Gudgell testified concerning wind direction.

In redirection, Mr. Kisielius asked Dr. Bodensteiner what he was relying on for his
testimony since he had not been to Davis Bay since 2002. Dr. Bodensteiner said he
was relying on review of documents and discussions with Mr. Betcher. He said he has
worked with Mr. Betcher for eighteen years, probably doing about a dozen projects a
year. He based his professional impact on the survey work he does.

Jeffrey Otis

1 Under examination by Mr. Kiselius, Mr. Otis testified that he received a Bachelor
2 Degree in Environmental Science from WSU and had completed coursework for
3 regional planning. He has worked as a land use consultant since 2001. His work
4 includes determining what clients can and can't do on properties, packing permits for
5 submission. Since 2001 he has worked mostly on shoreline application and has done
6 approximately 50 applications for docks. He has been involved in every stage of the
7 process for the Pohl's application, including design, survey, and applications to the
8 county and to WDFW.

9 Under questioning Mr. Kiselius asked Mr. Otis to identify a photograph (Exhibit 35),
10 which he stated was a view of the water from the shoreline of the Pohl residence. Mr.
11 Kiselius requested Mr. Otis identify another photo (Exhibit 36) that Mr. Otis had
12 taken himself. The photo was taken towards the Pohl property from the beach below
13 the Carey property and showed the mooring buoys and the shadows to the right of the
14 dock area. He then identified Exhibit 37, an aerial photo from the county assessor's
15 site showing the shaded area of the dock, and Exhibit 38, a photo taken from the
16 beach below the Juel property further east of in the bay, which he described as having
17 a similar fetch to the Pohl property, but stated that the Pohl dock area is calmer and
18 more protected. Exhibit 39 was described as a photo taken from the L. Burke property
19 looking across the bay showing that the screening of trees would prevent them from
20 having a view of the Pohl dock. He identified Exhibit 40 as a photo taken in front of
21 the house on the Powell property a week ago. This photograph was three shots
22 converged to create a panoramic view.

23 Mr. Eglick asked Mr. Otis if he had permission to go onto the property to shoot across
24 to the Pohl property. Mr. Otis replied that Mr. Pohl had permission. Mr. Eglick then
25 asked Mr. Otis how he put together the three photos to form a panoramic image. Mr.
Otis replied that he has spliced them together using Photoshop software.

Mr. Otis identified another photo, Exhibit 41, as the area of the dock on the Pohl
property, and stated that this photo was also a panoramic view created from three
photos.

Under questioning by Mr. Kiselius, Mr. Otis described the position of the dock in
relation to the views demonstrated from the photos. He stated that in designing the
dock, they were attempting to have the least visual impact on the Powell's property.
The proposed wrap-around design keeps the dock close to the property so it will stay
further out of the Powell's view, and the Powells would be looking at the short end of
the dock. The design keeps the pier below the top bank and low profile stairs and
walkway are screened by vegetation in the plan. From other views, he noted that
because the dock was a wrap around promontory in a shaded area, and swept into the
cove instead of sticking out, the dock appears to be part of the promontory.

Under examination regarding the issue of eel grass and regulatory requirements for
protection from WDFW, Mr. Otis stated that the regulations allow for the deck design
of light-permeable grating of the dock components that allows for up to 86% of light

1 to hit the substrate. The north/south orientation maximized the amount of light to the
2 substrate. He noted that the required distance from eel grass is 10 feet, and that the
3 distance of the dock is 25 feet from eel grass, exceeding the required 10 feet. He
4 stated that he had had a number of discussions with Laura Arber from the WDFW
5 regarding their protocol for surveys, and that if the survey meets the 10 foot guideline
6 for separation, these is a valid survey that doesn't need to be repeated. He refers to
7 Exhibit 32, an email from Laura Arber which addresses the protocol regarding the
8 acceptability of surveys.

9 Mr. Eglick objected, stating that Ms. Arber has originally been on the witness list and
10 now was testifying through email. The Hearing Examiner determined that Ms. Arber
11 would be cross examined via conference call at a later time.

12 Under questioning, Mr. Otis noted that in Exhibit 43, WSDFW Eelgrass/Macroalgae
13 Habitat Interim Survey Guidelines, page 3, paragraph 6, states that preliminary
14 surveys conducted at any time are acceptable - protocol that was summarized in
15 Laura Arber's email. He stated that the location of the Pohl dock was the only place
16 to put a dock due to number of factors, and that there would be many difficulties in
17 putting any dock in the bay, since it would be difficult to meet county standards. He
18 noted the boundary of eel grass shown in Exhibit 44, Lopez Island Shoreline Fish and
19 Wildlife Habitat Conservation Areas. He referenced Exhibit 45, an overlay of two
20 maps produced by Shoreline, showing bulkheads, mooring buoys, and the outer
21 boundary of eel grass. Mr. Eglick objected, asking for a determination as to where
22 the overlay was obtained. Hearing Examiner defined the exhibit as a draft of the
23 overlay, as it was from the Shoreline master program and taken from existing
24 information.

25 In response to questioning regarding the existing boat ramp on the Pohl property, Mr.
Otis testified that they had received a notice of correction for the structure. The ramp
had been identified as illegal and their choice was to remove it or get it permitted. He
stated that if the bulkhead were removed, the ramp would disappear through normal
erosion process.

Mr. Eglick asked Mr. Otis if it made sense to build a dock if there was another option
like a boat ramp. He replied that there was no permit for a boat ramp, it would not
conform to guidelines, the slope was too great, and that it ran parallel to shore, so it
would be difficult to get a boat in there. He noted that he did not know if the ramp
had ever been used to get boats into the water. The restoration plan for the boat ramp
included only the removal of the bulkhead, and no other areas surrounding it; once
the bulkhead is removed, the natural process of erosion will cause the ramp and paths
to erode away. San Juan had not denied an application for a boat ramp permit, but
that they provided the code and after discussion they determined that it was unlikely
that they would get approval for it. He added that he had not noted the ramp on either
the SEPA checklist for the dock nor the application narrative for the dock.

1 When cross examined regarding the presence of shade in the area of the dock, Mr.
2 Otis noted that there is a predominance of shade in the area of the dock due to trees
3 and the bend in the shoreline. He also noted that Davis Bay faces south. Regarding
4 visual impact of dock from other areas of Davis Bay, he stated that he took photos
5 from beach, at that the dock is designed to make a minimal visual impact from the
6 water. The impact of the dock to a forage fish habitat would have to be looked into.
7 With regard to eel grass, he noted that eel grass grows in areas around the bay, and
8 that unless he did a site-specific survey, he relied on maps to determine eel grass
9 boundaries.

6 Under redirect examination, Mr. Otis noted that the exposure of the dock was
7 southwest, that the most sun was received in the morning due to SW exposure, that
8 his photograph was taken in the morning, and that the shade of the trees contributed
9 to long periods of shade.

9 Under re-cross examination, Mr. Otis reiterated that there was morning shade due to
10 the trees on the Pohl's property.

11 Mr. Betcher

12 Under examination by Mr. Kiselius, Mr. Betcher stated that he was a Marine
13 Environmental Consultant with a BS in Marine Biology. He is qualified in eelgrass
14 survey, marine habitat, substrate, forestry, geoduck, and other marine mammals. He
15 has been working in this profession since 1988 and has completed over 1000 surveys.
16 He is familiar with the site in question and had been hired by Mr. Pohl for
17 characterization of the habitat. With regard to Davis Bay and wave energy impact, he
18 noted that he had worked in the area in the past and that outside the bay there are
19 swift currents, a long fetch, and strong wind action. He noted that the location of the
20 dock inside the bay had some protection from this wave energy impact but he
21 couldn't measure how much.

18 Under questioning regarding eel grass, Mr. Betcher testified that although there are
19 hypothesis, he cannot state precisely why eel grass grows where it does. He
20 explained the methodology used in his survey for the project (Exhibit 5), and
21 explained his findings. He restated that he cannot precisely determine why eel grass
22 grows where it does, but noted his hypothesis that it could be influenced by factors
23 including high banks, shadowing, and suspended non-attached microalgae. He stated
24 that although his survey was done May 15th and the preferred time frame is June to
25 October, his count is accurate and is acceptable by regulations. He stated that eel
grass "is where it is and is not where it is not" in his experience.

24 He noted that the term "preliminary survey" was not a good description, and that this
25 type of survey is considered accurate and can be used as the final survey for a permit.
A final survey would be unnecessary unless there was an impact on the eel grass. He
stated that as the dock was 25 feet away from the eel grass it would not impact the eel
grass, and that the 25 feet exceeded 10 feet as regulated by the DFW. With regard to

1 the impact of prop waves, he noticed no major impact from boats, and that since there
2 was a mooring buoy close by he would have expected to note any impact. He
3 speculated that there was no effect from boats. There could be a potential impact in
4 the vicinity of the dock at lowest tide with a big boat.

5 Mr. Betcher testified that after he performed his survey, Mr. Pohl hired another
6 surveyor to add to the information in order to increase the accuracy. Mr. Kisielius
7 noted that this dive survey was found in Exhibit 4 attached to a letter from January
8 28, labeled sheet 3 of 10. Mr. Betcher noted that this survey verified his
9 depths/contour lines.

10 Mr. Eglick stated that there was no verification or certification of the survey. Under
11 cross examination, Mr. Betcher stated that he had no knowledge of how the second
12 survey was prepared, but that it did match his contours. Under Mr. Eglick's cross
13 examination, he stated that the Pohl's boat could ground out at a minus 3 tide. He
14 stated that Laura Arber had given him written approval to complete this type of
15 survey. He noted that he had been to Davis Bay approximately 20 times for this
16 application, prior to this he had not completed an eel grass survey for Davis Bay. He
17 had not examined the prop anchors for the dock float. Regarding the impact of boats
18 on the eel grass, he stated that the impact would be to the substrate at low tide, not to
19 the eel grass.

20 Under redirect, Mr. Betcher testified that he had received approval from DFW for
21 multiple dive surveys and that this written advance approval happened regularly.
22 With regard to waterfront construction and anchors, he didn't look at this one
23 specifically, but it was typical for anchors to be bedded and used with "seaflex" for
24 dock in tight places in order to maintain consistent tension.

25 Jeffrey Otis

Mr. Otis was recalled to confirm information regarding two dive surveys. Under
examination by Mr. Kisielius he stated that Archipelago was retained to do a site
specific underwater topographical survey. This survey was then combined with that
produced by Mr. Betcher with the use of CAD software program. He stated that their
original information was verified and that the area was deeper than they had believed.
He also testified to the depth of low tides both historically and projected from 2013 to
2015.

Under questioning by Mr. Eglick, Mr. Otis stated that he did not prepare the
combined survey and that he wasn't present when it was prepared. He stated that
Waterfront Construction did the overlay. Mr. Eglick stated that the survey was not
certified.

Misty Philbin

1 Ms. Misty Philbin, a licensed landscape architect for over twenty years, stated that her
2 firm does all forms of landscape architecture from small residential all the way to
3 huge commercial and government jobs. In terms of design, the first thing her firm
4 does is site analysis, and they try to feel out the topography, the water, the rocks, etc.
5 She did forestry impact drawings in order to help forestry companies and loggers to
6 appreciate landforms, and she was the principle designer on a ranch in northern
California doing visual analysis. Her role in the firm is to project into the future what
a landscape will look like using 3D modeling in order to do visual analysis. She does
visual analysis reports on a regular basis for every single project in which she is
involved.

7 She explained how to complete a 3D rendering for a proposed project. There are two
8 ways. One way is to use Google to build a model from the land up with a survey; the
9 second way is to use photographs. Both are good techniques. Once a rendering is
10 created, in order to give advice on a design for a project, she looks for problems in
11 site planning, for areas with the highest impact, for areas where a structure might
12 improve the environment. She looks at the topography, at which way the wind is
13 blowing, at why the trees are tilted, at why the vegetation is the way it is in order to
figure out what the situation will be in the future. She stated that, in a coastal zone,
there is nothing more important than good site planning, and the golden rule is that no
structure should break the silhouette of the natural plane because the structure is a
part of the environment. The Hearing Examiner entered her CV as exhibit 47.

14 Ms. Philbin stated that she has been to the site for the Davis Bay dock project many
15 times. Her firm was asked to do site analysis of the property, and they took photos in
16 every direction. She stated that the Pohls were very sensitive about wanting their
17 project to meld into the environment. She owns a sailboat, has been in Davis Bay
18 several times, and knows how frightening the fog can be. She stated that she was not
asked to do site analysis of the dock itself until that became an issue, at which point
she did. Her renderings of the dock were passed around, and Mr. Kisielius asked her
to describe her renderings.

19 Ms. Philbin stated that she built the dock in 3D but chose to do an artist rendering
20 because to submit anything other than an artist rendering is a tricky situation; she
21 stated that making a 3D rendering completely accurate is difficult. For her artist
22 rendering, she used an approximate scale that came from the photographs and from
23 the measurements they took during the walk through. She stated that her artist
24 rendering is not one hundred percent accurate, but she does not believe that 3D
25 renderings are one hundred percent accurate either. She makes 3D renderings quite
often, but she does not like to do them for hearings, because they are not one hundred
percent accurate.

She stated that she used survey information in her rendering. They calculated how
high the bank was and how high the tree was, and they used those to approximate the
scale. The pastels made the rendering a little less precise, but that is the freedom
allowed in an artist rendering, and they want to try to present a feel for how the dock

1 would fit into the environment. The Hearing Examiner entered the artist renderings
as exhibit 48.

2 Mr. Kisielius asked Ms. Philbin to clarify on her golden rule for breaking a plane as a
3 measurement for impact. Ms. Philbin stated that, as seen in her sketches, the ramp
4 never breaks the edge of the rocky promontory. The ramp may break the plane a little
5 when looking in from the bay, but from the view from the homes sees the ramp
6 nestled into the hillside, and the ramp does not break the promontory silhouette. The
7 configuration of the dock is really well done, in her opinion, because the
configuration takes advantage of the hillside to reduce the height of the stairs coming
down and of the pier part. The dock is tucked into the hillside, and the view from the
bay as a whole puts the dock in the shady side where the trees block the sun.

8 Ms. Philbin stated that the stairs would have a very small amount of impact. The
9 thick, high vegetation would hardly be bothered even during construction, and that
10 vegetation would largely block the stairs from view. The pier as well as the ramp
11 coming up will be visible, but the colors are nicely chosen, and the dock itself is
12 tastefully designed to look like a floating log in the bay. In her opinion, docks like
13 this are integral in the San Juan landscape. There are not any other docks in Davis
14 Bay, but that is because there are not any other spots in Davis Bay that fit the code
15 requirements the way the spot for this proposed dock does. She believes that the dock
16 does not disturb the panoramic view. The dock does not cut across a beach. In her
opinion, the biggest distraction in an environment like this is the color white,
including white boats, white mooring buoys, etc., but that is a part of the San Juan
landscape, and that is not going to go away. Having access to a boat in islands like the
San Juans is a part of the lifestyle that everybody loves. She stated that the mooring
buoys, however, ought to be in tone with the shoreline. The Hearing Examiner
entered the photo rendering with superimposed boats as exhibit 49.

17 Mr. Kisielius asked Ms. Philbin to comment on the architect renderings that were
18 submitted previously as exhibits 19 and 20. Ms. Philbin stated that the renderings
19 inaccurately depict the pier as well as the stairs according to the dimensions that she
20 knows. This representation shows the dock extended further out than the plan
21 proposes. She stated that she does not believe the angles are right in this rendering,
22 and the dock was imposed on the photograph in the wrong place. It is not difficult to
get an accurate rendering, but it is nearly impossible to get a one hundred percent
accurate one. A complete built model from a complete survey is necessary for that,
but in this situation some vegetation would have to be removed in order for to do that.

23 Ms. Philbin stated that the rendering in exhibit 20 shows a straight line from the stairs
24 down to the landing and the dock is straight, but, in reality, the dock is tipped, and
25 there is an angular change between the pier and the ramp and again at the dock. The
stairs are obscured in her rendering due to the vegetation, which exhibits 19 and 20 do
not take into account.

1 Mr. Eglick asked Ms. Philbin to clarify when she became actively involved in the
2 matter of the dock, to which she replied that she became first saw where the dock was
3 going to be two years ago. When Mr. Eglick asked whether that meant the Pohls had
4 chosen that spot as the location for their dock two years ago, Ms. Philbin stated that,
5 yes, two years ago they were already hoping to put the dock in that location, but she
6 did not participate in studies concerning alternative locations. She started her visual
7 rendering about four weeks ago.

8 Mr. Eglick asked Ms. Philbin to compare one of her renderings, rendering A in
9 exhibit 48, with the rendering in exhibit 19. He stated that exhibit 19 showed a ramp
10 some distance above the water to connect the walkway to the float, and he asked
11 whether rendering A in exhibit 48 showed that. She stated that her rendering did show
12 that. He asked how someone looking at the rendering would know what height over
13 the water the ramp was, and she replied that the rendering was on an approximated
14 scale that used the height of the tree that they knew and the length of the dock that is
15 proposed. She stated that her rendering depicts the height of the ramp over the water
16 similarly to the rendering in exhibit 19. She does not think that the renderings in
17 exhibits 19 and 20 are completely inaccurate, but she thinks they are not quite
18 accurate. When Mr. Eglick prompted, she stated that exhibit 19 was about seventy
19 percent accurate and exhibit 20 was about fifty percent accurate. Her firm prepared
20 their own 3D model based on the construction documents and from there they had to
21 do a zero reduction to make the 3D model fit the approximate scale. Mr. Eglick asked
22 why she had not brought that model to the hearing.

23 Ms. Philbin said that she created the 3D model in the most reasonable way, but she
24 did not bring that in addition to her artist renderings because the 3D model was not
25 one hundred percent accurate. Mr. Eglick asked whether Ms. Philbin has actually
studied the construction drawings, and she stated that she has, but her firm did not
have the entire set. He asked whether she had sheet six, and she said her firm did have
that. He asked why the mesh seen on sheet six was not seen in her artist rendering,
and she explained that the mesh would not actually be visible. She confirmed that the
roses would mask the stairs. She stated that her recommendation was to cut the roses
down to stubs, to build the pilings, and to let the roses grow back, which is the least
invasive way to do construction on a hillside like that.

In redirection, Mr. Kisielius asked her whether she has done shoreline projects before,
and she stated that she has done many. Among other projects, she worked with the
Department of Ecology on a huge litigation for a landslide on a bay.

John Pohl

Next, Mr. Kisielius handed exhibit 35 to Mr. Pohl, who confirmed that he took the
photograph from the edge of Iceberg Point using a 300-millimeter lens. He stated that
the proposed location of the dock would be to the right of the house beside the
promontory at the edge of the photograph. Mr. Kisielius asked Mr. Pohl to explain
exhibit 49, which is the rendering with boats superimposed on to the photograph from

1 exhibit 35. Mr. Pohl stated that the idea was to show generally how boats would look
2 in the bay when placed on the mooring buoys.

3 In cross-examination, Mr. Eglick asked Mr. Pohl whether he had credentials in
4 altering photographs. Mr. Pohl stated that he does not have any such credentials, but
5 he does not think they are required for a rendering like exhibit 49. He stated that he
6 was not concerned with the boats being accurately sized; rather, he was simply trying
7 to show generally what boats look like in the bay. He stated that the boats were
8 reasonably proportioned when compared with the house. When Mr. Eglick asked, Mr.
9 Pohl confirmed that he did not use any formulas to make the rendering.

10 Julie Thompson, San Juan County Planner

11 When Mr. Eglick asked, Ms. Thompson stated that her staff recommendation has not
12 changed based on what she has heard, and her recommendation was that the
13 application should be denied and the appeal should be approved. She stated that her
14 recommendation for approval for the DNS appeal is based on information received
15 after the DNS was originally issued, but that does not include information presented
16 in the hearing, and she does not intend to use information in the hearing.

17 SEPA APPELLANT REBUTTAL

18 Donald Burt

19 Mr. Eglick asked Mr. Donald Burt to explain briefly the photographs he took during a
20 storm on December 18, 2012. He entered the photographs as exhibit 50. Mr. Burt
21 confirmed that he took the photographs in exhibit 50. He stated that the first one
22 shows where the dock will be, and the white in the water is not airbrushed on; it is
23 actually there. Mr. Burt said that turbulence of that sort is quite typical at this time of
24 year.

25 Mr. Eglick asked Mr. Burt how familiar he is with Davis Bay, and Mr. Burt stated
that he has spent his entire life in Davis Bay, and he is very familiar with the area.
Mr. Eglick asked what the logs featured in some photographs are meant to show, and
Mr. Burt responded they were meant to show the effects from tides and winds in
storms like this. In cross-examination, Mr. Kisielius asked Mr. Burt what lens he was
using to take these photographs, and he stated that he was using a regular digital
camera, and he took these photos from the bank.

James Kauffman

Mr. Eglick asked Mr. Kauffman when he took a particular photo in question (exhibit
51), and he stated that he took the photo at 12:15pm on March 4, 2013 to show that
the place where the dock is proposed is in the sun rather than in the shade. Mr.
Kauffman stated that he does not agree with the testimony from Mr. Otis that said the
dock site would be in the shade. He stated that the shade is an area that the sun does

1 not touch, and the shadow is an area of darkness that another element casts on the
2 ground. The trees cast shadows of substantial size, but those shadows are not on the
3 area where the dock is proposed to be at the time of day in the photograph. The
Hearing Examiner entered the photograph from Mr. Kauffman as exhibit 51 and a
photograph Ann Powell took as exhibit 52.

4 Mr. Eglick asked Mr. Kauffman to explain the photograph in exhibit 52. Mr.
5 Kauffman stated that this photograph showed Mr. Jerry Powell in his kayak at
6 approximately the location that the dock would cross from the land to the water. The
7 photograph clearly shows that he is in direct sunlight, and this was not an unusual
8 thing to see. Mr. Kauffman said that the artist rendering in exhibit 48 from Ms.
9 Philbin was not accurate, because the floating platform would not sit on the water the
way that Ms. Philbin depicted. She tipped the dock forward too far, and the ramp
from the floating platform to the pier is too long in the rendering. Also, the various
components of the stairs as well as of the ramp are not depicted.

10 Mr. Kauffman stated that Ms. Philbin said she would take contours from various
11 maps to build a site model in 3D, and that is exactly what he did when he prepared his
12 3D model. He used measurements verbatim from the application to create a scale for
13 the model. He stated that his depiction of the ramp and of the floating platform was
14 skewed, but they used measurements from the application. Everything on the paper
was put on a smaller scale in order to fit on the paper, but the scale remains accurate
according to measurements taken from the application itself. He stated that the artistic
rendering was about ten percent accurate.

15 In regard to landscaping in the artist rendering, Mr. Kauffman said that Ms. Philbin
16 was optimistic about the roses growing back after they were cut. He stated that the
17 white area she referenced in the exhibit 20 is actually the deck of the floating
platform. According to the application, the material on the deck of the floating
platform is a grid of plastic.

18 During cross examination, Mr. Kisielius asked Mr. Kauffman to clarify the data he
19 used to make his model. Mr. Kauffman stated that he took notes to accompany the
20 photographs for the model in which he recorded the location from which the photo
21 was taken, the time of the day, and the angle at which the photograph was taken. All
the photographs he prepared were taken with a 35-milimeter lens in a standard digital
camera, and nothing was cropped out.

22 Mr. Kisielius asked Mr. Kauffman to look at exhibit 4. Mr. Kauffman stated that the
23 length of the pier is twenty-six feet and the length of the ramp is forty-four feet. Mr.
24 Kisielius asked him why he claimed the two lengths were the same when he testified
25 that Ms. Philbin was inaccurate in portraying the ramp as longer than the pier when
they were basically the same length according to his model. Mr. Kauffman stated that,
incredibly, that was what his model showed. Mr. Kisielius asked whether the
computer model took into consideration light in order for Mr. Kauffman to claim that
the 3D model accurately showed the white area that Ms. Philbin critiqued. Mr.

1 Kauffman stated that his models were not run through a photorealism program that
2 would show the light as it actually hits the structure, which means the depiction is not
exact.

3 Mr. Kisielius asked which direction the photograph is pointed in exhibit 51, and Mr.
4 Kauffman stated that the photograph was looking to the southwest, thus the sun
5 would go from the left to the right. Mr. Kisielius asked Mr. Kauffman to clarify the
6 way in which he identified where the dock would be located. Mr. Kauffman
explained that he used the wet spot, or the shiny spot on a rock, and from six weeks
7 working on the project he knows that this spot is fairly close to where the dock is
going to be.

8 Ann Powell

9 Mr. Eglick asked Dr. Ann Powell when the photograph in exhibit 52 was taken, and
10 she stated that the photo was taken in August or September 2012, probably late in the
afternoon. Mr. Kisielius asked her whether she zoomed in at all, and she stated that
she probably had.

11 Richard Grout

12 Mr. Eglick asked Mr. Grout whether he has revisited the Davis Bay area since the
13 first day of hearing, and Mr. Grout said that he has, because the view of the dock site
14 that Mr. Pohl described was completely inconsistent with the recollection Mr. Grout
had of what he had seen, and he wanted to take another look for that reason. He spent
15 about an hour and a half there, starting from the west side of the Powell property,
16 going along the bluff in front of the houses, which is possible until the Karuza
property, and heading north up to the road. He walked fourteen parcels, but he did not
17 enter three parcels that were gated off, which means he saw the view from eleven
parcels, and nine of those parcels have a full view from the house, the front yard, or
18 both, and the other two parcels have a partial view. He added that the views are not
only what the neighbors see from their houses but also what they see from the beach,
19 where many have testified they spend time. The Shoreline Management Act is clear
in saying the view from the water is equally important.

20 Mr. Eglick asked Mr. Grout whether he thought the analysis methods that Mr.
21 Kauffman used would be used by the Department of Ecology, for which Mr. Grout
22 has worked, in evaluating a proposed application. Mr. Eglick asked Mr. Grout to look
at renderings A and B in exhibit 48, and he asked whether an exhibit like this would
23 be used by the Department of Ecology. Mr. Grout stated that an exhibit like this
would be used to try to demonstrate viewing effect. The kinds of representations that
24 Mr. Kauffman submitted were much more common.

25 SHORELINE PERMIT HEARING

Applicant Testimony

1 John Pohl

2 Under questioning by Mr. Kisielius, Mr. Pohl clarified that he has three residences on
3 his property and an adjacent unit for a caretaker. He uses all of the residences on the
4 property year-round, especially on the weekends and during holidays. The beach on
5 the east side of the property, where Mr. Pohl prefers to keep his boat, is difficult to
6 access during high-tide. The south side of the beach is heavily rocky. In regard to
7 boat recreation, the summertime sees much more boat traffic because people go out to
8 see whale rocks. There are six buoys for recreational boating in the bay. Besides
9 kayaks, Mr. Pohl does not believe there will be recreational boats in the vicinity of
10 the dock, excluding the Pohl's boat. Mr. Pohl chose to buy property on Davis Bay
11 because it is outside the inland waters. Mr. Pohl hopes to utilize the dock to help
12 maintain the shoreline. When he purchased the property, it came with two mooring
13 buoys. Mr. Pohl has occasionally used one of these buoys. He noted on exhibit 10
14 where these mooring buoys are located. He does not use the buoy on the south side
15 because it has previously broken off. It is difficult to reach the buoy as well because
16 the rocky beach. The other buoy is difficult to reach due to the steep embankment.
17 The banks are all undercut. He described a photograph he took of the waterfront
18 beach access area of his property before it cuts off. The photo shows a southwest
19 trajectory along the edge of the property. The photograph (exhibit 53) illustrates the
20 steep embankment, and the inability to bring a dinghy onshore in this area. Mr. Pohl
21 also referenced two photographs (exhibit 10i) which depict the steep embankment
22 and old stairs. The photos demonstrate the wave-cut terrace and deep cut into the
23 stones. He is unable to bring his smaller boat down this path with the old stairs
24 because it cannot make the turns (it is 12'). The path is 3' wide and has steep banks
25 on either side. Therefore, the existing structures do not function. Mr. Pohl's property
differs from his neighbors because the steep banks are heavily vegetated throughout.
Various neighbors, such as the Powells, have wider sets of stairs to better store boats
and more slumped banks. He submitted photos of the neighbors' boat storage
methods (exhibits 54 and 55). When compared to exhibits 54 and 55, exhibit 53
demonstrates the large contrast between Mr. Pohl's property and various neighbors'
properties. There are no other places that could provide the Pohls with boat access on
their property.

21 In regard to offsite mooring, Mr. Pohl noted the Fisherman's Bay Marina is 5.6 miles
22 from his home by car. By boat, Fisherman's Bay is approximately 7.5 nautical miles.
23 Moorage availability at the marina varies day to day, but the marina informed Mr.
24 Pohl that there is moorage available if he is willing to move his boat during busy
25 weekends. The Islander Marine Center has allowed the Pohls to moor in order to
repair because the Pohls bought the boat at the center. There is possibly permanent
moorage available at this marina, but Mr. Pohl is not sure. Both Fisherman's Bay and
The Islander cannot be used during very low tides. In order to navigate in and out of
Davis Bay, a mariner has to navigate out into open ocean and enter the Straits of Juan
de Fuca. A large boat can make the trip, but it is not feasible for a smaller craft due to
fog conditions, rip tides, and standing waves. It is not safe for Mr. Pohl to take his

1 smaller craft from Fisherman's Bay to Davis Bay. In regard to Spencer Spit Marina,
2 it is located on the eastern side of the island, 7.6 miles by car and 19.5 nautical miles.
3 Mr. Pohl's smaller craft cannot make this trip. In regard to joint-use, Mr. Pohl stated
4 that he approached both the Powell's and the Forrester's. Neither neighbor had any
5 interest.

6 Jeffrey Otis

7 According to Mr. Otis, when he calculated the dock dimensions, he included the pier,
8 the ramp, and the ramp floats. The float is 35' which potentially fits within the
9 single-use threshold. Previously, the county has not included stairs in calculating
10 dock dimensions for threshold analysis. He referenced a case on Center Island where
11 the county did not include stairs in calculations. Mr. Otis has reviewed the location
12 of existing mooring buoys in Davis Bay to calculate if there was any room for
13 additional buoys. Mr. Otis found that there is no room, and the current buoys are too
14 closely clustered. A mooring buoy needs 130' swing range. In regard to kayaks, Mr.
15 Otis said he has kayaked for over 30 years and enjoys paddling under docks. The
16 Pohl dock would allow kayakers to navigate underneath it. The dock will not
17 intersect with any beach areas. Mr. Otis added that the dock is one of the smallest he
18 has reviewed. In regard to archaeological and cultural resource sites, Mr. Otis
19 contacted an archaeologist to review the proposal. The archaeologist determined that
20 there would be no resources created by the project (exhibit 56). In regard to sea
21 mammals, Mr. Otis noted that, as part of the application process, the project must be
22 reviewed by the Corps of Engineers. There is a sea lion colony approximately a mile
23 away, thus, during the construction process, noise must be monitored. U.S. Fish and
24 Wildlife does not have any concerns with the project.

25 Under cross-examination by Mr. Eglick, Mr. Otis stated that the stairs in the Center
Island case were not contested, and there was no opposition to the case. The Pohl
application is for a dock and one of the components of the dock is the stairs that will
attach to it. It is his opinion that kayaking under docks is enjoyable. Mr. Otis is not
aware of any data on level of enjoyment while kayaking under docks and piers. The
dock is sized for single-use. The length of the float is 35'. Mr. Pohl's ocean sport
boat is approximately 30'. During extreme weather, only one side of the dock is
usable.

Under redirect by Mr. Kisielius, Mr. Otis described the planned stairs, noting that,
originally, the application included a walkway; however, the neighbors were opposed
to this walkway. The stairs were presented as an alternative to this walkway.

Under re-cross by Mr. Eglick, Mr. Otis testified that the proposal presented to the
county is for the walkway. The stairs are merely an alternative. The visual impact
for the walkway is greater than the impact from the stairs. Mr. Otis is not presenting
any information on the visual impact of the walkway. According to Mr. Otis, Julie
Thompson said that the applicant could submit the stairs as an alternative due to
neighbor opposition to the walkway.

1 Mr. Betcher

2 Mr. Betcher stated that forage fish have two spawning habitats: (1) eel grass and (2)
3 beach areas with sand of a particular grain size. The vicinity of the planned dock
4 does not have the proper habitat for forage fish spawning. In spawning habitat beach
5 areas, any activity done on the beach can impact the habitat; however, construction is
6 allowed over water near beach areas with spawning habitats as long as nothing is
7 placed on the beach and construction occurs within a specific time frame. In regard
8 to sea mammals, agencies look at the presence of animals during the construction
9 phrase and setup monitoring plans to ensure animals are not negatively impacted. To
10 date, the agencies have not been concerned with drilling plans.

11 Under cross-examination by Kyle Loring, Mr. Betcher noted that any type of activity
12 on the beach will disturb spawning habitats. He has checked for eggs during
13 construction periods, and if eggs are present, construction has been shut down. He
14 has never seen a squished egg and cannot cite any literature on mortality rates of
15 beach habitats. Mr. Betcher took a class offered by Daniel Pintilla on how to identify
16 egg spawning areas. He is not aware if dragging a dinghy over a beach spawning
17 area will squish the eggs.

18 Public Testimony

19 James Kauffman stated he has been a licensed architect since 1992. His company
20 specializes in building custom homes to maximize potential views. He has done work
21 throughout the western United States and designed several homes on waterfronts. He
22 has previously designed a home for the Powell family in California. In addition, he
23 designed the Powell residence on Davis Bay. He creates 3D models of his designs
24 that are incredibly accurate and even feature people moving about the homes. When
25 the dock application was placed, the Drs. Jerry and Ann Powell asked Mr. Kauffman
to utilize his 3D modeling skills to create a rendering of the proposed dock. In order
to create the 3D renderings, Mr. Kauffman used the Pohl Shoreline Substantial
Development application, the Waterfront Construction plan, the Jen-Jay dive survey,
the waterfront exhibit survey (exhibit 10), a survey of the Pohl property by
Archipelago Survey, numerous site photos, the applicants' pre-hearing submittal,
USGS topographic data, San Juan County's GIS website, and tide charts (both
historical and 2013). Mr. Kauffman has been working on the Powell property for over
a year, thus he is very familiar with Davis Bay. Mr. Kauffman noted that aerial views
of Davis Bay demonstrate there are no existing overwater structures (exhibit 59 a and
b). Exhibit 18 depicts the rocky point on the Pohl property. Mr. Kauffman took the
photo from the Powell bluff in May, 2012. The rocky point is in the foreground of
any view of the bay. The views may expand out to Mt. Rainier, but the point is still
the focus.

In regard to the 3D models, Mr. Kauffman testified that the scales from the Google
Earth image and Architect survey match, proving there was no attempt to make the

1 dock look bigger (shown in exhibit. The topographic lines that are superimposed
2 over the image and the site model match as well. He utilized the USGS topographic
3 data and the San Juan GIS website to review different sized contours. The tennis
4 court was used as a key to ensure scale match.

5 In regard to low tide events, Mr. Kauffman submitted a photo of a low tide event
6 taken on June 13, 2002. In the photograph submitted, he inserted the dock. By using
7 the tennis court as the key, he is able to meet the right perspective. At this low tide
8 event, the dock is very close to the beach. The tide during this event was -2.43' tide.
9 This tide information is based on the Richardson Bay tide level at 12:09pm,
10 approximately 30minutes after the photo was taken. The original basis for the 3D
11 model was a 2-dimensional plan of the Pohl property with the contours of the land
12 and water depicted. The size and dimensions of the dock are presented in the plan.
13 These dimensions were taken from the Waterfront Construction plan. Mr. Kauffman
14 also provided a model of the alternative stair option. He also submitted a rendering
15 of the dock at the lowest tide level expected in 2013 (exhibit 57), -2.77'. This tide level
16 came from the tide charts included in the pre-hearing submittal. -2.77' is the lowest
17 tide, but there are over 150 tides that are (-) tides. Most of these are during the
18 summer boating months. All of the contours used to create the models were based on
19 material submitted as part of the application.

20 Mr. Kauffman presented 2-dimensional site drawings based on the information
21 provided by Waterfront Construction. One of these drawings was rendered utilizing a
22 -2.77' tide, and this drawing is called a site section (exhibit 58). This site section
23 demonstrates that, at this tide level, the floating platform is very close to the sea floor.
24 The bottom of the float is only 20" from the sea floor at this tide level, and the water
25 level is only 2'9". A cut through of the depicted boat, which was given a 2'9" draw,
demonstrates that the boat will only be several inches off the seafloor. The height of
the rail on the pier is 17' in the air and the top of the stairs is close to 30' in the air
from the waterline. At the top of the stairs, you are not stepping onto level ground,
therefore the applicant will have to build additional earthen stairs. The end of the
floating platform would only be 13" off the seafloor during the -2.77' tide. In
addition to the -2.77' tide rendering, Mr. Kauffman created a site section for a -1'
tide. In these conditions, the dock and boat are also still very close to the seafloor.

Mr. Kauffman blended photographs with his 3D models to create renderings of the
potential view impacts. He used the pathway and stair alternative interchangeably in
his renderings. Exhibit 20 is one of the renderings that Mr. Kauffman created. The
original photo was taken from the Powell residence. By establishing three points in
the photo, Mr. Kauffman was able to triangulate and place the 3D model into the
photo using Photoshop. They triangulate to ensure the perspective and scale are
correct. Vegetation is not shown in the renderings, but there is no vegetation from the
high bluff down. The depiction shows the dock, clearly, and demonstrates the
trapezoidal shape that Mr. Otis referred to earlier. However, according to Mr.
Kauffman, the trapezoidal shape is only planned for the back of the dock; this is
shown in exhibit 20. This rendering is not for a low tide event. During a low tide

1 event, the dock would be even more visible. Exhibit 19 uses a similar process, with a
2 vantage point of #6 from exhibit 23. The next renderings are photographs taken from
3 the Gandini property's deck, and it looks back from the southwest towards the rocky
4 point. Mr. Kauffman took the photos (numbers 2 and 3 on the key map shown in
5 exhibit 23). The photos demonstrate that the pier, the stairs, and the ramp are still
6 very prominent even though there has been movement east along the bay. The next
7 two photos were taken from Lisa Burt's residence (numbers 4, stair option, and 5,
8 walkway option, on the key map shown in exhibit 23). Number 7 from the key map
9 is a view from the water with a more panoramic view than number 6. The rail
material depicted in the rendering is the wired mesh. These photos, that are keyed
into exhibit 23, were submitted as exhibit 59. Based on these renderings, it is clear
the dock will have a visual impact on the natural shoreline. In regard to exhibit 23, it
is merely an existing Google Earth photo with potential future docks depicted. Mr.
Kauffman concluded that the proposed dock is not compatible with the rest of the
Davis Bay shoreline.

10 Under cross examination by Mr. Kisielius, Mr. Kauffman confirmed that he took all
11 of the photographs that he superimposed 3D models onto, except for exhibit 19. In
12 exhibit 59 d and e, the area to the left of the scope of the photos would feature more
13 of Davis Bay. He did not use a panoramic view for these photos. These photos were
14 taken from the Gandini's deck (depicted in grey on exhibit 23). To the left of the
15 photo scope, there is an island in the middle ground. The photos used in the
16 renderings do not depict the entire view. The same concept holds for exhibit 59 b and
17 c. The dock is the center of the view finder in the photos. Exhibit 19 depicts
approximately the same view as 59f. In regard to the slope at the top of the stairs,
Mr. Kauffman noted that the slope is measured by rise and run. The rise on the stairs
is 4.5' and the run is 12'. The stair is 7" high, so you would need 7-8 steps to get up
to the height. Mr. Kauffman's research of the ocean sport found that the draft is 2'9"
with the motor down and 2'3" with the motor up.

18 Under questioning by the hearing examiner, Mr. Kauffman noted that the wire
19 meshing in the renderings may be depicted more opaque because the view is looking
20 through two walls of the mesh. The modeling program allows Mr. Kauffman to
21 depict many types of material. Exhibit 20 shows the stair rail without gridding
22 because there is not planned mesh. Under cross examination by Mr. Kisielius, Mr.
Kauffman stated that he does not know why the 3D model depicted two handrails,
one on either side. The construction plan submitted by the applicant only features
one handrail.

23 Under re-cross by Mr. Eglick, Mr. Kauffman testified that the draft data he found for
24 the ocean sport was based on the manager specifications. These specification are for
25 an empty or "dry" boat. Presumably when the boat is full of fuel and people, the draft
is greater.

Kyle Loring, staff attorney for FRIENDS of the San Juans, stated that FRIENDS is
requesting the hearing examiner deny the permit, consistent with San Juan County's

1 recommendation. This dock proposal reflects the confluence between public and
2 private interests. The Shoreline Master Program was created with the public in mind.
3 San Juan County has rigorous standards for obtaining a dock. Applicants for docks
4 believe themselves to be exceptions to the rule, but they are not. The first reason this
5 dock should be denied is that there are existing mooring buoys and available mooring
6 space at three nearby marinas. The applicants already moor their boat in Elliot Bay.
7 Additionally, this dock could result in cumulative aesthetic impacts as well as
8 ecological impacts. This dock would be the first in Davis Bay. The shoreline is
9 designated as conservative shoreline. The dock would be placed outside the
10 applicants' view, but in the middle-ground of the neighbors' views. The mooring
11 buoys are a feasible option for the applicants. An eel grass survey occurred for the
12 site, but it was outside the range the DFW has identified for final eel grass surveys.

13 Mr. Loring stated that he is not aware of a policy that allows a single eel grass
14 surveyor to conduct research whenever he chooses. He does not believe DFW has
15 delegated that authority to its habitat managers. The eel grass study provided by the
16 applicant is not valid. It is unclear the extent of the eel grass in the dock vicinity, and,
17 during cross-examination, the definition of distribution was not made clear. The
18 DFW's issuance of a HPA does not suggest there will be no impact to eel grass.
19 Since the mid-1940s, the DFW has never denied a permit in San Juan County. In
20 addition, since the 1980s, the applicants' expert has been influential within the DFW
21 and eel grass surveys, and eel grass has suffered significant declines throughout San
22 Juan County.

23 In regard to recreational activities, Mr. Loring noted that the seasons for crabbing and
24 shrimping are quite narrow so the dock will not be of much use to the Pohl family.
25 There is not testimony that suggests a mooring buoy to store a small craft would be
insufficient to conduct these recreational activities. In regard to wildlife habitats, Mr.
Loring stated that a dinghy being dragged along the beach would not have the same
impact on spawning habitats that the construction of a bulkhead potentially would.

In regard to the legal issues, Mr. Loring testified that the Shoreline Master Program
strongly disfavors construction along waterfront residences. The program establishes
a rigorous process for determining alternative feasibility options. Claiming that the
mooring buoys are not practical does not mean the dock warrants approval. The
Shorelines Hearings Board has previously found that moorage buoys are adequate and
feasible. The availability of dock slips in three surrounding marinas is also an
important point. The applicants claimed that navigating Fisherman's Bay is difficult,
but many boats do it. This applicant's situation is not unique, and other people
successfully enter/exit Fisherman's Bay. Convenience is not a justification for a
dock. The Shoreline Hearings Board has established in previous cases that
convenience alone is not enough to override the Shoreline Master Program.

In regard to aesthetic and ecological impacts, Mr. Loring stated that the Shoreline
Master Program requires the preservation of unique shore resources. Davis Bay is a
rare place with a broad scenic view. The dive survey has not made it clear the
varying depths of eel grass in the dock vicinity. A previous decision regarding joint-

1 use docks suggests that the Shoreline Hearings Board does not consider a dock to be
2 joint-use if the lots are owned by a single individual. Joint-use docks in subdivision
3 planning is a different type of situation. In regard to the applicants' reference to the
4 Walker decision, this is not comparable because there were no feasible alternatives.
5 In the Walker case, there was no moorage available at the surrounding marinas. In
6 addition, the Walker case does not apply to view impact findings. This dock could
7 lead to other docks in the future, even if the applicants claim it is a unique proposal.
8 The lack of a thorough eel grass survey does not mean that other residents will not be
9 able to build a dock cause of its existence. Finally, the Shoreline Hearings Board has
10 placed great emphasis on the precedential value of docks. This dock could be the first
11 of many docks which is unacceptable.

12 Stephanie Dallas testified that she has been a resident of Davis Bay for 12 years. She
13 owns a 30' coastal craft which is similar in size to the applicants' boat. For many
14 years, she moored her boat in Anacortes and then navigated into Davis Bay. Since
15 2007, she has moored her boat at Spencer's Spit Marina. She keeps a car at the
16 marina and then drives down to Davis Bay. The conditions of Davis Bay require each
17 resident to find their own solution to the location in order to enjoy the gorgeous,
18 undisrupted scenery. In regard to wind impacts, Ms. Dallas noted that the dock
19 application claims the Pohl dock will be sheltered from the strong winds in the bay.
20 However, this is not true because the Pohl application discounts the winds from the
21 southeast. Exhibit 61 features four pictures taken from the Dallas property in 2011.
22 The Dallas property faces due south, and the photos depict the waves coming from all
23 directions, but predominantly from the southeast.

24 Ms. Dallas submitted a video of the wave action during a 2011 storm. The proposed
25 dock area is shown in the video. Based on this evidence, the dock will be subject to
dangerous wave action with large amounts of debris. A single log could cause
significant damage to both the dock and the Pohl's boat. Every fall, Davis Bay
property owners remove all boats, beach chairs, and other equipment from the beach
in anticipation of the winter storms. While the most serious storms are in the winter,
there are occasional storms in the spring and fall. The dock could break away and
damage other boats and properties in the bay. Year-round moorage is available in
surrounding marinas, thus the Pohl family has other feasible options. The dock
application claimed that no dock slips were available to hold the 30' Pohl boat.
However, the application did not discuss waiting lists. Additionally, the application
claims they inquired about 30' slips, but the Pohl boat requires a 36' slip. The DBC
Association inquired about marina mooring availability in November, 2012. The
Galley Marina had available slips as early as Feb, 2013. Spencer Landing Marina
stated that there is moorage available in their docks as well (exhibit 62). The Pohl
family is already mooring their boat at Islander Marine Center, and they have not
been asked to vacate this slip. The Pohl family can bring their boat to a mooring
buoy in Davis Bay and then return it to a surrounding marina. The benefits of
utilizing a marina is easy access for commutes, access to water and electricity, peace
of mind, and economic and environmental advantage.

1 In regard to navigating the pass into Davis Bay, Ms. Dallas stated that many residents
2 do it on a regular basis without a problem. Hundreds of boats navigate the pass daily
3 without instance, no matter their size. The peak turbulence of the pass can be avoided
4 by planning ahead. Additionally, there is an alternative option to travel by navigating
5 between Lopez and Dead Man's Rocks. Mooring buoys are the ideal method of
6 putting boats in Davis Bay. The Pohl's neighbor to the west successfully utilizes a
7 mooring buoy. Additionally, the Pohl family has a beach which can have a small
8 craft successfully launched from it. There is at least 100' of gently sloping beach on
9 the Westside of the property. When there will be high tides, Davis Bay residents
10 carry their smaller boats up the beach. There is a public launch located less than 10
11 miles away from the bay which can also be used for small boat launches.

12 In regard to boating practices, Ms. Dallas testified that the neighbors utilize a variety
13 of methods to enjoy the water. The Gandinis have a 12' small craft which they bring
14 up the bank after using. The Days utilize a mooring buoy. The Ichikawas use a
15 mooring harbor and a marina. The Juels have a 12' aluminum rowboat. Ms. Dallas
16 uses a mooring buoy, an inflatable dinghy, and a boat slip. In closing, the Pohl family
17 has many other options than building a dock.

18 Dr. Jerry Powell stated that he grew up in Seattle on Lake Washington and has family
19 on the San Juan Islands that span three generations. He has sailed throughout the San
20 Juans for the past 30 years and he has vacationed at Davis Bay for the same amount
21 of time. He now owns property in the bay. The beach is the most important feature
22 of Davis Bay. Mr. Powell's family greatly appreciates the public beach in the bay.
23 He submitted a photo of the beach which depicts four families enjoying the beach. If
24 the dock was approved, it would disrupt family recreation on the beach and
25 navigation of Rowboat Cove. The water is shallow in many parts of the bay, thus
mooring buoys must be placed far away from the beach. Mr. Powell is an avid
kayaker, and he does not enjoy kayaking near dock structures. The quality of the
sand near Rowboat Cove is perfect for recreational activities such as sand-castle
building. The dock would damage this high quality sand. Seven generations of Davis
Bay community members have seen sea otters, birds, and other creatures playing on
the rocky point where the dock will be built. Davis Bay is incredibly scenic and one
of the few shorelines that has not been disrupted by overwater structures. The Pohl
family should explore other options, such as mooring buoys or a new boat ramp,
rather than destroying the environment of Davis Bay. The shoreline on the western
side of the Powell property has a low-bank shoreline. The two previous owners of the
Pohl property successfully utilized the existing boat ramp. These previous owners
submitted letters stating that the ramp was used frequently to transport 12' dinghies
(exhibit 63). Finally, the Pohl family should explore using Fisherman's Bay Marina
to store their larger boat. The Davis Bay community welcomes the Pohl family and
hopes they will help preserve the bay.

Michelle Sosin testified that she has owned her property on Davis Bay since 2008.
The graphs depicted in exhibit 10b do not represent the southeast winds accurately,
particularly in the winter. Ms. Sosin rejects the applicant's assertion that Rowboat

1 Cove is uniquely sheltered. Her fence was recently damaged from southeast winds in
2 December, 2012. In her opinion, the slope and width of the Pohl boat ramp is the best
3 access point for small crafts anywhere on the bay. She moves her 12' small craft
4 from her shoreline to her upper-yard, and it takes six people to move the craft. It is
5 not uncommon for the balloon float of mooring buoys to become detached during
6 winter storms. It is merely a maintenance issue. Ms. Sosin has previously used the
7 Galley Dock to moor her 15' boat. She easily navigated the pass into Davis Bay in
8 her 15' boat. The views of residents are panoramic, thus the dock will be a feature in
the neighbors' visuals. The approval of this application will lead to more dock
proposals. Prop wash and fuel leakage will impact the Davis Bay ecosystems. Buoys
do not have the same impact as docks because they are placed in much deeper water
and can be approached from 360 degrees. She summarized her written comments and
submitted them as exhibit 64. Additionally, she submitted individualized comments
on the Pohl application exhibits as part of exhibit 64.

9 **APPLICANT REBUTTAL**

10 Jeffrey Otis

11 Under examination by Mr. Kisielius, Mr. Otis stated that, when he received the Jen-
12 Jay dive survey, he reviewed it. Upon his review, he realized more topographical
13 information was necessary. Thus, Archipelago Surveying conducted research to
14 create underwater topos. This information was combined with Mr. Betcher's
15 research. All of this information was sent to Waterfront Construction who then
16 designed the dock. Exhibit 66 is the original plan created by the Philbin Group;
17 however, this plan was replaced after additional geological information was gathered.
18 MacKaye Harbor is 5 miles to the east of the Pohl property. When Mr. Otis contacted
19 the Galley Marina via email, the marina told him that moorage was not available at
20 that time. Moorage has not been available at the surrounding marinas throughout the
21 application process. There was moorage available at Islander Marine Center;
22 however, this moorage is temporary because boats have to be moved during busy
23 weekends. Mr. Otis noted the undercut on the Pohl bank resulting in the uselessness
24 of the existing stairs. This undercut is evident in a photograph taken by Mr. Otis
(exhibit 68). The existing stairs hit a 90 degree switchback after 3-4 stairs.

21 Under cross-examination by Mr. Eglick, Mr. Otis testified that he received an email
22 from Galley Marina, but he does not have this email conversation at the hearing. He
23 can provide the email as an exhibit. He did not inquire about Marianne Karuza's
24 interaction with the marina. Mr. Otis does not recall if he asked if there was a waiting
list at the marina. The geotechnical report did not review the existing stairs on the
property. Mr. Otis is unaware if the geotechnical report of the boat ramp has been
submitted into the record.

25 John Pohl

1 Mr. Pohl stated his situation is different from his neighbors to the west because they
2 do not keep their boat in the bay for extended periods of time. The western neighbors
3 also have tucked their buoy farther away from the southwest wind forces. In regard
4 to the banks, Mr. Pohl's embankment is at an 80 degree angle, much steeper than
5 most of the neighbors. The mooring buoys owned by the Pohls are not directly
6 accessible from their property. Other neighbors who utilize mooring buoys only have
7 to row approximately 200' straight out to reach their boat. Mr. Pohl has to row his
8 crafts all the way around his rocky point to reach a safe point. The east side of his
9 property has no storage area. Mr. Pohl does not get along with the previous owners
10 of his property due to the unauthorized ramp work they constructed. He does not
11 believe the boat ramp could be used to launch boats.

12
13 Laura Arber

14 Ms. Laura Arber, who has been a marina area habitat biologist for the Washington
15 Department of Fish and Wildlife for eight years, stated that her role in the department
16 with respect to dock applications is to evaluate applications for the potential impact to
17 fish life. She reviewed the application associated with this project. When Mr.
18 Kisielius asked, she confirmed that she sent the e-mail to Mr. Otis dated February 14,
19 2013, which is exhibit 42, and she stated that she felt the e-mail was an accurate
20 statement of how she understands the Department of Fish and Wildlife's regulations
21 would apply to this particular project.

22 In cross-examination, Mr. Loring asked Ms. Arber whether the Department of Fish
23 and Wildlife guidelines required that for an advanced survey to be done between June
24 1st and October 1st. She said that was not correct; the guidelines strongly
25 recommended that, but it was not required. Mr. Loring directed her to page three,
where the guidelines says advanced surveys *shall* occur between June 1st and October
1st, and he asked her whether the idea that guidelines were strongly recommended
was simply her interpretation. She replied that she was referring to the preliminary
survey, and he explained that he meant the advanced survey. She confirmed that the
guidelines required the advanced survey to be done between June 1st and October 1st.
Ms. Arber stated that the advanced survey needed to be done in that period, because it
is not possible to identify the full extent of eelgrass outside of that period.

Mr. Loring asked Ms. Arber whether she suggested to the applicant alternative dates
for taking an eelgrass survey other than the time they had taken. She stated that she
had not.

Mr. Eglick asked whether there was an earlier draft of the e-mail that she sent to Mr.
Otis. She said that there was not, that she prepared that e-mail herself. When Mr.
Eglick asked, she stated that, to be precise, when evaluating applications for docks
like this, she evaluated the impact to fish life from construction.

1 Under redirect from Mr. Kisielius, Ms. Arber noted that an advanced survey is not
2 required for this proposal because the project site was moved away from eel grass
3 areas. Her review is related to construction of the structure and how it may affect fish
4 habitats; however, she does not evaluate the long-term effects of using the structure.

5 Mr. White

6 Under direct from Mr. Kisielius, Mr. White testified that he is a professional land
7 surveyor and began his career in 1985. In 1999, he was licensed by the state of
8 California and, in 2000, he was licensed by the state of Washington. He was asked to
9 create a topographic exhibit of the surface under the water in the area of the dock.
10 His then combined his research with the work completed by Jen-Jay. He has worked
11 in the Davis Bay area on other occasions. Mr. White conducted his research by
12 collecting data points on the ground (X,Y,Z coordinates). He collected the points
13 using a rod submerged in the water. Exhibit 72 is the survey that Mr. White
14 conducted. The contour lines of the survey were created using the data acquired
15 during his research. The circles featured on the map are based on data provided by
16 the Jen-Jay survey. He combined the Jen-Jay survey with his own research by
17 utilizing common data points such as the mooring buoy anchor. The depths found
18 using the rod method are typically 5" within accuracy. Dive surveys provide a little
19 more accuracy. The survey is not stamped because Mr. White uses a rubber stamp,
20 instead of an electronic stamp like many companies. The survey was provided
21 electronically, thus it does not have a stamp. There is a copy with a rubber stamp
22 somewhere. It does not devalue the work to not have a stamp.

23 Under cross-examination by Mr. Eglick, Mr. White stated that contours in the region
24 are interpolated from shoreline data. Interpolated means that from one point to
25 another, the elevations are assumed to be in a straight grade. Up to where the
arrowhead stops on exhibit 72, Mr. White did not conduct data, thus the contour lines
are more uniform. He did not use grid points for this area of the survey. He is not
aware where the -1 contour line is in relation to the dock. When Mr. White was at the
site, he was on a boat. He gathered approximately 100 data points from the boat.
None of these locations are shown on exhibit 72. These data points are preliminary
and help determine the contour lines. The data points are not the product delivered to
the client in terms of a topographic map. Mr. White used an aluminum pole with a
reflector on the top to gather the data points from the boat. The pole sinks into the
surface to some degree; however, the goal is to achieve a consistency in the sinkage.
On land, it is easier to observe the sinking effect. Land surveys are more accurate
than water surveys. Mr. White utilized common points to combine his data with the
Jen-Jay survey. Mr. White cannot attest to the accuracy of the Jen-Jay survey.

March 21, 2013 Testimony

Applicant Closing Remarks

1 Tadas Kisielius stated that the applicant is asking for the SEPA appeal to be denied
2 and the shoreline permit issued. In regard to the SEPA appeal, the petitioners have not
3 met the burden of proof to overturn the threshold determination. DNS and the
4 standard of review should not change simply because San Juan County staff had a
5 change of heart regarding the decision. The staff decision change was based on a
6 change of opinion after reevaluation; the change was not based on new evidence. The
7 applicant fears that staff change in opinion was based in neighbor opposition.
8 Community displeasure is not grounds for issuing a determination of significance.
9 Staff and the appellants position is based on three points: (1) views, (2) eel grass, and
10 (3) cumulative impacts.

11 In regard to view impacts, Mr. Kisielius testified that the question is not merely “Is the
12 dock visible from neighbors’ views?” Instead, the question is whether the view
13 impact is significant. A view impact is not significant when it is only going to impact
14 a small portion of a panoramic view or will result in only marginal impacts to a full
15 range of water views. These standards have been supported by previous cases. Mr.
16 Kisielius referenced *Inskeep v. San Juan County*, SHB No. 98-033 which notes “any
17 dock will have a physical presence and alter the view of a particular shoreline...It is
18 not determinative that the dock will be the first such facility in Horseshoe Bay, more
19 important is the extent to which it will constitute a visual presence on the environment
20 and the significance of the manmade alterations.” This case dealt with a longer dock
21 than the applicant’s potential one. Another case, SHB 09-012 similarly asserts that
22 adding a structure to the existing view is not the type of visual impact that requires
23 denial on aesthetic grounds. The notion that because the dock is visible means it does
24 not meet SEPA standards is inconsistent with existing case law. Mr. Kisielius noted
25 that in *May v. Robertson* 153 Wash. App. 57 the courts were concerned in an SHB
view impact case that “*the Board interpreted this requirement as barring any
development that changes the shoreline’s visual effect regardless of whether this
development actually impairs the views from surrounding properties.*” It is not the
standard to deny an application because a dock will be visible. The evidence
presented by the applicant demonstrates the dock will not result in adverse impact
views. The dock will not be dominant in any views as it will be tucked away in a
large crescent bay. The applicant provided panoramic photographs (exhibits 36, 38-
41) to demonstrate the visibility from the dock in panoramic views. The planned dock
location is similar to previous Board decisions that authorized construction and
concluded no visible impacts. The appellant and Friends of the San Juans cite
Hearings Board decisions that focus on situations where the dock extends from the
center of the beach or is at the mouth of the bay (*May v. Robertson*, Friends of the San
Juans, Bellevue Farms, Mineral Heights). All of these cases involve the dock jutting
out across the center of a beach. The area is not pristine, currently. Presently, the bay
already has shoreline armoring and a cluster of mooring buoys. Exhibits 27, 29, and
33 note these other beach structures. The dock does not break the plain as it is set
against a rocky promontory. Therefore, this dock most resembles that of cases where
the Shoreline Hearings Board determined no visual impact such as Walker. Due to the
position of the sun and the promontory, the planed dock will be set against the
shadows. Photos submitted by the appellants demonstrate these heavy shadows

1 which will minimize the effect of the dock. The dock will be wrapping around the
2 promontory rather than projecting laterally into the view of the closest properties. The
3 views from most properties will be of the narrow part of the float, not the side. Most
4 of the viewing properties are orientated to the south east, rather than towards the dock.
5 The only properties that will have views of the docks are those set on the edge of the
6 bluff. The Board decisions regarding view impacts caution against relying on
7 photographs that focus on the area of issue because they distort and overstate said
8 impacts. Photos presented by the appellants depict a limited view and exaggerate the
9 view impact. The appellants have focused on the Powell's impact (and the properties
10 immediately adjacent to the Powell property), not those of Davis Bay in general. The
11 Powell and Byrd's properties are closest to the site, but their photos overstate the
12 potential view impacts. These photos show only a limited portion of views in the area
13 and crop out the full context. The appellants' architectural renderings in exhibit 59 do
14 not show the full view, a fact that the appellant's expert who prepared the drawings
15 noted in testimony. When asked, the expert stated that the views depicted in exhibit
16 59 are centered on the dock. In actuality, to the left (not depicted in the photos) is a
17 small island that is in the middle-ground of the view location. The appellant has
18 cropped out the full range of views, thus preventing the hearing examiner from
19 evaluating the view impacts properly.

20 In regard to the eel grass, Mr. Kisielius stated that the applicant has relied on experts
21 in fish-habitat biology and eel grass surveys to draw conclusions. In contrast, the
22 appellant did not offer testimony from any person with scientific expertise. While
23 there is eel grass in the general vicinity, a survey found that there is no grass in the
24 location of the dock. The eel grass beds are at least 25' from the planned location
25 which exceeds DFW protocols. The dock utilizes fish friendly techniques such as
light permeability, north-south orientation, and small size. Experts testified that prop
wash is unlikely due to the depths of the eel grass beds. There is no evidence of
previous crop wash. In addition, the applicant conducted a dive survey to ensure there
was adequate water even at the lowest tides. The appellant failed to present proper
evidence that the dock will cause deeper impacts than the current use, a mooring buoy.
The appellant presented evidence from a DOE office director and a former planning
director who are not scientific experts. The appellant did not have a dive survey
conducted. The appellant argued that the rules regarding the protection of fish habitat
are not stringent enough; however, this hearing is not the appropriate venue for these
claims. Previous testimony from Dr. Powell asserted that monitoring should be
required, but, it should be noted, Dr. Powell's science credentials are not specific to
eel grass science. The margin of error of +/- 2' described in Mr. Betcher's testimony
has already been resolved via the TOPA survey. The TOPA survey reduced the
margin of error to a matter of 2". Mr. Betcher's testimony also referenced the 25'
buffer which helps mitigate any variances or margins of error. In regard to the salmon
recovery area presented by the Friends of the San Juans, the mere mapping of habitat
restoration areas is not grounds for SEPA significance. In *May v. Robertson* 153
Wash. App. 57, the court found that general reference material does not trump site-
specific evaluation

1 In regard to cumulative impacts, Kisielius noted there are two sources of authority in
2 justifying these impacts: SEPA and some case law about Shoreline Substantial
3 Development Permits. Under SEPA, cumulative impacts are narrowly applied, and
4 the standard is not met in this case. No cumulative impact analysis is necessary when
5 dealing with speculative impacts. Previous cases (*Bane v. Vancouver*, etc) defend the
6 applicant's position. The appellant's prepared exhibit regarding future dock
7 development merely speculates without any specific analysis of whether these docks
8 are feasible. Mr. Otis's testimony notes that there are several barriers to dock
9 placement such as eel grass location, beach bisecting, and forage fish habitat. The
10 appellants' method is unsophisticated and unsubstantiated. The case law rejects the
11 appellants' approach. Mr. Kisielius referenced Shoreline Hearings Board decision 10-
12 015 which notes that future dock speculation must follow specific criteria of the SMP.
13 Under the Shoreline Management Act, there are no specific requirements for
14 cumulative impact analysis. There are requirements for CUPs and variances. In some
15 instances, the Board determines that cumulative impact analysis can be applied to
16 shoreline development permits when certain factors are met. The case that most aptly
17 summarizes this instance is *Fladseth*; however, in the Pohl case, the *Fladseth* factors
18 are not met. In all cases, including *Fladseth*, the general principle is that cumulative
19 impact analysis is not necessary when the impacts are speculative. Analysis of
20 previous cases demonstrates that no cumulative impact analysis is required, generally.
21 The other possible triggering factors such as risk/harm to habitat, loss of community
22 use, or significant view impacts are not met. The compatibility standard is very
23 generic.

14 The appellant argued that the analysis of the dock should have been considered with
15 the analysis of the restoration application. SEPA does not require a single review of a
16 proposal to construct a dock. Under WAC 197 11.06.03b, only projects that are
17 dependent on each other are required to undergo environmental review. WAC
18 provides standards for this determination of dependence. The Pohl project does not
19 meet these standards, as the bulkhead must be removed regardless of dock approval.
20 The appellants' expert testified to this fact. Additionally, Mr. Otis testified that the
21 bulkhead will need to be removed. Thus, the restoration application is completely
22 independent of the dock application.

20 In regard to the SEPA appeal, Mr. Kisielius argued that the appellants and county staff
21 failed to establish that the original DNS was erroneous. Public outcry is not enough to
22 overturn a decision. In regard to the shoreline substantial development permit, the
23 proposal satisfies code requirements for docks, thus it should be approved. Friends of
24 the San Juan has suggested that the applicant is searching for loopholes in order to
25 garner approval; however, the code requires case specific/fact specific analysis.
Despite the appellants' protests, this application is for joint-use. There are four
properties with three residences bound by a joint-use agreement. The fact that single
family owns these properties does not change the meaning of joint-use. The
agreement lives beyond the current owners. Moreover, despite the joint-use
agreement, the parameters are within the requirements of single-use. The dock is very
small and is not beyond single-use standards because the beach access is not included

1 in evaluation. San Juan County Code 18.50.140 specifically references views as being
2 from public areas to the shoreline. Other provisions speak more generally about
3 aesthetically compatibility. The dock does not break the plain and satisfies SJCC
4 requirements. The dock will not interfere with navigation and recreational uses. The
5 dock is too close to shore to cause negative impacts to boats. The configuration and
6 location of the dock allows for kayaks to paddle underneath. Additionally, it will not
interfere with people swimming across the bay unless they are wading across the cove
at the lowest possible tide. In terms of impacts to habitat, Dr. Bodensteiner previously
testified that flushing will not be an issue. Log accumulation is not relevant when
addressing flushing issues. There will be no impacts to sea mammals.

7 In regard to feasibility of mooring alternatives, Mr. Kisielius noted that all of the
8 marinas referenced by the appellants are located significantly far from the Pohl
9 property. Additionally, those marinas referenced are designed for northern cruising of
10 the San Juan, not local use of Davis Bay. Those who testified that they utilize the
11 marinas are not using boats in the bay; instead, they are using the marinas for
12 everyday commutes to the island. In the Bellevue Farms Shoreline Hearings Board
13 Decision 96-23, the Board recognized the distinction between the local use of docks
14 and use of docks for greater commutes. There are no on-site alternative, feasible
15 options. Yes, currently, mooring buoys are in use; however, these buoys are not
16 adequate for yearlong use. These moorings are vulnerable to wave energy. The Pohls
17 have experienced their moorings washing up. In addition, it is difficult to reach
18 moored boats because the Pohls' shore is steep and improper for storing small crafts.
19 The surrounding neighbors have less steep banks. Stairs are not feasible because the
20 bank is significantly undercut. The existing path, which has been termed a boat ramp,
is not in use because it does not back into the water and there is no pavement.
Moreover, this "boat ramp" was illegally constructed by the past owners and must be
removed. An after-the-fact permit is not possible for the bulkhead because of the
current conditions. Once the bulkhead is gone, the path will be destroyed. Therefore,
it is inappropriate to deny the dock based on the current existence of a boat ramp. If
the hearing examiner applies this case to each criterion of the Shoreline Hearings
Board, he will find that it is consistent with approval. This dock is unique to Davis
Bay because of the unique property, but that does not mean the dock should not
receive a shoreline permit.

21 Appellant Closing Argument

22 Mr. Eglick referenced a letter the opposition submitted on February 13, 2013 that
23 addresses several cases, including *May vs. Robertson* 153 Wash. App. 57, for
24 example, on page twelve. The letter gives the reasons why *May vs. Robertson* 153
25 Wash. App. 57 is not applicable, one of which is that the county code in the case is
different than the San Juan County Code. Mr. Eglick said that, with that in mind, he
did not intend to discuss very many cases in his closing arguments, because the
Examiner would be able to interpret the relevant cases for himself. The application can
and should be denied even with the DNS left in place. There are several cases in the
shoreline context where that has occurred, and the February 13 submission cites these.
He stated that this is not about neighborhood displeasure; that characterization is

1 insulting. The application submitted to the county was incomplete and was, in some
2 ways, misleading. He said his clients have attempted to fill in the blanks, starting with
3 the issue of alternative moorage, which was misrepresented in the application and at
4 the hearing up until the last half an hour.

5 Mr. Eglick testified that county code 18.50.190 G5, which requires the applicant to
6 show, before he or she can have a dock approved, that existing facilities are not
7 adequate or feasible for use as well as that alternative moorage is not adequate or
8 feasible. This is not a convenience requirement. The burden is on the applicants, and
9 the applicants absolutely have not met the adequate or feasible alternative moorage
10 requirement. The idea that the requirement is met because their use is localized, and
11 because they cannot go to nearby marinas, might work in some areas but is
12 inapplicable in this situation.

13 Mr. Eglick said that all the marinas in the area, with possibly one exception, have
14 indicated that they would be happy to accommodate the applicants, They have not
15 confirmed anything with Island Marine Center, where the applicants have been
16 keeping their boat, but at least three other marinas, Islander Resort, Galley Dock, and
17 Spencer's Landing, have said that they have moorage available. This has been
18 confirmed multiple times, including by Marianne Karuza, by David Base, by Wally
19 Gudgell, and by Jeffrey Otis. Mr. Otis said, as recorded in page 7 on the application
20 narrative in exhibit 4, that the Islander did not respond to the request from the
21 applicants for information on moorage. But exhibit 70 reveals that on October 8, 2012,
22 the applicants asked Islander Resort whether the marina had moorage available, and
23 the response was that they do have moorage for the specific boat in question.

24 Furthermore, exhibit 9, the attachments from Islander Resort, from Galley Dock, and
25 from Spencer's Landing, reveals that these marinas have said they cater to situations
like this. Exhibits 61 and 62, the testimonies from Dallas and Mann, possess similar
information as well as verbal confirmation from Island Marine Center that they have
long-term slips available. Additionally, exhibit 8, the testimony from Ms. Caruso,
confirms that, as of the hearing date, all three marinas had long-term moorage
available. The requirement for alternative moorage was thus not met.

In response to the argument from the applicants that their boat cannot navigate the
tight fit to and from Fishermen's Bay in order to use these available marinas, Mr.
Eglick cited Mr. Gudgell, who noted in exhibit 30, page 7 that, if the applicants cannot
handle the tight fit in Fishermen's Bay, they will not be able to handle the equally tight
fit in the proposed Davis Bay dock. Mr. Eglick pointed out that Mr. Gudgell has forty
years navigation experience around the world. Additionally, other neighbors in Davis
Bay, including Ms. Mann, have explained that they are able to navigate Fishermen's
Bay.

Mr. Eglick said that selective preferences should not dissolve the burden on the
applicants to show that there is not alternative moorage available. The applicants have
tried to dodge the issue rather than face it head on. The question has to be asked

1 whether the applicants stepped up to meeting the burden. If the burden is not met, the
2 application cannot be approved.

3 With regard to the county code requirements concerning onsite existing facilities, Mr.
4 Eglick said there are mooring buoys in the area, and those can cause difficulty in bad
5 weather or on a bad winter day, but that is the case everywhere. Mooring buoys are
6 supposed to be maintained, and they are not meant to be a permanent fixture; in fact,
7 they are preferred for that reason. Citing a mooring buoy as sullyng a bay in order to
8 use them as a precursor to a dock turns the code on its head. The mooring buoys are
9 not as convenient and present issues that a permanent fixed dock do not, but the code
10 has made the judgment that mooring buoys are preferred, a fact which the applicants
11 have ignored in their presentation. Exhibit 60B is an aerial photo showing the mooring
12 buoys in context. Also, several people in Davis Bay have used mooring buoys as their
13 primary moorage for decades, as cited in exhibit 8, the Burke testimony, in exhibit 61,
14 the Dallas testimony, and in exhibit 65, the Sosin testimony.

15 Mr. Eglick stated that the Pohl property has stone steps that go down to what is called
16 Rowboat Cove, and they are shown in exhibit 31. Those stone steps are perfectly
17 comparable to what the neighbors use, and they are perfectly sound. There is no expert
18 testimony that says the steps are getting undercut and cannot be fixed; that was an
19 assertion the applicant made without any support whatsoever. If the steps really are
20 problematic, renovating them is certainly cheaper than spending money on a dock
21 application. Further, those steps are actually a better access facility than other people
22 in Davis Bay have, including people who have figured out a fine way to bring their
23 boats in and out without the convenience that facility provides. Mr. Eglick said that,
24 additionally, having less beach available during hide tides is a part of shoreline living.

25 He stated that the Pohl property has thirteen hundred feet of shoreline, and there is an
installed boat ramp. In exhibit 63, Dr. Jerry Powell explains that he was sent letters
from the two successive previous owners to Mr. Pohl, and both previous owners
referred to the boat ramp as such. The applicants say that one previous owner, Mr.
Rohlf, is in a dispute with Mr. Pohl, therefore his statement should be ignored, but this
does not explain away the statement that the other previous owner, Ms. Gilder, gave.
She does not have any conflict with the applicants.

Mr. Eglick testified that the county issued a notice of correction for the boat ramp, but
no one has established that the boat ramp is illegal. As soon as the boat ramp was
brought to the fore, the applicants immediately wanted to get rid of it. The notice of
correction said the applicants needed to get a permit to establish the use of the boat
ramp or to do restoration, and the applicants applied for restoration. Mr. Eglick said
that, in his understanding of the testimony that Mr. Grout gave, Mr. Grout did not say
that the applicants could not get an after-the-fact permit. Mr. Grout said the county
would have to make the call, but he thought the boat ramp could be used in some
reduced capacity as access to the shoreline. Basically, the approach the applicants
have taken is to do everything possible to decommission an onsite alternative to a
dock, and the county should not issue a dock permit with that in mind. It would set a
terrible precedent. Coincidentally, in the SEPA checklist, question 8C on page six in

1 exhibit 4 asks for a description about structures on the site, but the boat ramp is not
mentioned in the given description.

2 Mr. Eglick stated that the restoration does not address the bulkhead, which will remain
3 presumably for convenience. All that the restoration proposes is to remove a few rocks
4 that would erode the ramp itself. In this case, what is left is a moderate bluff. Everyone
5 on the other side is dealing with bluffs that are around twenty feet, but this bluff would
6 be only be about eleven feet, which means navigating this would very easy compared
7 to what everyone else is dealing with. This is seen (1) in the testimony from Jerry
8 Powell in exhibit 63, which includes a photo of the low bluff along the Pohl's entire
9 southern shoreline, (2) in the testimony from Dallas and from Mann in exhibit 61,
during which they talk about their ability to handle their twenty-five foot bluff, and (3)
in the testimony from Gandini in exhibit 8, during which she mentions her ability to
handle a bluff that is about twenty feet. In exhibit 67, Ann Powell in her testimony
states that the Pohl's western bank is only about half as high as hers. Also, exhibit 71
shows the rock wall that will remain despite the restoration.

10 Thus Mr. Eglick stated that, even if the restoration is approved, even if the applicants
11 go forward with the restoration, which is not really a restoration as much as a way to
12 decommission the boat ramp, there is still a gently sloping area with ten layers of
concrete block to hold back the slope, which provide an alternative way for beach
access to occur.

13 Next, Mr. Eglick referenced the Walker case as one place in which the board
14 recognizes that a dock has to be necessary rather than simply a matter of convenience.

15 Mr. Eglick stated that he did not think everything should rise or fall on the SEPA
16 appeal, but he noted that, looking at 197-11-330, one of the SEPA regulations, part of
17 what one is supposed to do in a threshold determination is consider whether the
18 proposal will establish a precedent for future actions with significant effect, and this
goes to the deeper issue of whether a precedent that involves overwater structures,
view impacts, and so on is part of what should have been considered for the SEPA
DNS.

19 Mr. Eglick said that the scenic view protection requirements are not just in the
20 provision concerning public land. For example, county code 18.50.190 C4, which says
21 that every application for a permit for a dock or a pier shall be evaluated on the basis
22 of multiple considerations, lists scenic view as among the considerations. It does not
23 say scenic views from public land, only "scenic views." There is also the requirement
24 in code 18.50.070 for aesthetic compatibility, which Mr. Kisielius cited. The one that
25 he seemed to focus on to the point of not really acknowledging C4 is 18.50.140(A),
which says shoreline uses and activities must be designed and operated to avoid
blocking or adversely interfering with visual access from public areas to the water and
shoreline. If nothing else, part of the visual impact of this proposal is actually the
impact viewing from the water, which is a public area, and that is not just tricky logic.
The code is not just about looking from public land out; it is also what you see looking
back from the water to the shoreline and to where the dock would be.

1 Mr. Eglick stated that Mr. Grout confirmed this, and he was actually the original
2 author of the original San Juan county shoreline master program. Several photos in
3 several exhibits show that there are no docks or overwater structures in Davis Bay.
4 The dock that the applicants propose would be the first, thus the insertion of this dock
5 would create a different shoreline, and this is something Mr. Grout was adamant about
6 based on his experience. Mr. Grout said that Davis Bay is an important shoreline,
7 because it is pristine, and there are not that many like that left, and he said that when
8 you put in a dock, it is a precedent, and more follow. Mr. Eglick said that this is very
9 important when you consider the aesthetic impact, because the scenic view impact is
10 really both the impact of this proposal and the cumulative impact, or the precedential
11 impact. Both are legitimately considered under the master program and under SEPA.

12 Mr. Eglick stated that Mr. Grout testified that he went along the whole bluff, not just
13 to a few properties surrounding the Pohl property. This is in exhibit 8. There are aerial
14 photos in exhibit 60A and 60C, in the testimony from Jerry Powell in exhibit 63, and
15 in the testimony from Ann Powell in exhibit 67. The photographs as well as the
16 testimony from Mr. Grout show that the shoreline is pristine. He said he is aware that
17 Mr. Pohl thinks the driftwood forts that a few kids put up were a stain on the beach,
18 but these structures are not really structures, and they are not overwater, and Mr.
19 Eglick stated that the opposition thinks these are not comparable to an overwater
20 lumber and steel dock extending out from the shoreline.

21 Mr. Eglick stated the dock is a small part of the view, yes, but that is not what the
22 master program is about, nor does this accurately reflect what SEPA is supposed to
23 assess. Moreover, he said that there is testimony that says the dock is a central part of
24 the view from Mr. Kauffman and from Mr. Grout.

25 Mr. Eglick said that Mr. Kisielius' characterization of Mr. Kauffman's testimony was
taken out of context. Mr. Kauffman agreed that an exhibit showed X and not Y; he did
not agree that this somehow that meant Y was significant in the context of this case.
The fact remains that this is an important part of the view, and that the dock is a new
insertion into the view compared to what was there before. With computer 3D
modeling, Mr. Kauffman prepared photos that were very accurate. No one was able to
doubt the proportions, every question about the models was addressed, and none were
rebutted. Those models, seen specifically in exhibits 19, 20, 59, and 60, show what
one would see on the shoreline thus they are what should be evaluated.

Mr. Eglick stated that, during the testimony Mr. Kauffman gave, there was a question
about whether the dock would reflect that brightly on the walkway, and Mr. Kauffman
corrected himself, saying there is only a railing on one side, which means the dock
might not reflect as brightly as his model showed. He thus assumed a two-sided railing
would create a brighter reflection. Mr. Eglick pointed out that Mr. Kauffman
responded to what he was asked, and it is important to understand what he was not
asked. There are actually two places on the dock where there would be railings. One is
the elevated walkway, and Mr. Kauffman conceded that he might have shown that as
reflecting more brightly than the reality. But that is only the walkway. There is also a
twenty-six-foot pier, and no one asked Mr. Kauffman about that. That pier has the

1 same mesh railing on both sides, which is shown in exhibit 10A, sheet 6. Mr.
2 Kauffman made a mistake, and he acknowledged that as soon as he realized, but that
3 should not be used to determine the overwhelming accuracy of his work.

4 Mr. Eglick stated that, to rebut the idea of visual impact and of cumulative visual
5 impact, the applicants, who have the burden to present, said, first, simply do not look
6 there. They said it is an overall view, so it does not really matter. The Hearing
7 Examiner decides whether this particular dock inserted at that prominent point at
8 Davis Bay is insignificant to whatever else is there, but the opposition to the dock
9 believe it is, in fact, significant. The second argument the applicants made in rebutting
10 the idea of visual impact is that the dock does not break the plane, but Mr. Eglick
11 stated that he did not understand how not breaking the plane makes the dock less of a
12 visual impact.

13 He stated that perhaps a designer with a degree in architecture and a refined aesthetic
14 sense might look at the dock, say the plane is not broken, and be satisfied. But for the
15 average person, for whom the shoreline master program was created, the standard is
16 not whether something breaks the plane. The evidence in the record is that, for the
17 average person, the dock does interrupt the scenic view. He stated that the watercolor
18 renderings Ms. Philbin provided do not show even the approximate scale of the dock,
19 and the applicants are absurd in trying to suggest that the dock will look like
20 something out of a French impressionist watercolor. That is not what it will be.
21 Similarly, the applicants have a burden to do more than simply superimpose
22 photographs of boats on drawings or on photographs of the bay with the explanation
23 that these are not to scale but will still show what things will be like.

24 Mr. Eglick said that when evaluating whether there will be an impact on scenic view
25 and whether there will be a cumulative impact, the overwhelming weight of the
evidence says there will be. The SEPA DNS was erroneous on that, but it is not
necessary to reverse the DNS to deny the permit on that fact alone. The permit is
deniable in its own right. It is deniable under SEPA based on the county substantive
authority, which specifically calls out the SMP.

Mr. Eglick noted that photograph 13 from exhibit 8 highlights the lack of shade in the
dock vicinity. The photograph demonstrates the lack of shadow and minimal
reflection. Exhibits 19 and 59e illustrate the effect of the dock on views from Davis
Bay. Exhibits 8, 9, and 63 demonstrate the current uses for the area in which the dock
would extend. Uses of the area include kayaking, swimming, and boating. Public
waters should not be appropriated for a private use because it will restrict the public's
enjoyment. This area of the bay is part of public entitlement. In regard to navigation
impacts and hazards, Mr. Gudgell's testimony notes the winds have been characterized
improperly by the applicant's experts (exhibit 30). The neighbors have testified that
winds come from all directions, and the dock site is not protected from wave energy
due to its southern exposure. The dock will only be usable in the calm summertime.
The applicant's waterfront construction witness failed to testify on these matters, thus
Mr. Gudgell's testimony is not rebutted. Moreover, Dr. Bodensteiner's testimony is
irrelevant because he is not an expert in wave energy and had not traveled to Davis

1 Bay in over two decades. In regard to eel grass, code provision 18.50.190b1 asserts
2 that boating facilities should be designed to minimize impacts on marine life. The
3 dock float and the Pohls' boat will ground-out during extreme low tides, illustrated in
4 exhibit 57. Exhibit 60 depicts the dock superimposed on a 2002 DOE of photo of the
5 site at a -2.4' tide. These exhibits provide evidence of Mr. Gudgell's findings. The
6 Pohls' boat, if loaded, has the potential to draw down 3'6". An empty boat has the
7 potential to reach within 7" of the bottom during a low tide of 2'11". According to the
8 tide charts presented in Exhibit 10L, there will be over 150 minus tide events in 2013.
9 If the 2' margin of error is acknowledged, the Pohls' boat has great potential for
10 grounding out. When Mr. White was asked about margin of error, he stated the .4'
11 margin of error was based on the boat moving up and down; however, Mr. White
12 never mentioned how the rod was put into the bottom. The bottom of Puget Sound is
13 not flat, thus this margin of error is not proven. Surveying on dry land is a much
14 different process than on water. Mr. White was unwilling to claim his survey was
15 more accurate than the previous survey with a 2' margin of error. The applicant has
16 failed to prove Mr. White's survey is more accurate than the Jen-Jay survey. In
17 conclusion, many of the problems with the dock is not from construction, but from
18 operation. Ms. Arber's testimony notes that a HBA was granted, but it was focused on
19 construction, not operation. Navigating to the dock may cause negative impacts on the
20 eel grass.

21 With regard to prop wash, Mr. Eglick referenced exhibit 9, 11, and 67. In regard to
22 cumulative impacts, he stated that it was absurd to believe this dock will not set a
23 precedent. The applicant failed to provide conclusive evidence that other docks
24 cannot be built in the bay, thus the appellants' argument is not speculative. Mr.
25 Grout's testimony noted that when one dock is built, in his experience, many more
follow. Exhibit 21 illustrates potential future joint-use docks. The lots involved in the
joint-use agreement are not all developable residences. The lot configurations do not
lend themselves to separate use. Additionally, even if it will be a joint-use dock, this
does not escape the need to consider other feasible options such as off-site marinas or
moorings. In regard to the SEPA determination, the DNS was not technically
withdrawn by the county; however, WAC197.11.3403a notes that if significant new
information or DNS was procured by misrepresentation, than the lead agency shall
withdraw DNS. In this case, substantial amounts of new information regarding the
proposal's impacts have been provided. Moreover, the failure to disclose the
existence of the boat ramp and the failure to disclose the marina availability constitute
lack of material disclosure. These factors are part of the DNS threshold consideration.
The appellants do not believe the DNS must be suspended in order to deny the permit
because of the master program guidelines, however. The hearing examiner must look
at the Shoreline Master Program's hierarchy and the burdens it places on the applicant.

24 Applicant Closing Rebuttal

25 Tadas Kisielius testified that, in regard to marina availability, the testimony on record
indicates that the availability of boat stalls depended on what time and date inquiries
were conducted. In the beginning of the application process, there were no available
spots in surrounding marinas. They availability has since changed and continues to

1 morph. The applicant was not attempting to provide inaccurate information regarding
2 marina availability. According to previous Shoreline Hearings Board decisions, the
3 intended uses of a dock do matter in deciding feasibility of alternative options. In the
4 Pohl case, the localized use of Davis Bay is important in determining feasibility.
5 Additionally, despite neighbors ability to use mooring buoys and to store small crafts
6 on their banks, this is not a feasible option for the Pohl family. The Pohl property's
7 banks have very steep slopes. Yes, some neighbors have higher banks, but their slopes
8 are not as great. Moreover, according to testimony, mooring buoys are not used in the
9 winter, generally. In regard to the stairs, photographs provided by the applicant
10 demonstrate the stairs are not functional. The stairs are extremely steep and narrow,
11 and there is no way to carry a boat up them. No geologist testified to the undercutting
12 of the bank, but photographs provide general evidence of it. In regard to the existing
13 path, previous testimony noted that it should not be characterized as a boat ramp. The
14 appellants' expert testified that the existing bulkhead is "problematic" which is
15 consistent with testimony presented by the applicant. Without a bulkhead, the path
16 erodes, thus utilizing a path as an alternative creates a feasible issue of longevity. In
17 terms of views, the Shoreline Hearings Board utilizes specific standards in
18 determining whether construction creates significant view impacts. The entire view,
19 from various locations, must be considered when reviewing these standards. In terms
20 of the pristine nature of the bay, it is inappropriate to look at only overwater
21 structures; instead, residential development structures such as homes, beach stairs,
22 bulkheads, and mooring buoys, also need to be considered. During cross-examination
23 on March 4, the appellants' expert, Mr. Kauffman, confirmed that the photographs
24 provided by the appellant do not capture the full views of the area, especially the
25 views to the left. Ms. Philbin's concept of "breaking the plane" should not be
disregarded because Shoreline Hearings Board decisions utilize the concept in making
decisions regarding view impacts. The Board does not use the phrase "breaking the
plane," however. In regard to the shadows, Mr. Kisielius agrees that the dock will not
always be in the shade, but the general vicinity of the dock is an area of darkness
which will lessen the visual impact. In terms of wave impacts, Dr. Bodensteiner's
testimony should not be discounted due to lack of expertise because he has conducted
a number of tide, current, and wave studies in the past. Dr. Bodensteiner explained
why the primary wind impact does not enter the cove and noted that winds enter from
the southeast. The wave impact is diminished by underwater promontories and
islands. Mr. Gudgell testified that he was not formally educated, thus his testimony
should not be given the same weight as Dr. Bodensteiner's. In regard to the dock
grounding out, the appellant failed to demonstrate in exhibits how this would occur.
The appellants' argument in regard to grounding out is based on speculation and Mr.
Betcher's dive survey 2' margin of error finding. However, the applicant hired a
surveyor to conduct this 2' uncertainty. This surveyor, Mr. White, reduced the margin
of error to .4'. According to Mr. Kisielius, there is nothing in the record to support
Mr. Eglick's statements about bottom morphology. In terms of the eel grass survey,
the regulations state that surveys are accepted year-round; therefore, the appellants'
argument that the survey was conducted during a preferred period is irrelevant. Both
Dr. Bodensteiner and Mr. Betcher testified regarding the possibility of prop wash.
There is no evidence in the record to suggest that prop scour will occur, especially

1 considering the frequency of low-tides. The depths are sufficient to avoid negative
2 impacts.

3 In regard to cumulative impacts, both SEPA and the Shoreline Hearings Board case
4 law demonstrate that speculative impacts do not justify a cumulative impact analysis.
5 The Walker case presented similar arguments to that of the appellants, and the Board
6 determined that cumulative impact analysis was not necessary. The SEPA appeal
7 should be denied because the appellants have not met the burden of proof, and the
8 Shoreline Substantial Development Permit should be approved because the criteria
9 have been met and justify the construction of the dock.

10 Mr. Eglick noted that exhibit 5 (dive survey) describes the bottom-type as being
11 sandy-mud throughout the area. This survey provides expert information on bottom
12 morphology for the area.

13 Mr. Kisielius responded, stating that an expert surveyor had a margin of error that
14 accounted for this bottom-type.

15 **EXHIBITS**

16 Exhibits 1-15, listed in the exhibits cover sheet to the January 30, 2013 staff report,
17 were admitted into the record at the February 13, 2013 hearing on this matter. In
18 addition, the following exhibits were also admitted during the hearing:

19 Ex. 15: Grout CV

20 Ex. 16: Aerial Photograph of Davis Bay from Washington Coastal Atlas

21 Ex. 17: Aerial Photograph of Davis Bay taken by Mr. James Kauffman (looking
22 over the land out, across the Bay)

23 Ex. 18: Photograph taken from the bluff in front of the Powell residence which
24 depicts point on Pohl property, May 2012

25 Ex. 19: Architect, James Kauffman, rendering of dock over photograph of Davis
26 Bay from water (also known as #6 on the appellants' key map). The photo
27 was taken 100ft off the rocky point and is looking toward the Powell
28 residence

29 Ex. 20: Photograph taken by Ms. Kiker from the Powell property with architect,
30 James Kauffman, rendering of dock. (Also known as #1 on the appellants'
31 key map).

- 1 Ex. 21: Google earth composite photo of Davis Bay (Aerial) depicting architect
2 rendering of five docks
- 3 Ex. 22: 2/13/13 Eglick SEPA memo w/ WAC citations
- 4 Ex. 23: Aerial photo, or “Key Map” identifying perspectives used for architect
5 renderings, provided by appellant.
- 6 Ex. 24: Pre-hearing emails between SEPA parties
- 7 Ex. 25(a-b): Photos taken from neighboring properties
8 A- Photo taken from western most part of Powell residence and photo
9 taken from the center of the Powell residence looking out across their
10 structure
11 B- photo taken from the center of the third house to the east of the Pohl
12 home (Lisa Burt property)
- 13 Ex. 26: Photo taken by Mr. Pohl. It is a telephoto shot taken across the water
14 which depicts a dilapidated wooden structure. There is an additional
15 structure to the east.
- 16 Ex. 27: Photo taken by Mr. Pohl. Features a dilapidated wooden structure with
17 netting that comes down onto the beach.
- 18 Ex. 28: Photo taken by Mr. Pohl across the water. It is of the Powell residence
19 and depicts a number of wooden structures over the water.
- 20 Ex. 29: 3/31/09 Cascadia archaeological report
- 21 Ex. 30: Gudgell statement
- 22 Ex. 31(a) – (e): Photographs of shoreline
23 a-photo taken by Mr. Gudgell from the water in front of the old
24 Burt residence
25 b-photo taken by Mr. Gudgell from the beach in front of the Pohl
home showing the boat ramp on the left
c-photo taken by Mr. Gudgell showing the bulkhead on the ramp

- 1 d-photo taken by Mr. Gudgell showing the stairs going up from
2 beach on the Rowboat Cove side of the property
3 e-photo taken by Mr. Gudgell from where the stairs would start,
4 facing north towards Davis Bay
- 5 Ex. 32: CV of Bodensteiner
- 6 Ex. 33: 11x17 photograph identifying structures on shoreline
- 7 Ex. 34: Otis CV
- 8 Ex. 35: Photo of Pohl Residence from water, beach to the west
- 9 Ex. 36: Photo of Pohl residence from shore below Carey property, shadow
10 area to right is dock area
- 11 Ex. 37: Aerial photo with parcel lines; 3 shots merge to panorama
- 12 Ex. 38: Photo of Pohl residence from shoreline at Juel property
- 13 Ex. 39: View from shoreline from Burke property w/ stairs going to house
- 14 Ex. 40: Shoreline view from Powell property; 3 shots merged to panorama
- 15 Ex. 41: Shoreline view of dock area; 3 shots merged to panorama
- 16 Ex. 42: 2/14/13 email from Laura Arber to Jeffrey Otis
- 17 Ex. 43: WSDFW Eelgrass/Macroalgae Habitat Interim Survey Guidelines
- 18 Ex. 44: Lopez Island Shoreline Fish and Wildlife Habitat Conservation
19 Areas
- 20 Ex. 45: Draft overlay of two maps from Shoreline showing boundary of eel
21 grass, bulkheads, and mooring buoys
- 22 Ex. 46: Betcher C V
- 23 Ex. 47: Philbin CV
- 24 Ex. 48: Artist rendering of Pohl dock created by Ms. Philbin
- 25 Ex. 49: 11x17 photo (same photos from exhibit 35) with superimposed
boats

- 1 Ex. 50(a)-(o): 8x11 photos taken by Mr. Burt during a storm on December 18,
2 2012
- 3 Ex. 51: 8x11 photo of Pohl property from shoreline showing driftwood taken by
4 Mr. Kauffman at 12:15PM
- 5 Ex. 52: 8x11 photo taken by Ann Powell showing a kayaker at the Pohl property
- 6 Ex. 53: 8.11 photo taken by Mr. Pohl high tide photograph which depicts the
7 waterfront beach area of the property on a southwest trajectory.
- 8 Ex. 54: 8x11 photograph of boats beached along Powell beach stairs
- 9 Ex. 55: 8x11 photograph of boat beached along beach stairs
- 10 Ex. 56: Cultural Resources Report
- 11 Ex. 57: 11x17 Tide Depictions
- 12 Ex. 58: 11x17 site sections (2 pages) One is at -2.77' and one is at -1'. Rendered
13 by Mr. Kauffman
- 14 Ex. 59(a)-(e): 8x11 photographs with superimposed architecture renderings of
15 proposed dock
- 16 Ex. 60: Three aerial photographs – (1) Pohl property with superimposed
17 architecture rendering of proposed dock; (2) Pohl aerial photograph
18 labeling buoys, ramp and steps; and (3) aerial of bay with architecture
19 rendering of dock superimposed
- 20 Ex. 61: Dallas and Mann written comments with 86x11 photograph of Pohl
21 property
- 22 Ex. 62: 2/11/13 email from Smith to Kiker
- 23 Ex. 63: Written comments from Jerry Powell with attached photos depicting
24 public beach
- 25 Ex. 64: 2/2/13 written comments and separate responses to Pohl comments from
Michelle Sosin with attachments

- 1 Ex. 65: 11/24/11 storm video taken by Stephanie Dallas
2 Ex. 66: Shoreline Demolition and Grading Plan prepared by Misty Philbin
3 Ex. 67: Written comments from Dr. Ann Powell
4 Ex. 68: 8x11 photograph of Pohl beach stairs featuring the bank undercut taken by
5 Jeffrey Otis
6 Ex. 69: Three Otis photographs used to compose Ex. 40.
7 Ex. 70: 1/4/13 and 1/3/13 emails between Jeff Otis and Jeff Nichols
8 Ex. 71: Pohl Restoration Site Plan
9 Ex. 72: Survey of Pohl dock location completed by Mr. White
10 Ex. 73: Post-hearing emails between parties (between 3/4/13 and 3/21/13)

11 Ex. 8 is composed of the following public comments:

- 12 Anthony Karuza written comments w/ final wind energy report
13 Karin Gandini written comments
14 Marianne Karuza written comments
15 Donald Burt written comments
16 Lisa Burt written comments
17 Susan Peters letter Jan 13, 2013 letter
18 James Thomas letter
19 Peter Kilpatrick letter Dec 20, 2012
20 Donald Burt letter Dec 1, 2012
21 Pete and Karin Gandini letter Dec 3, 2012
22 Bill Burt letter Dec 2, 2012
23 Matt Karuza letter
24 Audrey Swanson email Dec 3, 2012
25 Jeff Jennings email Nov 30, 2012

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Arringtons letter dated Nov 30, 2012
Anna Karuza letter dated Dec 4, 2012
Diana Dyer letter dated Dec 7, 2012
Kauffman letter dated Dec 4, 2012
Doug Ichikawa letter Dec 2, 2012
Pat Dodds email Dec 3, 2012
Karen Hauger email Dec 10, 2012
Jeff Juel email Dec 7, 2012
Valerie Newson email Dec 7, 2012
The Daises email Dec 7, 2012
The Milewskis email Dec 7, 2012
The Zalugas letter Dec 7, 2012
The Burts letter Dec 1, 2012
Sarah Levey letter Dec 3, 2012
Daughter of Lisa Burt letter Dec, 2012
The Stuckeys letter Nov 29, 2012
Marianne Karuza letter Dec 3, 2012
Mark Stuckey letter Dec 4, 2012
Matthew Powell Dec 5, 2012
Lisa Dec 5, 2012
Weston Powell email Dec 6, 2012
Lisa Burt letter Dec 4, 2012
The Karuzas, The Gandinis, etc joint-letter Nov 20, 2012
The Powells letter Dec 5, 2012
The Newsons letter Dec 2, 2012

Stephanie Dallas and Krista Mann email Dec 7, 2012

Fred Levy letter Dec 3, 2012

Michelle Sosin letter Dec 5, 2012

John and Caroline Bay Dec 9, 2012

Lainie McMullan Dec 4, 2012

Pete and Karin Gandini email Feb 1, 2013

Marianne Karuza email Jan 31, 2013

Jeff Juel email Jan 31, 2013

FINDINGS OF FACT

Procedural:

1. Applicant. The applicants are John Pohl and Susan Wycoff Pohl.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application starting at 10:00 am on February 13, 2013. The hearing was continued to March 4, 2013 for additional testimony and then to March 13, 2013 for a conference call to complete some testimony and the presentation of final arguments. The examiner conducted a site visit on February 25, 2013 with accompaniment limited to County staff.

Substantive:

3. Site and Proposal Description. The Pohls have applied for a substantial development permit to construct a dock serving four properties at the Southern end of Lopez Island in Davis Bay. The shoreline application has been consolidated with an appeal of a SEPA determination of non-significance issued for the proposal. Staff recommended denial of the shoreline permit and also recommended against their own threshold determination, requesting that the Examiner order the preparation of a limited environmental impact statement.

The dock structure will include the following components: a 6' x 26' fixed pile pier; a 3' 9" x 44' ramp; a trapezoid-shaped ramp landing float that is 8' x 4' x 8' - 1 and 5/8" x 5'- 6"; and a trapezoid-shaped moorage float that is 8' x 35' x 8' -1 and 5/8" x 36' - 5 and 7/8". The total area (less the 20.5 square foot area in which the ramp overlaps) is 624.2 square feet. Total length is 83 feet, while the total length as measured from the Ordinary High Water Mark is 71 feet.

1 The four parcels to be served by the dock total approximately 17 acres and include
2 three residences and one accessory dwelling unit. The tax parcel numbers for the
3 four parcels are 241022019000, 241023001000, 24102201800, and 24102202000.
4 The parcels have a total of 1,371 feet of beach frontage. The Pohls use all of the
5 residences at various times throughout the year. The Pohls' properties may eventually
6 be further developed to include an additional residence consistent with the County
7 code. Currently the Pohls intend to use the properties for their extended family,
8 though it is possible that the Pohls may eventually transfer ownership to family
9 members or sell parcels to third parties. A map depicting the general vicinity of the
10 project and the four parcels that will be served by the dock are included in the
11 application materials, Ex. 4, Att. A.

12 4. Characteristics of the Area. The proposed dock will be located in the inside
13 reach of a promontory in Davis Bay located close to the western edge of the bay. The
14 promontory creates a cove called rowboat cove by Davis Bay residents. Davis Bay
15 faces south on the southern tip of Lopez Island. It is adjacent to the San Juan Channel
16 that runs between Lopez Island and Cattle Point, on San Juan Island. For many miles,
17 this shoreline reach has no docks or other overwater structures. Davis Bay is a
18 modest sized bay. There are no exact measurements in the record, but it appears to be
19 several hundred feet in length. Roughly 17 homes are located on waterfront lots along
20 the bay, most located behind an approximately 20 foot shoreline bank that is heavily
21 vegetated. Most homes are setback several feet from the shoreline banks. It appears
22 that all waterfront homes along Davis Bay are located to the east of the Pohl
23 properties. The proposed dock will be visible to all of the waterfront homes except for
24 the Pohl homes.

25 Between the shoreline banks of Davis Bay and its intertidal waters there are sandy
beaches accessed by shoreline stairs from most of the waterfront homes. Dinghies are
often found beached alongside these stairs. Many of these dinghies are used to access
boats moored at several mooring buoys located towards the center of the bay. As
noted from several letters submitted by Davis Bay residents, the waters and
uninterrupted sandy shorelines of Davis Bay are extensively used for walking,
swimming, crabbing and kayaking.

CONCLUSIONS OF LAW¹

Procedural:

1. Authority of Hearing Examiner. Shoreline Substantial Development
permit applications are reviewed and processed by Development Services Department
staff, and the Hearing Examiner, after conducting an open-record public hearing,
renders a decision on the shoreline permit. SJCC18.80.110(E). SJCC 18.80.140,

¹ The conclusions of law regarding adverse impacts, COL No. 8-14, are actually mixed questions of law and fact. Given the fact specific nature of the assessment of “probable significant adverse impacts”, it is more efficient to assess the law and facts together.

1 Table 8.3 provides that the hearing examiner has final decision making authority over
2 SEPA DNS appeals, appealable to the Shoreline Hearings Board.

3 **Substantive:**

4 2. Shoreline Designation. The subject property is designated as Rural Farm
5 Forest.

6 3. Review Standard. There are only two reasons to overturn a DNS: (1)
7 there are unmitigated probable significant adverse environmental impacts; or (2) the
8 SEPA responsible official has not undertaken an adequate review of environmental
9 factors as required by SEPA regulations. Each grounds for reversal will be separately
10 addressed below.

11 A. Probable Significant Adverse Environmental Impacts.

12 The primary relevant inquiry for purposes of assessing whether County staff correctly
13 issued a DNS is whether the project as proposed has a probable significant
14 environmental impact. See WAC 197-11-330(1)(b). WAC 197-11-782 defines
15 “probable” as follows:

16 ‘Probable’ means likely or reasonably likely to occur, as in ‘a reasonable probability
17 of more than a moderate effect on the quality of the environment’ (see WAC 197-11-
18 794). Probable is used to distinguish likely impacts from those that merely have a
19 possibility of occurring, but are remote or speculative. This is not meant as a strict
20 statistical probability test.

21 If such impacts are created, conditions will have to be added to the DNS to reduce
22 impacts so there are no probable significant adverse environmental impacts. In the
23 alternative, an environmental impact statement would be required for the project. In
24 assessing the validity of a threshold determination, the determination made by the
25 City’s SEPA responsible official shall be entitled to substantial weight. WAC 197-
11-680(3)(a)(viii).

26 B. Adequate Environmental Review

27 The second reason an DNS can be overturned is if the SEPA responsible official did
28 not adequately review environmental impacts in reaching his threshold determination.
29 The SEPA responsible official must make a prima facie showing that he has based his
30 determination upon information reasonable sufficient to evaluate the impacts of a
31 proposal. The courts have never actually overturned a decision for inadequate
32 review. These results provide some insight as to how deferential the courts have been
33 in applying the adequacy standard, but do not serve to eliminate the oft-repeated
34 judicial requirement that environmental factors must be adequately considered to
35 support a threshold determination.

1 As recently as 2010, the courts have ruled that an agency's threshold determination is
2 entitled to judicial deference, but the agency must make a showing that
3 "environmental factors were considered in a manner sufficient to make a prima facie
4 showing with the procedural requirements of SEPA." *Chuckanut Conservancy v.*
5 *Washington State Dept. of Natural Resources*, 156 Wn. App. 274, 286-287, quoting
6 *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73 (1973).
7 In applying this adequacy standard, on several occasions the courts have examined
8 how thoroughly the responsible official reviewed environmental impacts in addition
9 to assessing whether a proposal has probable significant adverse environmental
10 impacts. See, e.g., *Boehm v. City of Vancouver*, 111 Wn. App. 711 (2002), *Moss v.*
11 *City of Bellingham*, 109 Wn. App. 6 (2001). In *Moss*, for example, the court recited
12 the prima facie rule and then applied it as follows:

13 *The record indicates that the project received a great deal of review. The*
14 *environmental checklist was apparently deemed insufficient, and therefore*
15 *the SEPA official asked for additional information in the form of an EA. The*
16 *City gathered extensive comments from agencies and the public, held*
17 *numerous public meetings, and imposed additional mitigation measures on*
18 *the project before finally approving it. Notably, although appellants complain*
19 *generally that the impacts were not adequately analyzed, they have failed to*
20 *cite any facts or evidence in the record demonstrating that the project as*
21 *mitigated will cause significant environmental impacts warranting an EIS.*

22 109 Wn. App. at 23-24.

23 WAC 197-11-335 provides that a threshold determination shall be "be based upon
24 information reasonably sufficient to evaluate the environmental impact of a
25 proposal". The standard of review on adequacy, therefore, is that the SEPA
responsible official must make a prima facie showing that he has based his
determination upon information reasonably sufficient to evaluate the impacts of a
proposal.

A somewhat confusing facet of the standard requiring adequate review is WAC 197-
11-680(3)(a)(ii). This WAC provision prohibits the appeal of intermediate steps of
SEPA and only allows administrative appeals of threshold determinations and the
adequacy of an EIS. SEPA appellant arguments such as the SEPA checklist is
incomplete or inaccurate arguably seeks a ruling on intermediate steps of SEPA
review, i.e. the adequacy of the checklist. The judicial standard requiring adequate
environmental review was formulated before the adoption of WAC 197-11-
680(3)(a)(ii) in 1984, but as demonstrated in the *Moss* case quoted above it was still
applied to SEPA threshold appeals well after 1984. The courts have yet to address
the arguable conflict between WAC 197-11-680(3)(a)(ii) and the judicial adequacy of
SEPA review standard. The ultimate resolution may be that WAC 197-11-
680(3)(a)(ii) prohibits administrative agencies from assessing adequacy of review but
the courts are still free to do so. Unless and until the issue of whether adequacy of
review is germane to an administrative appeal is judicially resolved, the prudent

1 approach is to consider the issue as is done currently with cases such as *Moss*. Doing
2 so will avoid the need for an evidentiary remand should a reviewing court determine
3 that adequacy is something the Examiner should have considered.

4 Practically speaking, a consideration of the adequacy of review rarely results in a
5 reversal of a threshold determination. In order to meet its burden of proof on
6 adequacy, the SEPA appellant must often present the information the SEPA
7 responsible official should have considered at the SEPA appeal hearing. After the
8 information is presented, the SEPA responsible official is often asked whether they
9 still believe the project has no probable significant adverse environmental impacts. If
10 the responsible official responds that he or she does not see any reason to change the
11 threshold determination, the issue of adequate review becomes moot. This result is
12 allowed because the courts will consider information or mitigation supporting a
13 determination that wasn't reviewed or imposed until after issuance of the threshold
14 determination.

15 Again, the *Moss* decision is instructive on the allowance for this type of post hoc
16 rationalization. In *Moss*, the City of Bellingham added SEPA mitigation measures
17 after the SEPA responsible official issued the MDNS. The court sustained the MDNS
18 on the basis of subsequently imposed mitigation measures as follows:

19 *Although the DNS was issued prematurely, it is difficult to see how the
20 appellants were prejudiced. The city council imposed many additional
21 mitigation measures on the project before approving it, thereby making it
22 more environmentally friendly than the version in the DNS. Appellants
23 suggest that the DNS misled the city council into believing that all of the
24 impacts were capable of mitigation, but the record indicates that the project
25 received a considerable degree of scrutiny. Furthermore, WAC 197-11-350
requires an EIS where a proposal continues to have a significant adverse
environmental impact, even with mitigation measures. While all of the
required mitigation measures should have been imposed before the DNS was
issued, the appellants still have not shown that the approved project, as it
was mitigated, remains above the significance threshold.*

20 109 Wn. App. at 25.

21 5. Substantial Weight v. Staff Recommendation. As noted in the preceding COL, a
22 SEPA threshold determination is entitled to substantial weight. This case is unique in
23 that County staff are recommending that its own threshold determination be
24 overturned. It is reasonable to question whether a threshold determination is entitled
25 to substantial weight when the SEPA responsible official who issued the determination
urges its reversal. WAC 197-11-680(3)(a)(viii) clearly requires deference to be
provided to “the” threshold determination, which is the DNS initially issued by the
County. There is no room within this direct and plain language to imply the
nullification of this standard when the responsible official supports the reversal of the
determination. Indeed, the County had full authority to avoid this “substantial weight”

1 situation by withdrawing its DNS and issuing a DS under WAC 197-11-340(3)(a)(ii),
2 which requires an agency to withdraw a threshold determination if there is significant
3 new information indicating probable significant adverse environmental impacts. As
4 noted at page 3 of the SEPA staff report, Ex. 13, part of staff's support for the SEPA
5 appeal is based upon new information about the presence of endangered fish and
6 defects in the eelgrass survey.

7 Although this case presents the unusual situation of having to afford substantial weight
8 to a threshold determination opposed by the SEPA responsible official, the current
9 position of staff can still play an important role in evaluating environmental impacts.
10 As demonstrated in the last quote from the *Moss* decision, actions and evidence
11 presented after the issuance of a threshold determination can be considered in
12 evaluating its validity. The staff's change in position on the threshold determination is
13 certainly of relevance in assessing environmental impacts, given the staff's expertise
14 on such issues. Ultimately, the substantial weight standard will most likely make a
15 difference in close factual situations where the staff's current position has already
16 been balanced against opposing evidence.

17 6. SEPA Appeal Issues Limited to those Raised in Appeal Statement. Appeal issues
18 are limited to those identified in the Appellants' Notice of Appeal. SJCC
19 18.80.140(E)(5)(d) require the Notice of Appeal to identify the grounds of appeal.
20 This requirement would be undermined if other issues are allowed to be considered.
21 The Appellants' grounds for appeal are each addressed separately in the proceeding
22 COLs.

23 7. Aesthetic Impacts (B(1) of SEPA Appeal). The aesthetic impacts of the proposal
24 create probable significant adverse environmental impacts. No overwater structures
25 are located within the bay or within sight of anyone recreating along the waters of the
26 bay. Further, the high banks of Davis Bay obscure the surrounding homes and upland
27 development and in so doing create a natural enclave of pristine sandy beaches that
28 are used on a regular basis by the members of the Davis Bay community. The 71 foot
29 encroachment into the sandy, undeveloped beaches of Davis Bay is completely out of
30 character with the surrounding natural environment.

31 Although aesthetics alone has only a tenuous legal basis for the denial of land use
32 permits (*see, Anderson v. Issaquah*, 70 Wn. App. 64 (1993)), this has not deterred the
33 Shoreline Hearings Board in its review of shoreline permits. *See, Gennotti v. Mason*
34 *County*, SHB 99-011, Final Findings of Fact, Conclusions of Law, and Order
35 (October 29, 1999); *Viafore v. Mason County*, SHB 99-033, Final Findings of Fact,
36 Conclusions of Law, and Order (September 14, 2000). Perhaps this emphasis upon
37 aesthetic impacts is more justifiable for PRFs, since the private property interest at
38 stake is less than that usually associated with development permits. PRFs are not
39 confined to private property but rather encroach into public waters. Given these types
40 of decisions, aesthetics can serve as justification for denial so long as no two
41 reasonable minds could disagree on their assessment.

1 Although the *Viafore* SHB case is from Mason County, it is highly instructive on how
2 the SHB evaluates aesthetic impacts in areas that are not characterized by any dock
3 development. *Viafore* involved a dock proposal for a 100 foot dock. As described by
the SHB:

4 *The Bauer [applicant's] property is located on the eastern shore of Pickering*
5 *Passage across from Harstene Island. The shoreline is designated as an*
6 *urban residential environment under the Mason County Shoreline Master*
7 *Program (SMP). The area is developed with a number of recreational and*
8 *permanent residences. South of the property there is an existing dock and*
9 *boathouse that extends approximately 200 feet into Pickering Passage. This*
10 *structure predates the Shoreline Management Act (SMA), chapter 90.58*
11 *RCW. Further south is a bridge to Harstene Island. The shoreline north and*
12 *south of the subject property is otherwise devoid of any dock structures. With*
13 *the exception of the two noted structures, the view of the shoreline from the*
14 *Bauer property and surrounding properties is unobstructed and relatively*
15 *pristine.*

16 *Viafore* FOF No. 3.

17 Two Mason County SMP dock policies and one SMP dock regulation were applied in
18 assessing view impacts as follows:

19 *Policy 1: Piers and docks shall be designed and located to minimize obstruction*
20 *of views and conflicts with recreational boats and fishermen.*

21 *Policy 3: The type, design and location of docks and piers should be compatible*
22 *with the shoreline area where they are located. Consideration shall be given to*
23 *shoreline characteristics, tidal action, aesthetics, adjacent land and water uses.*

24 *Regulation 2: Docks and piers shall be located, designed, and operated to not*
25 *significantly impact or unnecessarily interfere with the rights of adjacent property*
owners or adjacent water uses. Community use or joint use facilities may be
located on the property line.

The SHB denied the dock application because it did not comply with the dock policies
and regulation quoted above, ruling as follows:

The proposed dock is not consistent with the cited policies and use regulation
from the SMP. The Bauer dock would be the first dock approved under the
SMA in an area with only one other existing dock structure that predates the
SMA. In this context the proposed dock is not compatible with the shoreline.
The proposed dock will also unduly impact the views on an extensive
shoreline with almost no dock development. In terms of both compatibility
and view impacts, considerable weight must be given to the possibility that

1 similar docks will be sought by property owners on Pickering Passage if the
2 permit here is allowed to stand. The cumulative effect of such development
3 would be inconsistent with the cited policies and regulations. It would allow
4 for the substantial degradation and corresponding reduction in public rights
5 resulting from multiple docks on what is now a relatively pristine shoreline
6 environment. In a case such as this it is critical to consider the cumulative
7 impacts of a proposed development. *Buechel*, 125 Wn.2d at 210; *Hayes v.*
8 *Yount*, 87 Wn.2d 280 (1976)(Logic and common sense suggest that numerous
9 projects, each having no significant effects individually, may well have very
10 significant effects when taken together.); *Bellevue Farm Owners Assn. v.*
11 *Shorelines Hearings Board*, 100 Wn. App. 341, 362 (2000).

12 *Viafore*, at 7.

13 The aesthetic impacts of the Pohl proposal are more adverse than those in *Viafore*.
14 The existing dock in *Viafore* was 200 feet and in addition to that structure there was
15 also a bridge visible in the distance. By contrast, there is no other over-water
16 structure in Davis Bay. *Viafore* does not contain any information on the extent of
17 landward shoreline development. However, even if the *Viafore* shoreline were less
18 developed than Davis Bay, that distinction would not be significant. Structures built
19 waterward of the bluff, Ex. 25-28, are minor in size and hidden amongst the shoreline
20 vegetation. Most notably, in Davis Bay the homes are set atop a bluff, which
21 provides a natural separation to the primarily undeveloped portions of the shoreline
22 waterward of the bluff. There is no question that under Mason County's shoreline
23 policies and regulations in place during the *Viafore* decision that the SHB would deny
24 the Pohl dock application.

25 Perhaps the opposite end of the spectrum on SHB evaluation of aesthetic impacts in
shoreline areas without over-water structures is *Innskeep v. San Juan County*, SHB No.
98-033. *Innskeep* also involved a dock proposal for Horseshoe Bay, which like Davis
Bay had no other overwater structures. In that case the SHB determined that the dock
would not create any significant aesthetic impacts:

*The proposed joint-use dock would not be an undue visual intrusion on the
shoreline. The high banks behind the proposed location and on either end of
Horseshoe Bay will allow the facility to blend into the environment. The
applicants have further assured this by the proposed use of non-glare and
natural materials for construction of the dock. As proposed, the facility will
not interfere with the aesthetic use and enjoyment of this shoreline.*

Innskeep, FOF No. X.

The court reasoned that the fact the dock was the first over-water structure in
Horseshoe Bay was not determinative, as follows:

1 *The proposed dock minimizes this impact by its location and design features. It*
2 *is not determinative that the dock will be the first such facility in Horseshoe*
3 *Bay. More important is the extent to which it will constitute a visual presence*
4 *on the environment and the significance of the man-made alteration. We*
5 *conclude that the dock is sited and designed in a manner consistent with the*
6 *policies of the master program and the SMA. SJCC 16.40.508(C)(5). The dock*
7 *will have a low profile and blend in with the surrounding high bank shoreline*
8 *from most views. The proposed dock is therefore capability [sic] with the*
9 *surrounding environment.*

10 *Inskeep* COL No. VII.

11 In this application as well, the dock will blend into the background rocky bluff to a
12 certain degree. The proposal can be conditioned upon the installation of mature rose
13 bushes or other vegetation to conceal the stairs as they descend the vegetated portions
14 of the bluff and the dark colors of the exposed lower rock will reduce the color
15 contrast with the colors of the dock.

16 *Inskeep* proved determinative in the recent Kan San Juan County examiner decision,
17 PSJ000-12-0004. In *Kan*, there were no other docks visible from the project site.
18 The examiner acknowledged that “*in general, it will be found that PRF’s that intrude*
19 *into undeveloped shorelines create significant adverse visual impacts*”. However,
20 relying upon the *Inskeep* decision, the examiner did not find this fact determinative,
21 distinguishing the proposal and approving the shoreline permit request on the basis
22 that it too was not visually intrusive because of a rocky shoreline bank, that the
23 proposal was for joint use, that there was no other evidence of adverse impacts and
24 because the building materials would blend in with the background.

25 It is somewhat unclear whether the rocky banks that were so important in the *Inskeep*
 and *Kan* decisions included a rocky shoreline between the banks and the tidal edge.
 Regardless, the nature and character of this portion of the shoreline was not
 considered in those two decisions and they are of great significance in this case. The
 sandy reaches of the Davis Beach create a shoreline amenity that is used often and
 extensively by the Davis Beach community. As testified by the Powells and many
 others, those sandy areas and the shallow portions of the bay are constantly used by
 both children and adults for walking, swimming, kayaking, crabbing and wildlife
 viewing. In this regard the high shoreline bank actually serves to exacerbate the
 visual impacts of the proposed dock, because those banks obscure the homes and
 other development from the intertidal areas of the bay. Once a person gets to those
 sandy beaches, man-made structures hidden behind the banks constitute a minor part
 of the visual landscape. A dock jutting 71 feet into these visually pristine
 surroundings is a significant and jarring obstruction of this natural setting.

1 San Juan County's SMP is an adopted SEPA policy and so can be used to provide
2 guidance on acceptable aesthetic impacts². See SJCC 18.80.050(H)(3)(a)(iii). As
3 noted in the prehearing briefing, the SMP provisions governing aesthetic impacts are
4 SJCC 18.50.070, which requires that all shoreline uses shall be located and designed
5 in a manner that "*must be aesthetically compatible with the affected area*" and SJCC
6 18.50.140(A), which requires that shoreline uses "*must be designed to avoid blocking
7 or adversely interfering with visual access from public areas to the water and
8 shorelines.*" Both of these SMP provisions are violated by the proposed dock. As
9 previously noted, the dock is a jarring encroachment into the natural enclave created
10 by the banks and undeveloped Davis Bay shoreline. The proposal is not aesthetically
11 compatible with this area. Further, for the same reasons the proposal also interferes
12 with visual access to both the shoreline and the water of the many people who use the
13 public intertidal areas of the beach and its associated waters.

14 The applicant makes the compelling point that the proposed dock only takes up a
15 small portion of the view scape from affected homes. Each of the homes in Davis
16 Bay has a commanding view of open water to the south. As shown in the aerial
17 entitled "orientation of houses" in Ex. 4, most of the homes along Davis Bay are
18 oriented towards this view scape, as opposed to the dock location, which takes up a
19 relatively small portion of the southwestern end of this view scape. Further, as
20 suggested in the aerial entitled "*landscaping blocking dock location*" in Ex. 4, there is
21 some landscaping that may partially block this view. However, it should be noted
22 that the examiner conducted a site visit and took in an outside view from the water
23 facing portions of the homes located at 501, 577, 573, 571, 533 and 467 Skid Road.
24 The dock location was prominently visible from the water facing portions of all of
25 these homes.

16 In the consideration of view impacts to the homes of Davis Bay, it is somewhat ironic
17 that the applicant has repeatedly made the point that the shoreline aesthetic
18 regulations do not focus on private view impacts. That is correct for many³ of those

19 ² It is recognized that SEPA policies are only required for the exercise of SEPA substantive authority
20 to mitigate or deny a proposal. See WAC 197-11-660(1)(a). However, the County's SEPA policies
21 provide some objectivity to the otherwise vague general SEPA threshold criteria of probable
22 significant adverse impacts, analogous to concluding that noise impacts are not significant because
23 they are below adopted noise dba standards. Ultimately, the impacts addressed in this decision are
24 easily divorced from the SEPA policies used to assess them and even without application of SEPA
25 policies the aesthetic and eelgrass and cumulative impacts assessed in this decision create probable,
significant adverse environmental impacts as each of those terms are defined in the SEPA rules.

³ One regulation that does directly encompass private view impacts is SJCC 18.50.190(C)(4), which
requires that dock evaluations be evaluated on the basis of multiple considerations, including scenic
views. The "scenic views" in this section are not limited to public views and encompass the private
views from the Davis Bay homes. The view impacts from some portions of the Powell property are
severe. As testified by the contractor currently building the Powell home, Pete Kilpatrick, the dock
will be located in the center of all the Powell interior shoreline views and this was confirmed by the
examiner's site visit. Although the view impairment from most other Davis Bay homes is not as
significant as that at the beach and interior Bay water level, those impacts are still probable significant
adverse environmental impacts that are inconsistent with the requirements of SJCC 18.50.190(C)(4).

1 regulations. The County's shoreline regulations focus on the aesthetic impacts to
2 Davis Bay and the public views from and to that bay. It is precisely those aesthetic
3 impacts that are the most significantly adverse in this application. As noted
4 previously, SJCC 18.50.070 requires that the proposed dock must be compatible with
5 the "affected area". The affected area in this case is Davis Bay. From the vantage
6 point of anyone within the sandy beaches of the bay or its interior waters, the dock
7 will play a prominent role in the views of the shorelines of the bay. Further, this
8 "affected area" comprises the immediate surroundings of anyone situated in the rear
9 yards of all the homes backing onto Davis Bay. Some recognition also has to be
10 made of the fact that land and structures located a few dozen or hundred feet from a
11 person, i.e. the "immediate surroundings" that comprise the regulated "affected area",
12 have a stronger visual impact than open water extending for several miles. Again, it
13 is precisely that affected area that is adversely affected to a significant degree.

14 The finding that the proposed dock creates probable significant adverse aesthetic
15 impacts is based upon the proposed location, height and scale of the facility. These
16 features were accurately represented in the architectural renditions presented by the
17 SEPA appellants. A great deal of testimony was presented on the accuracy of the
18 architectural renderings prepared by Richard Kauffman for the SEPA appellants,
19 those renderings specifically admitted as Ex. 19, 21, 23, 59(1)-(e) and 60. These
20 renderings comprised the most accurate and informative depictions of how the dock
21 would appear once completed. Credence is given to Ms. Philbin's testimony that
22 architecture renderings do not give a 100% accurate portrayal of how a structure will
23 appear. The most inaccurate aspect of the renderings are their coloring. The colors
24 used to depict the rendering are certainly not analogous to the colors of any dock that
25 the examiner has ever seen and would look more at home in a Disney cartoon than the
muted pastels that comprise the Davis Bay background. Part of the unrealistic nature
of the coloring probably derives from the absence of any depiction of lighting
impacts. Mr. Kauffman acknowledged that his models were not run through a
photorealism program that would show the light as it actually hits the structure.

Setting aside the coloring and lighting issues, it is determined that the Kauffman
renderings present a highly accurate depiction of the scale, dimensions and location
of the dock. Mr. Kauffman created his renderings by employing contours from
several different maps such as the Jen-Jay survey and Archipelago survey prepared by
the applicants, USGS topographic data and San Juan County's GIS website. Data
from tide charts was also used for the rendering. Mr. Kauffman used measurements
verbatim from the construction drawings prepared by the applicant to create the scale
for the model. He used reference points such as the tennis courts to assure that the
dock facility was accurately position in the photographs used for the renditions. Mr.
Kauffman noted that the scales of the Google earth photographs used for the rendition
match with the scale of the surveys used to construct the rendition, proving that the
dock is depicted at an accurate scale.

Richard Grout, who as a former DOE manager has reviewed numerous architectural
renderings as part of project review, testified that the methodology used by Mr.

1 Kauffman was the type commonly used for renderings prepared for DOE review. Mr.
2 Grout further testified that the Kauffman rendition accurately portrayed the scale of
the project.

3 The applicant did not contest the methodology used by Mr. Kauffman or otherwise
4 identify any error in how it was put together. Instead the applicant presented the
5 testimony of Misty Philbin, a landscape architect who testified that she didn't find
6 architectural renderings to be useful because making them accurate was "tricky" and
7 they were never 100% accurate. Instead of an architectural rendering, Ms. Philbin
8 presented an artistic rendering that basically comprises a watercolor painting of the
9 proposed dock. Ms. Philbin stated that she used survey information in her rendering.
She calculated how high the bank was and how high a tree was, and used that
information to approximate the scale. She acknowledged that the pastels made the
rendering a little less precise, but that is the freedom allowed in an artist rendering,
and she wanted to try to present a feel for how the dock would fit into the
environment

10 On its face and in the methodology of its creation, Mr. Kauffman's renderings are
11 significantly more credible and accurate than those of Ms. Philbin's. Mr. Kauffman's
12 renderings are clearly engineered to be as mathematically precise as available data
13 will reasonably permit, with no apparent exercise of a significant amount of
14 subjective judgment. In contrast, Ms. Philbin's artistic rendering is a highly
subjective interpretation of how the dock will appear with very little reliance upon
objective tools such as computer modeling and reliable sources of site data beyond
the project survey and a tree used as an approximate reference point.

15 A much more compelling rebuttal to the Kauffman rendition would have been an
16 architectural rendition using the same degree of precision employed by Kauffman that
17 demonstrated how using the same engineering tools could be used to depict the same
18 dock as significantly less aesthetically intrusive. The fact that this wasn't presented
19 creates the suspicion that it couldn't be done and that the Philbin rendering had to be
employed because any more objective representation would have not furthered the
applicants' case.

20 There was also conflicting evidence on whether the dock area is usually shaded or
21 not, resulting from the testimony of Mr. Otis that the proposed dock would be
22 camouflaged by shade. The evidence is inconclusive on this issue and the only
23 factual determination that can be made is that at times the dock area is shaded. Even
24 with shading, the scale, location and dimensions of the proposed dock still create a
25 probable significant adverse aesthetic impact. Further, this finding of aesthetic
impacts is still maintained taking into account that the dock will probably not have
the cartoon-like luminescence depicted in the Kauffman rendition and also that the
access stairs could be obscured by plantings required as a condition of approval.
However, it is within the realm of possibility that an architectural rendering with a
more realistic color scheme that depicted plantings that could be required to obscure
the access stairs may convincingly create a different picture. The EIS required by this

1 decision will give the applicant the opportunity to produce such a rendition if that is
2 possible using the type of precision employed by Mr. Kauffman.

3 8. Recreational Use Impacts ((B)(2) of SEPA Appeal). There are no significant
4 probable adverse impacts to the recreational use of Davis Bay, except as determined in
5 FOF No. 14. The SEPA appellants have succeeded in establishing extensive
6 recreational use of Davis Bay, but there is little to suggest that this would interfere
7 with these activities to any significant degree. The actual footprint of the proposed
8 dock is fairly small and there is nothing to suggest that persons using the public
9 portions of the bay would encounter any significant obstacles in going under or around
10 the structure. The SEPA appeal asserts that the dock would prevent direct, safe access
11 around the point via small craft, but if the operators of those craft are navigating to the
12 unprotected side of the point it does not appear that having to detour further inland on
13 the protected side of the point would be any more hazardous in comparison.

14 9. Eelgrass Impacts ((B)(3) of SEPA Appeal). The proposal will create probable
15 significant adverse impacts to eelgrass. Eelgrass impacts are the closest factual issue
16 of this case. The applicant's experts on eelgrass impacts were clearly the most
17 qualified in this case. In conjunction with the substantial weight standard, a finding
18 would normally have been made that the proposal would not create probable
19 significant adverse environmental impacts. However, a close examination of their
20 testimony reveals that at no point did they actually offer the opinion that the proposal
21 would not harm eelgrass. They just opined that the impacts would be no different than
22 those created by the boat currently used by the applicant. The assumptions underlying
23 this premise were never clearly laid out and are highly questionable. Further, it is
24 unlikely that the impacts of the proposal can legally be discounted for purposes of a
25 threshold determination by balancing them against impacts of current use. Given the
strong evidence supporting a finding of significant impacts and the fact that
endangered fish may be affected, the balance of evidence weighs in favor of a finding
of probable significant adverse environmental impacts.

The eelgrass is designated as a fish and wildlife habitat conservation area by SJCC
18.30.160(A)(5), which as part of Title 18 SJCC is an adopted SEPA policy. See
SJCC 18.80.050(H)(3)(a)(iv). SJCC 18.30.160(B)(1)(a) provides that the proposal
must mitigate to the greatest extent feasible any significant adverse impacts to habitat
functions and values and to habitat buffers. The eelgrass in this area is of particular
significance because there is a "medium probability" according to a Friends of the San
Juan study that it may serve as habitat for endangered Puget Sound Chinook Salmon.
See Ex. 11, p. 5 and att. B.

The eelgrass impacts of primary concern are those created by prop scour and
grounding. As shown in Ex. 57(a), eelgrass beds are located at a depth of -3 to -7 feet.
MLLW is at -4.5 feet. *See Ex. 4, construction drawings, sheets 3 and 4 of 10.* Clearly,
waters over the eelgrass bed can be very shallow. Unless the Pohl boat will be
approaching or exiting the proposed dock between the two closely spaced boulders
(see Ex. 57(a)), he will have to navigate outside of those boulders, which will likely

1 take him directly over the eelgrass beds, especially if he heads north. The SEPA
2 appellants have produced a study concluding that increased water turbidity due to
3 vessel transit has been reported to damage eelgrass stands. See Wyllie-Exheverria, S.
4 and M. Fonseca (2003). *Eelgrass in San Francisco Bay, California from 1920 to*
5 *present*, NOAA National Centers for Coastal Ocean Science, referenced in FN No. 19,
6 12/7/12 letter, Ex. 9. The end result is a boat path across eelgrass that at low tide
7 provides minimal or no separation from the hull of a boat and studies showing this can
8 damage eelgrass. This evidence solidly supports a determination that significant
9 impacts to eelgrass are reasonably likely to occur. There is insufficient evidence in the
10 record to determine if other locations may create less impact to eelgrass pursuant to
11 the “greatest extent feasible” mitigation requirement of SJCC 18.30.050(B)(1)(a)
12 referenced above.

13 In rebuttal to the eelgrass issues, the applicant presented the testimony of Dr.
14 Bodensteiner and Mr. Betcher. Both are highly qualified to testify on eelgrass
15 impacts. Both at no point in their testimony ever opined that the proposal would not
16 harm eelgrass. Both addressed the issue indirectly by noting that the proposal would
17 be expected to create the same impacts as the current buoy moorage for Mr. Pohl’s
18 boat because the buoy also necessitates the traversing of eelgrass beds. Mr. Betcher
19 took it one step further to note that there is no evidence of prop scour with the current
20 moorage. The underlying premise of this testimony, that the current mooring is just as
21 adverse, is not supported by the record. As shown in Ex. 57(a), the eelgrass beds that
22 would be damaged by the Pohl dock are located immediately to the southeast and
23 northeast of the dock. The Pohl mooring anchor is located waterward of these eelgrass
24 beds and separated from the beds by boulders that would likely prevent the boat from
25 drifting into the eelgrass beds while anchored. A boat moored to the current Pohl
mooring buoy would have no reason to traverse the eelgrass beds depicted in Ex. 57(a)
and there is no information in the record on any other eelgrass beds to be traversed or
at what depths they would be located. Further, it is legally questionable from a SEPA
impacts standpoint whether the proposed impacts of the proposal can be discounted
because another current use of the proposal has the same or similar impacts, especially
if the impacts are to different eelgrass beds. Further, even if the current moorage
entails some crossing of eelgrass beds, there is no basis to conclude that frequency of
boat trips would be the same. It is likely that the Pohls will use their boat more often
once their dock is constructed due to the enhanced ease of access.

Given the significance of the eelgrass issue it is a little surprising that the SEPA
appellants did not provide their own expert testimony on the issue. Mr. Grout testified
that the eelgrass impacts should have been more closely examined. Mr. Grout is a
former SEPA responsible official who evaluated eelgrass impacts for San Juan
County. However, his qualifications on eelgrass do not measure up to those of
Bodensteiner and Betcher, because he has no formal training or daily professional
experience involving scientific evaluation of aquatic habitat.

County staff, the SEPA Appellants and the Friends of the San Juans all raised concern
about the timing of the eelgrass study, referencing Washington State Department of

1 Fish and Wildlife (“WDFW”) Guidelines that require advance eelgrass surveys to be
2 conducted between June 1 and October 1. The eelgrass survey for this application was
3 done on May 15, 2012. However, as testified by Laura Arber, a WDFW marine
4 habitat biologist, all that was necessary for the subject application under WDFW
5 standards was a preliminary (not advance) eelgrass survey and that type of survey can
6 be done in May and provide sufficient information to lead to the conclusion that a 25
7 foot separation of eelgrass from a dock provides sufficient protection. The timing of
8 the eelgrass was done within the parameters of WDFW regulations, which ultimately
9 do not apply to the review of the shoreline permit and are of marginal relevance.

10 Mr. Betcher did say that a 25 foot separation is sufficient to protect eelgrass from dock
11 impacts, but he didn’t directly assess whether such separation is effective in
12 circumstances where a boat has to egress and ingress on a regular basis over eelgrass
13 beds with little or no clearance from the draft and/or prop of a boat. Similarly, Dr.
14 Bodensteiner noted that it would take a lot of prop scour to damage eelgrass, but he
15 didn’t identify what he considers to be “a lot” and there is no information in the record
16 as to how close the Pohls’ anticipated use would come to “a lot”.

17 Dr. Ann Powell noted in her written materials, Ex. 67, that the timing of the eelgrass
18 was flawed because it was made at the time when growth of the plants is at its lowest
19 level. Dr. Powell is a faculty member of the Plant Sciences Department of the
20 University of California, Davis. Her concerns on this issue are persuasive. However,
21 to the extent those concerns are centered upon the belief that the eelgrass may actually
22 extend to where the boat is moored at the proposed dock facility, such a result does not
23 appear to be reasonably likely given Mr. Betcher’s comments that the 25 foot
24 separation significantly exceeds the ten foot separation found sufficient by WDFW
25 and that in his opinion the 25 foot separation is sufficient to protect the eelgrass from
dock impacts.

Given the potential impacts of prop scour and the potential presence of endangered
fish, detailed environmental review needs to be conducted on whether endangered fish
are actually present, whether prop scour or other harm will be caused to the
surrounding eelgrass and whether alternative locations would result in less habitat
damage pursuant to the SJCC 18.8.050(B)(1)(a) mandate that the proposal is mitigated
to the greatest extent feasible.

10. Water Quality Impacts ((B)(4) of SEPA Appeal). There is no basis to conclude
that the proposal will create significant adverse impacts to water quality.

The only evidence provided by the SEPA Appellants on the water quality is alleged
poor flushing action due to the presence of large rafts of drifting logs that become
trapped during the winter months in rowboat cove. The Appellants note that Policy 13
of the San Juan County Shoreline Master Program Boating policies (adopted as a
SEPA policy as part of the comprehensive plan, see SJCC 18.80.050(H)(3)(a)(i))
provides that the capacity of a shoreline site to absorb waste discharges and gas and oil
spills should be considered in evaluating dock sites and also that SJCC

1 18.50.190(B)(4) mandates that areas with poor flushing action should not be
2 considered for long term moorage facilities. As testified by Dr. Bodensteiner, the
3 trapping of logs is not very probative of whether there is enough flushing action to
4 remove waste discharges such as oil and gas. Dr. Bodensteiner concluded that Davis
5 Bay is very open, and exchange of water is largely not restricted. County staff also
6 concluded in the staff report, Ex. 1, that the site “does not appear to be an area of poor
7 flushing action”. There was no credible expert testimony to refute the conclusions of
8 Dr. Bodensteiner and County staff and they are taken as verities.

9 11. Compatibility Impacts ((B)(5) of SEPA Appeal). The compatibility issues raised
10 by the SEPA appellants have been addressed as part of the aesthetics analysis.

11 12. Historic and Cultural Resources. The SEPA appeal asserts that a recorded
12 archaeological site has been found near the dock site. However, a cultural resources
13 report prepared by an archaeological consultant and submitted by the appellants as Ex.
14 56 concludes that the proposed dock will have no effect on historic properties. The
15 report was based upon “intensive pedestrian survey and excavation of eight auger
16 probes” in addition to historical records and geologic studies. The report
17 acknowledged the proximity of the historical resources cited by the appellants, but
18 found still found no adverse impact if the dock and access routes are as proposed in
19 this application. Given that there is no compelling evidence and no expert evidence to
20 contradict the conclusions of the cultural resources report, it is concluded that the
21 proposal will not create probable significant adverse impacts upon cultural resources
22 and also that environmental review has been adequate since the report establishes
23 more than a prima facie showing that the threshold determination is based upon
24 information reasonably sufficient to evaluate the impacts of a proposal.

25 13. Restoration Work. The SEPA appeal asserts that restoration work for an
unauthorized boat ramp that was in proximity to the proposed dock area should have
been addressed in the environmental checklist. Although the boat ramp and the
access it may provide to the shoreline after restoration may be relevant to shoreline
criteria regarding existing and alternative moorage, there is nothing to suggest that this
restoration work would add to the adverse environmental impacts of the proposal or
that review of the restoration work was necessary to evaluate the impacts of the
proposal. Further, although WAC 197-11-060(3)(b) requires that interdependent
projects be considered in SEPA review, the restoration project is not interlinked in this
manner with the proposed dock. The correction action involving the unauthorized
boat ramp will occur regardless of what happens with the dock application.

14. Cumulative Impacts. Cumulative impacts are germane to determining whether
the dock proposal will cause probable significant adverse environmental impacts.
WAC 197-11-792(2)(c) includes cumulative impacts in its definition of “impacts”.
The courts have recognized that as a general rule, a cumulative impact analysis for
SEPA need only occur when there is some evidence that the project under review will
facilitate future action that will result in additional impacts. *Boehm v Vancouver*, 111

1 Wn. App. 711, 720 (2002). As recognized in the quote from the *Viafore* SHB decision
2 quoted in COL No. 6, the approval of one dock in a reach of shoreline without any
3 overwater structures would create substantial cumulative impacts by setting a
4 precedent for multiple additional docks. Given that the primary justification for denial
5 in Davis Bay for a dock proposal is that there are no other docks, if the Pohl dock is
6 approved it is very likely that other docks will be approved as well since the aesthetic
7 impacts of an additional dock will no longer be so severe and extraordinary. This
8 result is borne out by the testimony of Richard Grout, a former planning director of
9 San Juan County, who testified that once a dock was approved in an undeveloped
10 shoreline additional docks were sure to follow. There is nothing speculative about the
11 cumulative impacts associated with approval of the Pohl docks – additional docks will
12 follow.

13 Since there is little question that approval of the Pohl dock will facilitate the approval
14 of other docks, there are potential probable significant adverse environmental impacts
15 that would result due to impacts on eelgrass and public navigation and recreational use
16 of the Davis Bay shoreline. However, given the speculative nature of these impacts
17 this is the one factual determination where the substantial weight that must be given to
18 the DNS makes a difference. For this reason, it is determined the aesthetic cumulative
19 impacts resulting from dock proliferation are the only cumulative impacts of the Pohl
20 dock proposal that qualify as probable significant adverse impacts.

21 15. Remedies. The SEPA Appellants and County staff have requested denial of the
22 shoreline permit as an exercise of SEPA substantive authority. Such a denial is
23 unambiguously prohibited by state statute. The only viable legal remedy is to require
24 the preparation of an EIS and a subsequent re-hearing on the shoreline permit
25 application.

With a finding of probable significant adverse impacts, there are three remedies
potentially available: (1) mitigate the impacts through a mitigated determination of
non-significance (“MDNS”) and make a final decision on the shoreline permit
application; (2) vacate of the DNS and require the issuance of a DS; and (3) deny the
shoreline permit as an exercise of SEPA substantive authority. Each option will be
considered separately below.

A. MDNS. The first option, conversion of the DNS to an MDNS, is not possible for
this proposal. The probable significant adverse environmental impacts identified in
this decision could be reduced to non-significant levels by the addition of mitigation to
the DNS, converting it to a mitigated determination of non-significance as authorized
by WAC 197-11-350. This approach is not feasible for this proposal because there is
no mitigation apparent from the record that would reduce the aesthetic impacts to non-
significant levels.

B. Denial. The SEPA Appellants and County staff have requested denial of the
shoreline permit using SEPA substantive authority. This would be the most efficient
remedy for the significant impacts caused by the proposal. Denial would give the

1 applicants a final shoreline permit decision that they can take directly to the shoreline
2 hearings board on appeal. There would be no need to do an EIS and no need for
another hearing before the hearings examiner.

3 Unfortunately, RCW 43.21C.060 requires a SEPA denial to be based upon “*impacts*
4 *identified in a final or supplemental environmental impact statement*”. Denial is
clearly prohibited at this stage of the proceedings.

5 The SEPA appellants have also requested that in conjunction with the denial, the
6 review process for the shoreline permits recommence at the notice of application
7 stage. Staff have requested that a re-application be ordered. Both options are invalid
8 in conjunction with a denial. Once the shoreline permit is denied, the applicant would
9 not be allowed to re-apply or otherwise have its permit application reviewed a second
10 time. Courts do not allow permit applicants a second bite at the apple once their
11 permit application has been denied under the common law principle of *res judicata*.
12 See *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 31, 891
13 P.2d 29 (1995).

14 C. EIS. The last and only valid option, requiring an EIS, is a feasible option but
15 would result in tremendous additional unnecessary costs to all the parties of record,
16 most notably the applicant. The examiner can order vacation of the DNS along with
17 direction to prepare a limited scope EIS that addresses the significant impacts
18 identified in this decision. Under this option, the shoreline permit cannot be
19 considered by the examiner until the FEIS had been completed. WAC 197-11-070(1)
20 provides that no action concerning a proposal may be taken until an FEIS is completed
21 if the action would have an adverse environmental impact or limit the choice of
22 reasonable alternatives. In principle, the courts adhere to this concept by refusing to
23 consider a permit decision if the SEPA review has been determined to be improper.
24 See, e.g. *Juanita Bay Valley Community Ass'n v. Kirkland*, 9 Wn. App. 59 (1973).
25 Instead, the courts remand the permit to the administrative agency to reconsider in
light of the information derived from corrected environmental review. See, e.g., *id.*
This position is reflected in Settle’s SEPA treatise as follows:

*Government action taken in violation of SEPA generally has been regarded
as unlawful, ultra vires, a nullity. Thus, action taken without an
environmental impact statement (EIS), generally has been held invalid. The
agency must consider the proposed action anew enlightened by proper
environmental review.*

23 Settle, Richard. *The Washington State Environmental Policy Act*. Section 19.01[10].

24 Also of relevance is the requirement by WAC 197-11-055(3)(a) that a final EIS shall
25 precede or accompany the final staff recommendation in a quasi-judicial proceeding.
Combining all these requirements, it is clear that any decision on the shoreline
permits without a final EIS would be “unlawful, ultra vires, a nullity”. It is also clear
that the latest point in a quasi-judicial review process that an FEIS can be introduced

1 is upon issuance of a final staff recommendation. Since the Examiner could not
2 consider any evidence outside the hearing process, including the FEIS and new staff
3 report, a second public hearing would have to be held on the shoreline permit once
4 the FEIS is completed.

5 The duplicative bureaucracy that this option engenders cannot be avoided unless the
6 parties are willing to agree to some creative solutions. Once an EIS is required for
7 the proposal, the parties will have to bear the time and expense of a second hearing
8 examiner shoreline permit hearing that is likely to be very similar to the hearing just
9 held. If the shoreline permit decision is appealed to the shoreline hearings board,
10 which is likely, the parties will then have to go through a third public hearing
11 presenting the same evidence and arguing the same issues involved in the first two
12 hearings. In the meantime, the applicant will also have to prepare an EIS that will be
13 expensive but may make little difference on the aesthetics issue, the primary issue of
14 his case. The same aesthetic shoreline criteria that served as the SEPA policies
15 governing SEPA aesthetic impact review will also govern the merits of the shoreline
16 permit application.

17 One route out of this bureaucratic quagmire would be for the SEPA appellants to
18 withdraw their SEPA appeal. If all parties of record waived any objection to this
19 procedure and the San Juan County Prosecuting Attorney's Office found this
20 procedure acceptable, the Hearing Examiner would be willing to approve the
21 withdrawal and then issue a final decision on the shoreline permit application. Any
22 request for a final decision on the shoreline permit would have to be accompanied by
23 a written 120 day Regulatory Reform waiver from the applicant authorizing a final
24 decision on the shoreline permit ten business days from the request. It is recognized
25 that the SEPA Appellants will be very reluctant to voluntarily relinquish the hard
fought victory of this SEPA appeal. The examiner will be very open to any legally
valid alternative disposition that will reduce the costs of these proceedings.

DECISION

The SEPA appeal, PAPL00-12-003, of the DNS issued for the Pohl application for a
shoreline substantial development permit is sustained and the threshold determination
for proposed dock is vacated due to the existence of probable significant adverse
environmental impacts identified in COL No. 6 and 8. The DNS is remanded to
County staff for the issuance of a DS requiring a limited scope EIS. The Pohl
shoreline permit may be re-evaluated upon completion of an FEIS and may be
considered by the hearing examiner after conducting another public hearing. The
limited scope FEIS shall be restricted to considering aesthetic and eelgrass impacts as
outlined in COL No. 6 and 8. Aesthetic impacts shall include cumulative impacts as
outlined in FOF No. 14. The evaluation of eelgrass impacts shall address whether
affected eelgrass provides habitat to any protected fish species and the resulting
impacts to those species. Use of area the SEPA appellants refer to as the boat ramp
for boat access shall be evaluated as an alternative in the EIS. Alternatives and

1 mitigation shall be assessed as required by the SEPA rules for EISs. Staff may impose
2 additional requirements for the content of the EIS as consistent with this decision and
3 applicable SEPA regulations.

4 Dated this 4th day of April, 2013.

5 
6 Phil A. Olbrechts

7 County of San Juan Hearing Examiner
8
9

10 **Change in Valuation**

11 Notice is given pursuant to RCW 36.70B.130 that property owners who are affected by this
12 decision may request a change in valuation for property tax purposes notwithstanding any
13 program of revaluation.
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