

**SAN JUAN COUNTY  
HEARING EXAMINER**

**FINDINGS, CONCLUSIONS AND DECISION**

**Applicants:** John and Barbara Woodman  
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O.C. COMMUNITY  
OCT 31 2008

**File No:** HE29-08 (08SJ007)  
DEVELOPMENT & PLANNING

**Request:** Shoreline Substantial Development Permit (SSDP)

**Location:** San Juan Island

**Parcel No:** 462650029

**Summary of Proposal:** A SSDP is requested to add to an existing rock bulkhead. Friends of San Juan (FOSJ) appealed the Determination of Non-Significance (DNS).

**Shoreline Designation:** Rural Residential/Conservancy

**Public Hearing:** After reviewing the report of the Community Development and Planning Department (CDPD) public hearings were held on June 4, 2008 and October 15, 2008.

**Applicable Policies and Regulations:** RCW 90.58 Shoreline Management Act (SMA)  
SJCC 18.50 Shoreline Master Program (SMP)  
RCW 43.21C State Environmental Policy Act (SEPA)  
SJCC 18.80.050 SEPA Rules  
SJCC 18.30.110 Environmentally Sensitive Areas  
SJCC 18.30.160 Marine Habitat Areas

**Decision:** Deny the SSDP; deny the SEPA appeal.

## **Findings of Fact**

1. The original hearing in this case was held June 4, 2008. After taking the testimony and evidence the hearing was closed. At the June 4, 2008 hearing FOSJ presented evidence that both an eelgrass bed and forage fish habitat existed adjacent to the proposed bulkhead and qualified as a marine habitat area under SJCC 18.30.160(A)(5).
2. On June 6, 2008 the applicants' representative filed a memorandum to reopen the public hearing to accept evidence concerning a habitat management plan (HMP) for forage fish habitat, eel grass and kelp located in the vicinity of the proposed bulkhead extension. The applicants' representative had checked to see if there were habitat areas in the project and on March 10, 2008 was told that none existed. The request to reopen was granted June 26, 2008.
3. An HMP was submitted July 1, 2008. CDPD indicated missing information and an addendum was submitted July 14, 2008. A new hearing date of September 3, 2008 was established.
4. On May 7, 2008 CDPD published notice that an initial threshold DNS had been reached. May 21, 2008 was indicated in the notice as the end date for comments. On May 21, 2008 FOSJ submitted a comment letter urging withdrawal of the DNS on the grounds that no identification of an environmentally sensitive area in the vicinity of the proposed bulkhead had been identified and addressed. SJCC 18.30.160.
5. On June 10, 2008 FOSJ filed an appeal of the DNS.
6. On September 3, 2008 the re-opened public hearing commenced. All participants at the June 4, 2008 hearing were present. The applicants' representative requested an opportunity to submit a motion to dismiss the SEPA appeal as frivolous and untimely. Recognizing that the SEPA appeal, if timely, would have to be heard with the re-opened habitat management plan issue, the applicants' representative requested a continued hearing date of October 15, 2008. That new date was established.
7. On September 12, 2008 the applicants filed a motion to "dismiss a frivolous SEPA appeal" (HEX Rule 3.4). The motion also requested dismissal because the appeal was untimely.
8. On September 19, 2008 FOSJ filed a responding brief. The brief addressed the issues of timeliness and the merits of the SEPA appeal argument.

9. On September 24, 2008 an order was entered denying dismissal on the basis of HEX Rule 3.4.
10. On October 15, 2008 the continued public hearing was held and completed. The arguments at that hearing included the timeliness of the SEPA appeal, the merits of the SEPA appeal and the merits of the HMP. Ex #1 for the 10/15/08 hearing was admitted. The exhibit stated that according to the prosecuting attorney's office, the FOSJ SEPA appeal was timely filed.
11. Exhibits 1-4 were admitted at the June 4, 2008 hearing. New exhibits 1-7 were submitted for the October 15, 2008 hearing. The applicants objected to FOSJ's submission of exhibits 5, 6 and 7.
12. At the October 15, 2008 hearing CDPD staff indicated that, had she been aware of the existence of the environmentally sensitive area, she may or may not have withdrawn the DNS and issued a Mitigated Determination of Non-Significance (MDNS). Even if a MDNS had been issued, the conditions would have been exactly the same as any conditions for approval of the bulkhead extension. Staff continued its consistent recommendation that the bulkhead extension did not meet SMP standards and should be denied.
13. In 1996 the applicants received an exemption to construct a rock bulkhead to protect their single family residence.
14. On November 10, 2004 a SSDP was granted to extend the existing rock bulkhead an additional 50 feet to the property line of Lot 29. In that decision the then hearing examiner (C/L #7) noted that the established use that "must be threatened" by erosion was an "established structural use, not landscaping."
15. In spite of that determination, C/L #8 noted that there was no evidence of longshore drift, effects experienced by neighbors, no significant environmental impacts nor any evidence that "existing beach condition will not be destabilized." Under those facts the then examiner concluded that the geotechnical expert's essentially uncontested opinion that the bulkhead was needed "should carry the day." No appeal from that decision was taken.
16. Sometime subsequent to the 2004 SSDP approval the applicants purchased adjoining undeveloped Lot 28. The applicants then modified the shoreline boundary so that the existing developed Lot 29 gained a substantial portion of continuous beach. The remainder of Lot 28 was, at the time of the hearing, for sale.
17. The Lot 29 property lies between the county road and the shoreline and includes a home, guest house, garage and small dock. Just south of the house are wooden stairs leading to the beach. The property lies on Mosquito Pass, facing the

southeast leg of Henry Island. The subject shoreline is medium bank with sand and gravel beach.

18. The proposal requests extending the eight foot high rock bulkhead to the south approximately 120 feet in length to reach the now new property line of Lot 29. There is no structure threatened by the current erosion process.
19. The geotechnical report for the 2004 SSDP approval was supplemented by a March 20, 2008 letter concerning the proposed 120-foot expansion. The geotechnical evaluation letter observed that the existing rock buttress was performing as intended. The report indicated that there were signs of recent erosion that was beginning to undermine several relatively mature trees. The report concluded that from a “geotechnical standpoint” the proposed bulkhead expansion would comply with the policy provisions of SJCC and would provide adequate protection from further bank retreat and instability. The 2004 geotechnical report opined that “soft” armoring would not be effective for the proposed 50-foot expansion that was approved. No evidence was presented as to whether “soft” armoring would be effective for the 120-foot extension.
20. As shown by the subsequently submitted HMP, the proposed rock bulkhead expansion is adjacent to both an eelgrass bed and forage fish habitat.
21. The HMP indicated that construction of the proposed extension would take place from the land to avoid short term impacts to the beach and to avoid disruption of substrate. BMPs would be followed to minimize sedimentation. Plantings would occur above the bulkhead to create a vegetative buffer. The HMP recommended that a beach profile and sediment composition be monitored for five years with review on years three and five. If there were documented impacts related to the bulkhead, a mitigation plan would then be developed.
22. After review of the HMP CDPD staff indicated that all of the environmental information that perhaps should have been reviewed prior to the June 14, 2008 hearing had been submitted and reviewed. Staff was uncertain as to whether a DNS or MDNS would have been issued had the HMP been submitted prior to the hearing. Staff continued to recommend denial of the SSDP.
23. Non-structural protection, restoration or modification techniques were not presented as alternatives.
24. While the bank is eroding, the 2004 geotechnical report and the 2008 letter do not find that any structures for the proposed 120-foot long addition are threatened. No cause for the bank erosions on the 120-foot extension is offered by the updated geotechnical report. There is no question that even with BMPs, some adverse environmental impact will occur because of the extended bulkhead. There is no evidence that the normal dynamic beach erosion needs stabilization. There

is no commerce or industry on this site. There is no previously permitted landfill which needs stabilization.

25. Minimizing armoring along the shoreline is a priority under the SMA and SMP.
26. The bank along the proposed 120-foot extension is not a marine feeder bluff . There is no appreciable net shore drift in the area.
27. A Washington State Department of Ecology (DOE) comment letter noted that the geotechnical report offered no information on the rate of erosion which was not shown to be significant under current aerial photographs.
28. Both DOE and the University of Washington Friday Harbor Laboratory noted that bulkheads have a range of adverse effects over a long period that included loss of habitat and aesthetics. Similar evidence was shown in Exs # 5, 6 and 7 from the October 15, 2008 hearing.
29. The staff report is incorporated herein by reference as though fully set forth. The analysis and factual statements contained in the staff report are adopted as a finding herein.
30. Any conclusion herein which may be deemed a finding is hereby adopted as such.

#### **Conclusions of Law**

1. The Hearing Examiner has jurisdiction over the persons and subject matter of this proceeding.
2. The proposal has complied with the requirements of the State Environmental Policy Act.
3. Initially because of insufficient information an appropriate SEPA analysis was not done. Ultimately the required information was submitted and considered prior to the close of the October 15, 2008 hearing. The additional information would not have caused the county to require an environmental impact statement. Therefore, it is immaterial whether a DNS or an MDNS would have been issued.
4. The appropriate time frame for appeals under SJCC is that the 21-day appeal period begins from the conclusion of a 14-day comment period. SJCC 18.80.050(D)(7) states that:

At the end of the comment period the threshold determination becomes final unless retained, modified, or withdrawn, and the appeal period begins.

Thus, the SEPA appeal was timely presented and the fees for filing the appeal should be refunded.

5. The basis for FOSJ's SEPA appeal is correct. As noted at the June 4, 2008 public hearing the marine habitat issue was not addressed and SEPA requirements were not followed.
6. The SMA provisions for bulkheads are found at RCW 90.58.030, WAC 173-27-040 and the SMP provisions are found at SJCC 18.50.210. All the requirements are similar to the SMP criteria that the non-exempt bulkhead is only permitted when non-structural shoreline protection has been shown to be ineffective and in addition at least one of the following conditions exist:
  - a. Serious erosion is threatening an established use on the adjacent upland;
  - b. A bulkhead is needed and is the most reasonable method of stabilizing an existing beach condition;
  - c. There is demonstrated need for a bulkhead in connection with the water-dependent or water-related commerce or industry in an appropriate establishment; or
  - d. A bulkhead is the most desirable method of stabilizing a landfill permitted under this master program
7. As noted in the 2004 hearing examiner decision, landscaping is not a use that is protected under these criteria.
8. The priority criterion for protection of marine habitat areas is avoidance. In this case the applicants have not sustained their burden of showing that the need for the 120-foot extension outweighs the actual and potential environmental damage to the shoreline and the adjacent marine habitat areas. This is the factor that most distinguishes this case from the 2004 approval.
9. While relevant for general knowledge, the proposed FOSJ Exs #5, 6 and 7 from the October 15, 2008 hearing are rejected as exhibits to this record.
10. Any finding herein which may be deemed a conclusion is hereby adopted as such.

**Decision**

The proposed 120-foot bulkhead extension SSDP request is denied. While the SEPA appeal is timely, the merits of the appeal are denied.

DONE this 31<sup>st</sup> day of October, 2008.



Wm. H. NIELSEN, Hearing Examiner

**Shoreline Appeal**

Any appeal of the shoreline substantial development permit shall be made to the Washington State Shoreline Hearings Board pursuant to RCW 90.58.180 and the rules adopted by said hearings board.