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Before Hearing Examiner  
Gary N. McLean

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

S.J.C. DEPARTMENT OF  
JUL 18 2016  
COMMUNITY DEVELOPMENT

In the Matter of Shoreline Substantial )  
Development and Shoreline Conditional )  
Use Permit Applications filed by )  
SNUG HARBOR ASSOCIATES LLC, )  
Applicant, )  
PROJECT: *Removal and Replacement of the )  
Snug Harbor Marina Facility, a legal )  
nonconforming use located within Mitchell Bay )  
along the northwest side of San Juan Island, )  
known as the "Snug Harbor Marina )  
Redevelopment Project"* )

**File No. PSJ000-14-0016 (Revised)**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
DECISION APPROVING SHORELINE  
SUBSTANTIAL DEVELOPMENT AND  
CONDITIONAL USE PERMITS**

**I. SUMMARY OF DECISION.**

The Shoreline Substantial Development and Conditional Use Permits for the Snug Harbor Marina Redevelopment Project ("the Project" or "Project") are approved, subject to Conditions of Approval that are based upon evidence in the Record and the unchallenged MDNS issued for the project.

**II. EXISTING CONDITIONS and PROJECT DESCRIPTION.**

The existing Snug Harbor marina facility is located in Mitchell Bay along the northwest side of San Juan Island. Mitchell Bay experiences regular tidal cycles, with water flowing to and from Mosquito Pass. The current marina has a total of 63 (sixty-three) slips or tie-on spaces available for long-term moorage. Additional space is provided for kayaks and transient moorage, as detailed in site plans included in the record. Given its location so close to the shoreline, marina-docks, floats, walkways, and boats that are moored or tied-onto various marina slips and spaces, are often left "grounded," lying upon the surface of the shoreline tide flats, when some of the lowest tide conditions occur.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
DECISION – APPROVING SHORELINE  
SUBSTANTIAL DEVELOPMENT AND  
CONDITIONAL USE PERMITS FOR SNUG HARBOR  
MARINA – FILE NO. PSJ000-14-0016**

**GARY N. MCLEAN  
AS HEARING EXAMINER PRO TEM  
FOR SAN JUAN COUNTY**

1 There is no dispute that Snug Harbor Marina is a legal, non-conforming use,  
2 developed long before state and local Shoreline Management regulations were implemented.  
3 Credible and un rebutted evidence, including a thorough site visit by the Examiner,  
4 established that the current marina facility is in a deteriorated condition, and in need of  
5 substantial improvements to bring it compliance with current environmental, building,  
design, and other standards or practices commonly used by comparable but newer facilities  
in San Juan County and the State of Washington.

6 Given the Marina's deteriorated condition, the applicant, Erik Nelson with Snug  
7 Harbor Associates LLC, has applied for permits needed to upgrade the facility, with an eye  
8 toward redesigning and replacing the entire marina to provide more environmentally-friendly  
9 features. Among other things, the proposed redesign would shift the marina further into open  
10 water, to reduce "grounding" conditions experienced by portions of the marina and boats  
11 moored in its slips. The number of proposed moorage slips/spaces available for long-term  
moorage will remain at 63, the same as exist in the current facility. Existing County Shoreline  
Codes permit expansion of a legal nonconforming shoreline use. The County confirms that  
the proposal on review in this Decision has "been modified and accepted by the County to  
ensure that the degree of non-conformity will not be increased." (Staff Report, page 2).

12 Given the project's location within the County's regulated shoreline area, and its  
13 estimated value, there is no dispute that a Shoreline Substantial Development Permit is  
14 required.<sup>1</sup> And, given that the marina is a legal, non-conforming use, the expansion of such  
use requires a Shoreline Conditional Use Permit. SJCC 18.80.110(A)(3)(b)(ii).

### 15 III. RELEVANT CODE PROVISIONS.

16 The San Juan County Code includes a specific, unambiguous, and clearly-captioned  
17 code section addressing "Shoreline Permit and Exemption Procedures," found at SJCC  
18 18.80.110. Relevant portions read as follows:

#### 19 **18.80.110 Shoreline permit and exemption procedures.**

##### 20 A. Purpose and Applicability.

- 21 1. This section includes the procedures necessary to ensure that the provisions of the  
Shoreline Master Program (Element 3 of the Comprehensive Plan and Chapter 18.50

22 <sup>1</sup> SJCC 18.20.190 defines Substantial Development. This provision of the county code will presumably be  
23 updated and revised upon DOE approval of the County's new SMP, to conform with the updated definition,  
24 with its higher and inflation-adjusted dollar threshold found in RCW 90.58.030(3)(e). Either way, there is no  
dispute that the marina redevelopment project qualifies as a Substantial Development under both definitions.

1 SJCC) are implemented and enforced, and to ensure that all persons affected by the  
2 master program are treated in a fair and equitable manner.

3 2. This section applies to all lands and waters within the jurisdiction of the master  
4 program and to all persons and agencies as described in Chapter 18.50 SJCC.

5 3. The following are referred to as “shoreline permits” and are subject to this review  
6 process:

7 a. Shoreline substantial development permits.

8 b. Shoreline conditional use permits, which include:

9 i. Uses which are permitted under the provisions of the master program only as  
10 conditional uses;

11 ii. The expansion of nonconforming uses; and

12 iii. Uses which are unnamed or not contemplated in the master program.

13 c. Shoreline variances.

14 [...]

15 E. Decisionmaking Authority. The hearing examiner has authority to take the following  
16 actions:

17 1. Based upon the criteria in subsection (H) of this section, hear and issue or deny  
18 shoreline permits following receipt of the recommendations of the administrator, and to  
19 impose conditions of approval on such permits[.]

20 [...]

21 H. Criteria for Approval of Substantial Development Permits. A shoreline substantial  
22 development permit shall be granted by the County only when the applicant meets his  
23 burden of proving that the proposal is:

24 1. Consistent with the policies of the Shoreline Management Act and its implementing  
25 regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as amended;

26 2. Consistent with the policies and regulations of the Shoreline Master Program in  
Chapter 18.50 SJCC;

3. Consistent with this chapter;

4. Consistent with the applicable sections of this code (e.g., Chapter 18.60 SJCC);

5. Consistent with the goals and policies of the Comprehensive Plan; and

6. All conditions specified by the hearing examiner to make the proposal consistent with  
the master program and to mitigate or avoid adverse impacts are attached to the permit.

[...]

J. Shoreline Conditional Use Permits.

1. General. The purpose of a shoreline conditional use permit is to allow greater  
flexibility in application of the use regulations of the Shoreline Master Program in a

1 manner consistent with the policies of RCW 90.58.020. Shoreline conditional use  
2 permits should also be granted in circumstances where denial of the permit would thwart  
3 the policy enumerated in RCW 90.58.020. By providing for the control of undesirable  
4 impacts through the application of special conditions, the scope of uses within each of  
5 the environments of the master program can be expanded to include many additional  
6 uses. Activities classified as shoreline conditional uses shall therefore be permitted only  
7 when the applicant also demonstrates that the proposed use will be compatible with  
8 permitted uses within the same area.

9 Shoreline conditional uses include the following:

- 6 a. Uses which are permitted under the provisions of the Shoreline Master Program  
7 only as conditional uses;
- 8 b. The expansion of nonconforming uses; and
- 9 c. Uses which are unnamed or not contemplated in the Shoreline Master Program.

10 2. Uses which are specifically prohibited by the Shoreline Master Program shall not be  
11 authorized through a conditional use permit.

12 3. Other Local Regulations. Conditional use permits granted under other sections of this  
13 code shall not be construed to constitute approval of a shoreline conditional use.

14 4. Criteria for Approval of Shoreline Conditional Uses. Uses which are classified or set  
15 forth in the Shoreline Master Program as conditional uses may be authorized by the  
16 County provided the applicant can demonstrate all of the following:

- 17 a. The proposed use is consistent with the policies of RCW 90.58.020 and the policies  
18 of the Shoreline Master Program;
- 19 b. The proposed use will not interfere with the normal public use of public shorelines;
- 20 c. The proposed use of the site and design of the project is compatible with other  
21 permitted uses within the area;
- 22 d. The proposed use will cause no unreasonably adverse effects to the shoreline  
23 environment in which it is to be located;
- 24 e. The cumulative impacts of additional requests for like actions in the area, or for  
25 other locations where similar circumstances exist, shall not produce substantial  
26 adverse effects to the shoreline environment, e.g., the total of the conditional uses  
shall remain consistent with the policies of RCW 90.58.020 and the Shoreline Master  
Program; and
- f. The public interest will suffer no substantial detrimental effect.

5. Other uses which are not classified or set forth in the Shoreline Master Program may  
be authorized as conditional uses provided the applicant can demonstrate consistency  
with the criteria set forth in WAC 173-27-160(1), and this subsection.

6. Filing of shoreline conditional use permits with and review by the Washington

Department of Ecology are described in subsection (L) of this section.

K. Nonconforming Uses. Any nonconforming structure or use under the jurisdiction of the Shoreline Master Program (Chapter 18.50 SJCC) shall be subject to the nonconforming use provisions in WAC 173-27-080, and the applicable procedures of Chapter 18.50 SJCC and this section. (See also SJCC 18.40.310 and 18.80.120.)

[...]

N. Rescission of Shoreline Permits. Any shoreline permit may be rescinded by the hearing examiner pursuant to RCW 90.58.140(8) upon the finding that the permittee has failed to comply with the terms and conditions thereof. In the event that the permittee is denied a required sewage disposal, building, or other permit necessary for the project in question, the shoreline permit may be rescinded by the hearing examiner. In the event a shoreline permit is rescinded by the hearing examiner, the permittee shall be notified by certified mail. Copies of the examiner's final action shall be filed with the Washington Department of Ecology.

[...]

**SJCC 18.80.120 re: Procedures for nonconforming uses and structures, reads as follows:**

A. Legally established land uses and structures that have subsequently become nonconforming because of changes to County land use regulations continue to be legal. Standards governing such nonconforming structures and uses are located in SJCC 18.40.310.<sup>2</sup>

<sup>2</sup> NOTE by Examiner: The "standards" mentioned in SJCC 18.80.120(A), which are found in SJCC 18.40.310, are "general" standards, NOT the same as specific, 'special', provisions that address "Shoreline Nonconforming Uses and Structures" provided in this same section of the County's Code, in SJCC 18.80.120(D). This distinction is factually and legally significant to the pending application. The distinction is further established by the fact that SJCC 18.50.010(A) defines the portions of the County's Code that comprise the Shoreline Master Program for San Juan County, which includes all of chapter 18.50 of the Unified Development Code, together with Element 3 of the Comprehensive Plan and SJCC 18.80.110(1)(3), 18.80.110(J)(4) and 18.80.120(D). By omission, the standards found in SJCC 18.40.310 are not included as a part of the County's Shoreline Master Program, and do not control over the more-specific provisions of SJCC 18.80.120(D) that expressly address "Shoreline Nonconforming Uses and Structures" and are included as part of the SMP. Further, a very specific, 'special' code section captioned "Shoreline Permit and Exemption Procedures" (SJCC 18.80.110(A)(3)(b)(ii)) expressly allows for 'expansion of a nonconforming use' under a Shoreline Conditional Use Permit, that comes with its own "Criteria for Approval of Shoreline Conditional Uses" found at SJCC 18.80.110(J)(4), another of the very few code sections outside of Chapter 18.50 that are expressly listed as part of the County's Shoreline Master Program. These 'special' shoreline-specific provisions must control over any potentially-conflicting, 'general' code provision that applies to non-shoreline situations, like that in SJCC 18.40.310(F)(1), which only allows for expansion, modification, or intensification of a nonresidential nonconforming use subject to a conditional use permit, provided: "1. A nonconformance with the standards of

1 B. No project permit or development permit shall be approved for any nonconforming  
2 use or structure that has been abandoned as per SJCC 18.40.310(J). Nonconforming uses  
3 or structures may not be moved to a new site nor be relocated on the same site.

4 C. When evaluating proposals for the alteration, modification, or expansion of  
5 nonconforming uses or structures, the decisionmaker shall consider the total impact of  
6 the nonconforming use or structure as well as the added impact of the incremental  
7 changes being proposed, and the consistency of the changes with the applicable land use  
8 designation.

9 D. Shoreline Nonconforming Uses and Structures. Any nonconforming structure or use  
10 under the jurisdiction of the Shoreline Master Program (Element 3 of the Comprehensive  
11 Plan and Chapter 18.50 SJCC) shall be subject to the nonconforming use provisions in  
12 WAC 173-27-080, and the applicable procedures of Chapter 18.50 SJCC and SJCC  
13 18.80.110.

14 E. Procedures for Nonconforming Use or Structure not Subject to the Shoreline Master  
15 Program.

16 1. The procedures for provisional uses (SJCC 18.80.070) shall apply to the actions and  
17 activities described in SJCC 18.40.310(B) through (D), as limited by SJCC 18.40.310(G)  
18 through (J).

19 2. The procedures for conditional uses (SJCC 18.80.100) shall apply to the actions and  
20 activities described in SJCC 18.40.310(F) as limited by SJCC 18.40.310(G) through (J).

21 F. Illegal Use. Any use, structure, or other site improvement not established in  
22 compliance with this code and other applicable codes and regulations in effect at the  
23 time of establishment is not nonconforming; rather, it is illegal and subject to  
24 enforcement provisions of Chapter 18.100 SJCC. (Ord. 15-2002 § 12; Ord. 2-1998 Exh.  
25 B § 8.12)

26 Drawn from the previously provided portions of the San Juan County Shoreline  
Master Program code provisions, and other applicable provisions of the County's Unified  
Development Code found in Title 18 SJCC, of which the SMP is a portion, the following

\_\_\_\_\_ this code shall not be created or increased.” (See *Walker v. City of Kennewick*, 2000 Wash. App. LEXIS 958  
(Wash. Ct. App. June 22, 2000), holding that specific, special codes supersede a more general code provision,  
citing *Seattle-First Nat'l Bank v. Snell*, 29 Wn. App. 500, 505, 629 P.2d 454 (1981), which explains where a  
conflict between an ordinance that treats a subject generally and another that treats the subject in a specific  
manner, the specific ordinance prevails; see also *DiGiovanni*, 54 Wn. App. at 631 (a special statute or ordinance  
supersedes the general). Whatever standard applies, as shown below, the project reduces the nonconformity of  
the marina, so the shoreline conditional use permit should be issued.

25 FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
26 DECISION – APPROVING SHORELINE  
SUBSTANTIAL DEVELOPMENT AND  
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FOR SAN JUAN COUNTY

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1 topics are worth highlighting in this Decision.

2 **Jurisdiction:** As shown above, under SJCC 18.80.110(E), the Hearing Examiner is  
3 given the authority to hold public hearings and issue or deny shoreline permits, based upon  
4 the criteria in SJCC 18.80.110(H).

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

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

16 **Standard of Review:** SJCC 2.22.210(H) explains that "for an application to be  
17 approved, a preponderance of the evidence presented at the hearing must support the  
18 conclusion that the application meets the legal decision criteria that apply."

19 **Shoreline Regulations:** The County's Shoreline Master Plan/Program (SMP) and its  
20 code provisions effectuating the SMP were recently amended, following review and approval  
21 by the San Juan County Council. Review and approval by the Department of Ecology, as  
22 required by applicable state law, is not yet complete. For purposes of permit processing, this  
23 project vested and was reviewed under the County's "old", yet-to-be-updated shoreline  
24 regulations.

25 SJCC 18.50.010(A), now reads as follows:

26 *"This chapter [18.50] of the Unified Development Code, together with  
Element 3 of the Comprehensive Plan and SJCC 18.80.110(I)(3),  
18.80.110(J)(4) and 18.80.120(D), is the Shoreline Master Program for San  
Juan County, Washington."*

So, until approved by the Department of Ecology, the County's SMP provisions are  
codified in SJCC Chapter 18.50, together with Element 3 of the Comprehensive Plan and  
SJCC 18.80.110(I)(3), re: Shoreline Variances, 18.80.110(J)(4), re: "Criteria for approval of  
Shoreline conditional uses," and 18.80.120(D), re: "Shoreline Nonconforming Uses and

Structures,” collectively known as the “SJC Shoreline Master Program” or “SMP.”<sup>3</sup>

**Review Criteria for a Shoreline Substantial Development Permit:** “Substantial Development” is defined in RCW 90.58.030(3)(e) and SJCC 18.20.190, and means any development of which the total cost or fair market value exceeds \$6,416<sup>4</sup> or any development which materially interferes with the normal public use of the water or shorelines of the state. Substantial developments proposed in shoreline areas of San Juan County require a Substantial Development Permit. SJCC 18.80.110(H). The approval criteria for a Shoreline Substantial Development Permit application is set forth in SJCC 18.80.110(H), which reads as follows:

**18.80.110(H). Criteria for Approval of Substantial Development Permits.** A shoreline substantial development permit shall be granted by the County only when the applicant meets his burden of proving that the proposal is:

1. Consistent with the policies of the Shoreline Management Act and its implementing regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as amended;
2. Consistent with the policies and regulations of the Shoreline Master Program in Chapter 18.50 SJCC;
3. Consistent with this chapter;
4. Consistent with the applicable sections of this code (e.g., Chapter 18.60 SJCC);
5. Consistent with the goals and policies of the Comprehensive Plan; and
6. All conditions specified by the hearing examiner to make the proposal consistent with the master program and to mitigate or avoid adverse impacts are attached to the permit.

**Review Criteria for a Shoreline Conditional Use Permit:** The expansion of nonconforming uses is/are specifically included as a conditional use at SJCC 18.80.100(J)(1)(b), where it provides that:

*“Shoreline conditional uses include the following:*

<sup>3</sup> See SJCC 18.50.010(B), which reads: “The short title of this chapter (18.50) and Element 3 of the Comprehensive Plan is the “SJC Shoreline Master Program” or “SMP.”

<sup>4</sup> This figure is the current figure posted on the Department of Ecology’s Shoreline Program website, which is based upon the initial statutory \$5,000.00 threshold, adjusted for inflation by the state Office of Financial Management on a 5-year cycle, most recently adjusted in 2012.



1  
2 *Review Criteria for the Department of Ecology:* Finally, if the Examiner approves  
3 or denies the Shoreline Permits, such decision must be forwarded to the Department of  
4 Ecology and the Attorney General, for state review and any appeals of the Shoreline Permit,  
5 in accord with Washington Shoreline Management regulations found in WAC 173-27-130.  
6 This Decision is subject to review and approval, approval with conditions, or denial by the  
7 Washington Department of Ecology within thirty days of submittal by the County. WAC  
8 173-27-130, and -200. Ecology's review criteria for Shoreline Substantial Development  
9 Permits is found at WAC 173-27-150<sup>6</sup>, with those for Conditional Use Permits found at WAC  
10 173-27-160<sup>7</sup>. The San Juan County review criteria for both permits is consistent with and  
11 substantially similar to those that will be used by the Department of Ecology.

12 //  
13 //

14 <sup>6</sup> WAC 173-27-150

15 **Review criteria for substantial development permits.**

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

17 (a) The policies and procedures of the act;

18 (b) The provisions of this regulation; and

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

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

24 <sup>7</sup> WAC 173-27-160

25 **Review criteria for conditional use permits.**

26 The purpose of a conditional use permit is to provide a system within the master program which allows flexibility in the application of use  
regulations in a manner consistent with the policies of RCW 90.58.020. In authorizing a conditional use, special conditions may be  
attached to the permit by local government or the department to prevent undesirable effects of the proposed use and/or to assure  
consistency of the project with the act and the local master program.

(1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the  
applicant demonstrates all of the following:

(a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;

(b) That the proposed use will not interfere with the normal public use of public shorelines;

(c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses  
planned for the area under the comprehensive plan and shoreline master program;

(d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and

(e) That the public interest suffers no substantial detrimental effect.

(2) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like  
actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances  
exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial  
adverse effects to the shoreline environment.

(3) Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the  
applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the  
master program.

(4) Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this  
section.

27 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND**  
28 **DECISION – APPROVING SHORELINE**  
29 **SUBSTANTIAL DEVELOPMENT AND**  
30 **CONDITIONAL USE PERMITS FOR SNUG HARBOR**  
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AS HEARING EXAMINER PRO TEM  
FOR SAN JUAN COUNTY

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1                                   **IV. RECORD AND EXHIBITS; SUMMARY OF PUBLIC HEARING**

2                                   Exhibits entered into evidence as part of the record, and an audio recording of the  
3 public hearing, are maintained by the San Juan County Department of Community  
4 Development, in accord with applicable law.

5                                   **Hearing Testimony:** The following individuals presented testimony under oath  
6 at the duly noticed open record public hearing held on May 19, 2016:

- 7                                   1. Julie Thompson, Project Planner for San Juan County, who prepared the Staff  
8 Report for the pending applications. Ms. Thompson confirmed that the County  
9 received Ex. 9, from the applicant, which reflects an increased use of grating, as  
10 required by DNR. The total number of slips/moorage spaces remains the same.  
11 Staff recommends approval as set forth in the Staff Report, subject to conditions  
12 found in the MDNS. She noted that the overall effects on the environment will  
13 be decreased by the project through elimination of unsealed (Styrofoam) floats,  
14 removal of creosote pilings, shifting the marina further out and away from the  
15 shoreline, and the like. She confirmed that she did not receive any written  
16 comments regarding the MDNS; and that she did not receive any appeals of the  
17 MDNS, which would have been consolidated into this hearing process if a timely  
18 appeal was filed.
- 19                                   2. Stephanie Johnson O'Day, appeared as the attorney for the applicant, and  
20 coordinated the applicant's presentation of witnesses and evidence at the hearing;
- 21                                   3. Erik Nelson, the Project Applicant and owner, appeared as a member of Snug  
22 Harbor Associates LLC, the owner of the Snug Harbor Resort and Marina;
- 23                                   4. Dan Jankelson, with TransPac Marinas, the designer of the pending marina  
24 redevelopment proposal, appeared on behalf of the applicant. Mr. Jankelson  
25 explained the design, modifications made to previous design, the removal and  
26 construction process;
5. Ed Kilduff, is with Camassia Applied Science, located in Friday Harbor; Mr.  
Kilduff credibly presented his expert qualifications and testified as an expert on  
behalf of the applicant, answering questions raised about the adequacy of flushing  
in Mitchell Bay, explaining his findings that the bay has "a well-mixed water  
column with strong currents". Mr. Kilduff is a licensed Hydrogeologist, and also  
a licensed Geophysicist, with extensive educational credentials, attending Tufts,  
Colorado School of Mines, and MIT. He performs marine surveys, and did so

1 continuously for the US Navy since the 1990s. Mr. Kilduff prepared and signed  
2 the Camassia Applied Science "Flushing and Water Quality in Mitchell Bay"  
3 letter/report dated April 13, 2016 for the applicant (about 14 pages), which is  
4 included in the Record as Exhibit 5(n). Mr. Kilduff provided a copy of RCW  
5 18.220.010 which defines "Hydrogeology", noting his experience in the field, and  
6 offered a short article which explains that "*Tidal flushing* refers to the systematic  
7 replacement of water in a bay or estuary as a result of tidal flow. The ocean is  
8 assumed to be a sink for water discharged during the ebb and a source of new  
9 water carried in by the flood." (See Ex. 13). Mr. Kilduff summarized scientific  
10 practices that broadly define the term tidal flushing in terms of an exchange ratio  
11 representing the fraction of water in a specified location that is replaced during a  
12 tidal cycle. The exchange ratio, also called the flushing rate or water renewal rate,  
13 is the difference between the volumes of water occupying the location at high and  
14 low tide. Mr. Kilduff explained his calculations and conclusions showing that  
15 "*the tides of Mitchell Bay result in an exchange of water (flushing) from the Bay  
16 on the order of 58% to 88% per tidal cycle. Bearing in mind that there are two  
17 tidal cycles every 24 hours and 50 minutes, tidal flushing amounts to an exchange  
18 of more than 100% of the volume of Mitchell Bay per day.*"

- 11 6. Francine Shaw, applicant's permit-application coordinator and agent for the  
12 pending project, from Ms. Johnson O'Day's law office;
- 13 7. Norris Palmer, moorage-holder at the existing Snug Harbor marina, spoke in favor  
14 of the project;
- 15 8. Jerry Rasmussen, represented that he spoke on behalf of 45 fellow residents of  
16 Mitchell Bay, who oppose the project. Mr. Rasmussen explained that he believed  
17 the proposal would pose a hazard to navigation, that the environmental impacts  
18 of marinas are bad, and that a pump-out facility is needed. He offered his opinion  
19 that the slip-count calculations are inaccurate, and that the applicant's materials  
20 include misleading data and dishonest figures. In follow-up testimony, he  
21 testified that he is a former County engineer. Exhibit 16 shows that Mr.  
22 Rasmussen lives to the east of the marina, along the shore of Mitchell Bay;
- 23 9. Dale Marble, lives along Mitchell Bay, and believes that the County's Master Plan  
24 Resort regulations do not include this site among those where such facilities can  
25 be located. [NOTE: Exhibit 16 shows that Mr. Marble lives on the point where  
26 the inner-Mitchell Bay begins, on a property with a large private dock that extends  
out into the channel, leaving about 170 feet of clearance between his dock and the  
Johnson's private dock, directly across the water from the Marble property. The  
same Ex. 16 shows that the proposed marina configuration will provide a  
minimum on 450 feet of space between its northwest corner and a private dock to

1 the north, and a minimum of 500 feet of clearance for waterborne vessels between  
2 its southeast corner and the private docks to the east of the marina, shown long  
3 private docks attached to the Bryan, Noste and Zygocki parcels along the Mitchell  
4 Bay shoreline. Mr. Marble spoke twice at the public hearing. In his final  
5 comments, he failed to refute or deny testimony of other witnesses regarding his  
6 failure to obtain necessary permits before building his large, private dock that is  
7 located at the narrow point where the inner and outer portions of Mitchell Bay  
8 connect].

- 9
- 10 10. John Boyd, supports the proposal, generally explained that the marina provides a  
11 public benefit as it is used by marine research groups;
- 12 11. David Zygocki, opposes the project, believes slip sizes will be increased, and that  
13 such factor should be considered in determining conformity, and generally  
14 explained how he believes kayak and boat slip counts and projections about the  
15 share of slips that will be used by local owners deserves scrutiny (Ex. 16 reflects  
16 that Mr. Zygocki owns a property located across the bay to the east of the Snug  
17 Harbor, where he has a private dock;
- 18 12. Lee Wehmeyer (spouse to Ms. Liu) lives along the shore of Mitchell Bay, opposes  
19 the project (Wehmeyer property is shown on Ex. 16, along the shore of Mitchell  
20 Bay, to the northeast of the Snug Harbor Marina;
- 21 13. Carol Liu, (spouse to Mr. Wehmeyer), lives across from the marina, believes the  
22 previous decision for the previous application was correct, and the current  
23 proposal should be denied. She challenged any claim that flushing achieves a  
24 100% exchange of water in the bay because it is never completely empty of water  
25 during low tide. Applicant's counsel objected to Ms. Liu's testimony regarding  
26 flushing and water exchange in the bay, and Ms. Liu admitted that she is not an  
27 expert in the field;
- 28 14. Pat O'Day, local resident, spoke in favor of the proposal, explaining that he  
29 personally encouraged the Nelson's to purchase the Snug Harbor Resort and  
30 Marina, noting that it "was a garbage dump", but now, after improvements made  
31 by the Nelson's, and the potential now to improve the marina, the facility  
32 enhances property values in the area;
- 33 15. Mark Dayvincent, expressed concerns with the potential for excess night-light  
34 coming from the marina, and speculated that bigger boats would mean more light;
- 35 16. Jim Pound, supports the project, noting that the Nelson's have done a lot to  
36 improve conditions at the Snug Harbor property;

- 1 17. Nancy Jane Cates, lives and owns land immediately west of the marina, noted that  
2 it serves as a community facility, used by island residents, and while she strongly  
3 supports the proposal, she noted with interest that she has personally been denied  
4 a permit to install a dock on her property, because Snug Harbor marina was  
5 deemed 'community moorage';
- 6 18. Val Deers, lives on "Harrowing Strait" [aka Haro Strait], noted that she is a dues-  
7 paying member of Friends of the San Juans", expressed her support for the current  
8 proposal, saying that she believes it is the best we are going to get, and that she  
9 was opposed to the prior proposal;
- 10 19. Kevin Carlton, Harbormaster at Roche Harbor Marina for over 35 years, testified  
11 that the pump-out facility available at Roche Harbor is readily available and  
12 within a short-distance from Snug Harbor, that the "Fecal Freak" boat at Roche  
13 Harbor provides mobile pump-out options for boats at Roche, that Roche has a  
14 refueling facility, explained that boaters prefer to pump-out while refueling, and  
15 that Roche Harbor has a huge waiting list for moorage tenants, so the local need  
16 for Snug Harbor marina is very serious, so island residents will have options on  
17 where they can keep their boats. Following testimony from other witnesses who  
18 expressed concerns that the proposed Snug Harbor marina might adversely impact  
19 boat navigation, and that boats would have difficulty travelling around the Snug  
20 Harbor Marina area, Mr. Carlton relied upon his expertise and 35 years of  
21 professional boating knowledge to confirm that a large photograph used by a  
22 witness to make such point (Ex. 16) actually shows a 45 foot boat cruising along  
23 in the area, essentially refuting assertions that boat traffic would be too hazardous,  
24 especially for larger boats.
- 25 20. Fred Shumaker, resident of Roche Harbor, strongly supports the proposal, noting  
26 that the Nelson's "are the first class people to handle this."
- 21 21. Ms. Zygocki, opposes the project, believes conservancy zone protections should  
22 apply, that sewage disposal should be addressed, and that flushing questions  
23 support her request for peer review on the topic. She did not offer any expert or  
24 credible professional studies or reports to challenge the flushing analysis  
25 commissioned by the applicant, and provided by Mr. Kilduff, from Camassia  
26 Applied Science.
- 22 22. Kyle Loring, spoke for Friends of the San Juans, and submitted a lengthy letter  
23 into the record, opposing the current proposal, noting that his organization  
24 supported the previous proposal, which was for more boat slips than the current,  
25 scaled-back proposal. Despite changes, Mr. Loring viewed the application as very

similar to the previous proposal;

- 1
- 2 23. Johannes Kreiger, owner of the Crystal Seas kayak rental company that leases
- 3 moorage slips from the Snug Harbor Marina where he operates is kayak rental
- 4 business, strongly supports the proposal. He testified that his kayaks are placed
- 5 in existing moorage slips at the existing marina. His testimony, and copies of the
- 6 Crystal Seas' moorage agreements that are included in the Record as Exhibits 12A
- 7 and 12B, firmly establish that kayaks currently fill 3 (three) slips/spaces where
- 8 permanent/long-term boat moorage could otherwise be provided, thereby refuting
- 9 claims made by project-opponents that the applicant was somehow presenting
- 10 false or inaccurate slip-count figures to support the project;
- 11
- 12 24. Elizabeth Sealy, strongly supports the project, notes that she is a biologist in the
- 13 area, and works from a research vessel that uses Snug Harbor Marina. She
- 14 explained that as a biologist, she appreciates how much the environmental
- 15 upgrades are overdue, as are safety upgrades;
- 16
- 17 25. Captain Spencer Domico, strongly supports the project, noted that he owns and
- 18 operates a whale watching operation that uses Snug Harbor Marina, Maya's
- 19 Legacy Whale Watching. He is a merchant marine officer. Mr. Domico
- 20 addressed previous witness comments raising concerns with navigation in
- 21 Mitchell Bay, and how the marina might negatively impact the channel. He
- 22 testified that he has at least 5,000 hours in and out of Mitchell Bay, and that there
- 23 is plenty of room to navigate around the redeveloped marina, which will provide
- 24 at least 500 feet of clearance to the north, noting that known tight spots are far
- 25 narrower than that. Mr. Domico credibly and convincingly refuted testimony by
- 26 project opponents that marine transportation/navigation problems in Mitchell Bay
- will be increased with the marina redevelopment project.
- 27
- 28 26. Kent Christensen, Manager of the Snug Harbor Resort, strongly supports the
- 29 proposal, explaining that he is sometimes "terrified" by the safety conditions
- 30 presented by the deteriorating docks within the marina. He notes that if you can
- 31 get passed the channel into Mitchell Bay, then you won't have any trouble
- 32 navigating into the bay and pass above the Snug Harbor Marina. He explained
- 33 that in his many years working at Snug Harbor, he has never had any complaints
- 34 of alleged discharges into Mitchell Bay.
- 35
- 36 27. Jeff Friedman, also with Maya's Legacy Whale Watching, which operates out of
- Snug Harbor Marina, supports the proposal, and emphasized that the issue is NOT
- about navigation. He is concerned about the condition of current docks, and
- taking passengers off and on the deteriorating docks. He believes that the
- redevelopment is absolutely necessary, and that Snug Harbor serves as a

1 wonderful spot for tourists to ride out and see whales, learn more about them,  
2 which benefits county residents and businesses.

- 3 28. Carey Neubri, manager with Crystal Seas Kayaking which has been at Snug  
4 Harbor for over ten years, and strongly supports the proposal. Safety is key for  
5 her guests, and she has seen conditions decline at the marina;

6 After members of the general public were all afforded an opportunity to speak one  
7 time, the following witnesses spoke a second time until public comments concluded: Mr.  
8 Zygocki, Mr. Rasmussen, Mr. Marble, Mr. Loring, and Ms. Liu.

9 The Examiner sustained Applicant's counsel's objection to all testimony provided by  
10 lay witnesses who attempted to raise or submit expert remarks through hearsay. Lay  
11 witnesses were permitted to provide their comments as private citizens, and the applicant's  
12 consultants were present and able to respond to comments or questions as they saw fit, at the  
13 end of the hearing day.

14 **Exhibits:** Exhibits were received into the record as numbered, identified and  
15 described as follows:

- 16 1. **Staff Report**, prepared by Ms. Thompson, dated May 5, 2016, for the May  
17 19<sup>th</sup> public hearing (35 pages);
- 18 2. **Request for Review of the Snug Harbor Marina Settlement Agreement**  
19 (Marina Redevelopment Proposal), distributed by L. Guernsey for the San Juan  
20 County Community Development & Planning Department on February 10, 2016,  
21 requesting review and written comments by Feb. 24, 2016 from the Washington  
22 Department of Ecology (3 individual recipients), the Dept. of Natural Resources, and  
23 from UW-Friday Harbor Labs, Director;
- 24 3. **SEPA Mitigated Determination of Nonsignificance (MDNS)** issued for the  
25 project on February 10, 2016, which details 12 specific, binding, mitigation measures  
26 or conditions of approval for the proposal. (NOTE: The Staff Report and Ms.  
Thompson confirmed that no written comments addressing, or appeals of, the MDNS  
were received by the County. By operation of WAC 197-11-545 (re: Effect of no  
comment), if a consulted agency does not respond with written comments within the  
time periods for commenting on environmental documents, the lead agency may  
assume that the consulted agency has no information relating to the potential impact

1 of the proposal as it relates to the consulted agency's jurisdiction or special expertise;  
2 further, lack of comment by other agencies or members of the public on  
3 environmental documents within the applicable time period shall be construed as lack  
4 of objection to the county's environmental analysis. Again, the record establishes  
5 that the MDNS was not appealed – SJCC 18.80.140(A) provides that a SEPA  
6 threshold determination like the MDNS issued for this project may be appealed within  
7 21 days of issuance.

8 **4. Application materials, including the following items:**

- 9 a. Cover sheet, for Shoreline Conditional Development Permit, signed by  
10 Applicant's Agent, Ms. Shaw, and dated 12/17/2015, but receipt stamp is not  
11 readable on copy presented to the Examiner;
- 12 b. Environmental checklist, Revised and Submitted by Applicant's Agent, Ms.  
13 Shaw, on January 25, 2016;
- 14 c. Vicinity Map for Snug Harbor Marina, prepared for the applicant by Transpac  
15 Marinas Inc. and AJD Engineering, marked 'Sheet 1 of 12', dated January 19,  
16 2016;
- 17 d. Site Plans, prepared for the applicant by Transpac Marinas Inc. and AJD  
18 Engineering, marked Sheets 2 through 12, all dated January 19, 2016; Sheet 2  
19 is labeled 'Parcel Map' and illustrates the approximate configuration of the  
20 existing and proposed marina, and includes parcel numbers for properties  
21 owned by Snug Harbor Associates LLC/Erik Nelson (the Project Applicant),  
22 and neighbors, confirming adjacent property owners, including Nancy Jane  
23 Cates, who testified in favor of the proposal; Sheet 3 illustrates how existing  
24 shoots of eelgrass that were identified by Fairbanks Environmental Services  
25 will be avoided by the proposed marina redesign, and includes Tide Data for  
26 the Snug Harbor Marina [OHWM = +7.0; MHHW = +7.6; MHW = 7.00;  
MLLW = 0.0; ELT = -3.8]; Sheet 4 shows the proposed marina replacement  
plans, including Grating and Deck Area calculations comparing existing and  
proposed marina designs; Sheet 5 shows Fixed Pier Plan, Elevation and  
Sections; Sheet 6 shows Fixed Pier Plan, including new ADA aluminum  
gangway/100% FRP Grated Deck; Sheet 7 is labeled 'Typical 8' Main Walk  
Float'; Sheet 8 is labeled 'Typical 6' Main Walk Float'; Sheet 9 is labeled  
'Mainwalk & Transient Float Sections'; Sheet 10 is labeled 'Typical Finger  
Float'; Sheet 11 is labeled 'Finger Float Sections'; Sheet 12 is labeled 'Shed  
Layout';
- e. Picture of existing Shed at the marina;
- f. "Detailed Project Description and Regulatory Analysis", 29 pages, prepared  
by Ms. Shaw, the applicant's agent, dated January 25, 2016;
- g. Stormwater Management, Certification of Compliance;
- h. Biological Assessment/Evaluation and Essential Habitat Assessment,  
including Marine Vegetation Survey, for the Snug Harbor Marina

1 Replacement Project, prepared for the applicant by Fairbanks Environmental  
2 Services, dated December 2014 (29+ page report, plus Appendix A re: Project  
3 Drawings, for previous proposal, dated July 18, 2014 [10 Sheets] and  
4 Appendix B re: Snug Harbor Marina Replacement Eelgrass and Macroalgae  
5 Survey [6 pages];

- 6 i. Hydraulic Project Approval, issued by the Washington Department of Fish  
7 and Wildlife, issued on March 24, 2015 (5 pages), for the previous project  
8 proposal that would have added additional moorage.

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**5. Comment letters:**

- a. Jonathan Bryan, short email, opposing project, dated Feb. 5, 2016. Also  
submitted Ex. 5(g);
- b. Megan Dethier, for UW – Friday Harbor Laboratories, dated Feb. 12, 2016,  
noting that she has no major issues to raise, that overall it appears the  
environmental impact will be reduced by the redeveloped marina relative to  
the current, aging marina; how the use of non-creosote pilings, grated ramp  
and deck surfaces, and removal of disintegrating Styrofoam will all ultimately  
benefit the local marine environment; implies flushing data should be  
considered instead of blanket statements by the applicant; requests cleanup of  
the bottom of the bay beneath Snug Harbor Marina as a Condition of  
Approval, noting substantial amounts of human debris are likely present on  
the bottom beneath the marina and on the shore, with no specific evidence to  
support her request, but explaining how a clean-up of the benthic habitat  
seems reasonable while the applicant is removing other old and  
environmentally damaging materials, like floats and creosote pilings, from the  
area;
- c. Robb Howard, dated Feb. 22, 2016, comments submitted to the County  
Councilmembers opposing change of Mitchell Bay’s Shoreline  
‘Conservancy’ designation to PMT (same author as Exhibits 5(e) and (j));
- d. Kenneth and Lesley Nilsson, dated Feb. 20, 2016, long-time residents of  
Mitchell Bay with a clear view of Snug Harbor Marina, relieved and  
appreciative how the current owners (the Nielson’s) have made significant  
investments to replace deteriorating structures and transform the marina, all  
in contrast to previous conditions when it was a “miserable dilapidated  
eyesore that was poorly operated... with no regard for the immediate  
surroundings or general environmental impact”. Supports long-needed  
upgrade and modernization of the marina;
- e. Robb Howard, email dated Feb. 23, 2016, re: environmental checklist,  
opposes the proposal, believes that the redesign is to accommodate larger  
boats, even if the number of slips is the same, the size of the slips will be larger  
in the redesign. Supports upgrading of existing footprint to serve vessels  
under 30 feet, with more environmentally friendly materials. (Same author as

Exhibits 5(c) and (j);

- 1 f. Erik Nelson, email dated Feb. 24, 2016 from the applicant, Erik Nelson, to  
2 Mr. Howard (author of Exhibits 4(c) and 4(e), challenging Mr. Howard on his  
3 allegations that certain numbers are inaccurate or misleading. Alleges that  
4 Mr. Howard installed an illegal, unpermitted, expansion to his own personal  
5 dock that is floating in front of his house on Mitchell Bay and that the  
6 Wehmeyer's installed a massive, multi-level marine bulkhead with no  
7 permits, engineering or public hearings, digging directly into the marine  
8 environment below the high water mark along Mitchell Bay. Mr. Nelson  
9 suggests that the Mitchell Bay Association has been silent regarding the  
10 Howard and Wehmeyer projects, causing him to question if the Mitchell Bay  
11 Association is interested in the ecological condition of Mitchell Bay;
- 12 g. Jonathan Bryan, resident on De Haro Lane, east of Snug Harbor, along  
13 Mitchell Bay, dated Feb. 24, 2016. (Also submitted Ex. 5(a). Opposes the  
14 project, disagrees with the County's determination that the new proposal does  
15 not increase the degree of nonconformity, details concerns about the  
16 application, references DoE SMP Handbook, and its general summary of how  
17 nonconforming uses might be addressed, without acknowledging language in  
18 the County's SMP which specifically lists 'expansion of nonconforming uses'  
19 as Shoreline Conditional Uses (See SJCC 18.80.100(J)(1)(b)). Includes  
20 references to several cases, including Guy Fox v. Ecology, SHB No. 00-025,  
21 which reads in relevant part: "Third and most importantly, there has been no  
22 evidence of any environmental harm that will result" from the requested  
23 expansion. "If there is no environmental harm, allowance of this expansion  
24 will foster 'all reasonable and appropriate uses', citing RCW 90.58.020;
- 25 h. Jennifer Bryan, self-described "County Resident", with no address given,  
26 short letter with handwritten comments made on an attached copy of the  
applicant's Environmental Checklist for the project, questioning certain  
statements made therein, dated and marked received by the County on Feb.  
26, 2016. NOTE: Ms. Bryan did not appeal the County's MDNS;
- i. Jennifer Bryan, letter dated Feb. 24, 2016, but received by the County on Feb.  
26, 2016, re: Compromise Proposal for Snug Harbor, suggests that the new  
proposal eliminates 9 slips 22 feet in length and the piers that support such  
slips, expressing concern that "these slips can easily be bolted back on to the  
dock at a later date; that light permeable decking has not been proven to help  
the environment; and that the floating part of the project is moved landward  
by three feet; includes copies of several site plans marked with highlighting  
to support points raised in her letter;
- j. Robb Howard, letter dated Feb. 26, 2016, received by the County on Feb. 29,  
2016, opposes the proposal, repeats similar points raised in his other written  
comments, including concerns about potential environmental impacts due to  
larger boats that will be able to use the redesigned marina. (Same author as

Exs. 4(c) and (e));

- 1 k. Lloyd Martindale, letter dated Feb. 24, 2016, opposing a Mitchell Bay Zoning  
2 Change, which is not at issue in this Decision);
- 3 l. Lloyd Martindale, letter dated Jan. 24, 2016, same author as Ex. k, described  
4 above; lives in Bellingham, owns waterfront properties located to the east of  
5 Snug Harbor, on the inner part of Mitchell Bay; comments address his  
6 opposition to a Mitchell Bay Zoning Change, which is not at issue in this  
7 Decision;
- 8 m. Rhonda Zygocki, letter dated March 4, 2016, opposing the project. Notes that  
9 she is a resident of Mitchell Bay, suggests that there are discrepancies in  
10 applicant plans and data; that prior decisions should be used to deny the  
11 current, revised proposal; that environmental issues, including flushing  
12 characteristics of Mitchell Bay, are not adequately addressed, and that a pump-  
13 out should be required for the Marina;
- 14 n. Francine Shaw, letter dated and received by the County on April 13, 2016,  
15 providing Applicant's Response to Rhonda Zygocki's comments made in Ex.  
16 m, above; Ms. Shaw provides a credible and convincing explanation of the  
17 Marina's Existing Size, noting how the US Army Corps of Engineers  
18 requested that the entire pier should be replaced with light-permeable grated  
19 decking;
- 20 o. Ziggy Hemmerich, letter dated May 18, 2016;
- 21 p. Gerald Rasmussen, Chair, Mitchell Bay Association, received May 16, 2016;
- 22 q. Dale Marble, collection of materials, including letter from 1976, photos of  
23 marina and resort, selections from state law, and the SJ Co. Comp. Plan;
- 24 r. David, Zygocki, received May 16, 2016;
- 25 s. Carol Liu, received May 19, 2016;
- 26 t. Jim Pound, dated May 17, 2016;
- u. Kyle Loring, Staff Attorney, for Friends of the San Juans, Letter dated May  
18, 2016, submitted at the public hearing; opposes the project, though  
previously supported previous, larger proposal; criticizes grated decking,  
though he requested "fully-grated decking" in his April 13<sup>th</sup> comment letter  
(Ex. 18);
- v. Johannes Krieger, with Crystal Seas Kayaking, undated;
- w. Richard Grout, dated May 18, 2016.

## 6. Legal advertising

- a. Newspaper ad, for publication on 2/10/2016, provides Notice of Applications  
and Public Hearings, including notice re: the pending applications for the  
Snug Harbor Marina Redevelopment; provides Notice of MDNS, with SEPA  
Comments End Date of 2/24/16; includes explanation that "The SEPA  
Determination may be appealed to the Hearing Examiner pursuant to SJCC  
18.80.140 within 21 days of the date of the SEPA Determination." Also

1 includes Newspaper ad, providing Notice changing hearing date to 5/19/16  
2 for the Snug Harbor Marina Redevelopment project;

- 3  
4 b. Posting and notification affidavit, confirming that Applicant's Agent, Ms.  
5 Shaw, mailed and posted notices as described in the document;

6  
7 **7. Portion of San Juan County Council Ordinance No. 01-2016, adopting SMP**  
8 **Update**, page 18 of 162, submitted into the Record by Applicant's Agent, Francine  
9 Shaw date stamped Apr. 15, 2016; includes highlighted passage numbered 53 that  
10 reads as follows: *"there is no scientific evidence in the record proving that any*  
11 *area in the County suffers from poor flushing."*

12  
13 **8. Settlement Agreement and Stipulated Continuance**, dated December 30, 2015,  
14 between Snug Harbor Associates LLC and San Juan County, regarding Snug  
15 Harbor's appeal before the Shorelines Hearings Board for the State of Washington,  
16 SHB No. 15-014. Under the Agreement, the County agrees to submit the revised  
17 Snug Harbor application for a Conditional Use Permit, and will support the revised  
18 proposal, as consistent with the SMP criteria for approval of a Shoreline CUP under  
19 SJCC 18.80.110;

20  
21 **9. Revised Snug Harbor Marina Site Plans**, 12 pages, dated May 11, 2016,  
22 submitted with a Letter dated May 17, 2016 from Applicant's Agent, Ms. Shaw to  
23 the County's designated review Planner for the project, Ms. Thompson. Explains  
24 that Snug Harbor Associates and the Washington Department of Natural Resources  
25 (DNR) recently resolved issues need to obtain DNR approval for the marina's  
26 aquatics land lease. Ms. Shaw's letter, and attached emails to/from the applicant  
and DNR District Manager, Mary Huff, confirm that certain changes were required  
in order to achieve DNR's "habitat stewardship objectives", including a requirement  
that the marina must add another 779 square feet of light-penetrating grading, and  
that treated wood may only be used for structural framing on overwater structure  
and cannot be used for decking or rub rails. Alleges that the new plan "makes for an  
even more environmentally friendly design resulting in a healthier marine  
environment in Mitchell Bay."

**10. Large illustration**, presented at the hearing by Applicant representatives, marked to  
illustrate the portions of the marina that are located within the Rural Residential,  
Conservancy, and Aquatic Shoreline designations. Exhibit is an enlarged copy of  
Sheet 3 of 12, dated May 11, 2016, from the Revised Snug Harbor Site Plans  
included as part of Ex. 10. Also shows location of eelgrass, and how it will be  
avoided in the marina redevelopment project.

**11. Aerial map, depicting new Shoreline Designations for portions of Mitchell Bay**,  
including the Snug Harbor Resort and Marina properties, that are shaded and identified

1 as "Port, Marina, Marine Transportation (PMT)". Includes pages 8 and 9 of 162, from  
2 Ordinance No. 01-2016, adopted by the San Juan County Council on or about April 5,  
3 2016, with highlighted passages that explain how the new PMT Shoreline designation  
4 was established, noting that it "is a new designation needed to acknowledge and protect  
5 the County's essential marine transportation infrastructure," and that "PMT recognizes  
6 the importance of waterborne transportation to the islands"

7 **12A and 12B. Moorage License Agreements for Snug Harbor Marina slips 37-  
8 40, for Johannas Krieger, with Crystal Seas Kayaks.** Mr. Krieger confirmed that the slips  
9 are actual boat slips, but his kayaks are placed there for his kayak rental business.

10 **13. Copy of RCW 18.220.010** provided by Mr. Kilduff at the hearing, which defines  
11 "Hydrogeology", noting his experience in the field, and offered a short article which  
12 explains that "*Tidal flushing* refers to the systematic replacement of water in a bay or  
13 estuary as a result of tidal flow. The ocean is assumed to be a sink for water discharged  
14 during the ebb and a source of new water carried in by the flood." The article explains  
15 the term tidal flushing in terms of an exchange ratio representing the fraction of water in  
16 a specified location that is replaced during a tidal cycle. The exchange ratio, also called  
17 the flushing rate or water renewal rate, is the difference between the volumes of water  
18 occupying the location at high and low tide. Mr. Kilduff explained his calculations and  
19 conclusions showing that "*the tides of Mitchell Bay result in an exchange of water  
20 (flushing) from the Bay on the order of 58% to 88% per tidal cycle. Bearing in mind that  
21 there are two tidal cycles every 24 hours and 50 minutes, tidal flushing amounts to an  
22 exchange of more than 100% of the volume of Mitchell Bay per day.*"

23 **14. Chart from Ms. Shaw, showing Snug Harbor Marina design change comparison,  
24 due to DNR's requirement that the marina use more permeable deck area.** Reflects  
25 that Existing Conditions at the marina provide "None"/zero "Total Light Permeable Deck  
26 Area"; that the DNR requirements will increase the number for the redeveloped marina  
from 6,150 to 6,929 sq.ft, and reduce the "Total Non-Permeable Deck Area" from 7,356  
to 6,577 sq.ft. Existing non-permeable deck area is shown at 10,883 sq.ft.

**15. Photos of Snug Harbor Marina and surrounding shoreline along Mitchell Bay,**  
submitted by Ms. Shaw at the public hearing. 15A shows the Howard Dock, with 2 slips;  
15B shows the marina floats, piers, docks, and boats lying on the surface of the shoreline  
during a low tide event, with a note stating "these photographs are evidence of why the  
marina needs to move seaward;" 15C shows the existing resort, with its recently re-built  
cabins and rental units; 15D is an aerial view of the proposed marina reconfiguration,  
with handwritten notes, indicating where "no obstruction of existing view" and "no view  
change" will occur for properties located south and east of the marina; 15E and 15F show  
recent pictures of Snug Harbor, including the Styrofoam floats that are deteriorating;

1       **16. Large aerial image of Mitchell Bay**, showing existing and proposed Marina  
2 configuration, and location of Wehmeyer, Bryan, Noste, Marble, Johnson, Rasmussen,  
3 and Blair/Howard properties along the shoreline of the bay, near or across from the  
4 marina. This is the large illustration that depicts a 45-foot vessel (confirmed by Kevin  
5 Carlton, Harbormaster at Roche Harbor Marina for over 35 years) cruising with a white  
6 wake behind it, as it travels comfortably outside the marina area, heading east towards  
7 the very narrow passage where the Marble and Johnson private docks create a 170-foot  
pinch point for navigation in and out of the inner bay. In comparison, the Snug Harbor  
Marina is shown with at least 450' of clearance to the north, and about 500' of clearance  
to the east. Ms. Shaw testified that a rough count of private docks shown on this Exhibit,  
with some having space for more than one slip, establishes that about 23 private dock-  
slips now exist in the shoreline areas surrounding Mitchell Bay.

8       **17. Puget Sound Assessment and Monitoring Program Sediment Quality**  
9 **Assessment**, dated November, 2008, submitted by Applicant's water quality/flushing  
10 expert, Mr. Kilduff. Mr. Kilduff explained that the Assessment reflects that water quality  
11 conditions throughout San Juan County are satisfactory, indicating that tidal action and  
12 water exchange is sufficient throughout inlets and bays in the County.

13       18. Kyle Loring, for Friends of the San Juans, Letter dated April 13, 2015, requesting  
14 conditions on CUP to require fully-grated decking; a maintained rate of permanent  
15 moorage; and a pump-out facility. Comparing this letter with the letter he submitted at  
16 the public hearing, marked as Ex. 5(u), his credibility is severely undermined. Mr. Loring  
17 and his organization supported the larger, previous proposal. Then, he requested more  
18 grated decking. Then, he submitted comments questioning the benefit of grated decking.  
19 In sum, the Examiner finds that this adversely reflects on the organization's credibility  
20 regarding this project. Some members of the organization testified in favor of the current  
21 proposal now before this Examiner. In the end, the organization did not speak with one  
22 voice, and did not provide a consistent, credible, convincing, meaningful or reliable basis  
23 that would serve to deny the pending applications.

24       At the conclusion of public comments, County staff and Applicant representatives  
25 and consultants were given an opportunity to address questions or issues raised during the  
26 hearing. Applicant's attorney, Ms. Johnson O'Day explained her blanket objection to all  
testimony and evidence presented by lay witnesses who did not have expertise in the  
particular field they provided comments, and she expressly objected to submittal of written  
evidence that includes hearsay or "back-door" comments from purported experts. She  
requested an opportunity to respond to lengthy written materials submitted at or shortly  
before the hearing, and to provide support for her objections raised at the hearing. The  
Examiner granted applicant's request, and allowed County Staff and the applicant to submit  
written responses to hearing materials by no later than June 13<sup>th</sup>. On June 13<sup>th</sup>, Ms. Thompson

1 forwarded a copy of the applicant's post-hearing Response materials, and confirmed that the  
2 County would not be submitting any additional materials. Upon receipt of the post-hearing  
3 materials, the Record was closed.

4 Based on Applicant's post-hearing submittal, which detailed objections to certain  
5 testimony and records offered into the record by some witnesses, the Examiner sustains the  
6 applicant's objection. See SJCC 2.22.210(I). Accordingly, lay-witness testimony on  
7 scientific matters, and the materials they presented on such matters, was not given much  
8 weight. Even with such evidence (which the examiner finds to be mostly speculative,  
9 frequently reflecting biases and self-interests, like those of beach owners who already have  
10 private docks extending out into Mitchell Bay), the project opponents failed to present  
11 testimony or evidence that was as credible, convincing, reliable, specific or authoritative as  
12 the applicant's experts and project consultants' testimony, or the environmental  
13 documentation submitted into the Record, including without limitation: Exhibit 4(h), the  
14 Biological Evaluation and Essential Fish Habitat Assessment prepared for the project by  
15 Fairbanks Environmental Services; and Exhibit 5(n), the Camassia Applied Science  
16 "Flushing and Water Quality in Mitchell Bay" letter/report dated April 13, 2016.

17 Given that the post-hearing filing schedule was established to accommodate  
18 participants' previous plans, and the Examiner noted his own previously-scheduled travel  
19 plans and an intervening Holiday Weekend, the applicant and the County agreed on the record  
20 to waive otherwise applicable deadlines for issuance of a final Decision. The Examiner has  
21 now had a full and fair opportunity to consider all evidence and testimony submitted as part  
22 of the record, has reviewed and researched relevant codes and caselaw, and is fully advised.  
23 Accordingly, this Decision is now in order.

## 24 V. FINDINGS OF FACT.

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

26 1. All statements of fact, assessments of credibility, or determinations on the weight of  
evidence as described in any other section of this Decision, are hereby incorporated by  
reference and adopted as Findings of Fact supporting this Decision and the attached  
Conditions of Approval.

2. In October of 2014, Snug Harbor Associates submitted an application to upgrade the  
marina because the marina has deteriorated significantly. In that application, the applicant  
asked for an additional 10 moorage slips. The existing marina is considered nonconforming  
because a new marina would not be permitted in the location. San Juan County Code (SJCC)  
18.50.190(K)(4) states that marinas shall not be permitted in the Conservancy shoreline

FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
DECISION – APPROVING SHORELINE  
SUBSTANTIAL DEVELOPMENT AND  
CONDITIONAL USE PERMITS FOR SNUG HARBOR  
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GARY N. MCLEAN  
AS HEARING EXAMINER PRO TEM  
FOR SAN JUAN COUNTY

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1 environment, where the record shows only a small portion of the marina facility is located.  
2 The 2014 application was denied, and was then appealed by the applicant, to the Shorelines  
3 Hearings Board (Case No. 15-014). The County and the applicant entered into a settlement  
4 agreement. This revised shoreline substantial development and conditional use permit  
5 application was submitted in response to the settlement agreement. The proposed  
6 improvements presented in the original 2014 application have been substantially modified  
7 and accepted by the County to ensure that the degree of overall non-conformity of the marina  
8 use will not be increased. The existing number of slips is 63, and the proposed number is the  
9 same, 63.

10 3. This hearing process stands on its own, includes evidence and testimony that is not  
11 identical to prior reviews, with presentations and points unique to each person. The Examiner  
12 is without the means to absorb every word spoken or page of paper submitted about the  
13 proposed Snug Harbor redevelopment in previous forums, before the County Council, or  
14 otherwise. This Decision is based solely on the Record that was put before the undersigned  
15 Examiner. Different findings and different conclusions are always possible when an  
16 application is not identical to another, and when evidence, testimony, witnesses, studies, legal  
17 arguments, and other items in the Record are not identical, or issues and points are not  
18 emphasized and focused in the same way as they might have been in any previous forum.  
19 This Decision is issued as though the process started anew, with a clean-slate, so as to provide  
20 the applicant, the County, and interested parties who commented at some point in the process,  
21 whether for or against the project, with a full and fair hearing process, to consider the  
22 application, the facts, the applicable law, and other relevant factors.

23 4. In any event, based on the Record, the Examiner finds that the current applications to  
24 redevelop the Snug Harbor Marina are substantially different than the proposal brought  
25 forward previously. Evidence supporting this finding includes, without limitation, the  
26 reduced number of slips requested in the current application vs the previous application that  
will be available for use by potential boat customers – and to ensure that the slip count and  
“use” remains the same as it currently exists, a condition of approval is included to do so.  
The amount of light-permeable deck area has increased significantly, in part because certain  
changes were required by DNR to achieve DNR’s “habitat stewardship objectives”, including  
a requirement that the marina must add another 779 square feet of light-penetrating grading,  
and that treated wood may only be used for structural framing on overwater structure and  
cannot be used for decking or rub rails. The current proposal varies in a highly relevant and  
substantial aspect from the original application in that the new proposal completely removes  
an old pier along the shoreline with its 10 creosote pilings, to be replaced with a 100% grated  
surface and steel pilings, and this is the only portion of the marina that lies within the  
conservancy shoreline area, thereby greatly reducing the overall nonconformity of the  
proposed marina.

5. The applicant, Mr. Nelson directly addressed the changes made to his earlier

1 application, noting that the revised application removes 9 24-foot boat slips. The current  
2 proposal also counts the current kayak space as moorage, which it is, but it is filled in with  
3 kayaks and their special movable docks that can be relocated. Mr. Nelson noted if the marina  
4 was just moved out of the mud, as required by DNR, but it is not allowed to move out further  
5 into the bay, then the marina would lose about half of all the marina space, which would take  
6 away 25 or more slips. As for long-term moorage, and requests that most slips should be  
7 required for long-term lease only, Mr. Nelson noted that it is a matter of economics. When  
8 he purchased the marina, he quickly learned that revenue is far better from long-term moorage  
9 agreements instead of short-term, touch and go tenancies. He explained that the Snug Harbor  
10 business model is not the same as Roche Harbor, where boats pull up, and there is active  
11 engagement with staff for various services. He said there are no "customer run-ups". Snug  
12 Harbor is not staffed for frequent, active touch and go boaters. Mr. Nelson's testimony  
13 established that the existing marina operations and services will not materially expand after  
14 the redevelopment. The activity level associated with the marina will not increase, so the  
15 nonconformity of the use will not be impacted.

16 6. As noted elsewhere, the application has been revised and substantially changed from  
17 the prior application packet. The current proposal decreases the overall degree of  
18 nonconformity for the marina, over the last application, and over the existing conditions, by  
19 eliminating all creosote pilings and replacing them with steel pilings; and increasing the  
20 amount of light-permeable deck surfaces from zero (existing), to 33% grating on 6 foot wide  
21 floats (previous proposal) to grating on 50% of deck surfaces, (current proposal) which will  
22 result in 6,929 sq.ft. of light permeable deck area at a marina that now has none. The  
23 applicant's unchallenged and unrebutted environmental study by Fairbanks Environmental  
24 Services, Ex. 4(h), reviewed the original proposal that asked to add boat slips, and it  
25 concluded that "[w]ith additional moorage capacity, vessel traffic will increase somewhat in  
26 the area." (See Ex. 4(h), page 22, at Sec. 9.2). The current application will not increase  
moorage capacity, so, unlike the original application, it will not increase vessel traffic in the  
area. Standing alone, the reduced request for moorage capacity, keeping the same 63 space  
count as exists today, is a substantial change from the previous application. But, as noted  
elsewhere in the Decision, there are other substantial changes in the pending proposal that  
make the project a less nonconforming use.

7. There was no credible evidence to suggest that the current project proposal will  
increase vessel traffic. Some witnesses explained that installation of a pump-out facility  
would increase vessel traffic in and out of Mitchell Bay, because it would be included on  
maps, making any new pump-out a potential destination for people who do not currently  
venture into Mitchell Bay. The Examiner visited online maps, including some accessible on  
the Department of Ecology's website, that list and pinpoint the location of pump-out facilities  
available for boaters throughout the state, including the San Juan Islands. Thus, the Examiner  
finds that witness testimony about future charts likely listing Snug Harbor as a site to pump-  
out boats (if a pump-out is added to the project) is valid. The applicant and county staff

1 believe that the current proposal will not increase the nonconformity of the marina use. The  
2 Examiner finds that a pump-out facility would be preferred on the site, and would be  
3 consistent with otherwise applicable county requirements. However, a preponderance of  
4 evidence in the record establishes that a new pump-out would increase vessel traffic in and  
out of Mitchell Bay. To avoid an increase in vessel traffic, but to ensure that Snug Harbor  
tenants respect and follow applicable regulations prohibiting illicit dumping into area waters,  
a condition of approval has been added to address the situation.

5 8. Most significantly, the proposed project will greatly reduce the frequency of  
6 groundings, which scours the surface of the shoreline or shallow areas with the bottom of  
7 boats, docks, floats, or other parts of the marina that rest atop dry land during low tide  
8 conditions. The current proposal calls for the complete removal of all creosote-treated  
9 pilings, now even including those placed in the conservancy shoreline area (ten pilings, where  
10 the pier connects the float sections to the shore). The Fairbanks Environmental report, which  
11 analyzed the original proposal that would have retained the old pier pilings (Ex. 4(h)), found  
12 that “[t]he removal of creosote-treated piles will contribute to overall water quality  
13 improvement.” Removing ten more creosote pilings is even better. Comments from outside  
14 agencies, including the UW Friday Harbor Lab, among others, emphasize the benefits to the  
15 environment that can be realized if the marina is redeveloped out over deeper water. The  
record and environmental materials are full of examples demonstrating how the redeveloped  
marina design will facilitate this objective, providing a valuable public benefit. Deeper water  
means less propeller and boat-bottom conflicts with the sediments and plants under Mitchell  
Bay. It also reduces the risk of spills caused by boats left grounded at odd angles.  
Repositioning the marina will greatly reduce the nonconformity of the existing marina, by  
greatly reducing environmental impacts caused by boats, docks, and marina facilities that rub  
against and interfere with the shoreline environment during low tide conditions.

16  
17 9. The Record and staff testimony confirms that no one submitted any comments  
18 regarding the SEPA MDNS issued for the project, and no one appealed the MDNS, within  
time periods allowed by applicable County codes.

19 10. A number of written comments were submitted by individuals regarding the revised  
20 shoreline applications, and those have been listed and generally summarized elsewhere in  
this Decision.

21 11. At the public hearing, County staff, applicant representatives, and a number of  
22 witnesses testified regarding the merits of the pending applications, expressing concerns with  
23 various aspects of the proposal, providing support for the project, opposing the project, and  
24 asking questions, which staff and/or the applicant team were given an opportunity to address  
before the conclusion of the hearing. A list of witnesses who appeared at the public hearing  
and a general summary of their testimony is provided in another section of this Decision.

1  
2 **12. Description of the Project Site:**

3 12A. According to the Biological Evaluation (BE) prepared by Fairbanks Environmental  
4 Services, dated December 2014 and labeled Exhibit 4(h), the proposed project is located in  
5 Mitchell Bay on the western shore of San Juan Island. Snug Harbor is on the southern shore  
6 inside of the entrance to Mitchell Bay. The shoreline of the project area is armored with rock  
7 riprap at the ordinary high water mark (OHWM). Below the OHWM, the sea floor is  
8 composed of sand mixed with gravel at the upper intertidal zone and sand mixed with silt to  
9 the extreme lower water, approximately -4 feet relative to mean lower low water (MLLW).  
10 The slope of the sea floor is very low and the sediment below -4 feet MLLW is composed of  
11 silt mixed with sand. A survey of marine vegetation was conducted on September 20, 2012.  
12 Very sparse vegetation was observed throughout the study area. The mud bottom had a  
13 uniform covering of periphyton, a mat of fine algae, bacteria and cyanophyta. Six shoots of  
14 the native eelgrass *Zostera marina* were observed in the study area. The green alga *Ulva* was  
15 the dominant attached algae in the study area along with a few plants of the similar alga  
16 *Ulvaria*. The coverage of algae ranged from 10 percent under the existing marina to 100  
17 percent outside of the marina. A few individual plants of the red algae *Cryptosiphonia* and  
18 *Halosaccion* were also observed in the study area. Drift algae and detritus covered much of  
19 the bottom along the shoreward part of the marina. The sea anemone *Metridium senile* was  
20 observed throughout the study area as were numerous Dungeness crab and red rock crab.

21 12B. The BE also states that the Snug Harbor Resort area has not been documented as a  
22 herring or forage fish spawning site by WDFW. A pre-spawning holding area for herring is  
23 identified by WDFW outside of Mitchell Bay, approximately 1,000 feet to the west of the  
24 project area and surf smelt spawning has been documented on a small beach approximately  
25 one third mile southeast of the marina.

26 12C. Witnesses established that the Washington State Department of Ecology has not  
identified impairments to the water quality of sediment in Mitchell Bay, or so it appears,  
anywhere along the shores of San Juan Island. The Examiner verified this testimony, taking  
official notice of the Department's online information available about TMDLs and water  
quality enforcement, and the like, and could find no water quality improvement plans or  
enforcement actions for sediment issues in or around Mitchell Bay.

12D. The project area is within the Salish Sea, which is an estuary of several large river  
systems including the Fraser River, Nooksack River, Skagit River and the smaller Samish  
River. These rivers support runs of Chinook Salmon and bull trout and Mitchell Bay is within  
Critical Habitat for ESA listed Puget Sound Chinook salmon, Puget Sound bocaccio and  
Puget Sound canary rockfish.

1 12E. Net shore drift moves from west to east along the shoreline of Snug Harbor, however,  
2 feeder bluffs have not been identified in the project area.

3 12F. Beamer and Fresh completed a study in 2012 that includes a prediction of the  
4 probability of presence of salmonids and forage fish within selected shoreline types and  
5 habitat types in the San Juan Islands. The shoreline in Mitchell Bay is an interior pocket  
6 beach and the probability of capturing selected salmon and forage fish along this shoreline in  
7 a beach seine between the months of March and October is shown in Table 5 of the BE, page  
8 6. The range of probability is also listed for reference. For all the species listed in Table 5,  
9 the probability that these fish are in the Action Area is moderate.

10 12G. The BE evaluated potential impacts to ESA listed species and the marine environment  
11 which includes:

- 12 • Noise impacts during construction;
- 13 • Turbidity impacts during construction;
- 14 • Change in overwater coverage;
- 15 • Removal of creosote-treated materials from the water; and
- 16 • Potential impacts to eelgrass.

17 12H. The BE concluded the following with respect to these impacts:

- 18 • Noise impacts to fish in the area are anticipated to be minimal and discountable.
- 19 • The following conservation measures will be followed to minimize turbidity:
  - 20 ○ The vibratory hammer will be used to loosen the piles from the bottom, which  
21 minimizes the amount of sediment that clings to the pile, and the hammer will  
22 be shut off as soon as the pile end reaches the mudline.
  - 23 ○ Piles will be lifter slowly through the water column to allow any clinging  
24 sediments to fall back to the bottom.
  - 25 ○ The barge where the piles are placed will be lined with filter fabric or hay  
26 bales to prevent sediment from washing back into the water.
- Although total overwater coverage will increase, light permeable grating will be used  
wherever possible so there will be a net reduction in shading surface.
- The removal of creosote-treated piles will contribute to overall water quality  
improvement.
- The small amount of eelgrass found in the marina will be located between two rows  
of finger piers. During construction, care will be taken to avoid disturbing any  
eelgrass by not allowing the barge to ground out during construction and not using  
walking spud anchors.

27 12I. Table 7 of the BE summarizes the effect determination on ESA listed species and

critical habitat. It explains that the project is not likely to adversely affect Marble murrelet, Coastal Puget Sound Bull trout, Puget Sound ESU chinook salmon, Puget Sound Steelhead trout, Puget Sound/Georgia Basin DPS bocaccio, Puget Sound/Georgia Basin DPS canary rockfish, Puget Sound/Georgia Basin DPS yelloweye rockfish, and Southern resident killer whale. It will not adversely modify Puget Sound ESU chinook salmon critical habitat, bocaccio critical habitat, canary rockfish critical habitat, or Southern resident killer whale critical habitat.

12J. None of the project opponents offered any serious evidence or information that would rebut or materially challenge the findings and analysis provided in applicant's environmental analysis and project construction recommendations described above.

**13. Description of the Proposal.**

13A. Snug Harbor Associates are proposing improvements to their existing resort marina, located in Mitchell Bay on the northwest side of San Juan Island. The existing marina is old and in varying degrees of deterioration. It is located over shallow water which causes inland floats and boats to ground during low tides. The marina is constructed with preservative treated lumber and untreated timber decking and structural members. The floatation system is mostly un-encapsulated expanded polystyrene foam and the pilings are treated with creosote. The proposal will replace these components with more environmentally sound materials. There is also a small shed at the head of the pier that they would like to replace with a slightly larger building so that it can accommodate storage of paddleboards. The following chart provides a comparison between the existing marina conditions and the proposed redevelopment.

**Existing vs. Proposed Comparison Table**

Snug Harbor Resort Marina	Existing Condition	Proposed Changes
Total Over Water Area	10,883 Square Feet	13,506 Square Feet
Total Light Permeable Deck Area	None	6,150 Square Feet <b>*Increased to 6,929 by DNR</b>
Total Non-Permeable Deck Area	10,883 Square Feet	7,356 Square Feet <b>*Decreased to 6,577 by DNR</b>
Number of Moorage Slips	63	63
Number of Kayak Slips	12 Slips	13 Slips
Side Tie Transient Moorage	250 Feet	196 Feet
Number of Piles	47 Creosote Piles (diameter unknown)	23-10" diameter and 18-12" diameter Hot Dipped Galvanized Steel Piles for a total of 41 Piles
Float Tub Material	Un-encapsulated Styrofoam	Foam Filled HDPE Float Drum
Storage Shed	55.39 sq. ft.	69.96 sq. ft.

Area of Eelgrass Covered by Marina	0 Square Feet	0 Square Feet
Water Depth at Seaward End of Float	-8	-9
Water Depth at Landward End of Float	-4	-6
Dockheads	35	35
Float Lighting	3	6

13B. Testimony by Applicant representatives credibly explained the final, “Revised Snug Harbor Marina Site Plans” included in the record as Exhibit 9, which is 12 pages, dated May 11, 2016, submitted with a Letter dated May 17, 2016 from Applicant’s Agent, Ms. Shaw to the County’s designated review Planner for the project, Ms. Thompson. Exhibit 9 establishes that Snug Harbor Associates and the Washington Department of Natural Resources (DNR) recently resolved issues need to obtain DNR approval for the marina’s aquatics land lease. Ms. Shaw’s letter, and attached emails to/from the applicant and DNR District Manager, Mary Huff, confirm that certain changes were required in order to achieve DNR’s “habitat stewardship objectives”, including a requirement that the marina must add another 779 square feet of light-penetrating grading, and that treated wood may only be used for structural framing on overwater structure and cannot be used for decking or rub rails. Ms. Shaw’s letter correctly observes that the new plan “makes for an even more environmentally friendly design resulting in a healthier marine environment in Mitchell Bay.” The “comparison table” provided above has been modified to reflect the changes required by DNR. The attached Conditions of Approval are also written to recognize and incorporate the DNR modifications to the project.

*Clarification of differences between revised project and previous project proposal:*

Marina Size

13C. Several witnesses expressed concern with an apparent discrepancy between the size of the existing marina noted in the original 2014 application (9,939 sf) and the revised 2016 application (10,883 sf). The applicant’s representatives, and the Staff Report, credibly and convincingly responded that the fixed pier was not included as part of the size calculations used in 2014, because it was not going to be replaced, but simply repaired. (See discussion in Ex. 5(n), Applicant’s explanation of changes). The 9,939 sf figure included only the floats and ramp, omitting the fixed pier size. Applicant representatives established that since the submittal of the 2014 application, the US Army Corps of Engineers asked that the entire deck of the fixed pier be constructed with light- penetrating grating. This led to the applicant’s decision to replace the fixed pier in its entirety. So, the 10,883 sf figure noted in the 2016 application includes the area covered by the 10’ x 91’ fixed pier (910 sf). (This figure also includes 34 sf of ramp overlap which should actually be subtracted from the 10,883 sf because

1 it does not contribute to the amount of over-water area. The actual amount of “over-water”  
2 structure is 10,849 sf.)

3 Slip Count

4 13D. Without malice, and in a completely understandable fashion, some comments  
5 questioned “slip-counts” presented by the applicant. In the Staff Report, and other exhibits  
6 in the record (including without limitation Ex. 5(n)) and through testimony provided by  
7 various Applicant representatives, the applicant credibly and convincingly established that  
8 there is a distinction between the term “number of slips” and “slip use”. The existing kayak  
9 docks are completely independent structures from the marina that are slid into three existing  
10 boat slips as part of a moorage agreement between Crystal Seas and Snug Harbor Associates.  
11 These kayak docks do not belong to Snug Harbor Associates but rather are “moored” at the  
12 marina similar to the moorage of a vessel. These kayak docks can be moved to another  
13 moorage area (i.e. side-tie areas) thus freeing up these slips for use by other boats. The two  
14 moorage agreements from Crystal Seas Kayaks, included in the Record as Exhibits 12A and  
15 12B, establish that the existing slips used by Crystal Seas is actually 3 (three) moorage slips.  
16 Thus, that number has been included in the slip-count used for the existing marina.

17 Side-Tie Moorage

18 13E. The original application inadvertently identified that there are 55 existing moorage  
19 slips and 526 feet of side-tie moorage at the existing marina. At that time, these side-tie area  
20 calculations included both long-term and transient moorage areas. However, long-term side-  
21 tie areas should have been considered as part of the slip count and not as area dedicated to  
22 transient short term use.

23 13F. Applicant representatives provided a letter and drawings, that are included in the  
24 Record as Exhibit 5(n), showing the existing marina configuration and the other showing the  
25 proposed configuration. Boats are sized and placed in areas dedicated to long term moorage  
26 which verifies there are 63 slips existing and 63 slips proposed. The length of transient side-  
tie moorage is also shown verifying 250 feet of existing side tie moorage. The reason for the  
reduction in side-tie moorage in the revised application (196 feet) is because some of this  
space will now be taken up by the Crystal Seas kayak docks.

13G. A specific condition of approval has been included to assure that future marina  
operations will not increase the nonconformity of the existing use, by restricting marina  
operations to allow for just 63 moorage slips and spaces, with limited areas for transient  
moorage, kayaks, and other features noted in the final site plans for the project. The applicant  
represented and established that the existing marina has 63 slips or spaces available for lease  
under long-term moorage agreements. That number shall not be increased.

1  
2 **14. Merits of the project.**

3 14A. *Comprehensive Plan.* The Staff Report, witness testimony, and exhibits included as  
4 part of the Record, including without limitation Exhibit 4(f), include facts and analysis that  
5 comprise far more than a preponderance of evidence to establish that the pending Shoreline  
6 applications satisfy, and in many respects, promote or implement, applicable provisions of  
7 the County's Comprehensive Plan. For example, Policy 3.5.C.16 reads as follows: "*To*  
8 *reduce the cumulative environmental impact of individual docks on the shorelines of the*  
9 *county and to provide moorage opportunities for inland and shoreline residents, encourage*  
10 *marina development that includes allocations of at least half the available moorage space to*  
11 *permanent, rather than transient moorage...*" Mr. Nelson confirmed that a majority of slips  
12 are leased to island residents. To ensure ongoing compliance with this policy, a condition of  
13 approval has been added to address the subject.

14 14B. Except as modified in this Decision, the Examiner hereby adopts by reference all  
15 statements of fact included in Section II(B) on pages 14-20, of the applicant's "Detailed  
16 Project Description and Regulatory Analysis", included in the Record as Ex. 4(f), which  
17 addresses the project's consistency with applicable County Comprehensive Plan provisions.  
18 The statements of fact adopted herein shall be deemed Findings of Fact supporting this  
19 Decision and Conditions of Approval.

20 14C. *Request for Pump-Out facility.* Comments requesting a new pump-out facility for the  
21 marina did not include any credible or convincing evidence to demonstrate that there are  
22 ongoing problems with marina tenants or visitors dumping sewage waste or other pollution  
23 into the Bay. To the contrary, Snug Harbor Resort staff testified that they cannot recall  
24 receiving reports or complaints about such incidents in the many years they have worked at  
25 the marina. If it was such a problem, as some of the neighbors speculated, then it is strange  
26 that they never raised their complaints with the County or the marina staff at any point prior  
to the public hearing. Such complaints were not credible, and appeared mostly speculative,  
surmising that boaters would just dump their waste materials on site if there is no pump out  
facility. The allegations were also contradicted by others, who explained that most boaters  
pump out when they fuel up, and Roche Harbor, in close proximity to Snug Harbor, has an  
active fuel dock and pump out facilities, including their mobile/floating pump out boat called  
the "Fecal Freak".

27 14D. While the facts in this Record do not justify imposition of a requirement for an on-  
28 site pump out facility at the marina, the Examiner finds that the addition of a pump out facility  
29 would increase boat traffic into Mitchell Bay. A new pump-out facility may not actually  
30 increase the nonconformity of the marina use, though the applicant implies that it probably  
31 would, and their current application is trying to avoid things that could be viewed as

1 increasing nonconformity. Whatever the case, an additional condition of approval is  
2 warranted, to ensure that the marina and its users are aware of applicable anti-pollution laws,  
3 and their options for waste disposal. This condition will help reduce a degree of  
nonconformity for the marina, and will help minimize or prevent illegal dumping in the  
waters of the marina.

4 14E. Substantial evidence in the record, including without limitation the application  
5 materials, environmental reports, and testimony by witness representatives, as well as  
6 explanations provided in the applicant's detailed regulatory analysis provided in Exhibit 4(F),  
7 fully support Staff's conclusions in the Staff Report, explaining that the proposed project  
8 satisfactorily complies with applicable county code provisions, and/or can be mitigated  
through conditions set forth in the MDNS issued for this project, to minimize, reduce, or  
prevent any probable, significant, adverse, environmental impacts associated with the project.

9 14F. For instance, there is substantial, credible, and un rebutted information in the  
10 application materials to demonstrate that no net loss of shoreline ecological functions will  
11 occur. These materials include the Biological Evaluation and Essential Fish Habitat  
12 Assessment prepared by Fairbanks Environmental Services dated December, 2014 and the  
13 Marine Vegetation Survey prepared by Fairbanks Environmental Services dated September,  
2012. Both of these documents are included in the record as Exhibit 4(h).

14 14G. The application materials also include a Spill Prevention, Containment, and Control  
15 Plan. The mitigation measures and conditions of approval also address these standards.

16 14H. Adding light-penetrating grating, moving deeper draft vessels out to reduce  
17 grounding, replacing un-encapsulated Styrofoam floats with sealed floats, and replacing  
18 creosote pilings with galvanized steel pilings will all reduce adverse impacts to marine life  
19 that currently exist by removing the potential for added toxics and allowing more light to  
20 support sea life. The proposed location has been designed to avoid structures over the few  
21 shoots of eelgrass in the vicinity.

22 14I. The marina already exists, so moving it out further into deeper water is reasonable  
23 and fully consistent with Comprehensive Plan Policies 3.5.C.3 and 4. The redevelopment  
24 takes advantage of deeper water to prevent disturbance of the substrate. The Fairbanks study  
25 indicates that current groundings caused by the shallow position of the existing marina could  
26 adversely affect sea life.

27 14J. Hydraulic Project Approval is required from the Department of Fish and Wildlife who  
28 will review the proposal to ensure that it is in compliance with their design criteria. An HPA  
29 was issued for the original proposal on March 24, 2015 (Exhibit 4.i) but since the design has  
30 been changed after the HPA was issued, to reduce the number of boat slips, and substantially  
31 increase the amount of light-permeable decking, a new HPA will be required.

32 FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
33 DECISION – APPROVING SHORELINE  
34 SUBSTANTIAL DEVELOPMENT AND  
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AS HEARING EXAMINER PRO TEM  
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1 14K. Given that the renovated marina facility's 'pieces and parts' [the Examiner's words]  
2 will be built off-site, the applicant's project engineer/designer, Mr. Jenkelson, explained that  
3 on-site construction activities should only be about 4 weeks, with 2 weeks for general  
4 assembly/installation and 2 weeks for electrical and mechanical work. *See Ex. 4(f), Project*  
5 *Description, at pages 5 – 7, re: construction and sequencing.* The entire removal and  
6 replacement process can be completed in a surprisingly short time-frame, which will greatly  
7 reduce potential impacts to neighbors and the Bay.

8 14L. The record for this matter includes no dispute whatsoever regarding the current legal  
9 nonconforming status of the Snug Harbor Marina. There were some assertions, assumptions,  
10 and allegations about what makes the marina nonconforming. Ms. Shaw noted that the San  
11 Juan County Code does not include any development standards establishing dimensional  
12 standards for marinas. Given that fact, she believes that there should be no concern with  
13 structural non-conformity. The sole issue is use – not structures. Whatever the issue, the  
14 bottom line is this – the redeveloped marina will be a far less nonconforming use than the  
15 existing environmentally challenging marina facility, with its 100% opaque decking surfaces,  
16 crumbling Styrofoam floats, creosote-treated pilings, and a design that causes many boats  
17 and floats to be grounded during low tide events.

### 18 *Flushing*

19 14M. The applicant's water quality expert, Mr. Kilduff, credibly testified about see-sawing,  
20 where water passes back and forth from the inner and outer portions of Mitchell Bay, and in  
21 and out of Mosquito Pass. He discounted public comments that a see-sawing situation in the  
22 bay indicates that water quality should be a reason to deny the shoreline permits for this  
23 project. Mr. Kilduff cited to the fact that there have been no TMDL<sup>8</sup> limitations placed on  
24 Mitchell Bay or any area waters, which would happen if pollution buildups are discovered  
25 by state regulators, like the Department of Ecology. He referenced sediment studies done  
26 regarding the San Juan Islands, looking into bays and inlets around San Juan Island, including  
Wescott Bay, which is similar to Mitchell Bay, that did not find any compromised sediment

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20 <sup>8</sup> The Examiner takes official notice of TMDL information provided on the Department of Ecology's website,  
21 to provide the following summary. A total maximum daily load (TMDL) is a numerical value representing the  
22 highest amount of pollutant a surface water body can receive and still meet water quality standards. Any amount  
23 of pollution over the TMDL level needs to be reduced or eliminated to achieve clean water. The Clean Water  
24 Act requires that states develop a TMDL for each of the water bodies on the state's 303(d) list. TMDLs describe  
25 the type, amount and sources of water pollution in a particular water body where the Department of Ecology  
26 has determined pollution and sources of pollution warrant a regulatory response; they analyze how much the  
pollution needs to be reduced or eliminated to meet water quality standards; and they provide targets and  
strategies to control the pollution. There are no TMDL's or similar water improvement projects imposed by the  
Department of Ecology for Mitchell Bay.

1 samples, in any of the inlets or bays. He stated that the take-away is that all San Juan Island  
2 sediments are satisfactory and have not been shown to reach levels requiring intervention by  
3 state or federal regulators. Finally, reviewing Mitchell Bay specifically, Mr. Kilduff  
4 explained that he did not identify any pollution or signs of water quality problems that would  
5 indicate problems with boat discharges at the marina. In short, Mr. Kilduff credibly and  
6 convincingly refuted speculative comments that Mitchell Bay has a flushing problem that  
7 should prevent the marina redevelopment from moving forward.

8  
9 *Navigation.*

10 14N. As addressed in general descriptions of witness testimony and exhibits provided  
11 above, there is no credible evidence to show that the marina redevelopment project will  
12 adversely impact marine travel and navigation in and around the Snug Harbor Marina.  
13 (*Testimony of Mr. Carlton, Mr. Domico, Mr. Christenson, and Mr. Friedman; See Ex. 16 for*  
14 *ample clearance available around the marina*). The allegations about navigation concerns  
15 are groundless, and provide no basis to deny the pending applications.

16  
17 **15. SEPA; the MDNS was not appealed.**

18 15A. The record and the Staff Report demonstrate how public notice was provided as  
19 required by applicable law. The legal notice was published in the paper on February 10,  
20 2016. Notices were sent to neighbors within 300 feet of the exterior boundaries of the  
21 property on which the proposed project will be located on February 10, 2016, and a Notice  
22 of Application and Hearing Table was posted on the property on February 10, 2016. A second  
23 legal notice was published in the March 16, 2016 edition of the newspaper to change the  
24 hearing date from March 17 to May 19, 2016.

25 15B. As noted in the Staff Report, and Exhibits included as part of the Record, the applicant  
26 submitted an environmental checklist for the project. Staff reviewed the environmental  
materials and issued a Mitigated Determination of Non-Significance on or about February  
10, 2016. Notices were provided in the time and manner as required by applicable codes and  
regulations. (*See Ex. 6*). According to Staff, no one submitted SEPA comments before  
expiration of the SEPA comment period. More significantly, the record and testimony from  
County staff confirms that no one appealed the MDNS. By operation of WAC 197-11-545  
(re: Effect of no comment), if a consulted agency does not respond with written comments  
within the time periods for commenting on environmental documents, the lead agency may  
assume that the consulted agency has no information relating to the potential impact of the  
proposal as it relates to the consulted agency's jurisdiction or special expertise; further, lack  
of comment by other agencies or members of the public on environmental documents within

1 the applicable time period shall be construed as lack of objection to the county's  
2 environmental analysis. Again, the record establishes that the MDNS was not appealed –  
3 SJCC 18.80.140(A) provides that a SEPA threshold determination like the MDNS issued for  
4 this project may be appealed within 21 days of issuance.

5 16. Consistent with SJCC 18.80.120(C), the Examiner has evaluated this proposal for the  
6 alteration, modification, and possible expansion of a nonconforming shoreline use, and  
7 considered the total impact of the nonconforming use and its facilities, as well as the added  
8 impact of the incremental changes being proposed, and expressly finds and concludes that  
9 looking at total impacts, positive and potentially negative, the project will result in a less  
10 nonconforming shoreline use that will provide substantial, positive, environmental benefits  
11 to the shoreline and public interests over the existing marina use.

12 17. The probable, significant, adverse environmental impacts of the proposal are virtually  
13 all related to the removal and construction process, which can be minimized and fully  
14 addressed through implementation of the mitigation measures identified in the County's  
15 unchallenged MDNS issued for the proposal. The MDNS is fully supported by unrebutted,  
16 credible, environmental studies and documentation, including without limitation the  
17 Biological Evaluation provided for the project.

18 18. The applicant's submittals and testimony provided on its behalf established that many  
19 aspects of the marina redevelopment project will provide a public benefit, especially to the  
20 shoreline environment, which is now adversely impacted by frequent groundings of boats  
21 and marina structures, deteriorating creosote pilings, solid-surfaces that block the passage of  
22 light into the water below, and a facility that was not designed to meet updated environmental  
23 stewardship objectives.

24 19. None of the individuals testifying at the hearing or submitting written comments in  
25 opposition to the project offered any expert reports, studies or other convincing  
26 environmental analysis that would rebut the expert reports, certifications and/or  
27 environmental analyses included in the record on behalf of the applicant. The findings,  
28 recommendations and conclusions provided in the environmental documentation submitted  
29 on behalf of the applicant, are credible and well-reasoned summaries of complicated  
30 regulations, conditions, possible impacts and appropriate mitigation measures associated  
31 with the proposed project. Applicant's proposal was modified based on input from regulatory  
32 agencies and the general public.

33 20. No one presented comparable expert witnesses or evidence with water quality,  
34 environmental, scientific, biology, marine vegetation, engineering or other relevant  
35 credentials providing credible and convincing views that would justify denial of the pending  
36 shoreline applications.

1 21. The project promotes and is consistent with the state shoreline policies set forth in the  
2 Shoreline Management Act at RCW 90.50.020(1-6). For example, the project provides a  
3 common area for boat moorage at a marina, which can be used by inland residents and others  
4 who would not otherwise have access to the shoreline and waters of Mitchell Bay, unlike  
5 waterfront homeowners, thereby recognizing and protecting a statewide interests over  
6 neighboring waterfront owners' local, self-interests; the redevelopment project will replace  
7 the existing facility with an environmentally-sensitive facility that will greatly improve  
8 existing conditions and serve to preserve and protect the natural character, resources, and  
9 ecology of the shoreline that is now scoured and ripped apart as boats and floats are grounded  
10 and scrape on the shoreline surface during low tide events; it will provide a demonstrated,  
11 long-term benefit, and hopefully reduce the obvious pressures for more single-use boat docks  
12 in and around Mitchell Bay, which are disfavored in the County's SMP; and finally, the  
13 record shows that whale watching and kayaking ventures are among the recreational  
14 opportunities that members of the public frequently use through access provided by the  
15 marina, thereby increasing recreational opportunities for the public in the shorelines of the  
16 area.

17 ***The Record includes substantial evidence that the application meets requirements to  
18 approve the Substantial Development Permit.***

19 22. Substantial and credible evidence in the record, including without limitation  
20 un rebutted findings and analysis provided in the Staff Report, and Applicant's Regulatory  
21 Analysis included in the record as Ex. 4(F), establishes that the applicant has met its burden  
22 to prove that the pending application satisfies all criteria for approval of a Substantial  
23 Development Permit, found at SJCC 18.80.110(H). Specifically, the applicant has met its  
24 burden to establish that: 1. The proposal is consistent with the policies of the Shoreline  
25 Management Act and its implementing regulations, Chapter 90.58 RCW and Chapter 173-27  
26 WAC, as amended; 2. The proposal is Consistent with the policies and regulations of the  
Shoreline Master Program in Chapter 18.50 SJCC; 3. The proposal is consistent with  
applicable provisions of SJCC chapter 18.80; 4. The proposal is consistent with the  
applicable sections of the SJCC code; 5. The proposal is consistent with the goals and policies  
of the Comprehensive Plan; and 6. The Examiner has conditioned approval of the project to  
make the proposal consistent with the shoreline master program and to mitigate or avoid  
adverse impacts.

27 ***23. The Record includes substantial evidence that the application meets the review  
28 criteria to approve the Shoreline Conditional Use Permit.***

29 23A. Substantial and credible evidence in the record, including without limitation  
30 un rebutted findings and analysis provided in the Staff Report, and Applicant's Regulatory  
31 Analysis included in the record as Ex. 4(F), establishes that the applicant has met its burden  
32 to prove that the pending application satisfies all criteria for approval of a Shoreline

1 Conditional Use Permit. The County's specific, unambiguous review criteria for a Shoreline  
2 Conditional Use Permit is set forth in SJCC 18.80.110(J)(4) (a) – (f).

3 a. The proposed use is consistent with the policies of RCW 90.58.020 and the policies  
4 of the Shoreline Master Program;

5 *The proposed expansion is consistent with the policies of RCW 90.58.020 and*  
6 *the policies of the Shoreline Master Program in that it provides public access*  
7 *to water-dependent activities like fishing, crabbing, kayaking, and whale*  
8 *watching.*

9 *RCW 90.58.020 states that priority is given to shoreline recreational uses*  
10 *including parks, marinas, piers, and other improvements facilitating public*  
11 *access to shorelines of the state.*

12 b. The proposed use will not interfere with the normal public use of public shorelines;

13 *The marina has no impact on publicly owned shoreline area, because it is on*  
14 *private property, but the redeveloped marina will facilitate public use of*  
15 *marine waters, and provide access to customers from many walks of life who*  
16 *enjoy kayaking, whale watching, and recreational boating activities.*

17 c. The proposed use of the site and design of the project is compatible with other  
18 permitted uses within the area;

19 *The marina already exists so compatibility with other permitted uses also*  
20 *exists. The record shows that over 20 waterfront properties in Mitchell Bay*  
21 *already have private docks on the shorelines fronting Mitchell Bay, so the*  
22 *marina use is fully consistent with such uses, and may decrease the demand*  
23 *for other, single-use, docks in the bay.*

24 d. The proposed use will cause no unreasonable adverse effects to the shoreline  
25 environment in which it is to be located;

26 *The proposed replacement should provide improvements to the shoreline*  
*environment as it will increase the penetration of light to the sea floor, reduce*  
*potential release of toxics into the water by replacing existing creosote pilings*  
*with galvanized steel piles, installing sealed floatation drums, and prevent*  
*grounding damage to the substrate, and other adverse impacts to the sea floor.*

e. The cumulative impacts of additional requests for like actions in the area, or for  
other locations where similar circumstances exist, shall not produce substantial

1 adverse effects to the shoreline environment, e.g., the total of the conditional uses  
2 shall remain consistent with the policies of RCW 90.58.030 and the Shoreline Master  
Program; and

3 *There are few shoreline environments where new marinas would be allowed*  
4 *by the current Shoreline Master Program. The only other marina marginally*  
5 *close to Snug Harbor is Roche Harbor, so the likelihood of additional marina*  
6 *expansion proposals is very small. Cumulative impacts are not likely.*

7 f. The public interest will suffer no substantial detrimental effect.

8 *The marina lies over state owned tidelands. The proposed redevelopment will*  
9 *decrease the overall nonconformity of the marina, by implementing current*  
10 *environmental design features, like light-permeable grating, non-creosote*  
11 *pilings, and docks that will be moved out into deeper water to minimize*  
12 *groundings during low tides. All of these aspects of the proposal provide*  
13 *substantial benefits to the environment, and are in the public interest.*

14 **24. Expansion, modification, or similar activities regarding a legal, nonconforming  
15 shoreline use – including a marina – are NOT “listed as prohibited” anywhere in the  
16 County’s existing Shoreline Management Plan, though the term “prohibited” does apply  
17 to many other specific uses or activities.**

18 24A. Some comments in opposition to the project focused on the notion that because SJCC  
19 provisions addressing uses in the “conservancy” shoreline areas states that “Marinas shall not  
20 be permitted”, then the pending applications to modify and upgrade the Snug Harbor Marina  
21 must be rejected, either outright, or because it allegedly expands a legal, non-conforming use  
22 or structure. These arguments run counter to specific, unambiguous language found in the  
San Juan County Shoreline Master Program, where the expansion of nonconforming uses  
is/are specifically included as a shoreline conditional use. Again, SJCC 18.80.100(J)(1)(b)  
unambiguously and clearly provides that “*Shoreline conditional uses include the following:*  
*b. The expansion of nonconforming uses.*” The pending applications are not seeking to obtain  
permits for a new marina where one does not exist today – which is not permitted under the  
above-referenced portion of the County’s code, SJCC 18.50.190(K)(4). Instead, the  
applications seek to redevelop an existing, legal, nonconforming use, i.e. the Snug Harbor  
Marina.

23 24B. The Staff Report correctly observes that expansion of an existing marina is not  
24 specifically prohibited by the San Juan County Shoreline Master Program. (Staff Report, at  
page 30). To the contrary, the SMP expressly provides that expansion of nonconforming

25 FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
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AS HEARING EXAMINER PRO TEM  
FOR SAN JUAN COUNTY

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1 shoreline uses are included as Shoreline Conditional Uses.

2 24C. SJCC 18.50.040(C) reads as follows: “Shoreline uses, modification activities, and  
3 conditions listed as “prohibited” are not eligible for consideration as a shoreline variance or  
4 shoreline conditional use permit.” Modification, expansion, adjustment, redevelopment or  
5 many other acts pertaining to an existing, legal, nonconforming marina, like Snug Harbor  
6 Marina, is/are not listed as “prohibited” anywhere in the County’s SMP.

7 24D. The term “prohibited” is used throughout the County’s existing SMP to  
8 unambiguously “prohibit” all sorts uses and activities in the shoreline area, including without  
9 limitation the following examples: solid waste disposal and liquid waste treatment facilities  
10 are prohibited on shorelines (SJCC 18.50.070(B)); Parking is prohibited on structures located  
11 over water (SJCC 18.50.090(A)); Internally lighted signs are prohibited (SJCC  
12 18.50.120(A)(4)); Use of herbicides to control aquatic weeds shall be prohibited except  
13 where no reasonable alternative exists and weed control complies with all state rules and  
14 regulations (SJCC 18.50.130(I)); in the Shaw Rural environmental designation, the following  
15 uses shall be prohibited – commercial recreational facilities, commercial transient  
16 accommodations by themselves or in combination with any other commercial use, food  
17 service facilities, and transient moorage facilities (18.50.220(B)(12)); and Marinas are  
18 prohibited in the ‘natural’ shoreline environment classification (SJCC 18.50.190(K)(5)).

19 24E. A marina is NOT “prohibited” in any of the 3 shoreline designations on which the  
20 existing marina is situated. A quick search for the term “prohibit” in the County’s Shoreline  
21 Master Program codified in Chapter 18.50 SJCC turns up approximately 109 matches. The  
22 County Code uses the term “prohibit” in many places, but it does not apply the term to  
23 expressly “prohibit” the proposed project, whether it is construed as a redevelopment,  
24 modification, or even an expansion of a legal, nonconforming shoreline use.

25 25. Any finding or other statement of fact contained in another section of this Decision  
26 that is deemed to be a finding of fact is hereby adopted as such and incorporated by reference.

## VI. CONCLUSIONS OF LAW.

1. The Record, including without limitation the County’s Staff Report and Ex. 4(f),  
Applicant’s Detailed Project Description & Regulatory Analysis, includes credible and  
convincing proof that the two Shoreline applications satisfy their respective approval criteria.

2. The overwhelming weight and credibility of evidence presented by the applicant and  
its consultants, particularly the Biological Evaluation, the flushing report, and other

1 environmental documentation supporting the project, constitutes substantial evidence in the  
2 Record that was not rebutted or credibly challenged by project opponents.

3 3. The principal purpose of SEPA is to provide decisionmakers and the public with  
4 information about potential adverse impacts of a proposed action. *Save our Environment v.*  
5 *Snohomish County*, 99 Wash.2d 363, 373 (1983). “SEPA is primarily a procedural statute  
6 that requires the disclosure of environmental information. SEPA does not demand a  
7 particular substantive result in government decision making; rather it ensures that  
8 environmental values are given appropriate consideration.” *Glasser v. City of Seattle*, 139  
9 Wn. App. 728, 742 (2007). In this matter, the Record includes substantial, credible, and  
10 un rebutted evidence to support issuance of the MDNS, and the marina redevelopment  
11 proposal is fully justified under SEPA as an appropriate measure that will substantially reduce  
12 and minimize the existing potential for negative environmental impacts that is presented by  
13 the marina in its current, deteriorating condition.

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

21 5. In this matter, the applicable San Juan County Shoreline Master Program provisions  
22 allow for expansion of a shoreline nonconforming use, such as the Snug Harbor Marina,  
23 through review and approval of a shoreline conditional use permit. New marinas are not  
24 permitted in the conservancy shoreline area; but, expansion of a legal, nonconforming marina  
25 use is expressly permitted as a shoreline conditional use under provisions that are listed in  
26 the enumeration of code sections that are part of the County’s Shoreline Master Program.

27 6. When it approved the San Juan County Shoreline Master Program, the Department of  
28 Ecology approved the County’s decision to permit recreation uses, like the marina, in its  
29 waters and along some shoreline areas. It included approval of provisions that allow for  
30 expansion of shoreline nonconforming uses, like the marina, through issuance of a shoreline  
31 conditional use permit. In so doing, both the County and DOE recognized that the area in  
32 which this proposal is located is an already-developed area within the county, which is  
33 suitable for recreation development. In an ideal world, we might well choose to preserve all  
34 shorelines in a natural, undisturbed state. But the Shoreline Management Act, DOE and the  
35 County understand that, in a practical world, development pressures exist and permitting a  
36 range of uses is necessary to accommodate those pressures. On the sliding scale of values  
37 contemplated by the Act and regulations, the natural condition of the shoreline portion of the  
38 marina simply does not justify effectively denying a conditional use permit for

1 redevelopment of a pre-existing, legal nonconforming marina use, a long-existing  
2 recreational use that is located along a shoreline area with dozens of private dock facilities.  
3 The redeveloped marina would allow for environmental recovery to occur along the current  
conservancy shoreline area, where boats, floats, and other marina equipment are now  
grounded during low tide events.

4 7. The County's limitation on locating marinas in the conservancy shoreline area applies  
5 only to new uses, not existing uses. Consistent with the Shoreline Management Act and the  
6 San Juan County Code, particularly SJCC 18.80.110(I), a balancing approach is required to  
determine whether approval should be given for the marina redevelopment.

7 8. First, the SMA clearly contemplates a balancing approach. "[C]oordinated planning  
8 is necessary in order to protect the public interest associated with the shorelines of the state  
9 while, at the same time, recognizing and protecting private property rights consistent with the  
10 public interest." RCW 90.58.020. Second, the SMA recognizes that alterations in the natural  
11 condition of the shoreline will occur with priority to be given for shoreline recreational uses  
12 like marinas. Id. The SMA does not prohibit development but attempts to ensure that  
development will occur in such a way to protect the public against "adverse effects to the  
public health, the land and its vegetation and wildlife, and the waters of the state and their  
aquatic life." Id. Lastly, the SMA fosters "all reasonable and appropriate uses" of the  
shorelines of the state. Id.

13 9. The San Juan County Code provides in part that: *"The purpose of a shoreline*  
14 *conditional use permit is to allow greater flexibility in application of the use regulations of*  
15 *the Shoreline Master Program in a manner consistent with the policies of RCW 90.58.020.*  
16 *Shoreline conditional use permits should also be granted in circumstances where denial of*  
*the permit would thwart the policy enumerated in RCW 90.58.020."* SJCC 18.80.100(I). This  
language supports a conclusion that a balancing approach is warranted.

17 10. The Record establishes that a redeveloped, more environmentally friendly marina,  
18 with the same amount of moorage spaces as exists today, will result in a net improvement to  
19 water quality and other natural aspects of Mitchell Bay. The Fairbanks Biological Evaluation  
20 explains that the project will produce a net reduction in shading surfaces, noting that the use  
21 of light-permeable decking will allow for greater benthic productivity and a smoother  
22 transition from light to dark areas. (Ex. 4(h), at page 16). The Biological Evaluation also  
23 explains that *"[a]n improvement in water quality will result from removing creosote-treated*  
24 *piles from the water... The removal will contribute to overall water quality improvement from*  
*effort to remove creosote-treated materials throughout Puget Sound."* The prospect of  
reduced grounding events with a marina moved out into deeper water provides benefits that  
seemingly speak for themselves, including without limitation less disturbance of the shoreline  
surface life by boats and floats left high and dry during low tide events.

1 11. In this matter, the marina redevelopment design does not increase its nonconformity  
2 with standards contained in the County's SMP. Instead, the project will provide an  
3 environmental benefit over existing conditions, enhancing the long-term health of Mitchell  
4 Bay. The overall impact of the project will be to decrease, rather than increase, the  
5 nonconformity of the marina use. Therefore, the project is not and cannot be construed as an  
6 unauthorized expansion of a non-conforming use.

7 12. If viewed in isolation, there is a gain in total over-water coverage by the redeveloped  
8 marina. However, given the use of light-permeable grated decking surfaces, there is a net  
9 reduction in shading surfaces now caused by the existing marina. Combined with the other  
10 environmental benefits that the redeveloped marina proposal can provide over existing  
11 conditions, the record weighs heavily in favor of the pending shoreline permits.

12 13. The marina redevelopment proposal furthers many of the goals of the SMA and the  
13 San Juan County SMP.

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

16 **VII. DECISION, CONDITIONS OF APPROVAL.**

17 Based on the record, and for the reasons set forth above, the Shoreline Substantial  
18 Development Permit and the Shoreline Conditional Use Permit for the Snug Harbor Marina  
19 Redevelopment Project are approved, subject to the following Conditions of Approval, which  
20 are attached hereto, and incorporated herein by reference.

21 ISSUED this 18<sup>th</sup> Day of July, 2016

22 

23 \_\_\_\_\_  
24 Gary N. McLean  
25 Hearing Examiner

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**CONDITIONS OF APPROVAL**

**Snug Harbor Marina Redevelopment Project**  
*Shoreline Substantial Development and Conditional Use Permits*  
*File No. PSJ000-14-0016*

Based on the Record, and under authority of applicable county code provisions, the Examiner imposes the following Conditions of Approval on the above-referenced permits. These conditions are reasonable and capable of being accomplished, and will serve to reduce the non-conformity of the existing marina use, and to reduce or prevent probable, significant, adverse, environmental conditions associated with the project and the redeveloped marina facility.

1. The Project shall be developed in a manner and design substantially in the form as the Revised Snug Harbor Marina Site Plans, prepared by TransPac Marinas, dated May 11, 2016, and included in the record as Exhibit No. 9. These plans appropriately and necessarily incorporate changes and revisions required by DNR. The applicant shall comply with the terms and conditions included in any associated permit or approval decision issued by San Juan County for the project, including without limitation the MDNS.

2. The applicant shall obtain any associated permit, license, or approval required by any state, federal, or other regulatory body with jurisdiction over aspects of the project; any conditions of regulatory agency permits, licenses, approvals or leases (including but not limited to the marina's Aquatics Land Lease with DNR) shall be considered conditions of approval for this project.

3. The applicant shall comply with all professional report conclusions and recommendations submitted in connection with these Shoreline Permits and associated approvals issued by the San Juan County for this project, as approved, referenced, relied-upon, and/or modified by the County.

4. Following completion of the Project, the applicant will implement reasonable practices and policies intended to prevent (to the fullest extent reasonably possible) boats with significant drafts, keels, or other features that would likely ground in upcoming low tides from being moored, tied, or placed in slips where they will ground during a regular tidal cycle, including possible steps to move or relocate vessels on a temporary basis to prevent grounding during a low tide cycle. To satisfy this condition, the applicant will submit a written description of the marina's "Grounding-Prevention Practices" for review and approval by the County Manager or his/her designee. This condition shall not apply to kayaks

1 or other watercraft that do not have engines, wastewater tanks, fuel tanks, or other possible  
2 sources of spills or pollution that can occur in a grounding situation.

3 5. 63 means 63. The number of existing boat moorage spaces shall not be increased  
4 above the number that exist at the time of this permit approval – 63. This is to ensure that  
5 the marina does not increase the nonconformity of its use. Recognizing that the existing  
6 Marina has a total of 63 slips or side-tie space available for boat moorage, and that the  
7 applicant has confirmed that it will not increase the marina’s existing nonconformity by  
8 increasing the number of spaces available for boat-moorage, the Snug Harbor Marina shall  
9 be limited to providing no more than a total of 63 slips or side-tie spaces for boat moorage.  
10 Further, spaces designated for kayak-use, fish-cleaning, or transient boat use on the final,  
11 approved site-plans for the redevelopment project, shall not be converted to boat moorage  
12 space that would increase the total number of moorage slips or spaces above 63.

13 6. To reduce the existing marina’s nonconformity and to effectuate San Juan County  
14 Comprehensive Plan Policy 3.5.C.16, which seeks to reduce the cumulative environmental  
15 impact of individual docks on the shorelines of the County and to provide moorage  
16 opportunities for inland and shoreline residents, the Marina will submit written certification  
17 to the County Manager on a bi-annual basis, beginning on January 1, 2017, then July 1, 2017,  
18 and each six months thereafter, confirming that at least 50% (fifty-percent) of the available  
19 moorage slips at the marina are allocated to permanent (i.e. long-term), rather than transient,  
20 moorage.

21 7. The applicant represented that the storage shed is now used for storage, and that its  
22 reconstruction is necessary. Accordingly, its use shall remain for that purpose, i.e. storage of  
23 marina-related tools, supplies, equipment, paddleboards, and other items commonly placed  
24 in such structures near a marina facility. The shed shall not be used for any commercial or  
25 retail purpose that would increase the nonconformity of the marina use. Any modification in  
26 the use of the storage shed will first require an amendment or modification of this Permit.

8. ***Best Boating Practices – to be Posted at the Marina and Included in Terms of  
Moorage Agreements:***

A) To reduce the existing marina’s nonconformity with the County’s  
Comprehensive Plan, because it does not have an accessible boat sewage disposal  
(pump out) facility, and to ensure ongoing compliance with applicable laws and  
regulations that prohibit the discharge of waste materials, gray water, sewage or  
similar substances from vessels moored at Snug Harbor Marina, the Marina shall  
submit a proposed collection of “Best Boating Practices” or similar written  
instrument, subject to review and approval by the County Manager or his/her  
designee, which will be posted (in summary form) and maintained at all times in  
appropriate locations at the Marina. To the fullest extent possible, the “Best

1 Boating Practices” shall include terms summarizing applicable waste-disposal  
2 regulations and measures that vessel owners, occupants, and operators should  
3 observe while in or around the Snug Harbor Marina; communicate that waste  
4 tanks are not to be discharged or emptied while in or around the marina; provide  
5 a list of available pump-out sites in the area, with numbers and hours, if deemed  
6 helpful; explain reporting requirements and an emergency contact  
7 number/regularly monitored email address to report a possible discharge at the  
8 Marina; and explain environmental-response measures that should/will be used  
9 in the event of an inadvertent or illegal discharge, including possible fines and  
10 penalties.

11 B) Acknowledgement of, and compliance with, applicable provisions of the  
12 above-referenced “Best Boating Practices” document, substantially in a form as  
13 approved by the County’s Attorney, shall be included in the terms of any  
14 moorage agreement for long-term, temporary, or other moorage arrangements  
15 used to lease slips or allow occupancy at the Marina.

16 NOTE: If the marina already posts substantially similar signage, or uses  
17 substantially similar language in existing moorage agreements, such items may  
18 be submitted for review and approval as described above.<sup>9</sup>

19 9. Except as modified below, the SEPA mitigation measures listed in the unchallenged  
20 MDNS issued for the Project are included herein as Conditions of Approval for the Project:

21 9.1. Timing limitations: In-water work shall only be allowed from July 16  
22 through February 15 for the protection of Salmon and Bull Trout.

23 a. Work below the ordinary high water line shall not occur from March 2  
24 through July 15 of any year for the protection of migrating juvenile  
25 salmonids.

26 b. Work below the ordinary high water line shall not occur from February 16  
through July 15 of any year for the protection of Bull Trout.

<sup>9</sup> At the discretion of the County Manager, the applicant and County staff may find it helpful to review the Department of Ecology’s website for “Boating Tips,” “Tips for Marinas,” and “Tips for Good Environmental Boating Practices,” at:  
<http://www.ecy.wa.gov/programs/spills/BoatingTips/BoatingTips.html>

Another source of helpful information may be Puget Soundkeeper Alliance’s online publication – “*Sound Information: A Boater’s Guide*” – which summarizes fines and penalties, among other things, associated with illicit pollution discharges into the waters of the state, at:  
<http://www.pugetsoundkeeper.org/wp-content/uploads/2013/01/2012-2013-Boaters-Guide.pdf>

1 9.2. Removal of all existing creosote piles shall be completed with vertical lift  
2 and using a vibratory hammer when necessary. The following methods  
3 shall be used to minimize an increase in turbidity in the marine water:

- 4 a. The vibratory hammer will be used to loosen the piles from the bottom,  
5 which minimizes the amount of sediment that clings to the pile, and the  
6 hammer will be shut off as soon as the pile end reaches the mudline.
- 7 b. Piles will be lifted slowly through the water column to allow any clinging  
8 sediments to fall back to the bottom.
- 9 c. The barge where the piles are placed will be lined with filter fabric or hay  
10 bales to prevent sediment from washing back into the water.

11 9.3. Pile driving operation shall occur between 2 hours after sunrise and 2 hours  
12 before sunset from April 1 through September 15 to protect Marbled Murrelet  
13 during nesting season.

14 9.4. Pile driving shall not occur when any Southern Resident Killer Whales or  
15 Steller Sea Lions are within 300 feet of the project site, or when Marbled Murrelet  
16 are within 160 feet of the project.

17 9.5. A qualified observer shall be on site during pile driving operations to watch  
18 for the presence or absence of Killer Whales and Steller Sea Lions within the 300-  
19 foot buffer zone and for the presence of Marbled Murrelet within the 160-foot  
20 buffer zone.

21 9.6 The contractor shall have the Spill Prevention, Containment, and Control  
22 Plan prepared by Transpac Marinas, date-stamped February 4, 2015, on site at all  
23 times as required by the Washington State Department of Ecology. This plan will  
24 address specific actions to prevent petroleum products from being discharged into  
25 surface water. The contractor shall also have oil-absorbent materials on site to be  
26 used in the event of a petroleum product spill, and will observe and implement  
any and all measures noted in the Spill Prevention, Containment, and Control Plan  
to avoid and/or prevent petroleum products or other deleterious materials from  
entering surface water.

9.7. Project activities shall not degrade water quality to the detriment of fish life.

9.8. Eelgrass and Macroalgae shall not be adversely impacted due to any project  
activities:

1 a. The construction barge shall not be allowed to ground in the project  
2 area;

3 b. Prop-wash shall not be directed in the eelgrass bed that is mapped to  
4 the south of the dock alignment; and

5 c. Barge anchors and cables shall not be placed in the eelgrass bed that  
6 is mapped to the south of the dock alignment.

7 9.9. Project activities shall be conducted to minimize siltation of the beach area  
8 and bed.

9 9.10. All floats shall include stops to keep the bottom off the tidelands at low tide.

10 9.11. Dock lighting shall meet the requirements of SJCC 18.60.170.

11 9.12. All construction materials shall be removed from the work site and natural  
12 material (boulders, rocks, significant beach material) will be returned to its original  
13 position at the end of construction.

14 9.13. Applicable "Common Saltwater Construction Provisions," found at WAC  
15 220-660-360, shall be implemented, observed, and strictly enforced by the applicant  
16 throughout all phases of the Project. Common construction provisions include job  
17 site access, equipment use, construction materials, sediment and erosion control  
18 containment, job site repair and revegetation. [NOTE: this provision corrects an  
19 apparently outdated reference in the MDNS, to WAC 220-110-270]

20 9.14. The project shall comply with all applicable provisions of the Unified  
21 Development Code, Title 18 San Juan County Code.

22 9.15. The project shall obtain all other required state and federal permits and shall  
23 comply with those permits

24 10. ***Failure to Comply with Conditions of Approval Shall Be Grounds for Rescission of  
25 Shoreline Permits.*** As provided in SJCC 18.80.110(N), captioned "Rescission of Shoreline  
26 Permits," any shoreline permit may be rescinded by the hearing examiner pursuant to RCW  
90.58.140(8), upon the finding that the permittee has failed to comply with the terms and  
conditions thereof. In addition, if the permittee is denied any other permit or authorization  
required by a state or federal agency with jurisdiction over aspects of the Project, the  
underlying shoreline permit(s) may be rescinded.

25 FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
26 DECISION – APPROVING SHORELINE  
SUBSTANTIAL DEVELOPMENT AND  
CONDITIONAL USE PERMITS FOR SNUG HARBOR  
MARINA – FILE NO. PSJ000-14-0016

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### EFFECTIVE DATE, APPEALS, VALUATION NOTICES

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

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

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

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