BEFORE THE SKAGIT COUNTY HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISION

Applicant:	American Gold Seafoods, LLC c/o Kevin Bright P.O. Box 669 Anacortes, WA 98221
File No:	PL 05-0904
Request:	Shoreline Substantial Development/ Conditional Use Permit
Location:	In North Skagit Bay in the channel north of the passage between Hope Island and Lone Tree Point. The project site is approximately 1,500 feet northwest of Lone Tree Point, at 48 24'28" N latitude and 122 33' 32" W longitude.
Shoreline Designation:	Aquatic
Summary of Proposal:	To add four additional cages to an existing salmon net pen rearing facility, referred to as the Hope Island facility. The new pens in total would encompass 86' by 458' attached to the west side of the existing facility, increasing the size of the overall structure by 42%.
Public Hearing:	After reviewing the report of Planning and Development Services, the Hearing Examiner conducted a public hearing on May 9, 2007. The Samish Indian Nation was given an opportunity to provide more information after the hearing and the applicant was allowed to respond to the Samish submission. With receipt of these additions, the record closed on May 30, 2007.
Decision:	The application is approved, subject to conditions.

FINDINGS OF FACT

1. American Gold Seafoods LLC (applicant) seeks a Shoreline Substantial Development and Conditional Use Permit to add four additional fish pens to an existing salmon net pen rearing facility.

2. The project is located in North Skagit Bay about 1,500 feet northwest of Lone Tree Point, at 48 24' 28" North latitude and 122 33' 32" West longitude. The facility is in the channel north of the passage between Hope Island and Lone Tree Point, in waters that are around 80 feet deep.

3. The location is a Shoreline of Statewide Significance. The environmental designation under the local Shoreline Master Program (SMP) is Aquatic. The facility is situated within Washington State Department of Natural Resources aquatic lands lease No. 20-A123356.

4. American Gold Seafoods is a Washington State based salmon farming company, producing fresh Atlantic salmon for the wholesale seafood market. American Gold purchased assets of Pan Fish USA, the previous owners in May of 2005. The company operates two freshwater hatcheries and eight saltwater net pen sites. The subject of the present application is called the Hope Island site.

5. At this site, the existing pen system measures 120' x 458', encompassing 54,960 square feet. There are currently 16 small pens. The proposal is to attach four larger fish pens to the existing array. The new pens would have overall dimensions of 86' x 458', increasing the existing facility's size by approximately 42%.

6. The existing facility is a floating steel cage pen system, held in place by an anchoring grid. On the surface are walkway structures made of galvanized steel with plastic foam-filled floats attached underneath. Nylon fish nets are suspended from the walkways and hang vertically to a depth of approximately 35 feet. The nets are weighted down by steel pipe that is attached by lines to the fish netting.

7. The present application is to enlarge the cage system by attaching additional walkways to the west side of the facility. The structures used to expand the site would be pre-constructed at a local ship yard and then towed into place. The new cage component would be attached to the existing cages by a system of metal pins and hinges that allow walkway joints to flex with the wave action. Installation at the site would take four to six days.

8. The adjacent shorelines are designated Rural Residential. The nearest residences to the facility are on the mainland over 1,500 feet to the east. The new pens would be placed on the opposite side of the existing array from these homes and would have little, if any, visual impact. The coloration of materials for cage components, netting, buoys, and other structures would be shades of grey or black that blend with the

surroundings. The operations at the site would be substantially the same as in the past, so that no appreciable increase in disturbance is predicted. Presently three full-time employees and one part-time seasonal employee work at the site. After the additional cages are attached, the number of full-time employees may increase by one.

9. The Hope Island facility is used as an intermediate nursery site in the overall fish raising operation. The process begins in the freshwater hatcheries. The hatcheries spawn captive brood stock and raise the juvenile fish until they reach the smolt stage when they are able to make the transition from fresh to salt water. Smolts are introduced to the Hope Island facility where they are acclimated to the marine habitat and are fed and held for about four months before being transferred to grow out sites near Cypress Island.

10. The Hope Island site is not far from the mouth of the Skagit River and so large volumes of fresh water are disgorged into the bay nearby. The result is a brackish environment that is less saline than the ocean proper. The introduction of smolts to salt water at this site reduces transfer stress, providing a better survival rate.

11. The new cages will give the site more rearing capacity, and allow more smolts to be introduced to the facility, but the increase in space will also be used to reduce the density of the fish being held. This will allow the fish to be grown to larger sizes before needing to be transferred off to other sites. The upshot should be not only better growth performance but also increased survival rates. The enhancement of size and health is intended to benefit the performance of the fish stocks all the way to eventual harvest.

12. The Hope Island facility has been in operation for over 20 years. Because it is a nursery site, the biomass is relatively small. The reduced biomass lowers the amount of salmonid organic wastes. The operational procedure is to raise one generation at a time. Two distinct classes of smolts are grown in the pens each year with the site lying fallow between each cycle of fish for approximately one month. Fish transfers from the site to other company facilities normally happen during the fall and early spring. Fish are pumped from the pens into the transport tanks of a live haul fishing vessel and moved to the Cypress Island sites. They are counted as they go into the holds.

13. The Hope Island site has some of the highest currents of any of the operational net pen sites on the Puget Sound. The company considers the location an ideal one for smolt entry because of its excellent water quality. During its history the facility has consistently met all monitoring requirements for water quality and sediments. In fact, optimal environmental conditions are the primary reason for pursuing expansion at this site. The idea is to improve the efficiency of the fish raising operations of the company overall. Even though more smolts will be brought in, the total biomass of fish held at the site will not substantially increase. Thus, little or no change is anticipated in results of environmental monitoring.

14. Shore support for the net pens is provided from docks at the Port of Anacortes. A support vessel picks up feed, nets and supplies at this facility and transports it to the pens in Skagit Bay. There are no plans to develop any nearby shoreline areas in relation to the operation.

15. The proposed project will encumber a surface area of approximately .0034 square miles. There are more than 250 square miles of surface area within Skagit Bay and the Whidbey Basin. There is some commercial and recreational crabbing and fishing in the bay, though the project area has not traditionally been used for these purposes. Ample area in the bay is available for navigation, and fishing. The project will not interfere with other shoreline uses or with upland uses.

16. The facility currently operates under a National Pollutant Discharge Elimination System (NPDES) Permit issued by the State Department of Ecology. The permit mandates Best Management Practices, including pollution prevention measures, fish escape prevention procedures and routine reporting of any fish escapes. The permit requires ongoing environmental monitoring and mandatory reporting for any non-compliance events. The NPDES monitoring requirements have rendered redundant monitoring requirements imposed by the County in its shorelines permit.

17. There is some minor escapement from the facility. The applicant company is committed to minimizing this. In 2001, the previous owners installed new cage systems, heavier gauged fish netting and new and increased mooring components. These improvements were designed to reduce the risk of stock escapement. A Biological Evaluation and Biological Assessment was prepared for this replacement project.

18. In 2005 company issued an updated Fish Escape Prevention Plan, Fish Escape and Recapture Plan, and Employee Manual on Escape Prevention. Procedures are in place for routinely tracking the number of fish on hand.

19. A Biological Evaluation and Biological Assessment, dated May 9, 2006, was prepared for the proposed net pen addition. An addendum was produced on July 13, 2006. According to the report, sediment studies show no evidence of excessive organic enrichment occurring from the operation. Overall, the report presents a highly favorable picture of the environmental impacts of the existing facility and, indeed, of raising Atlantic salmon in net pens generally. No likely adverse effects on any endangered species are predicted.

20. On November 20, 2006, the U. S. Army Corps of Engineers issued a Letter of Permission for this project, characterizing it as minor in nature and without significant cumulative impacts on the environment. Two special conditions were imposed: a) Compliance with the Endangered Species Act requirements set forth in the Biological Evaluation and b) limitation of construction to the period July 16 through February 15.

21. The current application was filed on December 29, 2005 (PL05-0904). A Mitigated Determination of Non-Significance (MDNS) under the State Environmental Policy Act (SEPA) was issued by the County on December 14, 2006. The MDNS contained standard conditions requiring the applicant to comply with the project information submitted for the proposal and to comply with applicable County regulations. The MDNS was not appealed. No comments were received from other County Departments.

22. Three letters were received from members of the public – all opposing the net pen expansion. The letters asserted that there is considerable scientific evidence that raising fish in net pens is having serious adverse environmental impacts.

23. A letter was received from the Skagit River System Cooperative, representing the fisheries interests of the Swinomish Indian Tribal Community and Sauk-Suiattle Indian Tribes. The letter expressed concerns over (1) potential disease effects from sea lice originating from aquaculture, and the lack of site specific information substantiating the claim that lower salinity prevents sea lice from becoming a problem at the Hope Island site, (2) the possible accidental release, naturalization and natural propagation of Atlantic salmon in the Skagit River System, (3) toxic compounds recently discovered on shellfish beds at sample sites in Skagit Bay, (4) the economic impact that tribal fisherman will face in light of farmed salmon in close proximity to their fishing grounds. The Cooperative asked for the preparation of an Environmental Impact Statement (EIS) to evaluate these issues.

24. At the hearing the Samish Indian Nation presented a statement in opposition to allowing the expansion of the net pen facility They noted that the site is a major migration route for salmon returning and leaving the Skagit River system. They pointed to research which, they said, attributes significant mortalities of wild juvenile pink and chum salmon in coastal British Columbia to sea lice infections picked up by migrating past fish pens. They pointed to articles that attribute ecological risk to the escape of farmed fish and to the use of antibiotics on farmed salmon. They said that Alaska has banned the farming of fish to "to protect wild stocks from the danger of disease and pollution as well as the possibility of escaped farm fish displacing or breeding with wild fish." Finally they emphasized that Washington's governor has launched high-priority salmon restoration projects in, among others, the Skagit watershed, under the Puget Sound Initiative Project. They said the increase and expansion of non-native Atlantic salmon pens at the Hope Island site could interfere with the restoration work to be done.

25. Subsequent to the hearing, at the Examiner's invitation, the Samish Nation provided a response to the information provided at the hearing by the applicant. The Samish post-hearing letter reiterated concerns about sea lice and questioned the adequacy of environmental monitoring of the sediments around the pens. The letter included an article which argues that salmon farming provides little benefit to the general economy.

26. The applicant responded to the concerns raised by both the Skagit River System Cooperative and the Samish Nation. The company's response is paraphrased as follows:

(1) Sea Lice. Sea lice are a marine species and cannot survive for long in a freshwater environment. For this reason, sea lice are not found at any of the applicant's freshwater hatcheries. Salinities in Skagit Bay as shown from the Lone Tree Point and Hope Island monitoring stations have an average salinity of around 23 ppt, lower than most other parts of Puget Sound where the average salinity ranges from 29 to 31 ppt. The complete development of sea lice through all life stages occurs only at salinities greater than 30 ppt. The lower salinity at the Hope Island site probably explains why the site has not had an infestation of sea lice over its 20 years of operation. In this regard it was noted that at the time pink salmon are out-migrating from the Skagit River watershed in early spring, the fish pens are typically receiving a new cycle of sea-lice-free salmon smolts from its freshwater hatcheries. In the applicant's view the potential risk of sea lice originating from the nursery operation at the Hope Island site and impacting out-migrating wild or hatchery origin juvenile Pacific salmon is extremely low to non-existent.

(2) Escapement and Competition. Available research shows that Atlantic salmon are incapable of diluting the Pacific salmon gene pool. Attempts to hybridize Atlantic salmon with Pacific salmon have been unsuccessful. In addition, escaped Atlantic salmon are unlikely to produce a self-sustaining run that will compete with the native Pacific salmon. In the past there have been some relatively large accidental releases of Atlantic salmon from pens, but no successful spawning events have been recorded in Washington rivers. Farmed salmon lose the instincts needed to survive in the wild. Escaped fish that are recovered often show that they are in a state of near starvation.
The newly replaced cage structures at the site are much stronger and better at preventing fish escapement than the original array. Operational escape prevention and recapture plans are in place. It is in the company's best interest to ensure that fish put into its pens makes it to the consumer.

(3) Toxic Sediments and Monitoring. Monitoring over the first 10 years at the site revealed no significant problems in the sediments near the pens. Each farm site must be managed so that sediment chemistry returns to natural conditions at the 100-foot perimeter around the net pen site. There is no evidence that any effects exceeded this sediment impact zone. The Department of Ecology and the Net Pen Advisory Group subsequently concluded that sampling every five years would be sufficient and that total organic compounds (TOC) is the property regulatory trigger. TOC values have not been exceeded. The current NPDES monitoring protocol will increase sampling frequent to twice every five years, notwithstanding evidence that the site meets or exceeds all performance standards.

(4) Contribution to the Economy. Domestic demand for seafood is growing. Both harvesting sustainable wild fisheries and aquaculture are needed to meet this demand. American Gold is the only American owned marine salmon farm in the United states. Company-wide it employs 80 people full time and over 200 people are employed at the seafood processing plant that is used by American Gold. Many others are employed in various support industries used by the company.

27. Nine years ago, the Washington State Pollution Control Hearings Board (PCHB) in a contested case looked at essentially the same questions that are being raised today in relation to, among others, the very Skagit Bay site under consideration. The overarching question they addressed is "What level of risk to Pacific salmonids is posed by the continued farming of Atlantic salmon in Puget Sound?" They considered risks of competition and predation by escaped net pen salmon, of disease transmission, of hybridization, and of colonization. They determined that the available evidence showed that the farming of Atlantic salmon "does not pose a reasonable potential threat" to wild Pacific salmon in the Puget Sound. They also discussed the considerable efforts made to prevent fish escapes.

28. In addition, the PCHB opinion addressed the issue of water quality and benthic impacts from fish farming. They found no evidence of pollution of the water column and none of adverse effects outside the 100-foot sediment impact zones

29. The tribes who question the subject application are particularly concerned because of the importance of wild salmon to their subsistence, their livelihoods and their culture. Recognizing that these are very significant concerns, the Examiner has carefully evaluated all the evidence in the record for some indication that the PCHB was wrong and that the farming of Atlantic salmon really does represent a threat to native stocks. The evidence in this record that to that effect is just not persuasive. The considerable scientific evidence of adverse impacts that the public letter writers assume was not brought forward. The tribes' points were effectively rebutted.

30. Moreover, there is a total lack of evidence of specific harm from the operations at the Hope Island site. Nothing demonstrates that the net pens there are contributing toxic compounds to shell fish beds in the vicinity. The presence of sea lice at the facility, the transmission of disease, adverse impacts from the use of antibiotics – none of these were shown.

31. Finally, the record does not document adverse economic impacts to the tribes or other fishermen from net pen operations in general or this net pen facility in particular.

32. Nevertheless, the history of permitting and of legislation regarding this and other net pen facilities in the County shows that the possibility that net pens are harmful has led to a highly restrictive regulatory approach.

33. The original Shoreline Substantial Development/Conditional Use Permit was issued by the County to build a fish pen facility in Skagit Bay on March 21, 1986. Subsequently modifications allowing relocation of the facility to deeper water were approved.

34. On March 3, 1987, the County placed a moratorium on applications for commercial net pens. The moratorium lasted until December 31, 1993. During the moratorium period, a considerable effort was put into modifying the aquaculture provisions of the County Shoreline Master Program (SMP). A Citizens Advisory Committee on Aquaculture was convened and met over a seven month period in 1991 and 1992. The County Planning Commission then took the matter up, held numerous open sessions, and made recommendations to the County Commission June of 1993. Subsequently the Commissioners approved aquaculture amendments in August of 1993. The Department of Ecology suggested various minor changes which were ultimately adopted by the Commissioners on May 22, 1995.

35. One result of this thorough process of consideration was changes that prohibited commercial fish net pens in Shorelines of Statewide Significance in Skagit Bay. See SMP 7.02(1)(D(2), 7.02(2)(B)(4) and 7.02(2)(B)(8)(b). This prohibition transmogrified the Hope Island facility into a nonconforming use.

36. The 1995 aquaculture amendments contained a specific provision relating to nonconforming uses. SMP 7.02(2)(B)(27) states, in part:

> a. Existing or non-conforming uses and/or structures proposed for expansion shall be evaluated pursuant to the provisions of Chapter 12 of this Master Program

37. Chapter 12 of the SMP allows a non-conforming use to continue provided that "it is not enlarged, or increased, or extended to occupy a greater area than was occupied on the date of adoption of this program, or applicable amendments thereto." SMP 12.02(1). However, this prohibition on expansion is subject to an exception set forth at SMP 12.04, as follows:

> If the Hearing Examiner and/or Planning Commission and/or Board of County Commissioners determines that the enlargement, extension or increase of the non-conforming use of shorelines or structures on shorelines can be accomplished <u>without appreciable threat to the health, safety and general welfare of the public or the shoreline environment and the purpose of this Program and the Act</u>, and that to deny the enlargement, extension or increase in the non-conformity would <u>constitute a hardship greater than the public benefit derived from denial of the nonconformity</u>, such proposal shall be permitted subject to terms and conditions established by the Hearing Examiner, Commission or Board and attached to the variance and/or conditional use permit required

of the applicant. (emphasis added)

38. Clearly, the amendments to the aquaculture portions of the SMP represent a legislative nod to the kind of criticism of net pen fish farming that the tribes have made in this proceeding. The prohibition of commercial fish net pens was explicitly made "in recognition of the importance of the Skagit and Samish Rivers to native and hatchery fish resources." See SMP 7.02(1)(D)(2).

39. But, it is also clear that expansion of existing net pen facilities in such areas was left open for consideration under the non-conforming use/structure provisions of the SMP. Express provision for this process was provided in the same list of regulations that contains the prohibition of new facilities. Had they wished to do so the Commissioners could easily have included "expansions" within the prohibition.

40. Thus, approval of this application hinges on the applicant's ability to meet a two-pronged test, namely that: (1) The expansion can be accomplished without appreciable threat to the health, safety and general welfare of the public or the shoreline environment and the purpose of the SMP and the Shoreline Act; and that (2) Denial of the expansion would constitute a hardship greater than the public benefit from denial of the nonconformity.

41. Looking at the entire record, the Examiner finds that the applicant has shown that the net pen expansion proposed at the Hope Island site can be accomplished without appreciable threat to the health, safety and general welfare of the public or the shoreline environment. The project has, likewise, been shown to be consistent with the purpose of the SMP and the Shoreline Act. That purpose is foster "reasonable and appropriate uses," including uses that are consistent with the control of pollution and prevention of damage to the natural environment and uses that are dependent on a shoreline location. See RCW 90.58.020.

42. Since the project involves no "appreciable threat," there would be no public benefit from denial. On the other hand, denial would entail a hardship for applicant. The hardship that denial would cause is simply preventing the applicant from improving the efficiency of its operations. The Hope Island is the smallest net pen site operated by the applicant. Expanding the site would allow the company to improve the biologic performance of the fish it raises. Denial would foreclose the opportunity for economic gains anticipated from the health and efficiency improvements. On the facts of this case, the Examiner finds that denial would constitute a greater hardship to the applicant than the public benefit gained.

43. The site was initially approved as meeting the criteria for a Shoreline Conditional Use Permit. Nothing about this expansion project changes the analysis of those criteria. The project would be consistent with the policies of the SMP and the ACT, would not interfere with normal public use of public shorelines, would be

compatible with other permitted uses in the area, would cause no unreasonable adverse effects to the shoreline environment, and would not be detrimental to the public interest. See SMP 11.03.

44. Under SMP 5.03, the location of the project on Shorelines of Statewide Significance requires that it be evaluated in light of preference to uses in the following order:

> (1) The statewide interest should be recognized and protected over the local interest;
> (2) The natural character of shorelines of statewide significance should be preserved;
> (3) Uses of the shorelines of statewide significance should result in long term benefits to the people of the state;
> (4) The natural resources and ecological systems of shorelines of statewide significance should be protected;
> (5) Public access to publicly owned areas in shorelines of statewide significance should be increased;
> (6) Recreational opportunities for the public should be increased on shorelines of statewide significance.

45. Nothing in the record demonstrates that this order of preferences is violated by the instant proposal. The project does not serve a local interest at the expense of statewide interests. The operation involved creates food products for the populace generally. The natural character of the shoreline will be only minimally impacted. There is no irreversible impact to the shoreline environment that would remain should the operations cease.

46. Condition 11 of the original permit prohibited the use of antifoulant paints to control the growth of marine fouling organisms. This was based on the use of tributyltin (TBT) which was the standard antifoulant paint used on marine vessels at the time. This substance has since been banned by Washington State for use in marine applications, but the use of other antifouling agents is not precluded. Indeed, a water based copper antifoulant treatment on nets has been approved. These developments support a change in the Condition 11, permitting the use of antifoulants on a case-by-case basis with the approval of the Department of Ecology.

47. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. Developments for expansion of non-conforming uses and structures on shorelines require a Shoreline Conditional Use Permit. The Hearing Examiner has jurisdiction over the issuance of such permits. SMP 11.02(b).

2. The requirements of SEPA have been met.

3. The proposal is a substantial development. RCW 90.58.030(3). Under the facts, the project, as conditioned meets the SMP standards for Substantial Development Permit issuance. SMP 9.02.

4. Under the facts, the proposal, as conditioned, meets the relevant criteria for approval of a Shoreline Conditional Use Permit. SMP 11.03.

5. Under the facts, the proposal, as conditioned, meets the preferences for Shoreline of Statewide Significance. SMP 5.03.

6. Under the facts, the proposal, as conditioned, is consistent with the requirements of SMP 12.04 which provides the basis for enlarging a non-conforming use.

7. Conditions 4 and 5 of the original permit impose monitoring conditions that are not longer needed in light of the monitoring program required by the Department of Ecology in its NPDES permit.

8. The Examiner recognizes that the interests of the native tribes in preserving their culture, their subsistence and their livelihood transcend the interest of the applicant company in improving the efficiency of its operations. He is also keenly aware of the precarious state of the wild salmon resource as shown by Endangered Species Act listings. And he is cognizant of recent governmental initiatives aimed at restoring the health of the Puget Sound in general. If it appeared that this fish pen enlargement project posed an appreciable threat to any of these concerns, he would deny the application. But, on this record, the case for such a threat simply has not been made. Of particular note, the United States Army Corps of Engineers' Letter of Permission follows a thorough federal agency review of the likely environmental consequences.

9. Any finding herein which may be deemed a conclusion is hereby adopted as such.

CONDITIONS

1. The applicant shall build and operate the project as described in the application materials, except as the same may be altered by these conditions.

2. The applicant shall comply with all applicable provisions of the Skagit County Code, including the Shoreline Management Master Program.

3. The applicant shall comply with the conditions of the MDNS and the conditions of the Corps of Engineers' Letter of Permission.

4. The applicant shall comply with all original conditions of Shoreline Substantial Development/Conditional Use Permit #3-86 and subsequent revisions thereof, with the exception of Conditions 4, 5 and 11. Conditions 4 and 5 are hereby stricken. Condition 11 is amended to read as follows:

> Antifoulants that are banned by Federal or State authorities shall not be used. Other antifouling agents may be used if permitted on a case-by-case basis by the Washington State Department of Ecology. Any such use and the approval thereof shall be reported to the County.

5. The applicant shall obtain all other permits required for this project. It is the responsibility of the applicant to inform the County of the pendency of permit applications with non-County agencies and of any related legal actions on any permit approval.

6. The project must commence within two years of the date of the final approval of the shoreline permits and be completed within five years thereof or the permits shall become void.

7. Failure to comply with any condition may result in permit revocation.

DECISION

The requested Shoreline Substantial Development/Conditional Use Permit is approved, subject to the conditions set forth above.

Wick Dufford, Hearing Examiner

Date of Action: June 15, 2007

Date Transmitted to Applicant: June 15, 2007

RECONSIDERATION/APPEAL

As provided in the Skagit County Shoreline Master Program, Section 13.01, a request for reconsideration may be filed with Planning and Development Services within five (5) days after the date of this decision. The decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with Planning and

Development Services within five (5) days after the date of decision or decision on reconsideration, if applicable.

DEPARTMENT OF ECOLOGY REVIEW

If approval of a Shoreline Variance or Shoreline Conditional Use becomes final at the County level, the Department of Ecology must approve or disapprove it, pursuant to RCW 90.58.140.