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*30 years of protecting the San Juan Islands (1979-2009)*

By Hand

April 21, 2009

Mr. Ron Henrickson, Planning Director  
San Juan County Community Development and Planning Department  
P.O. Box 947  
Friday Harbor, WA 98250

RE: Walker/Seidl Dock Application for Shoreline Substantial Development Permit,  
No. 09SJ004  
Tax Parcel No. 263222003

Dear Mr. Henrickson:

Friends of the San Juans (“Friends”) respectfully submits the following comments in response to the Shoreline Application (“Application”), Permit # 09SJ004, submitted by the Walkers and Bryce Seidl (“Applicants”) on March 3, 2009. The Application requests a permit for a two-user dock (“Dock”) over and near eelgrass in Post Office Bay, Shaw Island. Friends is concerned that the Application reflects a growing trend among shoreline property owners to “upgrade” the existing means by which they access the shoreline, such as mooring buoys, marine railways, or off-site marinas, in favor of individual or few-user docks. While Friends recognizes that the San Juan Islands community is composed of a significant segment of seafaring residents and guests, the community’s ability to access shorelines in the past without the significant number of new docks that are applied for each year indicates that the current number of dock applications may be related more to an increased desire for comfort than an absolute need.

In addition, the Application here originally failed to disclose that the Applicants have historically accessed the shoreline along their properties without the proposed dock. Comment letters rectified this omission, and offer evidence that similarly-situated

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residents have accessed the water without a pier, ramp, and float. In light of this information, and the proposed location within an eelgrass prairie, the proposal is inconsistent with the Shoreline Management Act (“SMA”), Shoreline Master Program (“SMP”), San Juan County environmentally-sensitive areas regulations, and public trust doctrine, and must therefore be denied.

## I. BACKGROUND

On March 3, 2009, Applicants submitted a request for a permit to construct a two-user dock in the midst of an eelgrass prairie in Post Office Bay, on the southwestern shore of Shaw Island. The Applicants have proposed this dock notwithstanding a history of opposition to other nearby dock proposals. According to an April 7, 2009 comment letter from Jon and Nancy Troxel, the Applicants reportedly opposed the Kaufman dock, constructed near the southern end of Post Office Bay, almost fifteen (15) years ago. John E. and Nancy J. Troxel, Comment on Walker and Seidl Dock, Permit #09SJ004, 2 (April 7, 2009) (hereafter “Troxel Comments”). The Seidls also allegedly objected to a dock that Jon and Nancy Troxel had discussed with them nearly twenty years ago. *Id.* The Troxels indicate that they responded to the Seidls’ aesthetic concerns by agreeing to forego their dock and relying on an anchored float, from which their children commuted to school in Friday Harbor as they advanced from kindergarten through high school. *Id.*

### A. The Application Materials Omit Information About Historic Shoreline Access.

The Application omits a substantial amount of information that is required for San Juan County (“County”) review of the dock request. For example, the Application did not explain that the Walkers currently have shoreline access via a buoy and low-bank gravel beach that they have used for approximately twenty years. Troxel Comments, at 1. In addition, the Seidls have purportedly enjoyed shoreline access for their property for over thirty years via a boat ramp. *Id.* In addition, Eleanor Bartig, who owns a parcel just north of the Applicants’ properties and Post Office Bay, reportedly accesses her more exposed shoreline with a mooring buoy, and has relied on this means of access for over twenty-five years. *Id.*

In addition to this information about existing facilities for shoreline access, the Application omits any meaningful analysis of impacts to the eelgrass prairie over which

the dock would be constructed. This oversight is discussed in greater detail in the section below.

**B. The Dock Likely Will Impact an Eelgrass Prairie, an Environmentally-Sensitive Area.**

The Applicants' shoreline constitutes a portion of the 400+ miles of San Juan County shorelines that the SMA designates as "shorelines of statewide significance." RCW 90.58.020. Even more critically, the dock would extend through and amidst an eelgrass prairie, with pilings driven into eelgrass, the pier and ramp shading eelgrass, and the float proposed for placement a mere ten (10) feet from a stand of eelgrass. In *Friends of the San Juans v. San Juan County*, the Washington State Shorelines Hearings Board ("SHB") explained the significance of eelgrass as follows:

It provides refuge sites and shelter from predators for fish and invertebrates, and for other small organisms. Eelgrass is a source of food for many marine animals and birds, and is habitat for red algae and other marine plants. It also provides physical stabilization of the nearshore area. Seagrasses baffle wave and tidal energy, protecting subtidal sediments and shorelines from erosion and can alter local and regional hydrography. Seagrasses such as eelgrass are the only rooted organisms in the near-shore region and they serve as the foundation for thousands of vertebrate and invertebrate species that use it for shelter, foraging, spawning habitat, and nurseries. For these reasons, protection of eelgrass and other seagrasses safeguards species richness, biodiversity, ecosystem structure, and many ecological processes.

SHB No. 08-005, FOF No. 15 (Aug. 25, 2008); *see also Holley v. San Juan County*, SHB No. 00-001 (July 31, 2000) (FOF No. 5) (noting that eelgrass is light sensitive and concluding that "the only way presently to 'ensure that a float will not impact eelgrass is not to build the float or avoid the site with eelgrass.'" at FOF No. 9).

State agencies have designated eelgrass a saltwater habitat of special concern in recognition of its importance in providing a number of functions and values in the marine environment. WAC 220-110-250. Eelgrass serves essential functions in the developmental life history of fish and shellfish, such as refugia and shelter for fish and invertebrates, food for marine animals and birds, and habitat for red algae and other

marine plants. Friends of the San Juans, *et al.*, San Juan County Eelgrass Survey Mapping Project Final Report, 6 (2004) (hereafter “Eelgrass Survey”); W. Judson Kenworthy, *et al.*, Seagrass Conservation Biology: An Interdisciplinary Science for Protection of the Seagrass Biome, 3-5 (2006) (excerpt) (hereafter “Seagrass Conservation”). Eelgrass also provides physical stabilization for the nearshore area by baffling wave and tidal energy, protecting subtidal sediments and shorelines from erosion. Seagrass Conservation, at 3-5.

Eelgrass is particularly important in Washington State. S. Wyllie-Echeverria, *et al.*, *Z. marina* Declines in San Juan County, WA, 2 (2003) (hereafter “Eelgrass Declines”). Washington protects eelgrass largely due to its many ecological services, such as habitat for spawning Pacific herring, out-migrating corridors for juvenile salmon, and foraging grounds for Great Blue Heron and other avians. Eelgrass Survey. Because of these functions, eelgrass also provides significant economic benefits to the state.

Eelgrass is particularly vulnerable to human-induced disturbances, including overwater structures. Kurt L. Fresh, *et al.*, Using light-permeable grating to mitigate impacts of residential floats on eelgrass *Zostera marina* L. in Puget Sound, Washington, 1 (2006). Even with light-pervious grating, docks are likely to affect eelgrass density. *Id.* at 7. As the number of docks has proliferated in Puget Sound, studies have documented a significant resulting decline in eelgrass densities, including in some instances the total loss of eelgrass beds. *Id.* at 2. Indeed, despite strict State and County criteria for protecting eelgrass, eelgrass declines have occurred in multiple bays and shorelines in the County, with the most dramatic losses in Westcott Bay, Garrison Bay and Mitchell Bay on San Juan Island. *Id.* One of the comment letters filed with CDPD notes a similar, substantial decline of eelgrass beds in the Neck Point, along the northwestern shore of Shaw Island.

The functions and values provided by eelgrass are largely place specific. Seagrass Conservation, at 4. Consequently, protection of eelgrass beds is preferable to replacement of beds because the surrounding environment loses the functions and values that the destroyed eelgrass beds provide. In addition to lost functions and values at the impact site, eelgrass patching will fragment the whole plant community, contributing to the eventual decline of an entire eelgrass bed. Eelgrass Declines.

In response to the Application, the University of Washington Friday Harbor Laboratories (“Labs”) submitted a comment letter March 26, 2009 that identified several potential adverse impacts of the Application. Letter from Kenneth P. Sebens to San Juan County Community Development and Planning Department (March 26, 2009) (hereinafter “Letter”). The Letter notes the substantial size and environmentally-sensitive location of the dock and gangway within an embayment that hosts extensive eelgrass. That letter also states that gaps in eelgrass beds, such as the one that Applicants identify as the location for the dock, are transitory and can become covered with eelgrass at a later date. Letter, at 1.

The cumulative impacts of docks, although difficult to quantify, are significant, and not limited to impacts from shading. Letter, at 1-2. These impacts include litter, toxic materials associated with boating, toxic metals that can leach from treated woods approved for marine construction, alterations in sediment deposition regimes along the shore, propeller wash impacts, addition of shell debris to sediments, and increased habitat for predatory organisms such as crabs and seastars that otherwise would not have such access to eelgrass beds. *Id.* In addition, some floating docks exhibit a halo effect – an area bereft of eelgrass larger than the footprint of the dock.

Although the Applicants propose to place the dock float ten feet from existing eelgrass, such location likely will prevent eelgrass from colonizing the area underneath the dock. In addition, the Application does not identify the size of the boats proposed for moorage at the dock to confirm that they will not contribute to eelgrass shading. Moreover, as noted by the Labs, locating such intensive development in the midst of this critical nearshore habitat may have significant impacts in addition to shading.

**C. The Dock Would Intrude Upon an Undeveloped Expanse of A State Scenic Byway.**

In April, 2008, the state designated the San Juan Islands ferry route as a State Scenic Byway. The byway follows the route north through San Juan Channel past Post Office Bay. At present there are only six docks along this 1-2 mile stretch of shoreline. Indeed, although two existing docks lie to the south of the proposed Dock, the next dock to the north, which is removed seasonally, is approximately ½ mile to the north. One must travel another ½ mile after that before encountering another dock to the north.

Thus, proposed dock would extend dock creep northwest along a shoreline that has managed to avoid such visual intrusion from the southern point of Post Office Bay well north.

## II. DISCUSSION

The Application must be denied because it does not offer sufficient information to evaluate its impacts, indicates based on its limited information that it is inconsistent with the SMA and SMP, contravenes the public trust, and would mar the newest State Scenic Byway.

### A. The Application is Incomplete.

The Application should be denied in the absence of a submission of all required information. *See* SJCC 18.80.020.C. In addition to a list of information expressly required for an application, the Code mandates that an application “be accompanied by plans and appropriate narrative and descriptive information sufficiently detailed to define clearly the proposed project and demonstrate compliance with applicable provisions of this code.” *Id.* In addition, for proposals in environmentally-sensitive areas, such as eelgrass, the Application must include “sufficient information about the location and extent of any affected [environmentally-sensitive areas] to demonstrate consistency with SJCC 18.30.110 through 18.30.160.” SJCC 18.80.020.C.10.

The Application does not offer sufficient information to demonstrate compliance with applicable provisions of the Code. As explained in detail below, an applicant has the burden of proving that existing facilities and alternative moorage are not adequate and feasible. However, the Application does not describe in any detail the mooring buoy or boat ramp means by which the Applicants have historically used their shorelines. The Application also does not evaluate whether those methods are adequate or feasible for current shoreline use.

The Application suffers similarly from a lack of analysis of the impacts associated with locating the proposed dock in an eelgrass prairie. Although the Application proposes to locate the dock float approximately ten feet from the nearest stand of eelgrass, it does not identify or evaluate impacts associated with driving pilings into eelgrass, or analyze other impacts that may arise from pier or ramp shading of eelgrass and actual use of a dock in close proximity to eelgrass. Moreover, although the

Application identifies a muddy, sandy substrate that constitutes eelgrass habitat in the area proposed for the dock float, it does not assess the likelihood that eelgrass will colonize that area, or the reasons for its asserted absence there. The Application also does not explore the use of mooring buoys, floats, or other moorage options that could be sited well beyond the most seaward extent of the eelgrass, and might thus avoid impacts to the eelgrass altogether pursuant to the County's environmentally-sensitive areas regulations.

**B. The Proposed Dock is Inconsistent With the Shoreline Management Act.**

1. The Application is inconsistent with policies established by the SMA.

The proposed dock cannot be permitted because it would contravene the primary shoreline protection policies of the SMA. *See* RCW 90.58.010 *et seq.*; *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998) (quoting *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994)). In 1971, the state legislature promulgated the SMA based on its findings that "the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state." RCW 90.58.020. The primary purpose of the SMA is "to protect the state shorelines as fully as possible." *Buechel*, 125 Wn.2d at 203; *Lund*, 93 Wn. App. at 336-37.

The SMA establishes a policy that "contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally the public right of navigation and corollary rights incidental thereto." *Buechel*, 125 Wn.2d at 203 (citing RCW 90.58.020; *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987)). To comply with that policy, all shoreline development must conform to the SMA, which "is to be broadly construed in order to protect the state shorelines as fully as possible." RCW 90.58.900; *Buechel*, 125 Wn.2d at 203.

Moreover, "the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible

consistent with the overall best interest of the state and the people generally.” RCW 90.58.020. “To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state’s shoreline.” *Id.* Finally, although the SMA contemplates limited alteration of natural shorelines, and gives priority to single-family residences in those circumstances, the SMA declares that such alterations will be authorized only in limited instances. *Id.*

In addition to providing protections for all shorelines, the SMA establishes heightened protections for San Juan County shorelines, which constitute “shorelines of statewide significance.” RCW 90.58.020. For these shorelines, the SMA sets forth a preference in the following order for uses that: (1) recognize and protect the statewide interest over local interest; (2) preserve the natural character of the shoreline; (3) result in long term over short term benefit; (4) protect the resources and ecology of the shoreline; (5) increase public access to publicly owned areas of the shorelines; (6) increase recreational opportunities for the public in the shoreline; and (7) provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary. *Id.*

The proposed dock here is inconsistent with SMA policies. Because the Dock would destroy portions of eelgrass, which is a critical marine habitat recognized by both state and local law for the essential role it plays in the development of commercially and ecologically valuable species, and extend over others and facilitate increased activity in the eelgrass bed, it would not protect against adverse effects to the land and its vegetation and wildlife or the waters of the state and their aquatic wildlife. It would also extend into waters along the ferry route from Friday Harbor to Orcas Island, which is a designated state scenic byway. The addition of one more structure along this route would mar the aesthetics of this route and, if the trend of shoreline development along this reach were continued, further decrease the scenic beauty of a ferry route that supports the tourist-based economy that operates in the San Juans. For these same reasons, it would not fall within any of at least the first six preferred uses for shorelines of statewide significance. *See* RCW 90.58.020.

2. The Application is inconsistent with policies established by SMA regulations.

In addition to the policies expressed in the SMA, the Department of Ecology's implementing regulations for local SMPs provide guidance here. Chapter 173-26 WAC. These regulations emphasize development that results in no-net-loss. For example, local jurisdictions must establish SMP policies and regulations to ensure no net loss of ecological functions. WAC 173-26-186(8)(b). Of particular applicability here, the regulations require SMPs that assure no net loss of shoreline ecological functions resulting from residential development. WAC 173-26-241(3)(j). And private docks will be authorized only where they will result in no net loss. WAC 173-26-221(2)(c)(iii)(C). Similarly, the regulations direct localities to create master programs for shorelines of statewide significance that preserve resources for future generations by severely limiting actions that would detrimentally alter natural conditions characteristic of shorelines of statewide significance. WAC 173-26-251(3)(b).

These regulations address not just the maintenance, protection, and preservation of the state's fragile shorelines, but also the restoration of healthy shorelines. WAC 173-26-186(8), -201(2)(f) (requiring that master programs set forth policies and actions for restoration of impaired shoreline ecological functions). Moreover, in critical saltwater habitats such as eelgrass beds, these regulations mandate that master programs "include policies and regulations to protect critical saltwater habitats and should implement planning policies and programs to restore such habitats." WAC 173-26-221(2)(c)(iii) (critical saltwater habitats).

The Application is inconsistent with the policies established by these regulations. The Application does not demonstrate that construction of a dock over and amidst eelgrass would result in no-net-loss of the function and value of the existing eelgrass prairie.

3. The Application is inconsistent with the SMA policy to avoid circumvention of other state laws.

The Dock is inconsistent with the SMA policies to recognize and protect statewide interest over local interests and to protect the resources and ecology of the shoreline because it would allow the circumvention of other state law. The Dock violates

the Hydraulic Code Rule mandate that “[p]iers, docks, floats, rafts, ramps...**shall be designed to avoid shading of eelgrass** (*Zostera* spp.).” WAC 220-110-300(3) (emphasis added).

**C. The Proposed Dock Is Inconsistent With the Shoreline Master Program.**

In 1978, San Juan County established its SMP to implement the SMA in the unique shorelines of statewide significance surrounding the San Juan Islands. The SMP establishes a strict policy to limit the proliferation of docks along the County’s shorelines. *Dagg v. San Juan County*, SHB No. 06-037, 4 (July 19, 2007) (Summary Judgment Order). Under the County’s strict SMP, docks are not permitted outright and, indeed, the SMP “clearly disfavor[s] the construction of residential docks.” *Shorett v. San Juan County*, SHB No. 06-038, COL No. 9 (June 7, 2007) (Findings of Fact, Conclusions of Law and Order); *see also Dagg*, SHB No. 06-037 at 5; *Bishop v. San Juan County*, SHB No. 99-034 (May 16, 2000); *Culver v. San Juan County*, SHB No. 98-39, COL No. 4 (Feb. 9, 1999) (Final Findings of Fact, Conclusions of Law and Order); *Bellevue Farm Owners Ass’n v. San Juan County, et al.*, SHB No. 96-23 (1996).

To avoid the “porcupine effect” of numerous individual docks and piers on the same shoreline, the SMP establishes preferences for methods to access the shoreline. San Juan County Comprehensive Plan (“Comprehensive Plan”) 3.5.C.; *Shorett*, SHB No. 06-038, COL No. 3. Generally, multiple use and expansion of existing facilities is preferred over construction of new facilities, mooring buoys and floats are preferred over docks and piers, and joint-use docks are preferred to single use docks. SJCC 18.50.190.C.; *see Shorett*, SHB No. 06-038 at COL No. 3. This preferential hierarchy is also intended to preclude further reductions in usable water surface. *Culver*, SHB No. 98-39 at 6. Because the Application does not demonstrate that it meets these preferential criteria, and because it has not addressed the potential for significant impacts in an environmentally-sensitive area, it must be denied.

1. The Application does not meet the statutory burden of proving that existing facilities and alternative moorage are not adequate and feasible.

The Application does not meet its burden of proof under the Code to show that existing facilities and alternative moorage are not adequate and feasible. SJCC 18.50.190.G.5.a.; *Culver*, SHB No. 98-39, at COL No. 5 (stating that under the County’s general regulatory criteria for docks, the applicant shoulders the burden of showing that neither existing facilities nor alternative moorage are adequate or feasible). Pursuant to the Code, the Applicants bore the burden of providing information showing that: (1) existing facilities are not adequate or feasible for use; and (2) alternative moorage is not adequate or feasible. SJCC 18.50.190.G.5; *Holley*, SHB 00-001, FOF 11 (recognizing that the SMP “requires all applicants for single-family residential docks to show that alternative moorage is not adequate and feasible”). The Code prohibits approval of a nonexempt dock or pier in the absence of such a showing. *Id.*

Although neither the SMA nor the SMP define “adequate” or “feasible,” the SHB has held that “adequate” means “enough or good enough for what is required or needed” or “barely satisfactory.” *Culver*, SHB No. 98-39 at 7 (citing Webster’s New World Dictionary, 2d ed., 510 (1972)). In addressing the term “feasible,” the *Culver* tribunal defined it as “suitable” or “capable of being used.” *Id.* An application does not meet these criteria by demonstrating that a private dock is more convenient to access and use than other facilities in an area. *Shorett*, SHB No. 06-038, at COL No. 5.

- a. *The Application does not demonstrate that existing facilities are inadequate and infeasible.*

The Application does not demonstrate that existing facilities are not satisfactory or capable of being used. *See id.* The Applicants purportedly already access their shorelines, and have done so for more than twenty years, via a mooring buoy and dinghy and a boat ramp. Such access has been deemed adequate and feasible.

Although Applicants assert that a mooring buoy would not survive winter storms in Post Office Bay, nearby property owners reportedly use a mooring buoy and mooring float year-round. As the SHB declared in *Holley*, “[t]he existence of mooring buoys lying in the cove, strongly suggests mooring buoys are a viable option for mooring boats in the area.” SHB 00-001, FOF 13. In addition, the Applicants claim that mooring buoy

and dinghy access would be unsafe, another claim that is contradicted by existing residents' use of mooring buoys year-round. Moreover, the Applicants do not support these assertions with data that would indicate that a mooring buoy or boat launch cannot be used for their access, and thus do not carry their burden under SJCC 18.50.190.G. Thus, like the SHB in *Shorett v. San Juan County*, which upheld the San Juan County hearing examiner's denial of a dock permit for an applicant who had successfully used existing facilities such as mooring buoys and boathouse and railway for many years, the County should deny the Application. SHB No. 06-038, *Id.* at COL 6.

- b. *The Application does not demonstrate that alternative moorage is inadequate and infeasible.*

Even if existing facilities were not adequate and feasible, the Application does not show that alternative moorage at the Captain's Landing Marina on Shaw Island is not adequate and feasible. *See Shorett*, SHB No. 06-038, COL No. 7. Although Applicants contacted the owner of the marina to ask whether moorage was available at that time, the Application does not indicate that moorage would not be available within a reasonable period of time. *Id.* Where moorage is "presently available or likely to become available within a reasonable waiting period," it is adequate and feasible. *Id.* (quoting *Stanford v. San Juan County*, SHB No. 06-004 (2006)). In determining the length of a reasonable waiting period, the SHB considers case-specific facts, such as the time of year and the size of the boat. *Id.* In *Shorett*, the SHB held that the dock applicants failed to meet their burden of demonstrating the unavailability of commercial moorage when the evidence presented to the SHB demonstrate that year-round moorage for a thirty-nine foot boat would be available at the Port of Friday Harbor, across the island from the applicant's residence, within six to nine months. *Id.* COL No. 8.

- c. *Improved convenience does not render existing facilities or alternative moorage inadequate and infeasible.*

Although the Dock might provide more convenient access and moorage than the ferry, a mooring buoy, or moorage at Captain's Landing, "[a]n applicant for a permit does not meet [Code] criteria by showing that a private dock is more convenient to access and use than other facilities in the area." *Stanford v. San Juan County*, SHB No. 06-004 (Sept. 20, 2006) (Findings of Fact, Conclusions of Law, and Decision). Thirty years of

SHB interpretations of the Code support the position that convenience is not an element of the adequate and feasible analysis. *See, e.g., Dagg*, SHB 99-021 at 5; *Christoffersen v. San Juan County*, SHB 97-07, 97-08, 3 (July 31, 1997) (Order Granting Summary Judgment and Dismissal); *Mineral Heights Ass’n, Inc. v. San Juan County*, SHB No. 77-25 (Sept. 29, 1977) (Final Findings of Fact, Conclusions of Law and Order). Indeed, the SHB concluded in *Kettering v. San Juan County* that “[i]f convenience alone were sufficient to override the San Juan County Shoreline Master Program, the County’s carefully planned approach to piers and docks would be essentially gutted.” SHB No. 89-10 (Oct. 11, 1989) (Conclusion of Law 6).

In addition, “[d]oing so would conflict with State Shoreline Management Act’s policy to foster planned use of the shoreline.” *Id.* The Application should be denied because, although the Dock would increase convenient access for the Applicants, existing facilities are adequate and feasible and thus provide a reasonable alternative that supports the SMP’s strong preference against residential docks.

2. The Application is inconsistent with the shoreline protection elements of the SMP.

In addition to prevention of the porcupine effect, the SMP establishes several significant policies and regulations to fulfill the SMA’s purpose of protecting the shorelines as fully as possible. Chapter 18.50 of the Code establishes the regulations, while Element 3 of the San Juan County Comprehensive Plan sets forth the goals and policies for the SMP. In addition, “[w]here provisions of this SMP conflict, the more restrictive of the provisions applies unless specifically stated otherwise.” SJCC 18.50.040.E.

SJCC 18.50.070 expressly addresses environmental impacts in the shoreline environment and dictates in pertinent part that: (1) the location, design, construction, and management of all shoreline uses and activities must protect the quality and quantity of surface and ground water adjacent to the site and must adhere to the policies, standards, and regulations of applicable water quality management programs and related regulatory agencies; (2) all shoreline uses and activities shall be located, designed, constructed, and managed in a manner that minimizes adverse impacts to surrounding land and water uses and must be aesthetically compatible with the affected area; (3) all shoreline uses and

activities must be located, designed, constructed, and managed to avoid disturbance of and minimize adverse impacts to fish and wildlife resources, including spawning, nesting, rearing and habitat areas, and migratory routes. SJCC 18.50.070.A., D., F.

The Dock is also inconsistent with SMP regulations that prohibit unnecessary intrusions into visual access of public areas. SJCC 18.50.140. The Code states that “[i]n order to limit interference with views from surrounding properties to the shoreline and adjoining waters, development on or over the water shall be constructed only as far seaward as necessary for the intended use.” SJCC 18.50.140.D. Such a visual impact contravenes the Code’s clear preference to avoid proliferation of structures along the county’s shorelines. See *Enselman v. San Juan County*, SHB No. 06-037, 4-5 (July 19, 2007) (Summary Judgment Order). Furthermore, these impacts would offend the aesthetic values that are “inherent in the values to be protected under the SMA...” *May, et al. v. Robertson, et al.*, SHB No. 06-031, 27 (April 16, 2007) (holding that “inherent in all of [the SMA’s] use preferences is protection of the aesthetics of the state’s shorelines, particularly for relatively undeveloped stretches like the beach that is the subject of this case”). The proposed Dock would be visible to individual users of the County’s shorelines as well as the ferries that travel between the islands and the islands and Sydney, British Columbia.

In addition, the proposal contravenes several elements of the SMP embodied in the Comprehensive Plan. Section 3.2 establishes the following goals and policies for shoreline use: (1) “[f]oster uses which protect the long-term benefits to the public against *compromise for reasons of short-term economic gain or convenience*;” (2) accommodate preferred shoreline uses (water-dependent, water-related and water-enjoyment uses and single-family residential uses) *while protecting and preserving shoreline resources and avoiding hazardous or sensitive areas*; and (3) all requiring that shorelines uses conform to the applicable policies of the SMP and to the goals and policies of other elements in the Comprehensive Plan. Comprehensive Plan § 3.2.A. (emphasis added).

The SMP further establishes a conservation goal “[t]o assure the preservation of scenic and non-renewable natural resources and to assure the conservation of renewable natural resources for the benefit of existing and future generations.” Comprehensive Plan § 3.2.F. The SMP identifies policies such as the following to facilitate that goal: (1)

assure the preservation, reclamation, rehabilitation, and where possible, the enhancement of unusual, fragile and/or scenic elements, and of non-renewable natural resources; and (2) preserve critical marine and terrestrial wildlife habitats; (3) encourage the preservation scenic views, open space and vistas. *Id.*

The SMP also sets forth policies to protect environmentally sensitive areas, which include fish and wildlife habitat such as the eelgrass beneath and around the area proposed for the Dock. Comprehensive Plan § 3.4.D; SJCC 18.30.160. These policies include: (1) the preservation of unique, rare and fragile shoreline resources; (2) protection of areas with unique and/or fragile geological or biological characteristics, from incompatible physical public access; and (3) discouragement of development on shorelines that are identified as hazardous for or sensitive to development or at least a limitation on their development in a manner that minimizes environmental damage. Comprehensive Plan § 3.4.D.

The SMP also recognizes the designation of San Juan County's shorelines of statewide significance, establishes policies that govern these shorelines, and declares that "uses which are not generally consistent with these policies should not be permitted on such shorelines." Comprehensive Plan § 3.4.F. Applicable policies include the following: (1) recognizing and protecting the statewide interest over the local interest; (2) preserving the natural character; (3) using the shorelines in ways that will produce long term benefits as opposed to short term benefits or conveniences in accordance with the following: (a) actions that would commit resources to irreversible uses or would detrimentally alter natural conditions characteristic of such shorelines should be severely limited, (b) the short term economic gain or convenience associated with a proposed development should be evaluated in relationship to long term and potentially costly impairments to the natural environment, and (c) the visual impact of every proposed project should be thoroughly evaluated and adverse impacts should be minimized; and (4) protection of the natural resources and systems, *and the mandate to leave undeveloped those areas containing unusual or fragile natural resources or systems. Id.* (emphasis added).

Finally, the SMP establishes strict policies for boating facilities, including docks and piers, to protect shoreline resources. Comprehensive Plan § 3.5.C. Boating facilities

should be located, designed, and constructed “to minimize adverse effects upon, and to protect all forms of aquatic, littoral or terrestrial life including animals, fish, shellfish, birds and plants, their habitats and their migratory routes.” Comprehensive Plan § 3.5.C.1. “The location, design, configuration and height of boathouses, piers, ramps, and docks should both accommodate the proposed use and minimize obstructions to views from the surrounding area.” Comprehensive Plan § 3.5.C.3. “In providing boating facilities, the capacity of the shoreline site to absorb the impact should be considered.” Comprehensive Plan § 3.5.C.5. “The use of mooring buoys should be encouraged in preference to either piers or floating docks.” Comprehensive Plan § 3.5.C.6. To spare San Juan County from the so-called ‘porcupine effect’ created by dozens of individual private docks and piers on the same shoreline, preference should be given to the joint use of a single structure by several waterfront property owners, as opposed to the construction of several individual structures. Comprehensive Plan § 3.5.C.11. And finally, “[t]he capacity of the shoreline site to absorb the impacts of waste discharges from boats and gas and oil spills should be considered in evaluating every proposed dock or pier.” Comprehensive Plan § 3.5.C.13.

As demonstrated by a review of these policies, the Dock is inconsistent with the SMP. The Dock would eliminate eelgrass under the pilings, shade eelgrass, and potentially impose additional impacts, thus failing to avoid adverse impacts to fish and wildlife resources. It is also aesthetically incompatible with the natural western shoreline of Shaw Island that currently remains undeveloped for approximately ½ mile north from Post Office Bay.<sup>1</sup> Moreover, the Dock and its adverse impacts to eelgrass and the viewshed violate the preservation policies established for shorelines of statewide significance.

**D. The Cumulative Impacts of the Proposal are Inconsistent With the SMA and SMP.**

The cumulative adverse impacts alone of docks over eelgrass throughout San Juan County demonstrate that the Permit should be vacated. Not only is it logically appropriate to consider cumulative impacts, the SHB noted in *Bishop v. San Juan County*

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<sup>1</sup> During winter months, when the next dock to the north is removed, this unbroken stretch of undeveloped shoreline extends well over 1 mile.

that “[i]n considering any shoreline development, particularly a dock or pier, it is essential to evaluate the cumulative impacts of similar proposals.” SHB No. 99-034 (May 16, 2000) (Final Findings of Fact Conclusions of Law, and Order (Corrected)) (citing *Hayes v. Yount*, 87 Wn.2d 280, 287, 552 P.2d 1038 (1976) for the determination that “[l]ogic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together.”). In addition, cumulative impact analysis serves the Washington State legislature’s purpose in enacting the SMA to prevent the “uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020.

Increasing the number of docks, such as the proposed Dock, throughout San Juan County, or even in the vicinity of Shaw Island, would have substantial cumulative impacts.<sup>2</sup> And just as the SHB found in denying a dock on Brown Island in *Harrison*, “the cumulative impact of many such small docks could be adverse.” *Harrison*, SHB No. 83-7, at 3. In *May*, the SHB found that “[w]here overwater structures cause adverse impacts on the marine environment, the extent of these impacts is magnified by increasing numbers of such structures” and “[t]o the degree that each single dock structure alters the light, substrate, and wave energy regimes of nearshore habitat areas, they contribute to a cumulative effect on those areas.” *Id.* at 12.

There are currently no other docks from Post Office Bay to the northwest for ½ mile along the Shaw Island shoreline. Issuance of the requested permit would promote dock creep along the western shores of Shaw Island, and the cumulative impacts of other such structures in similar locations would contravene the mandate of the SMA to protect San Juan County’s shorelines of statewide significance. *See Bishop v. San Juan County*, SHB No. 99-034, 5. Moreover, the County promulgated its Shoreline Master Program “to control the proliferation of docks along the shorelines of its islands.” *See Stanford v. San Juan County*, SHB No. 06-004, 7 (Sept. 20, 2006). Thus, to avoid the “porcupine effect” that would be created by numerous private docks and piers along the shoreline, the SMP establishes a hierarchy that prefers use of existing facilities. *See id.*

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<sup>2</sup> The appropriate geographic scope for a cumulative impacts review here is San Juan County, because San Juan County Hearing Examiner decisions are relied upon for all development county-wide. Thus, in the event of Hearing Examiner approval of the proposed Dock, similarly-situated dock applicants would

In addition, the cumulative impacts of allowing docks over eelgrass throughout San Juan County are substantial. There are currently 2,841 parcels in San Juan County with eelgrass, and 293 of those parcels also have a dock. While these eelgrass parcels may not all have eelgrass extending along their entire shorelines, or may not all be developed with docks, the potentially substantial number of future docks on parcels with eelgrass, in addition to the significant number of docks currently over eelgrass, would magnify light, substrate, and wave energy impacts throughout the San Juan Islands. These cumulative impacts would be inconsistent with the SMA and the SMP.

**E. The Application Contravenes the Code Because the Dock Would Not Avoid Environmentally-Sensitive Areas.**

The Dock would be inconsistent with the County's environmentally-sensitive area regulations. SJCC 18.30.160. Those regulations identify marine habitat areas include all kelp and eelgrass beds and establish protection standards for any approvals for activities within 300 feet of those habitats. SJCC 18.30.160.B.1. In those areas a proposal must mitigate to the maximum extent feasible any significant adverse impacts to habitat functions and values and must do so first by avoiding the impact by not taking the action or parts of actions on the portion of the site that contains the habitat area. *Id.*

As an initial matter, the proposal does not meet this criterion because it does not evaluate the impacts that the Dock may have on its surrounding eelgrass prairie. The Application merely states that it will locate the dock float ten feet from the eelgrass. The Application does not identify anticipated impacts, or respond to those identified by the Friday Harbor Labs. Instead, the Application appears to assume that by extending the float into an area currently devoid of eelgrass it will minimize impacts to that eelgrass. In the absence of any meaningful evaluation of potential impacts, the Application does not meet the requirements of the environmentally-sensitive areas regulations.

**F. The Application Contravenes the Public Trust.**

Approval of the Application is inappropriate because it would violate the public trust. The public trust's origins are rooted in ancient Roman law, which proclaimed that the sovereign held the beds of navigable waters in trust for the people for navigation,

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anticipate their approval of their docks located in eelgrass prairies, regardless of the distance from the proposal at hand.

commerce, and fisheries. *See Caminiti v. Boyle*, 197 Wn.2d 662, 668-69, 732 P.2d 989 (1987). The SMA incorporates elements of the public trust, but does not supersede the public trust. *See Orion Corp. v. State*, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987).

Because approval of the Application is likely to impair an environmentally-sensitive area that forms part of the corpus of the trust, and that provides critical habitat for fisheries, it should be denied as inconsistent with the trust. *See id.*

**G. The Application Is Inconsistent with the State Scenic Byway.**

In April 2009, the Washington State Senate voted to designate the Anacortes San Juan Island ferry route a state scenic byway. SB 5289. Criteria for designating state scenic byways include: (1) the scenic quality of the byway; and (2) natural aspects, such as geologic formations, water bodies, vegetation, and wildlife. RCW 47.39.100.

According to the Washington State Transportation Commission, the purpose of the scenic byways is to interpret, promote, and protect scenic features. And a Town of Friday Harbor Centennial website identifies an educational goal that exemplifies the need to protect San Juan County shorelines from unnecessary development – “[t]o educate the public regarding islanders’ stewardship ethics in protecting and preserving the unique environment, natural resources, watchable wildlife, scenic vistas, and quality of life through interpretive signage.” Available at

[http://www.historicfridayharbor.org/scenic\\_byways.html](http://www.historicfridayharbor.org/scenic_byways.html). In addition, the State Transportation Commission may remove the designation of a route if it no longer possesses the intrinsic qualities or fails to meet the criteria that supported its designation. RCW 47.39.100. Thus, the development of shorelines along the state scenic byway of the San Juan Island ferry route would hinder existing efforts to protect the aesthetic beauty of that corridor.

**C. Conclusion.**

The Application must be denied. Existing facilities and alternative moorage are adequate and feasible. The Application has not evaluated pile-driving, shading, and other dock and boat related impacts to eelgrass, an environmentally-sensitive area. And the cumulative impacts of allowing similar development throughout the San Juan Islands, would be substantial. Therefore, state and local legal authority prohibit the construction of the proposed Dock.

Respectfully submitted,

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