

1 rescinding of a permit. RCW 90.58.180(1). Taylor Resources opposes the motions for summary
2 judgment, claiming that Pierce County's actions in this case constituted revocation of their
3 shoreline permit.

4 In considering the motions, the Board reviewed the following submissions:

- 5 1. Coalition's Motion to Dismiss.
- 6 2. Taylor Resources Response to Motion to Dismiss.
- 7 3. Declaration of Duncan M. Greene with Attachments 1-15.
- 8 4. Coalition's Reply on Motion to Dismiss with Exhibit 1.
- 9 5. North Bay Partners Response to Coalition's Motion to Dismiss.
- 10 6. Pierce County's Motion to Dismiss.
- 11 7. Taylor Resources' Response to Pierce County's Motion to Dismiss.

12 The Board considered the motions on the record before it, without oral argument. Based upon
13 the records and files in the case, the evidence submitted, and the briefing of counsel, the Board
14 enters the following decision.

15 Factual Background

16 Taylor Resources Inc. applied for a shoreline substantial development permit in 2000 to
17 conduct commercial geoduck cultivation on private tidelands in Pierce County known as the
18 "Foss Farm." The application indicated the proposed starting date for the project would be
19 summer 2000 and the estimated duration of the activity would be "on-going." (Greene
20 Declaration, Attachment 1). A public hearing on the proposal was conducted by the Pierce
21 County Hearing Examiner in December 2000. (Greene Declaration, Attachment 2). The Staff

1 Report and testimony from staff indicated the project would involve planting baby geoducks in
2 PVC pipes for cultivation and subsequent harvest after approximately five years. The company
3 would then "repeat the process." The testimony at hearing acknowledged that Taylor's request
4 was for on-going activity. The staff recommended approval of the application. (Greene
5 Declaration, Attachment 2). In 2000, the Pierce County Hearing Examiner found the geoduck
6 project consistent with governing regulations and granted the permit subject to several conditions
7 including the following language regarding timing:

8 4. Construction or substantial progress toward construction of a project
9 for which a permit has been granted pursuant to the Act must be
10 undertaken within two (2) years after the approval of the permit.
11 Substantial progress toward construction shall include, but not be limited
12 to the letting of bids, making of contracts, purchase of materials involved
13 in development, but shall not include development or uses which are
14 inconsistent with the criteria set forth in WAC 173-14-100. Provided,
15 that in determining the running of the two (2) year period hereof, there
16 shall not be included the time during which a development was not
17 actually pursued by construction and the tendency of litigation
18 reasonably related thereto made it reasonable not to so pursue; provided
19 further, that local government may, at its discretion extend the two (2)
20 year time period for a reasonable time based on factors, including the
21 inability to expeditiously obtain other governmental permits which are
required prior to the commencement of construction.

5. If a project for which a permit has been granted pursuant to the Act
has not been completed within five (5) years after the approval of the
permit by local government, the local government that granted the permit
shall, at the expiration of the five (5) year period, review the permit, and
upon a showing of good cause, do either of the following:

1. Extend the permit for one (1) year; or
2. Terminate the permit; provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.

1 (Greene Declaration, Attachment 2). The County included this language as a standard permit
2 condition. The Pierce County planner assigned to the project indicated this language was
3 “boilerplate.” (Greene Declaration, Attachment 4, p. 15).

4 After the permit was granted, Taylor Resources began activities necessary to establish the
5 geoduck farm. They surveyed the area, notified necessary Tribes, and registered with
6 Washington Department of Fish and Wildlife and the Washington Department of Health. They
7 then began planting young geoduck in PVC pipes and maintaining the farm with protective
8 netting. (Greene Declaration, Attachment 4, p. 128-130). They planted portions of the property
9 with young geoduck each year and by the end of five years they had completed an initial planting
10 of geoduck over the entire farm area. (*Id.* at pp. 136, 169).

11 While they were developing the farm, Taylor Resources had conversations with Ty
12 Booth, the assigned planner for Pierce County, in which he indicated that once the farm was
13 established within a five-year period, the farming could continue on beyond the construction
14 period. (Greene Declaration, Attachment 4, p. 17). This view was also conveyed in writing to
15 one of the project opponents by Vicki Diamond, Supervisor of Current Planning for Pierce
16 County, who indicated that there was no expiration of a shoreline permit for geoduck cultivation
17 once the use was initiated and established. (Greene Declaration, Attachment 4, p. 84;
18 Attachment 7). In answer to the question “Once these geoduck permits are issued, how long do
19 they run?” she responded:

20 We have not placed any expirations of this particular activity for several
21 reasons. The aquacultural is to be an on going activity and once the
seeds are planted, it would take up to approximately 7 years for the

1 geoduck to reach a size to harvest for market. In a Conditional Use
2 Permit, there are time limits for expiration of the approval, which is
3 usually directed at development to be substantially completed within a
4 two year time period and finish within a 5 year window. If the activity is
aquacultural, then the activity would not be allowed to start if applicant
did not proceed with the harvest or planting with the time periods listed
above. This had not been the case of the geoduck applications.

5 (Greene Declaration, Attachment 7). At this point in time Pierce County had no formal
6 administrative position regarding the need to obtain successive permit approvals to conduct on-
7 going geoduck farming operations:

8 After the geoduck farm was in full operation, neighbors and others began to express
9 growing dissatisfaction with geoduck farming as a use on the shoreline. Many opponents
10 contacted the County, and ultimately filed a petition in June 2007, requesting that the County
11 revoke Taylor Resources shoreline permit for the Foss Farm. (Greene Declaration, Attachment
12 11). Pierce County held a number of internal meetings in the process of developing an
13 administrative policy on permit coverage for geoduck farming. The majority of staff believed
14 the five-year timeframe for establishing the farm should also limit the length of time it could
15 operate. (Greene Declaration, Attachment 4, p. 17-19, 84). In August 2007, Pierce County
16 finalized a formal position on the length of time a shoreline substantial development permit
17 authorized geoduck cultivation and issued an Administrative Determination on August 8, 2007,
18 informing Taylor Resources that its shoreline permit had expired at the end of six years. (Greene
19 Declaration, Ex. 5). The Determination indicated that further work at the site would have to be
20 authorized by a new permit. *Id.* Taylor Resources appealed the County's Determination to the
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1 Pierce County Hearing Examiner, who upheld the County's decision. (Greene Declaration,
2 Exhibits 12-15).

3 Taylor Resources appealed the Examiner's decision to this Board in SHB No. 08-010 and
4 later appealed the Examiner's decision on reconsideration to this Board in SHB No. 08-017. The
5 cases have been consolidated for hearing. Respondents Pierce County and Coalition to Protect
6 Puget Sound Habitat have moved to dismiss the case arguing that the Board lacks jurisdiction
7 over the matter. Taylor Resources is contesting the motion, and claims the Board has
8 jurisdiction over the case because Pierce County's action rescinded its shoreline permit for the
9 Foss Farm site.

10 Analysis

11 The Coalition and Pierce County claim the Board lacks jurisdiction over this case
12 because it involves expiration of a shoreline permit rather than the granting, denying, or
13 rescinding of a shoreline permit. Taylor Resources contends the Board has jurisdiction over its
14 appeal because Pierce County's Administrative Determination rescinded its shoreline permit.
15 The Board's jurisdiction is defined by statute as follows:

16 Any person aggrieved by the granting, denying, or rescinding of a permit
17 on shorelines of the state pursuant to RCW 90.58.140, may, except as
18 otherwise provided in chapter 43.21L, RCW, seek review from the
19 shorelines hearings board by filing a petition for review within twenty-
20 one days of the date of filing as defined in RCW 90.58.140(6).

21 RCW 90.58.180(1)

1 The issue before the Board for resolution in this motion is whether Pierce County's
2 Administrative Determination regarding Taylor Resources permit SD 22-00 constituted
3 rescission of a shoreline substantial development permit.

4 The Coalition and Pierce County argue that the permit could not be rescinded because it
5 had already expired by its own terms. They reason that Pierce County's Administrative
6 Determination simply notified Taylor Resources that the permit had expired. Under this
7 analysis, the Determination did not terminate any rights under the permit because any such rights
8 no longer existed.

9 The Taylor Resources permit addressed project timing in the standard language contained
10 in Conditions 4 and 5:

11 4. Construction or substantial progress toward construction of a project
12 for which a permit has been granted pursuant to the Act must be undertaken
13 within two (2) years after the approval of the permit. Substantial progress
14 toward construction shall include, but not be limited to the letting of bids,
15 making of contracts, purchase of materials involved in development, but
16 shall not include development or uses which are inconsistent with the
17 criteria set forth in WAC 173-14-100. Provided, that in determining the
18 running of the two (2) year period hereof, there shall not be included the
19 time during which a development was not actually pursued by construction
20 and the pendency of litigation reasonably related thereto made it reasonable
21 not to so pursue; provided further, that local government may, at its
discretion extend the two (2) year time period for a reasonable time based
on factors, including the inability to expeditiously obtain other
governmental permits which are required prior to the commencement of
construction.

5. If a project for which a permit has been granted pursuant to the Act has
not been completed within five (5) years after the approval of the permit by
local government, the local government that granted the permit shall, at the
expiration of the five (5) year period, review the permit, and upon a
showing of good cause, do either of the following:

1. Extend the permit for one (1) years, or
2. Terminate the permit, provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.

The moving parties read these conditions to limit authorized activity under a SDP to a maximum of five years, or six years, if extended by the County. A permit would expire at the end of five years without further action by the local government, and previously authorized activity would be prohibited unless the project owner obtained a new SDP permit.

Taylor Resources asserts that the permit was granted for ongoing geoduck cultivation. They maintain that the farm was established within the five year period referenced in the project conditions and that SD 22-00 contemplated and authorized ongoing use of the farm. Taylor contends its permit was rescinded when Pierce County changed its interpretation of the governing regulations, and issued the Administrative Determination terminating its approval to continue cultivating geoducks.

Condition 4 of SD 22-00 is directed to a permit holder's responsibility to diligently initiate and pursue construction of any improvements approved by the permit. It is not disputed that Taylor timely began construction of project improvements in this case. Permit Condition 5 addresses the topic of project completion. If a permit holder has not completed the project within five years, the local government is charged with reviewing the permit and extending it or terminating it. The language of Condition 5 does not create self-executing system for expiration

1 of shoreline permits. While it is arguable whether the language in Condition 5 is properly
2 applied to activity other than construction, it is clear that the permit conditions do not establish
3 an expiration date for SD 22-00.

4 The parties cite several prior decisions to the Board in an effort to buttress their
5 respective positions. Unfortunately, none of the decisions directly address the issue in dispute.
6 The Board's inquiry is focused on the nature of Pierce County's action, as a necessary first step
7 in determining the Board's jurisdiction. Under the Shoreline Management Act, the Board's
8 jurisdiction can only be invoked in this case if Pierce County's Administrative Determination
9 constituted the granting, denying, or rescinding of a shoreline permit. (RCW 90.58.180(1)).

10 The parties cite *Tamsin Taylor v. Langley*, SHB No. 93-39 (1994), which involved a
11 challenged to a local government decision extending the explicitly stated expiration date
12 contained in a shoreline permit. The Board concluded the extension, and any challenge based on
13 alleged permit expiration, were matters of local jurisdiction and did not fall within the ambit of
14 granting, denying, or rescinding a permit. The case did not address or analyze the distinction
15 between expiration and rescission of a permit. Likewise, *Brocard v. San Juan Cy*, SHB No. 181
16 (1975) involved a local government decision to terminate a permit, after the passage of a specific
17 expiration date chosen by the applicant and stated in the permit. The Board did take jurisdiction
18 over the matter as a rescission and upheld San Juan County's action. The decision, however,

1 provides no analysis helpful to the Board's task of characterizing Pierce County's actions in the
2 present case.¹

3 *Yale Estates Homeowners Association v. Cowlitz County*, SHB No. 03-012 (2003) is the
4 most helpful decision put forward by the parties. It touches on the ongoing validity and effect of
5 permit conditions or limitations. While not directly controlling the issue before the Board, it
6 demonstrates that the Board has recognized that shoreline permit restrictions continue to govern
7 actions in the shoreline beyond the period of five years. In the present matter, the ultimate
8 decision on whether Pierce County's Determination rescinded Taylor Resources' permit must be
9 based upon the particular facts of the case. After thorough examination of those facts and
10 circumstances, the Board concludes that Pierce County's action in this instance constituted a
11 rescission of the Taylor Resources permit SD 22-00.

12 When Taylor Resources originally applied for SD 22-00 they specifically indicated the
13 intent to engage in ongoing operations at the Foss Farm site. Pierce County fully understood the
14 farming to include planting, cultivating, and harvesting geoducks in 5-7 year cycles. The County
15 placed no explicit time limitation on the ongoing nature of the operation in the permit conditions,
16 nor did it require a permit renewal at certain intervals. The County placed no clear condition on
17 the permit that would require reexamination of the permit or its terms in the event certain

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20 ¹ The parties also cite *Okanogan Wilderness League (OWL) v. Okanogan County*, SHB No. 97-4 (Order of
21 Dismissal)(April 30, 1997), which held that the Board will not continue to assert jurisdiction over the appeal of a
permit if the permit is withdrawn and cancelled. This holding does not inform the inquiry into whether Pierce
County's action rescinded Taylor Resources' permit.

1 standards were not met by Taylor in the geoduck operation.² Instead, the County included its
2 standard language regarding the timeframes for initiating and completing construction of the
3 physical improvements authorized by the permit. We do not read this boilerplate language to
4 limit the on-going use of the permitted geoduck development to five years. Under the
5 circumstances surrounding this application, particularly the absence of a permit condition or
6 other policy directly addressing how on-going activities permitted by the SDP were to be
7 reviewed or expired, we conclude the county's later formal determination limiting the length of
8 the approved activity constituted rescission of Taylor's on-going authorization to farm geoducks
9 on this site.

10 There was no evidence presented to the Board indicating that Pierce County specifically
11 intended to limit the geoduck farming operations to a five year period at the time SD 22-00 was
12 issued. In fact, two separate Pierce County employees, in positions with authority over the
13 particular project, stated that the permit authorized ongoing operations if the geoduck farm was
14 established during the required five year period. (Ty Booth, Vicki Diamond). The evidence is
15 undisputed that the farm was constructed and established during the first five years of the permit.
16 Pierce County did not pursue the issue of permit expiration at the end of five years (January
17 2006) or at the end of six years (January 2007). To the contrary, in May 2006, Vicki Diamond,
18 supervisor of the Pierce County Current Planning Division, responded in writing to a citizen

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20 ² We note again, as the SHB has on more than one occasion, the importance of clearly delineating in the permit any
21 conditions a local government believes are necessary to address valid concerns associated with a permitted use; this
is essential for meaningful enforcement, citizen oversight, and review. See e.g., *Jarvis v. Kitsap County, Ecology & Suguamish Tribe*, SHB No. 08-001 (2008), at COL 20.

1 inquiry by stating “We have not placed any expirations of this particular activity for several
2 reasons.” (Greene Declaration, Attachment 7). Geoduck farming continued unabated at the Foss
3 Farm location well past the alleged five or six year term of the permit with the full knowledge of
4 Pierce County.

5 When citizen opposition to geoduck farming became more intense, Pierce County chose
6 to engage in a more formal review of their policy on geoduck farming permits. After full
7 consideration, the County adopted a formal position regarding the ongoing authority to pursue
8 geoduck farming under a SDP and issued an Administrative Determination in August 2007 that
9 required a new permit every five years (or six, if extended). This Determination served to
10 terminate Taylor Resources’ authority to continue the geoduck farming it had pursued since 2001
11 under SD 22-00. While the Board is not suggesting that Pierce County could not change its
12 interpretation of the longevity of geoduck farming permits, this change was applied in a
13 retroactive fashion to Taylor Resources’ previously permitted geoduck operation.³ Under this set
14 of facts, the Administrative Determination did constitute rescission of a permit authorization that
15 was previously considered ongoing. As a rescission, the appeal of Pierce County’s decision falls
16 within the Board’s jurisdiction. The Board reserves the question of whether a permit rescission
17 was warranted in this case for resolution at the hearing.

18 The Coalition has asked the Board to dismiss additional issues in the case relating to
19 equitable estoppel and the need for future permits. These matters would be relevant only to the

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21 ³ Given the change in Pierce County’s interpretation of the relevant provisions of its shoreline program, the Board is
not required to give the County’s analysis the same weight it would give a long-standing construction of County
regulations. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47 (2007).

1 extent they address the validity of Pierce County's decision rescinding Taylor Resources' permit
2 SD 22-00. This case has not been pursued as a declaratory action and the Board will not be
3 rendering an opinion on the need for any future permits. The case will be confined to the
4 validity of the rescission being challenged.

5 Based upon the foregoing analysis, the Board enters the following:

6 ORDER

7 The motions to dismiss for lack of jurisdiction brought by the Coalition and Pierce
8 County are denied. The case is set over for hearing on the issue of whether the rescission of SD
9 22-00 was justified. The Board will not be conducting a hearing on the need for any future
10 permit. The scope of the proceedings will be limited to the grounds for and merits of the
11 rescission in dispute.

12 Dated this 7th day of November 2008

13 SHORELINES HEARINGS BOARD

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KATHLEEN D. MIX, CHAIR

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Phyllis K. Macleod

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Administrative Appeals Judge

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