

WHATCOM COUNTY HEARING EXAMINER

re: The application of **Lummi Nation Public Works** for a Shoreline Substantial Development Permit and Zoning Conditional Use Permit

SHR2019-00014; and
CUP2019-0006

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant requests approval of a Shoreline Substantial Permit and Zoning Conditional Use Permit to install a new freshwater intake screen/pumphouse, pump and rail system, and access road. The water is pumped to the Lummi Bay Hatchery on the west side of the Lummi Peninsula.

Decision: The requested Shoreline Substantial Development Permit and Zoning Use Permit is granted, subject to Conditions of Approval.

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing.

FINDINGS OF FACT

I.

PRELIMINARY INFORMATION

Applicant: Lummi Nation Public Works

Property Location: 0 Haxton Way

Assessor's Parcel No. 380208-076102

Zoning: Agriculture

Adjacent Water Body: Nooksack River

Shoreline Designation: Resource & Aquatic

Statewide Significance: Yes

SEPA Review: Determination of Non-Significance (DNS) issued by Whatcom County Planning and Development Services on May 15, 2020.

Adjacent Land Uses:
North: Vacant
South: Tribal
West: Vacant
East: Vacant

<u>Applicable Ordinances:</u>	WCC 20.40	Agriculture Zone
	WCC 20.80.84	Conditional Use Criteria
	WCC 22.05	Project Permit Procedures
	WCC 23.50	Applicability
	WCC 23.70.	Administrator
	WCC 23.20	Goals and Objectives
	WCC 23.30.020	Official Shoreline Map
	WCC 23.30.080	Shoreline Resource Area Designation
	WCC 23.30.110	Shoreline Aquatic Designation
	WCC 23.40	Shorelines of Statewide Significance
	WCC 23.60.010	Substantial Development Permit Criteria
	WCC 23.90	General Policies & Regulations
	WCC 23.100.030	Aquaculture
	WCC 23.110	Definitions

Notice Information:

Application Submitted: October 21, 2019
Notice of Completeness: Determined Complete November 4, 2019
Notice of Application: November 25, 2019
Comment Period Ended: December 26, 2019

Hearing Date: July 29, 2020

Parties of Record

Lummi Nation Public Works
Attn: Dale Ander, P.E.
2665 Kwina Road
Bellingham, WA 98226

Andrew Law, Agent

Wilson Engineering
805 Dupont St., Ste.7
Bellingham, WA 98225

Sam McDaniel, Planner
Whatcom County Planning & Development Services

Ryan Ericson
Planning and Development Services
Whatcom County

Exhibit List: SHR2019-00014 & CUP2019-00006 Lummi Hatchery

1. Shoreline Substantial Application
2. Conditional Use Application
3. Project Narrative
4. Preliminary Traffic Information
5. Stormwater Proposal Application
6. Deed
7. Site plan
8. Agency Distribution List
9. Notice of Application
10. Legal Notice
11. Mailing Labels/List
12. Certificate of Mailing
13. Agency Comments
14. 95% Planset
15. Biological Assessment
16. FEMA Letter
17. eomorphic Assessment
18. Jarpa Form
19. Mitigation Plan
20. Wetland Delineation
21. Pier Foundation Evaluation
22. SEPA Checklist
23. Vicinity Map
24. SEPA Determination
25. Geohazard Analysis
26. Staff Report
27. Certificate of Mailing Notice of Zoom Hearing, July16, 2020
28. Bellingham Herald Legal Notice of Zoom Hearing, dated July 29, 2020
29. Posting Notice of Public Hearing [Zoom], dated July16, 2020

II.

The Lummi Nation Public Works is requesting approval of a shoreline substantial

development permit and zoning conditional use permit to upgrade the existing Lummi Bay Hatchery Water Supply System with a new in-take pump. The hatchery, located on the Lummi Reservation, rears Chinook and Coho salmon that are released into Lummi Bay. The hatchery's non-potable freshwater supply, pumped from the right (west) bank of the Nooksack River near River Mile 1.4, is experiencing operational interruptions due to sediment and woody debris depositions at the system's existing in-take, located directly downstream (south) of the Marine Drive bridge. The proposed new location for the in-take pumping station will also be along the river's west bank, but in a known area of unobstructed flow approximately 600 feet upstream of the Marine Drive Bridge, near River Mil 1.5.

III.

Whatcom County & Planning has recommended approval of the requested Shoreline Substantial Development Permit and Zoning Conditional Use Permit with Conditions, and issued a Staff Report entitled "Findings, Conclusions, and Recommendations," dated July 17, 2020 (herein "Staff Report").

The Applicant has indicated that the Staff Report is factually correct and agreed with all the recommendations. At the hearing the Applicant's Agent stated no objection to the Conditions of Approval recommended by Staff.

The Findings and Conclusions of Whatcom County as set forth in the Staff Report, Exhibit No. 26, dated July 17, 2020, a copy of which is attached hereto, are hereby adopted as findings of fact by the Hearing Examiner and incorporated herein by this reference.

There was no public comment at the Hearing.

IV.

Any Conclusion of Law made below which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

Substantial Development Permit

The proposed Application for a Substantial Development Permit is required for all proposed use and development of shorelines unless the proposal is specifically exempt from such requirements pursuant to one or more of the listed exemptions in 23.60.020.2 [23.60.010.A]. Staff reviewed this proposal for consistency with WCC 23.40.030 and RCW 90.58.030 and finds that this specific proposal conforms to the policies and statutes for shorelines of statewide significance.

Subject to the Conditions of Approval attached hereto, the proposed use is consistent with the Substantial Development Permit Criteria, and a Substantial Development Permit should be granted with those conditions.

20.84.220 Conditional Use Criteria

Before approving the proposed Application for a Zoning Conditional Use Permit, the Zoning Administrator shall ensure that any specific standards of the use district defining the use are fulfilled, and shall find adequate evidence showing that the Conditional Use Criteria (1) through (9) are met.

The Technical Review Committee has determined that subject to the following proposed conditions, the zoning conditional use permit and shoreline substantial development permit are consistent with Whatcom County Code and recommends the Whatcom County Hearing Examiner approval of the Zoning Conditional Use Permit and Shoreline Substantial Development Permit, subject to the Conditions of Approval.

II.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

A Shoreline Substantial Development Permit and Zoning Conditional Use Permit are hereby granted to Lummi Nation Public Works to install a new freshwater intake screen/pump station on the Nooksack River, and includes a new pumphouse, pump

and rail system, and access road. Water is pumped to the Lummi Bay Hatchery on the west side of Lummi Peninsula, on Assessor's Parcel No. 380208-076102. The permit is granted subject to the following conditions:

- 1. All work shall be consistent with the approved site plan dated August 16, 2019. Any additional alteration of the approved project proposal shall require additional review by the Shoreline Administrator. If substantive modifications are proposed, a revision may be required to be approved by the Whatcom County Hearing Examiner and the Washington State Dept. of Ecology (DOE).*
- 2. The applicant shall obtain a Building Permit(s) from the Whatcom County Planning & Development Services – Building Services Division prior to start of construction and demolition on the subject property. Such Building Permit(s) shall require development review by the Shoreline Administrator. The building permit submittal shall include site plans consistent with the plans approved by this permit.*
- 3. Pursuant to WCC 20.84.210, Conditional Use Permits shall be nontransferable unless said transfer is further approved by the Hearing Examiner.*
- 4. Pursuant to WCC Title 14, the owners of the property upon which this conditional use permit approval is granted shall sign a statement of acknowledgment containing a disclosure that pertains to the use of natural resources in Whatcom County. This disclosure shall be made on forms provided by Whatcom County, which shall then be recorded in the Whatcom County Auditor's office.*
- 5. The applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) and obtain a Hydraulics Project Approval (HPA) or any other approvals as required by WDFW. A copy of the HPA shall be submitted upon application of the required building permit.*
- 6. Best management practices (BMPs) for control of erosion and sedimentation shall be implemented for all development in shorelines through an approved temporary erosion and sedimentation control (TESC) plan reviewed and approved by the Shoreline Administrator or administrative conditions associated with the pending building permit application measures.*
- 7. Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.*
- 8. Flood proofing requirements, according to Whatcom County Code Chapter 17.16, will be required for the structure and must be met prior to approval of a future building permit (refer to attached Title-17 excerpts and building in a floodplain diagram). We advise that the project agent/representative and architect/engineer work with us throughout the design process to assure all necessary requirements are being met*

prior to submitting the final drawings for a building permit.

9. *The project requires Nationwide Permit approval from the Army Corps of Engineers (ACOE). As such, the ACOE is the Federal nexus for compliance with the ESA. A copy of the issued permit from the ACOE shall be provided to the River and Flood Division prior to start of any work.*
10. *A copy of the Hydraulic Project Approval (HPA) issued by Department of Fish and Wildlife must be submitted to the River and Flood Division and/or Planning and Development Services prior to start of any work.*
11. *The project shall result in a balanced cut/fill so that there is no loss in floodplain storage.*
12. *Construction BMP's shall be used, as necessary, to reduce or eliminate any construction related impacts within the SFHA.*
13. *All disturbed areas shall be planted, seeded and/or mulched.*
14. *The project shall comply with all applicable federal, state and local laws and regulations.*
15. *Should archaeological resources (e.g. shell midden, faunal remains, stone tools) be observed during project activities, all work in the immediate vicinity should stop, and the area should be secured. The Washington State Department of Archaeology and Historic Preservation (Gretchen Kaehler, Local Government Archaeologist 360-586-3088) and the Lummi Nation Tribal Historic Preservation Office (Lena Tso, THPO 360-312-2257; Tamela Smart, Deputy THPO 360-312-2253) should be contacted immediately in order to help assess the situation and to determine how to preserve the resource(s). Compliance with all applicable laws pertaining to archaeological resources is required.*
16. *If ground disturbing activities encounter human skeletal remains during the course of construction, then all activity will cease that may cause further disturbance to those remains. The area of the find will be secured and protected from further disturbance. The finding of human skeletal remains will be reported to the county medical examiner/coroner and local law enforcement in the most expeditious manner possible. The remains will not be touched, moved, or further disturbed. The county medical examiner/coroner will assume jurisdiction over the human skeletal remains and make a determination of whether those remains are forensic or non-forensic. If the county medical examiner/coroner determines the remains are non-forensic, then they will report that finding to the Department of Archaeology and Historic Preservation (DAHP) who will then take jurisdiction over the remains. The DAHP will notify any appropriate cemeteries and all affected tribes of the find. The State Physical Anthropologist will make a determination of whether the remains are Indian or Non-Indian and report that finding to any appropriate cemeteries and the affected*

tribes. The DAHP will then handle all consultation with the affected parties as to the future preservation, excavation, and disposition of the remains.

17. Applicant shall apply for revocable encroachment permit prior to any work to be performed in the county rights-of-way.
18. The access approach for the site shall be require a commercial paved apron designed and stamped by a Washington State Licensed Civil Engineer (P.E.) and submitted for county review prior to construction.
19. As presented the proposal demonstrates criteria that classify the development as exempt from a traffic concurrency evaluation. A Preliminary Traffic & Concurrency form must be submitted with the building permit application for processing.
20. The project is located outside the NPDES Phase II permit area, Lake Whatcom Watershed Overlay District, and stormwater special districts (as defined by WCC [20.80.635](#)) and shall comply with the 2012 Washington State Department of Ecology Stormwater Management Manual for Western Washington as amended in 2014 (SWMM), using the modified minimum requirements in the modified thresholds table located in WCC 20.80.630 for Medium land use intensity. As proposed the project triggers minimum requirements #1 thru #9.
21. A preliminary stormwater proposal is required at the time of building permit application and shall include a narrative and scaled drainage site plan clearly addressing runoff and how the minimum requirement #1 thru #9 are specifically satisfied.
22. All development shall comply with the Whatcom County Development Standards (WCDS).
23. Any change in project scope, area or design shall be submitted immediately to a Shoreline Administrator to determine if the change constitutes a revision pursuant to WCC 23.60.170.A.
24. All construction and work practices shall follow programmatic instructions and best management practices in the stamped approved site plans and approved NES report.
25. A mitigation as-built report authored by a qualified biologist is required for submittal within 180 days after the project has been constructed. For WCPDS submittal, please refer to mitigation case number MIT2020-00008. The applicant shall include

documentation of how the plantings were installed in all areas, any changes that occurred during construction, and 100% completion drawings of the project.

- 26. One year after the approval of the as-built, a yearly monitoring report is due to Whatcom County under case number MIT2020-00008. A report shall be submitted for a minimum of 5 successful monitoring years, and authored by a qualified biologist.*
- 27. If any part of the restoration is not working, and performance standards are not being met, a contingency plan shall be authored by the applicant which tailors a different approach to offsetting critical areas losses from the construction of the project.*
- 28. No clearing of vegetation is permitted outside of the designated work area shown on the approved site plans.*
- 29. Work areas shall be clearly identified and marked PRIOR to any land disturbance or vegetation clearing and according to submitted SWPPP.*
- 30. If the applicant does not fully conform to terms and conditions of this permit, then violations to critical areas are enforceable under Whatcom County Code.*
- 31. Prior to construction an "Agreement to Maintain Mitigation" shall be completed by the applicant submitted under case number MIT2020-00008. This form can be found online at: <http://whatcomcounty.us/DocumentCenter/View/2170/Agreement-to-Maintain-Mitigation-Site-PDF>. Payment of the following fees are required prior to construction: a. SHR2019-000014 – Payment in the total amount of **\$123.60** for Mitigation As-built inspection, plus 3% technology fee.*
- 32. MIT2020-00008- Payment in the total amount of **\$659.20** for 3 – 5 years monitoring plus 3% technology fee.*
- 33. Construction shall commence within two years of the effective date of the shoreline variances and substantial development permit as defined by WAC 173-27-090 (3), provided that the Whatcom County Hearing Examiner may authorize a single extension for a period not to exceed one year based on reasonable factors if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology.*

NOTICE OF POTENTIAL REVOCATION AND PENALTIES

This Approval is subject to all of the above-stated conditions. Failure to comply with them may be cause for its revocation. Complaints regarding a violation of the conditions of this permit should be filed with Whatcom County Planning and Development

Services. The Hearing Examiner may not take any action to revoke this approval without further public hearing. Violations of this title shall constitute Class I civil infractions pursuant to RCW 7.80.120. The maximum penalty and the default amount for such violations shall be consistent with Chapter 7.80.RCW.

FURTHER, in addition to incurring civil liability under Shoreline Management Program Section 23.80.20 and RCW 90.58.210, pursuant to RCW 90.58.220 any person found to have willfully engaged in activities on shorelines of the state in violation of the provisions of the act or the Shoreline Management Program or other regulations adopted pursuant thereto shall be guilty of a gross misdemeanor and shall be punished by a fine of not less than \$25 or more than \$1,000 or by imprisonment in the county jail for not more than 90 days, or by both such fine and imprisonment; provided that the fine for the third and all subsequent violations in any five year period shall not be less than \$500 nor more than \$10,000.

Any person who willfully violates any court order, regulatory order or injunction issued pursuant to the Shoreline Management Program shall be subject to a fine of not more than \$5,000, imprisonment in the county jail for not more than 90 days, or both. This approval does not release the applicant from any regulations and procedures required of any other public agency, or any County requirements other than the requirement to obtain a Shoreline Substantial Development Permit and Shoreline Conditional Use Permit. This permit may be rescinded pursuant to RCW 90.58.140(8) in the event the permittee fails to comply with the terms or conditions thereof. Pursuant to Whatcom County Shoreline Management Program Section 23.60.151 this permit shall expire within two years of the date of its approval and a new permit will be required, if the permittee fails to make substantial progress toward completion of the project for which it was approved. Pursuant to Section 23.60.152 it shall expire if the project is not completed within five years of the date of the approval, unless the permittee has requested a review, and upon good cause shown, been granted an extension of the permit.

THIS PERMIT IS NOT VALID (AND NO CONSTRUCTION NOR OPERATION AUTHORIZED BY THIS PERMIT SHALL BEGIN) UNTIL THIRTY (30) DAYS AFTER THE DATE OF FILING AS DEFINED BY RCW 90.58.140(6) AND WAC 197-14-090, OR UNTIL ALL REVIEW PROCEEDINGS INITIATED WITHIN THIRTY DAYS FROM THE DATE OF SUCH FILING HAVE TERMINATED; EXCEPT AS PROVIDED IN RCW 90.58.140(5)(A)(B)(C).

**NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF
THE WHATCOM COUNTY HEARING EXAMINER**

This action of the Hearing Examiner is final.

The applicant, any party of record, or any county department may appeal any final decision of the hearing examiner to Superior Court or other body as specified by WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of

the final decision of the hearing examiner, as provided in RCW 36.70C.040.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

Dated this 6th day of August 2020



Rajeev Majumdar, Hearing Examiner *Pro-Tem*