

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE CONDITIONAL USE) SHC2011-0019
Application for)
)
Whatcom County Public Works) FINDINGS OF FACT,
Division of Engineering) CONCLUSIONS OF LAW,
) AND DECISION
)

SUMMARY OF APPLICATION AND DECISION

Application: Whatcom County Public Works is requesting approval of a Shoreline Conditional Use Permit to install an approximate 375 square foot buried riprap collar waterward of the OHWM of Mosquito Lake Road Bridge, Pier 3, to protect the bridge pier from scour.

Decision: The requested permit is granted, subject to conditions.

FINDINGS OF FACT

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.

I.

PRELIMINARY INFORMATION

Applicant: Whatcom County Public Works, Division of Engineering

Property Location/Address: 5500 Block of Mosquito Lake Road
Bellingham, Washington

Legal Description: Section 27, Township 39N, Range 05E, W.M.

Adjacent Water Body: Nooksack River

Shoreline Designation: Conservancy & Aquatic

Shoreline of State-Wide Significance: Yes

Authorizing Ordinances: SMP 23.50 Applicability
 SMP 23.70.010 Administration
 SMP 23.70.030 Hearing Examiner

Applicable Shoreline Program Provisions

SMP 23.20 Goals and Objectives
SMP 23.30.020 Official Shoreline Map
SMP 23.30.090 Conservancy Area Designation
SMP 23.40 Shorelines of Statewide Significance
SMP 23.60.040 Conditional Use Permit Criteria
SMP 23.90 General Policies and Regulations
SMP 23.90.100 Landfill and Excavation

SEPA Review: Determination of Non-significance issued by Whatcom County Planning and Development Services on October 24, 2011

Legal Notices: Mailed – Notice of Application, September 16, 2011
 Notice of Public Hearing, November 17, 2011
 Published – Notice of Application, September 16, 2011
 Notice of Public Hearing, November 24, 2011
 Posted – Notice of Public Hearing, November 23, 2011

Hearing Date: December 7, 2011

Parties of Record

Chris Brueske
Whatcom County Public Works
322 N. Commercial, Ste. 301
Bellingham, WA 98225

Brian Gates
5385 Mosquito Lake Road
Deming, WA 98244

Rita Fleming
6084 Neevel Road
Ferndale, WA 98248

Sam McDaniel, Shorelines Planner
Planning and Development Services

Exhibits:

1 Land Use Application

- 1-1 Fee Responsibility
 - 1-2 Supplemental Application for SHC Permit
 - 1-3 Project Narrative
 - 1-4 PDS Form: Shoreline Permit Submittal Requirements
 - 1-5 Property Owner Labels
 - 1-6 Determination of Completeness, September 12, 2011
 - 1-7 PDS Form Letter: Notice of Application-Comment Form
 - 1-8 ESA Checklist
 - 1-9 Memo from Sam McDaniel to Carole Magner, October 31, 2011 re: application materials
- 2 Staff Report, dated November 23, 2011
- 3 Site Plan and Profile
- 4 Memorandum dated November 3, 2011 from Joseph Rutan to Sam McDaniel, November 3, 2011 re: Response to Dept of Natural Resources (DNR) Comments, letter dated Oct 26, 2011, attached
- 5 Letter dated October 12, 2011, from Property Owner Rita Fleming
- 6 SEPA DNS, October 24, 2011
- 7 Certificate of Mailing, Notice of Application, Sept 16, 2011
- 8 Legal Notice of Application, Sept 16, 2011
- 9 Certificate of Mailing, Notice of Public Hearing, Nov 17, 2011
- 10 Certificate of Posting, Notice of Public Hearing, Nov 23, 2011
- 11 Legal Notice of Public Hearing, Nov 24, 2011

II.

Whatcom County Public Works, Division of Engineering, seeks a Shoreline Conditional Use Permit for the proposed installation of an approximate 375 square foot buried riprap collar waterward of the OHWM to protect Mosquito Lake Road Bridge, Pier 3, from scour.

III.

The Applicant has indicated that the Staff Report is factually correct. The Applicant stated no objection to the Conditions of Approval recommended by Staff. Staff indicated, and

the Hearing Examiner concurs, that the public concerns expressed both in writing and at the public hearing were addressed in the Staff Report. The Findings of Fact and Conclusions of Law of the Shoreline Administrator of the Land Use Services Division of Whatcom County Planning and Development Services, as set forth in the Staff Report, Exhibit #2, dated November 23, 2011, a copy of which is attached hereto, are adopted and incorporated herein by this reference.

IV.

Any Conclusion of Law 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.

The Whatcom County Shoreline Planner has recommended approval of the requested Shoreline Conditional Use Permit for the proposed installation of an approximate 375 square foot buried riprap collar waterward of the OHWM in order to protect Mosquito Lake Road Bridge, Pier 3, from scour.

The Findings of Fact and Conclusions of Law are set forth in the Staff Report, Exhibit #2, dated November 23, 2011. Subject to the Conditions of Approval recommended by Staff, the Hearing Examiner also concludes that the proposal is consistent with the Goals, Policies, and Purpose of the Shoreline Management Act, RCW 90.58; the Goals and Policies of the Whatcom County Shoreline Management Program. The Conclusions of Law adopted by Staff in the Staff Report are incorporated herein as Conclusions of Law.

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 Conditional Use Permit is hereby granted to Whatcom County Public Works Department, Division of Engineering for the installation of an approximate 375-square foot buried riprap collar waterward of the OHWM for the protection of Mosquito Lake Road Bridge, Pier 3, located in the 5500 Block of Mosquito Lake Road, Deming, Washington. The permit is granted subject to the following conditions:

1. The proposed shoreline development shall be consistent with the scope and site plan approved by this Shoreline Conditional Use Permit. Any changes to the proposed development may require additional review and approval by the Whatcom County Shoreline Administrator and/or Whatcom County Hearing Examiner.

2. A Temporary Erosion and Sedimentation Control (TESC) Plan shall be developed and provided to the Whatcom County Shoreline Administrator prior to starting work.
3. If archaeological materials (bone, shell midden, cobble tools, etc.) are observed during site work, work in the area of discovery shall cease and the Whatcom County SEPA Administrator (676-6907) LNTHPO (384-2298) and Washington State Office of Archaeology and Historic Preservation (360-586-3065) shall be contacted immediately to determine the significance of the discovery. If human remains are observed, the Whatcom County Sheriff (911) and LHTHPO Department (384-2298) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.
4. Construction and/or demolition debris shall be wholly removed from water/shoreline. Disposal shall occur in accordance with all applicable agency laws and regulations, including but not limited to Whatcom County Planning and Development Services, DOE and Northwest Air Pollution Authority.
5. Issuance of this shoreline permit does not release the Applicant from any other State, regional or Federal statutes or regulations applicable to the proposed development.
6. State water quality and all other applicable standards shall be adhered to. Water quality of ground and surface waters shall not be significantly degraded.
7. Construction shall be commenced within two years, and authorization to conduct the construction shall terminate five years after the effective date of this shoreline permit as defined in 23.60.160.

NOTICE

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.

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

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the applicant, any opponent of record, or any

County department. Appeal to County Council. Within ten calendar days of the date of the written decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

Any party of record may request a closed record review of the Hearing Examiner's Decision, issued under SMP 23.60.15.H.4, by the County Council. Such an appeal shall be filed with the County Council on forms supplied by the County within ten (10) calendar days of the written decision. If appeal is made to the County Council, notice of appeal shall be provided to all parties of record at least fifteen (15) days prior to consideration by the County Council. The Council shall meet to review the Hearing Examiner's decision within twenty-one (21) days of transmittal thereof, at which time it may approve or disapprove the application, or remand the matter to the Hearing Examiner.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830 and Section 23.60.15.H. A copy of this document is available for review at the County Council Office. After an appeal has been filed and the Council Office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 7th day of December 2011.



Michael Bobbink, Hearing Examiner

WHATCOM COUNTY
Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097
360-676-6907, TTY 800-833-6384
360-738-2525 Fax



EXHIBIT

#2

J.E. "Sam" Ryan
Director

RECEIVED

NOV 30 2011

WHATCOM COUNTY
HEARING EXAMINER

November 23, 2011

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES
STAFF REPORT

The application of
Whatcom County Public Works
For a Shoreline Conditional Use Permit

FINDINGS, CONCLUSIONS
AND RECOMMENDATIONS
for SHC2011-00019

I. SUMMARY OF APPLICATION AND RECOMMENDATION

Application: Whatcom County Public Works is requesting approval of a shoreline conditional use permit to install an approximate 375 square foot buried riprap collar waterward of the OHWM on Pier 3 of the Mosquito Lake Road Bridge to protect the bridge pier from scour.

Recommendation: Staff recommends approval of the proposed project subject to the conditions outlined within this staff report.

II. PRELIMINARY INFORMATION

A. BACKGROUND INFORMATION

Applicant: Whatcom County Public Works
322 N. Commercial, Ste. 301
Bellingham, WA 98225

Property Location/Address: 5500 Block of Mosquito Lake Road

Legal Description: Section 27, Township 39N, Range 05E, W.M,

Adjacent Water Body: Nooksack River

Shoreline Designation: Conservancy & Aquatic

Shoreline of State-Wide Significance: Yes

B. PROCEDURAL INFORMATION

Authorizing Ordinances: SMP 23.50 Applicability
SMP 23.70.010 Administration
SMP 23.70.030 Hearing Examiner

Applicable Shoreline Program Provisions:

SMP 23.20 Goals and Objectives
SMP 23.30.020 Official Shoreline Map

SMP 23.30.090	Conservancy Area Designation
SMP 23.40	Shorelines of Statewide Significance
SMP 23.60.040	Conditional Use Permit Criteria
SMP 23.90	General Policies and Regulations
SMP 23.90.100	Landfill and Excavation

SEPA Review: Determination of Nonsignificance issued by Whatcom County Planning & Development Services on October 24, 2011.

III. FINDINGS

The project is located at the existing Mosquito Lake Road Bridge, which spans the North Fork Nooksack River, approximately 4 miles east of Deming. The original bridge on Mosquito Lake Road was constructed in 1930. In 1965, a new bridge deck was installed on the original concrete piers and abutments. The bridge is supported by four piers, three of which are above ordinary high water. Pier 3 sits on a spread footing foundation on the left bank that extends below the ordinary high water mark of the Nooksack River. Riprap extends upstream and downstream of Pier 3 to protect the pier and the road embankment from scour.

The applicant is requesting approval of a shoreline conditional use permit to install an approximate 375 square foot buried collar on the watershed side of Pier 3 of the Mosquito Lake Road Bridge that will be buried under a minimum of 3 feet of native streambed material. Approximately 168 cubic yards of native bed material will be removed and staged and used as backfill. Approximately 14 cubic yards of 2 inch clear rock and 60 cubic yards of heavy loose rip rap will be installed.

The Nooksack River is a shoreline of the state and thus subject to the provisions of the SMP. According to the Official Shoreline Map (Map) as outlined in 23.30.02.A, the subject site is located within the Conservancy area and Aquatic shoreline designations. Pursuant to 23.30.02.B exclusive of associated wetlands, the map identifies the lateral extent of shoreline jurisdiction on the Sumas River and the Mainstem, North Fork, Middle Fork and South Fork of the Nooksack River. The location of the proposed excavation and fill activities is located waterward of the OHWM of the Nooksack River.

The proposed development is a maintenance activity to an existing lawfully established development. As such, pursuant to 23.60.020.2.B, the applicant has made application for a Shoreline Statement of Exemption to conduct "Maintenance and Repair" activities.

Pursuant to Landfill and Excavation Regulations (23.90.100.B.2) fill and excavation waterward of the OHWM may only be authorized as a conditional use. In order for a shoreline conditional use permit to be approved, the proposal must satisfy the criteria of section 23.60.040 of the SMP. These criteria are set forth and discussed below. According to the applicant the project has a valuation of over \$100,000; therefore, pursuant to 23.60.130 the project is not exempt from an open record public hearing.

Pursuant to 23.40.01, development on Shoreline of Statewide Significance the statewide interest should be recognized and protected over local interest, agencies and local interest groups should be consulted and responses solicited. The natural character of the shorelines should be preserved, intensive development should be concentrated in areas already developed and limited in areas of low-density development. The use of Shorelines of Statewide Significance should result in long term benefit to the people of the state, resources and ecological systems should be protected and scarce or rare sites should be left in their natural state. Public access to publicly owned areas on Shorelines of Statewide Significance should be increased.

In the granting of all shoreline conditional use permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the sum of

the conditional uses and their impacts should also remain consistent with the policy of RCW 90.58.020 and should not produce a significant adverse effect to the shoreline ecological functions and processes or other users.

Shoreline Conditional Use Permit:

In order for a Shoreline Conditional Use Permit to be approved, the proposal must satisfy the criteria of section 23.60.040 of the Program. These criteria are set forth and discussed below.

23.60.04.B.1. That the proposed use will be consistent with the policy of RCW 90.58.020 and this Program.

The Shoreline Management Act of 1971, at RCW 90.58.020 indicates:

...It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses...This policy 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... Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area...

The existing Mosquito Lake Road Bridge crossing of Nooksack River is within the Conservancy & Aquatic designation, and does not comply with the minimum 150-foot setback from OHWM as required by the SMP. However, the bridge was constructed in 1930 prior to the adoption of the Whatcom County Shoreline Management Program. SMP 23.50.070.A states that lawfully established developments that existed prior to the adoption of the SMP shall be considered nonconforming and may be continued subject to the provisions the nonconforming provisions contained within the SMP (23.50.070). Section 23.60.022.B allows for maintenance and repair activities of lawfully established developments via a shoreline statement of exemption.

The proposed installation of a 375 square foot buried collar constructed of riprap is a maintenance activity to abate scour that if continues could threaten the bridge structure. The proposed use is consistent the policy of RCW 90.58.020 and the SMP.

23.60.04.B.2. That the proposed use will not interfere with normal public use of public shorelines.

The site location is located within the Mosquito Lake Road right-of-way, owned by Whatcom County and located upon Washington Department of Natural Resources property. The project proposal includes the installation of an approximate 375 square foot buried collar on the watershed side of Pier 3 of to protect the existing pier from scour and potential failure. Approximately 168 cubic yards of native bed material will be removed and staged and used as backfill. Approximately 14 cubic yards of 2 inch clear rock and 60 cubic yards of heavy loose rip rap will be installed below OHWM. No impacts to existing public access or use of the shoreline were identified through review of the project proposal. Currently a gravel public access exists which accesses an existing parking area to the south of the subject bridge which is utilized by the public to gain access to the Nooksack River. Public works is proposing to utilize the parking area as a staging area for two weeks which may temporarily impact public use of shorelines but will not have long term interference with normal public use of the shorelines.

23.60.04.B.3. That the proposed use of the site and design of the project will be compatible with other permitted uses within the area.

Nothing in the record demonstrates that the continued use of the proposed bridge or the design of the rip rap collar is incompatible with other permitted uses within the area.

23.60.04.B.2. That the proposed use will not cause adverse effects to the shoreline environment in which it is to be located.

The project includes work below the OHWM. Elements to minimize impacts to listed species and habitats were incorporated into the project design and schedule. The project is timed for the summer during seasonally low water levels, work below the OHWM will be performed during the WDFW in-water work window, and scour protection riprap will be buried under native streambed material rather than placed above the streambed. Conservation measures to minimize adverse impacts also include installation of sediment and erosion control BMPs to minimize sedimentation and turbidity, and following the WSDOT fish removal protocol.

Project construction activities involve isolating and dewatering the work zone, excavating the streambed and conserving streambed material, installing two-inch clear rock and heavy loose riprap, and backfilling with native streambed material. There is no evidence that the proposal will cause adverse effects to the shoreline environment.

23.60.04.B.2. That the public interest suffers no substantial detrimental effect.

No substantial detrimental effects to the public interest were identified by staff during review of the project.

In the granting of all shoreline conditional use permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if shoreline substantial development permits and conditional use permits were granted for other developments in the area where similar circumstances exist, the sum of the conditional uses and their impacts should also remain consistent with the policy of RCW 90.58.020 and should not produce a significant adverse effect to the shoreline ecological functions and processes or other users.

As stated previously within this staff report, as conditioned, staff anticipates no net loss of shoreline ecological functions or processes as a result of the proposed project. As such, additional approvals for additional developments where similar circumstances exist, are not likely to represent a cumulative environmental impact to the shoreline consistent with the above criteria.

In accordance with the criteria of RCW 90.58.030(2)(e), the legislature designated the Mainstem of the Nooksack River as a Shoreline of Statewide Significance. Policies for development on Shorelines of Statewide Significance. Pursuant to 23.40.010, development on Shoreline of Statewide Significance the statewide interest should be recognized and protected over local interest, agencies and local interest groups should be consulted and responses solicited. The natural character of the shorelines should be preserved, intensive development should be concentrated in areas already developed and limited in areas of low-density development. The use of Shorelines of Statewide Significance should result in long term benefit to the people of the state, resources and ecological systems should be protected and scarce or rare sites should be left in their natural state. Public access to publicly owned areas on Shorelines of Statewide Significance should be increased.

The project proposal will not consume additional shoreline resources nor impact valuable shoreline features. Views and public access will remain unaffected by this development. Through review of the proposal staff has determined that no long term adverse effects to the shoreline environment were identified. Other reviews on record demonstrate the project, as conditioned, should satisfy the public safety, health and welfare requirements of applicable Whatcom County regulations.

Based on staff's review, the proposed development appears, subject to the attached conditions of approval, to meet all the current development standards of the Shoreline Program, and concurrently protect the interest of the public on a regional basis.

V. PUBLIC COMMENTS

One comment was received during the comment period. The commenter was concerned about the right of way and potential damage to their property and potential loss of access.

Comment: comment forwarded to Public Works and staff notified the applicant of the hearing date and time as requested.

VI. AGENCY COMMENTS

The **Washington State Department of Natural Resources** supplied a comment via email dated October 26, 2011:

The Department of Natural Resources (DNR) is the steward of 2.6 million acres of state-owned aquatic lands. These lands are managed for the benefit of the citizens of Washington State. DNR's authority includes the stewardship and management of resources attached to, or embedded in aquatic lands (for example, seaweed, shellfish, sand, minerals and oil), and man-made structures in the water.

Through the state Constitution and Legislature, DNR is directed to ensure that the use of the aquatic environment is sustainable as well as to ensure a balance of benefits for the people of Washington State by the use of aquatic lands. These benefits include:

- Commerce and Navigation
- Public Use and Access
- Use of Renewable Resources
- Protection of the Environment (the health of these aquatic lands)
- Generate an Economic Return to Citizens (when appropriate).

DNR's role is unique among state agencies because we are the landowner on behalf of the state. We are responsible for fulfilling a distinct mission to ensure that future generations enjoy the benefits of these lands as we do today. In fulfilling this mandate, we carefully consider proposed uses for a number of reasons:

- We review our land records to determine whether the site is available (not under contract with another party)
- That the proposed use is appropriate for the location and can be carried out in a fashion that avoids environmental impacts and risks to public health and safety
- We ensure that proposals are consistent with state laws and rules.

If Whatcom County Public Works project will be occurring on, over or under State Owned Aquatic Lands (SOAL) you will need to apply for a use authorization with the Department of Natural Resources.

Whatcom County Public Works submitted a memo in response to the DNR Memo dated November 3, 2011:

This memorandum provides the Whatcom County Public Works response to the October 26, 2011 letter submitted by the DNR relating to the above referenced project.

Mosquito Lake Road Bridge was legally established at this location in 1891 for the specific use of operating a transportation facility. Whatcom County has continuously operated and maintained this facility since that time. All work associated with the project will be contained within this existing right of way.

State law does not compel Whatcom County to seek a further use agreement or additional permission from DNR to use or maintain this transportation facility. The State-mandated procedure for County right of way establishment obviously included river bedland crossings, making our right of way a pre-existing and preeminent substitute for the use agreement that DNR is currently requesting.

Comment: The November 3, 2011 response from Public Works was forwarded to the DNR and no further comments were received.

VII. RECOMMENDATIONS

Based on the above findings and technical review, **Staff recommends approval** of the request for a shoreline substantial development and shoreline conditional use permit subject to the following conditions of approval:

1. The proposed shoreline developments shall be consistent with the scope and site plan approved by this shoreline substantial development permit and shoreline conditional use permit. Any changes to the proposed development may require additional review and approval by the Whatcom County Shoreline Administrator and/or Whatcom County Hearing Examiner.
2. A temporary erosion and sedimentation control (TESC) plan shall be developed and provided to the Whatcom County Shoreline Administrator prior to starting work.
3. If archaeological materials (bone, shell midden, cobble tools, etc.) are observed during site work, work in the area of discovery shall cease and the Whatcom County SEPA Administrator (676-6907) LNTHPO (384-2298) and Washington State Office of Archaeology and Historic Preservation (360-586-3065) shall be contacted immediately to determine the significance of the discovery. If human remains are observed, the Whatcom County Sheriff (911) and LHTHPO Department (384-2298) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.
4. Construction and/or demolition debris shall be wholly removed from water/shoreline. Disposal shall occur in accordance with all applicable agency laws and regulations, including but not limited to Whatcom County Planning and Development Services, DOE and Northwest Air Pollution Authority.
5. Issuance of this shoreline permit does not release the applicant from any other State, regional or Federal statutes or regulations applicable to the proposed development.
6. State water quality and all other applicable standards shall be adhered to. Water quality of ground and surface waters shall not be significantly degraded.
7. Construction shall be commenced within two years, and authorization to conduct the construction shall terminate five years after the effective date of this shoreline permit as defined in 23.60.160.

Report prepared by:

Sam McDaniel
Whatcom County Shoreline Administrator
Whatcom County Planning and Development Services