

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE SUBSTANTIAL DEVELOPMENT) SHR2010-0013
Application for)
)
Washington State) FINDINGS OF FACT,
Department of Fish and Wildlife) CONCLUSIONS OF LAW,
) AND DECISION
)

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant is requesting approval of a Shoreline Substantial Development Permit to install ten (10) fiberglass fish holding tanks and associated developments at the existing Kendall Creek Hatchery for the purposes of rearing native Chinook salmon.

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: Washington State Department of Fish and Wildlife [WDFW]

Property Location/Address: WDFW Kendall Creek Hatchery
6263 Mount Baker Highway
Deming, Washington 98214

Legal Description: Section 03, Township 39N, Range 05E, W.M.

Adjacent Water Body: Kendall Creek
North Fork Nooksack River

Shoreline Designation: Conservancy

Shoreline of State-Wide Significance: Yes

Authorizing Ordinances: SMP 23.10 Authority

Applicable Shoreline Program Provisions:

SMP 23.20	Goals and Objectives
SMP 23.30.09	Conservancy Shoreline Area Designation
SMP 23.60.02	Shoreline Substantial Development Permit Criteria
SMP 23.90	General Policies and Regulations
SMP 23.100.03	Aquaculture Policies and Regulations
SMP 23.110	Definitions

SEPA Review: Determination of Non-Significance (DNS) issued on June 16, 2010 by Washington State Department of Fish and Wildlife (WDFW).

Legal Notices: Published – September 22, 2010, Notice of Application
March 31, 2011, Notice of Public Hearing
Posted – March 25, 2011, Notice of Application and Public Hearing
Mailed – March 23, 2011, Notice of Application and Public Hearing

Hearing Date: April 13, 2011

Parties of Record:

Washington State Department of Fish and Wildlife
Attn: Annette Hoffman
16018 Mill Creek Boulevard
Mill Creek, Washington 98012

Steve Seymour
Washington State Department of Fish and Wildlife
3725 Dana Road
Bellingham, WA 98225

Chad Yunge
Whatcom County Department of Planning and Development Services

Exhibits:

- 1 Land Use Application
 - 1-1 Fee Responsibility
 - 1-2 Revised Supplemental Application
 - 1-3 Revised Project Description
 - 1-4 Letter of Authorization, dated August 17, 2010

- 1-5 Property owners with addresses, within 300-ft
- 1-6 Letter of Complete Application, September 20, 2010
- 1-7 Letter to Property Owners, September 20, 2010

- 2 Staff Report, March 21, 2011

- 3 Agency Comments

- 4 DNS, issued June 16, 2010, by WA State Dept of Fish and Wildlife

- 5 Revised Plans: Site Plan, Vicinity Map, Erosion Control Detail, Stormwater Plan, Work Site 1 & 2 Plans

- 6 Legal Notice of Application, September 22, 2010

- 7 Certificate of Mailing, Notice of Public Hearing, March 23, 2011

- 8 Certificate of Posting, Notice of Public Hearing, March 25, 2011

- 9 Legal Notice of Public Hearing, March 31, 2011

II.

The Applicant seeks approval for a Shoreline Substantial Development Permit in order to install ten, above-ground, fiberglass fish holding tanks for rearing endangered south Fork Nooksack River Chinook Salmon, established as part of the South Fork Nooksack Spring Chinook Recovery Program.

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. There was no public comment on this matter during the application comment period or at the public hearing. The Findings of Fact and Conclusions of Law of the Shoreline Planner of the Land Use Services Division of Whatcom County Planning and Development Services, as set forth in the Staff Report, Exhibit #2, dated March 21, 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 Substantial Development Permit for the proposed installation of ten fiberglass fish holding tanks and associated developments for the rearing of native Chinook salmon.

Findings of Fact and Conclusions of Law are set forth in the Staff Report, Exhibit #2, dated March 21, 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, and with 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 Substantial Development Permit is hereby granted to the Washington State Department of Fish and Wildlife to install ten fiberglass fish holding tanks and associated development at the existing Kendall Creek Hatchery, located at 6263 Mount Baker Highway, Deming, Washington. The permit is granted subject to the following conditions:

1. The proposed shoreline developments shall be consistent with the scope and site plans approved by this Shoreline Substantial Development 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. The Applicant shall obtain a building permit from Whatcom County Department of Planning and Development – Building Services Division prior to starting work on the subject property. Whatcom County Department of Public Works – Engineering and River and Flood Divisions shall review said building permit to ensure compliance with applicable Whatcom County Code.
3. The Applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) to obtain a Hydraulics Project Approval (HPA) or any other required approvals as determined by WDFW. A copy of the issued HPA shall be provided to the Whatcom County Shoreline Administrator prior to starting any development activity. In addition, a habitat management plan or other approval from the WDFW Priority Habitat Species Biologist shall also be submitted demonstrating that the project will not adversely affect bald eagle habitat and/or activity as a result of the project.

4. The Applicant shall notify the Whatcom County Shoreline Administrator at least forty-eight (48) hours prior to starting work.
5. Construction and/or demolition debris shall be wholly removed from the 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.
6. Prior to starting work, the Applicant shall submit a final Engineered Stormwater Report and Temporary Erosion and Sediment Control Plan to be reviewed and approved by Whatcom County Department of Public Works – Engineering Division.
7. Aquaculture wastes shall be disposed of in a manner that will ensure strict compliance with all applicable governmental waste disposal standards; including, but not limited to, the Federal Clean Water Act, Section 401, and the Washington State Water Pollution Control Act (RCW 90.48). No garbage, wastes or debris shall be allowed to accumulate at the site of any aquaculture operation. The expanded aquaculture operations and associated discharges shall comply with the current National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit. It is the responsibility of the Applicant to demonstrate such compliance.
8. Predator control shall not involve the killing or harassment of birds or mammals.
9. Excavation spoils shall be removed from the subject property in accordance with all applicable regulations.
10. A Temporary Erosion and Sedimentation Control (TESC) Plan shall be developed and provided to the Whatcom County Shoreline Administrator prior to starting work. Best Management Practices (BMPs) shall be installed as close to the proposed excavation areas as feasible.
11. Clearing shall be limited to grass-covered lawn and pasture areas only. No tree or shrub area clearing is authorized.
12. Ground-disturbing activity shall be limited to the minimum amount necessary to accommodate the approved project. Use of heavy equipment shall utilize a single access point for ingress/egress to the approved excavation area along the northern portion of the subject property.
13. 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 13th day of April 2011.

Michael Bobbink, Hearing Examiner



March 21, 2011

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES
STAFF REPORT

The application of Washington State Department of Fish and Wildlife For a Shoreline Substantial Development Permit		FINDINGS, CONCLUSIONS AND RECOMMENDATIONS SHR2010-00013
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I. SUMMARY OF APPLICATION AND RECOMMENDATION

Application: The applicant is requesting approval of a shoreline substantial development permit to install ten (10) fiberglass fish holding tanks and associated developments at the existing Kendall Creek Hatchery for the purposes of rearing native Chinook salmon.

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

II. PRELIMINARY INFORMATION

A. BACKGROUND INFORMATION

Applicant: Washington State Department of Fish and Wildlife
600 Capital Way North
Olympia, Washington 98501

Applicant Representative Mr. Steve Seymour
Washington State Department of Fish and Wildlife
3725 Dana Road
Bellingham, Washington 98225

Property Location/Address: WDFW Kendall Creek Hatchery
6263 Mount Baker Highway
Deming, Washington 98214

Legal Description: Section 03, Township 39N, Range 05E, W.M,

Adjacent Water Body: Kendall Creek
North Fork Nooksack River

Shoreline Designation: Conservancy

Shoreline of State-Wide Significance: Yes

B. PROCEDURAL INFORMATION

Authorizing Ordinances: SMP 23.10 Authority

Applicable Shoreline Program Provisions:

Criteria	SMP 23.20	Goals and Objectives
	SMP 23.30.09	Conservancy Shoreline Area Designation
	SMP 23.60.02	Shoreline Substantial Development Permit
Criteria	SMP 23.90	General Policies and Regulations
	SMP 23.100.03	Aquaculture Policies and Regulations
	SMP 23.110	Definitions

SEPA Review: Determination of Non-Significance (DNS) issued on June 16, 2010 by Washington State Department of Fish and Wildlife (WDFW).

III. FINDINGS

The applicant is requesting approval of a shoreline substantial development permit to install 10 above ground water storage tanks to be utilized to rear endangered South Fork Nooksack River Chinook Salmon. The project includes installation of a gravel pad measuring approximately 7, 200 square feet in size upon which the fiberglass tanks will be placed. The tanks measure 16 to 20-feet in diameter and 5-feet in height. Water will be supplied to the tanks via the existing well source utilized by existing hatchery operations and discharged via a new subsurface outfall to Kendall Creek. In addition to the above structures, a portion of the site will be re-graded to create flood storage in compensation for fill placement within the floodplain. An 8-foot security/predator fence is proposed to surround the rearing tanks.

The proposed project is part of the South Fork Nooksack Spring Chinook Recovery Program of which the primary objective is to restore this Endangered Species Act (ESA)-listed South Fork Nooksack Spring Chinook Salmon run. The ponds are necessary to hold live captured juvenile fish to be reared at the facility and used as broodstock in an effort to restore the run.

The proposed project is located within the existing WDFW Kendall Creek Hatchery which was originally constructed on the site in the early 1900s. A majority of the WDFW property is located within the jurisdiction of the Whatcom County Shoreline Management Program (SMP) which includes lands adjacent to both the North Fork Nooksack River to the east of the facility and Kendall Creek which bisects the property to the west of the project site. The subject property consists of numerous buildings, tanks, roadways, staging areas etc. utilized in hatchery operations. In addition, numerous residential structures are located west of Kendall Creek to house hatchery staff. The area of the proposed tank installation consists of a grass-covered area surrounded by developed surfaces including a holding pond to the west and gravel roadways to the north, south and east. The proposed outfall will be installed underground between the tank pad and Kendall Creek to the west.

The proposed tank pad will result in approximately 267-cubic yards of excavation and 433-cubic yards of imported sand and gravel fill to create a stable base for the tank installation. In addition, 433-cubic yards of excavation are proposed to compensate flood storage capacity as required by Whatcom County Public Works – River and Flood Division. All excavated material will be disposed of off-site in accordance with all applicable regulations.

The proposed work is located within a conservancy-designated area and is classified as an aquaculture development pursuant to 23.110 of the SMP. According to Section 23.100.03.C.7, aquaculture activities are permitted subject to policies and regulations of the SMP. A Shoreline Substantial Development Permit is required for the above proposal as the activity or development is not specifically exempt per 23.60.02.2.

IV. CONCLUSIONS

Shoreline Substantial Development Permit:

In the review of shoreline substantial development permits, the Administrator or Hearing Examiner, as appropriate, must find that the proposal is consistent with the following criteria:

- 1. All regulations of the SMP appropriate to the shoreline designation and the type of use or development proposed shall be met, except those bulk and dimensional standards that have been modified by approval of a shoreline variance pursuant to 23.60.03.**
- 2. All policies of the SMP appropriate to the shoreline area designation and the type of use or development activity proposed shall be considered and substantial compliance demonstrated.**

General and use-specific policies and regulations associated with aquaculture developments are found within Sections 23.90 and 23.100.03, respectively. Applicable policies and regulations associated with the proposed development are listed and discussed below:

23.90.03 Ecological Protection and Critical Areas

23.90.03.A Policies

1. Shoreline use and development should be carried out in a manner that prevents or mitigates adverse impacts so that the resulting ecological condition does not become worse than the current condition. This means assuring no net loss of ecological functions and processes and protecting critical areas designated in WCC 16.16, in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property. Permitted uses shall be designed and conducted to minimize, in so far as practical, any resultant damage to the ecology and environment (RCW 90.58.020). Shoreline ecological functions that should be protected include, but are not limited to, fish and wildlife habitat, food chain support, and water temperature maintenance. Shoreline processes that should be protected include, but are not limited to, water flow; littoral drift; erosion and accretion; infiltration; ground water recharge and discharge; sediment delivery, transport, and storage; large woody debris recruitment; organic matter input; nutrient and pathogen removal; and stream channel formation/maintenance.

2. In assessing the potential for net loss of ecological functions or processes, project-specific and cumulative impacts should be considered.
3. Development standards for density, frontage, setbacks, impervious surface, shoreline stabilization, vegetation conservation, buffers, critical areas, and water quality should protect existing shoreline ecological functions and processes. During permit review, the Administrator should consider the expected impacts associated with proposed shoreline development when assessing compliance with this policy.

23.90.03.B Regulations

1. Mitigation Sequencing - To comply with the policies of SMP 23.90.03.A, a shoreline permit applicant or project proponent shall demonstrate all reasonable efforts have been taken to provide sufficient mitigation such that the activity does not have significant adverse impacts. Mitigation shall occur in the following prioritized order:
 - a. Avoiding the adverse impact altogether by not taking a certain action or parts of an action, or moving the action.
 - b. Minimizing adverse impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology and engineering, or by taking affirmative steps to avoid or reduce adverse impacts.
 - c. Rectifying the adverse impact by repairing, rehabilitating or restoring the affected environment.
 - d. Reducing or eliminating the adverse impact over time by preservation and maintenance operations during the life of action.
 - e. Compensating for the adverse impact by replacing, enhancing, or providing similar substitute resources or environments and monitoring the adverse impact and the mitigation project and taking appropriate corrective measures.
2. Because of its incorporation by reference herein under Section 23.10.06.A. above ,the provisions of the Whatcom County Critical Areas Ordinance, WCC 16.16, shall apply to any use, alteration or development within shoreline jurisdiction whether or not a shoreline permit or written statement of exemption is required. Unless otherwise stated, no development shall be constructed, located, extended, modified, converted, or altered, or land divided without full compliance with WCC 16.16 and the Program, provided that alteration for a water-oriented use may be allowed in accordance with WCC 16.16.225.B.3. Within shoreline jurisdiction, the regulations of WCC 16.16 shall be liberally construed together with the Program to give full effect to the objectives and purposes of the provisions of the Program and Act.
3. Unless otherwise stated, critical area buffers shall be protected and/or enhanced pursuant to this Program and WCC 16.16.
4. Use of motor vehicles including unlicensed off-road vehicles is permitted only on roads or trails specifically designated for such use. Motor vehicle use, except for vessels and float planes, is prohibited waterward of the ordinary high water mark, on tidelands, public or private beaches, wetlands and/or their associated buffers; except as necessary for

public health and safety or permitted maintenance activities associated with approved developments or as otherwise permitted.

5. Buildings, fencing, walls, hedges and similar features shall be designed, located, and constructed in a manner that does not preclude or significantly interfere with wildlife movement to/from important habitat areas consistent with the applicable provisions of WCC 16.16, provided that the Administrator may exempt security fencing associated with residential, industrial and/or commercial developments from this requirement on a case-by-case basis.
6. To provide for flexibility in the administration of the ecological protection provisions of this Program, alternative mitigation approaches as provided for in WCC 16.16.260.E may be approved within shorelines as a conditional use where such approaches provide increased protection of shoreline ecological functions and processes over the standard provisions of this Program and are scientifically supported.
7. The cumulative effects of individual development proposals shall be identified and evaluated to assure that no net loss standards are achieved.
8. Whenever the administrator issues a determination or recommendation and/or conditions of approval on a proposal, which will result in the denial or substantial alteration of a proposed action, such determinations will be provided in writing stating the relationship(s) between the ecological factors, the proposed action and the condition(s).

Staff Comment:

The proposed project is consistent with the above policies and regulations. The North Fork of the Nooksack River as well as Kendall Creek is designated as Habitat Conservation Areas (HCAs) according to Article 7 of the Whatcom County Critical Areas Ordinance (CAO) which is incorporated into the SMP pursuant to 23.10.06. Both streams are fish-bearing and the area is also a known Bald Eagle communal roost and foraging area. A majority of subject property is located within a Frequently Flooded Area pursuant to Article 4 of the CAO. In review of the applicable provisions of the CAO, no adverse impacts to the above-referenced critical areas were identified nor anticipated.

Setbacks for new development within the SMP are based on associated buffering requirements identified within the CAO. The prescriptive buffer from shoreline streams such as the Nooksack River and Kendall Creek is 150-feet as measured from the ordinary high water mark (OHWM) of such streams pursuant to 16.16.740.B. It is important to note that according to Section 16.16.740.A, buffers shall not include areas that are functionally and effectively disconnected from the habitat area by a road or other substantially developed surface. It is the determination of this Administrator that the location of the proposed tank is effectively disconnected from both the Nooksack River and Kendall Creek due the existing infrastructure surrounding the site and therefore not within an HCA buffer.

The excavation work proposed along the northern portion of the subject property is located within the 150-foot HCA buffer; however this type of development is not subject to setbacks pursuant to 23.90.13.B.7.c. This work is required by the Whatcom County River and Flood Department pursuant to Article 4 of the CAO and the Whatcom County Food Regulations – Title 17. The excavation work is proposed within an existing pasture area and will likely enhance the buffering functions in this area over the long term.

This permit recommendation has been conditioned that prior to starting any development activity on the subject property, the WDFW Priority Habitat Species biologist shall be contacted for recommendations on construction timing and/or the establishment of any necessary buffers associated with the Bald eagle habitats in the area. Documentation shall be provided to the Whatcom County Shoreline Administrator to demonstrate compliance with this provision.

The overall project has received approval from the Whatcom County Public Works – River and Flood Division and appropriate flood storage mitigation has been approved in the form of the swale being proposed adjacent to the Nooksack River along the northeastern portion of the subject property.

23.90.04 Water Quality and Quantity

23.90.04.A Policies

1. The location, construction, operation, and maintenance of all shoreline uses and developments should maintain or enhance the quantity and quality of surface and ground water over the long term.
2. Shoreline use and development should minimize the need for chemical fertilizers, pesticides or other similar chemical treatments to prevent contamination of surface and ground water and/or soils, and adverse effects on shoreline ecological functions and values.
3. Appropriate buffers along all wetlands, streams, lakes, and marine water bodies should be provided and maintained in a manner that avoids the need for chemical treatment.

23.90.04.B Regulations

1. Shoreline use and development shall incorporate measures to protect and maintain surface and ground water quantity and quality in accordance with all applicable laws.
2. New development shall provide stormwater management facilities designed, constructed, and maintained in accordance with the current stormwater management standards. Deviations from these standards may be approved where it can be demonstrated that off-site facilities would provide better treatment, or where common retention, detention and/or water quality facilities meeting such standards have been approved as part of a comprehensive stormwater management plan.
3. Best management practices (BMPs) for control of erosion and sedimentation shall be implemented for all development in shorelines through an approved temporary erosion and sediment control (TESC) plan, or administrative conditions.

Staff Comment:

The proposed project is consistent with the above-reference policies and regulations. A preliminary stormwater report and a storm water pollution and prevention plan (SWPPP) has been reviewed and approved by the Whatcom County Public Works – Engineering Division. Temporary erosion and sedimentation control measures will be implemented before and during

the construction phase of the project to protect adjacent waterbodies from sediment input from the construction activities.

In addition, the existing hatchery operations operate under a current National Pollutant Discharge Elimination System (NPDES) as well as a State Waste Discharge General Permit from the Washington State Department of Ecology (DOE). According to WDFW, these existing permits cover the additional discharges generated from the proposed work.

23.90.10 Landfill and Excavation

23.90.10.A Policies

1. Landfill and excavation should only be permitted to the minimum extent necessary to accommodate an approved shoreline use or development and with assurance of no net loss of shoreline ecological functions and processes. Enhancement and voluntary restoration of landforms and habitat are encouraged.
2. Landfill in water bodies, floodways, and/or wetlands should not be permitted for creation of new uplands, unless it is part of an approved ecological restoration activity. Landfill should be permitted in limited instances to restore uplands where recent erosion has rapidly reduced upland area, to build beaches and protective berms for shore stabilization or recreation, to restore or enhance degraded shoreline ecological functions and processes, or to moderately elevate low uplands to make such uplands more suitable for purposes consistent with this Program.
3. Fill should not be allowed where shore stabilization works would be required to maintain the materials placed.
4. Landfills and excavation should be located and developed so that water quality, hydrologic and runoff patterns are not altered.
5. The predicted economic benefits of landfills and excavation should be weighed against long term cumulative impacts on ecological processes and functions.

23.90.10.B Regulations

1. Landfill and excavation shall be minimized to the maximum extent practicable and allowed only along with approved shoreline use and development activities that are consistent with this Program.
4. Landfills or excavation shall not be located where shore stabilization will be necessary to protect materials placed or removed. Disturbed areas shall be immediately stabilized and revegetated, as applicable.
6. Landfills, beach nourishment and excavation shall be designed to blend physically and visually with existing topography whenever possible, so as not to interfere with long term appropriate use including lawful access and enjoyment of scenery.
8. A temporary erosion and sediment control (TESC) plan shall be provided for all proposed landfill and excavation activities.

Staff Comment:

The proposed landfill and excavation associated with the proposal are consistent with the above policies and regulations. No excavation or fill is proposed below OHWM or within wetlands on the subject property. Excavation and fill proposed to create the tank pad will not result in significant alteration to existing topography and runoff patterns. Excavation required as a result of the flood review is located within the buffer of the Nooksack River; however the proposed configuration will diversify the area which consists of a flat pasture currently. A temporary erosion and sediment control (TESC) plan has been required as a condition of this permit recommendation to be reviewed and approved prior to start of work. Such TESC measures shall be located as close to the proposed excavation area as feasible and ground disturbance shall be kept to the minimum necessary to accommodate the approved project.

23.100.03 Aquaculture

Aquaculture in shoreline areas shall be subject to the policies and regulations of this Section and Chapter 9.

Nothing in these policies or regulations may be construed as to impinge on tribal treaty rights exercised within Usual and Accustomed Areas. See also policy SMP 23.100.03.A.8 and regulation SMP 23.100.03.B.1.u.

23.100.03.A Aquaculture – Policies

1. Aquaculture is a water-dependent use and, when consistent with control of pollution and avoidance of adverse impacts to the environment and preservation of habitat for resident native species, is a preferred use of the shoreline (WAC 173-26-241(3)(b)).
2. Potential locations for aquaculture activities are relatively restricted because of specific requirements related to water quality, temperature, oxygen content, currents, adjacent land use, wind protection, commercial navigation, and salinity. The technology associated with some forms of aquaculture is still experimental and in formative states. Therefore, some latitude should be given when implementing the regulations of this section, provided that potential impacts on existing uses and shoreline ecological functions and processes should be given due consideration.
3. Preference should be given to those forms of aquaculture that involve lesser environmental and visual impacts and lesser impacts to native plant and animal species. In general, projects that require no structures, submerged structures or intertidal structures are preferred over those that involve substantial floating structures. Projects that involve little or no substrate modification are preferred over those that involve substantial modification. Projects that involve little or no supplemental food sources, pesticides, herbicides or antibiotic application are preferred over those that involve such practices.
4. Community restoration projects associated with aquaculture should be reviewed and permitted in a timely manner.
5. Aquaculture activities should be designed, located and operated in a manner that supports long term beneficial use of the shoreline and protects and maintains shoreline ecological functions and processes. Aquaculture should not be permitted where it would

result in a net loss of shoreline ecological functions; adversely affect the quality or extent of habitat for native species including eelgrass, kelp, and other macroalgae; adversely impact other habitat conservation areas; or interfere with navigation or other water-dependent uses.

6. Aquaculture that involves significant risk of cumulative adverse effects on water quality, sediment quality, benthic and pelagic organisms, and/or wild fish populations through potential contribution of antibiotic resistant bacteria, or escapement of non-native species, or other adverse effects on ESA-listed species should not be permitted.
7. The County should actively seek substantive comment on any shoreline permit application for aquaculture from all appropriate Federal, State and local agencies; the Lummi Nation, Nooksack Tribe, and other affected tribes; and the general public regarding potential adverse impacts. Comments of nearby residents or property owners directly affected by a proposal should be considered and evaluated, especially in regard to use compatibility and aesthetics.
8. The rights of treaty tribes to aquatic resources within their usual and accustomed areas should be addressed through the permit review process. Direct coordination between the applicant/proponent and the tribe should be encouraged.
9. Consideration should be given to both the potential beneficial impacts and potential adverse impacts that aquaculture development might have on the physical environment; on other existing and approved land and water uses, including navigation; and on the aesthetic qualities of a project area.
10. Legally established aquaculture enterprises, including authorized experimental projects, should be protected from incompatible uses that may seek to locate nearby. Use or developments that have a high probability of damaging or destroying an existing aquaculture operation may be denied.

23.100.03.B Aquaculture Regulations

23.100.03.B.1 Site Design and Operation

- a. Aquaculture activities proposed within shorelines of statewide significance shall be subject to, first, the policies contained in Chapter 4, Shorelines of Statewide Significance, and, second, the policies and regulations contained in this section.
- b. Aquaculture that involves little or no substrate modification shall be given preference over those that involve substantial modification. The applicant/proponent shall demonstrate that the degree of proposed substrate modification is the minimum necessary for feasible aquaculture operations at the site.
- d. Aquaculture proposals that involve substantial substrate modification or sedimentation through dredging, trenching, digging, mechanical clam harvesting, or other similar mechanisms, shall not be permitted in areas where the proposal would adversely impact existing kelp beds or other macroalgae, eelgrass beds or habitat conservation areas.

- e. Aquaculture activities, which would have a significant adverse impact on natural, dynamic shoreline processes or which would result in a net loss of shoreline ecological functions, shall be prohibited.
- f. Aquaculture practices shall be designed to minimize use of artificial substances and shall use chemical compounds that are least persistent and have the least impact on plants and animals.
- n. Unless otherwise provided in the shoreline permit issued by the County, repeated introduction of an approved organism in the same location shall require approval by the County only at the time the initial aquaculture use permit is issued. Introduction, for purposes of this section, shall mean the placing of any aquatic organism in any area within the waters of Whatcom County regardless of whether it is a native or resident organism within the county and regardless of whether it is being transferred from within or without the waters of Whatcom County.
- q. Aquaculture wastes shall be disposed of in a manner that will ensure strict compliance with all applicable governmental waste disposal standards, including but not limited to the Federal Clean Water Act, Section 401, and the Washington State Water Pollution Control Act (RCW 90.48). No garbage, wastes or debris shall be allowed to accumulate at the site of any aquaculture operation.
- r. Predator control shall not involve the killing or harassment of birds or mammals. Approved controls include, but are not limited to, double netting for seals, overhead netting for birds, and 3-foot high fencing or netting for otters. The use of other non-lethal, non-abusive predator control measures shall be contingent upon receipt of written approval from the National Marine Fisheries Service and/or the U.S. Fish and Wildlife Service, as required.
- u. The rights of treaty tribes to aquatic resources within their usual and accustomed areas shall be addressed through direct coordination between the applicant/proponent and the affected tribe(s) through the permit review process.
- v. Aquaculture structures and equipment shall be of sound construction and shall be so maintained. Abandoned or unsafe structures and/or equipment shall be removed or repaired promptly by the owner. Where any structure might constitute a potential hazard to the public in the future, the County shall require the posting of a bond commensurate with the cost of removal or repair. The County may abate an abandoned or unsafe structure, following notice to the owner, if the owner fails to respond in thirty (30) days and may impose a lien on the related shoreline property or other assets in an amount equal to the cost of the abatement. Bonding requirements shall not duplicate requirements of other agencies.

Staff Comment:

The proposed project is consistent with the above aquaculture policies and regulations. The South Fork Nooksack Spring Chinook Recovery Program is a collaboration between numerous agencies including the Nooksack Tribe and the Lummi Nation. Notice of application was sent to various agencies including the above tribes during review of this proposal. The proposed project is an expansion of existing aquaculture operations that have been on-going on the subject property since the early 1900s. The proposal utilizes existing hatchery infrastructure as

well as applicable State and Federal pollution discharge permits in compliance with the above regulations. The proposal is located within an upland area with exception of the discharge of wastewater to Kendall Creek. No use conflicts were identified with adjacent property owners or uses. As conditioned, the project does not represent an adverse impact to the shoreline environment nor does it interfere with on-going shoreline processes including flood storage capacity.

3 In the granting of all shoreline substantial development 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 were granted for other developments in the area where similar circumstances exist, the sum of the permitted actions should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes and other users.

Staff Comment:

The proposed project is consistent with the above cumulative impact provisions. To the knowledge of this Administrator, no other hatchery operations existing within this reach of the Nooksack River of which a similar proposal could be sought. Irrespective of that fact, the proposed project is minimal in scope and does not result in adverse impacts to shoreline functions and processes.

V. PUBLIC COMMENTS

No adverse public comment was received during the time of this permit review.

VI. AGENCY COMMENTS

No adverse agency comment was received during the time of this permit review.

VII. RECOMMENDATIONS

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

1. The proposed shoreline developments shall be consistent with the scope and site plans approved by this shoreline substantial development 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. The applicant shall obtain a building permit from the Whatcom County Planning and Development – Building Services Division prior to starting work on the subject property. Review by the Whatcom County Public Works – Engineering and River and Flood Divisions shall review said building permit to ensure compliance with applicable Whatcom County Code.
3. The applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) to obtain a Hydraulics Project Approval (HPA) or any other required approvals

as determined by WDFW. A copy of the issued HPA shall be provided to the Shoreline Administrator prior to starting any development activity. In addition, a habitat management plan or other approval from the WDFW Priority Habitat Species biologist shall also be submitted demonstrating that the project will not adversely affect bald eagle habitat and/or activity as a result of the project.

4. The applicant shall notify the Whatcom County Shoreline Administrator at least forty-eight (48) hours prior to starting work.
5. Construction and/or demolition debris shall be wholly removed from the 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.
6. Prior to starting work, the applicant shall submit a final Engineered Stormwater Report and Temporary Erosion and Sediment Control Plan to be reviewed and approved by the Whatcom County Public Works – Engineering Division.
7. Aquaculture wastes shall be disposed of in a manner that will ensure strict compliance with all applicable governmental waste disposal standards, including but not limited to the Federal Clean Water Act, Section 401, and the Washington State Water Pollution Control Act (RCW 90.48). No garbage, wastes or debris shall be allowed to accumulate at the site of any aquaculture operation. The expanded aquaculture operations and associated discharges shall comply with the current National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit. It is the responsibility of the applicant to demonstrate such compliance.
8. Predator control shall not involve the killing or harassment of birds or mammals.
9. Excavation spoils shall be removed from the subject property in accordance with all applicable regulations.
10. A temporary erosion and sedimentation control (TESC) plan shall be developed and provided to the Whatcom County Shoreline Administrator prior to starting work. Best Management Practices (BMPs) shall be installed as close to the proposed excavation areas as feasible.
11. Clearing shall be limited to grass-covered lawn and pasture areas only. No tree or shrub area clearing is authorized.
12. Ground disturbing activity shall be limited to the minimum amount necessary to accommodate the approved project. Use of heavy equipment shall utilize a single access point for ingress/egress to the approved excavation area along the northern portion of the subject property.
13. 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:

Chad Yunge
Whatcom County Shoreline Administrator
Whatcom County Planning and Development Services