

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Skagit County Public Works Department
1800 Continental Place
Mount Vernon, WA 98273

File No: PL#07-0013

Request: Shoreline Substantial Development/Conditional
Use/Variance Permit

Location: Samish Bay, approximately 750 feet southeast of Blue
Heron Road on Samish Island, within a portion of Sec. 25,
T36N, R2E, W.M.

Parcel Nos: P46952, P47066.

Shoreline Designation: Conservancy (above OHWM), Aquatic (below OHWM)

Summary of Proposal: To replace an existing stormwater outfall pipe with a new
24-inch concrete pipe extending 160 feet into the bay
waterward of the Ordinary High Water Mark (OHWM),
beyond the area of littoral drift. The permit would also
authorize a new cylindrical catch basin and tidegate which
are part of the drainage system leading to the outfall, and
located above the OHWM, landward of the shoreside dike.

Public Hearing: After reviewing the report of Planning and Development
Services, the Hearing Examiner conducted a public hearing
on March 11, 2009.

Decision: The application is approved, subject to conditions.

FINDINGS OF FACT

1. The County Public Works Department seeks shoreline permits for the “Blue Heron Stormwater Outfall Replacement Project” and related construction.
2. The overall project involves replacement of a 24-inch concrete pipe that passes stormwater from Samish Island through a dike, under the littoral drift zone, and into Samish Bay, as well as relocation of a tide gate to a new catch-basin installed on the landward side of the sea dike
3. The stormwater outfall is to extend about 160 feet into Samish Bay. The site is approximately 750 feet southeast of Blue Heron Road, within a portion of Sec 25, T36N, R2E, W.M.
4. The shoreline designation for the area landward of the Ordinary High Water Mark is Conservancy. The designation for the area waterward of OHWM is Aquatic.
5. The permits will authorize the catch basin and tide gate construction after the fact. These features were installed in September 2006. The entire package – catch basin, tide gate and outfall pipe – have been authorized by the United States Army Corps of Engineers (Corps) through a Nationwide Permit approval, dated October 27, 2008.
6. The existing concrete pipe is broken and partially filled with sediment. This causes periodic blockage of the catch basin outlet, meaning that during heavy rains, stormwater backs up and floods nearby homes and pastures.
7. The new outfall pipe will be installed at a gradient sufficient to self-maintain the outlet. The tide-gate relocation from the waterward to the landward side of the dike provides easier maintenance.
8. Directly to the west of the proposed activity is a wetland, constricted by a tall bluff to the south and west, Blue Heron Road to the north and the sea dike along the bay to the east. The tide gate prevents saltwater from entering this wetland
9. The pipe replacement will be completed during several low tide periods. A 160-foot long trench will be dug from the dike toward the deep water. The trench will be approximately three feet wide and one-to-four feet deep. About 60 cubic yards of tidal beach materials will be excavated using an excavator or backhoe and set aside for use as backfill over the pipe. When the backfill is complete, any excess material will be spread evenly in a thin layer adjacent to the covered pipe. No eelgrass or forage fish spawning habitat will be affected.
10. A Biological Evaluation (BE) was completed for this project, dated February 16, 2007. The BE finds that impacts of the project will be limited to minor temporary construction disruption. However, some conservation measures were recommended:

- Sediment and debris removal below the MHHW shall be limited to only that necessary to install the pipe and no natural material shall be removed from the work area.
- Sediment and debris removed for the pipe shall be stockpiled immediately adjacent to the pipe for use as backfill.
- All work shall be completed in the dry season during suitably low tides.
- All work shall be completed between July 16 through February 15 or as otherwise limited by WDFW in the HPA to be issued for the project.
- All work below the MHHW shall be completed with clean equipment in good condition with no evidence of petroleum product leakage. All equipment to be used below the MHHW line shall be inspected, serviced, and cleaned in an upland site as necessary to prevent leakage or any contamination of the beach or water.
- Emergency spill response and clean-up equipment shall be available on site during all work activities. At a minimum, this kit will include material for containment and clean-up of petroleum product.
- All potentially hazardous material (e.g. fuel, lubricating fluids) shall be stored in an upland staging area.
- No fueling or servicing of construction vehicles shall be permitted on-site.
- Telephone numbers of appropriate agency/department contacts shall be readily available on-site in case a spill should occur (e.g., Ecology, County Fire Department Hazmat Team, County Fire and Rescue.)
- Excavation shall follow all requirements of the HPA to be issued by the WDFW and the Section 10 permit to be issued by the Corps of Engineers.

11. Environmental review was conducted pursuant to the State Environmental Policy Act (SEPA). The County issued a Mitigated Determination of Non-Significance (MDNS) on August 2, 2007. No comments were received. The MDNS was not appealed. It contains the following conditions:

- 1) The applicant shall comply with all applicable provision of section 14.24, the Skagit County Critical Areas Ordinance (CAO).

2) The subject proposal shall comply with the Skagit County Shoreline Management Master Program (SCC 14.26) and the Shoreline Management Act (RCW 90.58).

3. The applicant shall strictly adhere to the project information (site diagram) submitted for this proposal. If the applicant proposes any modification of the subject proposal, he/she shall request at a minimum, a permit revision from this office prior to the start of construction.

4. The applicant shall perform the conservation measures recommended in the biological Evaluation prepared by Cedarock Consultants, dated February 16, 2007.

12. The Priority Habitat and Species Map generated by the Washington Department of Fish and Wildlife (WDFW) indicates two bald eagle nests and one great blue heron nest within a quarter mile of the work site. The entire area is a waterfowl concentration area.

13. The project is conditioned by the nationwide Corps permit as well as the conservation measures of the BE. The County staff determined that compliance with these conditions will satisfy the requirements of the County's CAO.

14. The undertaking is a shoreline-dependent utility project and as such is permissible under the local Shoreline Master Program (SMP). In the Conservancy and Aquatic zones, a conditional use permit is required. Underground pipelines are exempt from shore setbacks, but above ground project features are subject to a 200 foot setback from the OHWM. Because the new catch basin and tide gate are 20 feet landward of the OHWM, a setback variance is required.

15. Under the SMP, a Shoreline Conditional Use Permit may be approved when the applicant can show the following (SMP 11.03):

1. That the propose use will consistent with the policies of this Master Program and policies of RCW 90.58.020.

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

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

4. That the proposed use will cause no unreasonable adverse effects to the shoreline environment designation in which it is located.

5. That the public interest suffers no detrimental effect.

16. Variances from the Skagit County Shoreline Management Master Program for construction landward of the OHWM must meet the following criteria of SMP 10.03(1):

a. The strict application of the bulk dimensional or performance standards set forth in this Master Program precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by this Master Program.

b. The hardship described above is specifically related to the property and is the result of unique conditions such as irregular lot shape, size or natural features and the application of this Master Program and not, for example, from deed restrictions or the applicant's own actions.

c. That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to the adjacent properties or the shoreline environment designation.

d. The variance granted does not constitute a grant of special privilege not enjoyed by the other properties in the same area and will be the minimum necessary to afford relief.

e. The public interest will suffer no substantial detrimental effect.

In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area.

17. The Staff Report analyzes the application against the above criteria for conditional use and variance approval and finds that the project, as conditioned, will comply with them. The Hearing Examiner concurs and adopts the Staff analysis. The Staff Report is incorporated herein by this reference as though fully set forth.

18. The outfall, catch basin and tide gate are essential to the protection of the wetlands and of upland property uses. Public rights of navigation will be protected by undergrounding the pipe. No permanent detrimental impacts to the shoreline environment are likely.

19. The project location is a Shoreline of Statewide Significance. The special policies for overriding narrow local interests and for protecting natural shorelines are not violated by this project. Natural resources and ecological systems are protected. There will be long-term public benefits from the work. See RCW 90.58.020.

20. Departures from the strict requirements of the SMP are dealt with here through the variance process and analysis. Other than the shore setback variation, the project is consistent with the policies and regulations of the master program. The project also conforms to the statutory policies of the RCW 90.58.020. No conflict with Department of Ecology rules has been identified.

22. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the subject matter of this proceeding. SMP 9.07, 10.02, 11.02.

2. The requirements of SEPA have been met.

3. The proposal involves substantial development which is not covered by a statutory permit exemption.

4. Under SMP 9.02, a Shoreline Substantial Development Permit may be granted when a proposed development is consistent with (a) policies and regulations of the local Master Program, (b) the policies of the Shoreline Management Act, and (c) regulations adopted by the Department of Ecology pursuant to the Act.

5. The proposal, as conditioned, is consistent with the criteria for Shoreline Conditional Use Permit approval and Shoreline Variance Approval. SMP 11.03, 10.03.

6. With the Conditional Use and Variance approval, the proposal, as conditioned, meets the criteria of the SMP for approval of a Shoreline Substantial Development Permit.

7. Any finding herein which may be deemed a conclusion is hereby adopted as such.

CONDITIONS

1. The applicants shall implement all the conservation measure recommended in the February 16, 2007 Biological Evaluation, prepared by Cedarrock Consultants.

2. The applicant shall comply will all conditions set forth in the MDNS, issued August 2, 2007.

3. The applicant shall obtain all conditions set forth in the Corp's Nationwide Permit #7, approved October 27, 2008.

4. That applicant shall obtain all other required permits and abide by the conditions thereof. This includes, but is not limited to, the Hydraulic Project Approval (HPA) issued by the WDFW and any additional measures for the protection of bird habitat which WDFW may impose.

5. The project shall comply with all local and state regulations.

6. The project must be commenced within two years of final approval of the variance and conditional use permits and completed within five years thereof, or all of the shoreline permit approvals shall become void.

7. Failure to comply with any permit condition may result in permit revocation.

DECISION

The requested Shoreline Substantial Development/Conditional Use/Variance Permit (PL#07-0013) is approved, subject to the conditions set forth above.

DONE this 20th day of March, 2009.



Wick Dufford, Hearing Examiner

Date transmitted to Applicant: March 20, 2009

RECONSIDERATION/APPEAL

As provided in the Skagit County Shoreline Master Program, Section 13.01, a request for reconsideration may be filed with Planning and Development Services within five (5) days after the date of this decision. The decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with Planning and Development Services within five (5) days after the date of decision or decision on reconsideration, if applicable.

DEPARTMENT OF ECOLOGY REVIEW

If approval of a Shoreline Variance or Shoreline Conditional Use becomes final at the County level, the Department of Ecology must approve or disapprove it, pursuant to RCW 90.58.140.