BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeals of **SKAGITONIANS TO PRESERVE FARMLAND & SKAGIT COUNTY FARM BUREAU, INC. and FRIENDS OF SKAGIT COUNTY,** Appellants, v. **SKAGIT COUNTY and CLEAR VALLEY ENVIRONMENTAL FARM,** Respondents.	)	**Nos. PL08-0195** **PL08-0197** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**
In the Matter of the Applications of **CLEAR VALLEY ENVIRONMENTAL FARM, LLC,** For a Shoreline Substantial Development/ Conditional Use Permit and a Grading Permit for Proposed Wetland Restoration Activities on Approximately 396 Acres of Land	)	**Nos. PL06-0607** **BP06-0669**

SUMMARY

Applicant: Clear Valley Environmental Farm, LLC
c/o Jerome Ryan
9 Teaberry Lane
Tiburon, CA 94920

Requests: (1) Shoreline Substantial Development/Conditional Use Permit,
(2) Fill and Grade Permit

Appeals: Challenges to Mitigated Determination on Non-Significance (MDNS)

Location: East of the city limits of Mount Vernon and bordered generally by State Route (SR) 538 to the south, State Route (SR) 9 and Babcock Road to the east and Swan Road to the north. The site comprises approximately 396 acres within portions of Secs 10,11,14 and 15, T34N, R4E, W.M. Nookachamps Creek and East Fork Nookachamps Creek flow through the property.

Land Use Designation: Agriculture- Natural Resource Land (Ag-NRL)

Brief Project Description: To perform wetland restoration activities and then to operate a wetland mitigation bank. A native seed and plant nursery is also proposed. The project would occur in three phases.

Decision: The appeals of the MDNS are denied. The shoreline substantial development/conditional use permit and the fill and grade permit are approved, subject to conditions.

PROCEDURAL HISTORY

On June 28, 2006, the Applicant, Clear Valley Farms, LLC, filed applications for a Shoreline Substantial Development/Conditional Use Permit and for a Grading Permit for proposed wetland restoration and enhancement activities.

The County issued a letter of completeness within the 28-day window provided by SCC 14.06.100.

A Notice of Development Application was issued for the grading permit application on August 10, 2006. Use of the site for a native seed or plant farm or nursery was proposed in July 2007. A Notice of Development Application was issued for the shoreline permit application on February 14, 2008.

On February 28, 2008, Skagit County issued a Mitigated Determination of Non-Significance (MDNS) for the project proposed by the applications. The MDNS comment period was extended to March 20, 2008. The appeal period was determined to end on April 3, 2008.

An appeal of the MDNS was received from Friends of Skagit County on April 3, 2008. On the same day Skagitonians to Preserve Farmlands and the Skagit County Farm Bureau, Inc. jointly filed another appeal of the MDNS.

On receiving the appeals, the Hearing Examiner issued an order consolidating the hearing on the MDNS appeals with the hearing on the underlying shoreline and grading

permits. The stay of permit proceedings for matters under appeal (SCC 14.05.230) was dissolved.

On April 23, 2008, a Prehearing Conference was held. As a result, a schedule was established for the clarification of issues, the issuance of a County Staff Report, the identification of witnesses and exhibits, and the commencement of the hearing. The hearing was scheduled to begin on July 9, 2008.

In response to a request from Skagitonians to Preserve Farmland, the Examiner issued a Memorandum to the parties on May 8, 2008, stating that whether the project is or is not an allowed use under the Ag-NRL zoning is an issue that may be considered in the appeals as well as in the underlying permit hearing on the grading permit.

On June 2, 2008, Clear Valley filed a Motion for Partial Summary Judgment. The Motion was extensively briefed by the parties. The Examiner ruled on the Motion on June 30, 2008. The ruling made the following determinations:

1. Clear Valley's project is vested to the Skagit County land use code provisions in effect in 2006, prior to adoption of the September 2007 zoning amendments affecting the Ag-NRL zone.

2. Under the regulations in effect at the time of vesting, the project was an outright permitted use in the Ag-NRL zone.

In addition, the Examiner denied Clear Valley's request to dismiss allegations of probable significant adverse impact because of loss of agricultural lands on the subject site.

Hearings were held on nine separate days: July 9, July 10, July 11, September 3, September 4, September 5, September 26, October 15, and October 16, 2008. Public testimony was taken on July 9 and 11. The record was held open for additional public comments through September 5, 2008.

Twenty-seven witnesses testified for the named parties and were cross-examined. Sixteen members of the public testified. Two-hundred-one exhibits were admitted. The Examiner took official notice of the 1968 Skagit County Comprehensive Plan.

Post hearing closing arguments were filed simultaneously on November 14, 2008. Reply arguments were filed simultaneously on December 8, 2008.

The named parties to these proceedings were represented as follows:

Clear Valley Farms, LLC – Brett Carson and Amanda Carr, Attorneys at Law

Skagit County – Jill M. Olson, Deputy Prosecutor, and Betsy Stevenson, Senior Planner

Friends of Skagit County – Gerald Steel, Attorney at Law

Skagitonians to Preserve Farmlands/Skagit County Farm Bureau – Jeffrey Eustis, Attorney at Law

Hereinafter, the above parties shall be referred to as Clear Valley, the County, Friends, and Skagitonians, respectively.

FINDINGS OF FACT

1. Factual determinations in the above Procedural History are incorporated herein as findings.

2. Clear Valley seeks to restore and enhance wetlands on 396 acres of land in order to operate a wetland mitigation bank. The site will also be used for growing and harvesting native plant seeds and cuttings.

3. SCC 14.04.020 defines "Mitigation Bank," as follows:

> a properly developed collection of existing, created, restored or enhanced wetlands and their protective buffers that are created or established using the best available science to provide mitigation credits to offset future adverse impacts to wetlands from approved projects elsewhere.

4. The official name of the undertaking is "The Skagit Environmental Bank."

5. The mitigation bank is to be situated on the lower Nookachamps flood plain, at a location just east of the City limits of Mount Vernon, bordered generally by State Route (SR) 538 to the south, SR 9 and Babcock Road to the east, and Swan Road on the north. The property is within a portion of Secs 10, 11, 14 and 15, T34N, R4E, W.M.

6. The property is traversed by portions of the main stem and the east fork of Nookachamps Creek which converge on site. Barney Lake is just west of the site.

7. The location is also within the Skagit River flood plain. The mitigation bank will be about three miles south of the confluence of Nookachamps Creek with the Skagit River. The intervening topography is relatively flat. The project site is within a flood hazard zone and is, in fact frequently flooded. The site and properties in the vicinity have never been diked.

8. The City of Mount Vernon borders the bank on three sides (northwest, west, and southeast). This part of Mount Vernon is zoned for commercial and residential development. The Mud Lake housing community is located about a half mile to the northeast. The land to the north and southeast is zoned for agricultural use or as rural reserve land.

9. The proposed mitigation bank is within an Agriculture-NRL zone under the County's Comprehensive Plan and Unified Development Code. Under the Skagit County Shoreline Master Program the property is designated a Rural Shoreline area.

10. The mitigation bank site is a part of what has been, until recently, an 805-acre dairy and cattle farm. In the past, parts of the farm have been planted in corn or potatoes. The remainder has been used for grazing pasture. The dairying and row crop uses of the property have been carried on for at least 50 years.

11. The applicant purchased the entire 805-acre farm, but intends to use only about half of it for the mitigation bank. Portions of the acreage continue in cultivation presently through leases. The farm buildings are not within the acres selected for the mitigation bank. Parts of the acreage outside of the mitigation bank site have now been sold to third parties.

12. A wetland delineation identified approximately 59 acres of existing palustrine or riverine wetlands within the project site. The remaining acreage to be included within the bank will be converted to wetlands, with the exception of a few retained high spots.

13. The applicants contend that all or nearly all of the 396 acres that will be part of the mitigation bank were historically wetlands. They believe that deforestation, plowing, and grading, combined with the construction of drainage ditches, created the current non-wetland conditions on the majority of the acreage.

14. The preponderance of evidence supports this scenario. Historic survey documents, soil maps, and soils samples evidence the pre-settler wetland status of much of the area. Photographs and the recollection of witnesses substantiate the clearing, grading and ditch construction activities of more modern times.

15. The project will result in a variety of wetland classes and vegetation communities in the floodplain and along creek reaches. The restoration goals are to: (1) restore in-channel and off-channel rearing, refuge, and migration habitat for salmonids, resident fish, amphibians, reptiles, and other water dependent species; (2) restore stream channel morphology with the addition of large woody debris (engineered log jams) at intervals; (3) shade the stream channels by restoring a scrub-shrub and forest canopy; (4) restore palustrine forested, scrub-shrub, and emergent habitat that will extend well beyond the edges of the creek channels and effect change in hydrologic and hydraulic floodplain and wetland functions; (5) restore a wildlife corridor connection between existing wetlands near the bank.

16. The project will be implemented in three phases, as follows:

a. Phase 1 will restore wetland hydrology by filling drainage ditches and by constructing three engineered log jams (ELJs). The goal of Phase I is to create sufficient wetland hydrology without resorting to further site grading.

b. Phase 2 will be shaped by the results of hydrologic monitoring after Phase 1. In Phase 2 three high-flow back channels off the main stem and east fork will be built, re-grading will be conducted as necessary, and native vegetation will be planted.

c. Phase 3 will involve removing temporary access roads and converting them to forested wetland and upland habitats. Phase 3 will also include additional grading and planting as warranted by the hydrology established in Phases 1 and 2.

17. The premise is that past landscape modifications have lowered the water table in the area. Filling in the drainage ditches and disconnecting them from the creek is expected to raise the groundwater level and establish wetland hydrologic conditions. The three ELJs (one on the main stem and two in the east fork of the Nookachamps) ultimately will raise the stream bed elevations behind them to the height of the ELJ's. The new stream bed elevations, along with berm removal, will reconnect the streams to their floodplain, providing the necessary hydrology to support wetland conditions.

18. The three ELJs will be constructed of logs. A water barrier to prevent erosion under and around the ELJ structure is proposed for the upstream side of each. This barrier will consist of logs stacked on top of each other between piles and oriented perpendicular to the channel. The barrier will be buried approximately five feet below the existing channel bed and will extend 180 feet from each bank at a 90 degree angle. The ELJ structure itself will consist of multiple logs, with and without rootwads, that will be completely buried within the existing banks and channel bed. Gravel and slash will be added to the existing channel bed to provide stability.

19. The high-flow back channels will be constructed with reference to ground water elevations during the early growing season and will sustain seasonal surface flow. They will fill when stream elevations are bank full and will empty as the creeks fall in summer. Thus, during the non-growing rainy season they will be permanently flooded. They will be graded so as to prevent ponding when they drain out. Approximately 1.8 miles or 9,720 linear feet of back channels will be built. The channels will be approximately 75 feet wide in most locations. Hummocks created in the channels will be planted with scrub-shrub plants.

20. Backfill materials will come from the excavation associated with ELJ construction, from existing earthen berms adjacent to drainage ditches, and from

backchannel construction. Excavation materials from Phase 1 are estimated at 1,490 cubic yards. Fill materials from Phase 1 are estimated at 12,449 cubic yards. Excavated materials for Phase 2 are estimated at 1, 025,440 cubic yards. The quantity of fill required for Phase 2 is estimated at approximately 289,900 cubic yards. Excess material will be stockpiled off of the mitigation bank site.

21. Arrangements have been made to place as much as 710,000 cubic yards of material outside the 100 year flood plain on what is called the "Knoll" property. This is a 90.8-acre portion of the original 805-acre farm which has been sold by the applicants. Some of the stockpile will be on an eight-acre apron along this property which the applicants have the right to take back. The applicants have entered into an agreement with the buyer of the "Knoll" property which prevents the buyer from selling the stockpiled materials for use off site. The agreement runs with the land. A condition of approval prohibiting such sales has been included to insure compliance with this limitation.

22. The onsite grading will be limited to the minimum amount needed to achieve the hydrologic conditions sought. If all goes well, the amount of excess material may be far less than provided for in the worst case. Jerome Ryan, a project principal, testified that they would "mostly be moving the soils around" and that there might be as little as 200,000 cubic yards of excess material.

23. The applicants have submitted a planting plan that shows 17% of the bank in emergent wetland, 26% of the bank in shrub wetland, 36% of the bank in forested mosaic wetland and 19% of the bank in upland. The mitigation bank will be separated from adjacent property and adjacent uses by a buffer of 150 feet, in compliance with the County's Critical Areas Ordinance.

24. Clear Valley has sold or intends to sell most of the land in the original 805 acres that is not within the mitigation bank. Much of this land was never used for agriculture or incidental to agriculture. The 222 acres immediately adjacent to the bank to the west (including much of Barney Lake) is proposed to be sold to the Skagit Land Trust.

25. The mitigation bank will displace existing agricultural use on approximately 320 acres within the site that are not currently wetlands. The applicants originally proposed a four-part mitigation plan relating to these acres. This involved: (1) a set aside of funds for purchase of development rights, (2) an agricultural easement on 300 acres of the Clear Valley property not in the bank, (3) an experimental buffer project to determine effects of various buffer sizes, (4) support of a "future farmers" program in area schools.

26. The fate of this proposal is not altogether clear to the Examiner, but it appears that at least the first part (set aside of funds for development rights) is no longer being pursued.

27. In any event, the applicants maintain that, in fact, no land will be lost to agriculture. This is because, in their view, the commercial native seed and plant harvesting and cutting operation will serve as an alternative agricultural enterprise that will simply replace the existing agriculture activity with a new one. Overall, they say, there will be an increase in acres of land in agricultural production.

28. The applicants propose the eventual use of 380 acres of the bank for the native seed and plant cutting operation. The program calls for cultivating selected species and collecting seeds and cuttings by hand. The seeds and cuttings will be taken once a year for each selected species and harvested on a sustainable basis. No more than 30% of the entire mature seed crop and new stem growth available for a species will be harvested during any one growing season. Management practices will ensure that the collection activities result in no damage to the mitigation bank. There is an emerging market for these products. In concept, the seed and cutting enterprise will provide a source of income and employment.

29. The mitigation site contains soils that are currently classified as prime farmland soils. However, notwithstanding these classifications, the property itself is not a first-class area for growing crops because it is frequently flooded. The County's most significant (high value) crops do not thrive in these conditions and have not been grown on these lands. Other than grass, the crops that have been planted there (corn, potatoes) have at times suffered losses because of flooding. There have also been some very good years. The soils involved are well-suited for cropland if dikes and drainage systems are maintained. The subject acres are frequently flooded because they have never been diked.

30. The applicants have obtained three appraisals of the property in its existing state. These show that the land if used for farming is worth between $1,200 and $1,400 per acre. In general, farmland in Skagit County is worth from $1,000 per acre to $7,000 per acre. The value of land on the mitigation bank site, is thus at the low end of the range for farmland.

31. Hydraulic and hydrologic conditions on and adjacent to the project site were thoroughly evaluated by the applicants' consultants – Herrera Environmental Consulting, Inc.. Their primary expert in this area, Dr. Jeffrey Parsons, is particularly well-qualified in the area of sediment transport. Herrera's work was reviewed by experts from the County and from the State Department of Ecology who concurred with Herrera's findings.

32. Herrera's modeling and analysis produced the following picture:

a. There are two types of flooding regimes in the area. In the most significant floods, the Skagit River backs up and floods the site and adjacent areas. This occurs approximately once a year, resulting in inundation depths from one to five feet throughout the site. The other type of flood occurs when the Skagit River is at low flow

and the Nookachamps main stem and east fork are flowing at higher rates due to summer thunderstorms, resulting in localized flooding on the project site and adjacent properties.

b. During the Skagit backwater events, the flooding generally overwhelms the site, much like filling a bath tub with water. At such times the effect of structures in the incised streams, is negligible. Dr. Parsons likened the ELJs in such floods to objects that fill cracks in the bottom of a bath tub.

c. In intermediate flow conditions, unaffected by Skagit backwaters, ELJ #1 will not affect surface or groundwater hydrology on sections of the Nookachamps main stem off of the mitigation bank site. However, in flow conditions, ELJ #2 will have some influence within the channel of the east fork upstream off of the property. This will be limited to a 1.1 foot increase in the water surface elevation in the vicinity of the east boundary of the Clear Valley property, with increased water elevations extending a maximum of 3,372 feet upstream of the project site boundary under any flow conditions. The magnitude of this increase at its furthest point is no more that 0.2 feet.

d. The projected rise in water elevation in the east fork is not sufficient to cause groundwater recharge or increased flooding. No adjacent properties will be adversely affected. The SR9 bridge across the east fork is well beyond the area where any water surface increase will be experienced.

33. The Friend's expert, Dr. Ross Barnes, took issue with the Herrera analysis and predicted that bed aggradation caused by ELJ#2 will be as much as two feet at the SR9 bridge and would extend well upstream of the SR9 bridge. He urged that the effects of the aggradation on the water surface would mean increased flooding off site.

34. After reviewing all the testimony, the Examiner is persuaded that the Herrera scenario is supported by credible evidence and, more probably than not, correct. The Examiner therefore finds that the mitigation bank project is unlikely to have adverse impacts on flooding or groundwater off-site.

35. The applicants have committed to conduct monitoring of water wells to ensure that the project is not adversely impacting the regional water table. They will also conduct monitoring of aggradation, stream elevations, and sediment deposition on the project site. These commitments have been incorporated into the proposed Mitigation Banking Instrument.

36. Several farmers in the Turner Creek/Beaver Creek area above the SR9 bridge, expressed fears that the mitigation bank would create barriers in the flood plain that would retard the draining away of flood waters that often inundate their farms. Dr. Barnes concurred. He was particularly concerned about the effects of aggradation on receding flood waters flowing through the constriction at the SR9 bridge. He argued that the combination of aggradation in the stream, friction caused by wetland plants and road dikes/mounds will increase the time that upstream properties are flooded.

37. Assuming as found above, that Barnes' predicted aggregation scenario does not occur, the Examiner is not convinced that the structures and plantings in the mitigation bank will significantly retard the draining away of flood water from upstream properties.

38. Historically the Nookachamps Creek watershed supported several species of anadromous fish. Elevated stream temperatures are presently a major limiting factor for salmonid production. The high summer water temperatures have led to the listing of the main stem and east fork on the Department of Ecology's Clean Water Act Section 303d list of impaired and threatened water bodies.

39. The project will restore riparian vegetation along the bank of the creek which will improve shading and ultimately improve the current water temperatures. Since the streams are already temperature impaired, any interim temperature problems while the plants mature will not be a significant effect of the project. Dr. Barnes hypothesized that the warming of waters in the high-flow back channels could have a warming effect on stream temperatures when the back channel waters drain back to the creeks. Such effect will probably not be significant. The back channels will be graded to avoid ponding and, most of the time will be empty during the warm low-flow periods. The Examiner finds that the effect of the project on the temperature regime of the Nookachamps system will likely be positive.

40. The current conditions for fish passage will be maintained. The ELJs will feature rises that salmonids can readily negotiate and will not function as a barrier. The high-flow back channels are intended to provide refuge as well as rearing space. They will drain positively so as to prevent stranding. Improved temperature conditions and the re-introduction of large woody debris will benefit fish. The project as a whole will provide new structural diversity, substantially improving habitat that is, at present, badly degraded. The State Department of Fish and Wildlife has approved the project from the standpoint of fish protection and prepared a Hydraulic Project Approval (HPA).

41. A biological assessment was prepared for the project in compliance with the Federal Endangered Species Act. The U. S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, and the National Marine Fisheries Service have concluded that the project is not likely to adversely affect listed species.

42. In addition to improving the temperature regime, the project will likely improve water quality in the watershed by decreasing soil and stream bank erosion and by helping to increase concentrations of dissolved oxygen. Soil loss will be improved by revegetating any bare soils, stabilizing stream banks and installing dense plantings of trees and shrubs along the stream banks. Increase in dissolved oxygen concentration could result from the decrease in nutrient delivery to the stream. Nitrogen, phosphorus and fecal coliform bacteria will be reduced by the elimination of dairy farm operations.

43. Dr. Barnes hypothesized the avulsion of temporary roads within the project site during flood events, leading to erosion and the creation of new stream channels. Such events could upset the hydrological basis of the proposal and mean that the log jams are in the wrong places. Given the re-vegetation of exposed areas, the modest excavations involved and the low velocities anticipated, the Examiner finds that avulsion possibilities are remote.

44. There is currently little recreation on the site. The property is private and fenced. Fishing for salmonids is not allowed on the Nookachamps. There was testimony of some success in fishing for bass, but, in general, the stream is not a major attraction for fishermen.

45. Canoeing through the site does occur, but the recreational boating use is only occasional. During the warm summer season, the flows are frequently too low to permit even canoeing. The applicants' fisheries biologist was unable to use a canoe during visits in August and September. Boating on the Nookachamps is presently a challenge because beaver dams and natural log jams make portaging necessary. The ELJs will add new barriers to boating, but will not change the already difficult overall situation significantly.

46. The ELJs are designed, to the extent possible, to reduce the safety danger they pose. However, inevitably the structures will present a hazard to boaters who stray too close. Signs along the stream and at the property lines are necessary to warn boaters of the danger. Provisions should be made to allow for safe portages.

47. The market area for the mitigation bank will likely be Water Resource Inventory Area 3, an area comprising the western portion of Skagit County (from just east of Hamilton), excluding Fidalgo Island and salt water wetlands. Developers within this area who qualify for credits will be required to compensate for wetland loss at ratios greater than one acre of bank compensation for every acre of wetland impact. The outcome will be designed to secure no net loss of wetland functions and values.

48. Projections are that it will take 10 to 15 years for the bank to sell off all the credits made available, after it is up and running. This means that the creation of another mitigation bank for the same market is unlikely at least until this bank is sold out.

49. There is no evidence of any potential new application for a mitigation bank on Ag-NRL land.

50. The County has changed its regulations, so that mitigation banking in Ag-NRL zones is no longer a use permitted outright. Any future applications will be approvable only by Special Use Permit. This automatically subjects such applications to a hearing process, even if the sites are not within shorelines jurisdiction. Requirements will include an explicit finding of compatibility with existing land use and the Comprehensive Plan, meaning that agricultural protection policies will be entitled to

substantial independent weight. In short, permits for such developments on agricultural lands will be even harder to get.

51. The subject site is unusual, if not unique. The applicants are aware of no other sites on agricultural lands that present the same suite of possibilities for restoration of the wetland functions and values at which this project aims. No other such sites were identified during the hearing.

52. The replacement of 320 acres of land that historically supported traditional dairy-oriented agriculture with a slightly larger acreage for a native seed and cuttings farm represents the substitution of an experimental activity for a use that is a known contributor to the agricultural economy. However, the evidence is that dairies have been closing all over the region. There is some evidence of an emerging market for natural seeds and cuttings.

53. Testimony showed that the agricultural economy in Skagit County is resilient and that the past loss of market for some crops has not caused an overall decline in agricultural revenues. Farmers have simply moved to other higher value crops.

54. If viewed as lost to agriculture, the 320 acres involved here represent .3% of the agricultural acres in the County. Given the wetness of the site, these particular acres do not consistently yield a high return. Under the circumstances, there is little possibility of converting them to traditional high value crops.

55. The loss of these acres to traditional agriculture might very well occur through the sale of the property to another buyer who did not choose to engage in farming. The seed and cuttings operation offers at least the chance of viable new agricultural use.

56. No analysis was performed of the secondary or collateral impacts on agricultural support activities of the loss of the mitigation bank acres to traditional agriculture.

57. A Cultural Resource Assessment was prepared and submitted with the application. No archaeological resources were found on the site. An MDNS condition addresses action to be taken should such resources be encountered.

58. Since 2005, the project presented in the subject applications has been under review by an interagency group called the Mitigation Bank Review Team (MBRT), made up of representatives of Federal (EPA, US Army Corps of Engineers), State (Ecology, Fish & Wildlife) and County governments. The review conducted by the MBRT is conditioned by Chapter 90.84 RCW, the Mitigation Banking Act and Chapter 172-700 WAC, Ecology's pilot rules for the review and implementation of wetland banks in the state. Clear Valley is voluntarily participating in Ecology's pilot program.

59. Ultimately, the project will be required to comply with requirements set forth in a Mitigation Banking Instrument (MBI), a document (now in draft) setting forth in detail the objectives, administration, characteristics, and operation of the bank. The MBI will, in effect, describe a comprehensive set of limitations and conditions with which the enterprise will be required to comply.

60. The proposal will also require a permit from the Corps of Engineers under Section 404 of the Federal Water Pollution Control Act and an authorization from Ecology under Section 401 of the same statute.

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61. As noted the County has been a member of the MBRT for this project. The documents submitted to the MBRT have been reviewed as a part of the review of the local permit applications. The MBRT process is currently nearing completion.

62. Several witnesses noted that the excavations for the project will remove a considerable amount of excellent agricultural soil which can probably not be replaced. It was suggested that after the excavation, the soils beneath might not be suitable for wetland plants. The removal of these soils is significant only if the wetland mitigation bank project fails. Given the considerable investment of time and money on investigating and planning this project, and considering its review by multiple experts and agencies, the Examiner simply does not believe there is a high risk the project will fail because physical wetland restoration and enhancement on the site cannot be accomplished.

63. As noted, the MDNS for this project was issued on February 28, 2008. The conditions imposed by the MDNS are as follows:

> 1. The applicant shall comply with all applicable provisions of the Skagit County Code, including but not limited to Chapter 9.50 Noise Control, 14.32 Drainage Ordinance, 14.24 Critical Areas Ordinance, 14.26 Shoreline Management Master Program, 14.34 Flood Damage Prevention Ordinance, and 15.04 International Codes.
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> 2. The applicant shall comply with all applicable requirements of the Washington State Department of Fish and Wildlife to protect fisheries and wildlife resources.
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> 3. The applicant shall comply with all applicable requirements of the Washington State Department of Ecology under Section 401 of the Clean Water Act certification process.
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> 4. The applicant shall comply with the applicable requirements of the Washington State Department of Archaeology and Historic Preservation. If cultural resources are discovered during project activities, proper procedures and notification protocols shall be implemented.

5. The applicant shall comply with the applicable requirements of the Northwest Clean Air Agency.

6. Temporary erosion, sedimentation and drainage control measures shall be in accordance with local, state and federal requirements. Such measures shall be in place prior to commencement of soil disturbance, and shall be maintained for the life of the construction activities.

7. Nookachamps and East Fork Nookachamps Creeks are included on the 303(d) list for failure to meet water quality standards. In the document titled *Skagit Environmental Bank Response to Skagit County and Public Comments, January 2007,* the proponents have outlined various aspects of their project designed to improve water quality. In addition to the techniques proposed, the proponents shall coordinate with the Washington State Department of Ecology and Skagit County to develop implementing strategies under the Total Maximum Daily Load (TMDL) Study for the Lower Skagit River Tributaries for the proposed project site.

8. Prior to construction, the applicant shall notify Puget Sound Energy and Skagit Public Utility District #1 of their proposal and incorporate their recommendations for the protection of their utility easements through the site.

9. When the native seed and plant nursery become operational, the proponents shall submit a harvesting management plan to agencies with jurisdiction to determine harvest limit areas, to allow native vegetation to establish in height and density to offer riparian shading in order to reduce water temperature in the riparian areas.

10. The applicant shall furnish Skagit County Planning and Development Services copies of all required monitoring and management reports, as outlined in the supporting documents. In addition, the proponents shall furnish Skagit County with all applicable as-builts, in accordance with the objectives and performance for the proposed wetland mitigation bank.

11. The applicant shall comply with the requirements set forth in the mitigation banking instrument, technical appendices and plans.

64. Prior to issuing the MDNS, the County reviewed the completed application and all accompanying technical reports and studies. They reviewed the applicants' Environmental Checklist. They reviewed the applicants' submissions subsequent to filing the application. They reviewed comments of consulted departments and agencies, as well as comments from non-government organizations and the public. They participated in the MBRT. They looked at various government publications and technical reports independent of the application materials (See, *e.g.* Exhibits SC 23 – 27).

65. In issuing the Staff Report, the County likewise reviewed the above materials. Included were responses to questions that had been put to the applicants by the Staff. The Staff review consumed hundreds of hours and involved 15 to 20 people. Even though the Staff Report quotes extensively from the applicants' "compliance response," the record amply supports a finding that the County performed an independent review of the project. In these permit matters, the applicant bears the burden of proof. Quotation from the applicants' submissions is a means of expressing how that burden was met.

66. 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 subject matter of this proceeding. SCC 14.06.050(1)(ix), SMP 13.01, 9.02, 11.02.

Zoning

2. The prior version of SCC 14.16.400, the Zoning Code section on Agriculture-Natural Resource Lands (Ag-NRL), provided the following at subsections (2)(k) and (p)

> (2) Permitted Uses.
>
> (k) Impoundments that function as manure lagoons, irrigation ponds, on-site wetland enhancement/restoration projects or other on-site resource management based ponds.
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> (p) Water diversion structures and impoundments related to resource management and on-site wetland restoration/enhancement projects.

3. The Examiner re-confirms his ruling of June 30, 2008, that, under these subsections, the proposed use described in the completed application was permitted outright in the Ag-NRL zone at the time the application vested in 2006.

4. Under the facts, the project in question would qualify as a wetland restoration project. However, even if some portions of the area to be converted to wetlands were not historically wetlands, the Examiner concludes that the conversion proposed was permitted outright. The evidence shows that a number of wetland areas currently exist on the site. The term "enhancement" as used in the Code includes the creation of new wetland areas where there is at least some wetland to begin with. (The references herein to the "restoration" project are intended to encompass "enhancement/restoration" as used in the Code.)

5. The Examiner feels compelled to add that the question of whether off-site mitigation is a good idea is not before him. The topic is certainly debatable. But the Skagit County Critical Areas Ordinance clearly allows for it. See SCC 14.24.240 Thus, whether approval of this proposal would be an impetus to wetland destruction elsewhere cannot be considered. Presumably the County weighed the environmental consequences of mitigation banking when it approved the legislation.

Shoreline Substantial Development Permit

6. The property in question is within shorelines jurisdiction because of its location in the flood plain.

7. A Shoreline Substantial Development permit is required for this project because it meets the definition of "development" under the Shoreline Management Act and its implementing regulations, the local Shoreline Master Program (SMP). The development proposed is large enough to qualify as "substantial development." RCW 90.58.030(3)(d),(e), 90.58 140(2); SMP 3.03((D)(3), 3.03(S)(20), 9.01(1)

8. Under RCW 90.58.147 a project that is "designed to improve fish and wildlife habitat or fish passage" may be exempt from the Substantial Development Permit requirement that otherwise applies. Although the applicant has argued that this proposal fits within the exemption, the Examiner disagrees. The exemption is intended for projects which have fish and wildlife habitat improvement or fish passage as their primary purpose. Here the benefits to fish, while real, are an ancillary objective for a project that is principally directed toward the creation of wetlands for use in selling mitigation credits.

9. The subject project is consistent with the underlying policies of the Shoreline Management Act. RCW 90.58.020. Under the facts, the use is consistent with control of pollution and prevention of damage to the natural environment. Shoreline restoration is a recognized aim of the legislation. This project aims at restoration of the natural shoreline condition. The bias of the Act is to favor the natural condition over any developmental use, even if that use is agriculture.

10. The local SMP has been approved by the Department of Ecology and is consistent with the rules for Shoreline Management Permit and Enforcement Procedures as set forth in Chapter 173-27 WAC.

11. The local SMP was adopted in 1976. As relevant to these applications, it has not been amended since. But, in the intervening period, there has been an explosion of regulation outside the SMP dealing with wetlands. There is now a Critical Areas Ordinance which among other things seeks "to prevent the continual loss of wetlands, and, where practical to enhance or restore wetlands functions and values." SCC 14.24.020(1). The Critical Areas Ordinance incorporates mitigation banking as a tool.

SCC 14.24.240(12). Yet there is no mention of mitigation banking in the SMP. So, here, the SMP is being made to regulate a use undreamed of by its drafters. Because of this, construing the SMP in this case requires greater recourse than is normal to the idea of natural shoreline protection that lies at the heart of the underlying legislation.

12. Because the SMP contains no specific use category for a "wetland mitigation bank," shoreline review was conducted by the County using listed categories of activities involved in project construction and maintenance – e.g., dredging, landfills, recreation, shoreline stabilization and flood protection. This approach was judicially endorsed in *English Bay Enterprises, Ltd v. Island County,* 89 Wn.2d 16, 568 P.2d 783 (1977) Moreover, this method of review followed the County's long-standing approach in reviewing shoreline permit applications. The Examiner gives deference to the County's consistent interpretation of its own SMP. The approach taken is appropriate in light of the requirement for liberal construction of the act to carry out its purposes. *See, Clam Shacks of America, Inc. v. Skagit County,* 109 Wn.2d 91, 743 P.2d 265 (1987).

13. Under the SMP the "unclassified use" category is reserved for limited cases where the use appears so evidently contrary to shoreline policies, but where "extraordinary circumstances prevent reasonable use of the property" unless the use is allowed. The restoration of natural wetlands simply does not fit within a concept reserved for uses that must be authorized to avoid an unconstitutional "taking." The County committed no error in declining to treat the proposal as an "unclassified use."

14. In construing the SMP, it is irrelevant that the proposed use is a commercial operation that hopes to make a profit. The issues are (1) whether the policies and regulations support this sort of restoration activity, and (2) if the activity is otherwise permissible, whether the effect it will have on existing agriculture requires it to be denied as a matter of shorelines law.

15. The SMP embodies strong policies both favoring the protection of agriculture and the protection of natural shorelines. The program's Goal #2 (SMP 4.02(2)) is "to preserve, protect, and restore the natural resources of Skagit County's shorelines in the public interest and for future generations".

The objective of the Rural shoreline designation where the subject project is located is

> to protect agricultural land from urban density expansion, regulate intensive development along undeveloped shorelines, function as a buffer area between Urban and Conservancy Shoreline Areas and maintain open spaces and opportunities for recreational activities and a variety of uses compatible with agriculture and the shoreline environment.

This language contemplates uses compatible with both agriculture and the "shoreline environment." No guidance is provided for an instance of conflict.

16. Under the use category of "Agricultural Practices," the first policy listed is that "those lands which have agricultural capabilities should be identified and protected for continued agricultural use." SMP 7.01(1)(A)(1). However, the second policy listed calls for restricting the creation of new agricultural land by filling wetlands "which are potentially more productive in their long term natural state." SMP 7.01(1)(A)(2). So it is evident that both agriculture and wetlands are to be protected where possible.

17. The policies and regulations under "Dredging" and "Landfills" disallow these activities if the result will be to affect natural conditions adversely. They seek to prevent the dredging and filling of natural wetlands by projects that would displace such wetlands. The situation where the object of the activity is, essentially, to restore natural conditions is, in the main, not explicitly addressed However, the regulations do provide an exception to prohibitions where the activity would be for "beneficially public purposes consistent with this program."

18. The policy of the Shoreline Management Act is, where possible, to advance the "public interest" in shoreline protection, preservation, and restoration. Alterations of the natural condition are to be authorized in "limited instances." RCW 90.58.020. Reading the SMP in light of its function as a set of use regulations implementing the policy of the Act (RCW 90.58.100), the Examiner concludes that a project aimed at restoration of natural shorelines is a project for "beneficially public purposes consistent with this program."

19. The policies and regulations under "Dredging" and "Landfills" at several points contain strictures against dredging, spoils disposal or landfill that would adversely affect, diminish or even occur in "prime agricultural land." SMP 7.06(1)(A)(8)(a). Within the SMP, "prime agricultural land" is not a defined term. Although agricultural use has been made on the subject property for many years, the susceptibility of the area to flooding has made this a challenging proposition and has severely limited the kinds of crops that can be grown. The qualifier "prime" conveys a meaning of highest quality. Though obviously suitable for agriculture, the mitigation bank site does not qualify as "prime agricultural land."

<u>Dredging policies and regulations</u>

20. Policy 7.04(1)(A)(2): All dredging and spoil disposal operations should not:
    a. adversely alter natural drainage patterns, currents, river and tidal flows.
    b. interfere with or adversely affect water flows and capacities.
    c. create conditions that would endanger public health and safety.

    Policy 704(1)(A)(8): Proposals for dredging and spoil disposal projects should demonstrate that the operation will not be detrimental to the public interest and uses of the shorelines and water body.

In light of the facts found above, the subject proposal will not have the adverse impacts these policies seek to protect against. Something closer to natural drainage will be restored. There will be no adverse impact on flows. The public interest in natural shorelines will be served. The impacts on recreation will be *de minimis*.

21. Policy 7.04(1)(A)(5) Review of proposals for dredging and spoil disposal should assess:
a. The value of the dredge and disposal site in their present state versus the proposed shoreline use to be created by dredging and/or disposal expressed in short and long range economic, social, and environmental terms.

This subsection assumes a project that will alter the natural condition for a use that displaces it. The restoration of a wetland shoreline on land that has previously been converted to agriculture is really not what the SMP drafters had in mind. Nonetheless, the required assessment was, in fact, made. (See, Staff Report, SC 30, p 28). That the County accepted the applicant's analysis on this point or that the conclusions of that analysis are disputed is not relevant.

22. Policy 7.04(1)(B)(1): Dredging should not occur in the following, except for beneficially public purposes consistent with this program:
a. in estuaries, natural wetlands and marshes. . . .

The proposal is a project for beneficially public purposes consistent with the SMP.

23. Policy 7.04(1)(C)(1):
a. Deposition of dredge spoils in water should be discouraged, except when alternatives of depositing material on land is more detrimental to shoreline resources and uses than depositing in water areas.
b. Land spoils disposal should not be located upon, adversely affect, or diminish:
- Estuaries, natural wetlands, and marshes.
- Prime agricultural land.
- Natural resources including but not necessarily limited to sand and gravel deposits, timber, or natural recreational beaches and waters.
- Designated wildlife habitat and concentration areas.
- Water quality, quantity, and drainage characteristics.
- Public access to publicly owned shorelines and water bodies.

The purpose of these provisions is to prevent damage to water quality and aquatic life and to confine upland disposal to approved safe locales where on-site effects will not be

harmful to other uses. To the extent that dredge spoils will be deposited either in water or on land here, the effects will not be adverse. In net result, natural wetlands will be increased not diminished. The upland disposal contemplated is not on prime agricultural land and does not harm any of the resources identified. Interference with use of the water surface will not be significant.

24. Regulation 7.04(2)(B)(3): Dredging shall not occur in the following: except for maintenance work and for beneficially public purposes consistent with this program:
a. in estuaries, natural wetlands, and marshes . . .

The project is for beneficially public purposes consistent with the SMP.

25. Regulation 7.04.(B)(6): Dredge spoil disposal is prohibited on lake shores and beds, in streamways, estuaries, natural wetlands, and on marine accretion beaches EXCEPT as an element of an approved shore restoration or beach enhancement program.

The "shorelines" protected by the Shoreline Management Act include water areas and associated shorelands. RCW 90.58.030(2)(d). "Shorelands" include uplands within 200 feet of the ordinary high water mark, floodways and contiguous floodplain areas and wetlands associated with streams. Accordingly, the proposed project fits within category of "shore restoration" as used in the SMP.

<u>Landfill policies and regulations.</u>

26. Policy 7.06(1)(A)(2): All landfills should not:
a. adversely alter natural drainage patterns, currents, river and tidal flows.
b. interfere with or adversely affect floodwater flows and capacities.
c. create conditions that would endanger public health and safety.

Policy 7.06(1)(A)(4) Public uses – Proposals for landfills should demonstrate that the operation will not be detrimental to the public interest and uses of the shoreline and water body.

Policy 7.06(1)(A)(5) Public access – Landfills and their uses, if allowed on shorelines should enhance public access to the shoreline and water body.

In light of the facts found above, the subject proposal will not have the adverse impacts these policies seek to protect against. Something closer to natural drainage will be restored. There will be no adverse impact on flows. The public interest in natural shorelines will be served. The impacts on recreation will be *de minimis*. Public access to the shoreline, by the project as conditioned, will not significantly change from the present

condition. There is no regulation making enhancement of public access under Policy (A)(5) mandatory.

27. Policy 7.06(1)(A)(3): Review of proposals for landfills should assess the overall value of the landfill site in its present state versus the proposed shoreline use to be created and other future potential public or private shoreline uses, expressed in short and long range economic, social and environmental terms. . . .

This subsection assumes a project that will alter the natural condition to a use that displaces it. The restoration of a wetland shoreline on lands that have previously been converted to agriculture is really not what the SMP drafters had in mind. Nonetheless, the required assessment was, in fact, made. (See Staff Report, SC 30, p. 41). That the County accepted the applicants' analysis on this point or that the conclusions of that analysis are disputed is not relevant.

28. Policy 7.06(1)(A)(8): Landfills, if allowed on shorelines should not significantly damage, diminish or adversely affect:
a. Prime agricultural land…
c. Fish, shellfish, and wildlife migratory routes, spawning, nesting, harvesting, and habitat areas…
e. Public access to publicly owned shorelines and water bodies.

In light of the facts found above, the subject proposal will not have the adverse impacts this policy seeks to protect against. The fill contemplated will not be placed on prime agricultural land. Fish and wildlife habitat will be enhanced. Public access will not diminish.

29. Policy 7.06(1)(B)(1): Landfills should not locate:
a. in prime agricultural land.
b. in estuaries, natural wetlands, and marshes.. . .
e. below the ordinary high water mark.
f. where they would fill marine and river indentation features such as eddies, pools, and aeration drops that provide proven biologically productive aquatic habitats.

The proposed landfill activities in the shoreline are associated with the proposed dredging to facilitate wetland restoration by filling onsite ditches and installing the ELJs. The fill contemplated will not be placed on prime agricultural lands. The policy against filling wetlands assumes that the fill will displace the wetland use. Of course, the opposite is true here. The wetland use is being enhanced. The policy against filling below the ordinary high water mark is qualified by the regulations which allow filling below the ordinary high water mark as a conditional use. The project will, in fact, enhance aquatic habitats.

30. Policy 7.06(1)(C(1): Landfills should be designed no larger than necessary for the proposed use.

> Policy 7.06(1)(C)(3): All landfills, if allowed on shorelines, should be designed so as not to adversely affect or interfere with the flow of surface, subsurface, and floodwaters. Landfill proposals should take mitigating measure to minimize effects to drainage and floodwaters.

The proposed landfills on site are only as large as needed to carry out the restoration design. Excess materials are being stockpiled outside of the shoreline. Adverse affects on flow of surface, subsurface and floodwaters are the very things the project is designed to avoid. Under the facts found, such adverse effects are not likely to occur.

31. Regulation 7.06(2)(B)(2): Landfills are not permitted:
a. below the ordinary high water mark (OHWM) of all shoreline areas EXCEPT as a conditional use for approved water and shoreline developments that are consistent with this program. . . . .
c. in estuaries and their natural wetlands.
d. in floodways where flood capacity, flow, and direction would be adversely affected.

The subject proposal has been reviewed under the criteria for conditional use approval. The Examiner (see below) has concluded that these criteria are met. The proposal does not involve an estuarine wetland. Under the facts as found, the impacts on the capacity, flow and direction of floodwaters in the floodway will not be adverse.

<u>Mining</u>

32. The proposal is not subject to review under SMP 7.08 Mining. At SMP 3.03(M)(5) "mining" is defined as

> the removal of naturally occurring metallic and nonmetallic materials and other related materials from, on and beneath the earth's surface. Normally, such removal is for commercial and construction purposes. Mining in general includes deep pit, open pit, or surface mining, quarrying, and place or hydraulic mining. See "Surface or open pit mining."

"Surface or open pit mining" are defined at SMP 303(S)(21) as

> Involves either the removal of surface material (overburden) to enable the underlying mineral resources to be exposed and extracted (quarried) or the direct extraction of naturally occurring surface minerals and materials such as rock, sand, gravel and aggregate. Removal of sand from river bars is considered a surface mining activity.

33. The activities associated with restoration of the wetland in this case are not mining. No "commercial and construction purposes" are involved. These terms, in context, must be read to refer to using the removed materials for such purposes. That the mitigation bank project has a commercial purpose does not make all the movement of earth on the site a mining operation.

34. The difficulty here is with the word "normally." Is this the kind of earth moving operation that qualifies as "abnormal" mining under the definition? The Examiner concludes that it is not. The mining section of the SMP (7.08) deals with the kind of materials removal activities that have "irreversible impacts." The focus of the policies and regulations is to prevent such impacts from disrupting geohydraulic processes, channel form and alignment, from interfering with marshes and wetlands and from disrupting fisheries. The project here is designed to be beneficial with respect to all of these concerns. Dredging and filling in relation to wetland restoration simply does not fit within the concept of mining as regulated by the SMP. Indeed, if this project involves mining, it is hard to conceive of any activity authorized by a grading permit that is not mining.

35. Moreover, the stockpiling of excess materials on property outside of the shoreline does not in itself make the proposal into a mining project. The principal adverse impacts sought to be avoided by the mining regulations are not likely to occur from such stockpiling. The prevention of erosion, sedimentation and any aesthetic worries can readily be dealt with by simple management techniques that are required here through conditions of approval.

36. Policy 7.08(1)(A)(2) states:

> Mineral extraction activities along shorelines that would disrupt or permanently alter or remove prime agricultural lands and associated activities should be prohibited.

This merely means that activities that <u>are</u> mining must yield in favor of protecting prime agricultural lands. Since this project does not involve mining, this policy has no application here. And, as noted, the lands affected are not prime agricultural lands.

<u>Shoreline Stabilization and Flood Protection</u>

37. Section 7.16, the Shoreline Stabilization and Flood Protection section of the SMP is directed toward streamway modifications that cause interference with normal river geohydraulic process leading to erosion or flow restrictions that damage agriculture, roads or bridges, other adjacent land uses, or fish and wildlife resources. The policies and regulations require that streamway modifications comply with recognized standards to prevent such effects.

38. To the extent that this project involves streamway modifications, the adverse impacts which are the concern of Section 7.16 are effects that the professional design of the project has specifically been directed to preventing. Under the facts found, that design is likely to limit effects as represented. The project will not have significant adverse impacts to surface or groundwater hydrology outside of the project boundary during floods or otherwise. No impacts to off-site land uses are anticipated.

39. The Staff Report concludes that the proposal meets the requirements of the SMP for Transportation Facilities (Section 7.17) to the extent applicable. The Staff Report concludes that the Utilities section (7.18) is not applicable. The Examiner concurs in these determinations and adopts them.

40. SMP 9.02(1) contains the criteria for granting Shoreline Substantial Development Permits. The proposed development must be consistent with:

> (a) Policies and regulations of the Skagit County Shoreline Master Program;
>
> (b) Applicable policies of RCW 90.58.020 in regard to shorelines of the state . . . and
>
> (c) Regulations adopted by the Department of Ecology pursuant to the Act [now Chapter 173-27 WAC].

The applicants have met their burden of proof. The proposal, as conditioned, is consistent with the above Shoreline Substantial Development Permit criteria.

Shoreline Conditional Use Permit

41. Shoreline Conditional Use approval is needed because the project involves landfill below the Ordinary High Water Mark (OHWM) and because channel modifications and dams are contemplated. SMP 7.06(2)(B)(2)(a), 7.16(F2)(A)(3)(b).

42. SMP 11.03 sets for the criteria for approving Shoreline Conditional Use Permits:

> (1) Permits for uses which are classified or set forth in this Master Program as conditional uses may be authorized providing the applicant can meet all of the following criteria[.] The burden of proof shall be on the applicant.
> a. That the proposed use will be consistent with the policies of this Master Program and policies of RCW 90.58.020.
> b. That the proposed use will not interfere with the normal public use of public shorelines.
> c. That the proposed use of the site and design of the project will be compatible with other permitted uses in the area.

d. That the proposed use will cause no unreasonable adverse effect to the shoreline environment designation in which it is located.
e. That the public interest suffers no detrimental effect.

In addition, Conditional Use Permits may not be granted for uses that are prohibited by the master program, and consideration must be given to the cumulative impact of like actions in the area. SMP 11.03(3), (4).

43. The foregoing discussion under Shoreline Substantial Development Permit establishes consistency with the policies of the SMP and of the Shoreline Management Act.

44. The normal public use of public shorelines here involves occasional boating along the portions of Nookachamps Creek within the mitigation site boundary. The ELJs will necessitate portages where they occur, a problem encountered elsewhere in the system because of other stream blockages. Safety considerations presented by these impediments to passage can be addressed through design and through prominent appropriate signs. The effects of these structures on navigation will not prevent normal public use of the waterways. In the boating context of the Nookachamps system, the ELJs are not significant enough as impediments to constitute "interference" as that term is used in the conditional use criteria.

45. Both the landfill and the channel modifications and dams (ELJs) will meet the compatibility criterion because there will be no significant off-site impacts of the project.

46. The proposed use will not cause unreasonable adverse effects to the shoreline environment designation in which it is located. The project is consistent with the purposes of the Rural designation. It will offer protection from urban density expansion, will maintain open space and will act as a buffer between urban development and other uses.

47. The proposal is an effort to restore conditions akin to the natural shoreline condition historically. In the context of shoreline management, this effort is in the public interest.

48. The concern over landfill below the OHWM is directed at development that seeks to convert water areas into upland. Here nothing of the kind is intended. On the contrary, the idea is to create a larger shoreline area by expanding wetland hydrology. This is not the evil aimed at by the conditional use requirement.

49. As the SMP is interpreted herein, the project does not include uses prohibited by the master program. Under the facts found above, cumulative impacts are not likely to occur because like actions in the area are not a realistic possibility.

50. The Examiner concludes that the applicants have met their burden of proof and that the proposal is consistent with the criteria for Shoreline Conditional Use Permit approval.

Grading Permit

51. The Grading Permit is a form of Building Permit. The mitigation required here pursuant to SEPA is included among the conditions of approval. Title 14 SCC (Unified Development Code) applies to issuance of the Grading Permit only to require compliance with land use requirements. SCC 14.06.050(1)(a)(vi).

52. As noted, the project is permitted outright as a matter of vested zoning regulations. Compliance with the Shoreline Management Act is achieved by approval of the Shorelines Substantial Development /Conditional Use Permit as conditioned. Therefore, the underlying land use requirements for a Grading Permit have been satisfied and the project, as conditioned, is approved as to land use. The Building Department may impose appropriate additional conditions pursuant to Building Permit requirements.

State Environmental Policy Act (SEPA)

53. In issuing its MDNS, the County conducted an independent review of the application materials, including actual consideration of environmental factors.

54. The process for making the threshold determination conformed to the procedures of WAC 197-11-330.

55. On appeal, the Examiner must decide whether the issuance of the MDNS was "clearly erroneous". This means that the reviewer must be left with "the definite and firm conviction that a mistake has been committed." See, *e.g., Murden Cove Preservation Assoc. v Kitsap County,* 41 Wn. App 515, 704 P.2d 1242 (1985).

56. The administrative determination of the County in making the threshold determination "shall carry substantial weight in any appeal proceeding." SCC 14.12. 210(4).

57. An appeal of an MDNS seeks a determination that the adverse environmental impacts of a proposal are "significant" requiring the preparation of an Environmental Impact Statement (EIS) An impact is "significant" if it has a "reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794.

58. An alternative reason for turning down an MDNS is that the information on which it was based was not "reasonably sufficient to evaluate the environmental consequences of the proposal." WAC 197-11- 335.

59. At the outset, it should be emphasized that any threshold determination under SEPA necessarily presumes that all applicable rules and regulations will be complied with. Since SEPA was enacted, environmental regulation has grown enormously, so that today most of the gaps in impact control are filled by regulatory provisions. Recognizing this, the legislature enacted RCW 43.21C.240 which allows local governments to determine that requirements for environmental analysis and environmental protection contained in applicable regulations are adequate to address and mitigate specific adverse impacts of a project.

60. Thus, the mitigation banking project before the County here for a threshold determination on significance is a project which is already conditioned by all applicable local, state and federal requirements.

61. An MDNS is a mechanism by which conditions are attached to a threshold decision that operate to reduce a project's impacts to below the level of "significance." See WAC 197-11-350. To the extent that an MDNS simply requires compliance with existing regulations, its conditions are redundant. This, however, merely serves to emphasize that the rules are to be obeyed. It does not make the conditions wrong.

62. Moreover, the MDNS entered in this case goes beyond regulatory compliance to impose additional requirements – most notably the requirement to comply with the Mitigation Banking Instrument.

63. Under the facts as found, the appellants did not carry their burden to show that the probable adverse environmental impacts of the mitigation bank proposal, as conditioned, are "significant."

a. It does not cause significant adverse impacts on the physical surroundings through aggradation, avulsion, excavation, filling, erosion, sedimentation, or temperature change. It does not aggravate water pollution, flooding or the behavior of flood waters.

b. It does not adversely impact fish or wildlife.

c. The proposal is not contrary to applicable land use plans. As vested, the project is for a use permitted outright in the zone. The zoning ordinance is an implementing development regulation for the Comprehensive Plan and as such is presumed to be consistent with the Plan. If there is a conflict, the development regulation controls. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997).

d. The agricultural uses lost will be replaced by a different kind of agriculture. Even if the lands concerned are considered as taken out of agriculture, the loss of these particular non-prime lands does not rise to the level significance.

e. Though the protection of navigation is one of the major bases for the Shoreline Management Act, the impact of this project on recreational navigation is minor and not significant. The public's right to use public waters is adequately protected by conditions of approval.

64. The appellants suggest that certain impacts were not sufficiently studied. The secondary or collateral impacts of the change in agriculture on the economy were not studied. But economic impacts are not required to be considered under SEPA review. In any event, there was no showing that such impacts would likely be significant.

65. The approval of this particular mitigation bank under rules that have now been changed was not shown likely to provide a precedent for the approval of like actions in the County. There was no persuasive evidence of a cumulative effect on the loss of agricultural lands of any kind, much less of prime agricultural lands.

66. There was no showing that the mitigation banking project is likely to fail.

67. The threshold determination was based on information "reasonably sufficient" to evaluate the environmental impacts of the proposal.

68. The appellants have not carried their burden here. The Examiner does not have a "definite and firm conviction" that a mistake has been committed in the issuance of the MDNS.

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

CONDITIONS

1. The project shall be carried out as proposed in the application materials, except as modified by these conditions.

2. The applicants shall obtain all required permits and approvals.

3. The applicants shall comply with all conditions of the MDNS.

4. None of the excess materials for the project that are stockpiled in any location shall be sold or otherwise used for commercial or construction purposes.

5. Appropriate signs shall be erected along the streams and at property boundaries to advise boaters of the dangers posed by the ELJs.

6. Adequate portages shall be constructed to allow boaters to get around the ELJs.

7. The applicant, heirs, holders of the conservation easement for the long term monitoring and maintenance of the wetland mitigation bank and successors shall comply with the requirements set forth in the mitigation banking instrument, technical appendices, resource folder documents and plans.

8. The applicant, heirs, holders of the conservation easements for the long term monitoring and maintenance of the wetland mitigation bank, and successors shall develop a monitoring plan to monitor water levels in site Monitoring Wells MW-35, MW-36, MW-37, MW-38, and MW-39. The monitoring plan shall establish criteria to evaluate monitoring data and develop appropriate mitigation response actions should monitoring data indicate that the project is causing changes in groundwater levels that are adversely impacting nearby water supply wells. The monitoring plan shall be submitted to the county for comment and approval. The responsible party shall implement the approved monitoring plan for the duration of the project.

9. Construction pursuant to these permits shall commence within two (2) years of the final approval of the permits, whether such approval comes at the County level or after decision on any further appeals.

10. The required monitoring and maintenance and compliance with performance standards provide good cause for adopting a time period longer than five years for completion of this project. All activity permitted through the approval of these permits shall be authorized through the duration of the long term monitoring and maintenance program.

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

DECISION

The appeals of the MDNS are denied. The Grading Permit (land use approval) and the request for a Shoreline Substantial Development/Conditional Use Permit are approved, subject to the above conditions.

DONE this 23rd day of January, 2009.

Wick Dufford, Hearing Examiner

RECONSIDERATION/APPEAL

GRADING PERMIT

As provided in SCC 14.06.180, a request for reconsideration of the applicability of the provisions of Title 14 SCC to the grading permit may be filed with Planning and Development Services within 10 days after the date of this decision. As provided in SCC 14.06.120(9), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with Planning and Development Services within 14 days after the date of the decision, or decision on reconsideration, if applicable.

SEPA APPEALS

As provided in SCC 14.06.180, a request for reconsideration may be filed with Planning and Development Services within 10 days after the date of this decision. As provided in SCC 14.06.110(13), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the clerk of the Board within 14 days after the date of the decision, or decision on reconsideration, if applicable.

SHORELINE

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