

**NOTICE OF DECISION
BEFORE THE SKAGIT COUNTY HEARING EXAMINER**

Applicant: The Nature Conservancy
c/o Jenny Baker
410 North 4th Street
Mount Vernon, WA 98273

Requests/File No: Special Use Permit -- PL09-0484
Shoreline Substantial Development Permit -- PL09-0485

Location: Approximately 1.4 miles south of Conway on Old Pioneer Highway adjacent to the Fisher Slough crossing, within portions of Secs 19, 20, 29, 30, T33N, R4E, W.M.

Land Use Designations: Zoning: Agriculture-Natural Resource Lands (Ag-NRL)
Shorelines: Rural

Summary of Proposal: To develop a tidal marsh restoration project, involving the setback of an existing levee and realignment of a portion of Big Ditch.

SEPA Compliance: The County issued a Mitigated Determination of Non-Significance on February 25, 2010. The MDNS was not appealed.

Public Hearing: After reviewing the Report of Planning and Development Services (PDS), the Hearing Examiner conducted a public hearing on May 12, 2010. The Examiner visited the site.

Decision: The applications are approved, subject to conditions.

Appeal: Special Use: A request for reconsideration may be filed with PDS within 10 days of this decision. The decision may be appealed to the Board of County Commissioners by filing a written appeal with PDS within 14 days of the date of the decision, or decision on reconsideration, if applicable.
Shorelines: A request for reconsideration may be filed with PDS within 5 days of this decision. The decision may be appealed to the Board of County Commissioners by filing a written appeal with PDS within 5 days of the date of the decision, or decision on reconsideration, if applicable.

Online Text: The entire decision can be viewed at:
[www.skagitcounty.net/hearing examiner](http://www.skagitcounty.net/hearing_examiner)

FINDINGS OF FACT

1. The Nature Conservancy, in collaboration with Dike District #3, Drainage District #17, and local landowners, seeks permits for a project to reconnect natural freshwater tidal hydrology to approximately 50 acres of currently diked floodplain.

2. The project will restore historic tidal marsh vegetation communities, provide juvenile Chinook salmon rearing habitat, and improve passage for Coho and Chum salmon and other fish species to tributary spawning areas. The project will also improve flood and sediment storage conditions to protect agricultural uses on adjacent properties, and new drainage infrastructure will provide a significant additional benefit to agriculture in the area.

3. The location is approximately 1.4 miles south of Conway, on Old Pioneer Highway adjacent to the Fisher Slough crossing, within a portion of Sections 19, 20, 29 and 30, Township 33 North, Range 4 East, W.M. A complete list of the parcels involved is provided in the Staff Report, which is by this reference incorporated herein as though fully set forth. The properties involved are owned by the Nature Conservancy, private owners, the County and the dike and drainage districts.

4. A portion of the property (Hill Creek/Carpenter Creek and Fisher Slough) lies within shoreline jurisdiction. The subject shorelines are designated Rural under the local Shoreline Master Program (SMP). The Comprehensive Plan/Zoning designation for the property is Agriculture-Natural Resource Lands (Ag-NRL).

5. The instant proceeding relates to applications for both a Special Use Permit (zoning) and a Substantial Development Permit (shorelines).

6. The majority of the property is located within an A2 flood zone - area of 100-year flood. The base flood elevation on the site is approximately 9 feet MSL, based on mapping effective January 3, 1985.

7. The Nature Conservancy has been working on the project since 2004. A number of reports and design documents have been prepared and submitted for review by Federal, State and local agencies. In addition to the subject County permits, the proponents are seeking permits from the Washington Department of Fish and Wildlife (HPA), U.S. Army Corps of Engineers (Section 404 and Section 10 permits) and the Department of Ecology (general construction storm water permit). The Nationwide Clean Water Act Section 404 Permit from the Corps relieves the applicant of the requirement for a separate Section 401 water quality certification from the Department of Ecology. The contractor will provide a Stormwater Pollution Prevention Plan pursuant to the general stormwater permit.

8. The project area lies immediately east of the Old Pioneer Highway upstream of the

Fisher Slough bridge. From the adjacent uplands, the Hill Ditch (Carpenter Creek), Big Fisher Creek and Little Fisher Creek flow into the fresh-water slough, which migrates westerly across relatively flat bottom-land narrowly confined between two levees, and then flows under the highway, connecting to downstream sloughs, the Skagit River and salt-water tidal areas. The existing Big Ditch is a generally north-south tending agricultural drain that has been constructed several feet lower than the surrounding drainage system to provide interior drainage for local farm areas. At present the Big Ditch is routed via an old culvert through the levee system and under the slough at roughly the slough's mid-point. Downstream at the highway bridge is a floodgate. Both the floodgate and the Big Ditch culvert have acted as fish passage barriers.

9. The land uses on adjacent properties include cultivated agricultural land to the north, east and south and vegetated levees north and south of the Fisher Slough riparian area. There are several private residences to the east of the project that are higher in elevation than the proposed tidal restoration and flood storage areas of the project.

10. Overall the project consists of three phases. Phase I has already been completed. That phase, performed pursuant to a Shorelines Exemption, involved the retrofit of the existing floodgate to rectify its interference with fish passage as well as its contribution to increased water temperature and decreased dissolved oxygen in the slough during low tides. In the fall of 2009, a self-regulating floodgate was installed to increase the period of time water will flow through the structure, facilitating fish passage to tidal marsh rearing areas during juvenile Chinook spring migration and Coho spawning migration in the fall.

11. Phases II and III are covered by the subject permit applications. The concept is to realign the Big Ditch so that it crosses the slough at a point adjacent to the highway bridge and to move the South Levee farther south so that a larger area is created between the levees for the restored tidal marsh habitat to occupy.

12. Phase II will consist of Big Ditch realignment, South Levee setback pre-loading and tidal marsh restoration pre-excavation. With its new alignment the Big Ditch will cross the slough via a new inverted siphon. Phase II will include pre-excavation of the tidal marsh restoration pilot channels, the main tidal channel and tributary realignments in the dry.

13. Phase III will involve removal of the existing South Levee and the existing Big Ditch crossing and final loading of the new South Levee at its setback location. Connection will be made of the tidal marsh restoration final channels, the main tidal channel, and the realigned tributary channels.

14. The project will result in the loss of some agricultural land, but will have offsetting benefits to agriculture in the area. The new alignment of the Big Ditch and the new siphon will greatly improve drainage and solve leakage problems that have been urgently in need of correction. Upstream flooding will be reduced by the provision of increased flood storage in the marsh area. The new levee is designed to withstand larger floods, longer periods of inundation and saturation, and has an upgraded spillway as compared with the existing structure.

15. Groundwater mounding analyses were conducted to address drainage problems resulting when groundwater tables are elevated due to late Skagit River seasonal runoff and floods. The engineering investigations concluded that no adverse effects will occur. Project-induced increases in localized groundwater conditions will be minimal for the transient spring runoff condition and are addressed by drainage design and seepage protective features within the levee design.

16. There is one water well adjacent to the project area which is susceptible to floodwater intrusion and potential fouling and bacterial contamination during flood events. The proposed project will decrease the amount of flooding occurring on the tributaries and provide a minor incremental improvement in flood conditions for the Skagit River. The project, thus, reduces the potential risk for fouling and contamination of the water well. In addition, frequent freshwater tidal inundation will contribute somewhat to recharging the underlying aquifer source for the well.

17. During construction, the project area will be accessed from current access points along the Old Pioneer Highway. The project may include up to 8,000 vehicle trips to the site to import materials, and equipment and to dispose of materials from the site. During the 5-month summer working periods in 2010 and 2011, trucks and other vehicles will enter the highway every 14 to 15 minutes on average. The use of Franklin Road for truck ingress and egress is not currently planned. No significant adverse impacts on highway traffic flow are anticipated.

18. A temporary crossing of Fisher Slough at the current Big Ditch crossing has been proposed to reduce inter-site trips for moving materials to different project areas north and south of the slough. Temporary parking will be provided at designated staging areas. No permanent paved roads will be constructed, but temporary access roads will be built within the project footprint. Temporary roads will be of bare earth or woods chips, except for those leading from the highway to staging areas which will be graveled. Appropriate temporary erosion and sediment controls measures will be taken.

19. While the project is being built, employees will be onsite during normal business hours -- Monday through Friday from 7:00 a.m. to 7:00 p.m. There may be occasional weekend and off-hours work during low tide conditions and to accommodate in-water fish work windows. There may be as many as 50 employees on site at a given time during construction.

20. The planning of the project has been successfully carried out in cooperation with the full spectrum of stakeholders and interest groups. In addition to government agencies, local landowners and the affected dike and drainage districts, consultation has included input from Swinomish Tribe, the Skagit Systems Cooperative, Skagitians to Preserve farmland, the Skagit Watershed Council, the Skagit Conservation District, and the Western Washington Agriculture Association. Independent technical design review has been provided by professional engineering consultants.

21. Funding for the project is available from Federal stimulus money and state salmon restoration funds. A local company has been awarded the bid, adding immediate local economic benefit.

22. The project will help to implement several broader agreements, including the Skagit Drainage and Fish Initiative and the Tidegate Fish Initiative Implementation Agreement, providing effective mitigation for maintenance dredging activities in Hill Ditch and Big Ditch and creating restoration credits for tidegate maintenance.

23. A cultural and archaeological resources field investigation was performed at the site in June of 2009. No archaeological resources were found. The State Office of Archaeology and Historic Preservation has reviewed the information and concurs with the survey findings.

24. The applications were reviewed under the State Environmental Policy Act (SEPA) and a Mitigated Determination of Non-Significance (MDNS) was issued by the County on February 25, 2010. The MDNS was not appealed. It contained the following conditions:

1. The application 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 Ordinances and 15.04 International Codes.
2. The applicant shall comply with all applicable requirements of the Washington State Department of Fish and Wildlife to protect fisheries and wildlife resources.
3. The applicant shall comply with all applicable requirements of the Washington Department of Ecology under Section 401 of the Clean Water Act certification process.
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. The applicant shall furnish Skagit County Planning and Development Services copies of all required monitoring and management reports, as outline in the supporting documents.

8. The public right-of-way shall be kept clean. Tracking of mud and debris off site shall not be allowed.

25. The Examiner finds that the project, as designed and conditioned will not have an adverse impact on hydrologic functions, drainage infrastructure or the ongoing agricultural use of adjacent properties.

26. The project incorporates the best available science and engineering. Antiquated drainage and flood control infrastructure will be replaced with better designed and better constructed infrastructure.

27. The general criteria for Special Use Permit approval are set forth at SCC 14.16.900 (1)(b)(v), as follows:

A. The proposed use will be compatible with existing and planned land use and comply with the Comprehensive Plan.

B. The proposed use complies with the Skagit County Code.

C. The proposed use will not create undue noise, odor, heat, vibration, air and water pollution impacts on surrounding, existing or potential dwelling units, based on the performance standards of SCC 14.16.840.

D. The proposed use will not generate intrusions on privacy of surrounding uses.

E. Potential effects regarding the general public health, safety, and general welfare.

F. For special use in . . . Natural Resource Lands, the impacts of long-term natural resource management and production will be minimized.

G. The proposed use is not in conflict with the health and safety of the community.

H. The proposed use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding areas, or conditions can be established to mitigate adverse impacts on such facilities.

28. The Staff Report analyses the proposal in light of the above criteria and finds that, as conditioned, the project will comply with them. The Examiner concurs with this analysis and adopts the same.

29. In particular, the Examiner finds that habitat restoration and agricultural uses are not in conflict in this instance. The project will serve to improve habitat while mitigating flooding and drainage impacts on agricultural lands.

30. The area subject to the Shoreline Management Act is limited to a portion of Hill Ditch/Carpenter Creek, the slough below their confluence, and the riparian corridor involved. Two hundred feet on either side of the stream is within the area governed by the local Shoreline Master Program (SMP). Most of the agricultural land affected is beyond shoreline jurisdiction. The new South Levee is beyond the shoreline boundary.

31. Part of the restoration proposal will require excavation for relocating the Big Ditch. The Big Ditch, both old and new, is outside of the shorelines, except where the ditch currently crosses under Fisher Slough and where the realigned channel will make a new crossing under the slough through the inverted siphon structure.

32. The SMP policies and regulations for dredging apply to the proposed excavation work that is within the shoreline area. This will include removal of the existing South Levee, and the excavation of pilot channels and the main channel, and realignments of tributaries where they flow into Fisher Slough.

33. The Examiner notes that dredging is generally disallowed in estuaries, natural wetlands and marshes. However, there is an exception to this prohibition where the activity is "for beneficially public purposes." SMP 7.94(2)(B)(3). The Examiner finds that the subject habitat restoration project is for beneficially public purposes.

34. The SMP policies and regulations for landfills apply to the placement of excavated materials at various locations within the shoreline area and to the proposed contouring and grading involved in the restoration activities. In particular, the landfill provisions apply to the temporary crossing of Fisher Slough at the existing Big Ditch culvert location, and the parking and staging areas just north of the slough along the highway.

35. Under the SMP, landfills, like dredging are generally forbidden in estuaries, natural wetlands, and marshes. SMP 7.06(1)(B)(1). Here the proposed landfill activities in the marsh are associated with the proposed dredging and other activities to facilitate restoration. The policy against filling in a marsh assumes that the fill will displace the marsh. In this case the opposite is true. The marsh use is being enlarged and enhanced. Moreover, the prohibition against filling in a marsh must be read in conjunction with the language of SMP 7.06(1)(C)(3) which states "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." The subject proposal will have a positive

impact on flows and flood management. The anti-landfill provisions of the SMP are, thus, not applicable to the circumstances of this project.

36. The Staff reviewed the proposal under all applicable SMP provisions and determined that, as conditioned, it will be consistent with them. Again, the Examiner concurs and adopts the Staff's conclusion. Moreover, the project is entirely consistent with the basic policy of the Shoreline Management Act which has the restoration of natural shorelines as one of its explicit aims.

37. The Notice of Development Application was issued for the combined applications on January 7, 2010. No comments in opposition were received. Several letters of support were submitted. There was no adverse public comment at the hearing. Representatives of Dike District #3, Drainage District #17, the Western Washington Agriculture Association, and the State Department of Fish and Wildlife spoke in favor the project.

38. 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)(b)(ii), SMP 8.07.

2. The requirements of SEPA have been met.

3. A Hearing Examiner Special Use Permit is required for habitat enhancement or restoration projects. SCC 14.16.400(4)(c).

4. As conditioned the proposal is consistent with the requirements for a Special Use Permit. SCC 14.16.900(1)(b)(v).

5. The project is a substantial development as defined by the master program and requires a Substantial Development Permit SMP 3.04(S)(20), SMP 2.05.

6. As conditioned the proposal is consistent with the policies and regulations of the SMP, and the policies of the Shoreline Management Act. The project does not violate any regulation of the Department of Ecology relating to shorelines or shoreline permits.

7. Accordingly, the criteria for approval of a Shoreline Substantial Development Permit have been met. SMP 9.02.

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

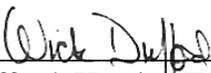
CONDITIONS

1. The project shall be constructed and maintained as described in the application materials, except as the same may be modified by these conditions.
2. The applicant shall comply with all conditions of the MDNS issued in this matter. (See Finding 23).
3. Prior to construction, the applicant shall obtain a Grading Permit from the County and shall conform to the conditions of that permit.
4. The applicant shall obtain all other required permits and shall abide by the conditions of same.
4. Construction shall commence within two years of the issuance of the permits and shall be completed within five years thereof.
5. Failure to comply with any condition may result in permit revocation.

DECISION

The requested Special Use Permit (PL09-0484) and Shoreline Substantial Development Permit (PL09-0485) are approved, subject to the conditions set forth above.

DONE this 24th day of May 2010.



Wick Dufford, Hearing Examiner

Transmitted to Applicant on May 24, 2010.

RECONSIDERATION/APPEAL

See page 1, Notice of Decision