



COUNTY COMMISSIONERS

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## HEARING EXAMINER

*Creating Solutions for Our Future*

### BEFORE THE HEARING EXAMINER FOR THURSTON COUNTY

In the Matter of the Application of	)	NO. 2021100996
	)	
<b>Nisqually Indian Tribe</b>	)	<b>Centralia Hydro Dam</b>
	)	<b>Adult Salmon Trap</b>
	)	
	)	FINDINGS, CONCLUSIONS,
For Shoreline Substantial Development	)	AND DECISION
<u>and Reasonable Use Exception</u>	)	

### SUMMARY OF DECISION

The requested shoreline substantial development permit and reasonable use exception to construct an adult salmon fish trap at the existing fish ladder at the Centralia diversion dam on the Nisqually River are **GRANTED** subject to conditions.

### SUMMARY OF RECORD

#### Request

The Nisqually Indian Tribe (Applicant) requested a shoreline substantial development permit, reasonable use exception, and floodplain permit approvals to construct an adult salmon trap and associated facilities within the existing fish ladder at the Centralia diversion dam on the Nisqually River. The subject property is addressed as 20000 Cook Road SE, Yelm, Washington.

#### Hearing Date

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the application on March 12, 2024. The record was held open through March 14, 2024 to allow members of the public unable to participate in the virtual hearing due to technology problems to submit written comments, with time scheduled for responses from the parties. No post-hearing public comment was submitted, and the record closed on March 14, 2024.

### **Testimony**

At the open record public hearing, the following individuals presented testimony under oath:

Heather Tschaekofske, Associate Planner/Biologist, Thurston County Community Planning & Economic Development Department

Christina Gourley, Environmental Planner, Washington Department of Fish and Wildlife, Applicant Representative

Lorenzo Pagano, Environmental Engineer, Washington Department of Fish and Wildlife, Applicant Representative

### **Exhibits**

At the open record public hearing, the following exhibits were admitted into the record:

Exhibit 1 Community Planning and Economic Development Report including the following attachments:

- A. Notice of Public Hearing, dated March 1, 2024
- B. Master Application, resubmitted November 8, 2023
- C. JARPA Application, resubmitted November 8, 2023
- D. Reasonable Use Exception Application, resubmitted November 8, 2023
- E. Revised Site Plan, dated October 17, 2023, submitted November 8, 2023, with existing historic site plans from 1985
- F. Project Narrative, received March 3, 2021
- G. Wetland Delineation, resubmitted November 8, 2023
- H. Revised No-Rise Certification, submitted February 28, 2024
- I. Floodplain Habitat Assessment, resubmitted November 8, 2023
- J. SEPA Determination of Non-Significance, dated July 14, 2021
- K. Environmental Checklist, resubmitted November 8, 2023
- L. Notice of Application, dated May 28, 2021
- M. Comment letters from Brad Beach of the Nisqually Indian Tribe, dated March 25, 2021, and July 14, 2021
- N. Comment email from Shaun Dinubilo of the Squaxin Island Tribe, dated June 7, 2021
- O. Department of Ecology comment letter, dated July 28, 2021
- P. Comment Memorandum from Dawn Peebles, Environmental Health Division, July 12, 2021
- Q. City of Centralia memo, dated August 1, 2022
- R. Mitigation Plan, resubmitted November 8, 2023

- S. Nisqually Indian Tribe emergency approval request email, dated June 16, 2021, and letter dated June 29, 2021
  - T. Emergency Approval letter from Thurston County, dated July 2, 2021; and extension emails dated July 13, 2022, and June 21, 2023
- Exhibit 2 Comment letter from the City of Centralia, received March 11, 2024

Based on the record developed through the open record hearing process, the Hearing Examiner enters the following findings and conclusions.

### FINDINGS

1. The Nisqually Indian Tribe (Applicant) requested a shoreline substantial development permit, reasonable use exception, and floodplain permit to construct an adult salmon trap and associated facilities within the existing fish ladder at the Centralia diversion dam on the Nisqually River. The subject property is addressed as 20000 Cook Road SE, Yelm in unincorporated Thurston County, Washington.<sup>1</sup> *Exhibits 1, 1.B, 1.C, 1.D, 1.E, and 1.F.*
2. The applications were received on March 3, 2021 and determined to be complete on May 26, 2021. *Exhibit 1.L.*
3. The subject property is 133.35 acres in area and is developed with a hydroelectric diversion dam, a fish ladder on the west side of the dam, and associated buildings that are managed by the City of Centralia, the property owner. *Exhibits 1, 1.C, and 1.E.* Surrounding properties are forested or are in agricultural use. *Exhibit 1.C.*
4. The proposed fish trap would have an aluminum frame with pickets and would include two gates to block the passage of fish up the fish ladder and to direct the fish into the trap area. The trap would have a floor that lifts approximately five feet to allow staff to capture the fish by hand, using nets, and place them into a cable conveyance system that would move them up to a new roofed but open-walled 17- by 14-foot sorting/sampling facility on a cement slab. Stairs would also be constructed between the fish trap and the sorting facility. The sorting area would include fish troughs for handling, enumerating, scientific sampling, and tagging. The fish would be returned to the fish ladder via a return pipe. River water would be pumped from the fish ladder area up to the sorting area through a screened suction intake pipe to keep the fish in moving water, and this water would be returned to the river via the fish ladder. A bypass pipe would be installed at the lower end of the trap. Within a previously disturbed area outside of the 100-year floodplain of the river, a 10- by 20-foot mobile office, portable toilet, hand washing station, and gravel parking area for up to six vehicles are proposed to be installed. *Exhibits 1.C, 1.E, 1.F, and 1.I.*

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<sup>1</sup> The staff report identifies the legal description of the subject property as follows: “1-16-2E L3 LY W OF RIVER LESS 10A SE-NWLY W OF RIVER LESS 1 8.18A L”; it also known as Tax Parcel Number 22601210100. *Exhibits 1 and 1.B.*

5. Grading would be required for construction of the sorting facility, including approximately 30 cubic yards of cut and 30 cubic yards of fill, as well as placement of a concrete slab. *Exhibit 1.K*. This work would occur within the 100-year floodplain but above the ordinary high water mark of the Nisqually River. *Exhibits 1, 1.C, and 1.E*.
6. The project is a key element of the Salmon Recovery Plan of the Nisqually Tribe and Washington Department of Fish and Wildlife. The Puget Sound Chinook salmon is listed as a threatened species under the Endangered Species Act (ESA). The National Marine Fisheries Service has concluded that the Nisqually population of salmon is among those with the best chance of recovery due to habitat conditions, and since then salmon biologists and geneticists from the National Oceanic and Atmospheric Administration, Washington Department of Fish and Wildlife, Northwest Indian Fisheries Commission, and Nisqually Indian Tribe have developed a multi-phase recovery approach to reintroduce a unique Nisqually Chinook population. One element of the plan is the proposed fish trap, which would be used for the following:
  - Count all Chinook using the upstream spawning habitat.
  - Remove stray hatchery Chinook in order to reduce competition within the spawning ground and eliminate the ability of hatchery strays to spawn with naturally produced Chinook to promote local adaptation of natural Chinook.
  - Collect a small number of natural origin Chinook to supply brood stock for a small integrated hatchery program that would boost the recovery of the natural stock.Conduct monitoring crucial to reporting on the success of the program, including genetic monitoring.

The fish ladder at the Centralia Diversion Dam was determined to be the best location for the fish trap because it is a resilient structure through which the fish are already being funneled. Environmental disturbance at this location could be minimized because the project would be within and adjacent to the existing structural footprint. *Exhibit 1.S; see also Exhibit 1.E*.
7. The facility would be used only seasonally (during upstream salmon migration periods), with up to four employees working at the facility at any one time. *Exhibits 1.K and 1.P*.
8. Thurston County granted emergency authorization for the project on July 2, 2021 and extended the emergency authorization on July 13, 2022 and on June 21, 2023. The current emergency authorization expires on July 2, 2024. *Exhibit 1.T*. No construction has occurred pursuant to the emergency authorizations because the Applicant is still waiting for approval from the Federal Energy Regulatory Commission. *Christina Gourley Testimony*.
9. The Nisqually River is a shoreline of the state that is regulated under the Shoreline Master Program for the Thurston Region (SMPTR). The SMPTR designates the subject shoreline as a Conservancy shoreline environment. *Exhibit 1*. The County determined that the proposal falls under the SMPTR's "landfill" and "aquaculture" use

classifications. Landfill is allowed in the Conservancy environment as long as it is for a use authorized by the SMPTR and does not significantly alter wildlife habitat, natural drainage control, maintenance of water quality, and aquifer recharge. Aquaculture is also allowed in the Conservancy environment, subject to the policies and regulations of the SMPTR. *Exhibit 1; SMPTR, Section 3, Chapter II(D) and IX(D)*. The proposed shoreline work requires an SSDP because its cost or fair market value would exceed the exemption limit of \$8,504. *Exhibits 1 and 1.C*.

10. The subject property is zoned Rural Residential Resource One Dwelling Unit per Five Acres (RRR 1/5). *Exhibit 1*. The purpose of the RRR 1/5 zone is described in Thurston County Code (TCC) 20.09A.010 as follows:

The purpose of this chapter is to encourage residential development that maintains the county's rural character; provides opportunities for compatible agricultural, forestry and other rural land uses; is sensitive to the site's physical characteristics; provides greater opportunities for protecting sensitive environmental areas and creating open space corridors; enables efficient road and utility systems; and does not create demands for urban level services.

*TCC 20.09A.010*. Agriculture (a use which includes aquaculture) is allowed outright in the RRR 1/5 zone. *TCC 20.09A.020; TCC 20.03.040(3)*.

11. The Nisqually River, a Type S (i.e., shoreline of the state) stream, is classified as a fish and wildlife habitat conservation area under the Thurston County critical areas ordinance (CAO). The CAO requires a standard riparian habitat width of 250 feet for Type S streams. However, fish hatcheries are permitted within riparian habitat areas, as well as within important habitats (e.g., the habitat of federally listed species) pursuant to Table 24.25-3 of the CAO, with approval of a critical area permit and subject to the criteria of TCC 24.25.190. The County's biologist submitted that the criteria of TCC 24.25.190 are met in this case, and that no separate critical area permit is required because the Applicant is seeking a RUE. The criteria of TCC 24.24.190 require that the Applicant demonstrate that there is no alternative location with less adverse impact on the critical area, that the operation will not reduce water quality or increase temperature to the detriment of native or planted game fish, and that the use comply with the SMPTR and employ best management practices to avoid adverse impacts to the important habitat area and buffer. *Exhibit 1; Heather Tschaekofske Testimony; TCC Table 24.25-1*.
12. The project area is within FEMA flood zone A, a special flood hazard area with no base flood elevation determined. The subject property is also mapped within the 1996 flood of record. *Exhibits 1, 1.G, and 1.H*. Consequently, the project area is classified as a frequently flooded area and regulated pursuant to Chapter 24.20 of the CAO as well as Chapter 14.38 of the Thurston County Code (Development in Flood Hazard Areas). *Exhibit 1; TCC 24.03.010*. Although TCC 24.50.030 allows the repair, maintenance, alteration within existing footprint, and vertical expansion of nonconforming structures

within frequently flooded areas, the proposed expansion outside of the existing footprint requires a RUE. *Exhibit 1.*

13. Consistent with the restrictions on use of fill within special flood hazard areas set forth in TCC 14.38.050.A.5, the Applicant submitted analysis by a qualified engineer demonstrating that the project would not result in a rise in flow elevations during a 100-year flood event. The engineer issued a “no rise” certification on February 28, 2024. *Exhibit 1.H.* The County’s floodplain manager has reviewed and accepted the analysis. *Exhibit 1.*
14. The Washington Department of Fish and Wildlife prepared a floodplain habitat assessment for the project. The conclusion of the assessment was that the project is not likely to adversely affect threatened species of fish occurring in the project area or their habitat, and would have no effect on Olympia, Tenino, or Yelm pocket gophers. One of the project features noted as supporting the assessment is the proposed location adjacent to the fish ladder. The location would minimize stress on collected fish by minimizing the distance the fish must travel, and the elevation of the sampling platform would allow the fish to be returned to the river via gravity pipe, which is considered a fast and gentle method of return. *Exhibit 1.I.*
15. There is one riverine wetland in the vicinity of the project area (Wetland A). The dominant species of vegetation within Wetland A include red alder, reed canary grass, Himalayan blackberry, and sedges. Wetland A is classified as a Category II wetland with a habitat score of 8 (H, H, M), requiring a 280-foot buffer pursuant to Table 24.30-1 of the CAO. Within the subject property, the 280-foot buffer encompasses the entire fish ladder area. Project activities would occur roughly 130 feet from the wetland edge. *Exhibits 1.G and 1.E.* Although TCC 24.50 allows the alteration, maintenance, or vertical expansion of legally established nonconforming structures (such as the fish ladder/dam) and allows the expansion of impervious surfaces within a wetland buffer under limited circumstances, the proposal exceeds the allowances of TCC 24.50, which means a reasonable use exception is required. *Exhibit 1; TCC 24.50.020; TCC 24.50.02; Heather Tschaekofske Testimony.*
16. The project would result in 790 square feet of new impervious surfaces within the wetland buffer, including 200 square feet for the gravel pad and 590 square feet for the sampling facility, associated stairs, and loading area. The Applicant proposes to mitigate this impact at a 1:1 ratio by enhancing 790 square feet of wetland buffer to the north of the project area, within a flat area at the top of the riverbank. The enhancement area is currently maintained in lawn grass that is routinely mowed. The proposed planting of eight Douglas fir trees and 41 Nootka rose plants would benefit the wetland by increasing forest cover and improving vegetative diversity. The Applicant proposes to monitor and maintain the mitigation plantings for five years. *Exhibit 1.R.* The County’s biologist submitted that the Applicant’s critical areas reports demonstrate that there would be no net loss of critical area functions as a result of the project. *Heather Tschaekofske Testimony; Exhibit 1.*

17. The project would not affect recreational uses of the river. The project would be within the footprint of and immediately adjacent to the existing fish ladder/diversion dam structure, which is gated to prevent public access, and there are no public recreation facilities in the immediate vicinity. *Exhibits 1, 1.D, 1.E, and 1.K.*
18. None of the structures within the regulated shoreline would be more than 35 feet tall. The proposed sorting facility would be approximately 18 feet tall as measured to the highest point of the roof. *Exhibits 1, 1.E, and 1.K.*
19. There would be no discharge of waste material to any water body as a result of the proposal. *Exhibit 1.K.*
20. No hazardous materials would be stored on site. *Exhibits 1.K and 1.P.*
21. Best management practices would be implemented on site to control erosion. *Exhibit 1.K.* The project plans depict the use of straw wattles between the ordinary high water mark and upslope project areas. *Exhibit 1.E.* Any unused excavated material would be hauled to an approved upland location. *Exhibit 1.C.*
22. Fill materials would be locally sourced where possible to meet the grade required for the sampling facility slab. Only clean fill would be used. *Exhibit 1.*
23. The Environmental Health Division of the Thurston County Public Health and Social Services Department reviewed the proposal and determined that it meets the requirements of the Thurston County Sanitary Code. Environmental Health did not identify any issues of concern and recommended approval of the permits. *Exhibit 1.P.*
24. Thurston County acted as lead agency for review of the project under the State Environmental Policy Act (SEPA) and issued a determination of non-significance (DNS) on July 14, 2021. The DNS was not appealed and became final on August 4, 2021. *Exhibits 1 and 1.J.*
25. Notice of the public hearing was mailed to all property owners within 500 feet of the site on February 22, 2024 and published in The Olympian on March 1, 2024, at least ten days prior to the hearing. *Exhibit 1.A.* The City of Centralia, which owns the hydroelectric facility and the subject property, consented to the project. *Exhibit 2.* The County received no public comment on the application. *Exhibit 1.* There was no public comment submitted through the virtual hearing process.
26. Planning Staff noted that there are no separate flood plain permit criteria for approval. Review for flood plain permit happens through the associated land use permit process and is addressed at time of building permit. Having heard all testimony, Planning Staff maintained their recommendation for approval of the SSDP, RUE, and flood plain permits subject to the conditions recommended in the staff report. *Heather Tschaekofske Testimony; Exhibit 1.* At hearing, Applicant representatives waived objection to the recommended conditions. *Testimony of Christina Gourley and Lorenzo Pagano.*

## CONCLUSIONS

### **Jurisdiction**

The Hearing Examiner is granted jurisdiction to hear and decide applications for Reasonable Use Exceptions pursuant to TCC 2.06.010(F) and TCC 24.45.030.

### **Criteria for Review**

#### ***Reasonable Use Exception***

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant the reasonable use exception if:

- A. No other reasonable use of the property as a whole is permitted by this title; and
- B. No reasonable use with less impact on the critical area or buffer is possible. At a minimum, the alternatives reviewed shall include a change in use, reduction in the size of the use, a change in the timing of the activity, a revision in the project design. This may include a variance for yard and setback standards required pursuant to Titles 20, 21, 22, and 23 TCC; and
- C. The requested use or activity will not result in any damage to other property and will not threaten the public health, safety, or welfare on or off the development proposal site, or increase public safety risks on or off the subject property; and
- D. The proposed reasonable use is limited to the minimum encroachment into the critical area and/or buffer necessary to prevent the denial of all reasonable use of the property; and
- E. The proposed reasonable use shall result in minimal alteration of the critical area including but not limited to impacts on vegetation, fish and wildlife resources, hydrological conditions, and geologic conditions; and
- F. A proposal for a reasonable use exception shall ensure no net loss of critical area functions and values. The proposal shall include a mitigation plan consistent with this title and best available science. Mitigation measures shall address unavoidable impacts and shall occur on-site first, or if necessary, off-site; and
- G. The reasonable use shall not result in the unmitigated adverse impacts to species of concern; and
- H. The location and scale of existing development on surrounding properties shall not be the sole basis for granting or determining a reasonable use exception.

#### ***Shoreline Substantial Development Permit***

Pursuant to WAC 173-27-150, in order to be approved by the Hearing Examiner, a shoreline substantial development permit application must demonstrate compliance with the following:

- 1. The policies and procedures of the Shoreline Management Act;
- 2. The provisions of applicable regulations; and
- 3. The Shoreline Master Program for the Thurston Region.

1. Shoreline Management Act

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971, establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Act. The Thurston County Shoreline Master Program (SMPTR) provides goals, policies, and regulatory standards for ensuring that development within the shorelines of the state is consistent with the policies and provisions of Chapter 90.58 RCW.

The policy of the Shoreline Management Act is as follows:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

*RCW 90.58.020.*

With respect to shorelines of statewide significance, the SMA mandates that local governments adopt shoreline management programs that give preference to uses that (in the following order of preference): recognize and protect the statewide interest over local interest; preserve the natural character of the shoreline; result in long term over short term benefit; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; and increase recreational opportunities for the public in the shoreline.

In implementing shoreline policy, the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state is to be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end, uses that are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline, are to be given preference. *RCW 90.58.020.*

2. Applicable regulations from the Washington Administrative Code

WAC 173-27-140 Review criteria for all development.

- (1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.
- (2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except

where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-150

- (2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

- (1) Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

3. Shoreline Master Program for the Thurston Region

SMPTR Section Two, V, Regional Criteria

- A. Public access to the shorelines shall be permitted only in a manner which preserves or enhances the characteristics of the shoreline which existed prior to establishment of public access.
- B. Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.
- C. Future water-dependent or water-related industrial uses shall be ....
- D. Residential development shall be undertaken in a manner that will maintain existing public access....
- E. Governmental units shall be bound by the same requirements as private interests.
- F. Applicants for permits shall have the burden of proving a proposed substantial development is consistent with the criteria which must be met before a permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.18.180(1), the person requesting the review shall have the burden of proof.
- G. Shorelines of this Region which are notable for their aesthetic, scenic, historic, or ecological qualities shall be preserved. Any private or public development which would degrade such shoreline qualities shall be discouraged. Inappropriate shoreline uses and poor quality shoreline conditions shall be eliminated when a new shoreline development or activity is authorized.
- H. Protection of public health is recognized as a primary goal. All applications for development of use of shorelines shall be closely analyzed for their effect on the public health.

### SMPTR Section Three, II, Aquacultural Activities

#### A. Scope and Definition

Aquaculture involves the culture and farming of food fish, shellfish, and other aquatic plants and animals in lakes, streams, inlets, bays and estuaries. Aquacultural practices include the hatching, cultivating, planting, feeding, raising, harvesting and processing of aquatic plants and animals, and the maintenance and construction of necessary equipment, buildings and growing areas. Methods of aquaculture include but are not limited to fish hatcheries, fish pens, shellfish rafts, racks and longlines, seaweed floats and the culture of clams and oysters on tidelands and subtidal areas.

#### B. Policies

1. The Region should strengthen and diversify the local economy by encouraging aquacultural uses.
2. Aquacultural use of areas with high aquacultural potential should be encouraged.
3. Flexibility to experiment with new aquaculture techniques should be allowed.
4. Aquacultural enterprises should be operated in a manner that allows navigational access of shoreline owners and commercial traffic.
5. Aquacultural development should consider and minimize the detrimental impact it might have on views from upland property.
6. Proposed surface installations should be reviewed for conflicts with other uses in areas that are utilized for moorage, recreational boating, sport fishing, commercial fishing, or commercial navigation. Such surface installations should incorporate features to reduce use conflicts. Unlimited recreational boating should not be construed as normal public use.
7. Areas with high potential for aquacultural activities should be protected from degradation by other types of uses which may locate on the adjacent upland.
8. Proposed aquacultural activities should be reviewed for impacts on the existing plants, animals, and physical characteristics of the shorelines.
9. Proposed uses located adjacent to existing aquaculture areas which are found to be incompatible should not be allowed.

#### C. General Regulations

1. Aquaculture development shall not cause extensive erosion or accretion along adjacent shorelines.
2. Aquacultural structures and activities that are not shoreline dependent (e.g., warehouses for storage of products, parking lots) shall be located to minimize the detrimental impact to the shoreline.
3. Proposed aquaculture processing plants shall provide adequate buffers to screen operations from adjacent residential uses.
4. Proposed residential and other developments in the vicinity of aquaculture operations shall install drainage and waste water treatment facilities to prevent any adverse water quality impacts to aquaculture operations.

5. Land clearing in the vicinity of aquaculture operations shall not result in offsite erosion, siltation or other reductions in water quality.
6. For non-aquacultural development or uses proposed within or adjacent to an Aquacultural District ....
7. Establishment of Aquacultural District. Due to the importance of aquaculture to the Thurston County economy and the unique physical characteristics required to initiate or continue operation, this section allows the establishment of an Aquacultural District. ....

#### SMPTR Section Three, IX, Landfilling

##### A. Scope and Definition

##### B. Policies

1. Shoreline fills or cuts should be designed and located so that significant damage to existing ecological values or natural resources, or alteration of local currents will not occur which create a hazard or a risk of significant injury to life, adjacent property and natural resource systems.
2. All fills should be accomplished with suitable safeguards for erosion control.
3. Fill material should be of such quality that it will not cause water quality degradation beyond the limits of adopted water quality standards defined by the Department of Ecology.
4. Priority should be given to landfills for water-dependent uses.
5. The size of landfills should be limited by the consideration of such factors as total water surface reduction, navigation restriction, impediment to water flow and circulation, reduction of water quality and destruction of habitat.

##### C. General Regulations

1. Disposal of solid wastes is not considered landfilling for the purposes of this section.
2. Landfills shall consist of clean materials including such earth materials as clay, sand, and gravel, and also may include oyster or clam shells. In addition, concrete may be included in fill material if it is not liable to pollute groundwater and is approved by the Administrator. Organic debris, such as wood and other vegetative materials shall not be used as fill material.
3. Landfills, except for beach feeding, shall be designed, constructed, and maintained to prevent, minimize, and control all material movement, erosion, and sedimentation from the affected area.
4. Landfill areas shall be covered with sufficient earth material to support indigenous vegetative ground cover and replanted with vegetation to blend with the surrounding environment.

5. Prior to issuance of any permit for landfilling in or along a stream, it must be demonstrated that the fill will not cause any detrimental change in flood elevations, or restrict stream flow or velocity. No fill which adversely affects the capability of a stream to carry 100-year flood flows will be allowed.
6. Artificial beach maintenance may be allowed by Substantial Development Permit in any environment, notwithstanding other regulations of this section. Provided, such maintenance shall be by "beach feeding" only, with both the quality and quantity of material to be approved by the Administrator. Habitat protection is a primary concern for any beach feeding operation and must be a consideration in permit approval.
7. Landfill which will interfere with public rights of navigation and rights corollary thereto shall not be permitted unless there is an overriding public interest.
8. Landfill placed for the purpose of providing land to ensure required distances for septic tank drainfields is prohibited.
9. Permits for landfilling shall be granted only if the project proposed is consistent with the zoning of the jurisdiction in which the operation would be located.

### **Conclusions Based on Findings**

#### *Reasonable Use Exception*

1. To deny the requested additional aquaculture facility at the location of the dam and fish ladder would be to deny reasonable use permitted by the CAO. The project location is already developed with a diversion dam and fish ladder. The fish trap is needed for salmon recovery efforts, and to be effective while protecting the fish that pass through, it must be integrated with the fish ladder. The use is also reasonable because it is allowed by the SMPTR and zoning ordinance, and by the CAO with respect to fish and wildlife habitat areas. *Findings 3, 6, 9, 10, 11, and 14.*
2. As conditioned, no reasonable use with less impact on critical areas is possible. Because some of the project would occur within the footprint of the existing fish ladder/dam structure, the amount of new impervious surfaces would be relatively small and would be mitigated through wetland buffer enhancement. The portable building and parking would be placed within a previously disturbed area. The use would be operational only seasonally. The development would not result in a rise in floodplain elevation. *Findings 1, 3, 4, 5, 6, 7, 9, 13, 16, and 26.*
3. As conditioned, the use would not result in damage to other property or threaten the public health, safety, or welfare, or increase public safety risks. The project area would be inaccessible to the public. No hazardous materials would be stored on site. A portable toilet and hand washing station would be provided on site outside of the 100-year floodplain in the previously disturbed area. No public health issues were identified during the review process. The conditions of approval require compliance with the County's Drainage Design and Erosion Control Manual. *Findings 17, 19, 20, 21, 22, 23, and 26.*

4. The proposal represents the minimum encroachment needed to prevent denial of all reasonable use of the property. The diversion dam and fish ladder are in a fixed location, such that integrating the fish trap into it necessitates work within the floodplain and wetland buffer. New impervious surfaces within these critical areas would be minimal. *Findings 3, 6, 12, 13, 15, and 16.*
5. As conditioned, the proposed use would result in minimal alteration of the critical area. Considering the specific impacts listed in the criterion, the intent of the project is to protect and improve fish resources. There would not be an impact on hydrological conditions. The project would largely occur within previously disturbed areas. *Findings 5, 6, 13, 14, and 26.*
6. As conditioned to require implementation of the mitigation plan, the proposal would ensure no net loss of critical area functions and values. *Findings 13, 14, 15, 16, and 26.*
7. The use would not result in unmitigated adverse impacts to species of concern. *Finding 14.*
8. The location and scale of existing development on surrounding properties was not a factor in this decision.

#### *Shoreline Substantial Development Permit*

9. As conditioned, the proposal is consistent with the policies and procedures of the Shoreline Management Act. The use is a reasonable and appropriate water-dependent use of the shoreline, which promotes the public interest by contributing to the recovery of threatened species of fish. *Finding 6.*
10. As conditioned, the proposal is consistent with applicable shoreline regulations. No structures over 35 feet in height are proposed, and no views would be impacted. *Findings 3 and 18.*
11. As conditioned, the proposal is consistent with the SMPTR.
  - a. As conditioned, the proposal is consistent with the regional criteria. There would be no public access to the shoreline at the project site, consistent with existing conditions. Water quality would be protected through implementation of erosion control measures. The Applicant, a government unit subject to the same permitting requirements as private interests, has met its burden of proving that the criteria for SSDP approval have been satisfied. The proposal would not degrade the aesthetics of the project site as it is already developed with a dam and fish ladder, and the project would be integrated into the existing structure. No public health issues were identified during review of the proposal. *Findings 1, 3, 4, 17, 21, 23, and 26.*
  - b. As conditioned, the proposal is consistent with the applicable aquacultural policies and regulations. The project area has been identified as having high potential for

Chinook salmon recovery. There would be no impact on navigation or recreational boating as navigation is already obstructed by the dam. There are no upland views that would be affected by the project. A floodplain habitat assessment was conducted which found that the project would not likely adversely affect threatened species of wildlife or their habitat. Erosion control measures would be implemented on site. The use is shoreline dependent. *Findings 3, 6, 14, 17, 21, and 26.*

- c. As conditioned, the proposal is consistent with the applicable landfilling policies and regulations. The proposed cuts and fills would be limited and scope and would be located to avoid damage to ecological values and natural resources. No fill would be placed below the ordinary high water mark, and credible evidence in the record demonstrates there would be no net rise in flood elevation as a result of the fill. Erosion control measures would be implemented on site, including use of straw wattles among others. The Applicant proposes to use locally sourced fill where possible, and no evidence was presented to suggest a water quality concern. The use is water dependent. The use would result in no new impediment to navigation or water flow. Wetland buffer impacts would be mitigated through enhancement plantings. There would be no disposal of solid waste on site. No beach feeding is proposed. *Findings 3, 5, 6, 13, 14, 16, 19, 21, 22, and 26.*

## **DECISIONS**

Based on the preceding findings and conclusions, the requested reasonable use exception and shoreline substantial development permit are **GRANTED** subject to the following conditions:

1. The project must comply with all other Local, State, and Federal regulations and acquire all applicable permits prior to any work. The property owner is responsible for obtaining permits and approvals from other agencies, as they apply.
2. Best management practices shall be employed, and there shall be no additional disturbance within the critical area without approval from Thurston County Community Planning and Economic Development. Erosion control shall be placed alongside proposed development areas. All activities shall fully comply with the Thurston County Stormwater Drainage Design and Erosion Control Manual (TCC 15.05) throughout all phases of the proposed project. This erosion control shall be inspected or verified via photos prior to building or construction permit issuance.
3. The Applicant shall complete all mitigation as proposed within the WDFW Mitigation Plan report dated September 12, 2022 prior to final building permit or construction permit inspection. A surety will be required in place of mitigation completion prior to final building permit inspection, per TCC 24.70.
4. Mitigation/enhancement shall be maintained and monitored for five years per TCC 24.35.017(B.6.).

5. The Applicant must obtain a building and/or construction permit from the Thurston County Community Planning and Economic Development Department for the proposal, at which time flood review standards shall be met.
6. The Applicant and subsequent property owners must comply with all requirements of state and/or federal law to avoid disturbance and alteration of artifacts, remains, or other cultural resources on site during development. In the event of inadvertent disturbance or alteration, the Applicant must immediately stop work and contact the Tribe and the State Department of Archaeology and Historic Preservation.
7. All on-site construction activities shall fully comply with noise limitations outlined in WAC 173-60.
8. All construction and operation of the facility shall comply with SMPTR landfilling policy number 3, which requires fill material to be of such quality that it will not cause water quality degradation beyond the limits of adopted water quality standards defined by the Department of Ecology.
9. A Construction Stormwater Permit from the Washington State Department of Ecology may be required. Information about the permit and the application can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html>. It is the Applicant's responsibility to obtain this permit if required.
10. All activities shall be in substantial compliance with the submitted plans, and the SEPA Determination of Non-Significance (21-102553 XA) findings and conditions issued on July 14, 2021 (Exhibit 1.J).

**DECIDED** March 22, 2024.



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Sharon A. Rice  
Thurston County Hearing Examiner

NOTE: Pursuant to TCC 22.62.020(C)10, affected property owners may request a change in valuation for property tax purposes.

**THURSTON COUNTY**  
**PROCEDURE FOR RECONSIDERATION AND APPEAL**  
**OF HEARING EXAMINER DECISION TO THE BOARD**

<b>NOTE:</b> THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).
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If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.\* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

**The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).**

**A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)**

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

**B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)**

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Community Planning & Economic Development Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

**C. STANDING** All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

**D. FILING FEES AND DEADLINE** If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$861.00** for a Request for Reconsideration or **\$1,174.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Building Development Center at 3000 Pacific Ave SE, Suite 100 no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable**. If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

\* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



Project No. \_\_\_\_\_  
Appeal Sequence No.: \_\_\_\_\_

☐ Check here for: **RECONSIDERATION OF HEARING EXAMINER DECISION**

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

☐ Check here for: **APPEAL OF HEARING EXAMINER DECISION**

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW \_\_\_\_\_  
on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, as an APPELLANT in the matter of a Hearing Examiner's decision  
rendered on \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_ relating to \_\_\_\_\_

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance \_\_\_\_\_
2. Platting and Subdivision Ordinance \_\_\_\_\_
3. Comprehensive Plan \_\_\_\_\_
4. Critical Areas Ordinance \_\_\_\_\_
5. Shoreline Master Program \_\_\_\_\_
6. Other: \_\_\_\_\_

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

### **STANDING**

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

APPELLANT NAME PRINTED \_\_\_\_\_

SIGNATURE OF APPELLANT \_\_\_\_\_

Address \_\_\_\_\_

Phone \_\_\_\_\_

Please do not write below - for Staff Use Only:

Fee of ☐ \$861.00 for Reconsideration or \$1,174.00 for Appeal. Received (check box): Initial \_\_\_\_\_ Receipt No. \_\_\_\_\_  
Filed with the Community Planning & Economic Development Department this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.