

**SAN JUAN COUNTY HEARING EXAMINER**

**FINDINGS, CONCLUSIONS, AND DECISIONS**

Applicant: San Juan County Public Works  
915 Spring Street, Friday Harbor, WA 98250

Agent: Exeltech, Inc., c/o Karl Kirker  
8729 Commerce Place Dr. NE, Suite A, Lacey, WA 9851

File No.: PSJ000-14-0013

Request: Shoreline Substantial Development Permit

Parcel No: Near 260723007

Location: The Channel Road crossing of Deer Harbor, Orcas Island

Summary of Proposal: Application for a shoreline substantial development permit to replace the Channel Road Bridge

Land Use Designation: Deer Harbor Hamlet Residential

  

Appellant: Michael Durland

Appeal No.: PALP00-15-0002

Summary of Appeal: Challenge to the adequacy of environmental review resulting in the Revised Mitigation Determination of Non-Significance issued March 18, 2015 associated with the SSDP

  

Public Hearing: May 28, 2015

Applicable Policies and Regulations: San Juan County Comprehensive Plan  
Section B, Element 3 Shoreline Master Program  
San Juan County Code: 18.30.110 Critical areas; 18.30.140 Critical aquifer recharge areas; 18.30.160 Fish and Wildlife Habitat Conservation Areas; 18.50.060 Clearing and grading; 18.50.070 Environmental impacts; 18.50.080 Environmentally sensitive areas; 18.50.150 Water quality; 18.50.340 Transportation facilities; 18.60.060 Clearing and grading standards; 18.60.070 Storm drainage standards; 18.80.020 Project permit applications—procedures; 18.80.030 Notice of project permit applications; 18.80.110 Shoreline permit and exemption procedures

Decisions: The Appellant failed to prove clear error in the issuance of the MDNS and the appeal is denied. The shoreline permit application is approved subject to conditions.

**S.J.C. DEPARTMENT OF**

**JUL 13 2015**

**COMMUNITY DEVELOPMENT**

**BEFORE THE HEARING EXAMINER  
FOR SAN JUAN COUNTY**

In the Matter of the Appeal of

**Michael Durland**

Of the March 18, 2015 MDNS and

In the Matter of the Application of

**San Juan County Public Works**

for Approval of a Shoreline Substantial  
Development Permit

) No. PALP00-15-0002

) No. PSJ000-14-0013

) **Deer Harbor Bridge SSDP  
and SEPA Appeal**

S.J.C. DEPARTMENT OF

JUL 13 2015

COMMUNITY DEVELOPMENT

**SUMMARY OF DECISIONS**

The Appellant did not satisfy the required burden of proving that the mitigated determination of non-significance was clearly erroneous and therefore the SEPA appeal is **DENIED**.

The request shoreline substantial development permit to allow replacement of the Channel Road Bridge at Deer Harbor, Orcas Island is **APPROVED with conditions**.

**SUMMARY OF RECORD<sup>1</sup>**

**Request**

San Juan County Public Works Department requested approval of a shoreline substantial development permit to replace the Channel Road Bridge across the mouth of Deer Harbor on Orcas Island. The proposal would include realigning Channel Road to meet the new approaches, temporary detour for local traffic during construction, and additional improvements to the eastern shoreline to promote channel restoration north of the bridge post-construction.

A mitigated determination of non-significance (MDNS) was issued for the proposal on November 26, 2014. After receiving comments at an open record public hearing conducted in February 2015, the County issued a revised MDNS on March 18, 2015. Michael Durland timely appealed the revised MDNS. The SEPA appeal and the shoreline permit application were consolidated for one open record public hearing.

**Hearing Date**

The San Juan County Hearing Examiner conducted an open record public hearing on the consolidated matters on May 28, 2015. The MDNS appeal was heard first, followed by the open record hearing on the shoreline permit application; testimony from the appeal was incorporated into the record for the project permit. At the conclusion of the proceedings, the record was held open for submission of additional information in conformance with the post-hearing order issued June 1, 2015. After the final documents requested in the order were submitted, the Applicant

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<sup>1</sup> Findings begin on page 6 and Conclusions based on findings begin on page 43.

requested additional opportunity to respond to public comment, which was granted. Subsequently, the Appellant requested additional opportunity to respond to the Applicant's post-hearing submittals, which was granted. The record closed on June 19, 2015, resulting in a decision issuance deadline of July 6, 2015. Prior to issuance, the Examiner requested a one week extension of the deadline for decision issuance, which the Applicant granted.

**Testimony**

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

**For the SEPA Appeal**

*For the Appellant:*

Michael Durland, Appellant  
Erik Smith, Cayou Quay Marina owner

*For San Juan County Community Development Department (SEPA Responsible Official) and Public Works (Applicant):*

Julie Thompson, Planner  
Colin Huntemer, Public Works Project Manager  
Karl Kirker, Exeltech Consulting, Inc.

**For the SSDP Permit Hearing**

Julie Thompson, Planner  
Colin Huntemer, Public Works Project Manager  
Karl Kirker, Exeltech Consulting, Inc.  
Erik Smith  
Sandra Cookston  
Wesley Heinmiller  
Kyle Loring, Staff Attorney, Friends of the San Juans  
Michael Durland, Deer Harbor Boatworks owner

**Exhibits**

At the open record public hearing and consistent with post-hearing submission of evidence discussed on the record as memorialized in the June 1, 2015 post-hearing order, the following exhibits were admitted in the record:

**Appeal (AP) Exhibits**

1. Department of Community Development Appeal Staff Report, dated May 15, 2015, with the following attachments:
  - a. Appeal of Michael Durland, submitted April 21, 2015
  - b. Puget Sound Nearshore Ecosystem Restoration Project (PSNRP) Information on Deer Harbor Estuary, two color pages
2. Michael Durland's Letter of Appeal with attachments:
  - a. Excerpted sections from the Shoreline Master Program
  - b. Excerpted sections from RCW 43.21C.030

- c. Historic and current photographs of the project vicinity
  - d. Portions of/excerpts from Technical report 2006-04, Native Shellfish in Nearshore Ecosystems of Puget Sound, Megan Dethier
  - e. Puget Sound Nearshore Ecosystem Restoration Project (PSNRP) Information on Deer Harbor Estuary (repeat of AP1b)
  - f. Excerpts from Staff Report related to the proposal, stated hearing date of December 15, 2015(sic), with handwritten comments from the Appellant
  - g. Washington Coastal Zone Management Program information from DOE website
  - h. "Focus - Washington's Coastal Zone Management Program - Federal Consistency" information sheet from DOE
3. Water sample analysis report, testing performed by Am Test Inc. (Kirkland, WA) of stormdrain discharge from the bank approximately 60 feet south of the Deer Harbor Boatworks dock, report dated May 19, 2015
  4. Deer Harbor Estuary Restoration Project Environmental Assessment and Feasibility Study report, prepared October 2005
  5. Google Earth photographs submitted by Erik Smith alleged to depict before and after images of the river mouth relating to the Elwha Dam removal (undated)

Shoreline Substantial Development Permit Exhibits

1. Department of Community Development Staff Report, dated May 15, 2015
2. Dept. of Community Development Request for Review, distributed March 12, 2015
3. Revised Mitigated Determination of Non-Significance, issued March 18, 2015
4. Environmental Checklist, prepared by Karl Kirker, dated August 25, 2014
5. Coastal Geological Services, Inc. Memorandum, dated February 24, 2015, with attached Memo to Jim Johannessen from Tina Echeverria, dated February 3, 2015
6. Land use project permit application, dated August 28, 2014, with attachments:
  - a. Vicinity Map
  - b. Existing Site Plan
  - c. Bridge and Plan Profile
  - d. Proposed Channel Realignment
  - e. Shoofly details
  - f. Project Impacts graphic
  - g. Site restoration plan
  - h. Letter Amending permit package, dated September 22, 2014, prepared by Exeltech
  - i. Shoreline Narrative, dated October 8, 2014, prepared by Exeltech

- j. Second Letter Amending permit request, dated December 12, 2014, prepared by Exeltech
    - k. Grading Plan
      - l. Riprap Detail
- 7. Biological Assessment, dated September 2014, prepared by Exeltech
- 8. Agency Comments, including:
  - a. Washington State Department of Ecology (DOE) comments, dated October 15, 2014
  - b. DOE comments, dated December 1, 2014
  - c. Washington State Department of Natural Resources comments, dated December 11, 2014
  - d. UW Friday Harbor Labs comments, dated February 24, 2015
  - e. UW Friday Harbor Labs comments, dated March 17, 2015
  - f. UW Friday Harbor Labs comments, dated March 31, 2015
- 9. Public Works Memorandum responding to Peer Review of proposal, dated March 5, 2015
- 10. Public comments received up to date of hearing:
  - a. Corey and Sandra Cookston
  - b. Robert Connor
  - c. Doug Meyers
  - d. Michael Durland
- 11. Staff Report from original schedule hearing held in February 2015
- 12. Joint Aquatic Resources Permit Application (JARPA), dated received August 25, 2014
- 13. Hydraulic and Geomorphic Assessment of Cayou Lagoon Restoration Alternatives, dated August 2011, prepared by ESA PWA
- 14. Adaptive Monitoring Plan for the Deer Harbor Bridge Replacement Project, dated June 3, 2015
- 15. Public Comments in response to the Adaptive Monitoring Plan<sup>2</sup>:
  - a. Sandra Cookston, June 9, 2015
  - b. Wesley Heinmiller, June 8, 2015
  - c. Kyle Loring, June 10, 2015
  - d. Michael Durland, June 10, 2015

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<sup>2</sup> The Post-Hearing Order expressly limited the opportunity to comment to persons who attended the public hearing and restricted comments in response to the plan to written comments in the nature of testimony that would have been offered at hearing and expressly excluded other evidence. Comments submitted by persons not at the hearing and new documents offered as attachments to written comments are not admitted.

- e. Erik Smith, June 10, 2015
- 16. Public Works Response to Public Comments on Adaptive Monitoring Plan, dated June 15, 2015
- 17. Appellant Durland response to Adaptive Monitoring Plan, dated June 19, 2015

The record also includes the Post-Hearing Order, dated June 1, 2015, setting a schedule for post-hearing submittals.

Based upon the record developed at the open record hearing, the Hearing Examiner enters the following findings and conclusions. The following findings are applicable to both the SEPA appeal and the requested permit.

## FINDINGS

### *Introduction and Site Description*

1. San Juan County Public Works (Applicant) requested approval of a shoreline substantial development permit (SSDP) to replace the existing Channel Road Bridge over Deer Harbor at the mouth of Cayou Lagoon. Built in 1971, the existing bridge provides the sole public access to more than two hundred homes on the southwest end of Orcas Island. The existing 52-foot, three-span timber bridge is 24.5 feet wide and is supported on two timber pile bents with a maximum span of 18 feet in the middle. Some bridge components have severely deteriorated, resulting in a low sufficiency rating. Heavy vehicles are restricted to the center of the bridge, only one at a time, and there is an advisory speed limit posted of 15 miles per hour. *Exhibits 1 and 12; Exhibit 12, Figure 2.*
2. For years, the community surrounding Deer Harbor has been strategizing means of restoring the Cayou Lagoon estuary to its historic condition. According to the Deer Harbor Estuary Restoration Project Environmental Assessment and Feasibility Study (DHERP) report, prepared in October 2005, two important public policy issues are driving this effort: the listing of the Puget Sound Chinook Salmon as threatened under the federal Endangered Species Act and the need of the County's Public Works Department to replace the bridge. The current wooden bridge requires constant maintenance. Soon after its construction, the US Fish and Wildlife Service and US Environmental Protection Agency cited the County for failure to adequately assess the bridge's impacts to the estuarine ecosystem. The DHERP report noted that it is likely that federal and state resource agencies will require any replacement of the bridge to mitigate the impacts of the current structure. *Exhibit AP 4.*
3. Construction of the existing bridge significantly constricted the mouth of the estuary compared to its pre-developed condition. The bridge limits tidal exchange and fish access and blocks downstream flux of sediment, degrading the ecosystem in the lagoon and its watershed. Additionally, at an unknown time, an unidentified party installed a rock sill beneath the bridge. The sill blocks flows below 3.5 FT mean lower low water (MLLW) and restricts flow to approximately 26 feet in width at 6.5 FT MLLW, which over time has had negative effects on circulation, access, fish passage, sedimentation,

water temperature, dissolved oxygen, and other parameters, creating a lagoon where there was historically an estuary.<sup>3</sup> The existing sill has resulted in scour of the bottom at both ends of the channel and active erosion along approximately 200 feet of the west bank immediately upstream of the outlet. *Exhibits 5, 6, and 13*. It is believed that the existing bridge has eliminated previously existing shellfish populations and salmonid feeding habitat in the estuary and salmonid rearing and spawning habitat in its tributaries. *Exhibit AP 4*.

4. A 736 acre watershed drains into the Cayou Lagoon. From the mouth of Fish Trap Creek at the head of the estuary to the crest of the rock fill under the bridge, Cayou Lagoon's bottom profile falls approximately about 1.3 feet over an 1,800-foot distance. At its widest, the lagoon measures about 680 feet. Below the bridge, the outlet channel drops steeply from about 4.2 feet above MLLW to about 1.8 feet above MLLW over a distance of about 43 feet. The narrowest point in this reach, under the bridge, is 50 feet wide. Below the steep drop, the channel falls at a gradual slope for another 1,250 feet to a depth of about -3.0 ft. MLLW at the mouth of the inner harbor. *Exhibits AP1 and AP4*.
5. The bridge is the narrowest point between the inner estuary, sometimes called Cayou Lagoon, and the remainder of Deer Harbor to the south. Deer Harbor, Cayou Lagoon, and shorelands within 200 feet of the ordinary high water mark (OHWM) are subject to the jurisdiction of the Washington State Shoreline Management Act as implemented by the San Juan County Shoreline Master Program (SMP). Project areas on the south side of the bridge are designated as Rural shoreline environment by the SMP, and affected areas on the north side of the bridge are in a designated Conservancy shoreline environment. *Exhibits 1 and 6*.
6. The project site is located in the Deer Harbor Hamlet. Proposed improvements would be developed primarily within the right-of-way owned by San Juan County. Approximately 7,000 square feet of additional right-of-way would need to be acquired from three adjacent property owners to the north on the west side of the harbor. Adjacent properties are zoned Residential Conservancy, Hamlet Residential (two acre minimum), and Hamlet Industrial. Surrounding parcels to the east are developed with residential/commercial uses including one residence used as a bed and breakfast and another operated as a boatworks; parcels to the west are developed with residential uses. Deer Harbor/Cayou Lagoon abuts the existing bridge to the north and south. *Exhibits 1 and 12*.
7. Vegetation on the west shoreline north of the bridge includes lawn and typical landscaping species, Douglas fir, bigleaf maple, and Himalayan blackberry among others. The shoreline south of Channel Road on the west side of the harbor is armored and contains sparse patches of vegetation including reed canary grass and various native grass species. *Exhibit 12*.

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<sup>3</sup> As of the 2005 DHERP Report, the estuary was not listed on the Federal Clean Water Act Section 303(d) list of impaired waterbodies. *Exhibit AP 4*.

8. San Juan County has received a federal BRAC grant for the bridge replacement project. The County Public Works Department has determined that bridge replacement serves as an opportunity to forward the rehabilitation of the Cayou Lagoon consistent with the overall goals identified by the Puget Sound Nearshore Ecosystem Restoration Project.<sup>4</sup> Anticipated ecological benefits include:

- Improved tidal conveyance resulting from the widening cross section, restoring natural flow regime between the Cayou Lagoon and Deer Harbor;
- Removal of the rock sill beneath the bridge is expected to reduce existing tidal velocities and shear stresses, alleviate the barrier to fish passage from velocities at flood tide, and reduce shoreline erosion and scour;
- Removal of the old bridge, piles, embankment would result in the creation of 800 square feet of marine/estuarine habitat, restoration of natural shoreline processes, and removal old creosote piles from Puget Sound;
- Increased aquatic nutrient exchange for vegetation; and
- Increased access window to Cayou Lagoon for salmon fry.

The enlargement of the bridge channel would open a cross sectional area approximately twice the size of the existing opening for tidal flows. *Exhibit 12; Huntmer Testimony; Exhibit AP1.b, page 2.*

9. Regulated critical areas within the project limits include critical aquifer recharge areas and fish and wildlife habitat conservation areas.<sup>5</sup> At the time the application was submitted, the overall project site was thought to contain a regulated wetland adjacent to the northeast edge of Channel Road. *Exhibits 1 and 12.* However, a site visit conducted by Department of Ecology staff determined that wetland soils and hydrology were insufficient and wetland criteria were not met for the area in question, meaning there is no wetland in the project limits. *Exhibit 8.b.*

#### *Procedural Background*

10. The SSDP application was submitted September 5, 2014 and determined to be complete on October 8, 2014. *Exhibit 1.*
11. The initial public hearing on the proposal was held February 19, 2015. On the record, several interested parties submitted comments expressing concerns. This was a surprise

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<sup>4</sup> These are similar to two of the four specific restoration objectives established in the 2005 DHERP Report: 1) remove fish passage blockages at the mouths of tributary creeks; 2) restore natural shading along the shoreline of the lagoon; 3) eliminate ongoing accumulation of fine sediment in the lagoon; and restore tidal hydraulics and sediment transport. *Exhibit AP 4.*

<sup>5</sup> Due to hydrogeologic characteristics, all of the land area of San Juan County is classified as highly susceptible aquifer recharge area. Institutional facilities must comply with the requirements of the County's critical aquifer recharge area regulations. Applicants are required to provide a list of the quantities and types of chemicals to be used, proposed spill containment plans, and a plan for disposal of waste materials. *SJCC 18.35.080, Critical aquifer recharge areas.*

to Department of Community Development Staff, which agency had not received any comment on the advertised application or the advertised determination of non-significance (DNS).<sup>6</sup> Also on the record, the Applicant indicated that consultant firm Coastal Geologic Services, Inc. (CGS) was preparing a peer review of the proposal addressing several issues including impacts to oyster beds in the project area. *Exhibit 11; Thompson Testimony.*

12. Because the public comments and the consultant's as-yet unreleased report had not been reviewed and incorporated into the Department's review of the application, the County's then-Hearing Examiner held the record open for two weeks to distribute and allow public comment on the peer review, and during that time afforded the Applicant and Staff an opportunity to respond to comments submitted at the hearing. Review of the materials led the Department to issue a March 18, 2015 revised mitigated determination of non-significance (MDNS) including several new conditions requiring enhanced mitigation to address concerns raised at the first hearing. The revised MDNS was re-advertised on March 18th with an appeal deadline of April 22, 2015. *Exhibit 1; Thompson Testimony.*
13. Neighboring property owner Michael Durland timely appealed the MDNS. *Exhibits AP 1 and 2; Thompson Testimony.*
14. Pursuant to SJCC 18.89.140.G, MDNS appeals must be consolidated with an open-record hearing on a related project application in a single procedure before the hearing examiner. The consolidated hearing was scheduled for May 28, 2015.<sup>7</sup>

#### *The Proposal*

15. Project components include replacing the existing facility with a new bridge measuring 80 feet long and 31.25 feet wide with a clear opening of 73 feet that completely spans the mean high water of Deer Harbor. Channel Road would be realigned to meet the new bridge approaches. A portion of the existing eastern shoreline would be removed in order to promote channel restoration north of the bridge by allowing more unobstructed water flow in and out of the lagoon. In order to detour local traffic around the bridge construction work, a temporary detour (shoofly) would be built north of the existing bridge. Land clearing, excavation, and filling would be required for construction of the detour, roadway improvements, and bridge footings. The most up to date estimated project impacts can be found at Exhibit 6.j. *Exhibits 1, 6, and 12; See Exhibit 6 attachments for the most up to date plans.*
16. Proposed construction of the shoofly originally consisted of the placement of six round culverts to allow water passage during construction. Based on comments received from the Coast Guard, the proposal was amended to provide a single span bridge, which would reduce impacts below mean high water (MHW) and would provide for navigation and

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<sup>6</sup> The Staff report stated: "The Public Works Department has done a lot of work with neighboring property owners to inform them of this proposal. It is not surprising that we have received no public comments on it." *Exhibit 11.*

<sup>7</sup> The County retained a new hearing examiner between the first and second hearing dates on the proposal.

fish passage during construction. The bridge bottom would be at elevation 10.6 feet, approximately 2.5 feet above the highest predicted tide during construction. The span bridge would pass tidal flows without increasing velocity. *Exhibit 6.*

17. The existing bridge deck would be saw cut at the expansion joints and lifted out by crane. The existing abutments would be dismantled in a manner that prevents debris from falling into the channel below, and then the timber piling would be pulled from the channel by crane. *Exhibit 12.* Construction of the new bridge would require excavation of both sides of the bank to an approximate elevation of four feet for placement of the new abutments. About 1,200 cubic yards of existing material would be excavated from the east bank to widen the channel. Finished grades on the east bank would be left at a 2:1 slope and on the west bank, at a 1:1.5 slope. Of the proposed excavation, approximately 208 cubic yards would be removed from below mean high water (MHW). Once excavation is complete, 16-inch steel piling, at 10 piles per pier, would be installed by crane mounted vibratory hammer and each pile filled with reinforced concrete. Forms would be installed around the piles and filled with concrete, and once the concrete has cured, gravel backfill would be placed behind each abutment. The eastern abutment would require approximately 25 cubic yards of concrete below MHW, and the west abutment would require approximately 60 cubic yards of concrete and 50 cubic yards of gravel backfill below MHW. *Exhibit 12.*
18. After construction of the abutments, seven pre-cast concrete slabs measuring 80 by 4.5 feet would be placed by crane and secured using hand tools. Gravel fill for the road approaches would be placed on top of the abutments, compacted, and topped with 10-foot approach slabs. After the bridge is complete, construction on the road realignment would begin, involving: installation of erosion control; clearing and grubbing along alignment; removal of abandoned portions of the old roadway; road prism preparation including fill and grade, placement of a six inch gravel base, compaction, and a six-inch asphalt overlay. Approximately 37,788 square feet of the existing roadway and adjacent right-of-way will be graded to prepare the new road prism, which will include approximately 117 cubic yards of new fill in order to build the road base. Once complete, the new road alignment would be revegetated consistent with the Site Restoration Plan (Exhibit 12, Figure 7). *Exhibits 1, 6, and 12.*
19. Once the new bridge is built, traffic would be rerouted onto it and the shoofly would be removed. All materials used in the shoofly would be hauled off-site for disposal. Finally, the sill beneath the existing bridge would be removed and the channel recontoured to match adjacent existing channel conditions. Areas above the MHW that had been disturbed would be restored. All bottom work would occur at low tide and equipment would be stationed above the MHW. Any debris that falls into the channel during any portion of construction would be immediately removed. All construction debris would be hauled off-site for disposal. At the conclusion of road construction, site restoration would be completed consistent with the restoration plan at Exhibit 12, Figure 7. *Exhibit 12.*

20. Currently, stormwater runoff from the bridge surface drains directly to the harbor. The proposal would divert runoff into vegetative strips that would biologically filter suspended solids and particulate pollutants. Construction of the bridge and its approaches would create approximately 600 square feet of new impervious surfaces. The project would not increase traffic capacity and is not anticipated to increase traffic volumes. As a result, the amount of pollution generated by vehicle use of the bridge would continue to be minimal, due to low use volumes of Channel Road, and would not increase. Removal of 14 existing creosote piles and improved treatment of stormwater runoff from the bridge and approach road surfaces would reduce sources of pollution to the aquatic environment relative to the current condition. *Exhibits 6 and 12.*
21. The proposed bridge would be designed and built to current Washington State Department of Transportation (WSDOT) and American Association of State Highway and Transportation Officials (AASHTO) LRFD Bridge Design Specifications. Estimated total project costs are approximately \$1.4 million. The proposed bridge would have a smaller footprint in the shoreline habitat than existing conditions. *Exhibits 6 and 12.*

*Project Studies Considered as part of the Application and SEPA Review*

22. In September 2014, a Biological Assessment (BA) was prepared for the proposal in order to satisfy consultation requirements set forth under Section 7 of the Endangered Species Act (ESA, 16 U.S.C. 1536(c)). The BA was prepared consistent with the standards required by the National Marine Fisheries Service (NMFS) and US Fish and Wildlife Service (USFWS). The BA assessed potential impacts from construction activities associated with the project in order to determine the extent that they may affect any threatened, endangered, proposed, or candidate ESA species known to exist in the project area or result in the destruction or adverse modification of critical habitat of such species. ESA-listed species within the action area include Puget Sound Chinook Salmon, Puget Sound Steelhead, Coastal Bull Trout, Bocaccio Rockfish, Canary Rockfish, Yelloweye Rockfish, Southern Resident Killer Whale, Humpback Whale, Green Sea Turtle, Leatherback Sea Turtle, Marbled Murrelet, Yellow-billed Cuckoo, and the Golden Paintbrush. *Exhibit 7.*
23. The BA identified the following potential impacts to listed species: direct effects could include construction related noise, water quality changes, turbidity and sedimentation, disruption of foraging in the project area, and restriction of access to the project area. In order to avoid potential adverse impacts on listed species and protected habitats, the BA identified 16 minimization and avoidance measures to be incorporated into project design and construction.<sup>8</sup> *Exhibit 7.*
24. The BA concluded that the project would have "no effect" on Puget Sound Rockfish, Southern Resident Kill Whale, Humpback Whale, Green Sea Turtle, Leatherback Sea Turtle, Yellow-billed Cuckoo, and Golden Paintbrush. The report concluded that the proposal "may affect but is not likely to adversely affect" Chinook salmon habitat, Puget

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<sup>8</sup> The 16 minimization/avoidance measures are substantially similar if not identical to the mitigation measures required in the revised MDNS, in Finding 31 below. *Exhibits 3 and 7.*

Sound Rockfish habitat, and Marbled Murrelet. The BA concluded that the proposal "may affect and is likely to adversely affect" Puget Sound Chinook Salmon, Puget Sound Steelhead, and Coastal Bull Trout. It characterized the adverse effects on the listed species as localized, temporary turbidity releases resulting in sublethal effects on the fish present within the aquatic action area. Finally, although recognizing the proposal would result in some short term, localized impacts to water quality from construction, the BA determined that it would not adversely affect essential fish habitat for coastal salmon, groundfish, and coastal pelagic species. *Exhibit 7.*

25. At the request of the Applicant, Coastal Geologic Services, Inc. (CGS) prepared a third-party review of the proposal assessing the type, size, and location of the proposed bridge to determine (using the 90% plan set dated November 25, 2014) whether the project adequately provides for restoration of tidal hydraulics, including natural sediment transport and exchanges, removal of fish passage barriers, and whether the project would obstruct potential future ecological project in the estuary in the future. The CGS study compared five potential bridge configurations (estuary opening widths) ranging from 80 feet to 120 feet with the existing 50-foot opening and historic, pre-developed conditions. The CGS report also addressed oysterlands in the project area by providing pre-project baseline information for toxin levels in oysters within the project area. The report included evaluation of comments from various agencies and made recommendations as to measures to be incorporated into the proposal to protect existing oyster habitat south of the bridge. *Exhibit 5.*
26. CGS concluded that the proposed 80-foot bridge span/opening would be effective in restoration of natural processes in the estuary and would accommodate future restoration efforts, rather than functioning as an impediment. The primary reason for their conclusion was that the 80-foot opening closely resembles the historical cross-sectional opening, as well as that it is predicted to restore approximately 90% of historical processes, with a 370-foot cross sectional opening below MHHW. Removal of the rock sill as part of the project is projected to have a significant impact on improving water circulation and exchange between the estuary and the greater harbor. The report estimates that it would be approximately two years before the newly established channel would stabilize. CGS concluded that while sedimentation may occur south of the bridge lower than MLLW where sand sediment is currently present, with implementation of recommendations, it is not likely to occur at moderately higher elevations above the intertidal channel where pebble and cobble occur for any length of time greater than several hours. *Exhibit 5.*
27. The report recommended changes to the 90% plans including (paraphrased and abbreviated): 1) making the top of the east slope scour protection meet the eastern abutment at a similar elevation as proposed on the west abutment; 2) excavation to lower depths north and south of the east end of the bridge than proposed and farther east and west; 3) phased, incremental lowering of the rock sill to distribute morphologic change over a longer time frame, removing it in stages; 4) measuring turbidity through periodic monitoring after construction to inform the sill removal process and track estuary changes; 5) reseeded oyster beds south of the bridge after the newly configured channel

is stabilized (perhaps three years after construction) should they experience high mortality rates as a result of sedimentation after removal of the rock sill; and 6) CGS recommended against attempting to maintain a turbidity curtain, as it is unlikely to be effective and would act as a trap for fish and wildlife, and because upon its removal, it would release a large amount of sediment. *Exhibit 5.*

28. In order to establish a pre-project baseline for the current health of the oyster beds south of the bridge, CGS collected two set of 20 oysters from the beds in question at locations where the oysters are the most dense, one sample from north and the other from south of the bridge. The samples were tested by an independent lab for the presence of Vibrio, coliform, E. coli., copper, lead, tin, arsenic, cadmium, and mercury. Results showed that both samples contained Vibrio, arsenic, cadmium, and high levels of copper. The sample from north of the bridge contained coliform but south of the bridge did not, and neither contained E. coli. Tin, lead, and mercury were present but below limits. Complete results are in the record at Exhibit 5, Appendix B. *Exhibit 5.*
29. In review of the CGS peer review, the Public Works Department arrived at a position on each of the recommended changes to the 90% plans. Staff determined that the recommended symmetrical channel under the bridge would not be preferable to the proposed asymmetrical channel geometry, which reflects the actual footing elevations on either side of the bridge. They did agree with recommended modified grading plans on the east end of the bridge and with incremental removal of the rock sill to slow and enable monitoring of anticipated silt discharge. The Public Works Department would intend to support outside organizations with implementation of the recommended post-project observation and documentation. Regarding potential impacts to oyster habitat downstream of the bridge, the Applicant agreed with CGS that there may be unavoidable impacts as a result of restoring the lagoon to its pre-bridge construction condition but did not agree that artificially reseeding the area after channel stabilization was appropriate; Staff noted that PSNERP anticipates that the restored intertidal areas may naturally support oyster beds. Finally, Public Works Staff agreed that a turbidity curtain would be of limited usefulness and could result in its own adverse effects. *Exhibit 9; Huntemer Testimony.*

#### *SEPA Review*

30. Consistent with the State Environmental Policy Act (SEPA), San Juan County Department of Community Development assumed lead agency status for review of the proposal's environmental impacts. After review of the environmental checklist and other materials on file with the Department, the SEPA Responsible Official issued a mitigated determination of non-significance (MDNS). As indicated above, new information and public concerns were made known to the Department at the initial SSDP hearing on February 19, 2015. The record was held open for review of the peer review report prepared by Coastal Geologic Services and consideration of and response to public comment. Upon review of the additional information, the SEPA Responsible Official determined that the proposal could be conditioned to the point that it would not result in probable, significant, adverse impacts on the environment and on March 18, 2015 issued

a revised MDNS incorporating mitigation measures recommended in the CGS report. *Exhibits 1 and 3; Thompson Testimony.*

31. Mitigation measures imposed in the revised MDNS include the following:
1. Any de-watering will be pumped to an upland site. Sediment-laden water will not be allowed to return to Deer Harbor/Cayou Lagoon.
  2. Upland construction staging will not be allowed within 150 feet of the mean high water (MHW) unless specific measures are implemented to prevent delivery of contaminants to Deer Harbor/Cayou Lagoon. Additionally, staging areas will be established in previously cleared areas.
  3. All construction equipment must be cleaned prior to entering the project area to prevent invasive plants and animals from establishing a foothold.
  4. All construction equipment will be cleaned and diapered prior to working below MHW to prevent contamination of Deer Harbor/Cayou Lagoon.
  5. Hand tools being used during construction below the MHW will be shrouded or attached to vacuum hoses to contain dust.
  6. Any construction equipment not in use must be stored in the designated staging areas.
  7. No cleaning or maintenance of any type of construction equipment may occur below the MHW.
  8. All concrete will be poured in the dry and will be allowed to cure for a specified amount of time before coming in contact with surface water.
  9. Refueling operations and storage of hazardous materials will be limited to areas identified in a Spill Prevention Control and Countermeasures (SPCC) Plan.
  10. Spill response kits will be located in the immediate vicinity of the equipment in the project area at all times.
  11. Erosion and sediment control devices will be inspected at least every seven days and within 24 hours after more than 3/8 inch of rain in a 24-hour period, or as required by the contract permits.
  12. The shorelines of the project area will be restored to a natural slope, pattern, and profile after construction is completed.
  13. Areas above the MHW that are cleared and disturbed during project construction will be revegetated using native vegetation.
  14. Any in-water work for the project will only take place within the In-Water Work Window, which is July 16<sup>th</sup> through February 15<sup>th</sup>, unless determined otherwise by the permitting agencies.
  15. Construction shall cease if any marine mammals come within 300 feet of the construction zone. Work shall not resume until the marine mammals

have departed the 300-foot construction buffer.

16. Common saltwater technical provisions (WAC 220-110-270) shall be strictly adhered to.
17. The project shall comply with all applicable provisions of the Unified Development Code, Title 18, San Juan County Code.

In addition, the project has been designed to avoid heavy equipment and construction activities within the shoreline buffer to the maximum extent possible. Several project-specific controls would be developed prior to beginning project construction and must be approved by the project engineer. These project-specific controls would include:

- Developing a site-specific Work Containment Plan (WCP) detailing containment measures to use during construction and demolition activities in order to prevent debris from entering the water.
- Installing shoring/in-water work isolation measures to limit construction exposure to flowing water.
- Selecting an upland staging area that is at least 150 feet landward of the MHW elevation.
- Developing a site-specific Temporary Erosion and Sediment Control (TESC) Plan that uses applicable Best Management Practices (BMPs).
- Developing a site-specific SPCC Plan to identify all potential spill hazards and prescribe preventive and response measures in order to minimize damage to the environment if a spill does occur.
- Implementing the prevention and containment measures in the SPCC Plan prior to placing project materials and construction equipment in the staging area or refueling and maintaining equipment on-site.

*Exhibit 3.*

*Appellant's SEPA Appeal*

32. Michael Durland owns Deer Harbor Boatworks, a boat repair facility on the east shore of the inner harbor with dry storage capacity for about 30 boats. He also owns oyster beds immediately under the bridge and south of the project. He acknowledged that a new bridge would be a public benefit, but he asserted that the environmental review for the proposal was insufficient to the extent it only considered impacts within the project footprint. Specifically he contended that the proposal as currently mitigated would result in probable, significant adverse impacts to oyster beds on his property immediately south of the existing bridge. He timely appealed the revised MDNS on April 21, 2015.

*Exhibits AP1, AP 2, and AP4; Durland Testimony.*

33. The appeal states the following issues:
  - 1) All of the project's specific adverse environmental impacts have not been addressed. There is no mention of possible adverse environmental impacts and

mitigation measures except for the footprint of the project. (See [attached excerpted] sections of the Shoreline Master Program and County Code which require mitigation and restoration of any affected areas for a shoreline project.)

- 2) The excessive amounts of copper and arsenic found in oysters immediately south of the bridge has not been adequately addressed. (See-SEPA Environmental Checklist 7. Environmental Health a. Environmental Health Hazards 1), 2), 5)).
- 3) Public Works is in negotiations with neighboring landowners to purchase new right of way to build approximately 100 yards of new roadway outside the existing roadway and right of way. 14d. of the SEPA Environmental Checklist omits this fact and therefore is factually inaccurate.
- 4) There is no mention of or determination of possible effects of the estimated 1,000 cubic yard of silt to be displaced with a wider opening and lowering of the rock sill under the current bridge.
- 5) There are no plans for testing of sediments for toxic substances in the silt estimated to be released by this project when it is known that oysters, which are excellent filter feeders and store toxins found in the water, are contaminated with high levels of copper and arsenic.
- 6) There are no mitigation plans for possible adverse effects to the oyster beds south of the project.
- 7) There are no mitigation plans for possible adverse effects of the estimated 1,000 cubic yards of silt which may be released to the marine environment including oysters, clams, eelgrass beds, crabs, etc. south of the project.
- 8) There are no mitigation plans or restoration plans in effect for possible damage or excessive silting to private or public moorage facilities located south of the project as a result of releasing approximately 1,000 cubic yards of silt.
- 9) There has not been adequate research into the long term stability of the portion of Channel Road situated on the high bank that this bridge will direct traffic to and no adequate research into future costs to maintain this road and repairs to sloughing of this roadbed into oysterlands.
- 10) There has not been adequate research into an alternate route for the traffic which now flows over the bridge.

*Exhibit A1.b.*

34. The Appellant requested the following relief:
  - 1) The threshold determination procedure should be revisited and revised to include an in depth study of possible adverse effects on the environment of Deer Harbor caused by the approximate 1,000 cubic yards of silt which may be released by this project or any other unforeseen consequence of this project.
  - 2) An EIS should be required.
  - 3) Testing of sediments in the lagoon which are estimated to be released with this

project.

- 4) Restoration and/or mitigation of any adverse effects of the project of the environment of Deer harbor.
- 5) Restoration and/or mitigation of any adverse effects of the project on the oyster beds immediately south of the project.
- 6) Monitoring of silt flows and repairs to private dock moorage and marina moorage in Deer Harbor if there is damage to or silting of moorage areas caused by silt flows.
- 7) An in depth study to determine the feasibility of an alternate route for traffic to bypass the bridge and use the current bridge for pedestrian and emergency traffic only.
- 8) An in depth study to determine the feasibility of an alternate route for traffic to bypass the bridge and use the current bridge for pedestrian and emergency traffic only.
- 9) Restoration and mitigation of past environmental damage caused by the location and placement of the current bridge.
- 10) A restoration or relief fund of 10% of the total project cost set up to be immediately available to offset any negative effects of the project on the marine environment and/or private moorage facilities. The amount in this fund will be increased as needed to repair and mitigate any environmental damage caused by this project.

*Exhibit AP1.a.*

35. Noting that some of the oysters sampled in the CGS study were from his beds, the Appellant testified that his oysters undergo Department of Ecology testing five times a year. In order to determine whether his boatworks commercial enterprise was contributing to the contamination in the beds, he had the runoff from a seep out of the bank on his property approximately 60 feet south of the boatyard dock, which he suggested was likely curtain drain discharge, tested in a lab. According to his testimony, the lab results are evidence that his enterprise is not a significant contributor of copper, lead, or zinc. *Durland Testimony; Exhibit AP 3.*
36. The Appellant speculated that the high levels of copper in the CGS-tested oysters were the result of boat cleaning activities in the bay going back to the 1940s and 1950s. However, the Appellant argued that up to 1,500 cubic yards of sediment could be released into Deer Harbor by the proposed removal of the rock sill, and that allowing this release without additional testing and study to identify contaminants in the sediments and an attempt to discover their source would result in probable, significant, adverse environmental impact. He argued that the MDNS is in error because it does not provide any plans for testing the sediments prior to release and no mitigation for possible adverse effects to oysters. He noted that not only his oysters would be impacted, but also

additional oyster beds owned by others as well as native eel grass beds, clams, and crabs. *Durland Testimony; Exhibit AP 4.*

37. The Appellant offered in evidence the Deer Harbor Estuary Restoration Project Environmental Assessment and Feasibility Study (DHERP) report, prepared in October 2005. The DHERP Report concluded that under a replacement bridge scenario providing a new 85-foot bridge and removing the rock sill, approximately 1,500 cubic yards of fine sediment would be mobilized over a period of six months to three years. Of this amount, approximately 350 cubic yards was projected to be fine silt transported as suspended sediment into the outer harbor and beyond. The remaining 1,150 cubic yards was projected to be sand-sized sediments transported as bed load into the inner harbor where it would settle out along the edges of the main channel. The average depth of accumulation of this coarser sediment was projected to be approximately 0.19 feet. The report concluded that the primary adverse impacts to wildlife from this similar bridge replacement scenario would be elimination of the habitat on the rock fill at the existing bridge abutments and temporary damage to oysters and other shellfish beds in the inner harbor due to sediment mobilization. The report stated that without implementation of mitigation measures, the cultivated oyster beds nearest the lagoon outlet would be partially or wholly covered for one to two seasons. Recommended mitigation measures included: excavation below the mean high tide elevation only during low tide periods; use of coffer dams to isolate any excavation in the lagoon while during periods it contains water; silt fencing and other best management practices during excavation; stabilization of disturbed bank soils with native grasses or salt marsh plant species; and appropriate monitoring of turbidity during construction to track effectiveness of mitigation and implementation of an adaptive management process to ensure ongoing effectiveness of mitigation measures. The report suggested that the cultivated oyster beds be protected with turbidity control measures such as submerged silt fences, that their owner be compensated for losses, and that the owner be assisted in reestablishing beds after the channel stabilizes. The report recommended that detailed sediment flux modeling be conducted prior to construction to predict the quantity and distribution patterns of sediment as a result from the proposal, and that a detailed plan for mitigation, restoration, and compensation be required as part of the project. *Exhibit AP 4.*
38. The Appellant contended that the environmental checklist erred in stating that "no new road" would be built. He also argued that Channel Road is currently being undercut and that investment in the proposed alignment could be wasted resources if the road gives way. He further asserted that there was not adequate research into alternate routes for detour traffic, and that the detour route planned would result in adverse environmental impacts. *Durland Testimony.*
39. The Appellant asserted that the most comprehensive study performed on Deer Harbor/Cayou Lagoon estuary restoration – The Hydraulic and Geomorphic Assessment of Cayou Lagoon Restoration Alternatives, dated August 2011, prepared by ESA PWA - either recommended or assumed an EIS would be prepared for replacement of the Channel Road Bridge. He read portions in his testimony. *Durland Testimony; Exhibit AP 2.* The complete study was subsequently provided for the record. *Exhibit 13.*

40. Finally, the Appellant contended that the revised MDNS failed to follow the County's own SEPA implementation rules and should therefore be overturned, noting that pursuant to SJCC 18.80.050, SEPA implementation rules, section G:

In determining an impact's significance, the responsible official shall take into account the guidance in WAC 197-11-330 and 197-11-794, including:

- i. Locational, quantitative, and cumulative effects, severity and likelihood of the effects, and effects on environmentally sensitive or special areas; and
- ii. Shall consider mitigation measures that will be implemented. The responsible official shall not balance whether beneficial aspects of a proposal outweigh its adverse impacts in determining significance.

*Exhibit AP 2; Durland Testimony.*

41. The Appellant offered the testimony of Erik Smith, owner of the Cayou Quay Marina located south of the bridge on the west bank of Deer Harbor.<sup>9</sup> The marina slips for approximately 60, primarily recreational boats. As to whether or not there should be an EIS, Mr. Smith expressly took no position, other than to state that he didn't want to see wasted time and public funds. His marina could be in the path of any sediments released by the project. He submitted photographs of the estuary at the mouth of the Elwha River taken before and after dam removal. *Exhibit AP5*. He expressed concern that similar siltation would happen at the mouth of the lagoon, if on a smaller scale. He testified that currently water at the south end of the marina is 33 feet deep, but at the first slip is only five feet deep. Noting that 1,500 cubic yards is 150 dump trucks of sediment, he contended that loss of moorage could make the marina economically unviable. *Smith Testimony; Exhibit AP 4*.
42. Regarding contamination in the lagoon, Mr. Smith testified that his DNR lease requires him to restore the site from any pollution that settles in the sediments during his stay. He does not feel he should be liable for pollution that travels to the marina as a result of the project. *Smith Testimony*.
43. Stating that one objective of project is to increase currents, he expressed concern that it is not known how changes to currents from the proposal would affect customer use of the marina. He asserted that the revised MDNS fails to address these foreseeable issues and is therefore in error. He requested that the County be required to reopen environmental review to take measurements to get baseline data on depth and on contamination and requested that the County be required to set aside funds to remediate future potential damages. *Smith Testimony*.
44. In closing, Mr. Durland noted that going forward as planned would require more than monitoring of impacts, because monitoring won't fix anything. He noted that if there are adverse impacts to his oysters, he will want financial assistance to remediate them, and the County has refused to assure him it will be forthcoming. *Durland Testimony*.

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<sup>9</sup> See Exhibit 14, Index Map.

*Department of Community Development's SEPA Appeal Response*

45. Department Staff disagreed that the only impacts considered were those within the project footprint, but rather contended that environmental review considered impacts to all areas directly or indirectly affected by the project including land within the project construction limits (i.e., all areas used for staging and mobilization, construction purposes, and any other areas specifically related to project activities), as well as adjacent, upstream, and downstream areas where direct and indirect effects may occur during and following construction.
46. Department Staff noted that several factors that have the potential to influence the natural distribution of sediment in Deer Harbor and Cayou Lagoon, including: type of sediment present, channel discharge, water velocity, channel depth and width, bottom topography, and man-made effects. Turbidity within the aquatic portion of the action area is anticipated to be limited to Deer Harbor or Cayou Lagoon, within approximately 150 feet of the work site. As stated in the Biological Assessment, the project was designed to avoid potential adverse impacts from construction on local fish populations and associated habitat. The minimization and avoidance measures implemented together with best management practices identified in the erosion control, stormwater plan, and spill prevention and control plans would be incorporated into the design and construction specifications along with other measures identified through state and federal permitting processes. Staff asserted the MDNS is appropriate because the proposal is mitigated to maximum extent possible. *Exhibit AP 1; Thompson Testimony.*

*Applicant Public Works SEPA Appeal Response*

47. Public Works Staff noted that there is a state-wide SEPA exemption for structurally deficient bridges, but the instant project has undergone SEPA review. The County relied on the 2011 hydraulic modeling report and on the peer review of the nearly completed design proposal in reaching its determination that the project would not result in probable, significant environmental impacts. The 2005 citizen-sponsored DHERP report identified bridge replacement as the means of improving estuary. The proposal has been conceived and designed in collaboration with local, state, and federal agencies and citizen groups. Staff contended that the requested assurances would address impacts that are unquantifiable and hypothetical; not that the concerns of the appeal are entirely without merit, but that the County is not able to mitigate against unquantified and uncertain impacts. Staff agreed that the proposal would have a significant impact on the estuary but asserted that it would be a net benefit, that habitat would not be lost but restored. Staff asserted that the 1,500 cubic yards of relocated sediment discussed in the DHERP report was estimated based on looking at other projects, whereas the 2011 ESA study was based on a scientific model. The Public Works project manager testified that he has attended seminars on Elwha Dam removal monitoring, and that he participates in the Northwest Straits foundation. While agreeing that during and post construction monitoring is important and merited, Staff testified that none of the studies in the record shows a catastrophic event that dictates mitigation in the form of funds set aside in advance. *Exhibits AP 4 and 13; Huntmer Testimony.*
48. Public Works Staff's testimony emphasized that the existing sill would remain in full

capacity until after bridge construction and that sill removal would be staged. The phasing for removal would relate to incrementally reducing the height of the existing sill, allowing changes to occur over a longer period of time. Staff noted that UW Friday Harbor Labs commented several times and that their final comment was in support of the proposal. Regarding concerns about pollutants in the sediment, Public Works took no position, stating the County is not aware of or concerned about who caused the pollutants. Regarding the asserted environmental checklist erroneous statement that there would be no new road, Staff responded that the road is obviously relocating and the County is in the process of acquiring right-of-way. As to stability of Channel Road, he noted the new alignment would be moving away from the bank and that there may be future projects if road slumping continues. Staff disputed the assertion that the MDNS only considers impacts within the project footprint, noting that the 2011 ESA study and the 2014 CGS study both looked at the larger picture. Staff noted that the proposal was considered by the County Council, which body decided to fund the bridge replacement. The proposal would be reviewed by the US Army Corps and Washington Department of Fish and Wildlife, both of which agencies have regulatory authority over its construction, and the County would be required to comply with mitigations required in those agencies' permitting processes. Staff contended that PSNERP endorsed the project footprint and its anticipated restoration of 16 acres upstream. *Huntemer Testimony.*

49. Regarding the Appellant's request for additional baseline data, Public Works Staff testified that the County would be obtaining bathymetric data prior to work, has already started to get baseline data on pollutants, and that changes to currents are easy to test for. Staff testified that water flow velocities through the enlarged opening should decrease by a significant factor. Regarding the Appellant's assertion that the County should fund future remediation of any damages to the Appellant's cultivated oyster beds or to the commercial and private boating facilities in the harbor that could experience changes from the proposal, Staff testified that Public Works has no ability identify what the appropriate monetary amounts would be. Staff asserted that the marina, boat works, cultivated oysters, and private boating facilities currently existing are all operating in artificially constrained situation resulting from previous environmental damage and that it is not known whether these uses could have existing or endured without the artificial change to the environment resulting from the 1971 bridge construction. Staff noted that even if remediation funds were set aside, such a measure would not prevent parties from seeking restitution. Staff argued that the County cannot provide assurances against "what ifs". Public Works Staff asked that the MDNS be upheld. *Huntemer Testimony.*

*Findings Related to the Shoreline Substantial Development Permit*

50. As proposed, the realigned road on the west side of the channel would be pushed away from the bank relative to its current location, which should reduce the current erosion issues. All of the existing, abandoned roadway would be reclaimed, excess material disposed of off-site, and disturbed areas would be seeded and soiled. There would be between 600 and 1,000 square feet of additional impervious surfaces as a result of realignment and vertical adjustment for entire road. *Huntemer Testimony; Kirker Testimony.*

51. Construction is proposed for summer 2016 and Public Works hopes to advertise for bids this December. It is expected that construction would take up to one year. *Huntemer Testimony; Kirker Testimony.*
52. Both stormwater site plan and stormwater pollution prevention plans for the proposal are in development. Prior to the start of construction, both would be required to be consistent with SJCC 18.60.070. The instant public transportation project would not result in the ongoing use of any chemicals, meaning no spill containment plan is required to be submitted for ongoing use of the bridge. The Applicant submitted a water quality protection plan addressing construction demonstrating how water quality would be protected throughout construction. *Exhibit 6.*
53. In addition to the instant SSDP, the project would require approval of, and compliance with any conditions imposed pursuant to, the following permits: Hydraulic Project Approval (HPA) from Washington Department of Fish and Wildlife; Section 401 Water Quality Certification from Washington Department of Ecology; a Section 10 Permit from US Army Corps of Engineers for work in navigable waters; and critical area approval issued administratively by San Juan County. *Exhibits 7 and 12.*
54. The application materials were routed to eight agencies for review and comment on the proposal and the revised MDNS, including Department of Ecology (DOE), UW Friday Harbor Labs; and Department of Natural Resources. *Exhibit 2.*
55. Responding to the first MDNS, DOE requested additional information regarding the following: 1) the location of the ordinary high water mark was not shown on the drawings and 2) the project description stated that 480 square feet of wetland would be permanently impacted from realignment of the bridge approach, but no compensatory mitigation was proposed. After conducting a site visit, DOE staff noted in a second letter dated December 1, 2014 that the OHWM determination was relatively easy at this site and determined that the pinflags placed by the Applicant consultants were either at the same elevation as theirs or slightly higher and recommended taking the average elevation from all of these locations to determine this elevation contour. They also indicated that after digging three test holes in the temporary shoofly location, they determined that wetland criteria were not met due to insufficient presence of wetland soils and hydrology. DOE stated that no mitigation for impacts to the area previously thought to be a wetland would be required. *Exhibits 8.a and 8.b.*
56. Washington State Department of Natural Resources checked the tideland ownership at this location and determined it is all private even though the bridge is public; the agency had no further comments. *Exhibit 8.c.*
57. Three comments were submitted by Dr. Megan Dethier, Associate Director for Academics and the Environment at the University of Washington Friday Harbor Labs. In a comment dated February 24, 2015, she noted that the Puget Sound Nearshore Ecosystem Project (PSNERP) included the Deer Harbor bridge replacement in a short list of feasible and worthwhile Puget Sound restoration projects. Noting that the County used

the PSNERP conceptual designs as a basis for their grant application, she stated that the proposed design with a shorter bridge and removing would less fill would accomplish at least some of the objectives of the proposed restoration, i.e. increasing tidal flushing of the lagoon and potentially allowing that uncommon habitat type to recover some of the ecosystem services it provided in the past. She cautioned:

However, these long-term benefits may come at a short-term cost. Opening up the entrance to the lagoon will clearly cause short-term environmental changes in terms of new drainage patterns developing and a large quantity of sediment, retained behind the bridge for decades, being released into Deer Harbor. While restoring this sediment supply to the shoreline does restore a natural process, it appears that there has been inadequate consideration of the potential short-term environmental impacts of these changes. The short-term consequences of sediment transport and settlement should be considered.

*Exhibit 8.d.*

58. In her second comment, dated March 17, 2015, Dr. Dethier stated that the project additions suggested by Coastal Geologic Services (CGS) are appropriate and helpful; however she was surprised by the lack of detail included in the County's plan to respond to these suggestions. She particularly noted that items 18 and 19 on pages 3 and 4 of the revised MDNS contain no detail about how these new conditions will be carried out.

The results that CGS present on contaminants (e.g. copper) in oysters suggest that there may be significant water quality issues that may relate to water and sediment coming out of the lagoon, yet there is no acknowledgement of this problem in the revised MDNS.

Also, despite the extensive comments received about the potential issues associated with substantial release of old retained sediments from behind the bridge, there was little discussion in the revised proposal about this issue, except for the statement in Condition 19 about removing the sill in stages. Will this alleviate the problem of sediment buildup in Deer Harbor, or just make it happen more slowly. Some detail would have been useful.

*Exhibit 8.e.*

59. In her third letter dated March 31, 2015, Dr. Dethier clarified that although her comments in her second letter might make it sound as though her organization was opposed to the bridge replacement project, such was not the case.

The proposed project will accomplish at least some of the objectives of the proposed PSNERP restoration, i.e. increasing tidal flushing of the lagoon and potentially allowing that uncommon habitat type to recover some of the ecosystem services it provided in the past. Fish passage and cultivation of native shellfish in the lagoon may again be possible once the project is

completed. In the long term, this project will restore key and badly needed ecosystem functions, including passage of fish and nutrients into and out of the lagoon, and re-supply sediments to the sediment-depleted drift cells of western Orcas Island.

*Exhibit 8.f.*

60. Prior to the consolidated public hearing on the SSDP and the SEPA appeal, the County received public comments on the proposal included the following concerns and comments:

One Deer Harbor household wrote in support of replacing the bridge and commented that Public Works had been working closely with the community, surrounding land owners, and the Deer Harbor Planning and Review Committee. She urged approval of the shoreline permit granted with conditions: 1) removal of some of the rock sill before construction to monitor how fast the silt might exit the estuary; 2) some kind of remediation of the oyster beds should the silt kill them; and 3) if the few docks in the channel south of the bridge silt in to the point they are not usable, the County should put some provision in to make those boat accesses viable. *Exhibit 10.a, Cookston Comments.*

Other local residents have noticed detrimental changes in the Deer Harbor environment traced back to the installation of the current bridge and the addition of rip rap, including increased speed of the incoming tide which carried silt into the estuary. They urged the County to “keep pursuing the wise oversight route until you have exhausted all possibilities of preventable degradation of our Deer Harbor Environment” and attached an undated letter from Doug Meyers, who was the Director of Science for People for Puget Sound at the time it was written. *Exhibit 10.b, Connor Comments.*

The owner of Deer Harbor Boatworks and oyster beds located just south of the bridge submitted detailed comments on the peer review done by CGS, conclusions about what he has read and heard about the project. As noted by planning staff, his detailed comments don't lend themselves to paraphrasing. He requested: a detailed drawing of the proposed channel modifications with discussions on how the modification will affect current flows and oyster populations; immediate testing of sediments likely to be displaced by the wider opening to see what if any environment consequences may occur with sediment flows out of the lagoon and across oysterlands and into the marine environment of Deer Harbor; continued testing of sediments flowing out of the lagoon for at least three years or until the shoreline has stabilized; mitigation measures funded and in place if sediment flows result in increased silting of dredged areas alongside two docks in the immediate vicinity of the bridge and further out in the harbor at the two marinas; mitigation measures funded and in place if sediment flows affect oyster populations downstream from the bridge in designated oysterlands and alongside the rock shoreline of Deer Harbor; funding in the amount of at least 5% of the total project costs in the bank as a reserve to fund any environmental

consequences of this bridge project with this amount as a starting point for immediate action, with a proposal that restoration and mitigation measures could be resolved in collaboration by representatives from the Northwest Straits Commission, Friday Harbor Labs, WDFW, DOE, and local residents affected by changes; strict adherence to Section 18.30.110 Critical Areas with special emphasis on B.1. No net loss provisions, E.1-2 Mitigation actions and management plans, and 7(j) Monitoring plans, monitoring schedule, explanation of corrective actions that will be taken to deal with any problems; strict adherence to Section 18.50.070 Environmental Impacts with special emphasis on D. minimizing adverse impacts to habitat areas, G. designed to minimize interference with natural shoreline processes such as water circulation, sand and gravel movement, erosion, and accretion; and a requirement that this project complete an Environmental Impact Statement if the Hearing Examiner feels it is warranted. This letter included additional comments from Deer Harbor Boatworks Stormwater, Environmental, and Safety Officer providing commentary on the function of oysters in the environment, a detailed analysis of the CGS report and its alleged shortcomings, and a discussion of DHBW manages its stormwater discharge, not to the marine waters, but in a sump and settlement basin. *Exhibit 10.d, Durland Comments.*

61. Public comment received at the hearing included the following:

The owner of the Cayou Quay Marina testified that County monitoring is fine, but its value is higher if baseline study is done before construction rather than after. He recommended performing sill removal before high tide. He noted that a wider bridge should reduce current at the bridge, but his concern is at marina. He asked the County to take responsibility to remediate impacts to his business resulting from the project. *Erik Smith Testimony.*

One member of the public testified that Public Works has done an incredible job reaching out to the community (addressing statements by others that the Department had not). She urged that the bridge be replaced soon to protect public safety but that the County agree to remediate impacts downstream uses that will be impacted. *Sandra Cookston Testimony.*

Another member of the public expressed concern that although the community desperately wants the bridge replaced, he also has dock with a pit dug out to provide sufficient moorage for his boat, and he's concerned that the pit will be filled in. He requested assurance that he will be allowed to dredge it in the future, but he testified that he's more concerned about pollution. He requested that proper testing be conducted in advance to determine where it would go. He does not feel it would be fair for him to be held liable for contaminated sediments landing on his property as a result of the project. *Wesley Heinmiller Testimony.*

A representative of the Friends of the San Juans commented that it is important to develop the bridge replacement project in as environmentally safe a way as possible. He recommended that the County should study sediment and requested that a

monitoring and adaptive management plan developed to establish a baseline before starting an adaptive management strategy. *Kyle Loring Testimony.*

Michael Durland disputed that his oysters live in an artificial environment, contending the lagoon used to be filled with oysters. He noted that there is emergency access to the site via an overland route through the Connors' property and that argued that the bridge is not in as dire need of replacement as Staff has made it out to be. He testified that the County performed a ten year fix only five years ago. He objected to comments regarding making any rehabilitated shoreline within the project footprint on his property into a park/public access, as the public would be crossing on his land. *Michael Durland Testimony.*

62. In response to consultant, agency, and public comment and testimony offered during the SEPA appeal regarding potential environmental impacts from release of the silt, the Applicant proposed to remove the sill in stages, conduct monitoring, and adjust the timing of sill removal to manage silt release for best possible outcomes. However, the record offered contained no written information detailing the staging, monitoring, or adaptive management strategies contemplated. At hearing, the Examiner requested that the Public Works Department provide a conceptual monitoring and adaptive management plan in order to complete the record. A post-hearing order, issued June 1, 2015, memorialized the submission schedule agreed to on the record. The Order allowed for those present at the hearing to respond to the submitted plan with written comments, and it allowed for Public Works to respond to public comment. *Post-Hearing Order, dated June 1, 2015.*
63. Public Works Staff submitted an adaptive monitoring plan (Plan), noting that the document would be modified as necessary to comply with local, state, and federal regulatory requirements. The Plan was to be shared with the Deer Harbor Monitoring Project Advisory Committee, which includes representatives of Northwest Straits, UW Friday Harbor Labs, Coastal Geologic Services, San Juan Marine resources Committee, and County Public Works. The Plan identified three potential impacts to be monitored: depth, current, and sediment, and indicated that changes to water depth and tidal current would be monitored at specific locations and that sediment quality in Cayou Lagoon would be evaluated. Baseline measurements would be established according to sites distributed through project Areas identified in Table 2 of the document: two sites for sediment testing; two sites for current speed, and 11 sites for depth. For depth, the Plan would establish bottom elevation if shallower than -10 feet. For current, the Plan would establish maximum velocity at statistically equivalent peak tidal exchanges pre-project. Regarding sediment evaluation, the Plan stated that sediment in the lagoon would be monitored for compliance with marine sediment quality standards established in state regulations. As a next step, the Plan identified "establish[ing] an approach to regulating and moderating the potential impacts by systematically removing the rock sill... in horizontal and vertical stages." *Exhibit 14, page 3.* Finally, the Plan would regularly monitor the stated values at the given locations, starting at a frequency of once per month and adjusting frequency as needed to accurately capture the changes. *Exhibit 14.*

64. The Plan established the following acceptable change thresholds: for depth, a one-foot decrease at one site or 0.5-foot decrease at two sites; for current, a 10% increase in Area 3; and for sediment quality, the Plan referred to the WAC 173-204-320. If an impact is observed exceeding a given threshold, the following steps would be taken: 1) Cease removing the rock sill (not to include halt of bridge construction); 2) Notify interested regulatory agencies and affected property owners and continue to take measurements until acceptable standards are reestablished or equilibrium is achieved; and 3) The County Engineer would consider all readily available information in determining the appropriate response, and all information would be shared interested parties prior to action. *Exhibit 14.*
65. Members of the public who submitted comments on the adaptive monitoring plan had the following comments:

One stated that the plan looked adequate. *Exhibit 15.a, Cookston Comment.*

Another continued to express concern about pollution impacts downstream in Deer Harbor and the greater Puget Sound because the source of existing contaminants is not known. *Exhibit 15.b, Heinmiller Comment.*

Friends of the San Juans submitted comments generally supportive of the proposal and the plan but requested changes to the plan to address water quality and shellfish habitat concerned, as follows:

- 1) Identify the individual who would be performing each monitoring task and their qualifications;
- 2) Specifically monitoring for sediment impacts at oyster bed locations, establishing a lower threshold for coverage of those beds, and an adaptive management process that maintains oyster habitat in the project vicinity;
- 3) Adding a process to address any elevated contaminants detected by the sampling of sediments likely to be released by the project;
- 4) Increased specificity for processes that will be implemented if monitoring results exceed established thresholds, including: whether sediment would be removed, the timeframe for determining whether sediment should be removed, and the mechanism for removal;
- 5) If the planned baseline sediment testing reveals elevated levels of contaminants, next steps need to be included in the plan. At a minimum, such steps should include contacting state agencies with authority over contaminated sediments and taking steps to prevent the release of toxins, and/or proposing to remove sediment the sill area.
- 6) Sediment monitoring should be established at the oyster bed site; and
- 7) Measures to respond to oyster bed burial at a level of less than half or one inch, based on the memorandum in the record noting that sedimentation of approximately 1.5 inches could eliminate oysters when buried for a 12-day period (citing Echeverria memo attached at Exhibit 5). *Exhibit 15.c, Loring Comment.*

Mr. Durland commented that while establishing monitoring protocol, the Plan does not provide any adaptive management strategies. He reiterated his position that the bridge is not in as much of a crisis as implied by the County, noting that the failing piling caps were repaired in 2009.<sup>10</sup> He submitted comments detailing various alleged deficiencies in the proposed plan, including among other items the lack of a timeline for response if thresholds are exceeded, lack of information about speed of planned sill removal. He requested that the Plan include setting a threshold of ½ inch maximum sedimentation on oyster beds as a threshold, that the health of oyster beds be monitored, and that the Boatworks dock current and depth be monitored, that turbidity in the water column be monitored, and some acceptance of financial responsibility on the part of the County be included if adverse environmental impacts occur. *Exhibit 15.d, Durland Comment.*

Erik Smith submitted comments on the Plan, requesting additional sediment, current, and pollution testing locations at the Cayou Quay Marina. He indicated that he is not concerned that the County/contractor would act in a timely fashion to address surprises, but he remains concerned about who would be financially responsible in the event of significant project impacts. *Exhibit 15.e, Smith Comment.*

66. In response to public comment on the Plan, Public Works offered the following: The Plan offers affected property owners the opportunity to have Public Works monitor changes to depth, current, and sediment on their property. Participation is voluntary. The Plan will provide an official record of changes. It will be modified to include all conditions applied in required DOE, WDFW, USACOE, and any other agency review processes. Staff contended that the bridge is structurally deficient and posted. Removal of the rock sill is a fundamental component of restoring the estuary and it will not be replaced absent direction from a regulatory agency. The County is willing to work with Mr. Durland to strategically locate tidal flows based on his interests and his management of his oyster beds. Depth would be monitored under the direction of a licensed Civil Engineer. Currents would be monitored under the direction of a licensed Surveyor. Sediments would be sampled in accordance with DOE standards. In response to Friends' requested changes, Public Works offered to lower the sediment threshold at oyster bed locations to four inches. The County's response to threshold exceedance would depend on the response of affected property owners, regulatory requirements, and legal advice, indicating that no further specificity is possible at this time. *Exhibit 16.*
67. Based on the record created up to the date of hearing, Department Staff determined that the proposal as conditioned would result in no net loss of shoreline ecological function, would be consistent with applicable critical areas and comprehensive plan requirements, and would be consistent with the applicable regulations of the County's Shoreline Master Program. Staff recommended project approval. The recommended conditions of approval incorporated the minimization and avoidance measures identified in the BA,

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<sup>10</sup> Extensive documents related to bridge inspection and current state of the bridge offered by Mr. Durland with his post-hearing comments on the Plan were not admitted. They were not invited by the order and nothing in Mr. Durland's comments shows any reason they could not have been offered at hearing.

recommendations from the peer review report by CGS, and additional conditions that would ensure compliance with applicable provisions of the County Code. *Exhibit 1; Thompson Testimony.*

## CONCLUSIONS

### Jurisdiction

The Hearing Examiner has jurisdiction to decide this shoreline substantial development permit application pursuant to San Juan County Code 2.22.100(1) and Section 36.70.970 of the Revised Code of Washington. The Examiner is authorized to decide appeals of environmental threshold determinations made pursuant to the State Environmental Policy Act pursuant to San Juan County Code 2.22.100(6).

### Criteria and Standards for Review

#### *SEPA Appeal*

The State Environmental Policy Act (Chapter 43.21C RCW or “SEPA”) specifies the environmental review procedures the County must follow for proposals that may have an impact on the environment. *RCW 43.21C.030 (b)*. The SEPA threshold determination is a determination as to whether a proposal is “likely to have a probable significant adverse environmental impact.” *WAC 197-11-330*. If the responsible official determines that a proposal will not have a probable, significant adverse environmental impact, a Determination of Non-Significance (DNS) is issued. If the responsible official determines that a proposal *will* have a probable, significant adverse environmental impact, a Determination of Significance (DS) is issued and an Environmental Impact Statement (EIS) must be prepared. SEPA provides a process in which a Mitigated Determination of Non-Significance (MDNS) may be issued to address identified probable significant adverse environmental impacts so that an EIS need not be prepared. *WAC 197-11-350*. The lead agency must make its threshold determination “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” *WAC 197-11-335*. The lead agency’s reliance on existing laws and plans to mitigate some of the environmental impacts of a project need not be disclosed in the MDNS. *Moss v. City of Bellingham*, 109 Wn. App. 6, 21-23 (2001). Use of mitigation to bring a project into compliance with SEPA, without promulgation of an EIS, has been viewed favorably by Washington Courts. *Anderson v. Pierce County*, 86 Wn. App. 290, 303 (1997).

Clear error is the standard of review applicable to substantive decisions under SEPA. *Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, (1988). The determination by the governmental agency is clearly erroneous only if the reviewing tribunal is left with “the definite and firm conviction that a mistake has been committed.” *Id.* at 747 (quoting *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, (1978)). The burden of proof is on the Appellant to show that the proposal will have probable, significant adverse environmental impacts. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, (2002). The procedural determination of the County’s Responsible Official shall be accorded substantial weight in appeals. *RCW 43.21C.090*.

#### *Shoreline Substantial Development Permit*

Pursuant to SJCC 18.80.110.H, a shoreline substantial development permit shall be granted only when the applicant meets the burden of proving that the proposal is:

1. Consistent with the policies of the Shoreline Management Act and its implementing regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as amended;
2. Consistent with the policies and regulations of the Shoreline Master Program in Chapter 18.50 SJCC;
3. Consistent with this chapter;
4. Consistent with the applicable sections of this code (e.g., Chapter 18.60 SJCC);
5. Consistent with the goals and policies of the Comprehensive Plan; and
6. All conditions specified by the hearing examiner to make the proposal consistent with the master program and to mitigate or avoid adverse impacts are attached to the permit.

### ***San Juan County Shoreline Master Program Applicable Policies and Regulations***

#### ***San Juan County Comprehensive Plan, Section B, Element 3***

#### ***Shoreline Master Program - Goals and Policies Applicable to Transportation Facilities***

##### ***3.1.A Purpose***

This element provides goals and policies additional to those of other elements in this *Plan* and applies to all shorelines of the state which include freshwater lakes 20 acres or larger, the area 200 feet landward from the ordinary high water mark, and marine water areas. It is the intent of this program to manage the use and development of the shorelines of San Juan County, giving preference to water-dependent and water-related uses and to encourage shoreline development and use to occur in harmony with natural conditions. Uses that result in long-term over short-term benefits are preferred. Background information for this element can be found in Appendix 1 of the *Comprehensive Plan*. This element is composed of five sections: overall goals and policies which are the foundation of the Master Program and set the priorities and tone of the whole element; the shoreline environments section which designates segments of the shoreline for specific uses; a section with general policies that apply to all shoreline uses and activities; a section with policies that apply to specific uses of the shoreline; and, the shoreline modification policies section which applies to structural and nonstructural modification activities on the shoreline.

##### ***3.1.B Relationship of this Element to the Unified Development Code***

The shoreline use regulations which implement the goals and policies of this element are contained in Chapter 5 of the Unified Development Code (UDC). Chapter 5 is essentially Part 2 of the County's Shoreline Master Program with this element of the *Comprehensive Plan* being Part 1. Except where otherwise stated, the Master Program applicability is coterminous with areas shown on the Official Shoreline Master Program Designated Environments Map. In the event of a conflict between the provisions of the Shoreline Master Program and any other elements of the *Comprehensive Plan* or chapters of the UDC, the Master Program controls.

##### ***3.2 Overall Goals and Policies***

This section addresses seven general subjects required by the SMA: Shoreline Use; Economic Development; Public Access; Recreation; Circulation; Conservation; Historic and Cultural Resources; and Administration.

### *3.2.A Shoreline Use*

Goal: To assure protection of the unique character of San Juan County with its many islands while providing for uses of the shorelines which do not needlessly diminish the quality of the shoreline environment by reserving shoreline areas for water-oriented uses and discouraging non-water-oriented uses other than single-family residential uses, and to assure the optimum opportunity for participation by County residents in the decision making processes that may affect that character.

#### *Policies (3.2.A.1-8):*

1. Foster uses which protect the potential long-term benefits to the public against compromise for reasons of short-term economic gain or convenience.
2. Allow only uses which would not adversely alter the shoreline, or conflict with or preempt water-dependent uses.
3. Accommodate preferred shoreline uses (water-dependent, water-related and water-enjoyment uses and single-family residential uses) while protecting and preserving shoreline resources and avoiding hazardous or sensitive areas.
4. Encourage studies of the physical and economic aspects of shoreline systems in order to provide a continuously updated information base against which the impact of any proposed shoreline use can be measured.
5. Restrict over-water development to those uses which are *water-dependent*.
6. Recognize the unique suitability of certain areas to accommodate preferred shoreline uses such as deep water ports and other boating facilities.
7. All shoreline uses should conform to the applicable policies of this Master Program and to the goals and policies of other elements in the *Comprehensive Plan*.
8. Ensure that the location, density, configuration, setback, and other aspects of all shoreline developments are appropriate to the site and vicinity and respond to the physical limitations of the site.

### *3.3 Shoreline Environments*

#### *3.3.B Rural Environment*

Purpose: The Rural Environment is intended for residential development and other mixed use forms of development such as marinas, restaurants, resorts, and rural commercial and industrial activities. The Rural Environment should be used where roads, utilities, and public services can be or are provided to serve a mix of uses on the shoreline. The Rural Environment is an area capable of accommodating residential and mixed use development, but which is not suitable or desirable for a more restrictive rural designation.

Designation Criteria: Shoreline areas to be designated Rural should meet one or more of the following criteria:

- a. areas presently containing medium density residential development mixed with non-residential uses;

- b. areas designated for rural residential or non-residential uses in the Land Use Element;
- c. areas which do not fall under criteria a. or b., *above*, but which do not present major biological or physical limitations for medium density residential development and which can provide the necessary capital facilities, utilities, and access required to accommodate such development;
- d. areas which are suitable for non-residential uses or that can be made compatible with residential areas; or
- e. areas which would make desirable transition zones between Urban and Rural Farm Forest, or between Urban and Conservancy environments.

*Management Policies:*

1. Protect and enhance the mixed use character of Rural Environments by regulation of the type, location, scale, and timing of new shoreline development.
2. Restrict uses in Rural Environments to residential, recreational, and non-residential uses which are compatible with each other and with the shoreline.
3. Public physical and visual access to the shoreline should be planned for a provided wherever appropriate.
4. Where possible, public access points should be linked by non-motorized transportation routes, such as hiking and bicycle paths.
5. Setback controls, sign control, and site development standards should be applied to new developments to minimize impacts on the scenic quality of the shoreline.
6. Regulate development to protect the shore process corridor and its elements.

*3.3.E Conservancy Environment:*

Purpose: The purpose of the Conservancy designation is to protect, conserve, and manage existing natural resources and systems and/or valuable historic, educational, or scientific research areas without precluding compatible human uses. It is the most suitable designation for shoreline areas which possess a specific resource or value which can be protected without excluding or severely restricting all other uses, and for areas where primarily non-consumptive uses of the physical and biological resources are preferred. It should be applied to those areas which would most benefit the public if their existing character is maintained, but which are also able to tolerate limited or carefully planned development or resource use.

Designation Criteria: Areas to be designated Conservancy should meet one or more of the following criteria:

- a. areas possessing valuable natural resources or features, the use of which precludes activities or uses except those which would not degrade the area to be conserved;
- b. areas possessing valuable natural resources which will tolerate only minimal disturbance of the existing terrestrial or marine /freshwater environments;
- c. areas containing resources which lend themselves to management on a sustained-yield basis;
- d. areas possessing scenic or recreational qualities of considerable local, regional, or statewide significance which would be adversely affected by extensive modification or use; or
- e. areas which are free of extensive development and can serve as needed open space if their present character is maintained.

*Management Policies:*

1. Prohibit activities and uses which would substantially degrade or permanently deplete the physical, biological, or aquatic resources of the area.
2. Allow only that new development which will be compatible with the natural and biological limitations of the land and water and which will not require extensive alteration of the land-water interface.
3. Development should be designed to protect the *shore process corridor* and its elements.
4. Prohibit activities or uses which would cause the substantial removal of vegetative cover, cause substantial erosion or sedimentation, or adversely affect aquatic life.
5. Allow residential development only at densities which will not endanger the resource which is the basis for the Conservancy designation and ensure that development design will preserve the natural character and Conservancy values of the shoreline.
6. Allow only those recreational activities and developments which are compatible with preservation of the shoreline character and with the forces which created and maintain the shoreline area.
7. Allow aquacultural and agricultural uses, and facilities supporting the commercial fishing industry, which are compatible with preservation of the shoreline and the resource which is the basis for the designation.
8. Public physical and visual access to the shoreline should be planned for and provided wherever appropriate, in a manner consistent with the purpose of the Conservancy designation.

*3.4 General Shoreline Policies*

*3.4.C Environmental Impacts*

Purpose: The SMA is concerned with the potential environmental impacts of shoreline uses and modification activities. Shoreline and water quality degradation caused by the introduction of contaminants such as petroleum products, chemicals, solid waste, domestic or industrial wastewater and sediment from erosion are issues which must be addressed.

*Policies (3.4.C.1-5):*

1. Minimize the adverse environmental impacts of shoreline development.
2. Require that shoreline use and development minimize erosion, siltation, and interference with the natural shoreline geophysical processes.
3. Shoreline use which generates sewage or other waste should have waste disposal facilities of approved design and sufficient capacity to prevent any adverse environmental impacts, particularly on water quality.
4. Provide for the treatment of surface water runoff either on-site or through shared facilities, including the use of setbacks, buffers, or retention/detention ponds.
5. Conduct dredging and filling so as to minimize impacts to water quality consistent with applicable State law and only for the purposes allowed by this Master Program.

*3.4.D Environmentally Sensitive Areas*

Purpose: Environmentally sensitive areas are those areas with especially fragile or hazardous biophysical characteristics and/or with significant environmental resources as identified by the County in the Environmentally Sensitive Area Overlay District (*see* Land Use Element

Section 2.5.B) or by a scientifically documented inventory accomplished as part of the SEPA/NEPA process or other recognized assessment. Environmentally sensitive areas include: Geologically Hazardous Areas; Frequently Flooded Areas; Critical Aquifer Recharge Areas; Wetlands; and Fish and Wildlife Habitat.

*Policies (3.4.D.1-4):*

1. Preserve unique, rare and fragile shoreline resources, including, but not limited to, critical aquifer recharge areas, wetlands, streams, unstable slopes and tidal inlets and associated native plant communities.
2. Protect areas with unique and/or fragile geological or biological characteristics, from incompatible physical public access (*e.g.*, wetlands, dunes, unstable bluffs, shoregrass, *etc.*).
3. Discourage development on shorelines which are identified as hazardous for or sensitive to development or limit their development in a manner to avoid hazards to life and property or to minimize environmental damage.
4. Restoration of shorelines degraded by natural or manmade causes or for the purpose of habitat enhancement should use techniques to arrest the processes of erosion, sedimentation and flooding.

*3.5, Shoreline Use Policies*

This section provides policies for specific uses to be addressed in local master programs in accordance with WAC 173-16-060. Shoreline uses not specifically identified in this Master Program and for which policies have not been developed will be evaluated on a case-by-case basis. Such uses will be required to satisfy the policies of the Shoreline Management Act, the goals and policies of this Master Program, and must be consistent with the character and management policies of the designated shoreline environment in which they are proposed to be located. A use not named or contemplated in this Master Program may be allowed subject to a conditional use shoreline permit and to the applicable provisions of the Master Program and WAC 173-27-160.

*3.5.N Transportation Facilities*

Purpose: Transportation facilities include roads, trails, airports, barge landing and log transfer sites, county docks, county boat ramps, float plane facilities, ferries and related terminals, commercially operated transportation facilities, and parking areas. Generally such facilities account for a very small percentage of total shoreline uses, but their impact is substantial. New transportation facilities within the shoreline must be planned for with considerable thought being given to their relationship to other shoreline uses and their various primary and secondary impacts. These facilities must also meet the requirements of the Transportation Element of this *Plan*.

*Policies:*

1. Prohibit the location of transportation facilities in shoreline areas if they could feasibly and practically be located elsewhere.
2. Design and construct transportation facilities in shoreline areas to minimize their impacts on shoreline resources and natural systems.

3. Improve, retain and keep open, whenever possible, old roads, rights-of-way, and other facilities in public ownership which afford scenic views or access to the water.
4. Install transportation and utilities facilities in the same rights-of-way when the effect will be to reduce the adverse impacts on the shorelines.
5. Confine inter-island transportation to air and waterborne craft.
6. Prohibit deep water ports for the handling or processing of oil and underwater cross-Sound oil pipelines. Such uses are incompatible with the environment and the ecosystems that make these islands unique.
7. Consider the ecological impact in building, improving, or maintaining roads. In addition, roads should:
  - a. be maintained at widths consistent with safety standards for limited speeds;
  - b. follow the natural terrain as much as possible and still maintain reasonable levels of safety;
  - c. include safe turnouts and viewpoint areas as appropriate.
8. Re-landscape or replant land with native species if it has been scarred or it is necessary to remove natural cover due to road construction or improvements.
9. Wherever practical, all new roads proposed near the shoreline should be set back at least 200 feet from the ordinary high water line.
10. Protect access to private driveways and business locations through the establishment of "No Stopping or Standing" zones in ferry lines and other methods.
11. Encourage non-vehicular traffic on ferries to moderate the impact of vehicular traffic on the shoreline environment.
12. Locate airports and air transportation facilities to maximize public access to publicly owned shorelines and to minimize adverse impacts on shoreline and upland areas.
13. On non-ferry-served islands, where there is no alternative for the movement of freight, a single designated barge landing site is preferred over the development of multiple barge landing sites.
14. Identify a minimum of one log dump and a minimum of one barge landing site, where needed, on each non-ferry served island to address special freight mobility needs.
15. Locate and conduct the use of log transfer and barge landing sites and associated operations so as to minimize impacts on existing water quality, fish habitats and the shoreline environment in general.
16. The use of an unimproved shoreline area or development to create a usable log transfer or barge landing site are subject to a conditional use permits.
17. To the extent practicable, log transfer and barge landing sites should be located where a single location can serve multiple users. Land access to such sites should be provided for community use in order to prevent unnecessary damage to shoreline resources caused by shoreline modifications required for the creation of multiple sites.

*SJCC 18.30.110, Critical Areas*

- A. Purpose. Critical areas overlay districts are adopted to protect the functions and values of critical areas in conformance with the requirements of the Washington Growth Management Act and the policies of the San Juan County Comprehensive Plan. There are five types of critical areas as defined in SJCC 18.30.120 through 18.30.160:
  1. Geologically hazardous areas.
  2. Frequently flooded areas.

3. Critical aquifer recharge areas.
  4. Wetlands.
  5. Fish and wildlife habitat conservation areas.
- B. Applicability. These overlay districts provide regulations for land use, and development and vegetation removal in critical areas and areas adjacent to critical areas as established in SJCC 18.30.120 through 18.30.160.
1. Applicability to Uses and Structures within the Shorelines of the State.  
Notwithstanding any provision in this code to the contrary, any use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the County's development regulations to protect critical areas shall be regulated consistent with RCW 36.70A.480(3)(c). Such uses or structures may continue as a conforming use and may be redeveloped or modified if the redevelopment or modification is consistent with Chapter 18.50 SJCC and either: (1) the proposed redevelopment or modification will result in no net loss of shoreline ecological functions; or (2) the redevelopment or modification is consistent with SJCC 18.30.110 through 18.30.160. If the applicant chooses to pursue option (1), the application materials for required project or development permits must include information sufficient to demonstrate no net loss of shoreline ecological functions. For purposes of this subsection, an agricultural activity that does not expand the area being used for the agricultural activity is not a redevelopment or modification. For purposes of this subsection, "agricultural activity" has the same meaning as defined in RCW 90.58.065.
- C. General Exemptions. When conducted in accordance with the provisions of this subsection (C), and other applicable requirements, the following uses and activities are exempt from standard critical area regulations:
2. The operation, maintenance, repair, remodel, or replacement of existing structures, facilities, infrastructure systems, development areas and uses, provided there is no further intrusion into geologically hazardous areas, frequently flooded areas, wetlands, or fish and wildlife habitat conservation areas or their buffers; soil erosion is controlled; disturbed areas are promptly stabilized; and actions do not have an additional adverse effect on the functions and values of critical areas. Existing structures, uses and activities located within shorelines of the state are addressed separately as described in subsection (B) of this section and SJCC 18.30.160.
- ...
- D. Critical Area Mitigation Requirements.
1. This section outlines the provisions for mitigating adverse impacts to critical area functions and values when mitigation is authorized or required by the San Juan County Code. Possible mitigation actions may include minimizing impacts as well as reestablishment, rehabilitation, restoration, creation, and enhancement.
  2. Mitigation, monitoring, and adaptive management plans must be developed by a qualified professional(s).
  3. Mitigation, monitoring, and adaptive management plans are reviewed and approved by the decision maker for the underlying permit or approval (director or hearing examiner, depending on type of permit/approval).
  4. Preparation of mitigation, monitoring, and adaptive management plans, and their

review by the County, which may include referral to independent qualified professionals, shall be at the applicant's expense. If review by a third party is necessary because of the complexity of the plans or apparent errors, the Department may require advance payment of fees for this review based on the estimated review time. As an alternative to third party review, the applicant and the director may jointly select the qualified professional who will complete the plans.

5. Mitigation options include the use of certified mitigation banks and approved in-lieu fee mitigation sites when they are developed.
6. Removal of illegal modifications cannot be used to mitigate new adverse impacts to critical areas when those modifications were made by the owner of the property that is the subject of the application.
7. Mitigation plans must be appropriate for the scale and scope of the project, and include adequate information for the decision maker to determine that the project and application are in conformance with approval criteria. Potential components of an application include the following:
  - a. For both the area proposed for development or vegetation removal, and the proposed mitigation site, the applicable items listed in SJCC 18.80.020(C) (Project Permit Applications—Forms) as well as photos of both the development and mitigation sites.
  - b. Any related project documents such as applications to other agencies or environmental documents prepared pursuant to the State Environmental Policy Act.
  - c. For both the area proposed for development or vegetation removal, and the proposed mitigation site, applicable critical area reports, critical area delineations and best available science documents supporting the proposal.
  - d. For both the area proposed for development or vegetation removal and the mitigation site, copies of any proposed or approved stormwater and erosion control plan required by Chapter 18.60 SJCC.
  - e. A narrative describing anticipated adverse impacts to critical area functions and values, the mitigation proposal (including the goals of the proposal, performance standards that will be used to gauge the effectiveness of the proposal, construction methods, and the sequence and timing of actions), and explaining how the proposal meets the plan approval criteria. Assessment of adverse impacts to critical area functions and values and of the effectiveness of proposed mitigation shall be based on the best available science.
  - f. For off-site mitigation actions, an explanation of why on-site mitigation was not feasible, along with the site selection criteria employed.
  - g. Grading and excavation details. If grading is proposed, pre- and post-construction contour plans are required as a scale that is suitable for the site.
  - h. A planting plan (if planting is proposed) identifying plant species, quantities, sizes, locations, spacing, and density, along with proposed measures to protect and maintain the plants until they are established.
  - i. Any other drawings necessary to illustrate the proposal.
  - j. Monitoring and adaptive management plans appropriate for the scale and scope of the project. These plans must describe measurable data that will be collected to assess the effectiveness of the project, must include a monitoring schedule

(monitoring is required at least once each year, with a report submitted to the Department by November 1<sup>st</sup>), and must explain corrective actions that will be taken to deal with any problems. The project shall be monitored for three years or until the director determines that it is successful, functioning as designed, and that established performance standards have been met.

- k. For mitigation of adverse impacts to wetland, the plan, including associated wetland replacement ratios, must be consistent with the guidance provided in Wetland Mitigation in Washington State—Part 1: Agency Policies and Guidance, Ecology Publication No. 06-06-01 1a; and Wetland Mitigation in Washington State—Part 2, Publication No. 06-06-01 1b. As an alternative, mitigation actions may follow the procedures described in Ecology Publication No. 10-06-01 1, Calculating Credits and Debits for Compensatory Mitigation in Wetlands of Western Washington or another mitigation approach or publication approved by Ecology.
- l. A description of the report author’s education and experience relevant to designing and implementing the proposed actions.

*SJCC 18.30.160.A, Fish and Wildlife Habitat Conservation Areas (FWHCAs)*

Applicability. Unless exempted or otherwise allowed under SJCC 18.30.110, the provisions of this section apply to uses and activities in or within 200 feet of fish and wildlife habitat conservation areas as defined in this title (the Unified Development Code). In addition to County regulations, in some cases activities in fish and wildlife habitat conservation areas may be regulated by state and federal agencies including the Washington Department of Ecology, Washington Department of Fish and Wildlife, Washington Department of Natural Resources, and the U.S. Army Corps of Engineers. Compliance with County regulations does not relieve the property owner of the responsibility to comply with state and federal requirements.

*SJCC 18.35.130(G). Standards and Requirements for Shoreline Modifications*

Shoreline modifications, including shoreline stabilization measures, are allowed within and over aquatic FWHCAs and their buffers subject to this section and Chapter 18.50 SJCC. These requirements remain in effect until they are replaced with an approved comprehensive update of the Shoreline Master Program. Unless specifically allowed by this section and Chapter 18.50 SJCC, construction of new shoreline modifications is prohibited.

1. General Standards.
  - a. Definitions. Definitions applicable to this subsection (G) are found in RCW 90.58.030 and WAC 173-26-020 and 173-27-030.
  - b. Mitigation sequencing. Per WAC 173-26-201(2)(e), adverse impacts associated with new, expanded or replacement shoreline modifications must be mitigated consistent with the requirements of SJCC 18.35.020 through 18.35.050 and the following mitigation sequence:
    - i. Avoiding the impact altogether by not taking the action or part of the action.
    - ii. Minimizing impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology or by taking affirmative steps to avoid or reduce impacts.

- iii. Rectifying the impact by using appropriate technology or by repairing, rehabilitating or restoring the affected environment.
- iv. Reducing or eliminating the impact over time by preservation and maintenance operations.
- v. Compensating for the impact by replacing, enhancing or providing substitute resources or environments.
- vi. Monitoring the impact and compensation projects and taking appropriate corrective measures.

*SJCC 18.50.020.A, Relationship [of Shoreline Master Program] to Comprehensive Plan.*

This master program provides land use regulations to implement the goals and policies of the Comprehensive Plan Shoreline Element. These regulations apply to all of the land and waters of San Juan County which fall under the jurisdiction of the Shoreline Management Act. These regulations do not apply to development and uses beyond the jurisdictional limits of the Act unless a proposed development involves both jurisdictional and non-jurisdictional land and the upland development is found to adversely affect the shoreline environment. If a conflict occurs between this chapter and other sections of this code, this chapter shall prevail.

*SJCC 18.50.060, Clearing and grading*

- A. Clearing and grading activities are allowed only if (1) associated with an approved shoreline development; (2) conducted only landward of a required building setback from shorelines; and (3) disturbed areas not converted to another use within one year are replanted with native species. Replanted areas shall be maintained so that the vegetation is fully reestablished within three years of planting.
- B. Normal nondestructive pruning and trimming of vegetation of maintenance purposes is not subject to these clearing and grading regulations. In addition, clearing by hand-held equipment of invasive nonnative shoreline vegetation or plants listed on the state noxious weed list is allowed, provided native vegetation is promptly reestablished in the disturbed area.
- C. Tree removal permitted in a development approval is exempt from the regulations in this section.
- D. Commercial timber harvest conducted in accordance with an approved forest practices permit is exempt from the regulations in this section.

*SJCC 18.50.070, Environmental impacts*

- A. The location, design, construction, and management of all shoreline uses and activities must protect the quality and quantity of surface and ground water adjacent to the site and must adhere to the policies, standards, and regulations of applicable water quality management programs and related regulatory agencies.
- B. Solid waste disposal and liquid waste treatment facilities are prohibited on shorelines. Solid and liquid wastes, biosolids, and untreated effluents shall not be allowed to enter any bodies of water or to be discharged onto land.
- C. The release of oil, chemicals or hazardous materials onto land or into the water contrary to state or federal law is prohibited. Equipment for the transportation, storage, handling or application of such materials in association with a lawful shoreline use must be maintained in a safe and leak-proof condition. If there is evidence of leakage, the further

use of such equipment shall be suspended until the deficiency has been satisfactorily corrected.

- D. All shoreline uses and activities shall be located, designed, constructed, and managed in a manner that minimizes adverse impacts to surrounding land and water uses and must be aesthetically compatible with the affected area.
- E. All shoreline uses and activities must utilize effective erosion control methods during construction and operation. Proposed methods must be included in the project description submitted with any permit application.
- F. All shoreline uses and activities must be located, designed, constructed, and managed to avoid disturbance of and minimize adverse impacts to fish and wildlife resources, including spawning, nesting, rearing and habitat areas, and migratory routes.
- G. All shoreline uses and activities must be located, designed, constructed, and managed to minimize interference with natural shoreline processes such as water circulation, sand and gravel movement, erosion, and accretion.
- H. Land clearing, grading, filling, and alteration of natural drainage features and land forms must be designed to prevent maintenance problems or adverse impacts to adjacent properties or shoreline features.
- I. All shoreline developments must be located, constructed, and operated so as not to be a hazard to public health and safety.
- J. All shoreline uses and activities must be located and designed to minimize or prevent the need for shoreline defense and stabilization measures and flood protection works, such as bulkheads, other bank stabilization, landfills, levees, dikes, groins, jetties, or substantial site regrades.
- K. Herbicides and pesticides may not be applied to or allowed to directly enter water bodies or wetland unless approved for such use by the appropriate agencies.

*SJCC 18.50.080, Environmentally sensitive areas*

When located in an environmentally sensitive area overlay district or its buffer, shoreline uses and activities must be located, designed, constructed, and managed in accordance with the applicable requirements of SJCC 18.30.110 through 18.30.160, environmentally sensitive areas.

*SJCC 18.50.150, Water quality*

- A. During and after construction, all shoreline developments shall minimize any increase in surface runoff through control, treatment, and release of surface water runoff so that the receiving water quality and shore processes are not adversely affected. Control measures include dikes, catch basins or settling ponds, oil interceptor drains, grassy swales, planted buffers, and fugitive dust controls. All surface water shall be retained on site unless discharge to road ditches or other drainage channels is approved in writing by the County engineer.
- B. All industrial, institutional, commercial, residential, recreational, and agricultural uses shall adhere to all required setbacks, buffers, and standards for stormwater. (Refer to shoreline use and environment designation regulations for specific limits.)
- C. All shoreline development must comply with the applicable requirements of the Stormwater Management Manual for the Puget Sound Basin or a County-approved program that meets or exceeds the requirements of the manual. (See also SJCC 18.60.060(B) and (C) and 18.60.070.)

*SJCC 18.50.340, Transportation facilities*

A. Regulations—General.

1. Transportation facilities located in shoreline areas must be designed and maintained to prevent erosion and to permit the natural movement of surface water.
2. The filling of wetlands for the construction of transportation facilities is not permitted unless it can be clearly shown that no feasible alternative exists.
3. All overburden, debris, and other waste material resulting from the construction of transportation facilities shall be disposed of in a fashion which will prevent their entry into any water body.
4. Excess construction materials shall be removed from the shoreline immediately following completion of the construction project.
5. Where appropriate, provisions for pedestrian access to or along the water shall be included in the plans for all new public transportation facilities.
6. Commercial watercraft and seaplane operations at public access points require a substantial development permit.

B. Regulations by Environment.

- ...
2. Rural. Same as urban; provided, that barge landing sites and facilities shall be allowed only on non-ferry served islands if the site will serve multiple users on the island affected, subject to the policies and regulations of this SMP.
- ....
5. Conservancy. Pedestrian trails shall be permitted in the conservancy environment. Roads and parking areas serving permitted uses shall be permitted where no feasible alternative exists; ferry terminals may be permitted as conditional uses where it can be shown that no feasible alternative exists and that the public interest clearly would be better served by construction of the facility. Barge landing sites and facilities may be allowed in the conservancy environment only on non-ferry-served islands if the site will serve multiple users on the island affected, and the applicant demonstrates that conservancy shoreline resources will not be materially harmed. Parking lots and other transportation facilities shall not be permitted.

*SJCC 18.60.060, Clearing and grading standards*

...  
E. Grading

1. ...
2. Clearing and Grading Permit. The clearing and grading permit is a development permit that is processed using the procedures under the Uniform Building Code, adopted as the San Juan County building code, Chapter 15.04 SJCC.
  - a. All grading of 500 cubic yards or more is subject to a clearing and grading permit, except grading associated with the following:
    - i. Maintenance of gravel roads;
    - ii. A SEPA-exempt (cf. WAC 197-11-800(2)(d)) residential driveway;
    - iii. Construction of a Class I—III logging road (per RCW 76.09.050 and WAC Title 222);

- iv. Drainage improvements constructed in accordance with SJCC 18.60.060(B) and 18.60.070; or
  - v. Construction of a pond of one-half acre or less which is not in a regulated wetland (cf. SJCC 18.30.150).
- b. Applications for projects which require a clearing and grading permit shall include the following information:
- i. Source of fill material and deposition of excess material;
  - ii. Physical characteristics of fill material;
  - iii. Proposed methods of placement and compaction;
  - iv. Proposed surfacing material;
  - v. Proposed method(s) of drainage and erosion control;
  - vi. Methods for restoration of the site;
  - vii. Demonstration that instream flow of water will remain unobstructed;
  - viii. Demonstration that erosion and sedimentation from outflow channels will be minimized by vegetation or other means; and
  - ix. Demonstration that pond runoff will be controlled to protect adjacent property from damage.

*SJCC 18.60.070, Storm drainage standards*

All new development and redevelopment must conform to the standards and minimum requirements set by the Washington Department of Ecology Stormwater Management Manual for Western Washington, Publication Nos. 05-10-029 through 05-10-033. In addition, the best management practices identified in the January 2005 Low Impact Development Technical Guidance Manual for Puget Sound, produced by the Puget Sound Action Team, are acceptable alternatives for managing runoff, controlling soil erosion, and maximizing and protecting recharge.

*SJCC 18.80.110, Shoreline permit and exemption procedures*

- E. Decisionmaking Authority. The hearing examiner has authority to take the following actions:
- 1. Based upon the criteria in subsection (H) of this section, hear and issue or deny shoreline permits following receipt of the recommendations of the administrator, and to impose conditions of approval on such permits; and

...

G. Shoreline Permits – Administrative Actions.

....

- 3. In granting a shoreline permit, the hearing examiner may attach such conditions as deemed necessary to ensure that the development will be consistent with the master program and other applicable provisions of this code. The examiner shall also prepare findings of fact and conclusions of law.
- 4. In approving shoreline conditional use permits, the hearing examiner is authorized, on a case-by-case basis, to impose any special conditions or standards which are reasonable and necessary to enable a proposed conditional use to satisfy the criteria established in subsection (J) of this section.

...

## Conclusions Based on Findings

### SEPA Appeal

1. The burden of proof in a SEPA appeal is on the Appellant to show that the proposal will have probable, significant adverse environmental impacts. The record offered by the Appellant does not demonstrate probable, significant, adverse environmental impacts; the impacts asserted are speculative in nature and, further, are capable of mitigation. The record demonstrates that the revised MDNS was based on information reasonably sufficient to evaluate the environmental impacts of the project. The County was entitled to rely on existing laws and plans to mitigate some of the environmental impacts of the project, including the required compliance with state and federal permits. Given the deference required to the determination of the County's Responsible Official and the mitigation proposed/required in the record as a whole, the Examiner is not left with a definite and firm conviction that the MDNS was issued in error. The appeal must be dismissed. *Findings 1, 3, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, and 53.*

### SSDP

2. Additional conditions of approval requiring modifications to the submitted Adaptive Monitoring Plan are necessary to ensure compliance with SJCC 18.50.070.A, .D, and .F by ensuring protection of water quality, minimizing impacts to surrounding land uses, and minimize adverse impacts to fish and wildlife resources and habitat areas. Specifically, additions to the Plan are required to address testing of and response to potential contaminants in the lagoon's sediments that may be released into Deer Harbor and to address foreseeable potential impacts to the oyster beds adjacent to the south of project site.
  - a. Regarding sediment testing, the Plan must be modified to include next steps in the event that baseline testing reveals elevated levels of contaminants. At a minimum, next steps should include contacting state agencies with authority over contaminated sediments and preventing the release of levels of toxins into Deer Harbor exceeding thresholds established in the Washington Administrative Code through identified options including but not limited to removal of sediment from the sill area prior to lowering the sill, determining the timeframe for deciding whether sediment will be removed, and the mechanism for removal.
  - b. Sediment deposition should be monitored at oyster bed locations.
  - c. The Plan should be modified to include measures to respond to oyster bed burial at a level one inch.

With these modifications, the draft adaptive monitoring plan will provide sufficient adaptive management response options to bring the project into compliance with the SMP provisions requiring protection of water quality, surrounding land uses, fish and wildlife resources and habitat areas. *Findings 3, 22, 23, 24, 25, 26, 27, 28, 29, 55, 56, 57, 58, 59, 60, and 61.*

3. Replacement of the Channel Road Bridge as proposed and conditioned is consistent with the Shoreline Management Act (SMA). The policy of the SMA, as set forth in RCW 90.58.020, is to “provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses.” 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*. Pursuant to the County's Shoreline Master Program, transportation facilities/roads are allowed in both the Rural and Conservancy Shoreline Environments, the latter only in cases where no feasible alternative exists. The project work is necessary to allow continued use of the existing road to access Deer Harbor Hamlet and has been consolidated with a multi-agency and grassroots effort to restore the estuary. Compliance with the conservation measures in the Biological Assessment, any mitigation measures imposed in the State and Federal permits required prior to commencement, and the additional conditions of approval would ensure that adverse effects to the waters of the state would be avoided. *Findings 2, 3, 8, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 53, 60, 61, 63, 64, 65, and 66.*
  
4. Replacement of the existing overwater bridge is a water-dependent use designed to remediate historic damage resulting from installation of the existing facility. Its replacement in an environmentally responsible manner would be of long term benefit to the public interest and public safety. The project has been designed and conditioned to minimize the adverse environmental impacts, including erosion during and after construction, and to facilitate restoration of natural shoreline geophysical processes. Surface water runoff from the new bridge and road approaches would be conveyed to vegetative swales for biofiltration prior to release into the Sound, a marked improvement over currently untreated runoff. Stormwater treatment would be reviewed for compliance with the standards and minimum requirements set by the Washington Department of Ecology Stormwater Management Manual for Western Washington. In addition to replacing a structurally deficient bridge, the project is intended and designed to restore the unique aquatic environment of Cayou Lagoon, Deer Harbor, and tributaries thereto by remediating historic, manmade disturbance to natural processes. Conditions of approval would ensure compliance with proposed project design elements that would minimize the impacts of required dredging and filling to minimize erosion and sediment release impacts to water quality during construction. As conditioned, the design and construction of the replacement bridge would the quality of surface water adjacent to the site. The new bridge would not generate solid waste and untreated effluents, and it would not involve storage, handling, or application of hazardous chemicals or herbicides and pesticides. No commercial watercraft or seaplane operations are involved. A temporary erosion and sediment control plan would be finally approved prior to construction commencement after review by state and federal agencies. Compliance with conditions of approval and the adaptive monitoring plan would ensure minimization of adverse impacts to fish and wildlife resources. The proposal is intended to restore the natural shoreline processes of water circulation, sand and gravel movement, erosion, and accretion as compared to the existing condition. No wetlands exist within the project area. Conditions would ensure that construction debris and overburden are prevented

from falling into the water. *Findings 2, 3, 5, 8, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 53, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, and 66.*

5. Processing of the application has been conducted consistent with the requirements of SJCC 18.80. In addition to the required notice of application and environmental threshold determination, the Applicant was involved in community groups dedicated to Deer Harbor restoration. Comments of reviewing agencies were considered and informed the final proposal. The public has had all required opportunities for participation. The public hearing, convened in February 2015, was reconvened to allow further development of the proposal and further public participation. The matter was fully considered at an open record public permit hearing. *Findings 10, 11, 12, 13, 14, and 62.*
6. As conditioned, the proposal is compliant with other applicable chapters of the San Juan County Code and with the County's Comprehensive Plan. Regarding applicable critical areas provisions, this project is to replace the existing bridge with a new one; therefore it meets the general exemption requirement. There would be no further intrusion into critical areas. Soil erosion would be controlled, disturbed areas stabilized, and as conditioned no additional adverse effect on the functions and values of critical areas would occur. The recommendations of the Biological Assessment was prepared, which concluded that, with implementation of minimization and mitigation measures, the project would not likely jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of their critical habitat. Conditions of approval would ensure compliance with clearing, grading, and erosion control requirements of the County Code during and after construction. *Findings 8, 9, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 50, 51, 52, 53, 55, 56, 57, 58, 59, and 67.*

### **DECISION**

Because the Appellant did not satisfy the burden of proof demonstrating that issuance of the MDNS was clear error, the SEPA Appeal is **DENIED**.

Based on the foregoing findings and conclusions, the shoreline substantial development permit application is **APPROVED, subject to the following conditions:**

1. Any de-watering will be pumped to an upland site. Sediment-laden water will not be allowed to return to Deer Harbor/Cayou Lagoon.
2. Upland construction staging will not be allowed within 150 feet of the mean high water (MHW) unless specific measures are implemented to prevent delivery of contaminants to Deer Harbor/Cayou Lagoon. Additionally, staging areas will be established in previously cleared areas.
3. All construction equipment must be cleaned prior to entering the project area to prevent invasive plants and animals from establishing a foothold.
4. All construction equipment will be cleaned and diapered prior to working below MHW to

- prevent contamination of Deer Harbor/Cayou Lagoon.
5. Hand tools being used during construction below the MHW will be shrouded or attached to vacuum hoses to contain dust.
  6. Any construction equipment not in use must be stored in the designated staging areas.
  7. No cleaning or maintenance of any type of construction equipment may occur below the MHW.
  8. All concrete will be poured in the dry and will be allowed to cure for a specified amount of time before coming in contact with surface water.
  9. Refueling operations and storage of hazardous materials will be limited to areas identified in a Spill Prevention Control and Countermeasures (SPCC) Plan.
  10. Spill response kits will be located in the immediate vicinity of the equipment in the project area at all times.
  11. Erosion and sediment control devices will be inspected at least every seven days and within 24 hours after more than 3/8 inch of rain in a 24-hour period, or as required by the contract permits.
  12. The shorelines of the project area will be restored to a natural slope, pattern, and profile after construction is completed.
  13. Areas above the MHW that are cleared and disturbed during project construction will be revegetated using native vegetation.
  14. Any in-water work for the project will only take place within the In-Water Work Window, which is July 16<sup>th</sup> through February 15<sup>th</sup>, unless determined otherwise by the permitting agencies.
  15. Construction shall cease if any marine mammals come within 300 feet of the construction zone. Work shall not resume until the marine mammals have departed the 300-foot construction buffer.
  16. Common saltwater technical provisions (WAC 220-110-270) shall be strictly adhered to.
  17. The project shall comply with all applicable provisions of the Unified Development Code, Title 18, San Juan County Code.
  18. Minor changes to the grading plan shall be implemented on the east end of the proposed bridge as presented in the peer review from Coastal Geologic Services, Inc. memo dated February 24, 2015 regarding the Final Deer Harbor Estuary Bridge Design Review.
  19. The rock sill shall be removed in phases to provide a more gradual change in the restoration process.
  20. In addition, the project has been designed to avoid heavy equipment and construction activities within the shoreline buffer to the maximum extent possible. Several project-specific controls will be developed prior to beginning project construction and will be approved by the project engineer. These project-specific controls will include:
    - a. Developing a site-specific Work Containment Plan (WCP) detailing containment

- measures to use during construction and demolition activities in order to prevent debris from entering the water.
- b. Installing shoring/in-water work isolation measures to limit construction exposure to flowing water.
  - c. Selecting an upland staging area that is at least 150 feet landward of the MHW elevation.
  - d. Developing a site-specific Temporary Erosion and Sediment Control (TESC) Plan that uses applicable Best Management Practices (BMPs).
  - e. Developing a site-specific SPCC Plan to identify all potential spill hazards and prescribe preventive and response measures in order to minimize damage to the environment if a spill does occur.
  - f. Implementing the prevention and containment measures in the SPCC Plan prior to placing project materials and construction equipment in the staging area or refueling and maintaining equipment on-site.
21. A Stormwater Management Plan and a Stormwater Pollution Prevention Plan shall be approved by San Juan County Public Works Department prior to commencement of construction.
  22. The Adaptive Monitoring Plan in the record at Exhibit 14 shall be expanded consistent with Conclusion number 2.
  23. Development under this permit shall commence within two years of the date of permit approval and shall be substantially complete within five years thereof or the permit shall become null and void.
  24. Failure to comply with any terms or conditions of this permit may result in its revocation.

Decided July 13, 2015.



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Sharon A. Rice  
San Juan County Hearing Examiner

Pursuant to SJCC 18.80.110.O, the BOCC has authority to hear and decide appeals from decisions of the hearing examiner on shoreline permit applications as provided in SJCC 18.80.140, and any person aggrieved by a BOCC action granting, denying, or rescinding a permit for a use or development on the shorelines of the state pursuant to RCW 90.58.140 may seek review as provided by law.

Pursuant to SJCC 18.80.110.P, as provided for in RCW 90.58.290, the restrictions imposed upon the use of real property through the implementation of the policies and regulations of the SMA and the master program shall be duly considered by the County assessor and the County board of equalization in establishing the fair market value of such properties.