

SPONSORED BY: Consent
PROPOSED BY: PDS
INTRODUCTION DATE: _____

Resolution # _____

A RESOLUTION APPROVING A MAJOR PROJECT PERMIT
FOR THE CITY OF BELLINGHAM

WHEREAS, the Whatcom County Council reviewed the City of Bellingham's (COB) Umbrella Mitigation Bank Prospectus and granted a Notice to Proceed to COB on August 2, 2022; and

WHEREAS, on February 28, 2024, Whatcom County Planning and Development Services received an application by the City of Bellingham (COB) for a Major Project Permit to create an umbrella mitigation bank program on two sites in two phases within Whatcom County (the County); and

WHEREAS, on March 8, 2024, a SEPA Determination of Non-significance was issued by the COB, acting as lead agency pursuant to WAC 197-11-926; and

WHEREAS, WCC 2.11.205 requires the hearing examiner to conduct an open record public hearing for major project permits; and

WHEREAS, the hearing examiner held an open record public hearing for the major project permit on June 13, 2024; and

WHEREAS, pursuant to WCC 22.05.120 the Whatcom County hearing examiner received testimony and made a recommendation of approval to the Whatcom County Council of the major project permit on June 18, 2024 (Exhibit 'A'); and

WHEREAS, WCC 22.05.120(6) requires any deliberation or decision of the County Council shall be solely based upon consideration of the record established by the hearing examiner, the recommendation of the hearing examiner and the criteria set forth in applicable county code, the county Comprehensive Plan, compliance with SEPA, Chapter 197-11 WAC as adopted and modified in the county code and the county's adopted SEPA policies; and

NOW, THEREFORE, BE IT RESOLVED by the Whatcom County Council that the major project permit is approved, subject to conditions of approval identified in the Whatcom County hearing examiner's recommendation to council.

APPROVED, this ____ day of July, 2024.

ATTEST:

**WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON**

Cathy Halka,
Clerk of the Council

Barry Buchanan,
Council Chair

APPROVED as to form:

/s/ Kellen Kooistra via email/LB
Civil Deputy Prosecutor

EXHIBIT A

WHATCOM COUNTY OFFICE OF THE HEARING EXAMINER

re: The application for a Major
Project Permit

by **City of Bellingham**

MPP 2024-00001

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDATION TO
CITY COUNCIL

SUMMARY OF APPLICATION AND RECOMMENDATION

Application: The Applicant, City of Bellingham (COB) has applied for a Major Project Permit to create an umbrella mitigation bank program on two sites in two phases within Whatcom County (the County).
Such applications require a public hearing conducted by the Hearing Examiner, and for the Hearing Examiner to make recommendations to County Council, which is the final decision maker.

Recommendation: The requested approval of the Major Project Permit to create an umbrella mitigation bank program on two sites in two phases within Whatcom County should be conditionally approved subject to conditions.

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing, in which opportunity was afforded to interested parties to object, comment, or bring information forward.

FINDINGS OF FACT

I. PRELIMINARY INFORMATION

Applicant / Agent for Owner: Annaliese Burns
Habitat and Restoration Manager
City of Bellingham
2221 Pacific Street
Bellingham, WA 98229

Property Location / Assessor's Parcel Number(s):

1. Bear Creek Corridor: 380202209221, 38020206407, 380211165469 and 380211231475
2. McCormick Creek Headwaters: 390336042360, 390336519362, 390336332340 and 390336367460

Zoning:

1. Bear Creek Corridor: Rural (R5A) and Light Impact Industrial (LII);
2. McCormick Creek Headwaters: R5A

Comprehensive Plan:

1. Bear Creek Corridor: Rural and City of Bellingham Urban Growth Area
2. McCormick Creek Headwaters: Rural

Shoreline Designation: N/A

SEPA Determination: Determination of Non-Significance (DNS) on March 8, 2024.
There was no appeal of the SEPA DNS.

FEMA 100 Year Floodplain: NO

Total Acreage: 158.7 Acres

Water Supply: N/A

Sewage Disposal: N/A

Public Schools: N/A

Application Date: February 28, 2024

Determination of Completeness: March 28, 2024

| | | |
|----------------------------|------------------------|-------------------|
| <u>Notice Information:</u> | Application Submitted: | February 28, 2024 |
| | Notice of Application | April 10, 2024 |
| | ~Mailing: | April 11, 2024 |
| | ~Posting: | April 11, 2024 |
| | Hearing Notices | |
| | ~Mailed / emailed | May 22, 2024 |
| | ~Publication: | May 30, 2024 |
| | ~Posting: | June 6, 2024 |

Authorizing Codes, Policies, Plans, and Programs, including but not limited to:

- Code of Federal Regulations (CFR)
 - 33 CFR 332.8, Mitigation Banks and In-Lieu Fee Programs
- Revised Code of Washington (RCW)
 - RCW 36.70A, Growth Management
 - RCW 36.70B, Local Project Review
 - RCW 43.21C, State Environmental Policy Act (SEPA)
- Washington Administrative Code (WAC)
 - Chapter 197-11, SEPA Rules
- Whatcom County Code (WCC)
 - WCC Title 2, Administration and Personnel
 - Chapter 2.11, Hearing Examiner
 - WCC Title 12, Roads and Bridges
 - Chapter 12.08, Construction Standards
 - WCC Title 16, Environment
 - Chapter 16.08, Whatcom County SEPA Administration
 - Chapter 16.16, Critical Areas
 - WCC Title 20, Whatcom County Zoning Ordinance
 - Chapter 20.36, Rural Zone
 - Chapter 20.66, Light Impact Industrial
 - Chapter 20.80, Supplementary Requirements
 - Chapter 20.88, Major Project Permits
 - WCC Title 22, Land Use and Development
 - Chapter 22.05, Project Permit Procedures
 - WCC Title 24, Health Regulations
- Whatcom County Comprehensive Land Use Plan.
- Business Rules of the Whatcom County Hearing Examiner (BRWCHE), pursuant to WCC 2.11.220, approved by Whatcom County Council on 4/23/2024 per Res. 2024-021

Parties of Record:

Amy Keenan
Whatcom County Planning & Development Services
5280 Northwest Drive
Bellingham WA 98226

Analiese Burns
City of Bellingham Public Works
Natural Resources Division
104 W. Magnolia Street
Bellingham, WA 98225

Scott Havill
City of Bellingham Public Works
Natural Resources Division
104 W. Magnolia Street
Bellingham, WA 98225

Steve Karras
2271 Smith Road
Bellingham, WA

Gatlin McConnell
Gatlin.mcconnell@gmail.com

Erin Page
Whatcom County Public Works
322 N Commercial Street
Bellingham, WA 98225

Lisa Yeager
5001 Mission Road
Bellingham, WA

Admitted Exhibits:

1. Bellingham Habitat Restoration Technical Assessment, dated November 15
2. McCormick Creek Headwaters Deed, dated October 3, 2018
3. Mitigation Banking Instrument Checklist, dated June 19
4. City of Bellingham Umbrella Mitigation Bank Prospectus (modified), dated April 13, 2020
5. City of Bellingham Umbrella Mitigation Bank Prospectus (complete), dated April 13, 2020
6. Bear Creek Corridor Critical Areas Assessment, dated August 31, 2021
7. Wildlife Corridor Analysis, dated November 15, 2021
8. Initial Review and Notice to Proceed Memo to Council, dated July 29, 2022
9. Council Action Summary, dated August 9, 2022
10. Bear Creek Corridor Deed, dated October 1, 2022
11. Whatcom County Notice to Proceed, dated August 17, 2022
12. McCormick Creek Headwaters Critical Areas Assessment (draft), dated October 1, 2022
13. Bear Creek Corridor/McCormick Creek Mitigation Bank Boundary, dated September 11, 2023
14. SEPA Checklist, dated December 21, 2023
15. Notice of Application (SEPA) and Optional DNS Process, dated February 21, 2024

16. Re-notice of Application (SEPA) and Optional DNS Process, dated February 23, 2024
17. Application, dated February 28, 2024
18. Property Information, dated February 28, 2024
19. SEPA Determination of Non-Significance, dated March 8, 2024
20. Determination of Incompleteness, dated March 13, 2024
21. LINTHOP SEPA Comment Email, dated March 28, 2024
22. Determination of Completeness, dated March 28, 2024
23. Public Comments, dated April 1, 2024
24. Notice of Application Legal Notice, dated April 10, 2024
25. Certificate of Mailing, dated April 10, 2024
26. Notice of Application (mailing), dated April 11, 2024
27. Notice of Application (posting), dated April 11, 2024
28. Notice of Application addresses, dated April 11, 2024
29. Vicinity Map, dated April 11, 2024
30. Staff Report, dated April 11, 2024
31. Certificate of mailing (HE), dated May 3, 2024
32. Payment of Legal Notice (HE), dated May 23, 2024
33. Certificate of Posting (HE), dated June 10, 2024
34. Revised Staff Report w/corrections, dated June 10, 2024
35. Revised Staff Report-clean, dated June 10, 2024

II.

The City of Bellingham has applied for a Major Project Permit to create a “mitigation bank” program on two sites in two phases within Whatcom County. This follows the Whatcom County Council previously reviewing the City of Bellingham’s Umbrella Mitigation Bank Prospectus and granting the City of Bellingham notice to proceed in applying for a Major Project Permit for the project in a vote of 7 to 0, on 8/9/22.¹

A hearing was conducted on June 13, 2024. The Hearing Examiner took testimony made under penalty of perjury, and admitted 35 exhibits into the record as being relevant.

BRWCHE §14 grants parties the right to object to evidence and to cross-examine. In the case at hand, with full knowledge of the evidence being admitted, no objection was made to any of the 35 exhibits that were admitted into the record.

¹ Whatcom County Council AB2022-440; see Exhibit 9.

III.

A mitigation bank is an ecological resource area that has been restored, established, enhanced, or preserved for the purpose of providing offset to unavoidable environmental impacts to ecological resources elsewhere in the area. A mitigation bank may be created when a government agency, corporation, nonprofit organization, or other entity undertakes these activities under a formal agreement with a regulatory agency; an Interagency Review Team (IRT)² provides regulatory review, approval, and oversight of the bank for a designated number of “credits” which is a measurement of area impact. These credits can then be sold by the bank creator to other development sites in lieu of conducting mitigation, often in places where mitigation might otherwise be impossible under local, state, or federal regulations otherwise; the credits are not a “get out of jail free card” as local, state, or federal regulatory bodies would still have the ultimate decision to allow such deviations.

Whatcom County Council adopted comprehensive laws regarding approving and regulating such mitigation banking in 2005, and modified thereafter in 2017 and 2018.³

In Whatcom County, only one mitigation currently bank exists. That bank is owned by the Lummi Nation and established in 2012, it consists of 1,945-acres spread out over four parcels; however, there are a limited number of credits available for non-member development projects.⁴

In the case at hand, Bellingham is not expected to make a profit on such credits generated by the creation of the mitigation banks, but be repaid for the acquisition, restoration, and maintenance of pristine parcels of the undeveloped land under a permanent conservation easement.⁵

Whatcom County sits on the IRT/MBRT that would oversee this bank.⁶

IV.

The City of Bellingham, as the mitigation bank developer, is proposing to create

² In the WCC this is known as the Mitigation Bank Review Team (MBRT); WCC 16.16.263(B)(2)

³ Currently reflected in WCC 16.16.263 [(Ord. 2018-032 § 1 (Exh. C); Ord. 2017-077 § 1 (Exh. A); Ord. 2005-068 § 1 (Formerly 16.16.260(F))].

⁴ <https://www.lummi-nsn.gov/Website.php?PageID=66>

⁵ Testimony of Burns

⁶ Testimony of Keenan

two wetland mitigation bank sites in the County on land owned by the City of Bellingham:

1. The Bear Creek Corridor (BCC) site consists of four parcels totaling 95.6 acres in the Silver Creek Watershed. The proposal will preserve the entire acreage, enhance approximately 17.5 acres of wetlands to improve wetland structure and function, and enhance approximately six acres of upland area. Three of the parcels are located between Pacific Highway and Northwest Drive but have no direct access on either road. The fourth parcel is located east of Northwest Drive. All of the parcels are vacant. The parcels are collectively described as one mitigation bank site as the functions are complimentary and they are within the same riparian corridor.
2. The McCormick Creek Headwater (MCH) site is comprised of four parcels totaling 158.7 acres in the Squalicum Creek Watershed. The proposal will again preserve the entire acreage, enhance approximately 43 acres of wetlands, create approximately four acres of wetlands and enhance the nearly four-acre riparian corridor onsite. The parcels are contiguous and are located in an L-shape with frontage on Everson Goshen and Smith Road. The parcels are vacant, but for a well and pumphouse owned by the Wahl Road Water Association that is located in the northeast corner of the property, but will not be impacted.

Parcel A of the BCC site and the MCH site are zoned Rural (R5A) with a Rural Comprehensive Plan designation. Parcels B, C and D of the BCC site are zoned Light Impact Industrial (LII) with a City of Bellingham Urban Growth Area Comprehensive Plan designation.

The two sites are anticipated to create 43.06 credits. The credits will be available to offset permitted wetland and aquatic resources, and buffer impacts for projects within the bank service area.⁷ Minor ground disturbing activities are anticipated at the mitigation bank sites to include, but are not limited to, removal of invasive species and installation of new plants intended to enhance environmentally sensitive critical areas as well as uplands areas.

V.

⁷ See description of service area in Exhibit 5 at 20.

BRWCHE §20 allows the Hearing Examiner to issue subpoenas and compel attendance of witnesses— but in this case no party requested the Hearing Examiner to compel a witness or any public comment provider to appear in person and be cross examined by the parties.

VI.

The Planning and Development Services Department (“PDS”) made a written specific recommendation to approve the umbrella mitigation bank program on the two, and did also review and reference the applicable facts and laws with proposed necessary conditions in a report entitled “Whatcom County Planning and Development Services Staff Report,” *revised as of* June 10, 2024 (herein “Revised Staff Report” entered into the record as **Exhibit 35**).

The Applicant has indicated that the Staff Report is factually correct and agreed with all the recommended conditions put forward by PDS.

The findings of fact as set forth in the Revised Staff Report are supported by the record as a whole. Any factual or legal findings set forth in the Revised Staff Report, a copy of which is attached hereto, that are not contradicted by specific findings made in this decision are hereby adopted as findings of fact and law by the Hearing Examiner and incorporated herein by this reference.

VII.

Public comments were received by the Whatcom County Planning & Development Services during the public comment period as well as during the public hearing itself. Those concerns were regarding potential impacts from creating wetlands adjacent to single family residents, historic, and cultural resource concerns, public access to the wetlands, whether there is a need for the mitigation and an inquiry into the nature of mitigation credits.

The County has proposed conditioning the project in ways that would address the public concern expressed, including a 100 foot buffer around each site where no new wetland would not be created. There were also inquiries about the nature and value of

mitigation credits, but they are not relevant facts under the WCC.

VIII.

Any Conclusion of Law made below which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

Pursuant to WCC 22.05, the Hearing Examiner held a duly noticed open record public hearing where he considered the Planning and Development services department recommendation, testimony of the applicant, public testimony, and exhibits submitted at the public hearing. Based on applying those facts to law, the Hearing Examiner makes the following findings in support of a recommendation to County Council:

II.

Zoning

Rural Zone. The purpose of the Rural District is to maintain the low density rural residential character of the areas designated as rural and rural neighborhood on the Comprehensive Plan map and implement the Comprehensive Plan policies that define the rural character in Whatcom County.⁸ However, as a conditional use, mitigation banks are allowed as a form of compensatory mitigation for wetland and habitat conservation area impacts; provided, applications for mitigation banks shall be processed as a major development projects.⁹

Light Impact Industrial Zone. The purpose of the Light Impact Industrial District is to implement the Comprehensive Plan by providing for the planned development of large land areas, in appropriate locations within urban growth areas, primarily for industrial and subordinate uses which provide support services to the district.¹⁰ Light

⁸ WCC 20.36.010

⁹ WCC 20.36.196

¹⁰ WCC 20.66.010

industrial uses are primarily related to services, and distribution, manufacture and assembly of finished products that have a relatively light impact on adjacent uses and districts. However, as a conditional use, mitigation banks are allowed as a form of compensatory mitigation for wetland and habitat conservation area impacts; provided, applications for mitigation banks shall be processed as a major development projects.¹¹

Each zone allows mitigation banks as a conditional use provided application processing as a major projects permit. Despite the direction to process these as major project permits, that does not eliminate the requirement of the project to meet the conditional use criteria in WCC 22.05.026(3);^{12 13} thus, requiring the project to meet the conditional use criteria as well as the major permit criteria. The criteria are similar but not identical. If the project meets both sets of criteria the project should be approved.

III.

Major Project Criteria

The applicant is applying for a Major Project Permit under WCC 20.88, as a Major Project Permit is required for all proposed mitigation banks.¹⁴ Major Project Permits are Type IV project permits requiring public notification, an open record public hearing with the Hearing Examiner, and a recommendation from the Hearing Examiner to Council for final decision.¹⁵ The Hearing Examiner may recommend or the Council may impose any reasonable conditions precedent to the establishment of the major development as may be required to mitigate impacts of the proposal on the natural environment of the county, and to protect the health, safety and general welfare of the people of the county consistent with the policies for environmental protection set forth in the Comprehensive Plan.¹⁶

Prior to applying for a Major Project Permit, or coming before the Hearing Examiner to make a recommendation to the Council, the Council must have determined

¹¹ WCC 20.66.196

¹² WCC 20.88.130(2)

¹³ A suggested place for potential code clarification is to emphasize the required adherence to both CUP and MPP criteria in 20.36.196 and 20.66.196

¹⁴ WCC 20.88.120; WCC 16.16.263

¹⁵ WCC 22.05.020 and .120

¹⁶ WCC 20.88.140

in an initial review of a submitted mitigation bank prospectus that the proposal is complete, technically accurate, and consistent with the purpose and intent of WCC Chapter 16.¹⁷ If the Council decides it is a valid prospectus, they issue notice to the presupposed applicant that they may apply for the Major Project Permit.¹⁸ The Council did so in a vote of 7 to 0, on 8/9/22, clearing the way for this permit to proceed.¹⁹

Pursuant to WCC 20.88.130 and 22.05.120, the Hearing Examiner shall recommend to the County Council project approval, approval with conditions, or denial, based upon written findings and conclusions supported by the evidence of record. The Hearing Examiner's recommendation and County Council's decision shall determine the adequacy of a major project permit application based on the following seven criteria:

1. Will comply with the development standards and performance standards of the zone in which the proposed major development will be located; provided where a proposed major development has obtained a variance from the development and performance standards, standards as varied shall be applied to that project for the purposes of this act.
2. Where the project is conditionally permitted in the zone in which it is located, the project must satisfy the standards for the issuance of a conditional use permit for the zone in which the project is located.
3. Prior to commencement of any site preparation or construction activities, will obtain, if required, a state aquatic lands lease, and all other necessary permit consultations and authorizations, including federal determinations that the project will not interfere with treaty fishing rights of tribal nations, the limits set forth in the "Magnuson Amendment" under 33 U.S.C. § 476(b) (2004), Section 10 of the Rivers and Harbors Act (for structures in or over navigable waters of the U.S.), the Coastal Zone Management Act (including any state Department of Ecology shoreline conditional use or variance approval), the Clean Air Act, and/or under the Clean Water Act, including but not limited to a federal Section 404 authorization (for fill into waters of the U.S.) and a state Section 401 water quality certification.
4. Will not substantially interfere with the operation of existing uses.
5. Will be served by, or will be provided with essential utilities, facilities and services necessary to its operation, such as roads, drainage facilities, electricity, water supply, sewage disposal facilities, and

¹⁷ WCC 16.16.263(B)(3) and (4)

¹⁸ WCC 16.16.263(B)(4)

¹⁹ Whatcom County Council AB2022-440; see Exhibit 9.

police and fire protection. Standards for such utilities, facilities and services shall be those currently accepted by the state of Washington, Whatcom County, or the appropriate agency or division thereof.

6. Will not impose uncompensated requirements for public expenditures for additional utilities, facilities and services, and will not impose uncompensated costs on other property owned.
7. Will be appropriately responsive to any EIS prepared for the project.²⁰

Additionally, the Hearing Examiner may recommend, or the Council may impose, any reasonable conditions precedent to the establishment of the major development as may be required to mitigate impacts of the proposal on the natural environment of the county, and to protect the health, safety, and general welfare of the people of the county consistent with the policies for environmental protection set forth in the Comprehensive Plan.²¹

The proposed permit can be approved if consistent with the Major Permit Criteria and the Hearing Examiner makes the following specific findings:

1. The proposed mitigation bank is allowed as a conditional use, processed as a major project permit, in both the Rural and Light Industrial zones. No variance for development or performance standards are necessary. The proposed mitigation bank is consistent with the Rural zone, the Light Industrial zone, and the standards in WCC 16.16.
2. Consistency with the conditional use permit criteria is found in §IV for this Recommendation.
3. As conditioned, the proposal is required to obtain all necessary state and federal permits and authorizations appropriate for a mitigation bank.
4. The parcels are generally vacant with no pre-existing uses, but will not interfere with the single pre-existing use of the Wahl Road Water Association, nor with neighboring uses through the use of buffering.
5. Once the sites are established as a mitigation bank, no essential utilities, facilities

²⁰ WCC 20.88.130

²¹ WCC 20.88.140

or services will be necessary.

6. There are no additional public expenditures for utilities, facilities or services associated with the implementation of the mitigation bank.

7. An EIS was not required for the proposed mitigation bank.

As the project meets the criteria for a Major Project as conditioned in this recommendation, the permit should be granted.

IV.

Conditional Use Criteria

The proposed permit can be approved if consistent with the Conditional Use Criteria of WCC 22.05.026 (3) (§a through i):

- a. Will be harmonious and in accordance with the general and specific objectives of Whatcom County's Comprehensive Plan, zoning regulations, and any other applicable regulations.
- b. Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity, and that such use will not change the essential character of the same area.
- c. If located in a rural area (as designated in the Comprehensive Plan), will be consistent with rural land use policies as designated in the rural lands element of the Comprehensive Plan.
- d. Will not be hazardous or disturbing to existing or future neighboring uses.
- e. Will be serviced adequately by necessary public facilities such as highways, streets, police and fire protection, drainage structures, refuse disposal, water, sewers, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services.
- f. Will not create excessive additional requirements at public cost for public facilities and services, and will not be detrimental to the economic welfare of the community.

- g. Will not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property, or the general welfare by reasons of excessive production of traffic, noise, smoke, fumes, glare or odors.
- h. Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets.
- i. Will not result in the destruction, loss or damage of any natural, scenic, or historic feature of major importance.

The criteria for a conditional use permit are similar enough to major permit criteria that much of the analysis for MPP is applicable, which supports the additional analysis in the Staff Report specific for conditional use criteria as well as more than enough evidence in the record to support the conclusion that subject to the Conditions of Approval attached to the recommendation to grant this permit, the proposal is consistent with the Conditional Use Criteria.

V.

Concurrency

No conditional use permit shall be approved unless it is found that:

- 1. All providers of water, sewage disposal, schools, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the existing development; and
- 2. No county facilities will be reduced below applicable levels of service as a result of the existing development.²²

In this case, the proposed mitigation bank will not utilize permanent water or sewage disposal. There will be no need for schools or fire protection more than exists in the current status of site development. As conditioned, no county facilities will be reduced below applicable levels of service as a result of the proposal.

²² WCC 20.80.212

VI.

Any Conclusion of Law deemed to be a Conclusion of Fact is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

RECOMMENDATION

It is the Hearing Examiner's recommendation to the Council that the application be granted, subject to the following conditions:

Public Works – Engineering Services

1. The project shall comply with the Whatcom County Development Standards (WCDS).
2. The project shall comply with WCC 20.80.630 and applicable portions of DOE 2019 Stormwater Management Manual for Western Washington (2019 SWMMWW). Stormwater erosion and sedimentation control plans shall be submitted with land fill and grade permits.
3. Encroachment permits and trail permits shall be obtained.
4. All appropriate permits must be obtained prior to construction.

Critical Areas – Wetlands

5. A mitigation banking instrument shall be submitted to Whatcom County for review as part of the IRT. The instrument shall contain all items outlined in the Submittal Information: Mitigation Banking Instrument for Federal and State Wetland Mitigation Banks in Washington State, as amended, required by the United States Army Corps of Engineers and the Washington State Department of Ecology.

Planning and Zoning

6. Inadvertent Discovery of Archaeological Resources: Should archaeological resources (e.g. shell midden, animal remains, stone tools) be observed during project activities, all work in the immediate vicinity should stop, and the area should be secured. The Washington State Department of Archaeology and Historic

Preservation (Stephanie Jolivette, Local Government Archaeologist 360-628-2755) and the Lummi Nation Tribal Historic Preservation Office (Lena Tso, THPO 360-961-7752; Tamela Smart, Deputy THPO 360-927- 2944) should be contacted immediately in order to help assess the situation and to determine how to preserve the resource(s). Compliance with all applicable laws pertaining to archaeological resources is required.

7. Tribal Land in the State of Washington (RCWs 68.50.645, 27.44.055, and 68.60.055): If ground disturbing activities encounter human skeletal remains during the course of construction, then all activity will cease that may cause further disturbance to those remains. The area of the find must be secured and protected from further disturbance until the State provides notice to proceed. The finding of human skeletal remains must be reported to the county medical examiner/coroner and local law enforcement in the most expeditious manner possible. The remains must not be touched, moved, or further disturbed. The county medical examiner/coroner will assume jurisdiction over the human skeletal remains and make a determination of whether those remains are forensic or non-forensic. If the county medical examiner/coroner determines the remains are non-forensic, then they will report that finding to the Department of Archaeology and Historic Preservation (DAHP) who will then take jurisdiction over the remains. The DAHP will notify any appropriate cemeteries and all affected tribes of the find. The State Physical Anthropologist will make a determination of whether the remains are Indian or Non-Indian and report that finding to any appropriate cemeteries and the affected tribes. The DAHP will then handle all consultation with the affected parties as to the future preservation, excavation, and disposition of the remains (DAHP).
8. The use and location on the site as approved by this Major Project Permit, as shown in concept on the site plan, shall be consistent with the concepts of the site plan. Minor changes shall be reviewed administratively consistent with WCC 20.80.215. Major changes shall be subject to review from Staff and further approval of the Council and as consistent with WCC 20.88.215.
9. The Applicant shall obtain a Land Fill and Grade Permit for site development work as required by Whatcom County regulations. A final inspection will be required for the permit to document completion of the project improvements.
10. Pursuant to WCC 20.80.620, no development shall exceed the maximum environmental noise level established by WAC 173-60.
11. The COB shall complete the mitigation banking instrument with appropriate signatures within 24 (twenty-four) months of the date of the issuance of this decision pursuant to WCC 22.05.140(1). Failure to submit the completed and executed mitigation banking instrument shall result in the expiration of this permit. The decision maker may extend this period up to one year from the date of original expiration upon written request by the applicant prior to the initial expiration. The applicant shall apply for the associated Land Fill and Grade Permit within two years

of the mitigation banking instrument signature consistent with WCC 22.05.060(4).

12. For the McCormick Creek Headwaters site, the applicant shall vacate the Wahl Road right-of-way prior to any wetland creation in the right-of-way. Road vacation shall occur consistent with road vacation process with the Whatcom County Council.
13. A SEPA Checklist will be required at the time of Land Fill and Grade Permit submittal for work done at either the BCC or MCH site at the time of site-specific work is being proposed.
14. Wetland creation actions that extend the off-site buffers beyond the existing regulatory buffers at the time of permit approval are prohibited.

Health and Community Services

15. At the time of construction, the applicant shall ensure sanitary facilities, such as portable toilets, are available when workers are onsite.

CHALLENGES, APPEALS AND JUDICIAL REVIEW

This is not a final decision, and not appealable.

The final decision will be made by the Whatcom County Council.

The applicant, any party of record, or any county department may appeal any final decision of the County Council to Superior Court or other body as specified by WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of the final decision of the County Council, as provided in RCW 36.70C.040.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

DATED this 18th day of June, 2024



Rajeev D. Majumdar, Hearing Examiner



WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES STAFF REPORT

Issue Date: June 4, 2024
Revised: June 10, 2024*
Hearing Date: June 13, 2024

I. Summary of Application and Recommendations

Application

The City of Bellingham (COB) applied for a Major Project Permit to create an umbrella mitigation bank program on two sites in two phases within Whatcom County (the County).

Project Numbers

MPP2024-00001

Summary

COB, as the umbrella mitigation bank sponsor, is proposing to create two wetland mitigation bank sites in the County. The Bear Creek Corridor (BCC) site will preserve and enhance 98.95 acres of forested wetland, riparian, and upland habitat. The McCormick Creek Headwater (MCH) site will preserve, enhance and create wetlands on 158.7 acres of land. The two sites are anticipated to create 43.06 credits. The credits will be available to offset permitted wetland and aquatic resource, and buffer impacts for projects within the bank service area. Minor ground disturbing activities are anticipated at the mitigation bank sites to include, but are not limited to, removal of invasive species and installation of new plants intended to enhance environmentally sensitive critical areas as well as uplands areas.

Recommendation

The Technical Review Committee recommends that the Whatcom County Hearing Examiner (the Hearing Examiner) recommend approval to the Whatcom County Council (the County Council), subject to the requested conditions located in Section VII of this report.

* Staff report was revised to address factual errors.

II. Preliminary Information

| | |
|--------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Applicant/Owner: | Annaliese Burns Habitat and Restoration Manager City of Bellingham 2221 Pacific Street Bellingham, WA 98229 |
| Site Location/Address: | Bear Creek Corridor: 380202209221, 38020206407, 380211165469 and 380211231475 McCormick Creek Headwaters: 390336042360, 390336519362, 390336332340 and 390336367460 |
| Zoning: | Bear Creek Corridor: Rural (R5A) and Light Impact Industrial (LII) McCormick Creek Headwaters: R5A |
| Comprehensive Plan: | Bear Creek Corridor: Rural and City of Bellingham Urban Growth Area McCormick Creek Headwaters: Rural |
| Shoreline Designation: | N/A |
| FEMA 100 Year Floodplain | No |
| Total Acreage: | 158.7 acres |
| Water Supply: | N/A |
| Sewage Disposal: | N/A |
| Public Schools: | N/A |
| Application Date: | February 28, 2024 |
| Determination of Completeness: | March 28, 2024 |

Authorizing Codes, Policies, Plans and Programs:

Revised Code of Washington (RCW) Chapter 36.70A
Whatcom County Comprehensive Plan
Whatcom County Code Chapter 12.08, Development Standards
State Environmental Policy Act (SEPA); Washington Administrative Code Chapter 197-11,
Whatcom County Environmental Policy Administration Chapter 16.08
Whatcom County Code, Chapter 16.16, Critical Areas
Whatcom County Code, Title 20, Official Whatcom County Zoning Ordinance
Whatcom County Code, Title 22, Land Use and Development Procedures
Whatcom County Code, Title 24, Health Regulations

Mitigation Bank Process and Background

Umbrella mitigation banks are approved through an established process with several steps of review. The majority of the mitigation bank approval progression occurs outside of the

Whatcom County permitting process. Mitigation proposals are reviewed through the Interagency Review Team (IRT or MRBT in Whatcom County Code) with co-chair representatives from US Army Corps of Engineers (USACE) and the Washington State Department of Ecology (Ecology), and additional members from other federal, state, tribal and local regulatory and resource agency representatives. The IRT for the COB mitigation bank includes the County and both the Lummi Nation and the Nooksack Indian Tribe.

As delineated in Chapter 173-700 Washington Administrative Code (WAC), the major steps in establishing a mitigation bank include:

- Submittal of a prospectus to the IRT,
- IRT review and public comment opportunity,
- Initial evaluation approval,
- Submittal of the draft mitigation banking instrument to IRT,
- Submittal of a final instrument to IRT,
- Certification of the wetland mitigation bank when the final instrument has been signed by Ecology, the COB, and the County.

The mitigation bank process utilizes several terms not common in land use and zoning discussions. The following definitions are useful for understanding the mitigation bank process. It should be noted the County definitions may differ slightly from the USACE /Ecology definitions, however the meaning of the term is similar.

“Mitigation bank” means a site where wetlands or similar habitats are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to aquatic resources.

“Mitigation bank instrument” means the documentation of agency and bank sponsor concurrence on the objectives and administration of the bank. The “bank instrument” describes in detail the physical and legal characteristics of the bank, including the service area, and how the bank will be established and operated.

“Mitigation bank review team” or “MBRT” means an interagency group of federal, state, tribal and local regulatory and resource agency representatives that are invited to participate in negotiations with the bank sponsor on the terms and conditions of the bank instrument. [also known as the IRT]

“Mitigation bank review team process” or “MBRT process” means a process in which the county and other agencies strive to reach consensus with the MBRT members on the terms, conditions, and procedural elements of the bank instrument.

“Mitigation bank sponsor” means any public or private entity responsible for establishing and, in most circumstances, operating a bank.

The following table outlines the process and timelines specific to the COB Mitigation Bank and the County:

| Action | Body | Timeline |
|-------------------------------------------|----------------|--------------|
| Prospectus Submittal to Ecology and USACE | IRT | 4/2/2018 |
| Prospectus Determination of Completeness | IRT | 4/16/2020 |
| Prospectus Public Comment | IRT | 5/7/2020 |
| Initial Evaluation Approval | IRT | 8/19/2020 |
| Notice to Proceed | Whatcom County | 8/9/2022 |
| Preparing Mitigation Banking Instrument | IRT | 2020-present |
| SEPA Determination | COB | 3/8/2024 |
| Major Project Permit Application | Whatcom County | 2/28/2024 |

As stated in WCC 20.88.100, mitigation bank approval requires a Major Project Permit (MPP). An MPP is a Type IV project permit requiring public notification, an open record public hearing with the Hearing Examiner, and a recommendation from the Hearing Examiner to County Council for final decision.

Application Proposal

COB is requesting approval from the County for an umbrella mitigation bank to allow mitigation of permitted wetland and aquatic resources and buffer impacts within the bank service area. The service area is primarily the City of Bellingham jurisdiction with minor extensions to the north or south excluding the Lake Whatcom Watershed. Umbrella mitigation banks are recognized as a viable option for mitigation in the Federal Rule on Compensatory Mitigation for the Losses of Aquatic Resources (33 CFR 332.8(h)).

For all development, when a developer has unavoidable impacts to wetlands and/or aquatic resources (or Habitat Conservation Areas (HCA's) pursuant to Article 7 of the Whatcom County Critical Areas Ordinance) they must fully mitigate for the resulting ecological and habitat losses that will result whether within the County or the COB. Currently, the most common type of mitigation in Whatcom County is called permittee-responsible where a developer will be required to prepare a mitigation proposal, find and create a mitigation site if the mitigation cannot be done onsite, monitor the site for up to ten years and provide a bond, assignment of savings, or similar financial instrument to ensure success. A less common but allowed type of mitigation is for the developer to prepare a mitigation proposal to purchase credits from an approved mitigation bank. A bank allows the sponsor to create larger wetland and HCA mitigation projects with higher rates of success for ecological functions and long-term viability. The umbrella mitigation bank format allows the sponsor to have more than one mitigation site. Although the COB initially proposed four sites, only two were chosen to move forward for approval.

The COB has proposed a prospectus to comply with local, state and federal requirements regarding mitigation bank proposals. The prospectus outlines the process the COB has been

working on to establish a programmatic approach to wetland mitigation for development proposals. In the most basic form, the COB will preserve, enhance and create wetlands and HCA's on approximately 254 acres in the County in advance, to allow future compensatory impacts in the bank service area to wetland and HCA's.

BCC Site

The BCC site consists of four parcels totaling 95.6 acres in the Silver Creek Watershed. The proposal will preserve the entire acreage, enhance approximately 17.5 acres of wetlands to improve wetland structure and function, and enhance approximately six acres of upland area. Three of the parcels are located between Pacific Highway and Northwest Drive but have no direct access on either road. The fourth parcel is located east of Northwest Drive. All of the parcels are vacant. The parcels are collectively described as one mitigation bank site as the functions are complimentary and they are within the same riparian corridor. The credit generation proposal on this site will include preservation with riparian and wetland enhancement where possible with additional upland enhancement.

Access to Parcel A will be from the existing COB owned parcels to the north of Northwest Drive. Access to Parcel's B, C and D also be from existing COB owned parcels to the north or south of the proposed parcels and from Thomas Road. The Horton Road right-of-way was vacated along the northern portion of Parcel B by order of vacation by the County Council on June 22, 2022.



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The BCC site in total includes several wetlands and the West Fork Bear Creek as well as the mainstem of Bear Creek. In total, the area is mostly forested with areas of non-native plants. Very detailed site descriptions of the BCC site can be found in the Prospectus as well as the Critical Areas Assessment and the Bellingham Habitat Restoration Technical Assessment (included as exhibits).

MCH Site

The MCH site is comprised of four parcels totaling 158.7 acres in the Squalicum Creek Watershed. The proposal will again preserve the entire acreage, enhance approximately 43 acres of wetlands, create approximately four acres of wetlands and enhance the nearly four-acre riparian corridor onsite. The parcels are contiguous and are located in an L-shape with frontage on Everson Goshen and Smith Road. The parcels are vacant; however, some development was historically located in the northeast corner of the project area which has been removed. A well and pumphouse owned by the Wahl Road Water Association is located in the northeast corner of the property. The well and pumphouse will not be impacted.

Access to the site will occur from Wahl Road, Smith Road and/or Everson Goshen Road as approved by Public Works.



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The MCH site also includes over 70 acres of wetlands and the headwaters of McCormick Creek. The area has been logged in the past and currently includes forested areas as well as disturbed and degraded areas as a result of the logging. Additional, detailed site descriptions of the MCH site can be found in the draft Critical Areas Assessment, also included as an exhibit.

Timing

The BCC site is further along in the mitigation bank progression and more substantial technical analysis has been done. The completion date of the mitigation banking instrument is expected in 2025. The onsite enhancement will occur on the BCC site after the instrument is signed as outlined within the mitigation banking instrument. Credits will then be available for projects that will fill or impact wetlands and HCA's within the bank service area.

The MCH site is proposed to be further out in timing and additional process with regard to studies and analysis as well as the mitigation banking instrument will likely occur over the next five years.

Noted Submitted Plans/Map Data/Reports (see exhibit list for all items)

| | |
|---------------------------------------------------------------------|------------|
| City of Bellingham Mitigation Bank Prospectus (BCH and MCH sites) * | 4/13/2020 |
| City of Bellingham Mitigation Bank Prospectus (Complete) | 4/13/2020 |
| Bear Creek Corridor Critical Areas Report | 8/31/2024 |
| McCormick Creek Headwaters Critical Areas Report - Draft | 12/8/2021 |
| Bellingham Habitat Restoration Technical Assessment | 11/2015 |
| City of Bellingham Wildlife Study | 11/15/2021 |

[* It should be noted the original City of Bellingham Mitigation Bank Prospectus included four potential migration bank sites. The proposal has been amended to include only the BCC and MCH sites.]

III. Public Notice and Comment

Requirements for public notice are contained in Chapter WCC 22.05.080.

Notice of Application

The Notice of Application for this proposal was published on April 11, 2024 in the Bellingham Herald and on the County website. A Notice of Application was also sent to owners of property within 1,000 feet of the BCC site and the MCH site. Both sites were posted on April 11, 2024. The comment period ended April 25, 2024.

Public Comment

During the public comment period for the Notice of Application, Whatcom County Planning & Development Services Department (PDS) received comments from members of the general public. A summary of these comments and a brief response to those comments are listed below:

Comment 1: Concerns regarding potential impacts from creating wetlands adjacent to single family residential parcels.

Response: There was public comment received regarding potential impacts to offsite properties from the creation of wetlands on adjoining parcels, particularly related to the MCH site. Although there are existing wetlands, HCA's and buffers on the MCH site, the comments were specific to creating wetlands onsite that would then establish buffer impacts on neighboring properties.

The COB has already proposed a 100-foot buffer around both BCC and MCH sites, and has acknowledged that the existing conditions and the conceptual design figures showing the wetland creation area at the McCormick Creek Headwaters are based on a reconnaissance-level

investigation. Additional fieldwork is required to confirm the exact location and hydrologic conditions (depth/duration) of the wetland creation area. To ensure neighboring properties are not impacted by the proposal, the County will not permit any wetland creation actions that extend the off-site buffers beyond the existing regulatory buffers at the time of permit approval. Enhancement may occur within that area, but no creation will allow buffers to extend beyond the existing regulatory buffer.

Comment 2: Historic and Cultural Resource Concerns.

Response: Although the COB was the SEPA lead agency, Whatcom County is aware of comments received through the SEPA comment period. A representative from the Lummi Nation Tribal Historic Preservation Office recommended that the Washington State Department of Archaeology and Historic Preservation (DAHP) be consulted regarding potential historic properties and that the Inadvertent Discover Plan (IDP) language be required and followed should archeological resources or human remains be encountered.

The IDP language regarding discovery of archeological resources and discovery of human skeletal remains have been included as conditions of approval.

IV. State Environmental Policy Act

The State Environmental Policy Act (SEPA) requires applicants to disclose potential impacts to the environment unless the proposal is categorically exempt from SEPA threshold review. The total square footage of land disturbance exceeds the categorical exemption threshold for in WCC 16.08.070(A)(5) and thus SEPA review is required.

The COB acted as lead agency pursuant to WAC 197-11-926 and issued a Determination of Non-Significance (DNS) on March 8, 2024. There was no appeal of the SEPA DNS.

V. Consistency with Regulations and Findings of Fact

A. Roads and Bridges (WCC 12.08)

WCC Chapter 12.08 adopts and gives authorization for development standards for development within the County. The County shall establish uniform, comprehensive and distinct requirements which shall be applied to all developments. These requirements shall be established as “Whatcom County development standards” and shall exist to provide clear development guidelines for all construction activity within the county. These standards shall establish administrative and technical requirements for the implementation of land use regulations and shall provide the basis by which developments are evaluated to ensure compliance with county regulations.

The Whatcom County Public Works Department Division of Engineering reviewed the proposal and issued a memo dated May 14, 2024 with the following discussion:

Public Works Engineering Services (PWES) staff has reviewed the application for the proposed Bellingham Mitigation Bank consisting of two sites: Bear Creek Corridor (BCC) and McCormick Creek Headwaters (MCH).

The proposal is conceptual at this time. When the development plans associated with access points to the two sites have been determined, additional PWES review may be required. PWES may also have additional review requirements regarding compliance with the Washington State Department of Ecology Stormwater Management Manual. Recommended conditions for the proposed project are noted in the conditions section of this report.

Finding: The Technical Review Committee has determined that, as conditioned, the project meets the requirements of WCC Title 12.08.

B. Whatcom County Critical Areas Ordinance (Title 16)

Wetlands and Habitat Conservation Areas (Chapter 16.16.600 and .700)

Chapter 16.16 of the County Code contains standards, guidelines, criteria and requirements intended to identify, analyze, preserve and mitigate potential impacts to the County's critical areas and to enhance and restore degraded resources such as wetlands, riparian stream corridors or habitat, where possible. The review applied the entirety of Chapter 16.16 WCC to the proposal as applicable. This analysis reviews specific provisions, which summarize the standards, guidelines, criteria, and requirements of Chapter 16.16 WCC.

Mitigation Banking (16.16.263)

A. The county may approve mitigation banking as a form of compensatory mitigation for wetland and habitat conservation area impacts when the provisions of this chapter require mitigation and when it is clearly demonstrated that the use of a bank will provide equivalent or greater replacement of critical area functions and values when compared to on-site mitigation; provided, that all of the following criteria are met:

1. Banks shall only be used when they provide significant ecological benefits including long-term conservation of critical areas, important species, habitats and/or habitat linkages, and when they are consistent with the county comprehensive plan and create a viable alternative to the piecemeal mitigation for individual project impacts to achieve ecosystem-based conservation goals.

Finding: As identified in the COB Mitigation Bank Prospectus and the site-specific reports for the BCC and MCH sites, the proposed bank locations will provide ecological benefits for conservation of wetlands and HCA's when compared to individual onsite mitigation proposals.

2. The bank shall be established in accordance with the Washington State Draft Mitigation Banking Rule, Chapter 173-700 WAC or as revised, and Chapter 90.84 RCW and the federal mitigation banking guidelines as outlined in the Federal Register, Volume 60, No. 228, November 28, 1995. These guidelines establish the procedural and technical criteria that banks must meet to obtain state and federal certification.

Finding: The COB has been working with the USACE and Ecology to establish the mitigation bank consistent with state and federal requirements.

3. Preference shall be given to mitigation banks that implement restoration actions that have been identified formally by an adopted shoreline restoration plan, watershed planning document prepared and adopted pursuant to Chapter 90.82 RCW, a salmonid recovery plan or project that has been identified on the watershed management board habitat project list or by the Washington State Department of Fish and Wildlife as essential for fish and wildlife habitat enhancement.

Finding: The BCC site has been evaluated as part of a Habitat Restoration Technical Assessment which identified wetlands around the BCC site as a priority for protection and enhancement. The Wildlife Corridor Analysis also identified the BCC site as important for wildlife habitat preservation.

The MCH site has not had the level of technical assessments performed compared to the BCC site, but likely has the capacity for additional lift in ecological functions if the bank is approved and the area is enhanced and preserved.

B. Mitigation banks shall require a major project permit in accordance with Chapter 20.88 WCC and shall be subject to a formal review process including public review as follows:

1. The bank sponsor shall submit a bank prospectus for county review. The prospectus shall identify the conceptual plan for the mitigation bank, including:
 - a. The ecological goals and objectives of the bank;
 - b. The rationale for site selection, including a site map and legal description of the prospective bank site;
 - c. A narrative demonstrating compliance with the Whatcom County comprehensive plan, associated development standards and this chapter, shoreline restoration plan, watershed planning documents prepared and adopted pursuant to Chapter 90.82 RCW, and/or the salmonid recovery plan;
 - d. A description of the existing site conditions and expected changes in site conditions as a result of the banking activity, including changes on neighboring lands;
 - e. A conceptual site design;
 - f. A description of the proposed protective mechanism such as a conservation easement; and
 - g. Demonstration of adequate financial resources to plan, implement, maintain, and administer the project.

Finding: The COB Umbrella Mitigation Bank Prospectus, revised 4/13/2020, was reviewed by the County and other members of the IRT. The IRT issued an Initial Evaluation Approval in 2020.

2. The technical administrator shall review the bank prospectus either by participating in the state's Mitigation Bank Review Team (MBRT) process and/or by hiring independent, third-party expertise to assist in the review.

Finding: The County has participated in the IRT (MBRT).

3. If the technical administrator determines that the bank prospectus is complete, technically accurate, and consistent with the purpose and intent of this chapter, s/he shall forward the prospectus to the county council for initial review. If the proposed bank involves conversion of agricultural land to nonagricultural uses, the county council shall seek a recommendation from the agricultural advisory committee as to whether the conversion should be allowed. The committee's recommendation shall be nonbinding. The county council may require mitigation for the loss of agricultural lands.

Finding: County staff was involved in the COB Umbrella Mitigation Bank as a participant in the IRT. The prospectus was determined to be complete by the IRT and PDS Director. No sites are proposed on Agricultural zoned lands and no recommendation is necessary from the Agricultural Advisory Committee.

4. If the county council determines, based on the initial review, that the prospectus is valid, it shall issue a notice to proceed to the bank sponsor. Following receipt of the notice to proceed, the bank sponsor may submit application for a major project permit in accordance with Chapter 20.88 WCC. The notice to proceed shall not be construed as final approval of the bank proposal, but shall indicate approval to proceed with the development of the mitigation bank instrument, which details all of the legal requirements for the bank.

Finding: The County Council reviewed the COB mitigation bank proposal at their August 9, 2022 meeting and granted a Notice to Proceed on August 17, 2022. The approval allowed submittal of the major project permit with Whatcom County and to proceed with the development of the mitigation banking instrument through the IRT.

5. Upon receipt of a draft mitigation banking instrument from the bank sponsor and major project permit application, the technical administrator shall review the banking instrument and major project permit in consultation with the MBRT and/or other third-party expert. Following review of the mitigation banking instrument and major project permit, the technical administrator shall make a recommendation to certify and approve, conditionally certify and approve, or deny the bank proposal and major project permit in accordance with the provisions of Chapters 20.88 and 22.05 WCC.

Finding: COB has been working with the IRT to establish the mitigation banking instrument, which will describe the physical and legal obligations of the bank including the service area and

how the bank will be established and operated. The IRT gave authorization for preparation of the mitigation bank instrument in 2020 and preparation has been ongoing.

As the mitigation bank instrument is prepared, the County will continue to be part of the IRT and will provide feedback and comments on the proposal, and as conditioned, the mitigation banking instrument must be completed and signed by the COB, USACE and Ecology. The County will also sign the document as a member of the IRT but has no obligations to the mitigation bank and the banking instrument is not binding on the County.

6. Following receipt of the recommendation, the county council shall proceed with review in accordance with the provisions outlined in Chapters 20.88 and 22.05 WCC.

Finding: After a recommendation from the Hearing Examiner, the County Council shall hold a public meeting and make a determination on the proposal.

7. The bank sponsor shall be responsible for the cost of any third-party review.

Finding: No third-party review was required for this mitigation bank proposal.

C. The award of bank credits for an approved bank may be negotiated based on habitat acreage, habitat quality, and contribution to a regional conservation strategy that has been approved by the county and other appropriate regulatory agency(ies). Credit availability may vary in accordance with agreed-upon performance criteria for the development of the resource value in question. Awarded bank credits, subject to the approval of the county and regulatory agency(ies), may be made transferable. Whether out-of-kind mitigation credit will be allowed at a particular bank will require a fact-specific inquiry on a case-by-case basis for the project creating the impacts.

Finding: The award of bank credits will be determined as outlined in the mitigation banking instrument as reviewed and approved by the IRT.

D. Use of Bank Credits.

1. Credits from a wetland mitigation bank may be approved for use as compensation for unavoidable impacts to wetlands when:

- a. The bank is certified under state rules;
- b. The administrator determines that the wetland mitigation bank provides appropriate compensation for the authorized impacts; and
- c. The proposed use of credits is consistent with the terms and conditions of the certified bank instrument.

2. Replacement ratios for projects using bank credits shall be consistent with replacement ratios specified in the certified bank instrument.

3. Credits from a certified wetland mitigation bank may be used to compensate for impacts located within the service area specified in the certified bank instrument. In some cases, the service area of the bank may include portions of more than one adjacent drainage basin for specific wetland functions.

Finding: Use of the bank credits will be determined by the COB as outlined in the mitigation banking instrument approved by the IRT prior to implementation of the bank.

C. Zoning Ordinance (Title 20)

Parcel A of the BCC site and the MCH site are zoned Rural (R5A) with a Rural Comprehensive Plan designation. Parcels B, C and D of the BCC site are zoned Light Impact Industrial (LII) with a City of Bellingham Urban Growth Area Comprehensive Plan designation.

i. Rural Zone (WCC 20.36)

Purpose (WCC 20.36.010)

The purpose of the Rural District is to maintain the low density rural residential character of the areas designated as rural and rural neighborhood on the Comprehensive Plan map and implement the Comprehensive Plan policies that define the rural character in Whatcom County in accordance with RCW 36.70A.070(5). In addition, it is the intent of this district to allow a variety of low intensity uses that are compatible and complementary with the conservation of agricultural, forestry and related uses.

Conditional Uses (WCC 20.36.150)

Items indicated by an “*” are not allowed outside rural communities and urban growth areas unless the applicant can demonstrate that there is a need to locate outside those areas in order to comply with legal requirements or standards; or that the proposed location is the most efficient place for the proposed use with respect to providing needed services to the public.

WCC 20.36.196 Mitigation banks as a form of compensatory mitigation for wetland and habitat conservation area impacts when permitted in accordance with the provisions of Chapter 16.16 WCC; provided, applications for mitigation banks shall be processed as a major development project pursuant to Chapter 20.88 WCC.

Finding: Mitigation banks are allowed as a conditional use permit in the R5A zone, except that applications for mitigation banks shall be processed as a major development permit [major project permit]. The applicant applied for the major project permit on February 28, 2024 after gaining a Notice to Proceed from the County Council on August 17, 2022.

ii. Light Impact Industrial Zone (WCC 20.66)

Purpose (WCC 20.66.010)

The purpose of the Light Impact Industrial District is to implement the Comprehensive Plan by providing for the planned development of large land areas, in appropriate locations within urban growth areas, primarily for industrial and subordinate uses which provide support services to the district. Light industrial uses are primarily related to services, and distribution, manufacture and assembly of finished products that have a relatively light impact on adjacent uses and districts. Furthermore, it is the purpose of this district to encourage the master planning of the entire industrial site in ensuring compatibility between industrial operations, as well as the existing and future character of adjacent areas. It is also a purpose of this district to accommodate limited commercial uses that are incompatible with other commercial uses.

Conditional Uses (WCC 20.66.196)

WCC 20.66.196 Mitigation banks as a form of compensatory mitigation for wetland and habitat conservation area impacts when permitted in accordance with the provisions of Chapter 16.16 WCC; provided, applications for mitigation banks shall be processed as a major development project pursuant to Chapter 20.88 WCC.

Finding: Mitigation banks are allowed as a conditional use permit in the LII zone, except that applications for mitigation banks shall be processed as a major development permit [major project permit]. The applicant applied for the major project permit on February 28, 2024.

Drainage (WCC 20.36.656 and WCC 20.66.653)

All development activities are subject to the stormwater management provisions of WCC 20.80.630 through 20.80.635. No project permit shall be issued prior to meeting those requirements.

Finding: Stormwater management has been addressed through conditions of approval from Public Works – Engineering Services.

iii. Concurrency (WCC 20.80.212)

WCC Section 20.80.212 states that no conditional use permit shall be approved without a written finding that:

1. All providers of water, sewage disposal, schools, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the existing development.
2. No county facilities will be reduced below applicable levels of service as a result of the existing development.

Finding: The proposed mitigation bank will not utilize permanent water or sewage disposal. There will be no need for schools or fire protection more than exists in the current status of site development. As conditioned, the Technical Review Committee finds that no county facilities will be reduced below applicable levels of service as a result of the proposal.

iv. Major Project Permit (Chapter 20.88)

Purpose (20.88.010)

To establish standards and procedures that will provide for special review of those projects or developments that because of their magnitude and impact will tend to affect the public at large.

Major Project permits (WCC 20.88.130)

Pursuant to WCC 22.05.120 the hearing examiner shall recommend to the county council project approval, approval with conditions, or denial, based upon written findings and conclusions supported by the evidence of record. The hearing examiner's recommendation and county council's decision shall determine the adequacy of a major project permit application based on the following criteria:

(1) Will comply with the development standards and performance standards of the zone in which the proposed major development will be located; provided where a proposed major development has obtained a variance from the development and performance standards, standards as varied shall be applied to that project for the purposes of this act.

Finding:

BCC: The proposed mitigation bank is allowed as a conditional use, processed as a major project permit, in the R5A and LII zones. No variance for development or performance standards are necessary. The proposed mitigation bank is consistent with the Rural zone, the LII zone, and the standards in WCC 16.16.

MCH: The proposed mitigation bank is allowed as a conditional use, processed as a major project permit in the R5A zone. No variance for development or performance standards are necessary. The proposed mitigation bank is consistent with the Rural zone and the mitigation bank standards set forth in WCC 16.16.

(2) Where the project is conditionally permitted in the zone in which it is located, the project must satisfy the standards for the issuance of a conditional use permit for the zone in which the project is located.

Finding: Consistency with the conditional use permit criteria is shown in Section V.F. of this report.

(3) Prior to commencement of any site preparation or construction activities, will obtain, if required, a state aquatic lands lease, and all other necessary permit consultations and authorizations, including federal determinations that the project will not interfere with treaty fishing rights of tribal nations, the limits set forth in the “Magnuson Amendment” under 33 U.S.C. § 476(b) (2004), Section 10 of the Rivers and Harbors Act (for structures in or over navigable waters of the U.S.), the Coastal Zone Management Act (including any state Department of Ecology shoreline conditional use or variance approval), the Clean Air Act, and/or under the Clean Water Act, including but not limited to a federal Section 404 authorization (for fill into waters of the U.S.) and a state Section 401 water quality certification.

Finding: The proposal shall obtain all necessary state and federal permits and authorizations appropriate for a mitigation bank.

(4) Will not substantially interfere with the operation of existing uses.

Finding:

BCC: Parcels A, B, C and D are currently vacant. Operation of the mitigation bank will not interfere with existing uses.

MCH: The parcels are primarily vacant with the exception of a well and pumphouse owned by the Wahl Road Water Association located in the northeast corner of the proposal. Operation of the mitigation bank will not interfere with the use and maintenance of the well and pumphouse by the Wahl Road Water Association. In addition, as noted in the public comments section, there will be a 100-foot buffer surrounding the mitigation banking site parcels.

(5) Will be served by, or will be provided with essential utilities, facilities and services necessary to its operation, such as roads, drainage facilities, electricity, water supply, sewage disposal facilities, and police and fire protection. Standards for such utilities, facilities and services shall be those currently accepted by the state of Washington, Whatcom County, or the appropriate agency or division thereof.

Finding: Once the sites are established as a mitigation bank, no essential utilities, facilities or services will be necessary.

Parcels B, C and D of the BCC site will be accessed off Northwest Drive via unopened right-of-way (ROW). The COB shall obtain a Trail Permit or Encroachment permit, as necessary, prior to accessing the ROW and in order to conduct planting and invasive species removal. Additional conditions may be required at issuance of the road use permits.

Parcel A of the BCC site is accessed directly off Northwest Drive. An encroachment permit will be necessary to establish the location of the access point and to allow work within the ROW.

The MCH site has access off both Smith Road and Everson Goshen Road. An encroachment permit will be required for access to the site for enhancement, invasive plant removal, and habitat creation.

The mitigation bank sites will not use electricity, water or sewage disposal facilities. The need for police or fire protection will not increase with implementation of the mitigation bank.

(6) Will not impose uncompensated requirements for public expenditures for additional utilities, facilities and services, and will not impose uncompensated costs on other property owned.

Finding: There are no additional public expenditures for utilities, facilities or services associated with the implementation of the mitigation bank.

(7) Will be appropriately responsive to any EIS prepared for the project.

Finding: The COB issued a DNS on March 8, 2024. There was no appeal of the SEPA DNS. An EIS was not required for the proposed mitigation bank.

WCC 20.88.140 In addition, the hearing examiner may recommend or county council may impose any reasonable conditions precedent to the establishment of the major development as may be required to mitigate impacts of the proposal on the natural environment of the county, and to protect the health, safety and general welfare of the people of the county consistent with the policies for environmental protection set forth in the Comprehensive Plan. The county decision maker may approve a major project permit with a condition to obtain relevant leases and complete any necessary federal and state permitting requirements, and may restrict the major project permittee from undertaking site preparation or construction activities until it has fulfilled that condition.

Finding: The Whatcom County Technical Review (TRC) has reviewed the mitigation bank proposal and has included recommended conditions of approval in this report. The mitigation bank will also have to follow the process for a mitigation bank through the USACE and Ecology. Additional permits and steps in the process will be necessary for state and federal mitigation bank approvals.

D. Conditional Use Permits (WCC 22.05.026)

As required in WCC 20.88.130(2), a major project permit must also meet the conditional use permit approval criteria.

(1) Application. Conditional use permit applications shall be processed per the provisions of this chapter.

Finding: In the R5A and LII zones, a mitigation bank is permitted as a conditional use permit and is processed as a major project permit. The applicant applied for a major project permit on February 28, 2024.

(2) Conditional use permits shall be nontransferable unless said transfer is approved by the hearing examiner.

Finding: The mitigation bank parcels are proposed to be held in perpetuity by the COB. If the parcels are to be transferred outside of the ownership of the COB, a transfer request shall be submitted to PDS for approval by the Hearing Examiner.

(3) Approval Criteria. Before approving an application, the director or hearing examiner shall ensure that any specific standards of the zoning district defining the use are fulfilled, and shall find adequate evidence showing that the proposed use at the proposed location:

(a) Will be harmonious and in accordance with the general and specific objectives of Whatcom County's Comprehensive Plan, zoning regulations, and any other applicable regulations.

Finding:

Zoning Code

Rural (R5A) Zone: A mitigation bank is allowed as a conditional use permitted through a major project permit in the R5A zone and the applicant has applied for a major project permit. Preservation of critical areas is common throughout the County. This proposal will permanently protect, enhance, wetlands, buffers and HCA's on the BCC and MCH sites and also include some level of creation at the MCH site.

LII Zone: A mitigation bank is also allowed as a conditional use permitted through a major project permit in the LII zone. Through the Washington State Growth Management Act, the County is required to designate and maintain adequate lands zoned appropriate for industrial uses. The approval of the mitigation bank will permanently prohibit development in the LII zone. Although the amount of available lands for LII designated uses will decrease, the land has not been developed historically due to the existing wetlands, buffers, and HCA's and the requirement of adequate mitigation for impacts to those areas.

Critical Areas Code

As part of the Washington State Growth Management Act, critical areas are required to be designated and regulations must be adopted to protect such areas. The wetlands, buffers and HCA's on the proposed mitigation bank parcels are required to be protected, however, in the course of development some level of impacts can occur. This proposal will permanently protect and enhance those areas through the mitigation bank.

Whatcom County Comprehensive Plan

Chapter 10 of the Whatcom County Comprehensive Plan outlines the goals and policies for the Environment. The following goals and policies are applicable directly to protection of wetlands and habitat conservation areas:

Goal 10M: Conserve and enhance regulated wetlands.

Policy 10M-1: Recognize natural wetlands such as swamps, bogs, saltwater marshes, and ponds for their value in cleaning water, reducing flood damage, providing valuable habitat for plants, fish and wildlife, and as sites for groundwater recharge.

Policy 10M-4: Encourage land development to avoid wetland impacts. Impacts to regulated wetlands should be contingent upon full mitigation measures that equitably compensate for wetlands impacts, on a case-by-case basis. Approved mitigation measures shall include resources for long-term monitoring and adaptive management of mitigation outcomes to assure effectiveness. Strongly discourage alteration of land that results in the degradation of type 1 and 2 wetlands.

Policy 10M-6: Recognize beneficial wetland uses, functions, and values. Support protection of fish and wildlife habitat, water quality, plant diversity, flood attenuation and low-flow contribution, and water storage through planning, acquisition, incentive programs, and mitigation.

As conditioned, the proposal is consistent with the general and specific objectives of Whatcom County's Comprehensive Plan, zoning regulations, and any other applicable regulations.

(b) Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity, and that such use will not change the essential character of the same area.

Finding: The proposed mitigation bank will continue to be vegetated in a natural state and consistent with the existing and intended character of the general vicinity for both the BCC and MCH sites.

(c) If located in a rural area (as designated in the Comprehensive Plan), will be consistent with rural land use policies as designated in the rural lands element of the Comprehensive Plan.

Finding: The Critical Areas Ordinance requires preservation of wetlands, buffers and HCA's which is consistent with the Comprehensive Plan. The permanent preservation and enhancement of the sites will be consistent with the rural character.

(d) Will not be hazardous or disturbing to existing or future neighboring uses.

Finding: The proposed mitigation bank and permanent protections of critical areas will not be hazardous or disturbing to existing or future neighboring uses.

(e) Will be serviced adequately by necessary public facilities such as highways, streets, police and fire protection, drainage structures, refuse disposal, water, sewers, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services.

Finding: As conditioned, the use will be adequately serviced by necessary public facilities.

(f) Will not create excessive additional requirements at public cost for public facilities and services, and will not be detrimental to the economic welfare of the community.

Finding: No additional requirements for public facilities and services is required for this proposal.

(g) Will not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property, or the general welfare by reasons of excessive production of traffic, noise, smoke, fumes, glare or odors.

Finding: The preservation and enhancement of existing critical areas will not be detrimental to persons, property, or the general welfare of the public. The creation of wetlands at the MCH site will be internal to the site and additional buffers will not impact neighboring properties.

(h) Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets.

Finding: Public Works – Engineering Services has recommended approval of the proposed expansion. Encroachment and/or Trail Permits will be required at the time of development of the sites, if necessary.

(i) Will not result in the destruction, loss or damage of any natural, scenic, or historic feature of major importance.

Finding: The proposed mitigation bank will not result in the destruction, loss or damage of any natural, scenic or historic feature of major importance. The proposal will enhance and preserve natural features associated with the BCC and MCH sites.

E. Health Code

The purpose of Title 24 is to provide minimum standards to safeguard public health and welfare by regulating and controlling the activities considered in this title and any related work.

The Whatcom County Health Department (WCHD) has reviewed the proposed project noted above in accordance with WCC 24.05 On Site Sewage System Regulations and WCC 24.11 Drinking Water Code.

Finding: The proposal does not require drinking water or sewage disposal utilities. At the time of construction, the applicant shall ensure sanitary facilities, such as portable toilets, are available when workers are onsite. The Whatcom County Health department has determined the proposal is consistent with WCC 24.05 and 24.11.

VI. Decision Authority

Purpose (WCC 2.11)

The purpose of this chapter is to establish the authority and responsibilities of the hearing examiner.

Recommended Decisions (WC 2.11.205)

In accordance with the provisions of Chapter 22.05 WCC, the hearing examiner shall conduct an open record hearing and prepare a record thereof, and make recommendations to the county council for approval or disapproval of:

- A. Major project permits, including major project permit applications for mitigation banks proposed in accordance with the provisions of Chapter 16.16 WCC.

Finding: The open record public hearing is scheduled for June 13, 2024 and the Hearing Examiner shall prepare the record and make recommendations to the County Council for approval or disapproval of this application.

VII. Recommendation

The Technical Review Committee recommends that the Hearing Examiner recommend approval to the County Council for the applicant's request for a mitigation bank.

VIII. Expiration of Project Permits

Project Permit approval status shall expire two years from the date of approval except where a different duration of approval is authorized by Whatcom County Code, or is established by a court decision, or executed by a development agreement. The decision maker may extend this period up to one year from the date upon written request by the applicant (WCC 22.05.140).

Finding: As conditioned, the COB must complete the mitigation banking instrument within two years of Council approval. A one-year extension may be requested and may be approved by the Council upon written request prior to the expiration of the major project permit.

IX. Recommended Conditions of Approval

Public Works – Engineering Services

1. The project shall comply with the Whatcom County Development Standards (WCDS).
2. The project shall comply with WCC 20.80.630 and applicable portions of DOE 2019 Stormwater Management Manual for Western Washington (2019 SWMMWW). Stormwater erosion and sedimentation control plans shall be submitted with land fill and grade permits.
3. Encroachment permits and trail permits shall be obtained.
4. All appropriate permits must be obtained prior to construction.

Critical Areas – Wetlands

5. A mitigation banking instrument shall be submitted to Whatcom County for review as part of the IRT. The instrument shall contain all items outlined in the Submittal Information: Mitigation Banking Instrument for Federal and State Wetland Mitigation Banks in Washington State, as amended, required by the United States Army Corps of Engineers and the Washington State Department of Ecology.

Planning and Zoning

6. Inadvertent Discovery of Archaeological Resources: Should archaeological resources (e.g. shell midden, animal remains, stone tools) be observed during project activities, all work in the immediate vicinity should stop, and the area should be secured. The Washington State Department of Archaeology and Historic Preservation (Stephanie Jolivet, Local Government Archaeologist 360-628-2755) and the Lummi Nation Tribal Historic Preservation Office (Lena Tso, THPO 360-961-7752; Tamela Smart, Deputy THPO 360-927- 2944) should be contacted immediately in order to help assess the situation and to determine how to preserve the resource(s). Compliance with all applicable laws pertaining to archaeological resources is required.
7. Tribal Land in the State of Washington (RCWs 68.50.645, 27.44.055, and 68.60.055): If ground disturbing activities encounter human skeletal remains during the course of construction, then all activity will cease that may cause further disturbance to those remains. The area of the find must be secured and protected from further disturbance until the State provides notice to proceed. The finding of human skeletal remains must be reported to the county medical examiner/coroner and local law enforcement in the most expeditious manner possible. The remains must not be touched, moved, or further disturbed. The county medical examiner/coroner will assume jurisdiction over the human skeletal remains and make a determination of whether those remains are

forensic or non-forensic. If the county medical examiner/coroner determines the remains are non-forensic, then they will report that finding to the Department of Archaeology and Historic Preservation (DAHP) who will then take jurisdiction over the remains. The DAHP will notify any appropriate cemeteries and all affected tribes of the find. The State Physical Anthropologist will make a determination of whether the remains are Indian or Non-Indian and report that finding to any appropriate cemeteries and the affected tribes. The DAHP will then handle all consultation with the affected parties as to the future preservation, excavation, and disposition of the remains (DAHP).

8. The use and location on the site as approved by this Major Project Permit, as shown in concept on the site plan, shall be consistent with the concepts of the site plan. Minor changes shall be reviewed administratively consistent with WCC 20.80.215. Major changes shall be subject to review from Staff and further approval of the Council and as consistent with WCC 20.88.215.
9. The Applicant shall obtain a Land Fill and Grade Permit for site development work as required by Whatcom County regulations. A final inspection will be required for the permit to document completion of the project improvements.
10. Pursuant to WCC 20.80.620, no development shall exceed the maximum environmental noise level established by WAC 173-60.
11. The COB shall complete the mitigation banking instrument with appropriate signatures within 24 (twenty-four) months of the date of the issuance of this decision pursuant to WCC 22.05.140(1). Failure to submit the completed and executed mitigation banking instrument shall result in the expiration of this permit. The decision maker may extend this period up to one year from the date of original expiration upon written request by the applicant prior to the initial expiration. The applicant shall apply for the associated Land Fill and Grade Permit within two years of the mitigation banking instrument signature consistent with WCC 22.05.060(4).
12. For the McCormick Creek Headwaters site, the applicant shall vacate the Wahl Road right-of-way prior to any wetland creation in the right-of-way. Road vacation shall occur consistent with road vacation process with the Whatcom County Council.
13. A SEPA Checklist will be required at the time of Land Fill and Grade Permit submittal for work done at either the BCC or MCH site at the time of site-specific work is being proposed.
14. Wetland creation actions that extend the off-site buffers beyond the existing regulatory buffers at the time of permit approval are prohibited.

Health and Community Services

15. At the time of construction, the applicant shall ensure sanitary facilities, such as portable toilets, are available when workers are onsite.

Prepared for the Technical Review Committee by:
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