THIS MATTER came before the Bellingham Hearing Examiner for hearing on the 17th day of November 2010 on the application of the City of Bellingham Parks and Recreation Department for a Shoreline Conditional Use Permit (CUP) to construct an over-water walkway in Bellingham Bay between Cornwall Avenue and Boulevard Park.

Testimony was received from Steve Sundin, Planning and Community Development Department; Leslie Bryson and Gina Austin, Parks and Recreation Department; Derek Koellmann, Anchor QEA, Project Consultant; Mark Bennett, 1537 Humboldt Street; Wendy Harris, 3925 E. Connecticut Street; Frances Badgett, 2514 West Street; Geoff Middaugh, 206 Highland Drive; Tim Paxton, 2120 Ellis Street; and John Blethen, 1123 Railroad Avenue.

In addition to the Bellingham Municipal Code (BMC) and Comprehensive Plan, the following documents were considered as part of the record: See Exhibit List.
The public comment period was held open until January 7, 2011. Response to additional public comments from the City was received through January 21, 2011.

A motion was filed on January 5, 2011 by Wendy Harris, et.al., to remand the application to the City of Bellingham for development of additional information and analysis. The City responded to this motion on January 21, 2011.

I. FINDINGS OF FACT

Proposal

1. The City of Bellingham Parks and Recreation Department filed an application for a Shoreline Substantial Development Permit and Shoreline CUP to construct an over-water walkway from the Cornwall Landfill site to Boulevard Park in Bellingham. The application was filed on June 11, 2010.

2. The proposal includes construction of a pedestrian and bicycle walkway over a portion of Bellingham Bay, approximately 2,350 feet long, about 14 – 18.5 feet wide, and about eight feet above the mean higher high water elevation. It would include approximately 1,500 square feet of grated decking to allow light penetration to bedlands near the shore, approximately 96 steel pilings about 24 inches wide, railings, low-level lighting, approximately 600 cubic yards of material placed at the Boulevard Park abutment, approximately 800 cubic yards of material placed at the Cornwall abutment along with additional material for slope and bank protection, and construction of wing walls at both ends. The landing at Boulevard Park would be approximately 5,600 square feet in area. The landing at Cornwall would be approximately 12,300 square feet in area. The project also includes demolition and removal of an existing 877 square foot timber pier, a 2,455 square foot timber wharf, and 96 creosote pilings. Concrete rip-rap in the water near the Cornwall abutment would also be removed.

3. The proposed walkway would extend from the southern end of the Cornwall Landfill, west of Boulevard Street and immediately south of a line even with Palm Street if it was extended to the northwest, to the northern end of the lower portion of...
Boulevard Park, north of a line even with Olive Street if it was extended to the northwest.

4. The walkway would connect existing and future trails along the shoreline.

Process

5. Prior to the application submittal the project has undergone review by the Bellingham Greenways Advisory Committee, the Bellingham Parks Board, the Bellingham Planning Commission, the Bellingham City Council, and various agencies. Opportunities for public review and comment have been included within the processes of these agencies.

6. The proposed over-water walkway is included as a potential or future project in the 2002 Parks, Recreation and Open Space Plan, and the 2008 update to that plan, the 2004 Waterfront Futures Group Vision and Framework Plan, the 2006 City of Bellingham Comprehensive Plan, the Waterfront District Master Plan, including the Draft Environmental Impact Statement (EIS), both Supplemental EIS's and the Final EIS, the draft 2009 Shoreline Master Program (SMP), which has been approved by the City of Bellingham and is awaiting Department of Ecology (DOE) approval, and the Waterfront District Preliminary Sub-Area Plan of 2010.

7. The proposed walkway has been identified in waterfront and parks and recreation planning processes, as well as the proposed 2009 SMP as an improvement to recreational and waterfront access to the shorelines. It is intended to link Boulevard Park to the Waterfront District and to become a part of the Coast Millennium Trail, a corridor of on and off-street pedestrian and bicycle facilities between Skagit County and British Columbia.

8. The proposal requires permits from other agencies. A Joint Aquatics Resource Permit application (JARPA) was filed on June 11, 2010. The materials submitted for the JARPA permit were submitted in support of the Shoreline CUP as well.
9. Additional permits required for the proposal include a 401 Water Quality Certification from the DOE, Hydraulic Project approval from the Department of Fish and Wildlife (WDFW), Aquatic Resource Use Authorization from the Department of Natural Resources (DNR), an Individual Permit from the U.S. Coast Guard, a Section 106 Concurrence from the Department of Archaeology and Historic Preservation, an Endangered Species Act Concurrence from the U.S. Fish and Wildlife and National Marine Fisheries Service, National Environmental Policy Act (NEPA) Compliance from the FHWA, Critical Area Permit for the abutments, and Building and Stormwater permits from the City of Bellingham.

10. A Mitigated Determination of Non-Significance (MDNS) pursuant to the State Environmental Policy Act (SEPA) was issued by the City’s Responsible Official on September 29, 2010.

11. On November 1, 2010 the City issued a Notice of Public Hearing for the proposal.

12. Shoreline CUP proposals are regulated by the City’s SMP. The proposal is also located in an area regulated by the City’s Critical Areas Ordinance (CAO), BMC 16.55, and must comply with the requirements of that ordinance.

13. In 2009, the City approved a new SMP but it has not yet been approved by the DOE, and is not yet in effect. The 1989 SMP applies to this project.

14. Shoreline permits are issued by the Director of the Planning and Community Development Department. Shoreline CUPs must be approved by the Hearing Examiner after a public hearing. The Hearing Examiner’s decision is forwarded to the DOE for final approval.

15. A Shoreline CUP is a Type IIIA review process pursuant to BMC 21.10.040D.

16. Shoreline CUPs are regulated by Section 13 of the SMP. It reads as follows:

Section 13: CONDITIONAL USES:
A. The purpose of the Conditional Use provision is to provide more control and flexibility for implementing the regulations of the Master Program. It is realized that many activities, if properly designed and controlled, can exist on the shorelines without detriment to the shoreline area.

B. All applications for conditional uses shall comply with the provisions of the Washington Administrative Code 173-14-140.

C. An applicant for a Substantial Development Permit, which requires a Conditional Use Permit shall submit applications for both permits simultaneously.

D. Conditional Use Permit applications shall be considered by the Board of Adjustment at a public hearing, except for over-water, water-enjoyment uses proposed in the Urban Multi-Use Environment, in accordance with Section 25 (C) 4c, which shall be considered by the City Council. In addition to the notice requirement in RCW 90-58.140, notice of such public hearing shall be published no less than ten days prior to the date of the hearing.

E. Prior to the granting of a Conditional Use Permit, the Board, or City Council where applicable, must find that:

1. The conditions spelled out in the Master Program have been met.
2. The use will cause no unreasonable adverse effects on the environment or other uses.
3. The use will not interfere with the public use of public shorelines.
4. Design of the site will be compatible with the surroundings.
5. The proposed use will not be contrary to the purpose and intent of the environment designation in which it is located and the general intent of the Master Program.

The Board, or City Council where applicable, may require additional conditions as are necessary to insure proper compliance with the intent and purpose of the environment designation and Master Program or to insure protection of the surrounding environment and uses.

F. Any Conditional Use Permit granted by the City must be forwarded to the Department of Ecology for its approval or approval with conditions or denial.

17. BMC 2.56.050B(10) provides that the Hearing Examiner hears and decides Shoreline CUPs in lieu of the Board of Adjustment or City Council.
18. The proposed over-water walkway is located in Area 6 of the South Hill Neighborhood and Area 21 of the Central Business District (CBD). Area 6 of the South Hill Neighborhood is designated Public, Parks, Open Space/School. A Special Condition is shoreline. Area 21 of the CBD is designated Industrial/Waterfront Mixed Use, Marine. Special regulations state that the Marine Industrial designation is in effect.
until a Master Development Plan (MDP) is adopted. Once the MDP is adopted, area zoning is Waterfront Mixed Use as specified in the MDP.

19. The Shoreline designations for the project, north to south, are Urban Maritime, Conservancy III and Conservancy II.

20. Section 24 of the SMP provides regulations applicable to the Urban Maritime environment. It states:

Section 24 – URBAN MARITIME ENVIRONMENT:

A. DEFINITION: Areas proximate to navigable waters and are suitable for water borne commerce or other water dependent use.

B. PURPOSE AND INTENT: The purpose of the Urban Maritime Environment is to reserve areas of land use activities that require proximity to navigable waters.

C. REGULATIONS

1. Permitted uses must be:
   a. Water-dependent, or
   b. Publicly owned waterfront recreational uses, which make use of a unique shoreline resource such as a waterfront park, view, tower, public pathway, public maritime interpretive display, or aquarium.
   c. Required public access features. The above uses are permitted on over-water construction.

2. Non-water dependent uses, excluding residences, may be permitted as accessory uses provided they functionally support a permitted use. Accessory uses must be vacated if the primary use they support is vacated. Uses permitted as accessory uses shall not be built on over-water construction in the Urban Maritime Environment.

3. Conditional Uses: Water enjoyment uses may be permitted as conditional uses on land above the ordinary high water mark in the Urban Maritime Environment provided they meet all other ordinances, codes and regulations and provided they meet the following conditions:
   a. The proposed development provides continuous public access at the water’s edge.
   b. The proposed use does not interfere or restrict existing or permitted water-dependent uses. Water-dependent commercial and industrial uses have primary over water-enjoyment uses in the Urban Maritime Environment.
Other conditions as set by the Direction of the Planning and Economic Development. Water enjoyment uses except for publicly owned waterfront recreational uses may not be built on over-water construction in the Urban Maritime Environment.

21. Section 21 of the SMP provides regulations applicable to the Conservancy III environment. It states:

Section 21: CONSERVANCY ENVIRONMENT III:
A. DEFINITION: Areas which offer unique opportunity for the citizens of Bellingham to enjoy visual access to the shorelines and water.
B. PURPOSE AND INTENT: The purpose of the Conservancy Environment III is to preserve those areas which do not have physical limitations and are not uniquely natural, but which offer views of the water from public property and/or substantial numbers of residential properties.
C. REGULATIONS: No fills, hard surfacing, permanent structures, or storage shall be located within 25 feet of the ordinary high water mark, unless permitted by Section 26 of this ordinance.

Any development undertaken on the shorelines of a Conservancy III Environment shall be designed so that the highest point of any structure will be no higher than the level of the nearest adjacent upland public street right-of-way which is relatively parallel to the shoreline.

22. Section 20 of the SMP provides regulations applicable to the Conservancy II environment. It states:

Section 20: CONSERVANCY ENVIRONMENT II:
A. DEFINITION: Areas which offer unique opportunity for the citizens of Bellingham to enjoy physical access to the shorelines and water.
B. PURPOSE AND INTENT: The purpose of the Conservancy Environment II is to preserve those areas which do not have physical limitations and are not uniquely natural, but offer opportunities for the general public to enjoy the shorelines of the City, whether said shorelines be natural or intensively developed.
C. REGULATIONS: No clearing within 50 feet of the ordinary high water mark. No fills, hard surfacing, permanent structures or storage shall be located within 100 feet of the ordinary high water mark or clearing within 50 feet of the ordinary high water mark, unless permitted by Section 26 of this ordinance or the following:

CONDITIONAL USES: Setback may be reduced to 50 feet if the proposed development is of the nature and design that it takes advantage of and enhances the physical access to the shorelines for the general public.
Section 26 of the SMP provides general regulations applicable to the Urban
Maritime, Conservancy III and Conservancy II environments. Subsection A of this
section provides for exceptions to setbacks and in-water activities as follows:

Section 26: GENERAL REGULATIONS:
A. The following activities are allowed within the setbacks required in
Section 18 through 25 of this ordinance or in any water body, EXCEPT in a Natural
Environment.

1. Road, railroad, and utility construction necessary to span the
shorelines to facilitate the circulation or utility network of the City.

2. Development necessary to facilitate public access subject to the
following:
   a. Structures necessary to facilitate public access shall be
designed so as not to impair the function of the water body.
   b. Public access development within a required setback
shall be limited to pedestrian or bicycle access.
   c. Public access development shall consider and protect
adjacent private properties.

3. Bulkheads necessary to protect property from erosion; must
conform to regulations pertaining to bulkheads contained herein.

4. Landscaping:
   a. Contour alterations resulting from site preparation shall
not be substantially different from existing contours.
   b. Landscaping materials shall be used which will prevent
soil erosion.
   c. Existing natural vegetation shall be used when feasible.
   d. Land, which is cleared of natural vegetation, shall be
replanted as soon as possible. The landscaping plantings
shall emphasize the plant species on the State of
Washington Department of Wildlife and Department of
Fisheries list of recommended plants.

5. Minor channel improvements necessary to maintain the carrying
capacity of the waterway. Alteration of channel route is
prohibited except in connection with road or railroad
construction necessary to span the shoreline.
   a. Dredging and bulkheading activities shall conform to
pertinent regulations contained herein.
   b. Removal of incompatible debris and/or structures is
permitted.
c. When brush and bramble vegetation is removed it shall be replaced by grasses, shrubbery, and/or trees.

d. Dead trees or trees which are presently in danger of falling due to erosion may be removed provided such trees are cut at or near ground level and the roots are allowed to remain.

6. Materials may be placed within the water body for the purpose of enhancing fish production or migration. Such activity must be approved by the State Departments of Fisheries or Wildlife.

Over-water construction including: Piers, docks, floats, breakwaters, jetties and groins are permitted within Urban I, Urban Maritime and Urban Multi-Use Environments and those areas of Conservancy I designation located from the north section line of Section 14 Township 37 north, Range 2 east northerly to the south right-of-way line of Willow Road and from the extended north line of Lot 7, Block 3, Division No. 2 northerly to the southerly line of Cowgill Avenue extended westerly subject to pertinent provisions contained herein.

24. Subsection G of Section 26 of the SMP provides for public access as follows:

G. PUBLIC ACCESS: Public access shall be encouraged wherever possible. The Bellingham Open Space Plan shall be used as a guideline for where access is most desirable.

1. No development shall block or interfere with the normal public use of or public access to publicly owned shorelines and water bodies.

2. All developments shall be designed to protect and enhance views and visual access to the water and shorelines.

3. All developments, including recreational, multi-family residential, commercial or industrial, located along public shorelines or unique shoreline areas shall be required to provide view corridors, public accessways, trail easements or other amenities upon a determination by the City that the action would enhance public enjoyment of the shoreline, not unduly conflict with the proposed use, adjacent uses or public safety nor adversely impact the shoreline environment and is consistent with the City of Bellingham Open Space Plan.

4. Any required public access easement shall be of a size and design appropriate to the site, size, and general nature of the proposed development. Such easements shall be recorded on a property deed or face of a plat as a condition running in perpetuity with the land.
5. Signs which indicate the public’s right of access shall be installed as required by the Director of Planning and Economic Development Department.

6. Public use on private property which is a condition of a shoreline permit may be limited to daylight hours or otherwise restricted to prevent use conflicts.

7. Where possible, public access sites shall have direct and easy access from the street.

8. Public access may be considered unfeasible and not be required where:
   a. Unavoidable hazards to the public in gaining access exist.
   b. Inherent security requirements of the use cannot be satisfied.
   c. Unavoidable interference with the use would occur.
   d. The cost of providing the access is unreasonably disproportionate to the total cost of the proposed development.
   e. Where damage to the natural ecology of the area would result and could not be mitigated.
   f. In the above, the applicant shall first demonstrate and the City shall determine that all reasonable alternatives have been exhausted, including but not limited to 1) maintaining a gate and limiting hours of use, or modifying operations and scheduling 2) designed separation of uses and activities, i.e. fences, terracing, use of one-way glazings, hedges, landscaping, etc. 3) provision of or contribution to an access at a site geographically separated from the proposal.

9. Public access to the shoreline shall be required on all public property, except as indicated above or as follows:
   a. In harbor areas completely occupied by water-dependent uses.
   b. In street ends or waterways occupied by water-dependent uses under permit or lease.

10. On property where public access is infeasible, the applicant may be permitted to provide off-site public access in the form of view platform, interpretive display or other public access enhancement consistent with the Open Space Plan in lieu of on-site access.

11. Required public access sites shall be fully developed and available for public use at the time of occupancy of the development unless the required public access site is on an
undeveloped segment of a trail route designated in the Bellingham Open Space Plan. In this case, the required public access shall be fully developed and available for use when the trail segment is developed.

12. Where public access is not required on-site due to one of the factors cited in 8 or 9 above, a payment in lieu may be required prior to permit approval to provide a similar or equivalent amenity.

13. “Required public access” shall include not less than a pedestrian bicycle pathway of suitable surfacing and standards to meet the intended purpose, adequate signage to inform the public of the public access, design features and landscaping to make the facility in harmony with the shoreline setting, and where appropriate, facilities which are designed to meet the anticipated use including use by disabled persons.

Where required public access is located on a trail route indicated in the City of Bellingham Open Space Plan, the accessway shall connect to adjoining trail sections including access points and vistas, either existing or planned. If the required access does not connect to a continuous public trail, the required access shall connect to a public right-of-way.

Future actions by the applicant shall not diminish the usefulness or value of the public access site.

25. Section 27 of the SMP provides general use regulations. Subsection N of that section provides regulations for the installation of piers, docks and floats as follows:

N. PIERS: The following regulations shall apply to the installation of all piers, docks, and floats on the shorelines of the City.

1. Piers, docks or floats shall be constructed so as to cause minimum interference with the public use of the water surface and shoreline, and so as to cause no undue harm to adjacent properties.

2. Prior to the granting of a permit for a pier, dock or float, the effect of that structure upon adjacent shorelines shall be determined by the Director of the Bellingham Planning and Economic Development Department and the disposition of the permit shall reflect such determination.

3. Where feasible pile or floating piers and docks shall be used instead of rip-rapped or bulkheaded supports.

4. Piers, docks, or floats within 200 feet of the point of entrance of a freshwater stream into marine waters shall not interfere with or
endanger the migration of anadromous fish species nor be constructed over estuarine mudflats which are exposed at mean lower low tide.

5. No covered moorage or boathouses shall be constructed on the shorelines except in an authorized marina.

Use of treated wood on Lake Whatcom: Piles, floats or other members in direct contact with the water on Lake Whatcom shall not be treated or coated with paint, pentachlorophenol, arsenate compounds, creosote or other preservative treatment. Wooden members situated above the water may be constructed of factory applies copper arsenate providing it is approved by the U.S. Environmental Protection Agency (EPA) for the purpose and the EPA regulations for its use are adhered to. No field application of paint, preservative treatment or other chemical is permitted over the water of Lake Whatcom or in a location where water run-off could enter the lake.

26. Subsection 27P provides regulations for the development of recreational facilities on the shorelines as follows:

P. RECREATION: The following regulations shall apply to the development of all recreational facilities on the shorelines of the City.

1. Recreational development shall be designed to minimize adverse effects on the natural amenities of the shoreline while enhancing its recreational value and protecting the public health and safety.

2. Public recreational development shall recognize the wide variety of recreational needs and desires.

Commercial recreational development shall conform to regulations contained herein relating to commercial development.

27. BMC 16.55.200 provides review criteria for activities in critical areas. It states:

16.55.200 - Review Criteria

A. Any alteration to a Critical Area, unless otherwise provided for in this Chapter, shall be reviewed and approved, approved with conditions, or denied based on the proposal's ability to comply with all of the following criteria:

1. The proposal minimizes the impact on Critical Areas in accordance with Mitigation Sequencing [Section 16.55.250];

2. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;

3. The proposal is consistent with the general purposes of this Chapter and the public interest;

4. Any alterations permitted to the Critical Area are mitigated in accordance with Mitigation Plan Requirements [Section 16.55.260] and additional requirements as outlined in specific Critical Area sections;
5. The proposal protects the Critical Area functions and values consistent with the best available science and results in no net loss of Critical Area functions and values; and

6. The proposal is consistent with other applicable regulations and standards.

B. The City may condition the proposed activity as necessary to mitigate impacts to Critical Areas and to conform to the standards required by this Chapter.

C. Except as provided for by this Chapter, any project that cannot adequately mitigate its impacts to Critical Areas in the sequencing order of preferences in Section 16.55.250 shall be denied.

28. BMC 16.55.250 requires mitigation sequencing as follows:

16.55.250 - Mitigation Sequencing
Applicants shall demonstrate that all reasonable efforts have been examined with the intent to avoid and minimize impacts to Critical Areas. When an alteration to a Critical Area is proposed, applicants shall follow the mitigation sequential order of preference below:
A. Avoiding the impact altogether by not taking a certain action or parts of an action;
B. Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps, such as project redesign, relocation, or timing, to avoid or reduce impacts;
C. Rectifying the impact to wetlands, critical aquifer recharge areas, frequently flooded areas, and habitat conservation areas by repairing, rehabilitating, or restoring the affected environment to the historical conditions or the conditions existing at the time of the initiation of the project;
D. Minimizing or eliminating the hazard by restoring or stabilizing the hazard area through engineered or other methods;
E. Reducing or eliminating the impact or hazard over time by preservation and maintenance operations during the life of the action;
F. Compensating for the impact to wetlands, critical aquifer recharge areas, frequently flooded areas, and habitat conservation areas by replacing, enhancing, or providing substitute resources or environments; and
G. Monitoring the hazard or other required mitigation and taking remedial action when necessary.
Mitigation for individual actions may include a combination of the above measures.

29. BMC 16.55.260 requires mitigation plans to have the following elements:
16.55.260 - Mitigation Plan Requirements

When mitigation is required, the applicant shall submit a mitigation plan as part of the Critical Area report. The mitigation plan shall include:

A. Prepared by a qualified professional specializing in the type of Critical Area.

B. Report requirements:
   1. Detailed summary of the project, including the impacts to the Critical Area, and the proposed mitigation to compensate for lost functions and values to appear in the beginning of the report.
   2. Rationale for selecting the mitigation site.
   3. Complete site characterization of the proposed mitigation site to include parcel size, ownership, soils, vegetation, hydrology, topography, and wildlife.
   4. Goals, objectives, performance standards and dates of completion of the mitigation proposal.
   5. Report and maps of the Critical Area to be impacted. (If it is a wetland, the report must include a functional assessment – see Section 16.55.280).
   6. Monitoring, maintenance, and contingency plan. The monitoring schedule (dates, frequencies and protocols) must be included and a monitoring report submitted accordingly. Monitoring and maintenance shall be required for at least five years unless otherwise stipulated by another government agency.
   7. Map of development, with scale, shown in relation to Critical Area.
   8. Financial guarantees ("surety") for 150 percent of the total costs to ensure the mitigation plan is fully implemented, including, but not limited to, the required monitoring and maintenance periods.

30. Washington Administrative Code (WAC) 173-27-160(3) provides for the authorization of conditional uses on the shorelines of the state for those uses not classified or set forth in the applicable master program provided the applicant demonstrates consistency with the requirements of WAC 173-27-160 and the requirements for conditional uses contained in the master program.

31. WAC 173-27-160 provides as follows:

Review criteria for conditional use permits.
The purpose of a conditional use permit is to provide a system within the master program which allows flexibility in the application of use regulations in a...
manner consistent with the policies of RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by local government or the department to prevent undesirable effects of the proposed use and/or to assure consistency of the project with the act and the local master program.

(1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant demonstrates all of the following:

(a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;

(b) That the proposed use will not interfere with the normal public use of public shorelines;

(c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;

(d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and

(e) That the public interest suffers no substantial detrimental effect.

(2) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

(3) Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program.

(4) Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this section.

32. Over water construction of publicly owned recreational uses are permitted in the Urban Maritime environment in accordance with SMP Section 24C.

33. The Conservancy II and III environment regulations in the SMP do not provide for over water construction, except as provided in Section 26A of the SMP which allows development necessary to facilitate public access.

34. The proposed over water walkway falls within the definition of “water enjoyment use” as provided in SMP Section 4.
35. The Conservancy II and III environment regulations in the SMP neither classify as conditional uses nor specifically prohibit over water public recreational facilities.

36. The Bellingham Planning and Community Development Director determined that the proposal qualified for a Shoreline Conditional Use Permit subject to satisfaction of the criteria specified in SMP Section 13 and WAC 173-27-160-3.

Technical Reports


40. A Feasibility Report for the proposal was prepared by Reid Middleton dated September, 2009.

SEPA

41. The MDNS for the proposal included several conditions, including: 1) installation of grated decking on walkway bents that cover bed-lands up to a depth of 15 feet Mean Lower Low Water (MLLW); 2) replacement of removed trees greater than six inches diameter at breast height at a ratio of 2:1 with similar or native species
within the shoreline jurisdiction within Boulevard Park; 3) provision of a shoreline erosion and sediment transport evaluation based on the proposed alignment of the walkway prior to public notice of the public hearing; 4) approval of a revised Mitigation and Monitoring Plan that includes elements pertaining to acquisition of pre-project baseline data on macro-algae presence along the proposed centerline of the walkway and post project eelgrass colonization at each end of the walkway consistent with WDFW guidelines by the WDFW, DNR and City of Bellingham prior to issuance of building permits for site work except for exploratory borings; 5) submittal and approval of a staging and construction access plan for each of the two abutments prior to site work building permits except for exploratory borings; and 6) implementation of mitigation and monitoring as required by other agencies.

42. The MDNS conditions have been satisfied or incorporated into the proposal. Grated decking is proposed over depths up to -15 feet to allow eelgrass the opportunity to colonize and establish beyond its existing footprint. Removed trees would be replaced as provided in MDNS Condition No. 2. A shoreline erosion and sediment transport evaluation was provided on November 2, 2010. Mitigation and monitoring as approved by other agencies with jurisdiction will be required. A staging and construction access plan is required to control hours of operation and heavy equipment trips through Boulevard Park and Cornwall Avenue.

Existing Conditions

43. The north end of the proposed walkway is the site of an historic municipal landfill operated by the City of Bellingham. It has been occupied by industrial uses, including log storage and processing by Georgia Pacific (GP), since closure of the landfill. The landfill has been listed as a Model Toxics Control Act (MTCA) site and is under a consent decree/agreed order executed by the DOE. The property is currently vacant. A remedial investigation and feasibility study is underway for cleanup.
activities, habitat creation and public access improvements. The property will be owned by the City of Bellingham and developed consistent with the cleanup plan.

44. Between the north and south abutments the adjacent shoreline contains large boulders and rip-rap to stabilize the BNSF railroad grade located along the shoreline. Eelgrass is present along the entire stretch of shoreline within the project area and has established itself between '2 and '10 MLLW.

45. The South Bay Trail, a public recreational trail, is located along the shoreline approximately 100 feet upland from the Ordinary High Water Mark (OHWM), averaging 40 feet in elevation above the OHWM. The trail is heavily vegetated, limiting marine views from the trail. It connects downtown Bellingham and Boulevard Park. The railroad tracks are located between the trail and the shoreline, cutting off access from the trail to the water.

46. Data sheets describing existing conditions along the stretch of shoreline from the Cornwall landfill to Boulevard Park are contained in Exhibit D to the Staff Report. These data sheets describe the fish and wildlife species, vegetation, soils, geological conditions, structures, and other physical attributes of the shoreline areas.

47. The south end of the walkway is located at Boulevard Park. An existing pier, wharf and associated pilings are currently inaccessible due to safety concerns. These features will be removed as part of the proposal.

Shoreline Functions

48. City Planning staff expects that the natural processes existing at the project site, including wave energy, tidal currents, long-shore drift, sediment transport and natural or ambient light patterns will be maintained with construction of the proposal. Removal of the existing pier, wharf, pilings and concrete material, as proposed, is expected to reintroduce some of the natural processes that do not currently exist at the site.

49. City Planning staff also expects that existing habitat structure present at the site, including an accretion beach at Boulevard Park, extensive eelgrass beds, near-shore
substrate of sand, gravel and cobble and a gently sloping inter-tidal area along the railroad grade will be maintained with the project, with an opportunity for improvement over existing conditions.

50. A function analysis for the existing Cornwall landfill shoreline area indicates that most functions are at least partially impaired. The hydrologic function is partially impaired with shoreline armoring. Shoreline vegetation is impaired and absent in most areas, with non-native species dominant where vegetation is present. The terrestrial habitat function is impaired. Intertidal habitat function is impaired in most locations, but moderate to high at the toe of the Cornwall Avenue beach. The shallow and deepwater habitat functions at a moderate to high level, with shallow water habitat limited. The existing functions are limited by the old landfill with sediment and groundwater contamination and rip-rap armoring of the shoreline. The functions are sustainable with enhancements.

51. The function analysis for the Conservancy III section of shoreline indicates that existing functions are slightly impaired. The hydrologic function is slightly impaired by rip-rap at the base of the railroad tracks. The shoreline vegetation function is slightly impaired by invasive species and reduced canopy. The terrestrial habitat is slightly impaired with limited connectivity. The intertidal habitat is slightly impaired by rip-rap. Shallow and deepwater habitat functions at a moderate to high level, with high function for offshore winter bird habitat.

52. The function analysis for the Boulevard Park section of shoreline, the Conservancy II environment, indicates that functions are impaired to slightly impaired. The hydrologic function is slightly impaired by rip-rap. Shoreline vegetation is impaired to slightly impaired with a dominance of lawn and native shrubs and trees interspersed along the boardwalk. Terrestrial habitat is impaired to slightly impaired with poor cover and connectivity. Intertidal habitat is impaired in areas with rip-rap and armoring, and functioning in areas without armoring. Shallow and deep water habitat functions at a moderate to high level with high fish spawning in pocket beaches.
Functions are limited by rip-rap and armoring, a risk of off shore toxic contamination, limited shoreline vegetation and existing active park uses.

53. City Planning staff has concluded that the design of the project is consistent with best available science (BAS) and is expected to result in no net loss of shoreline ecological function.

Conditional Use Criteria and Compliance

54. One of the criteria specified in WAC 173-27-160 is consistency with the policies set forth in the Revised Code of Washington (RCW) 90.58.020. This section of the SMA provides that it is the policy of the state to provide for the management of shorelines of the state by planning for and fostering all reasonable and appropriate uses, to insure the development of shorelines in a manner which allows for limited reduction of rights of the public in navigable waters but promotes and enhances the public interest. Uses that protect the statewide interest over local interest, preserve the natural character of the shoreline, result in long term over short term benefit, protect the resources and ecology of the shoreline, increase public access to publicly owned areas of the shoreline, increase recreational opportunities for the public, and provide for any other element defined in RCW 90.58.100, in that order, are given preference. The public’s opportunity to enjoy the physical and aesthetic qualities of natural shorelines are to be preserved to the greatest extent feasible consistent with the best interests of the state and people generally. Alterations of the natural condition for single-family residences, ports, shoreline recreational uses including parks, piers, marinas and improvements facilitating public access to shorelines, and developments dependent on shoreline location are given priority. Uses in the shorelines are to be designed and conducted to minimize, as practical, damage to the ecology and environment of the shoreline area and interference with the public’s use of the water.

55. The proposed walkway is designed to provide a unique public access recreational opportunity for citizens from all parts of Washington State. It is anticipated...
that it will provide an attraction similar to Taylor Dock for residents and visitors alike. It is anticipated that it will become a link in a trail system that will extend from Skagit County to British Columbia. It has also been designed to protect priority habitat for federally and state listed salmonids, including extensive eelgrass beds within the project area. The proposal will promote the statewide interest in the shorelines.

56. The proposal has been designed to protect and maintain the natural features, resources and ecology of the shoreline, including the habitat areas. Removal of existing pollution generating and unsafe structures will improve the natural features of the area.

57. The proposed walkway will increase recreational opportunities for the public in the shoreline.

58. WAC 173-27-160(2) provides that consideration shall be given to the cumulative impacts of additional requests for like actions in the area in the granting of a conditional use permit. This section explains that the total of the conditional uses that would be granted for developments in the area where similar circumstances exist must also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

59. Over-water structures are permitted within the Urban Maritime environment at the north end of the proposed walkway. Conditional use permits are not required for similar proposals in this area.

60. The shoreline area within the Conservancy II environment in the area of the proposal is owned by the City of Bellingham and managed as Boulevard Park. Nearly all shorelines within the City that are designated Conservancy II are public parks or public access area controlled by the City. Additional over-water public access facilities are not included in any planning documents for the area and none are proposed.

61. The proposed walkway is entirely over water within the Conservancy III environment located between the Cornwall landfill area and Boulevard Park. This area is the only Conservancy III environment within the City. Shoreline development within this stretch is nearly impossible due to the location of the BNSF railroad tracks and...
South Bay trail adjacent to the shoreline and steep slopes. The northern portion of Boulevard Park is located at the top of the slope east of this area, adjacent to State Street. The bed-lands in this area are owned by DNR. It is not anticipated that any additional similar developments could be proposed in this area.

To the south of Boulevard Park Taylor Dock has been reconstructed over water, linking the park to pedestrian trails to the south leading to Fairhaven.

It is unlikely that any additional requests for conditional use permits for developments similar to the proposal will be made that would result in cumulative impacts to the shoreline.

WAC 173-27-160(1)(b) provides that a proposed conditional use must not interfere with the normal public use of public shorelines. SMP 13E(3) provides that the proposed conditional use must not interfere with the public use of public shorelines. The proposal will provide an enhanced opportunity for public use of the shoreline by extending public access over additional shoreline area, and linking existing and proposed trails and recreational areas. It will not interfere with existing public use of public shorelines.

WAC 173-27-160(1)(c) and SMP 13E(4) require that the proposed conditional use and design be compatible with the surroundings and other authorized uses within and planned for the area. The proposed walkway will complement existing public access facilities at Boulevard Park, connect the park to planned trail amenities, and further the implementation of habitat, shoreline, waterfront and public park and recreation improvement plans contained in the City’s Comprehensive Plan, Waterfront plans, and proposed Shoreline plans. The proposal will be compatible with its surroundings and existing and planned improvements in the area.

WAC 173-27-160(1)(d) and SMP 13E(2) require that the proposed conditional use cause no significant adverse effects to the shoreline environment in which it is located or other uses. The walkway, as designed and conditioned, will allow approximately 70% of light transmission into near-shore areas where eelgrass is present.
Grated decking will be installed on panels that extend out to 15 feet MLLW. Eelgrass does not typically establish or colonize beyond a depth of 15 feet MLLW. Pilings are 24-inch galvanized steel approximately 10 feet apart within the bed-lands, aligned in a perpendicular orientation, predominantly in water deeper than 15 MLLW. The walkway is aligned within several degrees of north/south. The base is approximately eight feet above the elevation of Mean Higher High Water (MHHW). Low level lighting will be installed along railings and directed inwards towards the deck panels, except in areas with grated decking. Nearly all of the material at the Boulevard Park abutment, and all of the material at the Cornwall abutment will be placed above the MHHW elevation. Construction will occur during work windows established by WDFW and U.S. Army Corps of Engineers (USACE). Pilings will be installed at low or slack tide in intertidal areas with vibratory hammer. These design features are intended to comply with BAS to minimize adverse impacts to salmonids, forage fish, and shellfish, and their habitats and food sources, from shading, pilings, armoring, and lighting. The design complies with recommendations of BAS documents, including the 2001 white paper, “Overwater Structures: Marine Issues”, “Land Use Planning for Salmon, Steelhead and Trout”, October, 2009 by WDFW, “Protection of Marine Riparian Functions in Puget Sound”, June, 2009 by Washington Sea Grant, and “Non-Fishing Impacts to Essential Fish Habitat and Recommended Conservation Measures”, August, 2003 by the National Oceanic and Atmospheric Administration (NOAA). With the incorporation of these design elements the proposal will not cause unreasonable or significant adverse effects on the environment or other uses. The proposal also includes removal of features that are detrimental to the environment, including creosote treated pilings, 3,300 square feet of pier/wharf that shades the intertidal area and is unsafe, a wall supporting the existing pier and concrete rip-rap in the water. Removal of these structures will improve the environment over the existing conditions.

WAC 173-27-160(1)(e) provides that the public interest suffer no substantial detrimental effect from the proposed conditional use. The proposal is a public access
project that will serve the public interest. The public interest will not suffer any
detrimental effects from the proposed use.

68. SMP Section 13E(5) provides that the proposed conditional use must not be
counter to the purpose and intent of the environment designation in which it is located
and the general intent of the Master Program. The general intent of the SMP is to
coordinate the regulation of shoreline uses so as to insure uses which result in long-term
over short-term benefit, protect the resources and ecology of the shorelines, increase
both visual and physical public access to the shorelines, and accommodate water
dependent uses. The purpose and intent of the Conservancy II environment is to
preserve those areas that do not have physical limitations and are not uniquely natural,
but offer opportunities for the general public to enjoy the shorelines of the City. The
purpose and intent of the Conservancy III environment is to preserve those areas which
do not have physical limitations and are not uniquely natural, but which offer views of
the water from public property and/or substantial numbers of residential properties.
Public recreation and public access uses are specifically permitted in Conservancy II
and III designations. The purpose and intent of the Urban Maritime Environment is to
reserve areas of land use activities that require proximity to navigable waters.
Waterfront recreational uses such as waterfront parks, views, towers, public pathways,
public maritime interpretive displays and aquariums, and over water public access
features are specifically permitted uses within the Urban Maritime Environment. The
proposed walkway is not contrary to the purpose and intent of the Conservancy II and
III and Urban Maritime designations and the general intent of the Master Program.

69. WAC 173-27-160(1)(a) and SMP Section 13E(1) require that the proposed
conditional use satisfy the conditions of the SMP and that it be consistent with the
policies of the SMP.

70. Relevant policies of the SMP include policies relating to piers, bulkheads,
landfills, shoreline protection and recreation. The SMP encourages the cooperative use
of piers, docks and floats, provides that they should be constructed so as to cause
minimum interference with the public use of the water surface and shoreline, provides that the effect of the structure upon adjacent shorelines should be determined by the Department of Planning and Economic Development prior to granting a permit, discourages the use of preservative treated wood in direct contact with the water in the Lake Whatcom watershed, and reserves over water construction on piers, docks and floats for water oriented uses and where feasible they should provide public access.

71. Bulkhead policies of the SMP provide that the effect of the bulkhead on adjacent properties should be determined by the Planning Department, that they should not be allowed for the purpose of creating land, and that they should not adversely affect public access to public shorelines.

72. Landfill policies provide that they should contribute to attainment of SMP goals, they should be vegetated or otherwise protected from erosion, they should not result in water surface reduction except for water dependent or public uses, they should not pose a potential threat to water quality, and they should blend with existing topography.

73. Shoreline protection policies include prohibition of incompatible structures and fills, and bank stabilization conformance to bulkhead policies.

74. Recreation policies of the SMP provide that the procurement and public use of shorelines which provide a locally unique opportunity for public recreation should be encouraged, that recreational development should be designed to minimize adverse effects on the natural amenities of the shoreline while enhancing its recreational value and protecting the public health and safety, that the recreational and educational benefits of natural shorelines should be considered in recreational planning, that recreational planning and development should recognize the wide variety of recreational needs and desires, and that the applicable objectives stated and actions recommended in the City of Bellingham Open Space Plan should be pursued through SMP requirements and by the ongoing acquisition of property and development of public access along shoreline trail routes identified in the Open Space Plan.
75. The proposed walkway is consistent with the SMP policies relating to piers, bulkheads, landfill, shoreline protection and recreation.

76. An over-water walkway is permitted outright in the Urban Maritime environment. In the Urban Maritime, Conservancy II and Conservancy III environments SMP Section 26A(2) allows development within setbacks and in-water necessary to facilitate public access provided structures are designed so as not to impair the function of the water body, access is limited to pedestrians and bicycles, and the development shall consider and protect adjacent private properties. The proposed walkway is designed so as not to impair the function of the water body, it is limited to pedestrian and bicycle access, and adjacent properties are public and protected. The walkway is not otherwise limited by the provisions of Sections 20, 21 and 24 of the SMP.

77. SMP 26F provides that vegetation clearing within Conservancy II environments is prohibited within 50 feet of the shoreline except where necessary to provide public access and under other specified conditions. The proposal calls for the removal of several mature conifers and deciduous trees at the Boulevard Park abutment to develop the ADA accessible landing. Trees greater than six inches in diameter at breast height will be replaced at a 2:1 ratio and installed within shoreline jurisdiction within Boulevard Park.

78. SMP 26G provides that public access is encouraged wherever possible and that the Bellingham Open Space Plan shall be used as a guideline for where access is most desirable. The regulation provides requirements for public access as set forth in Finding of Fact No. 22 above. The proposed walkway is included in the City’s Open Space Plan, will not block or interfere with the normal public use of or public access to publicly owned shorelines, is designed to protect and enhance views and visual access to the water, will indicate the public’s right of access, and will connect existing and planned trail sections as indicated in the Open Space Plan.
79. The proposed walkway will allow navigational access to small watercraft within the project area. Currently vessels are moored in the area but they are not authorized. A lease granted by the DNR is required for the mooring of vessels within the area. Larger vessels, including typical fishing vessels used by Lummi Nation, would not be able to access the waters between the walkway and the abutting shoreline. Consultation by the City with the Lummi Nation is on-going regarding treaty rights. Resolution of this issue will be necessary prior to construction of the project but is outside the scope of the Hearing Examiner’s jurisdiction in this matter. The limited reduction of navigation rights of the public is consistent with the SMA and SMP, especially in light of the enhancement of public access that will result from the proposal.

80. Section 27 of the SMP contains regulations applicable to the placement of bulkheads, seawalls and rip-rap, landfills, piers, and shoreline protection, among other things. The proposal is consistent with the requirements of Section 27E relating to bulkheads, seawalls and rip-rap. The effect of the proposed abutments at each end of the walkway was analyzed by Coast & Harbor Engineering, Inc. which concluded that a worst case storm event produced winds up to nearly 54 mph, originating from 240 degrees, that the majority of wind comes from a southerly direction and that the site is mostly sheltered due to headlands of Boulevard Park. The analysis showed that this storm event would not change existing natural processes and that wave heights and bottom scouring that occurred in concert with wave energy would be equal to or less than those associated with existing conditions. The abutments do not create new usable land areas, do not impact access to publicly owned shorelines and will consist of large boulders and quarry spalls. The structures will be raised above the adjacent upland in order to comply with ADA requirements and to elevate the walkway above the MHHW to avoid shading impacts to eelgrass beds.

81. Section 27J of the SMP applies to landfills on the shorelines. The abutments do not create new, dry upland areas, but a small amount of material would be placed below
the OHWM. The proposed placement of materials is to accommodate a public use. It complies with the requirements of Section 27J.

3. Section 27N of the SMP applies to the installation of piers, docks and floats. The walkway is designed to cause minimum interference with the public use of the water surface and shoreline, the effect of the structure on adjacent shorelines has been analyzed utilizing BAS and has been determined to be not significantly adverse to the environment. It is consistent with the requirements of Section 27N.

4. SMP Section 27P regulates the development of recreational facilities on the shorelines. It provides that public recreational development shall be designed to minimize adverse effects on the natural amenities of the shoreline while enhancing its recreational value and protecting public health and safety, and that development recognize the wide variety of recreational needs and desires. The proposal is in an area where the shorelines are not natural, but are historic landfills or have been heavily armored to prevent erosion. The proposal will enhance the existing amenities by providing public access over the water and will complete a waterfront linkage from Boulevard Park to future improvements at the Cornwall Avenue landfill site and the multi-modal trail planned along the waterfront. It is designed to minimize adverse effects on the eelgrass beds and other features of the natural environment and it enhances the recreational value of the shoreline. The removal of unsafe and degraded existing structures will protect the public health and safety.

5. SMP Section 27S provides regulations for shoreline protection. It requires that bank stabilization to protect property from erosion must conform to regulations relating to bulkheads. The proposal is consistent with the provisions for bulkheads.

Critical Areas Compliance

6. The Critical Areas Ordinance, BMC Chapter 16.55, (CAO) also applies to the proposal. Critical Areas Permits are administered and issued by the Planning and
Community Development Department. Compliance with the applicable provisions of the CAO is outlined below.

86. BMC 16.55.200 provides that alterations to critical areas comply with the criteria specified in that section. These provisions generally require mitigation planning and sequencing, protection of the critical area functions and values consistent with BAS, consistency with the general purposes of the CAO and the public interest, consistency of other applicable regulations and standards, and demonstration that the proposal does not pose an unreasonable threat to the public health, safety and welfare.

87. Requirements for mitigation sequencing are specified in BMC 16.55.250. This section provides a list of methods to reduce or eliminate impacts to critical areas in order of preference. First in the order of preference is avoiding the impact altogether by not taking a certain action or parts of an action. In this case the proposal is dependent upon crossing critical areas in order to connect the two landing sites. Not proceeding with the proposal would eliminate the opportunity to remove dilapidated and polluting structures that are harmful to the critical areas. Not constructing the proposed over water walkway would not fulfill the intended purpose of providing additional public access amenities and implementing plans resulting from public processes. This option would fail to achieve the desired public benefit.

88. Public comments regarding the proposal have contested the need for the over water walkway due to the existence of the South Bay trail along the shoreline upland from the proposed walkway. The South Bay trail connects Boulevard Park with the CBD, not the waterfront. Views from the South Bay trail are limited by vegetation. Access to the water is limited by the steep slope and railroad tracks. The proposed walkway provides a different experience for the user.

89. The revised mitigation report (Exhibit K to the Staff Report) analyzes each of the mitigation sequencing steps. The mitigation measures outlined in the report and incorporated into the project design comply with the mitigation sequencing required by BMC 16.55.250.
90. BMC 16.55.480 requires a critical area report for habitat conservation areas, including a habitat assessment. A Biological Assessment and Mitigation Report were prepared for the project. The report includes the elements specified in BMC 16.55.480.

91. BMC 16.55.490 provides performance standards for proposals impacting critical areas. Mitigation of alterations to habitat conservation areas must achieve equivalent or greater biologic and hydrologic functions and include mitigation for adverse impacts upstream or downstream of the site. Approvals must be based on BAS. The proposal will require full compliance with the Revised Mitigation Report, installation of additional grated decking, replacement of upland vegetation and observance of seasonal restrictions. The proposal is expected to result in no net loss of shoreline ecological function.

92. Monitoring reports were provided from the Taylor Dock project, which is similar to the proposed walkway. Eelgrass continued to colonize and expand within and outside of the project area of the Taylor Dock beyond the bi-yearly minimums established by WDFW. Similar results are expected from the proposed walkway.

93. Performance standards for specific habitats are provided in BMC 16.55.500. Management plans have been adopted by WDFW that recommend design elements and mitigation measures to incorporate into project designs and mitigation plans for proposals within habitat conservation areas with a primary association with endangered/threatened or sensitive species. No bald eagle nests have been documented within the project area. Work windows pertaining to anadromous fish have been specified by WDFW and USACE to be between September 1st and October 14th. Alternative alignments were considered in the September 2009 Feasibility Report by Reid Middleton and are shown in Exhibit N to the Staff Report. The proposed alignment was selected as the one that can achieve a no net loss of shoreline ecological function and is the most desirable to the general public. The proposal will not prevent the migration of salmonids within the near-shore area.
Staff Recommendation

94. City Planning Staff has recommended approval of the Shoreline CUP subject to conditions set forth in the Staff Report. Condition No. 4 of the Staff Recommendation has been modified to request that the Hearing Examiner issue a decision irrespective of resolution of issues with the Lummi Nation. Staff has indicated that the proposal would be returned to the Hearing Examiner if resolution of these issues results in significant changes to the proposal. The recommended conditions include application of conditions of the MDNS, lighting to be directed away from the water surface in areas where grated decking exists, and grading and filling activity required to develop the abutments to not occur between October 1st and May 1st.

Public Comment and Reponses

95. Comments from other agencies were received regarding the proposal. The Lummi Nation responded to the MDNS with comments that the proposal would preclude the exercise of treaty rights by excluding fishing in approximately 25 acres of Bellingham Bay, that the cumulative effects were not adequately addressed in the documents provided for review, that environmental justice issues were not addressed in the documents provided for review, that the design should be modified to avoid or minimize impacts to tribal fishing areas, and that compensatory mitigation is required for unavoidable impacts. The City is continuing to discuss issues raised by the Lummi Nation regarding treaty rights.

96. WDFW commented in August 2010 regarding work window and eelgrass monitoring and mitigation. These comments and requests were incorporated into the proposal.

97. The USACE commented that the proposal was a bridge across navigable waters that was regulated by the Coast Guard and not the USACE.

98. Public comments were received expressing concerns regarding a number of elements of the proposal, as well as the review process. ReSources commented that the
walkway was not needed because there is a parallel trail on the land, that the purpose of
a trail is to get from point A to point B and not to be overwater, that a cumulative
impacts analysis was not done, the proposed mitigation is insufficient, that mitigation
for temporary construction impacts should be included and a restoration project near the
impact site should be included, impacts to eelgrass have not been adequately
considered, the eelgrass reference site is within the shadow of the overwater structure,
the Lummi Nation’s concerns should be addressed, information was missing and it did
not support the project. The City provided information regarding the shoreline erosion
transportation and evaluation and updated the eelgrass survey and mitigation report
after these comments were received. Additional comments by ReSources stated that
there has not been an adequate discussion of mitigation sequencing as required by the
CAO and that the no net loss standard would not be met because of a net increase in
shaded area. The City responded to these comments that an alternatives analysis was
performed, the additional shading would occur in deeper water, and there would be a
net decrease in shading in the inter-tidal zone.

99. Wendy Harris submitted numerous comments expressing concerns regarding
Lummi Nation treaty rights, impairment of public navigation, issuance of the MDNS
before all studies were completed, cost of the project, lack of adequate notice, hearing
the shoreline CUP application prior to issuance of a CAO permit, loss of function of the
eelgrass beds, harm to the Caspian tern colony during construction, impacts on harbor
seals and harlequin ducks, the need for an EIS, location of the project within MTCA
sites, lack of analysis of impacts on shallow waters, lack of meaningful mitigation,
communication from the project engineer only to supporters of the project, failure of the
City’s SMP to comply with the SMA and 2003 SMP Guidelines, and failure to address
and mitigate impacts to other species. The City responded to these comments that all
necessary permits and approvals, including agreement with the Lummi Nation, would
be obtained, that applicable standards would be satisfied, that required reports have
been prepared or obtained, that BAS would be applied to the project, and that required notices have been issued.

100. People for Puget Sound expressed concern regarding habitat and wildlife impacts, inconsistency with mitigation sequencing, and impacts to tribal access, fishing rights and navigation access. It suggests that an elevated walkway on land would create less impact and be less costly.

101. Frances Badgett expressed concern that the cleanup of the project site has not been slated, the new SMP has not been completed, and regarding the lack of public process, allocation of funds, unresolved issues with the Lummi Nation treaty rights, contamination of the project site, and lack of notice for the hearing.

102. Laura Leigh Brakke requested that a thorough EIS be completed for the proposal and that the outdated SMP not be used to review the project. She also expressed concern regarding the cost of and need for the proposal, the impact of driving and removing pilings in a contaminated area, lack of information regarding contamination, and impacts and limitations on public access with the proposal.

103. Kevin Cournoyer expressed concerns regarding the cost of the project, that it is unnecessary and superfluous, that the hearing was not openly publicized, that an e-mail was sent to supporters of the project, that the proposal would be contaminated with toxic compounds, that signatures from the Healthy Bay Initiative were not included in the Feasibility Study, and that cleanup is not contemplated for the area.

104. Tim Paxton expressed concern that the Lummi Nation has not yet approved the proposal, that mitigation to protect priority species has not been mentioned, that impact studies for priority species have not been provided, that the proposal has been misrepresented as having been voted on by the public, that the project site includes toxic waste sites, that Port commissioned studies showed cesium and tritium contamination near the site, that e-mails refer to possible ex parte communications with the Hearing Examiner, that there is a shoreline alternative to the proposal, that an
adequate EIS should be required, and that a complaint has been filed with the Federal Department of Transportation Inspector General regarding the process.

105. Opposition to the proposal was also expressed by William Hogan (not needed and cost), and Mark Bennett (cost).

106. Geoff Middaugh submitted comments in support of the proposal, including that he has continually heard strong support for the proposal as a liaison to the Parks and Recreation Advisory Board and South Hill Neighborhood Association, that he never received any comment urging not supporting the project, that the hearing record is thorough and complete, that there is overall public support for the project, that the environmental effects and mitigations are solidly developed and addressed, that the project has met decision criteria, that the project provides ecological restoration to a severely impacted area of the Bay, that the proposal is an improvement over past land uses, that it will make the habitat better, that the SEPA/NEPA analysis, biological assessment, and permitting processes are carefully coordinated, the nation to nation issues with Lummi Nation are respectfully addressed, that there is no need for an EIS and that he looks forward to the high-quality recreation experience the completed resource will provide.

107. Danne Neill urges support for the proposal. She indicates that she has watched the area change over a 20-year period from her home and that she uses the South Bay trail on a regular basis. She states that being on a walkway over the water provides an extremely different perspective than being on land, that the community has spent years planning and is looking forward to a new downtown waterfront, with the proposal as the first step toward revitalization of the waterfront.

108. John Blethen also supported the proposal. He stated that he has been involved with the project for over 10 years through the waterfront master planning process and the Greenways program, that the proposal is important economically to the City because it completes a water linkage from Fairhaven to the downtown waterfront and will serve as a first step in economic revitalization of the currently blighted downtown waterfront.
area left vacant after the closing of the GP mill. He states that the proposal will bring
thousands of people to the waterfront that has not been accessible for more than 100
years and will tie Boulevard Park to a new park which will cap an existing garbage
dump, and that it will be a first step in naturalizing the water’s edge with soft shoring,
native plants and near shore reconstruction.

109. The Bellingham Parks and Recreation Advisory Board commented that
protection of the environment is a central aspect of the proposal, the mitigations the
City proposes are appropriate and necessary, the Board fully supports the proposal and
this support echoes the overwhelming support of the citizens of Bellingham, there is no
substantive reason why the project should not receive a Shoreline CUP, and that the
City should make a strong effort to meaningfully consult the Lummi Nation.

110. Additional support for the proposal was received from Dee Dee Wine (owns
property immediately above the proposal, excited about improvements in the
neighborhood), Harvey Schwartz (perfect eco-friendly tie in to new waterfront
development, proposal is imaginative and practical, boardwalk one of best features in
Bellingham), Elizabeth Kianowski (strongly support, look forward to using it),
Timothy Morris (support the project), Thomas and Marilyn Olsen (strongly endorse,
frequent users of South Bay trail and Taylor Dock, proposal will extend and improve
the trail, improving health, complementing transportation, burnishing tourism,
enhancing quality of life, and leveraging development of GP site), and Barbara Curry
(wonderful project). Richard L. Sullivan stated that if the bay is cleaned-up there will
be wildlife all over and we need provisions for fishing from the walkway.

111. Wendy Harris, Frances Badgett, Laura-Leigh Brakke, Shane Roth, and Sue
Brown submitted a Motion to Remand the proposal to the Planning Department for
further review, and to reopen the public hearing after additional materials were
provided. The Motion was based on the lack of agreement between Lummi Nation and
the City, lack of completion of CAO compliance, lack of a cumulative impact analysis,
failure to resolve issues relating to toxic cleanup, problems designing an eelgrass
mitigation program, inadequate protection of water quality during construction, and failure to address legal performance standards.

112. The City has responded to this Motion indicating that the consultation with Lummi Nation is being overseen by the federal lead agency, the Federal Highway Administration (FHWA), which deferred lead status to the City, that if substantial revisions to the proposal are required due to other permitting processes the City would bring the project back to the Hearing Examiner for review, that the City requested that the public comment period be extended, and it was extended until January 7, 2011 after the November 17, 2010 hearing. It stated that a Shoreline CUP is the appropriate permit for this proposal and that compliance with both the SMP and the CAO is the correct process, that the information submitted for the Shoreline CUP includes the information required by the CAO and is embodied in the materials submitted for JARPA, the Biological Assessment and the initial and revised Mitigation Reports and the 2009 Feasibility Study. The response indicates that a cumulative impact analysis was conducted in accordance with WAC 173-27-160, that BAS is documented in the submitted materials, that the mitigating measures recommended have been incorporated into the design, and that there is not a lack of valid scientific information relating to the subject critical area. The City also states that it has not failed to protect the functions and values of critical areas, that the mitigation proposed will achieve no net loss of function, that species associated with the area have been identified as required by the regulations, that mitigation is sufficient and mitigation sequencing has been employed. The response also states that other agencies may require additional information and mitigation, that future remedial actions pursuant to MTCA is a separate permitting process, and that it is not necessary to remand the proposal or to reopen the public hearing.

113. The City also provided a No Development Alternative analysis and an evaluation of potential impacts of the proposal to the common loon, both prepared by Anchor QEA. The No Development Alternative analysis concluded that this alternative
would avoid temporary and permanent impacts, including construction noise, substrate
displacement, over-water structure location, and impairment of vessel traffic within the
project area, that environmental betterments, including the removal of creosote-treated
piles, derelict structures, early action cleanup of contaminated sediments, improvement
of existing flooding issues at Boulevard Park, removal of shoreline armoring, and
enhancement of the pocket beach and adjacent shoreline, would not occur, and that the
project’s purpose of providing an over-water pedestrian trail to link Boulevard Park to
the Cornwall Landing site would not be accomplished.

114. The evaluation of potential impacts to the common loon concluded that the loon
does not nest in the marine environment, but on freshwater lakes or ponds, that nests are
not likely to occur within 490 feet of the project site, that the species is likely
accustomed to noise due to existing train and truck traffic in the vicinity, the level of
noise generated by human activities is not expected to be more significant than existing
noises, and the project is not expected to adversely affect the common loon populations
that may be present in the project area.

115. The Hearing Examiner is not aware of any substantive ex parte communications
regarding this matter that have not been included in the public record of this proceeding,
and none have been considered in the formulation of this decision. Inquiries via e-mail
regarding scheduling of the public hearing and appeal fees were made or forwarded by
staff.

II. CONCLUSIONS OF LAW

1. Public notice of the proposal for the Shoreline CUP and public hearing was
   issued as required by provisions of the BMC and SMA.

2. Adequate opportunity for public comment was provided at the public hearing
   and through the extension of time for submission of additional written comment after
   the public hearing date.
3. Submission of additional material in support of the proposal, consisting of the No Development Alternative analysis and the Common Loon evaluation does not warrant re-opening of the public hearing. These reports provided minimal new information relevant to the proposal that was not included in previous materials.

4. Additional permits and review processes are required for the proposed development. Completion of these permitting processes is not required prior to issuance of a decision on the Shoreline CUP.

5. Requiring resolution of issues relating to treaty rights of the Lummi Nation is beyond the scope of the Hearing Examiner’s jurisdiction. The decision herein is based upon the proposal submitted by the Applicant, as modified by conditions required by the MDNS and other mitigating measures incorporated into the proposal.

6. Significant modification of the proposal as a result of conditions imposed by other agencies or resolution of treaty issues may require additional review of the Shoreline CUP.

7. The Applicant has adequately addressed the issues relevant to the Shoreline CUP allowing a decision on the proposal.

8. Section 26G of the SMP allows public access facilities to be constructed in and over the water in Conservancy II and III environments. In and over water construction of a public walkway is a permitted use in the Urban Maritime environment. It is not clear that the proposal requires a Shoreline CUP. However, the proposal has been processed as a Shoreline CUP, the Director of Planning and Community Development has interpreted the SMP to require a Shoreline CUP for the proposal, and the Applicant has not contested the requirement. The decision contained herein assumes that a Shoreline CUP is required for the proposal but is not a determination that one is required.

9. Because the City’s updated SMP, approved by the City in 2009, has not yet been approved by the DOE and is not yet in effect the proposal is governed by the 1989 SMP. It is also required to comply with the City’s CAO.
10. A Shoreline CUP must comply with the provisions of the SMP, WAC 173-27-160, and the policies of RCW 90.58.020.

11. The Applicant has demonstrated compliance with the requirements of the SMP.

12. The Applicant has demonstrated consistency with the policies of RCW 90.58.020. The proposal is for a public use, providing recreational access to the shoreline for citizens of Bellingham and visitors from other areas, designed to protect the resources and ecology of the shoreline and restore some of the natural character of the shoreline that is not currently existing. It will limit large vessel navigation within the project area, but will result in an overall increase in public access, recreational opportunities and public benefit.

13. The Applicant has demonstrated compliance with the requirements of WAC 173-27-160(1). The proposal will not interfere with the normal public use of public shorelines. The proposal will increase public use of the shorelines. Existing public uses will remain and be enhanced. The proposed use of the site and design of the project is compatible with other authorized uses of the area and uses planned for the area. The proposal is included in planning documents adopted by the City and is part of a master plan for public access and recreation throughout the area. With required mitigation and monitoring the proposal will not cause significant adverse effects to the shoreline environment. Remedial measures included in the proposal will improve the shoreline ecology. The public interest will not suffer substantial detrimental effects from the proposal, but will be served by it.

14. The cumulative impact analysis required by WAC 173-27-160(2) for a shoreline conditional use is an analysis of cumulative impacts from similar requests for conditional uses in the area where similar circumstances exist. The Applicant has demonstrated that it is unlikely that additional requests for similar conditional uses within the same environments will be made or add cumulative impacts.

15. The Applicant has demonstrated that the proposal complies with the requirements of Section 13E of the SMP. The proposal is consistent with the purpose.
and intent of the Urban Maritime and Conservancy II and III designations and the general intent of the SMP.

16. CAO permits are administered by the Planning and Community Development Department. A CAO permit is required for the abutments. It is required to comply with the requirements of the CAO. No development is permitted until compliance has been demonstrated and permits issued. The Applicant has demonstrated that the proposal can comply with the requirements of the CAO. This decision is not a determination that a CAO permit shall be issued. The Department has authority to determine compliance and require additional information and conditions, subject to appeal as provided in the CAO.

17. Issues of cost of the proposal and desirability of the project are outside the scope of the Hearing Examiner's authority. These issues are determined by the City administration and City Council, with input from various advisory bodies and the public.

18. The decision to approve, deny or condition a shoreline conditional use is based on compliance with the criteria specified in the SMA, applicable portions of the Washington Administrative Code, the SMP and the Bellingham Municipal Code.

19. A decision of the Hearing Examiner to approve a shoreline conditional use is forwarded to the DOE which has the final authority to approve, deny and/or condition the proposal. The decision of the DOE is subject to appeal to the Shorelines Hearings Board.

20. Any Finding of Fact that should be denominated a Conclusion of Law shall be deemed to be a Conclusion of Law. Any Conclusion of Law that should be denominated a Finding of Fact shall be deemed to be a Finding of Fact.

III. ORDER

The Motion to Remand is denied.
The proposed Shoreline CUP for a public access over-water walkway between the Cornwall landfill site and Boulevard Park, together with abutments at each end and removal of derelict structures and rip-rap, as described in the materials submitted in support of the proposal, is approved, subject to the following conditions:

1. This approval is subject to review and final determination by the Department of Ecology (DOE), which may approve, deny, or approve with conditions, all or part of the proposal.

2. The approved Shoreline Conditional Use Permit (CUP) shall be substantially as proposed, including the elements and features described in this decision, the attached site plan (Exhibit A), and/or in the Staff Report, together with any modifications necessary to comply with this Order or a decision approving or approving with conditions issued by the DOE, and minor modifications necessary to comply with approvals required by other agencies with jurisdiction. A modification shall be considered minor for purposes of this decision if it has no significant adverse effect on the public use and benefit of the proposal, compliance with the Shoreline Management Act (SMA) and Shoreline Master Program (SMP), and/or the shoreline environment. A significant realignment of the walkway, change in location of abutments, significant decrease in the height of the walkway above the water, or significant change in the decking, lighting, or in-water materials, shall not be considered a minor modification.

3. The use shall comply with all conditions of Mitigated Determination of Non-Significance No. SEP2010-00027, Exhibit C to the Staff Report.

4. Lighting on portions of the walkway where grated decking is located shall be directed away from the water surface.

5. Grading and filling activities required to develop the abutments shall not occur between October 1st and May 1st of any year.

6. Construction activities shall observe all required work windows prescribed by other agencies with jurisdiction.
7. All required permits and approvals shall be obtained prior to development of the use. The Applicant shall comply with all applicable regulations, or obtain variances therefrom, in the design, location, construction and operation of the use.

8. The Shoreline CUP is subject to all conditions imposed in the Substantial Development Permit issued for the proposal.

ENTERED this 4th day of February 2010.

Bellingham Hearing Examiner

Dawn Sturwold