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**THE HEARING EXAMINER OF THE CITY OF BELLINGHAM  
WHATCOM COUNTY, WASHINGTON**

<b>IN RE:</b>  <b>PORT OF BELLINGHAM, Applicant</b>  <b>Roeder Avenue Bridge</b>  <b>SHR2023-0029 and SHR2023-0030 /</b> <b>Substantial Development Permit and</b> <b>Shoreline Conditional Use Permit</b>	<b>HE-24-PL-005</b>  <b>FINDINGS, CONCLUSIONS, AND</b> <b>DECISIONS</b>  <b>SHARON RICE, HEARING EXAMINER</b>
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**SUMMARY OF DECISIONS**

The requested shoreline conditional use and substantial development permits to authorize installation of power and telecommunications conduit banks on the underside of the Roeder Avenue Bridge in Bellingham, Washington are **APPROVED** subject to conditions.

**SUMMARY OF RECORD**

**Request:**

Susan Driver of David Evans & Associates, on behalf of the Port of Bellingham (Applicant), requested approval of shoreline conditional use and substantial development permits to allow installation of power and telecommunications conduit banks on the underside of the Roeder Avenue Bridge in Bellingham, Washington. A total of 12, new over-water conduits ranging from two to six inches in diameter are proposed to be attached to the existing bridge.

**Hearing Date:**

The Bellingham Hearing Examiner conducted a virtual open record hearing on the request on April 10, 2024. The record was held open two business days to allow for public comment, with additional days for responses by the parties. No post-hearing public comment was submitted, and the record closed on April 12, 2024.

1 No in-person site visit was conducted, but the Examiner viewed the project location on  
2 Google maps.

3 **Testimony:**

4 At the hearing the following individuals presented testimony under oath:

5 Steve Sundin, City of Bellingham Senior Planner

6 Susan Driver, David Evans & Associates, Applicant's Representative

7 Igor Kasko, Port of Bellingham

8 **Exhibits:**

9 At the open record hearing, the following exhibits were admitted in the record:

10 Exhibit 1 Planning and Community Development Department Staff Report to the  
11 Examiner on the shoreline conditional use permit, dated November 9, 2022,  
12 with the following attachments:

13 A. Project Site Plan / Design Plans

14 B. Aerial Vicinity and Shoreline Designation Maps

15 C. Application Materials for Shoreline Substantial Development Permit  
16 (SDP), Shoreline Conditional Use Permit (SCUP), and SEPA  
Determination

17 D. Applicant's Justification for SCUP

18 E. Habitat Memo, JARPA, and Criteria for Critical Saltwater Habitat

19 After consideration of the testimony and exhibits submitted, the Hearing Examiner  
20 enters the following findings and conclusions:

21  
22 **FINDINGS**

23 *Site Conditions and Context*

24 1. Susan Driver of David Evans & Associates, on behalf of the Port of Bellingham  
25 (Applicant), requested approval of shoreline conditional use and substantial  
26 development permits to allow installation of power and telecommunications  
27 conduit banks on the underside of the Roeder Avenue Bridge in Bellingham,  
Washington.<sup>1</sup> The full project site extends from C Street to Central Avenue.  
28 *Exhibits 1 and 1.F.*

29 <sup>1</sup> The right-of-way in which the project is proposed is located in a portion of Section 30, Township 38  
30 North, Range 3 East, W.M., Whatcom County. *Exhibit 1.F, JARPA.*

- 1 2. The Roeder Avenue Bridge is within Area 6 of City Center Neighborhood and  
2 within the Waterfront District. The bridge crosses over the Whatcom  
3 Waterway, which is the mouth of Whatcom Creek where it enters Bellingham  
4 Bay. The bridge is currently used as a transportation corridor serving industrial  
5 and commercial businesses along Bellingham's waterfront. This portion of  
6 Roeder Avenue is in the industrialized waterfront of downtown Bellingham,  
7 which has been used for industrial purposes since the founding of the Port of  
8 Bellingham in 1920; most of the original waterfront activities revolved around  
9 logging mills. Due to the history of industrial and transportation uses in the  
10 immediate project vicinity, there is very little native vegetation in or adjacent to  
11 the project area, and the only vegetation present is Himalayan blackberry and  
12 other invasive weeds. Adjacent properties are used as industrial and commercial  
13 businesses, including railroad, a diesel engine repair company, and the Granary  
14 building. *Exhibits 1, 1.B, and 1.F.*
- 15 3. The bridge is 45 feet wide and approximately 525 feet long, and its surface is  
16 improved with a two-lane arterial with bike lanes on each side and a 10-foot  
17 sidewalk on the south side facing the Whatcom Waterway. It parallels an active  
18 Burlington Northern Santa Fe railroad to the north. Both bridges are supported  
19 by pilings. A 48-inch City sewer trunk main also supported by pilings is located  
20 between the two bridges. All three linear features are located at the mouth of  
21 Whatcom Creek. North of the railroad bridge, another bridge crosses Whatcom  
22 Creek at West Holly Street, which severely constricts high flows because the  
23 opening is approximately 25 feet wide. While the in-water and upland areas  
24 between West Holly Street and Roeder Avenue are heavily impacted by  
25 remnant pilings, concrete chunk stabilized stream banks, and invasive species,  
26 the area upstream of the Holly Street crossing has been remediated and enjoys  
27 better intertidal function. *Exhibit 1.*
- 28 4. Whatcom Creek is a 303(d)-listed Category 2 water violating standards for low  
29 dissolved oxygen levels set by the Washington Department of Ecology. In  
30 addition, inner Bellingham Bay (including the mouth of Whatcom Creek) is  
303(d)-listed as a Category 4A sediment TMDL area, with numerous  
contaminants identified. Despite these existing impacts, the entire estuary  
comprising Whatcom Waterway downstream of the Roeder Avenue bridge and  
upstream to the base of the Whatcom Creek falls is active habitat for marine  
mammals including seals, otters, mink, birds, salmonids (chum, chinook, and  
steelhead), bull trout, and many other marine species, several of which are listed  
as threatened or endangered in the federal Endangered Species Act and/or the  
Washington Department of Fish and Wildlife priority habitat and species

1 (WDFW PHS) list. There are no wetlands in or adjacent to the project area.  
2 *Exhibits 1 and 1.F.*

- 3 5. Whatcom Creek and the adjacent upland areas within 200 feet of the ordinary  
4 high-water mark of either bank are subject to the jurisdiction of the Washington  
5 State Shoreline Management Act as implemented through the Bellingham  
6 Shoreline Master Program (SMP), codified in Bellingham Municipal Code  
7 (BMC) Title 22. As identified in BMC Table 22.11.030.B, Whatcom Creek is a  
8 shoreline of the state, which requires a standard buffer of between 50 and 75  
9 feet. The proposed work under the Roeder Avenue bridge would be located  
10 within the Aquatic shoreline environment, and the upland trenched portions  
11 would be in the creek's buffer within the shoreline mixed-use sub-area of the  
12 Waterfront District shoreline environment. *Exhibits 1 and 1.F; BMC*  
13 *22.11.030.B.* The portion of Whatcom Creek where the project is proposed  
14 meets the SMP's definition of critical saltwater habitat. *BMC 22.08.040;*  
15 *Exhibit 1.F.*
- 16 6. The proposed work in the shoreline jurisdiction triggers the requirement for  
17 shoreline permits. The installation of over-water utility conduits in the Aquatic  
18 shoreline environment requires a shoreline conditional use permit (SCUP). *BMC*  
19 *22.03.030.E(4).* The upland portion of the project, all of which is proposed  
20 underground and under existing right-of-way improvements, is located wholly  
21 with the shoreline jurisdiction on either side of the water body. The Roeder  
22 Avenue bridge sits on the dividing line between two different upland shoreline  
23 designations. Upstream of the bridge, shorelands are designated Urban  
24 Conservancy environment. Downstream of the bridge, shorelands are designated  
25 Waterfront District shoreline mixed use. *See Exhibit 1.C, .pdf page 7.* Both  
26 upland shoreline designations allow utilities; however, non-exempt development  
27 within shoreline jurisdiction that exceeds \$8,504.00 in fair market value requires  
28 approval of a shoreline substantial development permit (SDP).<sup>2</sup> In this case, the  
29 non-water oriented utility improvements are not an exempt activity, their fair  
30 market value would exceed \$8,504.00, and an SDP is required. *Exhibits 1 and*  
*1.F (Section 6.g); BMC 22.05.020.B(1)(a); BMC 22.08.010.B(4)(d).* While the  
City's Hearing Examiner is authorized to issue the City's final decision on each  
permit, shoreline conditional use permits must be reviewed by and receive final  
approval from the Washington State Department of Ecology. *BMC 22.06.010.B;*  
*22.06.050.D and .F.*

<sup>2</sup> *Washington State Register (WSR) 22-11-036, as acknowledged in BMC 22.05.020.B(1)(a).*

1 *Proposed Development*

- 2 7. In the Aquatic environment, the project would attach 12 power and  
3 telecommunication conduits ranging from two to six inches in diameter to the  
4 underside of the bridge in prefabricated conduit banks. At project completion,  
5 the conduit banks would not extend any lower than the existing bridge girders.  
6 For the upland portions of the project in the Waterfront District mixed-use  
7 shoreline environment, the contractor would core through the east and west  
8 wingwalls and excavate a trench under the concrete approach slabs within the  
9 Roeder Avenue right-of-way east to Central Avenue and west to C Street. The  
10 ends of the new conduit would connect to existing conduit facilities that  
11 continue outside the shoreline jurisdiction. The project would complete an  
12 existing gap in fiber optic service and would add electric capacity to serve  
13 potential future development in the Waterfront District. *Exhibits 1, 1.A, 1.C,*  
14 *and 1.F.*
- 15 8. All work is proposed on, in, or under existing right-of-way improvements, co-  
16 located with existing bridge and utility infrastructure. No undeveloped areas  
17 within the shoreline jurisdiction would be disturbed, and no riparian vegetation  
18 would be impacted. As proposed, there would be no in-water work and no work  
19 below the 100-year flood plain elevation. Construction in the Aquatic  
20 environment is proposed to occur either from a barge secured to the bridge or  
21 from a platform suspended from the underside of the bridge. No equipment  
22 would anchor in the waterway below, avoiding impacts to the inter-tidal bed  
23 lands. In either case, netting, tarps, or similar mechanisms would be hung  
24 beneath the work area to catch pieces of the bridge resulting from drilling,  
25 fastening, and any tools or equipment used. The Applicant would prepare and  
26 implement a construction stormwater pollution prevention plan (SWPPP). The  
27 installed conduit banks would not increase shading over Whatcom Creek and  
28 would not change the hydraulic capacity of the stream channel because the  
29 conduit would be contained within the existing structure of the bridge. Based on  
30 the opinion of a qualified professional consultant who prepared a critical  
saltwater habitat assessment for the project, no net loss of shoreline ecological  
functions would result. The finished project would not reduce or alter public  
access to the upstream or downstream of the project site, nor obstruct views of or  
from either the shoreline or the waterway. Once constructed, the utility facility  
would not be visible, and it would not hinder any potential future efforts to  
improve the ecological function of the waterway below and in the vicinity of the  
bridge. *Exhibits 1 1.A, 1.E, and 1.F.*
9. The proposed utilities would serve the general public by filling an existing gap in  
facilities to transmit electricity and fiber-optic communications across the

1 waterway and would have the capacity to increase service to the marine trades,  
2 log pond, and shipping terminal sub-area in the waterfront district and other Port  
3 properties to the west. *Exhibits 1 and 1.F.*

4 10. Given the need for physical utility lines to cross the waterbody, the Applicant  
5 indicated that no alternative alignment that avoids critical saltwater habitat is  
6 feasible. Staff offered that the alternative means of getting utilities across the  
7 waterway would consist of boring (via directional drill) at least 500 linear feet  
8 underneath both wing walls among known and unknown existing and remnant  
9 pilings and other barriers that may be buried in the bed lands of the channel. Not  
10 only would such an undertaking cost considerably more than the proposal, it  
11 could introduce additional risk in terms of a boring machine getting damaged,  
12 stuck, or veering significantly of course. *Exhibit 1; Testimony of Steve Sundin  
13 and Susan Driver.*

14 11. Planning Staff accepted the Applicant's consultant's critical saltwater habitat  
15 assessment (see Exhibit 1.F) as meeting the critical area study requirements of  
16 Code. *Exhibit 1; BMC 22.08.040.B(2); BMC 22.06.020.*

17 12. The roads, railways, and utilities section of the shoreline master program  
18 acknowledges that utilities are necessary to provide efficient public circulation  
19 and the shipment of goods and services and requires utilities to be collocated  
20 within existing rights-of-way, to be undergrounded, and to avoid critical areas to  
21 the maximum extent feasible. *BMC 22.09.110.A.* The Applicant submitted, and  
22 Planning Staff concurred, that the proposal meets the intent of these provisions.  
23 *Exhibits 1, 1.A, and 1.F.*

24 13. Addressing the prohibition adopted in BMC 22.08.040.B(1) against new  
25 structures of any kind in or over critical saltwater habitats unless (among other  
26 requirements) they are associated with a water-dependent use, Planning staff  
27 offered the following analysis.

28 Please note that subsection 1 specifies that the only way a structure can be  
29 constructed over critical saltwater habitats is if it is associated with a water-  
30 dependent use. However, BMC 22.08.010 B 4 allows bridges and utilities to  
cross over shorelines of the state, regardless of the nature of the utility or the  
purpose it solves. So, there is an inherent unintended conflict between the two  
sections.

The Roeder Avenue bridge was constructed before 1950 and was expanded in  
approximately 1994 / 1995 to its current configuration. The rule above was  
instituted in 2013 and was intended to address new over and in-water structures  
in marine waters, i.e., piers, floats, pilings, wharves, mooring dolphins, etc. The

1 'use' is already existing and attaching a utility conduit banks to the underside of  
2 it do not materially expand or intensify the use or its dimensional configuration,  
3 and most notably, its impact.

4 Therefore, given the above, staff concludes that the proposal is consistent with  
5 this subsection because it; will result in no net loss of existing shoreline  
6 ecological function, it avoids direct impacts to critical saltwater habitats and, it  
7 does not infringe on the public trust doctrine.

8 *Exhibit 1; Steve Sundin Testimony.*

- 9 14. Addressing the required cumulative impact analysis, Planning Staff submitted  
10 that future similar project proposing to install utility conduits on existing bridges  
11 across waterways, if designed and conditioned to require all improvements  
12 outside of the 100-year floodplain and outside of the ordinary high water mark,  
13 would minimize if not avoid impacts to shoreline ecological functions and would  
14 not affect existing public access or future habitat restoration opportunities.

15 *Exhibit 1.*

- 16 15. The project would require the Applicant to receive hydraulic project approval  
17 (HPA) from the Washington Department of Fish and Wildlife and a Section 10  
18 permit from the US Army Corps of Engineers for work in navigable waters.  
19 *Exhibit 1.F.* Each would require additional review for potential impacts, and  
20 each would be subject to additional conditions by the various agencies.

21 *Public Hearing Process*

- 22 16. The Applicant submitted applications for SDP, SCUP, and review pursuant to  
23 the State Environmental Policy Act (SEPA) on December 18, 2023. The  
24 applications were determined to be complete on February 6, 2024, and a notice  
25 of complete application, public hearing, and optional SEPA determination of  
26 non-significance was issued on that date commencing a public comment period  
27 ending March 7, 2024. This notice was mailed to owners of property within 500  
28 feet of the project and was posted at the project location. Additional notice of  
29 the hybrid open record permit hearing on the consolidated shoreline permit  
30 applications was mailed to surrounding property owners on March 26. The City  
received no comment on the proposal. *Exhibits 1 and 1.D; Steve Sundin  
Testimony.*

17. Having assumed the role of lead agency for the review of impacts to the  
environment pursuant to SEPA, on March 27, 2024, the Planning and  
Community Development Department issued a final determination of non-  
significance (DNS) for the proposal (SEP2023-0041). *Exhibit 1.D.*

1 18. At hearing, having heard all testimony, Planning Staff maintained their  
2 recommendation for approval of the shoreline permits with the conditions stated  
3 in the staff report. *Exhibit 1; Steve Sundin Testimony*. An Applicant  
4 representative waived objection to the recommended conditions. *Susan Driver*  
5 *Testimony*.

## 6 CONCLUSIONS

### 7 Jurisdiction:

8 The Hearing Examiner is granted authority to hold hearings and make decisions on  
9 shoreline conditional use permit applications pursuant to BMC 2.56.050.B(10).  
10 Pursuant to BMC 21.10.060, an Applicant may consolidate related applications of  
11 different review types, making them all subject to the highest review process. In such  
12 cases, the Hearing Examiner has jurisdiction to hear applications for shoreline  
13 substantial development permits.

### 14 Shoreline Conditional Use Permit:

15 Pursuant to BMC 22.06.050, the following provisions apply to applications for  
16 shoreline conditional use permits.

- 17 A. The purpose of the conditional use provision is to provide more control and  
18 flexibility for implementing the regulations of the master program in a manner  
19 consistent with the policies of the Act. In authorizing a conditional use, special  
20 conditions may be attached to the permit by the city or department to prevent  
21 undesirable effects of the proposed use and/or to assure consistency of the  
22 project with the Act and this program.
- 23 B. An applicant for a substantial development permit which also requires a  
24 conditional use permit shall submit applications for both permits simultaneously  
25 pursuant to Chapter 21.10 BMC.
- 26 C. Prior to the granting of a conditional use permit, as specifically required by this  
27 program or for uses which are not classified as such by this program, the  
28 applicant shall demonstrate all of the following:
- 29 1. The provisions spelled out in the master program have been met and the  
30 proposed use is consistent with the policies of the Act;
  2. The proposed use will cause no significant, adverse impacts to the shoreline  
environment, ecological functions, or other uses;
  3. The proposed use will not interfere with the normal public use of public  
shorelines;



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- 4. 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 the program;
- 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;
- 6. The proposed use(s) shall provide a long-term public benefit in terms of providing public access or implementing habitat restoration that is consistent with the goals of this program; and
- 7. That the public interest shall suffer no substantial detrimental effect.

- D. The hearing examiner or department may require additional conditions as are necessary to ensure proper compliance with the intent and purpose of the environment designation and master program or to insure (*sic*) protection of the surrounding environment and uses.
- E. In the granting of conditional use permits, consideration shall be given to the cumulative environmental 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 sum of the conditional uses and their impacts shall also remain consistent with the policies of RCW 90.58.020 and shall not produce a significant adverse effect to the shoreline environment.
- 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 per WAC 173-27-160.
- G. The hearing examiner or department may require additional conditions as are necessary to insure (*sic*) proper compliance with the intent and purpose of the environment designation and master program or to insure protection of the surrounding environment and uses.
- H. In the granting of conditional use permits, consideration shall be given to the cumulative environmental 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 sum of the conditional uses and their impacts shall also remain consistent with the policies of RCW 90.58.020 and shall not produce a significant adverse effect to the shoreline environment.

1 I. Any conditional use permit granted by the city must be forwarded to the  
2 Department of Ecology for its approval, or approval with conditions, or denial  
3 per WAC 173-27-160.

4 **Shoreline Substantial Development Permit:**

5 Pursuant to BMC 22.06.030, the following provisions apply to applications for  
6 shoreline substantial development permits.

7 A. A substantial development permit shall be obtained for all proposed use and  
8 development of shorelines unless the proposal is specifically exempt pursuant to  
9 BMC 22.05.020(A) and (B)(1).

10 B. Shoreline permits that include analysis and regulation of critical areas pursuant  
11 to BMC 22.08.030, Critical areas, shall comply with the applicable critical areas  
12 reports and mitigation plan submitted pursuant to BMC 22.06.020, Submittal  
13 requirements, as well as the general and specific performance standards  
14 specified in BMC 22.08.060 through 22.08.080.

15 C. In order to be approved, the director must find that the proposal is consistent  
16 with the following criteria:

17 1. All regulations of this program appropriate to the shoreline designation  
18 and the type of use or development activity proposed shall be complied  
19 with, except those bulk and dimensional standards that have been  
20 modified by approval of a shoreline variance under BMC 22.06.040,  
21 Variances.

22 2. All policies of this program appropriate to the shoreline designation and  
23 the type of use or development activity proposed shall be considered and  
24 substantial compliance demonstrated. A reasonable proposal that cannot  
25 fully conform to these policies may be permitted, provided it is  
26 demonstrated that the proposal is clearly consistent with the overall  
27 goals, objectives and intent of the program.

28 3. For projects located on shorelines of statewide significance, the policies  
29 of Chapter 22.04 BMC shall also be adhered to.

30 **Other Applicable Provisions:**

*A. Shoreline Management Act*

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971,  
establishes a cooperative program of shoreline management between the local and state  
governments with local government having the primary responsibility for initiating the  
planning required by the chapter and administering the regulatory program consistent  
with the Act. The Bellingham Shoreline Master Program (BMC Title 22) provides

1 goals, policies, and regulatory standards for ensuring that development within the  
2 shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

3 The intent of the policies of RCW 90.58.020 is to foster “all reasonable and appropriate  
4 uses” and to protect against adverse effects to the public health, the land, and its  
5 vegetation and wildlife. The SMA mandates that local governments adopt shoreline  
6 management programs that give preference to uses (in the following order of  
7 preference) that: recognize and protect the statewide interest over local interest;  
8 preserve the natural character of the shoreline; result in long term over short term  
9 benefit; protect the resources and ecology of the shoreline; increase public access to  
10 publicly owned areas of the shorelines; and increase recreational opportunities for the  
11 public in the shoreline. The public’s opportunity to enjoy the physical and aesthetic  
12 qualities of natural shorelines of the state is to be preserved to the greatest extent  
13 feasible consistent with the overall best interest of the state and the people generally.  
14 To this end, uses that are consistent with control of pollution and prevention of damage  
15 to the natural environment, or are unique to or dependent upon use of the state’s  
16 shoreline, are to be given preference.

13 *B. Applicable regulations from the Washington Administrative Code*  
14 WAC 173-27-140 Review criteria for all development.

- 15 a. No authorization to undertake use or development on shorelines of the state shall  
16 be granted by the local government unless upon review the use or development  
17 is determined to be consistent with the policy and provisions of the Shoreline  
18 Management Act and the master program.
- 19 b. No permit shall be issued for any new or expanded building or structure of more  
20 than thirty-five feet above average grade level on shorelines of the state that will  
21 obstruct the view of a substantial number of residences on areas adjoining such  
22 shorelines except where a master program does not prohibit the same and then  
23 only when overriding considerations of the public interest will be served.

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

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

1 *C. Applicable Provisions of the City's Shoreline Master Program*

2 BMC 22.02.020: Shoreline Goals and Objectives

3 A. Shoreline Use. The shoreline use element considers the proposed general  
4 distribution and general location and extent of the use of shorelines and adjacent  
5 land areas for housing, business, industry, transportation, agriculture, natural  
6 resources, recreation, education, public buildings and grounds, utilities and other  
7 categories of public and private land use.

8 1. Goal.

9 a. Coordinate shoreline uses to insure uses that result in long-term over  
10 short-term benefit, protect and restore the shoreline resources and  
11 ecological functions, increase public access to the shoreline, and promote  
12 economic development and accommodate water-dependent uses.

13 BMC 22.03.030 E: Aquatic Shoreline Designation

14 1. Purpose. Protect, restore, and manage the unique characteristics of the aquatic  
15 environment.

16 2. Management Policies.

17 a. Aquatic uses should not adversely impact critical saltwater and freshwater  
18 habitats or their connectivity for salmonids and other aquatic and terrestrial  
19 species that migrate within the near-shore environment.

20 b. New aquatic uses should only be allowed for water-dependent uses, public  
21 access or ecological restoration and enhancement.

22 c. All developments and uses within navigable waters or their bedlands should  
23 be located and designed to minimize interference with surface navigation, to  
24 consider impacts to public views, and to allow for the safe unobstructed  
25 passage of aquatic species and wildlife, particularly those species using  
26 those areas for rearing and/or migration.

27 ...

28 e. Aquatic uses and modifications should be designed and managed to prevent  
29 degradation of water quality and alteration of natural hydrologic conditions  
30 including sediment transport and benthic drift patterns.

3. Designated Waterbodies.

a. Areas waterward of the OHWM for all shorelines within the city including  
wetlands and Bellingham Bay out to the jurisdictional limits of the city.

4. Permitted Uses: Roads, Railways and Utilities are specified as conditional uses  
in the aquatic shoreline designation.

5. Regulations.

- 1 a. For development and uses within critical areas or their buffers that occur in
- 2 the shoreline jurisdiction, the applicable provisions of this program shall
- 3 apply.
- 4 b. When aquatic development occurs within shorelines of statewide
- 5 significance, the policies in Chapter 22.04 BMC shall also apply.
- 6 c. Aquatic uses shall not result in a net loss of shoreline ecological function.
- 7 d. Development shall be consistent with the development regulation matrix in
- 8 BMC 22.11.030(E), Development regulation matrices.
- 9 e. Aquatic uses shall not disrupt the hydrologic function of the water body in
- 10 terms of current, wave action or tidal influence.
- 11 ...
- 12 g. Aquatic uses shall not interfere with water-dependent uses or compromise
- 13 the public's ability to safely enjoy access to the shoreline and aquatic areas
- 14 from uplands and from the water.

13 BMC 22.03.030.F: Waterfront District

- 14 ...
- 15 4.b. Permitted Uses Within the Waterfront District Shoreline Mixed-Use Sub-Areas.
- 16 i. Those uses specified in subsections (F)(4)(a)(i) through (vii) of this section;
  - 17 and
  - 18 ii. Non-water-oriented uses within a shoreline mixed-use structure subject to
  - 19 the requirements in subsection (F)(6) of this section.
  - 20 iii. Any water-oriented or non-water-oriented use that includes preservation
  - 21 and/or adaptive reuse of historic structures.
  - 22 iv. Standalone non-water-oriented uses between the north line of Myrtle Street
  - 23 (extended) and the north line of Oak Street (extended).
- 24 ...

23 F.6 Regulations within the waterfront district mixed-use sub-area are as follows:

- 24 a. Development shall result in no net loss of shoreline ecological functions.

25 BMC 22.04: Shorelines of Statewide Significance

- 26 ...
- 27 B. This master program gives preference in the following order to uses that:
- 28 1. Recognize and protect the statewide interest over local interest;
  - 29 2. Preserve the natural character of the shoreline;

3. Result in long-term over short-term benefit;
4. Protect the resources and ecology of the shoreline;
5. Increase public access to publicly owned areas of the shoreline;
6. Increase recreational opportunities for the public in the shoreline; and
7. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

BMC 22.08: General Regulations

22.08.010: Shoreline Buffers

A. Policies.

1. Protection of and uses allowed within shorelines and their associated buffers as specified in this title shall be managed in a manner that results in no net loss of shoreline ecological function.
2. The city via the provisions within this title should protect shorelines and their buffers so that they continue to contribute to existing ecosystem-wide processes and shoreline ecological functions.

B. Regulations

...

4. The following specific activities may only be permitted as part of an authorized use and subject to submittal of a critical area report within a shoreline, or a critical area within shorelines and/or their required buffers when they comply with the applicable policies and regulations of this chapter and Chapters 22.03, 22.04 and 22.09 BMC:

...

- d. Public Utility Facilities. New utility lines and facilities may be permitted to cross watercourses in accordance with an approved critical area report and shall comply with the policies and regulations within BMC 22.09.110, Roads, railways, and utilities; ....

BMC 22.08.020: Mitigation sequencing

- A. For all developments, applicants shall demonstrate that all reasonable efforts have been examined with the intent to avoid and minimize impacts to shoreline ecological functions. Applicants shall follow the mitigation sequential descending order of preference below:

1. Avoiding the impact altogether by not taking a certain action or parts of an action;

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2. 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;
3. Rectifying the impact to wetlands, critical aquifer recharge areas, frequently flooded areas, and habitat conservation areas and their associated buffers, by repairing, rehabilitating, or restoring the affected environment to the equivalent or better than the conditions existing at the time of the initiation of the project;
4. Reducing or eliminating the impact or hazard over time by preservation and maintenance operations during the life of the action or project;
5. Compensating for the impact to wetlands, critical aquifer recharge areas, frequently flooded areas, and habitat conservation areas and their associated buffers by replacing, enhancing, or providing substitute resources or environments; and
6. Monitoring the hazard or other required mitigation and taking remedial action and appropriate corrective action to fully restore the intended ecological functions of the mitigation action, as proposed.

BMC 22.08.040: Critical saltwater habitats (fish and wildlife habitat conservation areas)

A. Policies

1. Development within critical saltwater habitats including, but not limited to, designated habitats of local significance, all kelp beds, eelgrass beds, spawning and holding areas for forage fish, such as herring, smelt and sand lance, subsistence, commercial and recreational shellfish beds, mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association, should result in no net loss of ecological function, comply with the applicable requirements in this title and those specific use policies and regulations in Chapter 22.09 BMC.
2. Protection of critical saltwater habitats should incorporate the participation of resource agencies including tribal nations to assure consistency with other legislatively created mandates and programs in addition to local and regional government entities. (Including but not limited to Washington State Department of Fish and Wildlife, Lummi Nation, Nooksack Tribe, Port of Bellingham, Puget Sound Action Team, Department of Ecology.)
3. Permitted uses adjacent to or within critical saltwater habitats should not compromise the ability to restore these features in the future.

1 B. Regulations

- 2 1. No structures of any kind shall be placed in or constructed over critical  
3 saltwater habitats unless they result in no net loss of ecological function, are  
4 associated with a water-dependent use, comply with the applicable  
5 requirements within this chapter and Chapter 22.09 BMC and meet all of the  
6 following conditions:
- 6 a. The project, including any required mitigation, will result in no net loss  
7 of ecological functions associated with critical saltwater habitat;
  - 8 b. Avoidance of impacts to critical saltwater habitats by an alternative  
9 alignment or location is not feasible or would result in unreasonable and  
10 disproportionate cost to accomplish the same general purpose;
  - 11 c. The project is consistent with the state's interest in resource protection  
12 and species recovery;
  - 13 d. The public's need for such an action or structure is clearly demonstrated  
14 and the proposal is consistent with protection of the public trust, as  
15 embodied in RCW 90.58.020;
  - 16 e. Shorelands that are adjacent to critical saltwater habitats shall be  
17 regulated per the requirements within this program.
- 18 2. A qualified professional shall demonstrate compliance with the above  
19 criteria in addition to the required elements of a critical area report as  
20 specified in Chapter 22.06 BMC.

19 BMC 22.08.090: Public access

20 Public access includes the ability of the general public to reach, touch, and enjoy the  
21 water's edge, to travel on the waters of the state, and to view the water and the shoreline  
22 from adjacent locations. Examples include but are not limited to public parks, trails,  
23 piers and boardwalks, view overlooks, street ends, beaches, boating facilities, hand-  
24 carry craft launches/pullouts, and water-borne public transportation. The public access  
25 provisions below apply to all shorelines of the state unless stated otherwise.

24 A. Policies

- 25 1. Public access, in its variety of forms, should be promoted whenever feasible  
26 provided the result is no net loss of the shoreline's ecological function.
- 27 2. Public access should be provided to the shoreline as a primary use or as  
28 development occurs while protecting private property rights and public  
29 safety.
- 30 3. Public access should not compromise the rights of navigation and space  
necessary for water-dependent and water-related uses.



- 1 4. To the greatest extent feasible and consistent with the overall best interest of  
2 the state and the people generally, the public's opportunity to enjoy the  
3 physical and aesthetic qualities of shorelines of the state, including views of  
the water, should be protected.

4 B. Regulations

- 5 1. When public access is provided, it shall not result in a net loss of existing  
6 shoreline ecological function.

7 ...

- 8 4. Public access, whether developed as a primary use or as a required element  
9 of a permitted use, and where applicable, shall be provided and designed  
10 consistent with applicable and adopted public access plans such as the City  
11 of Bellingham Park, Recreation and Open Space Plan (2005), public access  
plans as specified in BMC 22.02.010, General goals and policies, applicable  
neighborhood plans and/or the Waterfront District Master Plan, as adopted.

12 BMC 22.09.110: Roads, railways and utilities

13 Roads, railways and utilities are necessary to provide efficient public circulation and the  
14 shipment of goods and services. These transportation circuits can include but are not  
15 limited to roads, highways and interstates, rail lines and spurs, public service water and  
16 sewer mains, power generation, transmission and distribution facilities, and wireless  
communication facilities.

17 A. Policies.

18 ...

- 19 9. Whenever feasible, utilities should be co-located within existing right-of-  
20 way corridors.

- 21 10. Utilities within shorelines should be under-grounded and their visual impact  
22 minimized to the extent feasible.

23 B. Regulations

24 ...

- 25 10. New utilities shall avoid critical areas to the maximum extent feasible.

26 ...

- 27 12. New utilities when necessary to be located within shorelines shall be located  
28 underground. This requirement does not include a water-dependent  
29 generation or transmission facility such as a desalination plant, bio-diesel  
30 facility, water-intake or pump/lift stations.

1 13. New utility systems should be co-located with other existing or planned  
2 utilities, roadways and/or railways and/or placed within already disturbed or  
3 impacted corridors whenever possible.

4 **Conclusions Based on Findings:**

5 *A. Shoreline Conditional Use Permit:*

- 6 1. The proposed utility project across Whatcom Creek is a reasonable and  
7 appropriate use of the shoreline as conditioned. It would result in long term  
8 benefit to existing and potential future industrial, maritime, and commercial  
9 development in the vicinity while causing no net loss of shoreline ecological  
10 functions and values. The record contains no evidence of impact to public  
11 shoreline access, navigation, or recreational use of the water way. As discussed  
12 in the following conclusions, the project appropriately co-locates new and/or  
13 expanded utility service to the public benefit without adverse environmental  
14 impacts. *Findings 2, 3, 5, 6, 7, 8, 9, 11, 12, 17, and 18.*
- 15 2. As proposed and conditioned, the project would not result in significant, adverse  
16 impacts to the shoreline environment, ecological functions, or other shoreline  
17 uses. Above water work would be conducted either from a barge secured to the  
18 bridge or from a platform suspended from the bridge; no anchoring or other  
19 disturbance of the bed of the creek would result. A catchment mechanism  
20 would be implemented beneath the work area to ensure that any falling debris or  
21 equipment does not enter the water way. A stormwater pollution prevention  
22 plan and other appropriate erosion control measures would be implemented for  
23 the upland portions of the project to prevent sediment laden runoff from entering  
24 the water. No native vegetation, existing landscaping, or previously undisturbed  
25 areas would be disrupted; all work would occur in, on, and under existing right-  
26 of-way improvements. The proposal was reviewed for compliance with SEPA  
27 and a DNS was issued. *Findings 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, and 18.*
- 28 3. Once the proposed utilities are installed, they would be virtually invisible, either  
29 connected to the underside of the bridge or buried under sidewalk and bridge  
30 abutment surfaces. Once construction is complete, no portion of the project  
would protrude into the navigable water way, nor would hinder public access to  
the shoreline. *Findings 7 and 8.*
4. The proposed utilities would serve the industrial, maritime, and commercial uses  
existing in and contemplated for future development in the Waterfront District.  
*Findings 7, 8, and 9.*

- 1 5. The Aquatic shoreline environment expressly allows utility projects not  
2 associated with a water dependent use subject to conditional use approval. The  
3 bridge is existing and is not a new use in the critical saltwater habitat. The  
4 addition of utility conduit to the underside of the existing bridge is an  
5 appropriate co-location of infrastructure and would not result in additional  
6 impacts to the water way beyond those already existing. The Waterfront District  
7 shoreline mixed-use subarea allows utilities associated with non-water  
8 dependent uses subject to compliance with standards. In that the record contains  
9 evidence supporting a conclusion that the project would result in no net loss of  
10 shoreline functions and values, and that there would be no impact to access,  
11 recreation, or navigation, the proposal is consistent with the applicable  
12 regulations. *Findings 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 17, and 18.*
- 13 6. In providing utilities that would serve existing and permitted future recreational,  
14 industrial, maritime, and commercial uses in the Waterfront District, and in co-  
15 locating with an existing creek crossing in a manner that would not alter the  
16 hydrologic function of the waterway, nor decrease capacity of the floodway, and  
17 cause no net loss of shoreline functions, the project would serve long-term  
18 public benefit and would hinder neither public shoreline access nor future  
19 habitat restoration activities in the vicinity. *Findings 7, 8, 9, 10, and 18.*
- 20 7. As conditioned to obtain all required local, state, and federal permits, to  
21 implement the under-work catchment mechanism and prohibit disturbance of the  
22 bed lands under the waterway, and to implement stormwater pollution  
23 prevention and erosion control measures for the upland portions of the project,  
24 the project would not result in substantial detrimental effect to the public  
25 interest. *Findings 7, 8, 9, 11, 12, 15, and 18.*
- 26 8. If additional shoreline conditional use permits were issued for similar utility  
27 extensions that co-locate on existing water crossings with credible evidence that  
28 they would not result in net loss of shoreline functions, the cumulative impacts  
29 of such additional conditional uses would remain consistent with the intent and  
30 policies of the Shoreline Management Act and would not produce a significant  
adverse effect to the shoreline environment. *Findings 7, 8, 11, and 14.*

*B. Shoreline Substantial Development Permit*

1. No variance has been requested, nor is one needed for the project as proposed. In co-locating with the existing bridge infrastructure, the project satisfies the intent of shoreline use regulations established at BMC 22.02.020.A(1) to coordinate shoreline uses to promote long-term over short-term benefit, protect shoreline resources and ecological functions, and

1 promote economic development. Pursuant to BMC 22.03.030.E(4), utilities  
2 are allowed in the Aquatic shoreline environment subject to conditional use  
3 review. The project, as conditioned, comports with regulations applicable to  
4 development in the Aquatic environment as follows. Credible evidence in  
5 the record demonstrates that the proposal as conditioned would not result in  
6 net loss of shoreline ecological function, consistent with BMC  
7 22.03.030.E(5). No habitat impacts are anticipated, as the utility conduits  
8 would be either attached to an existing bridge or buried underneath the  
9 associated bridge superstructure; no previously undeveloped areas would be  
10 disturbed. No work would occur below the ordinary high water mark nor in  
11 the 100-year flood plain. No alteration to existing shoreline access, nor  
12 hindrance to future shoreline access or habitat restoration projects in the  
13 vicinity would result. Additionally, the project, as conditioned, comports  
14 with regulations applicable to development in the Waterfront District  
15 shoreline mixed-use sub-area regulations established in BMC  
16 23.03.030.F(6) as follows. Again, the record supports the conclusion that  
17 there would be no net loss of shoreline functions and values. The utility  
18 facilities would be co-located with the bridge and other existing  
19 infrastructure without adding new developed areas in the shoreline or in the  
20 critical saltwater habitat below, with no disruption to vegetation, and no in-  
21 water work. None of the installed utility conduits would be above grade  
22 within the shoreline jurisdiction, and none would interfere with or alter  
23 public access to the shoreline. The proposed utility project does not  
24 constitute shoreline mixed use development that triggers habitat restoration.  
25 No buildings are proposed. *Findings 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 17, and*  
26 *18.*

- 27
- 28 2. As conditioned, the project is consistent with the shoreline management  
29 policies applicable within the Aquatic shoreline environment established in  
30 BMC 22.03.030.E. The proposed use over the Aquatic environment would  
not extend below the ordinary high water mark nor into the 100-year  
floodplain and would not disturb any previously undeveloped areas; all  
improvements would be installed in/ on, or under existing concrete right-of-  
way improvements. As conditioned to prevent installation-related debris  
from falling into the water, the project would not impact the aquatic  
environment. Credible evidence in the record supports the conclusion that  
the proposal, as conditioned, would not result in net loss of shoreline  
functions and values. The utility conduits are an addition to the existing  
bridge rather than a wholly new use over the Aquatic environment. As  
proposed and conditioned, the utility conduits would not interfere with  
navigation or with the safe passage of aquatic species and other wildlife

1 using the area. A stormwater pollution prevention plan and other erosion  
2 control measures would protect the waterway from sediment laden runoff  
3 from the project. The proposal would also comport with applicable  
4 Waterfront District shoreline mixed-use sub-area management policies  
5 established in BMC 22.03.030.F(2) as follows. Public notice of the proposal  
6 was circulated to commenting agencies; no comments in opposition were  
7 submitted. It would not be feasible to remove or reduce the Roeder Avenue  
8 Bridge or its supporting infrastructure, and co-locating the proposal on the  
9 bridge minimizes impacts by providing utilities without additional crossing  
10 of the waterway. The project location has not been identified as an  
11 opportunity for habitat restoration or public access provision. The proposal  
12 specifically implements policy g, in that it would preserve utilities to  
13 existing, and potentially provide service to future permitted, uses including  
14 administrative, professional, institutional, housing, retail and water-  
15 enjoyment development, services, educational and cultural facilities water-  
16 dependent and water-oriented uses in the project vicinity. Once construction  
17 is completed, the project would not alter or hinder future public shoreline  
18 access proposals in the vicinity. *Findings 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 17,*  
19 *and 18.*

- 20 3. As conditioned, the proposal is consistent with policies established in BMC  
21 Chapter 22.04 related to development on shorelines of statewide  
22 significance. The project would satisfy the intent of BMC Chapter 22.04 in  
23 that it would enable continued and enhanced utility service to existing  
24 industrial, maritime, and commercial uses in the Waterfront District without  
25 adverse impact to a shoreline of statewide significance. As concluded  
26 above, there would be no in-water work, no reduction in hydrologic capacity  
27 of the floodplain, and no net loss of shoreline functions. Expanding the  
28 utility infrastructure of the Port of Bellingham without impact the shoreline  
29 functions and values is consistent with statewide, long-term interests.  
30 *Findings 7, 8, 9, 11, 14, 17, and 18.*

### DECISIONS

Based on the preceding findings and conclusions, the requested shoreline substantial development permit and shoreline conditional use permit for the installation of power and telecommunications conduit banks on the underside of the Roeder Avenue Bridge and under the bridge wingwalls and approach slabs to C Street and Central Avenue are **APPROVED** by the City subject to the conditions below.

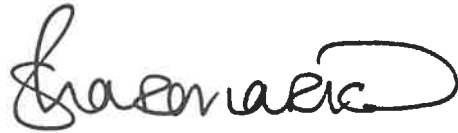
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Further, as recommended by the undersigned, the requested shoreline conditional use permit **SHOULD BE APPROVED** by the Washington State Department of Ecology subject to the following conditions:

- 1. A debris containment system designed to keep all debris and equipment out of the waterway shall be employed for all portions of the project that are associated with hanging the conduit banks and cutting the holes in each of the wing-walls for upland underground trenching.
- 2. Work shall not occur until all other required local, state and/or federal permits are approved. The Applicant shall abide by conditions imposed in state and federal permits, if any.
- 3. If a barge is utilized to perform any portion of the work, it shall be secured to the Roeder Avenue bridge or other out of water structure and shall not anchor within abutting bed lands.
- 4. Construction pursuant to the instant permits shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).
- 5. The SCUP approval shall not excuse the Applicant from compliance with any other federal, state, or local statutes, ordinances, or regulations that may be applicable to this project. In the event the Applicant fails to comply with the terms of the conditions herein, the permit(s) may be rescinded. All work must be completed according to these permits.

DECIDED April 29, 2024.

BELLINGHAM HEARING EXAMINER



Sharon A. Rice