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Memorandum

To: Guy Michaelsen, The Berger Partnership
From: Gisele Sassen and Peter Hummel, Anchor Environmental, L.L.C.
Date: December 13, 2005
Re: Draft Luther Burbank Park Permitting Process

Anchor Environmental, L.L.C. and The Berger Partnership are assisting the City of Mercer Island (City) in Master Planning activities for Luther Burbank Park in Mercer Island, Washington. This memorandum outlines and evaluates the environmental approvals that are anticipated for future improvements at Luther Burbank Park. The full suite of aquatic-related permits would likely be necessary from local, state, and federal authorities for several elements of the anticipated work; however, all of these approvals would not be required for each of the proposed improvements. The scope of work and location of proposed activities would determine which approvals are required. The attached matrix provides a list of environmental approvals that would need to be considered for each of the proposed improvements. The lead agency for these approvals would depend on the activity being permitted. Lead agencies for the various permits and approvals are discussed in the following sections.

PERMIT AND APPROVAL PROCESS

Federal Approvals

U.S. Army Corps of Engineers

A Section 10 permit from the Rivers and Harbor Act of 1899 would be required for dredging or placement of structures in waters of the U.S.—including wetlands—from the U.S. Army Corps of Engineers (Corps). A Section 404 approval would be required from the Corps for fill activities below the ordinary high water (OHW)¹ line of Lake Washington, in streams, and in wetlands. Section 404 pertains to the Clean Water Act and is intended to protect chemical and biological integrity of waters of the U.S. Regulated activities under Section 10/404 include such things as dredging or the placement of fill material (riprap, beach enhancement, bulkheads, etc.)

¹ At Lake Washington, the OHW line is 21.8 feet (COE), equal to 18.67 feet OHW (NAVD 88).

in water or wetlands. Depending on the nature of the proposed project, it may be possible to apply for Nationwide Permit(s) (NWP), which are permits that cover a range of activities included under Section 10 and Section 404. For example, a NWP 3 is for routine repairs and replacement of structures, and as long as the proposed activity complies with the national and regional conditions associated with that NWP, a NWP could be issued. A Joint Aquatic Resources Permit Application (JARPA) would be used to apply for the permits. A set of design-level plans (typically 30%), including cross-sections, would need to accompany the JARPA.

For permit approvals, the Corps is required to comply with the National Environmental Policy Act (NEPA). Except for major project actions (those that require an Environmental Impact Statement), the Corps typically handles NEPA internally by preparing a memorandum for the file demonstrating how the proposed project complies with NEPA. They use NEPA regulations and information in the JARPA to complete their NEPA analysis.

National Marine Fisheries Service and U.S. Fish and Wildlife Service

The permit approval required by the Corps would provide the federal nexus that triggers the need to address Endangered Species Act (ESA) requirements. Projects that receive federal funding are also required to comply with ESA. If ESA compliance is required, a Biological Assessment (BA) that addresses the existing habitat and the effects of the project on species listed for protection under ESA and designated critical habitat would need to be prepared. The Corps would use the BA to initiate consultation under Section 7 of ESA with the National Marine Fisheries Service (NMFS) and with the U.S. Fish and Wildlife Service (USFWS). These two agencies oversee the protection of various fish and wildlife species listed under ESA and designated critical habitat; they would need to concur with the findings of the BA. The BA would include an assessment of Essential Fish Habitat, which is also required by NMFS under the Magnuson-Stevens Fishery Conservation and Management Act.

State Approvals

Washington Department of Fish and Wildlife

A Hydraulic Project Approval (HPA) would likely be required from the Washington Department of Fish and Wildlife (WDFW) for any work that uses, diverts, obstructs, or changes the natural flow or bed of state waters. The JARPA would also be used to apply for this permit.

Prior to submitting the JARPA to WDFW, a State Environmental Policy Act (SEPA) determination would need to be issued by the City (see City Approvals below).

Washington State Department of Ecology

401 Water Quality Certification

A 401 Water Quality Certification is required from the Washington State Department of Ecology (Ecology) when applying for a federal permit to conduct any activity that might result in a discharge of dredge or fill material into water or wetlands, or any excavation in water or wetlands. This approval is the state component of the Clean Water Act. The JARPA would also be submitted to Ecology for this certification. Ecology would provide input to the City for both the shoreline permit and SEPA review processes (see City Approvals below).

Coastal Zone Management Act Consistency Determination

In addition, project activities that require a federal permit or receive federal funding require a determination of consistency with the Coastal Zone Management Act (CZMA). A Coastal Zone Management Certification will be issued by Ecology for non-federal agency projects. In the case of Luther Burbank Park, the Corps permit will likely trigger the CZMA process. If the CZMA is approved as part of a NWP, no further action will be required.

Washington Department of Natural Resources

An Aquatic Use Authorization by the Washington Department of Natural Resources would be required for a project that affects state-owned aquatic lands, including the bedlands of Lake Washington. It includes activities such as pile replacement, over-water coverage, and dredging and filling below OHW.

Local Approvals

City of Mercer Island

A SEPA review would be required for the City to formally adopt the Luther Burbank Park Master Plan. The City would act as the lead agency for SEPA review. Based on project information provided in an SEPA environmental checklist, the City would evaluate the proposal's likely environmental impacts. The City would issue a threshold determination – Determination of Non-Significance (DNS), Mitigated Determination of Non-Significance

(MDNS) or a Determination of Significance (DS). If a DS were issued for the project, an Environmental Impact Statement (EIS) would need to be prepared.

PROJECT APPROACH AND TIMING

Upon preliminary review, we do not think that the elements included in the proposed Luther Burbank Master Plan would generate probable significant adverse environmental impacts that cannot be mitigated. We would expect that a DNS/MDNS process would be appropriate for a project of this anticipated scope and nature. Continued dialogue with interested neighbors and interest groups and general public outreach efforts by the City would help reveal where the Master Plan stands with constituents and allow for incorporation of public concern into the proposed Master Plan design.

However, to clearly establish whether or not the impacts would be significant, a non-project SEPA analysis and review process is recommended to accompany the adoption of the Master Plan. This process would determine the level of impact of any given element of the proposed Master Plan. The threshold determination generated by this SEPA process will inform and help guide the future implementation strategy for the various plan elements from an environmental standpoint.

The Luther Burbank Park project will likely be constructed in phases, and it may make sense to use a phased SEPA review following the non-project SEPA checklist and review process as individual phases of the project move towards implementation. SEPA specifically addresses how to conduct a phased review (Washington Administrative Code [WAC] 197-11-060 {5}). A series of environmental checklists would be generated that address specific project-level design details for each individual phase of the project.

CRITICAL AREA ORDINANCE AND SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT

Some areas of the park are designated by the City as Environmentally Critical Areas in accordance with the Growth Management Act and the SEPA. At Luther Burbank Park, there are shorelines, wetlands, streams/watercourses, and landslide prone areas. Design criteria and

permitted uses may be applicable in these areas. Review of the effects on the resources under the City Critical Areas Ordinance would be required as part of the SEPA process.

Under the Shoreline Management Act, any activity within 200 feet of a state shoreline requires a shoreline permit. The City would also be responsible for issuing the shoreline permit. Luther Burbank Park is designated as "Park Conservancy" under the shoreline management plan. The guidelines pertaining to the "Park Conservancy" designation are found in Chapter 19.07.080 of the Mercer Island City Code.

Environmental Approvals Required for the Luther Burbank Project

Approval	Jurisdiction	Items Necessary Prior to Submittal	Next Steps/ Timeframe
SEPA	City of Mercer Island	Detailed project description. Completed SEPA Checklist with figures (Vicinity Map, Site Map(s), Photos).	Submit copy to City Public meeting Total timeframe: 3 to 6 months, including public comment period and mandatory 14 day publication of SEPA threshold determination
Shoreline Substantial Development Permit	City of Mercer Island	Pre-application meeting with City staff to determine requirements for permit submittal, package contents and need for critical areas review.	Conduct pre-application meeting Submit permit package; respond to request for additional information Total timeframe: 4 to 9 months, including public comment period, 21 day wait period after the permit is issued to allow for any party to appeal, and 14 day publication of shoreline permit application. The Growth Management Act requires local jurisdictions to complete the shoreline process within 120 days of receipt of a complete application; however, depending on the project and shoreline issues, the time frame may be extended to 9 months
HPA	Washington Department of Fish and Wildlife	Need SEPA process finalized before an HPA can be issued. JARPA form and corresponding design drawings.	Provide WDFW with copy of SEPA threshold determination and mitigation plan; determine any potential issues Once SEPA complete, submit JARPA Total timeframe: WDFW has 45 days from receipt of a complete application and receipt of SEPA threshold determination to issue or deny an HPA
CZMA Consistency Determination	Washington State Department of Ecology	Need Shoreline Substantial Development Permit CZMA form	Total time frame: Within 30 to 60 days after the shoreline permitting process is complete
401 Water Quality Certification	Washington State Department of Ecology	Need CZMA completed JARPA form and corresponding design drawings.	Total timeframe: Ecology has up to 1 year but typically the timeframe is 6 to 8 months (following Corps Public Notice)
Section 404 permit	U.S. Army Corps of Engineers	Need 401 Water Quality Certification and ESA completed JARPA form and corresponding design drawings.	Total timeframe: 12 to 18 months (length primarily due to ESA consultation)

Environmental Approvals Required for the Luther Burbank Project

Approval	Jurisdiction	Items Necessary Prior to Submittal	Next Steps/ Timeframe
Section 10 permit	U.S. Army Corps of Engineers	Need ESA completed JARPA form and corresponding design drawings.	Total timeframe: 2 to 3 months
Nationwide Permit	U.S. Army Corps of Engineers	Need ESA completed. JARPA form and corresponding design drawings.	Total timeframe: 45 days to 3 months
ESA Compliance	U.S. Fish and Wildlife Service National Marine Fisheries Service	Biological Assessment.	Total timeframe: 30 to 60 days if consultation is informal; 135 days if consultation is formal from the time the Services receive the Biological Assessment.
NEPA	U.S. Army Corps of Engineers	JARPA form and corresponding design drawings.	NEPA review may be required if the Corps implements any of the proposed activities, or if federal funding is received. If required, an approach for NEPA review would need to be developed.

PERMITTING CONSIDERATIONS FOR SPECIFIC SITE CONDITIONS

Shoreline

(City of Mercer Island – Ordinance No.05C-12; Section 4)

Shoreline designated environments are established to regulate development and uses consistent with the specific characteristics of a given segment of shoreline within the City of Mercer Island. The rules and regulations apply to a 200-foot setback measured from the OHW mark. All development within the designated (setback) area shall be consistent with the Shoreline Master Program, the Shoreline Management Act of 1971, the Mercer Island Development Code, and permit requirements of all other agencies having jurisdiction within the designated environment.

The shoreline of Lake Washington within Luther Burbank Park is designated as Park Conservancy. The main purpose of this environmental designation is the protection and management of existing natural resources and the provision of recreational opportunities.

Uses consistent with this designation include public recreational facilities and parks, moorage facilities, bulkheads and shoreline protective structures, utilities, dredging and alterations over

250 cubic yards – outside of a building footprint. All of these development options require a Shoreline Substantial Development Permit and a review under the SEPA.

Wetlands

(City of Mercer Island – Ordinance No.05C-12; Section 4)

The City uses the *Washington State Wetland Identification and Delineation Manual* to identify and delineate regulated wetlands within the city of Mercer Island. The wetland classification system is consistent with the *Washington State Wetland Rating System for Western Washington*.

The code distinguishes between wetlands that are naturally occurring and artificially created wetlands. With the exception of wetlands created to mitigate for impacts to naturally occurring wetlands, none of the artificially created wetlands are protected under the Critical Areas Ordinance.

Several potential wetlands have been identified within the park based on observed plant communities and hydrologic conditions. Two potential Category II wetlands exist—one at the northernmost end of the park, and the other one just south of the swim beach. One potential Category III wetland is located near the centrally located parking lot. In addition, there are three potential Category III wetlands, and one potential Category IV wetland within the park boundary.

Because no on-site surveys or delineations of potential wetlands were conducted, further field investigations would be necessary to confirm the presence, absence, boundaries, functions, and values of wetland systems within the City park property. To confirm wetland boundaries, wetland delineations should be conducted according to the methods defined in the *U.S. Army Corps of Engineers Wetland Delineation Manual* (Environmental Laboratory 1987) and the *Washington State Wetland Identification and Delineation Manual* (Ecology 1997).

The standard buffer width required for a Category II wetland is 75 feet, but may be reduced to a minimum of 37 feet with enhancement. The standard buffer width required for a Category III wetland is 50 feet, but may be reduced to a minimum of 25 feet with enhancement. The standard buffer width required for a Category IV wetland is 35 feet, but may be reduced to a minimum of 25 feet with enhancement (Mercer Island City Code 19.07.080; C1).

Any activities associated with filling and grading operations, disturbance and removal of vegetation, and alterations of hydrology within the wetlands are restricted. However, alterations within Category III and IV wetlands under 2,500 square feet are allowed (MICC 19.07.080; D).

Impacts to a wetland buffer can be offset by buffer averaging by adding the prevented net loss of buffer area. However, some uses and associated alterations are allowed within the buffer area without the need to mitigate, such as pedestrian trails.

Watercourse

Watercourses within the park are regulated under the City's Critical Areas Ordinance (19.07.070). The code identifies three types of watercourses depending on whether or not they are used by fish and whether they are perennial or seasonal as follows.

Type I – Watercourses or reaches of watercourses used by fish, or located downstream of areas used by fish; the buffer area associated with this type designation is 75 feet, but can be reduced to 37 feet if a buffer enhancement is implemented.

Type 2 -- Watercourses or reaches of watercourses with year-round flow, not used by fish; the buffer area associated with this type designation is 50 feet, but can be reduced to 25 feet if a buffer enhancement is implemented.

Type 3 -- Watercourses or reaches of watercourses with intermittent or seasonal flow and not used by fish; the buffer area associated with this type designation is 35 feet, but can be reduced to 25 feet if a buffer enhancement is implemented.

A watercourse with potential fish use (Type 1) is designated within the wetland at the north end of the park. The buffer overlaps with the wetland and wetland buffer described above, and restrictions for both critical areas apply. A perennial (Type 2) watercourse is located just north of I-90, partially within the wetland south of the swimming beach, and the same overlap between the two regulated critical areas applies. Another perennial (Type 2) watercourse flows through the portion of the park that is located south of I-90. A seasonal (Type 3) watercourse originates at the very south end of the park and extends north across I-90.

ESA Species

Eagle

An active eagle nest is located northwest of the park. While the nest is not located on the actual park property, some areas of the park fall within the regulated zone around the nesting site. The City designates those areas used by these species for nesting, breeding, feeding and survival as wildlife habitat conservation areas (19.07.090 Wildlife Habitat Conservation Areas).

In addition, the state requires an eagle management plan to be approved by a WDFW eagle biologist for all development within 400 feet of a known nest site. State regulation of eagles does not prevent development, but does result in the retention of large trees and snags (where this can be done safely).

If changes to the wildlife habitat conservation area would be proposed, the code official may require a critical area study to ensure compliance with all state or federal laws.

Seasonal restrictions may apply during sensitive periods of the year: January 1 through August 15 during nesting, and November 1 through April 1 during winter roosting season. Activities may be further restricted and buffers may be increased during the specified seasons.

Salmonid Fish

Resident and anadromous salmonids, both juveniles and adults, use Lake Washington. Specific species utilizing the lake include chinook, coho, sockeye, cutthroat and rainbow/steelhead trout, and bull trout. Pink and chum salmon were historically abundant in the lake system, but now are considered extinct in the watershed (GLWTC 2001). The NMFS has identified chinook salmon, a threatened species, and coho salmon, a candidate species, as potentially occurring in the project vicinity (NMFS 2001). The USFWS indicates that bull trout may occur in Lake Washington. Any proposed changes to the shoreline at Luther Burbank Park would affect these species. The Master Plan is proposing improvements for the partially degraded shoreline, including regrading steeper areas to shallow sloping beaches and replenishing substrates, and enhancing and restoring native vegetation—all of which would have a positive impact on fish habitat and habitat function over existing conditions.

General Allowed and Restricted Alterations Applicable to All Critical Areas

The following potentially applicable alterations are allowable:

- Operation, maintenance, renovation or repair of existing structures, facilities and landscaping are allowed if there is no further intrusion or expansion into the critical area.
- Construction of new streets and driveways if it is designed to mitigate for impacts to critical areas so there will be no net loss of critical area, and if it is consistent with best management practices. A critical area study or restoration plan may be required by the code official.
- Removal of noxious weeds with hand labor or light equipment using appropriate erosion control measures and revegetation of native species.
- Non-motorized trails are an allowable use if certain conditions are met. The trail should be surfaced with pervious materials and be located to mitigate the encroachment.
- Conservation, preservation, restoration and enhancement of critical areas that do not negatively impact the functions of any critical area.
- Tree pruning, cutting, and removal in accordance with permit requirements as set forth in MICC chapter 19.10.

If a project is not allowed under the above-listed provisions, it may be allowed through a reasonable use exception.

REFERENCES

Ecology. 1997. *Washington State Wetland Identification and Delineation Manual*. Publication #96-94. Olympia, WA.

Environmental Laboratory. 1987. *U.S. Army Corps of Engineers Wetland Delineation Manual*. Technical Report Y-87-1, U.S. Army Engineers Waterways Experiment Station, Vicksburg, Mississippi.

Greater Lake Washington Technical Committee (GLWTC). 2001. Draft Reconnaissance Assessment-Habitat Factors that Contribute to the Decline of Salmonids. Greater Lake Washington Watershed WRIA 8. Prepared by the Greater Lake Washington Technical Committee.

City of Mercer Island. 2005. Mercer Island Code and Environmentally Critical Areas Ordinance. Mercer Island, Washington. Accessed online at <http://www.ci.mercer-island.wa.us> on November 24, 2005.

National Marine Fisheries Service (NMFS). 2001. Correspondence with the agency regarding threatened and candidate species occurring in the project area: July 13, 2001 email between Elizabeth Appy of Anchor Environmental and John Winton of the NMFS.