



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3190 160th Ave SE • Bellevue, WA 98008-5452 • 425-649-7000  
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February 22, 2016

Donald Omsberg  
BNSF Railway Co.  
2454 Occidental Avenue South, Suite 2D  
Seattle, WA 98134

**RE: Water Quality Certification Order #12962 for U.S. Army Corps of Engineers  
Public Notice #NWS-2014-980, Custer to Ferndale Double Track Project,  
Wetlands and California Creek, Whatcom County, Washington**

Dear Mr. Omsberg:

On April 6, 2015, BNSF Railway Co. submitted a Joint Aquatic Resource Permit Application (JARPA) to the Department of Ecology (Ecology) for a Section 401 Water Quality Certification under the federal Clean Water Act for the proposed Custer to Ferndale Double Track project. A revised JARPA was submitted to Ecology on September 24, 2015.

On behalf of the State of Washington, Ecology certifies that the work described in the JARPA and the public notice complies with applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act, as amended and applicable state laws. This certification is subject to the conditions contained in the enclosed Order.

If you have any questions, please contact Rebekah Padgett at (425) 649-7129. You may appeal the enclosed Order by following the procedures described in the Order.

Sincerely,

Erik Stockdale, Section Manager  
Shorelands and Environmental Assistance Program  
Northwest Regional Office

ES:rrp:ap

Enclosure



BNSF Railway Co.  
February 22, 2016  
Page 2 of 2

By certified mail: 7005 1820 0000 6707 8599

cc: Ron Wilcox, U.S. Army Corps of Engineers  
Pierre Bordenave, JL Patterson & Associates, Inc.  
Joel Ingram, Washington Department of Fish and Wildlife  
Beth Doglio, Climate Solutions

e-cc: Doug Gresham, Ecology  
Paul Anderson, Ecology  
Bob Wright – NWRO  
Loree' Randall, Ecology  
Marnie Black, Ecology  
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Laura Ackerman, The Lands Council [lackerman@landscouncil.org](mailto:lackerman@landscouncil.org)  
ecyrefedpermits@ecy.wa.gov

**IN THE MATTER OF GRANTING A ) ORDER #12962**  
**WATER QUALITY ) Corps Reference #NWS-2014-980**  
**CERTIFICATION TO ) Custer to Ferndale Double Track Project;**  
**BNSF Railway Co. ) Wetlands and California Creek, Whatcom**  
in accordance with 33 U.S.C. 1341 ) County, Washington.  
(FWPCA § 401), RCW 90.48.120, RCW )  
90.48.260 and Chapter 173-201A WAC )

**TO: BNSF Railway Co.**  
**Attn: Donald Omsberg**  
**2454 Occidental Avenue South, Suite 2D**  
**Seattle, WA 98134**

On April 6, 2015, BNSF Railway Co. submitted a Joint Aquatic Resources Permit Application (JARPA) to the Department of Ecology (Ecology) for a Section 401 Water Quality Certification. The U.S. Army Corps of Engineers (Corps) distributed a joint public notice regarding the request for the above-referenced project pursuant to the provisions of Chapter 173-225 WAC on March 17, 2015. A revised JARPA was submitted to Ecology on September 24, 2015. Ecology issued a second public notice on November 4, 2015.

The proposed construction of 3.48 miles of new railroad track would connect existing sidings in order to allow for 6.6 miles of double track operations. Work would include:

- Clearing and grubbing for construction.
- Relocating, upgrading, and or installing utility infrastructure.
- Reconstruction and safety improvements to existing access roads.
- Excavation, grading, and structural fill for the new rail grade.
- Extension or replacement of existing culverts.
- Relocation/modification of existing drainage channels along the edge of the rail grade to an adjacent location.
- Installation of rail, ties, and ballast.
- Vegetation restoration.

Mitigation for permanent fill of 1.76 acres of Category III wetland fill would include purchase of credits from a wetland mitigation bank.

The project is located in the BNSF NW Division, Bellingham Subdivision, Line Segment 50, from Milepost 107.87 (0.5 mile north of Ferndale) to Milepost 111.35 (0.3 mile south of Custer), Whatcom County, Washington, in wetlands and California Creek, Section 36, T. 40N, R. 1E; Section 1, T. 39N, R. 1E; and Sections 6, 7, 8, and 17, T. 39N, R. 2E; WRIA 1.

**AUTHORITIES:**

In exercising authority under 33 U.S.C. § 1341, RCW 90.48.120, and RCW 90.48.260, Ecology has examined this application pursuant to the following:

1. Conformance with applicable water quality-based, technology-based, and toxic or pretreatment effluent limitations as provided under 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306 and 307).
2. Conformance with the state water quality standards contained in Chapter 173-201A WAC and authorized by 33 U.S.C. § 1313 and by Chapter 90.48 RCW, and with other applicable state laws.
3. Conformance with the provision of using all known, available and reasonable methods to prevent and control pollution of state waters as required by RCW 90.48.010.

#### **WATER QUALITY CERTIFICATION CONDITIONS:**

Through issuance of this Order, Ecology certifies that it has reasonable assurance that the activity as proposed and conditioned will be conducted in a manner that will not violate applicable water quality standards and other appropriate requirements of state law. In view of the foregoing and in accordance with 33 U.S.C. § 1341, RCW 90.48.120, RCW 90.48.260 Chapter 173-200 WAC and Chapter 173-201A WAC, water quality certification is granted to the Applicant subject to the conditions within this Order.

Certification of this proposal does not authorize the Applicant to exceed applicable state water quality standards (Chapter 173-201A WAC), ground water standards (Chapter 173-200 WAC), or sediment quality standards (Chapter 173-204 WAC). Furthermore, nothing in this certification shall absolve the Applicant from liability for contamination and any subsequent cleanup of surface waters, ground waters or sediments occurring because of project construction or operations.

#### **A. General Conditions:**

- A1. For purposes of this Order, the term "Applicant" shall mean BNSF Railway Co. and its agents, assignees and contractors.
- A2. For purposes of this Order, all submittals required by its conditions shall be sent to Ecology's Northwest Regional Office, Attn: 401/CZM Federal Project Manager, 3190 160<sup>th</sup> Avenue SE, Bellevue, WA 98008-5452. Any submittals shall reference Order #12962 and Corps Reference #NWS-2014-980.
- A3. Work authorized by this Order is limited to the work described in the JARPA received by Ecology on September 24, 2015. The Applicant will be out of compliance with this Order and must reapply with an updated application if the information contained in the JARPA is voided by subsequent changes to the project not authorized by this Order.

- A4. Within 30 days of receipt of an updated JARPA, Ecology will determine if the revised project requires a new water quality certification and public notice or if a modification to this Order is required.
- A5. We will rescind this Order if the U.S. Army Corps of Engineers does not issue an individual Section 404 permit.
- A6. The Applicant shall provide to Ecology's 401/CZM Federal Permit Manager a copy of the final Corps permit within two weeks of receipt of the permit. Please submit a copy per condition A2 above.
- A7. Copies of this Order shall be kept on the job site and readily available for reference by Ecology personnel, the construction superintendent, construction managers and lead workers, and state and local government inspectors.
- A8. The Applicant shall provide access to the project site and all mitigation sites upon request by Ecology personnel for site inspections, monitoring, necessary data collection, and/or to ensure that conditions of this Order are being met.
- A9. Nothing in this Order waives Ecology's authority to issue additional orders if Ecology determines that further actions are necessary to implement the water quality laws of the state. Further, Ecology retains continuing jurisdiction to make modifications hereto through supplemental order, if additional impacts due to project construction or operation are identified (*e.g.*, violations of water quality standards, downstream erosion, etc.), or if additional conditions are necessary to further protect water quality.
- A10. The Applicant shall ensure that all appropriate project engineers and contractors at the project site have read and understand relevant conditions of this Order and all permits, approvals, and documents referenced in this Order. The Applicant shall provide Ecology a signed statement (see Attachment A for an example) from each project engineer and contractor that they have read and understand the conditions of this Order and the above-referenced permits, plans, documents and approvals. Please provide these statements to Ecology before construction begins at the project or mitigation sites.
- A11. This Order does not authorize direct, indirect, permanent, or temporary impacts to waters of the state (including wetlands) or related aquatic resources, except as specifically provided for in conditions of this Order.
- A12. Failure of any person or entity to comply with this Order may result in the issuance of civil penalties or other actions, whether administrative or judicial, to enforce its terms.

**B. Native Planting Conditions:**

B1. Except as modified by this Order, the native planting area is described in *Final Revised Water Quality Monitoring and Protection Plan, Custer to Ferndale Double Track*, Attachment C: Planting Plan Detail Sheets and Attachment D: Restoration Planting Work Plan Overview, as prepared by J.L. Patterson & Associates, Inc. – Environmental Services Group, dated January 20, 2016.

B2. In addition to conditions in the above-referenced planting plan, the following requirements shall be conditions of this Order:

- a) Annual Monitoring: Please record the condition of riparian plantings in Years 1, 2, and 3 as compared to the performance standards. Monitoring should document plant survival and vigor and include representative photos from permanent locations.
- b) Performance Standards: The project shall meet the following performance standards:
  - Sufficient hydrology to support hydrophytic vegetation.
  - Survival of plantings in Year 1 of 100%, and 70% survival in Years 2 and 3.
  - Percent cover of planted species shall be no less than 50% at Year 3.
  - Percent cover of invasive species shall not exceed 50% in any year.
- c) Annual Monitoring Reports: Reports shall document the condition of mitigation areas as compared to the performance standards. Please submit copies of all monitoring reports to Ecology per Condition A2 by December 31 of each year that they are due. The report shall include the following:
  - Vicinity map showing site access.
  - Drawings that clearly identify in plain view the location and square footage of the planted areas.
  - The installed planting scheme showing approximate locations of plants and the time of planting.
  - Photographs of planting areas taken from permanent reference points.
  - Description of maintenance activities to improve mitigation success.
- d) Maintenance: The Applicant is responsible for maintenance and protection of the native vegetation planting area both throughout and after the 3-year monitoring period for riparian plantings. Please replace all plants that fail to survive for one (1) year after planting before or at the beginning of the next growing season.

**C. Wetland Compensatory Mitigation Conditions:**

C1. The Applicant shall mitigate aquatic resource impacts as described in *Revised Wetland Mitigation Bank Use Plan, BNSF Railway Company (BNSF) Custer to Ferndale Double Track Project* (hereafter called the “mitigation plan”), prepared by J.L. Patterson &

Associates, Inc. – Environmental Services Group, dated September 18, 2015, or as revised and approved by Ecology.

- C2. Prior to impacting aquatic resources, the Applicant shall submit to Ecology documentation from the bank sponsor verifying the purchase of 1.76 wetland mitigation bank credits from the Lummi Nation Wetland and Habitat Mitigation Bank. This documentation must include the permit number, permit issuance date, impact acreage, the amount of credits required by the permit, and date of credit purchase.
- C3. The Applicant shall notify Ecology of any changes to the amount of aquatic resource impacts, or revisions to the mitigation plan.
- C4. The Applicant shall complete the purchase of credits before the impacts to aquatic resources occur or Ecology may require additional compensation to account for temporal loss of aquatic resource functions.
- C5. If the credits are not purchased within 13 months of the date of this Order, the Applicant shall inform Ecology, in writing, of the status of
- a) Custer to Ferndale Double Track Project.
  - b) When credits will be purchased.
- With the:
- c) Expected date of completion.
  - d) Reason for the delay.
- The Applicant shall submit an updated written notification every 12 months thereafter until Custer to Ferndale Double Track Project is complete and the required credits are purchased.

**D. Water Quality Conditions:**

- D1. This Order does not authorize temporary exceedances of water quality standards beyond the limits established in WAC 173-201A-200(1)(e)(i) or WAC 173-201A-200(1)(g).
- D2. The Applicant shall conduct in-water construction water quality sampling and monitoring as described in the *Final Water Quality Monitoring and Protection Plan (WQMPP)*, *Custer to Ferndale Double Track*, prepared by J.L. Patterson & Associates, Inc. – Environmental Services Group (JLP-E), dated January 20, 2016 (hereafter referred to as the Water Quality Monitoring Plan), or as modified by this Order or revised and approved by Ecology.
- D3. Notification of exceedances that are detected through water quality sampling shall be made to Ecology with reference to Order #12962, Attn: 401/CZM Federal Project Manager, by telephone at (425) 649-7129 or (425) 649-7000, or by fax to (425) 649-

7098. The Applicant shall, at a minimum, provide Ecology with the following information:

- i. A description of the nature and cause of exceedance.
- ii. The period of non-compliance, including exact dates, duration, and times and/or the anticipated time when the Applicant will return to compliance.
- iii. The steps taken, or to be taken, to reduce, eliminate, and prevent recurrence of the non-compliance.
- iv. In addition, within five (5) days after notification of an exceedance, the Applicant shall submit a written report to Ecology that describes the nature of the exceedance, turbidity results and location, photographs, and any other pertinent information.

**E. Conditions for Construction Activities:**

- E1. Applicant shall comply with Construction Stormwater General Permit #WAR303134 for this project.
- E2. Construction stormwater, sediment, and erosion control best management practices (BMPs; *e.g.*, filter fences, etc.) suitable to prevent exceedances of state water quality standards shall be in place before starting construction at the site.
- E3. Sediment and erosion control measures shall be inspected and maintained prior to and during project implementation.
- E4. All construction debris shall be properly disposed of on land so that it cannot enter a waterway or cause water quality degradation to state waters.
- E5. The Applicant shall use environmentally acceptable lubricants composed of biodegradable base oils such as vegetable oils, synthetic esters, and polyalkylene glycols in equipment operated in or near the water.
- E6. Machinery and equipment used during construction shall be serviced, fueled, and maintained upland, unless otherwise approved by Ecology, in order to prevent contamination to any surface water.
- E7. Wash water containing oils, grease, or other hazardous materials resulting from wash down of equipment or working areas shall be contained for proper disposal, and shall not be discharged into state waters or storm drains.

- E8. Clean Fill Criteria: Applicant shall ensure that fill (soil or other material) placed for the proposed project does not contain toxic materials in toxic amounts.

**In-Water Conditions:**

- E9. Work in or near the water that may affect fish migration, spawning, or rearing shall cease immediately upon a determination by Ecology that fisheries resources may be adversely affected.
- E10. Excavated material shall not be stockpiled on a temporary or permanent basis below the OHWL.
- E11. All manmade debris that has been deposited below the Ordinary High Water Line (OHWL) within the construction work area shall be removed and disposed of upland such that it does not enter waters of the state. Concrete rubble, metal debris, and other debris in the construction work corridor that have washed into waters of the state shall be removed from the project area.
- E12. If cast in place, wet concrete/grout shall be prevented from entering waters of the state. Forms for any concrete/grout structure shall be constructed to prevent leaching of wet concrete/grout. Impervious materials shall be placed over any exposed concrete/grout not lined with the forms that will come in contact with state waters. Forms and impervious materials shall remain in place until the concrete/grout is cured.
- E13. In-water work shall be conducted in the dry or low water to the extent practicable. Remaining water shall be diverted around the work area using a temporary bypass.
- E14. Fish shall be removed and isolated from the work area. Work area isolation shall be through the use of either a total or partial bypass to reroute the stream through a temporary channel or pipe.
- E15. Work shall be sequenced to minimize the duration of dewatering.
- E16. The temporary bypass shall be designed to minimize the length of the dewatered stream channel.
- E17. During all phases of bypass installation and decommissioning, flows shall be maintained downstream of the project site in order to ensure survival of all downstream fish.
- E18. The temporary bypass shall be installed before starting other construction work in the wetted perimeter using the gravity or pump bypass method.

- E19. Diverted water shall be returned to the channel immediately downstream of the work area, with flow energy dissipated from the diversion in order to prevent scour or erosion of the channel and bank.
- E20. If the bypass is a pumped diversion, once started it must run continuously until it is no longer necessary to bypass flows. This requires back-up pumps on site and monitoring for overnight operation.
- E21. If the diversion inlet is a pump diversion in a fish-bearing stream, the pump intake structure shall have a fish screen installed, operated, and maintained in accordance with Washington Department of Fish and Wildlife requirements (WAC 220-660-120 (9)(m)(i-iv)). The fish screen shall remain in place whenever water is withdrawn from the stream through the pump intake.
- E22. Upon completion of the project, the disturbed bed, banks, and riparian zone shall be restored to pre-project condition to the extent practicable.
- E23. In-stream flows shall not be returned to the work area until all in-channel work is completed and the bed and banks are stabilized, in order to minimize turbidity.
- E24. Water flow shall be returned slowly to the in-water work area in order to minimize turbidity.
- E25. The Applicant shall implement the appropriate measures to prevent the transport and introduction of aquatic invasive species, including thoroughly cleaning all equipment and gear before arriving and leaving the job site and properly disposing of all water and chemicals utilized to clean gear and equipment in order to protect state waters from invasive species.

**F. Emergency/Contingency Measures:**

- F1. The Applicant shall develop and implement a Spill Prevention and Containment Plan for all aspects of this project.
- F2. The Applicant shall have adequate and appropriate spill response materials on hand to respond to emergency release of petroleum products or any other material into waters of the state.
- F3. Fuel hoses, oil drums, oil or fuel transfer valves and fittings, etc., shall be checked regularly for drips or leaks, and shall be maintained and stored properly to prevent spills into state waters.

- F4. Any work that is out of compliance with the provisions of this Order, or conditions causing distressed or dying fish, or any discharge of oil, fuel, or chemicals into state waters, or onto land with a potential for entry into state waters, is prohibited. If these occur, the Applicant shall immediately take the following actions:
- a. Cease operations at the location of the violation or spill.
  - b. Assess the cause of the water quality problem and take appropriate measures to correct the problem and/or prevent further environmental damage.
  - c. Notify Ecology of the failure to comply. All oil spills shall be reported immediately to Ecology's 24-Hour Spill Response Team at 1-800-258-5990, **and** within 24 hours of spills or other events to Ecology's 401/CZM Federal Project Manager at (425) 649-7129 or (425) 649-7000.
  - d. Submit a detailed written report to Ecology within five (5) days that describes the nature of the event, corrective action taken and/or planned, steps to be taken to prevent a recurrence, results of any samples taken, and any other pertinent information.

Compliance with this condition does not relieve the Applicant from responsibility to maintain continuous compliance with the terms and conditions of this Order or the resulting liability from failure to comply.

#### **G. Timing Requirements**

- G1. In-water work shall be conducted according to the following:
- a. Between July 15 and September 30 of any year, unless otherwise approved by Ecology.
  - b. Work may commence prior to the timeframe described in Condition G1.a. of this Order if a watercourse has been dry for three (3) weeks or greater. For work in the dry watercourse, the Applicant shall ensure that bypass materials are present and ready for deployment should the channel become re-watered.
- G2. This Order is valid until all compliance requirements in the Order have been met and the applicant has received written notification from Ecology to that effect.

#### **H. Reporting and Notification Requirement Conditions**

- H1. Applicant shall provide notice to Ecology's 401/CZM Federal Project Manager:
- At least three (3) days prior to the start of construction.

- At least one (1) day prior to removal of the temporary bypass.
- Within 14 days after completion of construction at the project site.

Notification, referencing Corps Reference #NWS-2014-980, Order #12962 can take place by telephone to (425) 649-7129 or (425) 649-7000, fax to (425) 649-7098, or in writing.

H2. If the project construction is not completed within 13 months of issuance of this Order, the Applicant shall submit per Condition A2 a written construction status report and submit status reports every 12 months until construction and planting is complete.

### **YOUR RIGHT TO APPEAL**

You have a right to appeal this Order to the Pollution Control Hearing Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do both of the following within 30 days of the date of receipt of this Order:

File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.

Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) Email is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

### **ADDRESS AND LOCATION INFORMATION**

<b>Street Addresses</b>	<b>Mailing Addresses</b>
<p><b>Department of Ecology</b>            Attn: Appeals Processing Desk            300 Desmond Drive SE            Lacey, WA 98503</p> <p><b>Pollution Control Hearings Board</b>            1111 Israel Road SW            STE 301            Tumwater, WA 98501</p>	<p><b>Department of Ecology</b>            Attn: Appeals Processing Desk            PO Box 47608            Olympia, WA 98504-7608</p> <p><b>Pollution Control Hearings Board</b>            PO Box 40903            Olympia, WA 98504-0903</p>

## CONTACT INFORMATION

Please direct all questions about this Order to:

Rebekah Padgett  
Department of Ecology  
Northwest Regional Office  
3190 160<sup>th</sup> Avenue SE  
Bellevue, WA 98008  
(425) 649-7129  
[rebekah.padgett@ecy.wa.gov](mailto:rebekah.padgett@ecy.wa.gov)

## MORE INFORMATION

### Pollution Control Hearings Board Website

[www.eho.wa.gov/Boards\\_PCHB.aspx](http://www.eho.wa.gov/Boards_PCHB.aspx)

### Chapter 43.21B RCW - Environmental and Land Use Hearings Office – Pollution Control Hearings Board

<http://apps.leg.wa.gov/RCW/default.aspx?cite=43.21B>

### Chapter 371-08 WAC – Practice And Procedure

<http://apps.leg.wa.gov/WAC/default.aspx?cite=371-08>

### Chapter 90.48 RCW – Water Pollution Control

<http://apps.leg.wa.gov/RCW/default.aspx?cite=90.48>

### Chapter 173-204 WAC – Sediment Management Standards

[www.ecy.wa.gov/biblio/wac173204.html](http://www.ecy.wa.gov/biblio/wac173204.html)

### Chapter 173-200 WAC – Water Quality Standards for Ground Waters of the State of Washington

[www.ecy.wa.gov/biblio/wac173200.html](http://www.ecy.wa.gov/biblio/wac173200.html)

### Chapter 173-201A WAC – Water Quality Standards for Surface Waters of the State of Washington

[www.ecy.wa.gov/biblio/wac173201A.html](http://www.ecy.wa.gov/biblio/wac173201A.html)

## SIGNATURE



Erik Stockdale, Section Manager  
Shorelands and Environmental Assistance Program  
Northwest Regional Office

2-22-2016

Date

**ATTACHMENT A**

**BNSF RAILWAY CO.  
CUSTER TO FERNDALE DOUBLE TRACK PROJECT  
Water Quality Certification Order #12962**

**Statement of Understanding of  
Water Quality Certification Conditions**

I have read and understand the conditions of Order #12962 Section 401 Water Quality Certification for the BNSF Railway Co. Custer to Ferndale Double Track Project. I have also read and understand all permits, plans, documents, and approvals associated with the project referenced in this Order.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Title

\_\_\_\_\_  
Company