STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
Northwest Regional Office • 3190 160th Avenue SE • Bellevue, Washington 98008-5452 • (425) 649-7000

December 3, 2009

BNSF Railway Co. (BNSF)
Attn: Donald Omsberg, BNSF Manager Engineering
2454 Occidental Avenue South, Suite 1-A
Seattle, WA 98134

WSDOT Rail Office
Attn: Kevin Jeffers, WSDOT Rail Engineering Manager
PO Box 47407 / 310 Maple Park Ave. SE
Olympia, WA 98504-7407

RE: Water Quality Certification Order #7238 for U.S. Army Corps of Engineers Public Notice #NWS-2008-1520-NO to Fill Wetlands for the BNSF Stanwood Siding, Snohomish County, Washington

Dear Mr. Omsberg and Mr. Jeffers:

On December 5, 2008, BNSF Railway Co. submitted a Joint Aquatic Resource Permit Application (JARPA) to the Department of Ecology (Ecology) for a Section 401 Water Quality Certification (401 Certification) under the federal Clean Water Act for the proposed BNSF Stanwood Siding project.

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. The enclosed Order may be appealed by following the procedures described in the Order.

Sincerely,

Erik Stockdale

Erik Stockdale
Northwest Regional Office
Shorelands and Environmental Assistance Program

ES:rrp:cja

Enclosure

By Certified Mail #7009 1410 0002 4050 6744 to BNSF Railway Co. (BNSF)
By Certified Mail #7009 1410 0002 4050 6751 to WSDOT Rail Office

cc: Ron Wilcox, U.S. Army Corps of Engineers
Pierre Bordenave, Intermountain Resources
Sue PaDelford, Intermountain Resources
Roxanne Pilkenton, Snohomish County
Elizabeth Phinney, WSDOT State Rail and Marine Office

e-cc: Paul Anderson – NWRO
Barbara Nightingale – NWRO
Chuck Steele – NWRO
Loree' Randall – HQ
Raman Iyer – NWRO
Lynn Logen lynn.logen@pse.com
ecyrefedpermits@ecy.wa.gov

IN THE MATTER OF GRANTING A WATER QUALITY CERTIFICATION TO BNSF Railway Co. and WSDOT Rail Office in accordance with 33 U.S.C. 1341 (FWPCA § 401), RCW 90.48.120, RCW 90.48.260 and Chapter 173-201A WAC	)	**ORDER #7238** **Corps Reference #NWS-2008-1520-NO** BNSF Stanwood Siding Project; Wetlands, Snohomish County, Washington.

TO: BNSF Railway Co. (BNSF)
Attn: Donald Omsberg, BNSF Manager Engineering
2454 Occidental Avenue South, Suite 1-A
Seattle, WA 98134

WSDOT Rail Office
Attn: Kevin Jeffers, WSDOT Rail Engineering Manager
PO Box 47407 / 310 Maple Park Ave. SE
Olympia, WA 98504-7407

On December 5, 2008, BNSF Railway Co. submitted a Joint Aquatic Resources Permit Application (JARPA) to the Department of Ecology (Ecology) for a Section 401 Water Quality Certification. A joint public notice regarding the request was distributed by the U.S. Army Corps of Engineers (Corps) for the above-referenced project pursuant to the provisions of Chapter 173-225 WAC on June 1, 2009. A JARPA addendum was submitted on December 1, 2009.

The applicants propose to complete a siding, switching and infrastructure improvement project along an approximately 1.81-mile segment of the rail corridor. The work would impact 1.50 acres of palustrine emergent, scrub-shrub, and forested wetlands, including up to 0.18 acre of adjacent perennial open water ditches. Up to 20,000 cubic yards of material would be placed into the wetlands. The adjacent drainage ditches would be relocated approximately 15 feet to the west of the current location to the edge of the BNSF right of way. The wetlands would be re-established from the west edge toe of the expanded railroad prism to the edge of the newly constructed ditches to the west. Twelve existing culverts would be extended to maintain drainage capacity and function within the BNSF right of way corridor.

Wetland impacts will be compensated for by onsite reconstruction of 0.18 of an acre of open water ditches immediately to the west of the siding expansion and restoration of approximately 1.32 acres of Category I and II wetland along Steamboat Slough on Milltown Island as part of the Skagit River System Cooperative Milltown Island Restoration Project.

The project is located in the existing BNSF rail corridor between BNSF Mileposts 56.33+/- and 58.14+/- on the Bellingham Subdivision, Northwest Division, north of Stanwood, Snohomish County, Washington, in wetlands, Sections 12, 13, and 24, T. 32N, R. 3E, W.M., WRIA 3 and 5.

Mitigation will occur onsite (0.18 of an acre) and off-site (1.32 acres) at the Skagit River System Cooperative Milltown Island Restoration Project site, near Conway, Skagit County, Washington, Section 31, T. 33N, R. 04E, W.M., WRIA3.

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, 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; and

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 meet the 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 as a result of project construction or operations.

A. General Conditions:

A1. For purposes of this Order, the term "Applicant" shall mean BNSF Railway Co. and WSDOT Rail Office 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 160th Avenue SE, Bellevue, WA 98008-5452. Any submittals shall reference Order #7238 and Corps Reference #NWS-2008-1520-NO.

A3. Work authorized by this Order is limited to the work described in the JARPA received by Ecology on December 5, 2008. 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. This Order shall be rescinded if the U.S. Army Corps of Engineers does not issue an individual Section 404 permit.

A6. 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.

A7. 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.

A8. 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.

A9. 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. These statements shall be provided to Ecology before construction begins at the project or mitigation sites.

A10. This Order does not authorize direct, indirect, permanent, or temporary impacts to waters of the state or related aquatic resources, except as specifically provided for in conditions of this Order.

A11. 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. Wetland Compensatory Mitigation:

B1. The Applicant shall mitigate wetland impacts as described in the *Waters of the U.S. Delineation, Impacts, Mitigation Report* (hereafter called the "Conceptual Mitigation Plan") prepared by InterMountain Resources, and dated April 30, 2009, or as modified by this Order or revised and approved by Ecology.

A Final Wetland Mitigation Plan shall be prepared and submitted to Ecology for review and approval within 60 days of the date of this Order. The Final Mitigation Plan shall include, at a minimum, as-built grading and planting, contingency, and monitoring plans along with goals, objectives, and verifiable performance standards.

B2. The Applicant shall submit any changes to the Final Mitigation Plan in writing to Ecology (see A2) for review and approval before work begins.

B3. The Applicant shall get review and written approval from Ecology of any plan changes required if problems arise during construction and planting of the wetland mitigation site.

B4. The Applicant shall have a wetland professional at the wetland mitigation site during construction and planting.

<u>Implementation</u>

B5. Unless otherwise approved by Ecology in writing, the Applicant shall begin the compensatory mitigation project before, or concurrent with, impacting wetlands or Ecology may require additional compensation to account for additional temporal loss of wetland functions.

B6. If the mitigation site(s) cannot be completed within 13 months of the date of this Order, the Applicant shall inform Ecology, in writing, of the status of

a) BNSF Stanwood Siding Project.
b) Milltown Island and onsite mitigation sites.

With the:

c) Reason for the delay.
d) Expected date of completion.

The Applicant shall submit an updated written notification every 12 months thereafter until the BNSF Stanwood Siding Project and Milltown Island and onsite mitigation sites are complete.

B7. The Applicant shall ensure that all excess excavated site material is disposed of in an appropriate location outside of wetlands and their buffers at the wetland mitigation sites and above the 100-year floodplain.

B8. The Applicant shall ensure that no material is stockpiled within existing wetlands and their buffers at the wetland mitigation site(s) at any time, unless provided for in the Ecology-approved Mitigation Plan.

B9. The Applicant shall ensure that no construction debris is deposited within existing wetland and their buffers at the wetland mitigation site(s) at any time, unless provided for in the Ecology approved Mitigation Plan.

B10. The Applicant shall not use Polyacrylamide on exposed or disturbed soil at the mitigation site(s).

B11. The Applicant shall not use hay or straw on exposed or disturbed soil at the mitigation site(s).

B12. If seeding is used at the wetland mitigation site, the seed mix must contain native, annual, non-invasive plant species.

B13. The Applicant shall place signs at the mitigation areas' boundaries, including buffers, every 75 feet to mark the areas as wetland mitigation site(s).

B14. Upon completion of site-grading and prior to planting, the Applicant shall submit to Ecology written confirmation that the finished grades are consistent with the approved Final Mitigation Plan or subsequent Ecology-approved plan changes. Written confirmation can be in the form of a signed letter from the surveyor or project engineer indicating how final elevations were confirmed and whether those elevations are consistent with the Final Mitigation Plan.

B15. Within 90 days of completing construction and planting of the mitigation sites, the Applicant shall submit to Ecology (see A2) one hard copy and one electronic file of the final as-built report including maps. The as-built report must:

a) Document site conditions at Year Zero.

b) Include the information listed in Attachment B (Information Required for As-built Reports).

c) Include documentation of the recorded legal mechanism required in Condition B16.

B16. Within 90 days of the date the Order was issued, the Applicant shall record a conservation easement for Milltown Island mitigation site, a copy of this Order, and a site map indicating the location of mitigation site and their buffers. These documents must be recorded with the County Recording Office, Registrar of Deeds, or other official responsible for maintaining records for, or interest in, real property.

Monitoring and Maintenance

B17. The Applicant shall water and maintain all mitigation site plantings so as to meet the Final Mitigation Plan's performance standards.

B18. The Applicant shall monitor the mitigation site for a minimum of 10 years. The Applicant shall use the monitoring methods described in the Final Mitigation Plan.

B19. The Applicant shall submit to Ecology (see A2) one hard and one electronic copy of monitoring reports documenting mitigation site conditions for years 1, 2, 3, 5, 7, and 10. At a minimum, the reports must contain the information in Attachment C (Information Required for Monitoring Reports). The Applicant shall submit the first monitoring report 12 months after completing the mitigation site construction and planting.

B20. The Applicant shall implement the Final Mitigation Plan's contingency measures if the Final Mitigation Plan's goals, objectives, or performance standards are not being met.

B21. Prior to implementing contingency measures not specified in the Mitigation Plan, the Applicant shall consult with and obtain written approval from Ecology for the changes.

B22. When necessary to meet the performance standards, the Applicant shall replace dead or dying plants with the same species, or an appropriate native plant alternative, during the first available planting season and note species, numbers, and approximate locations of all replacement plants in the subsequent monitoring report.

B23. For monitoring years five (5) and ten (10) the Applicant shall use the 1997 or updated versions of the "Washington State Wetlands Identification and Delineation Manual" (or as updated) to delineate all compensatory wetlands and include delineation information (e.g. data sheets, maps, etc.) in the monitoring reports.

B24. At the end of the monitoring period, the Applicant shall use the August 2004 or updated version of "Washington State Wetlands Rating System for Western Washington" to rate all wetlands (except those that have been preserved) and include the information in the monitoring report.

B25. If the Applicant has not met all conditions and performance standards for the mitigation sites at the end of the monitoring period, Ecology may require additional monitoring, additional mitigation, or both.

B26. Until the Applicant has received written notice from Ecology that the Final Mitigation Plan has been fully implemented, the Applicant's obligation under Condition B1 to mitigate for wetland impacts is not met.

C. Conditions for Construction Activities:

General Conditions:

C1. Applicant shall obtain and comply with a Construction Stormwater General Permit for this project.

C2. 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.

C3. Sediment and erosion control measures shall be inspected and maintained prior to and during project implementation.

C4. All construction debris shall be properly disposed of in a manner to prevent it from entering the wetlands and/or wetland buffers.

C5. 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.

C6. 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.

C7. Clean Fill Criteria: Applicant shall ensure that fill (soil) placed for the proposed project does not contain toxic materials in toxic amounts.

D. Emergency/Contingency Measures:

D1. The Applicant shall develop and implement a Spill Prevention and Containment Plan for all aspects of this project.

D2. 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.

D3. 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.

D4. 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.

E. Timing Requirements

E1. This Order is valid until all compliance requirements in this document have been met.

F. Reporting and Notification Requirement Conditions

F1. Applicant shall provide notice to Ecology's 401/CZM Federal Project Manager at least three (3) days prior to the start of construction and within 14 days after completion of construction at the project site. The Applicant shall also provide Ecology notice within 14 days after completing each site of the wetland mitigation project. Notification,

referencing Corps Reference #NWS-2008-1520-NO, Order #7238 can take place by telephone to (425) 649-7129 or (425) 649-7000, fax to (425) 649-7098, or in writing.

G. Appeal Process:

You have a right to appeal this Order. To appeal this you must:

- File your appeal with the Pollution Control Hearings Board within 30 days of the "date of receipt" of this document. Filing means actual receipt by the Board during regular office hours.
- Serve your appeal on the Department of Ecology within 30 days of the "date of receipt" of this document. Service may be accomplished by any of the procedures identified in WAC 371-08-305(10). "Date of receipt" is defined at RCW 43.21B.001(2).

Be sure to do the following:

- Include a copy of this document that you are appealing with your Notice of Appeal.
- Serve and file your appeal in paper form; electronic copies are not accepted.

1. To file your appeal with the Pollution Control Hearings Board

Mail appeal to:

The Pollution Control Hearings Board
PO Box 40903
Olympia, WA 98504-0903

OR

Deliver your appeal in person to:

The Pollution Control Hearings Board
4224 – 6th Ave SE Rowe Six, Bldg 2
Lacey, WA 98503

2. To serve your appeal on the Department of Ecology

Mail appeal to:

The Department of Ecology
Appeals Coordinator
P.O. Box 47608
Olympia, WA 98504-7608

OR

Deliver your appeal in person to:

The Department of Ecology
Appeals Coordinator
300 Desmond Dr SE
Lacey, WA 98503

3. And send a copy of your appeal to:

Department of Ecology
Northwest Regional Office
Attn: Rebekah Padgett
3190 160th Avenue SE
Bellevue, WA 98008

For additional information visit the Environmental Hearings Office Website:
http://www.eho.wa.gov

To find laws and agency rules visit the Washington State Legislature Website:
http://www1.leg.wa.gov/CodeReviser

Your appeal alone will not stay the effectiveness of this Order. Stay requests must be submitted in accordance with RCW 43.21B.320. These procedures are consistent with Ch. 43.21B RCW.

Dated December 3, 2009 at Bellevue, Washington.

Erik Stockdale

Erik Stockdale, Unit Supervisor
Northwest Regional Office
Shorelands and Environmental Assistance Program
Department of Ecology
State of Washington

ATTACHMENT A

BNSF RAILWAY CO. AND WSDOT RAIL OFFICE
BNSF STANWOOD SIDING PROJECT
Water Quality Certification Order #7238

Statement of Understanding of
Water Quality Certification Conditions

I have read and understand the conditions of Order #7238 Section 401 Water Quality Certification for the BNSF Railway Co. and WSDOT Rail Office BNSF Stanwood Siding 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

Attachment B
Information for As-built Reports
(See Condition B15)

BNSF RAILWAY CO. AND WSDOT RAIL OFFICE
BNSF STANWOOD SIDING PROJECT
Water Quality Certification Order #7238

Corps Reference #NWS-2008-1520-NO

Background Information

1) Project name.
2) Ecology docket number and the Corps reference number.
3) Name and contact information for the parties responsible for the mitigation site including:
    a) The applicant.
    b) The landowner.
    c) Wetland professional on site during construction of the compensatory mitigation site.
4) Name and contact information for the party responsible for preparing the report.
5) Who the report was prepared for (name, address, and phone number) {*if different from number 3 above.*}
6) Month and year the report was produced.

The Development Site

7) Brief description of the development project. Include:
    a) Directions to the site.
    b) Month and year construction of the development project started and ended.
    c) Area (acres) and type(s) (rating category, HGM classification, and Cowardin classification) of wetlands that were **actually** impacted by the development project, including temporary impacts.

The Compensatory Mitigation Project

8) Brief description of the **final** compensatory mitigation project with any changes from the approved plan made during construction. Include:
    a) Directions to the site.
    b) Who completed the compensatory mitigation project (name, address, and phone number.
    c) Acreage and type(s) (re-establishment, rehabilitation, creation, enhancement, and preservation) of mitigation authorized to compensate for wetland impacts.
    d) Important dates including:
        i. Month and year the wetland impacts occurred.
        ii. When work on the compensatory mitigation site began and ended.

iii. When different activities began and ended such as grading, removal of invasive plants, installing plants, and installing habitat features.

9) Description of any problems encountered and solutions implemented (with reasons for changes) during construction of the compensatory mitigation site.
10) Any changes to the goals, objectives, and performance standards of the compensatory mitigation project.
11) List of any follow-up actions needed, with a schedule.
12) Final site maps (8 1/2" x 11" or larger) of the compensatory mitigation site(s) including the following (at a minimum).
    a) Geographic location of the site with landmarks;
    b) Clear delineation of the project perimeter(s);
    c) Topography (with a description of how elevations were determined),;
    d) Installed planting scheme (quantities, densities, sizes, and approximate locations of plants, as well as the source(s) of plant material);
    e) Location of habitat features;
    f) Location of permanent photo stations.

    The final site maps should reflect on-the-ground conditions after the site work is completed. Include the month and year when the maps were produced and, if applicable, when information was collected.
13) Photographs of the site at as-built conditions taken from permanent photo stations. We recommend photo pans.
14) Copies of any records of deed notification or conservation easements.

Attachment C
Required Information for Monitoring Reports
(See Condition B19)

BNSF RAILWAY CO. AND WSDOT RAIL OFFICE
BNSF STANWOOD SIDING PROJECT
Water Quality Certification Order #7238

Corps Reference #NWS-2008-1520-NO

Ecology requires the following information, for monitoring reports submitted under this Order. Ecology will accept additional information that may be required by other regulators.

Background Information

1) Project name
2) Ecology docket number and Corps reference number
3) Name and contact information of the parties responsible for the mitigation site including:
    a) The applicant
    b) The landowner
4) Name and contact information for the party responsible for the monitoring activities and report.
5) Who the report was prepared for (name, address, and phone number) {*if different from number 3 above.*}
6) Month and year the monitoring data were collected
7) Month and year the report was produced

Mitigation Project Information

8) Brief description of the mitigation project including:
    a) Directions to the site
    b) Acreage and type(s) (re-establishment, rehabilitation, creation, enhancement, and preservation) of mitigation authorized to compensate for wetland impacts
9) Brief description of monitoring approach and methods.
10) A list of the goals and objectives for the mitigation project
11) Summary table of monitoring data compared with performance standards. Using the monitoring data, describe how the site is developing toward goals and objectives and whether the project is in compliance with performance standards
12) Summary (including dates) of management actions (maintenance, contingencies, and corrective actions) implemented at the site(s)
13) Summary of any difficulties or significant events that occurred on the site that may affect the ultimate success of the project

14) Specific recommendations for any additional corrective actions or adaptive management with a time table
15) Summary of any lessons learned
16) Site maps (8 1/2" x 11" or larger) of the compensatory mitigation site(s) including the following (at a minimum):
    a) The month and year when the maps were produced and, if applicable, when information was collected
    b) The geographic location of the site with landmarks.
    c) Clear delineation of the project perimeter(s).
    d) Species, numbers, and approximate locations of all replanted material vegetation.
    e) Location of habitat features.
    f) Location of permanent photo stations and location of any other photos.
    g) Location of sampling points or transects.
17) Photographs taken at permanent photo stations (and other photographs as needed) from the most recent monitoring visit, which are dated and clearly indicate the direction from which the photo was taken. We recommend photo pans.