



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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April 12, 2012

Kris Knight  
The Nature Conservancy  
410 N. 4<sup>th</sup> Street  
Mt. Vernon, WA 98273

**RE:** Water Quality Certification Order #8944 for U.S. Army Corps of Engineers  
Public Notice #NWS-2011-1026, Livingston Bay Pocket Estuary Restoration  
Project, Island County, Washington

Dear Kris Knight:

On November 22, 2011, The Nature Conservancy 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 Livingston Bay Pocket Estuary Restoration 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, Unit Supervisor  
Northwest Regional Office  
Shorelands and Environmental Assistance Program

ES:rrp:cja

Enclosure

**By certified mail: 7011 0470 0003 3720 9565**



cc: Catherine Blackwell, U.S. Army Corps of Engineers  
Doug Thompson, Washington Department of Fish and Wildlife

e-cc: David Pater – NWRO  
Susan Meyer – NWRO  
Loree' Randall – HQ  
Raman Iyer – NWRO  
[ecyrefedpermits@ecy.wa.gov](mailto:ecyrefedpermits@ecy.wa.gov)

**IN THE MATTER OF GRANTING A ) ORDER #8944**  
**WATER QUALITY ) Corps Reference #NWS-2011-1026**  
**CERTIFICATION TO ) Livingston Bay Pocket Estuary Restoration**  
**THE NATURE CONSERVANCY ) Project; Livingston Bay, Island County,**  
in accordance with 33 U.S.C. 1341 ) Washington.  
(FWPCA § 401), RCW 90.48.120, RCW )  
90.48.260 and Chapter 173-201A WAC )

TO: Kris Knight  
The Nature Conservancy  
410 N. 4<sup>th</sup> Street  
Mt. Vernon, WA 98273

On November 22, 2011, The Nature Conservancy 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 December 16, 2011.

The restoration proposal includes:

- Excavation of 3,000 cubic yards of soil and sediment to breach the north shore of an existing dike
- Placement of 607 cubic yards of excavated soil and sediments to close a dike breach on the south shore of the existing dike and backfill an existing ditch

The project is located at the northeastern portion of Camano Island, Island County, Washington, Livingston Bay, Sections 29 and 32, T. 32 N., R. 3E., WRIA 6.

#### **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; 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 The Nature Conservancy 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 #8944 and Corps Reference #NWS-2011-1026.
- A3. Work authorized by this Order is limited to the work described in the JARPA received by Ecology on November 22, 2011. 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. Water Quality Condition:**

- B1. Livingston Bay is classified as "Excellent" and the criteria of that class apply except as specifically modified by this Order. This Order does not authorize temporary exceedances of water quality standards beyond the limits established in WAC 173-201A-210(1)(e)(i).
- B2. In-Water Construction Water Quality Sampling and Monitoring: A Water Quality Protection and Monitoring Plan (Plan) shall be developed and implemented. "In-water construction" is defined as all work below the ordinary high water mark of Livingston Bay.

The Plan shall include the following minimum requirements:

- a. Locations of samples: Locations of water quality sampling sites shall be identified and described in the Plan and on a map of the project area. At a minimum, sampling shall take place at the point of compliance as specified in WAC 173-201A-210(1)(e)(i), which allows a 150-foot temporary area of mixing for turbidity resulting from disturbance of in-place sediments in Livingston Bay. Background samples shall be collected outside the area of influence of the in-water work. Background samples shall be collected at the same frequency as the point of compliance samples.
- b. Number of samples: Number and frequency of water quality samples to be taken.
- c. Parameter to be sampled: Turbidity shall be sampled for this project.
- d. Equipment: Sampling for turbidity is to be accomplished using a turbidometer properly calibrated according to the operator's manual.
- e. Best Management Practices (BMPs): A description of the BMPs that will be used during construction to protect water quality.
- f. Detection of exceedances: Water quality standards for turbidity in "Excellent Quality" waters are as follows: turbidity shall not exceed 5 NTU over background conditions when the background is 50 NTU or less, or a 10 percent increase in turbidity when the background turbidity is more than 50 NTU. If exceedances of this standard at the point of compliance specified in WAC 173-201A-210(1)(e)(i) is detected through water quality sampling and monitoring, the Applicant shall immediately take action to stop, contain, and prevent unauthorized discharges or otherwise stop the violation and correct the problem. After such an event, the Applicant shall assess the efficacy of the site BMPs and update or improve the BMPs used at the work site in an effort to reduce or prevent recurrence of the turbidity exceedance.
- g. Reporting: If no exceedances are detected, results of water quality sampling, as determined by the Plan, shall be forwarded to Ecology on a monthly basis in accordance to Condition A2.
- h. Notification of exceedances: Notification of exceedances that are detected through water quality sampling shall be made to Ecology within 24 hours of occurrence. Notification shall be made with reference to Order #8944, 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.

**C. Conditions for Construction Activities:**

**General Conditions:**

- C1. 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.
- C2. Sediment and erosion control measures shall be inspected and maintained prior to and during project implementation.
- C3. 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.
- C4. 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.
- C5. 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.
- C6. 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.
- C7. All manmade debris that has been deposited below the Ordinary High Water Line 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 marine areas shall be removed from the project area.

- C8. Excavated material shall not be stockpiled on a temporary or permanent basis below the ordinary high water line.
- C9. Project activities shall be conducted to minimize siltation of the beach area and bed.
- C10. Native riparian vegetation shall be left in place along the shoreline to the extent practicable.
- C11. The construction vessel temporary landing area shall be confined to no more than two barge landing zones and the footprint of disturbance minimized.
- C12. Disturbed work areas below Mean Higher High Water (MHHW) and outside of proposed construction features shall be restored to pre-disturbance grade and substrates.
- C13. Excavation activities seaward of the pocket estuary shall be conducted in the dry during low tide periods in order to minimize turbidity.
- C14. Material placement activities during borrow ditch hydraulic improvements shall be conducted prior to dike breaching in order to minimize turbidity.
- C15. Environmentally sensitive areas and existing wetland vegetation outside of work areas shall be avoided. These areas shall be noted on project drawings and staked in the field.
- C16. Equipment access between the north and south work areas shall be along the upper beach profile and the area of use shall be minimized. These areas shall be restored to pre-project grade and substrates when construction is complete.
- C17. Material placement activities at the south breach shall be conducted during low tide periods in order to minimize turbidity.
- C18. Fill for the project shall come from excavated soils and sediments within the project area.
- C19. The derelict trailer and associated structure, wooden shack and contents, and pickup truck shall be disposed of at an appropriate off-site upland facility.

**D. Project Monitoring Conditions:**

- D1. Monitoring of the constructed channel and salmonid access shall be conducted per the *NOAA Restoration Center Monitoring Plan, Livingston Bay Pocket Estuary Restoration Project* (hereafter referred to as the "Monitoring Plan"), except as modified by this Order.

Monitoring will include the following:

- a. As-Built Report and Drawings: A report documenting the final construction of the restoration area shall be prepared when site construction is completed. Two copies of the As-Built Report shall be sent to Ecology per Condition A2 within 60 days of completing construction, and in no case later than December 15, 2012, unless approval is obtained in advance from Ecology.
- b. Post-Construction Monitoring: Post-construction monitoring to measure changes in the constructed pilot channel shall be performed as described in the Monitoring Plan after the first winter. Two (2) copies of all monitoring reports shall be submitted to Ecology per Condition A2.
- c. Salmonid Monitoring: Monitoring to measure changes in Salmonid access to the pocket estuary shall be performed as described in the Monitoring Plan the first spring following construction. Two (2) copies of all monitoring reports shall be submitted to Ecology per Condition A2.
- d. Photo Monitoring: Photo monitoring shall take place twice after construction as described in the Monitoring Plan. Two (2) copies of all photo monitoring shall be submitted to Ecology per Condition A2.

**E. Emergency/Contingency Measures:**

- E1. The Applicant shall develop and implement a Spill Prevention and Containment Plan for all aspects of this project.
- E2. 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.
- E3. 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.
- E4. 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.

**F. Timing Requirements**

- F1. This Order expires five (5) years from the date of issuance of the Corps permit.

**G. Reporting and Notification Requirement Conditions**

- G1. The Applicant shall provide to Ecology's 401/CZM Federal Permit Manager a copy of the final Corps permit within 2 weeks of receipt of the permit. A copy shall be submitted per condition A2 above.
- G2. 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. Notification, referencing Corps Reference #NWS-2011-1026, Order #8944 can take place by telephone to (425) 649-7129 or (425) 649-7000, fax to (425) 649-7098, or in writing.
- G3. 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 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).

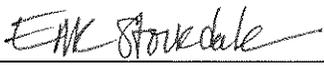
To appeal you must do all of the following within 30 days of the date of receipt of this Order:

- 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.) E-mail 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**

Street Addresses	Mailing Addresses
<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 RD 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>

  
 Erik Stockdale, Unit Supervisor  
 Wetlands/401 Unit  
 Shorelands and Environmental Assistance Program  
 Northwest Regional Office

4-12-2012  
 April 12, 2012

**ATTACHMENT A**

**THE NATURE CONSERVANCY  
LIVINGSTON BAY POCKET ESTUARY RESTORATION PROJECT  
Water Quality Certification Order #8944**

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

I have read and understand the conditions of Order #8944 Section 401 Water Quality Certification for The Nature Conservancy Livingston Bay Pocket Estuary Restoration 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