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

January 29, 2009

REGISTERED MAIL
RB 670 439 767 US

Diking District #3
c/o David Olson
18385 Torset Road
Mount Vernon, WA 98273

RE: Water Quality Certification Order #6321 for U.S. Army Corps of Engineers Reference No. NWS-2008-1093-NO, Drainage Maintenance Diking District #3 Project, Carpenter Creek, Sandy Creek, Johnson Creek, Fisher Creek, Hill Ditch, Fisher Slough, and Artificial Drainage Watercourses, Skagit County, Washington

Dear Mr. Olson:

On August 14, 2008, Diking District #3 submitted a Joint Aquatic Resources Permit Application (JARPA) to the Department of Ecology (Ecology) for a Section 401 Water Quality Certification (401 Certification) under the federal Clean Water Act (CWA) for the proposed Drainage Maintenance Diking District #3 project. The Corps issued a joint public notice on December 8, 2008, for the proposed project.

The applicant proposes to conduct routine drainage maintenance activities within the diking district.

On behalf of the State of Washington, through the enclosed Order, Ecology certifies that the work described in the August 14, 2008 JARPA and the December 8, 2008 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 or email at rpad461@ecy.wa.gov. The enclosed Order may be appealed by following the procedures described in the Order.

Sincerely,

Erik Stockdale

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

ES:rrp:cja
Enclosure

cc: Randel Perry, U.S. Army Corps of Engineers
Brian Williams, Washington Department of Fish and Wildlife
Patty Michak, Marine View Fisheries Consulting, Inc.
Mike Rundlett, Western Washington Agricultural Association
Mike Shelby, Western Washington Agricultural Association

(Over)

e-cc: Loree' Randall – HQ
Alice Kelly – NWRO
Richard Grout – BFO
Mak Kaufman – BFO
Bob Fritzen – BFO
Sally Lawrence – NWRO
Dave Garland – NWRO
Raman Iyer – NWRO
Ernie Roque ernie@haygrass.com
ecyrefedpermits@ecy.wa.gov

IN THE MATTER OF GRANTING A WATER QUALITY CERTIFICATION TO Diking District #3 in accordance with 33 U.S.C. 1341 (FWPCA § 401), RCW 90.48.120, RCW 90.48.260 and Chapter 173-201A WAC	)))))))	**ORDER #6321** **Corps Reference #NWS-2008-1093-NO** Drainage Maintenance Diking District #3 Project; Carpenter Creek, Sandy Creek, Johnson Creek, Fisher Creek, Hill Ditch, Fisher Slough, and Artificial Drainage Watercourses, Skagit County, Washington.

TO: Diking District #3
c/o David Olson
18385 Torset Road
Mount Vernon, WA 98273

On August 14, 2008, Diking District #3 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 8, 2008.

The proposed drainage maintenance work includes:

- Flood Gates: Removal of debris and minor repairs.
- Channel In-Water Bucket Mowing: Removal of vegetative material below the water line, not including the root system or soil.
- Channel Out-of-Water Mowing: Removal of vegetative material above the water line, not including the root system or soil.
- Dredging: Maintenance dredging of channels to restore original depths and contours, including side slopes. Includes debris removal.
- Screw Gate Flood Bypass: Removal of debris and maintenance.

The project is located within Diking District #3, within the Skagit River Delta of Skagit County, south of the City of Mount Vernon and north of Stanwood, Washington, in Sections 04, 05, 06, 07, 08, 17, 18, 19, 20, 29, 30, 31, T. 33 N., R. 04 E., and Sections 29, 31, 32, T. 34 N., R. 04 E., WRIA 3.

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 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 as a result of project construction or operations.

A. General Conditions:

A1. For purposes of this Order, the term "Applicant" shall mean Diking District #3 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 #6321 and Corps Reference #NWS-2008-1093-NO.

A3. Work authorized by this Order is limited to the work described in the JARPA received by Ecology on August 14, 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. Water Quality Conditions:

B1. Water quality standards for turbidity in "Salmonid Spawning, Rearing, and Migration" 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-200(1)(e)(i) are 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.

B2. Notification of exceedances: Notification of three (3) successive exceedances that are detected through hourly visual water quality monitoring shall be made to Ecology within 24 hours of occurrence. Notification shall be made per Condition A.2. The Applicant shall, at a minimum, provide Ecology with the following information:

a. A description of the nature and cause of non-compliance, including the quantity and quality of any unauthorized discharges;

b. The period of non-compliance, including exact dates, duration, and times and/or the anticipated time when the Applicant will return to compliance; and

c. The steps taken, or to be taken, to reduce, eliminate, and prevent recurrence of the non-compliance.

d. In addition, the Applicant shall submit a written report to Ecology upon request that describes in writing the information described in Condition B.2.a–c.

B3. Reporting: If no exceedances are detected, results of water quality monitoring, as determined by the *General Supplement, Skagit County Diking District No. 3 Drainage Maintenance Plan (DMP) and Water Quality Guidance*, revised 11/24/08, shall be forwarded to Ecology at the end of each season, and no case later than March 1st of each year, in accordance to Condition A2.

C. Conditions for In-Water Construction Activities:

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. Work shall be accomplished per the BMPs described in the following documents, except as modified by this Order:

- *Diking District #3 Drainage Maintenance Agreement*, dated 6/16/06, including Addendum A: Best Management Practices and Addendum B: Drainage Maintenance Plan (dated 6/16/07).

- *General Supplement, Skagit County Diking District No. 3 Drainage Maintenance Plan (DMP) and Water Quality Guidance*, revised 11/24/08.

If any of the above documents are modified, they shall be submitted to Ecology for review and approval.

C4. All debris shall be properly disposed of on land so that it cannot enter a waterway or cause water quality degradation to state waters.

C5. Machinery and equipment 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. Work in or near the water that may affect fish migration, spawning, or rearing shall cease immediately upon a determination by Ecology or WDFW that fisheries resources may be adversely affected.

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 expires five (5) years from the date of issuance. A new 401 Certification must be obtained prior to expiration in order to continue drainage maintenance in Diking District #3 beyond five years.

F. Reporting and Notification Requirement Conditions

F1. Applicant shall provide notice per condition A.2. 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.

F2. Applicant shall provide notice to Ecology per Condition A.2. within 48 hours of any Force Majeure Event and/or any other unanticipated events as described in the *General Supplement, Skagit County Diking District No. 3 Drainage Maintenance Plan (DMP) and*

Water Quality Guidance, revised 11/24/08. The Applicant shall, at a minimum, provide Ecology with the following information:

a. A description of the event, dates and duration of the event, and any steps taken, or to be taken, by the Applicant to address water quality issues related to this project.

b. In addition, within two (2) weeks of the Event, the Applicant shall submit a written report to Ecology that describes the nature of the Event, action taken and/or planned, photographs, and any other pertinent information.

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:		Deliver your appeal in person to:
The Pollution Control Hearings Board PO Box 40903 Olympia, WA 98504-0903	OR	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:		Deliver your appeal in person to:
The Department of Ecology Appeals Coordinator P.O. Box 47608 Olympia, WA 98504-7608	OR	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 January 29, 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

DIKING DISTRICT #3
DRAINAGE MAINTENANCE DIKING DISTRICT #3 PROJECT
Water Quality Certification Order #6321

Statement of Understanding of
Water Quality Certification Conditions

I have read and understand the conditions of Order #6321 Section 401 Water Quality Certification for the Drainage Maintenance Diking District #3 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