



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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August 12, 2010

Evan Lewis, Chief
Environmental Resources Section
US Army Corps of Engineers, Seattle District
4735 East Marginal Way South
Seattle, WA 98124

RE: Sande-Williams Levee Repairs and Construction, Nooksack River –
Coastal Zone Management (CZM) Consistency – **CONDITIONAL APPROVAL**

Dear Mr. Lewis:

The Department of Ecology (Ecology) has concluded its additional review of your proposal to repair and modify approximately 1,000 lineal feet (lf) of levee along the right bank of the Nooksack River at or near River Mile 33.0 in Whatcom County, Washington. The work is further described as occurring within Sections 26 and 35, T39N, R4E situated in WRIA 1 and approximately 700 yards south of the end of Williams Road. This letter replaces our letter of objection sent to you on January 6, 2010.

Specific construction activities considered for CZM consistency are:

- Placement of riprap both above and below the ordinary high water mark (OHWM)
- Excavation of and re-sloping the riverward levee face
- Installation of large woody debris structures and related excavation and pile driving
- Construction of a new 200 lf long “dogleg” barrier buried approximately 16 ft deep
- Cutting and clearing several mature conifer and hardwood trees
- Approximately 1,000 lf of gravel road construction
- Installation of willow plantings for approximately 778 lf near the OHWM



Ecology concurs with your September 8, 2009 determination that the proposed action is consistent with the enforceable policies of the State of Washington's Coastal Zone Management Program (CZMP) provided two primary conditions are met, as described below. The two

conditions may be summarized as: (1) Diking District #2 (DD#2) submits complete applications for shoreline development and conditional use permits for the entire structure prior to the initiation of work on the ground and then takes appropriate and timely action to follow-through on the permit applications to a final determination by the County and Ecology, and (2) the Army Corps of Engineers (Corps), Ecology, DD#2, and the other interested parties work collaboratively and diligently to obtain federal funding to complete a long-term solution addressing shoreline management, flood hazard reduction, water quality and salmon recovery. We base our conditional approval on the project's consistency with the Shoreline Management Act, specifically 90.58.020 and 90.58.140, as more fully set forth below.

As stated in the Washington State Shoreline Management Act (SMA), Chapter 90.58 RCW, the state's policy for shoreline use preference at RCW 90.58.020 is enunciated as follows,

"The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines

for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

(1) Recognize and protect the statewide interest over local interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

(4) Protect the resources and ecology of the shoreline;

(5) Increase public access to publicly owned areas of the shorelines;

(6) Increase recreational opportunities for the public in the shoreline;

(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and shorelands of the state shall be recognized by the department. Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and shorelands of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter 90.58 RCW.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water."

The proposed activity is substantial development and use within SMA jurisdiction designated by the legislature as a "shoreline of statewide significance" and as defined in the SMA as follows,

RCW 90.58.030 Definitions and concepts.

(2) Geographical:

- (e) "Shorelines of state-wide significance" means the following shorelines of the state:
 - (v) Those natural rivers or segments thereof as follow
 - (A) Any west of the crest of the Cascade range downstream of a point where the mean annual flow is measured at one thousand cubic feet per second or more,
 - (vi) Those shorelands associated with (i), (ii), (iv), and (v) of this subsection (2)(e);
 - (f) "Shorelands" or "shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.
- (3) Procedural terms:
- (d) "Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;

The proposal and current activities have not been authorized or permitted under the SMA in accordance with RCW 90.58.140, to wit,

RCW 90.58.140 Development permits – Grounds for granting – Administration by local government, conditions – Applications – Notices – Rescission – Approval when permit for variance or conditional use.

- (1) A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules, or master program.
- (2) A substantial development shall not be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.

CONDITIONS ENUMERATED:

1. Diking District #2 Shall Obtain Required Shoreline Permits

Much of the existing Sande-Williams structure was never permitted or authorized by the county for the diking district or the underlying private property owners. From 2007 forward Diking District #2 was responsible for obtaining permits for work on the levee that did not

qualify as emergency repairs or were emergency repairs that required after-the-fact permits but did not do so. The structure and any proposed modifications to it are in direct conflict with RCW 90.58.140(2), which requires a permit for any substantial development on state shorelines. The county's Shoreline Master Program requires a shoreline conditional use for flood control works and in-stream structures in the shoreline Conservancy designation where the proposal is located. Adding to or modifying the levee without proper permitting would only serve to compound the inconsistency with the SMA. Prior to any additional

construction activities, Diking District #2 shall apply for after-the-fact substantial development and conditional use permits for the entire project, including the work proposed for 2010, running from the proposed upper "dogleg" to the lower end revetment work. The

Diking District, as the applicant, shall then take appropriate and timely action to follow-through on the permit application to a final determination by the County and Ecology.

2. The US Army Corps of Engineers (USACE) Shall Work Cooperatively with Local Sponsors (Diking District #2, Ecology, and Whatcom County) To Evaluate A Long-Term Solution to Flooding Issues in Reach 4

Ecology has determined that there is a clear and urgent need for a planned, rational and concerted evaluation, jointly performed by federal, state, tribal and local governments, to prevent the inherent harm resulting from continued uncoordinated and piecemeal development of the state's shorelines. The evaluation must include alternatives for several levee configurations that include a setback levee or a combination of setback levees and other measures in Reach 4 that will provide adequate width to allow the river to disperse its flood flows, reduce current velocities, and avoid undermining the clay banks on the downstream left bank. The levee configurations to be analyzed must be approved by Ecology prior to commencement of the work. The intent is to allow the flood flows to dissipate their energy over a much larger portion of the floodway and floodplain, allow habitat protection and enhancement functions to occur, provide a safer and recreationally-friendly setting, reduce or eliminate the severe erosion of the clay banks, with its significant silt contributions and impacts on water quality and salmon, and provide a lower-cost protection scheme over the long-term. The work will include but not be limited to a geomorphic analysis, hydraulic and engineering analysis, and economic analysis, as approved by Ecology. The existing FEQ unsteady flow flood model shall be used for the hydraulic analysis to provide a solid understanding of the best way to protect this area and its resources consistent with the county's larger flood management plan and salmon recovery plan. In addition, a "floodway no-rise analysis" must be performed consistent with Federal Executive Order 11988 and the Whatcom County floodway encroachment standard. The work will be performed under the oversight of Whatcom County Public Works River and Flood Division, using the county's modeling consultants.

Diking District #2 shall participate as a co-sponsor with Ecology and Whatcom County in working with USACE to identify appropriate programs and obtain available federal funding for the evaluation. Following the receipt of a letter of intent from a qualified sponsor, USACE shall seek available funding under appropriate programs. Prior to USACE

determination of the appropriate authority to pursue federal assistance, USACE and the local sponsors shall meet and identify the potential project geographical scope, problems and issues, and potential solutions. The letter of intent from the local sponsor must stipulate the study authority.

See Attachment A, which is a part of this conditional approval.

In the event the above two conditions are not met, all parties shall treat Ecology's conditional concurrence letter as an objection pursuant to the applicable subpart and notify, pursuant to §930.63(e), applicants, persons and applicant agencies of the opportunity to appeal the State agency's objection to the Secretary of Commerce within 30 days after receipt of Ecology's conditional concurrence/objection or 30 days after receiving notice from the federal agency that the application will not be approved as amended by Ecology's conditions.

You have the right to appeal this decision to the Pollution Control Hearings Board. 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

Deliver your appeal in person to:

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

3. And send a copy of your appeal to:

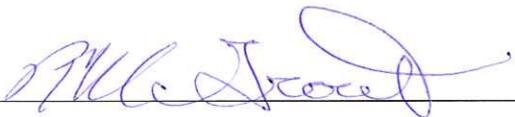
Department of Ecology
Bellingham Field Office
Shorelands and Environmental Review Program
Attn: Barry A. Wenger
1440- 10th Street
Bellingham, WA 98225-2078

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 August 12, 2010 at Bellingham, Washington.



Richard Grout, Manager
Bellingham Field Office

RG:bw

Enclosure: Attachment A
By certified mail

cc: Whatcom County Diking District #2 Commissioners – Gene Aarstol, Art Anderson,
Harry Williams

ecc: Frank Abart, Whatcom County Public Works
Chad Yunge, Whatcom County Planning & Development Services
David Spicer, U.S. Army Corps of Engineers

Chuck Ebel, U.S. Army Corps of Engineers
Merle Jefferson, Lummi Nation
Jeremy Freimund, Lummi Nation
Robert Kelly, Nooksack Tribe
Llyn Doremus, Nooksack Tribe
David Kaiser, OCRM
Kerry Kehoe, OCRM
Martha Jensen, U.S. Fish and Wildlife Service
Jeffrey Kamps, Washington Department of Fish and Wildlife
David Roberts, Washington Department of Natural Resources
Gordon White, Ecology HQ
Jeannie Summerhayes, Ecology NWRO
Loree' Randall – Ecology HQ
Carrie Byron, Ecology HQ
Geoff Tallent, Ecology NWRO
Chuck Steele – Ecology NWRO
Rebekah Padgett, Ecology NWRO
Barry Wenger, Ecology BFO

ecyrefedpermits@ecy.wa.gov

ATTACHMENT A

Agreement Pursuant to the Sande-Williams Levee Repairs and Construction, Reach 4, Nooksack River – Coastal Zone Management (CZM) Consistency – CONDITIONAL APPROVAL, dated August 12, 2010 (attached)

The parties agree as follows:

1. Diking District #2 Shall Obtain Required Shoreline Permits

Much of the existing Sande-Williams structure was never permitted or authorized by the county for the diking district or the underlying private property owners. From 2007 forward Diking District #2 was responsible for obtaining permits for work on the levee that did not qualify as emergency repairs or were emergency repairs that required after-the-fact permits but did not do so. The structure and any proposed modifications to it are in direct conflict with RCW 90.58.140(2), which requires a permit for any substantial development on state shorelines. The county's Shoreline Master Program requires a shoreline conditional use for flood control works and in-stream structures in the shoreline Conservancy designation where the proposal is located. Adding to or modifying the levee without proper permitting would only serve to compound the inconsistency with the SMA. Prior to any additional construction activities, Diking District #2 shall apply for after-the-fact substantial development and conditional use permits for the entire project, including the work proposed for 2010, running from the proposed upper "dogleg" to the lower end revetment work. The Diking District, as the applicant, shall then take appropriate and timely action to follow-through on the permit application to a final determination by the County and Ecology.

2. The US Army Corps of Engineers (USACE) Agrees to Work Cooperatively with Local Sponsors (Diking District #2, Ecology), in Conjunction with Whatcom County, To Evaluate A Long-Term Solution to Flooding Issues in Reach 4 of the Nooksack River

Ecology has determined that there is a clear and urgent need for a planned, rational and concerted evaluation, jointly performed by federal, state, tribal and local governments, to prevent the inherent harm resulting from continued uncoordinated and piecemeal development of the state's shorelines. The evaluation must include alternatives for several levee configurations that include a setback levee or a combination of setback levees and other measures in Reach 4 that will provide adequate width to allow the river to disperse its flood flows, reduce current velocities, and avoid undermining the clay banks on the downstream left bank. The levee configurations to be analyzed must be approved by Ecology prior to commencement of the work. The intent is to allow the flood flows to dissipate their energy over a much larger portion of the floodway and floodplain, allow habitat protection and enhancement functions to occur, provide a safer and recreationally-friendly setting, reduce or eliminate the severe erosion of the clay banks, with its significant silt contributions and impacts on water quality and salmon, and provide a lower-cost protection scheme over the long-term. The work will include but not be limited to a geomorphic analysis, hydraulic and engineering analysis, and economic analysis, as approved by Ecology. The existing FEQ unsteady flow flood model shall be used for the hydraulic analysis to provide a solid

understanding of the best way to protect this area and its resources consistent with the county's larger flood management plan and salmon recovery plan. In addition, a "floodway no-rise analysis" must be performed consistent with Federal Executive Order 11988 and the Whatcom County floodway encroachment standard. The work will be performed under the oversight of Whatcom County Public Works River and Flood Division, using the county's modeling consultants.

Diking District #2 shall participate as a co-sponsor with Ecology and Whatcom County in working with USACE to identify appropriate programs and obtain available federal funding for the evaluation. Following the receipt of a letter of intent from a qualified sponsor, USACE shall seek available funding under appropriate programs. Prior to USACE determination of the appropriate authority to pursue federal assistance, USACE and the local sponsors shall meet and identify the potential project geographical scope, problems and issues, and potential solutions. The letter of intent from the local sponsor must stipulate the study authority.

Whatcom County Diking District #2

Gene Aarstol, Commissioner

date

Art Anderson, Commissioner

date

Harry Williams, Commissioner

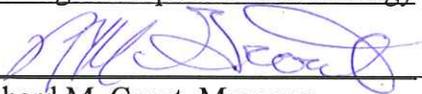
date

US Army Corps of Engineers

David N. Spicer, Project Manager

date

Washington Department of Ecology



Richard M. Grout, Manager
Bellingham Field Office

8/12/10
date