



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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April 5, 2021

Captain R.G. Rhinehart, U.S. Navy
Commanding Officer
Naval Base Kitsap
120 South Dewey St.
Bremerton, WA 98314-5020

RE: Ecology's Conditional Concurrence for the Navy's Consistency Determination for the Transit Protection Program Pier and Support Facilities, Naval Base Kitsap Bangor, Silverdale, Washington.

Dear Captain R.G. Rhinehart:

The Department of Ecology (Ecology) is issuing a Conditional Concurrence to Naval Base Kitsap, Bangor for the Transit Protection Program Pier and Support Facilities (TPP) project. The project involves building a new pier and upland support facilities at the Naval Base Kitsap Bangor waterfront, in the Hood Canal in Silverdale. The pier project includes associated fuel tanks, roadway, and parking. The conditions relate to the Navy's receipt of the Section 401 Water Quality Certification (401 WQC), and the In-Lieu Fee Program (ILF) mitigation plan.

Due to misunderstandings surrounding federal consistency requirements of the Coastal Zone Management Act (CZMA) and Ecology's federal consistency processes, Ecology is taking this opportunity to include some process details in order to clearly state the record and provide important information to the Naval Base Kitsap for application to future projects.

On July 1, 2020, the Navy submitted its Consistency Determination (CD) to Ecology, and stated that the proposed project was consistent to the maximum extent practicable with Washington's Coastal Zone Management Program (CZMP) pursuant to Section 307 of the Coastal Zone Management Act (CZMA). According to federal regulations, when a federal agency submits a CD to Ecology, it is acknowledging that the proposed project has foreseeable effects to Washington's coastal zone resources and uses. (CFR 930.36 (a)(b)).

The Navy's CD identified the Shoreline Management Act (SMA) and the State Water Pollution Control Act as containing enforceable policies that would be triggered by the project. The SMA analysis addressed only a few policies found in the SMA and missed those found in WAC 173-26. For that reason, on July 15, 2020, Ecology sent the Navy a message within the 14 days allowed for in CFR 930.41 alerting them that the CD was incomplete and that a fuller analysis of the SMA and the regulations was necessary in order for Ecology to fully understand the impacts and how the Navy was going to address them.

The Shoreline Management Act

Ecology recommended that the Navy follow the Kitsap County Shoreline Master Program (SMP) to assist with its analysis – while not NOAA-approved enforceable policies, Ecology recommends this option as the simplest path to demonstrate consistency with the SMA by preparing an analysis of the applicable SMP. The Navy chose the option to review the shoreline regulations and prepared a table addressing the WACs in 173-26 and sent it to Ecology on September 17, 2020. Ecology deemed that table incomplete and, on October 20, 2020, Ecology sent the Navy the specific enforceable policies that needed to be addressed. On January 20, 2021, the Navy responded, and Ecology deemed the CD complete, which started the 75-day review period.

The Navy and Ecology had many discussions about the “effects test” described in the federal consistency regulations (i.e., if a federal agency project has foreseeable effects to a state’s coastal uses and resources it must submit a Consistency Determination to the state). The project can be on federal property with effects to coastal resources that use other resources on that property; and with this project, the Navy is affecting eelgrass beds on its base, and this eelgrass is relied upon by coastal zone species such as salmon and herring for habitat and other uses. Thus, the impacts to this eelgrass affects Washington’s coastal resources.

On March 25, 2021, the Navy supplied the analysis of the applicable enforceable policies WAC 173-26-221(2)(c)(iii)(C), which contains policies regarding overwater structures in critical saltwater habitats. One of these policies is that *“The project including any required mitigation, will result in no net loss of ecological functions associated with critical saltwater habitat.”* The Navy indicated its intent to purchase credits through the Hood Canal Coordinating Council ILF Program as compensatory mitigation for aquatic impacts. Ecology has reviewed the draft ILF Use Plan, dated January 2021, and concurs with the Navy’s approach to achieving no net loss of ecological function through purchase of ILF credits. However, this plan lacks the actual calculation of ecological debits (Table 7), and Ecology staff were informed that the document is likely to be revised. Without the ability to review the Navy proposed debit calculation and final ILF Use Plan, Ecology cannot concur that no net loss of ecological function will be achieved.

Thus, first condition below is necessary in order for the Navy to demonstrate that the project is consistent with the SMA (RCW 90.58) and the SMP Guidelines (WAC 173-26).

Section 401 Water Quality Certification

In its July 1, 2020 CD, the Navy also indicated that it would get a Section 401 Water Quality Certification (401 WQC) from Ecology, and Ecology notified the Navy that it should perhaps delay submitting the complete CD until the timing with the 401 WQC was worked out, as Ecology does not issue a CZM federal consistency decision until it is satisfied that all of the enforceable policies have been met, and thus needs evidence that the 401 WQC has been issued prior to issuing its CZM decision. The Navy argued that Ecology has always given it a Conditional Concurrence ahead of the 401 WQC decision, so that the Navy can get Ecology’s CZM decision in order to mesh with its NEPA process; however, Ecology can find only one example of a Conditional Concurrence issued to the Navy relating to the 401 WQC since 2008.

In order to demonstrate good faith and cooperation between the agencies, and in recognition that the Navy was unfamiliar with its processes, Ecology decided to issue a Conditional Concurrence for the TPP project, including a condition that the Navy obtain a 401 WQC. Thus, the second condition below is necessary in order for the Navy to demonstrate that the project is consistent with the Washington State Water Pollution Control Act, its regulations and water quality standards. Receipt of the 401 WQC ensures that the project meets the requirements of the law, regulations, and standards.

Pursuant to Section 307(c)(3) of the Coastal Zone Management Act of 1972, as amended, Ecology concurs with the Navy's determination that the proposed work is consistent with Washington's CZM Program, provided the following conditions are met:

- 1. The Navy shall submit to Ecology a final ILF Use Plan and demonstration of credits purchased for review and concurrence at least 30 days prior to the start of in-water work.***
 - ***Submit the information to Maria Sandercock, Ecology NW shoreline planner, at mari461@ecy.wa.gov***
- 2. Naval Base Kitsap Bangor shall obtain a Section 401 Water Quality Certification decision from the Department of Ecology prior to conducting any work at the site.***

Pursuant to 15 CFR 930.4 Ecology is informing the Navy that if it fails to meet the above conditions, then Ecology and the Navy will treat this Conditional Concurrence letter as an Objection. The Navy shall immediately notify Ecology if the conditions are not acceptable. The Navy has the opportunity to appeal Ecology's Objection to the Secretary of Commerce within 30 days from receipt of Ecology's Conditional Concurrence/Objection.

Ecology is taking this opportunity to reiterate to the Navy that, for future projects, the Navy will be required to obtain the 401 WQC prior to Ecology issuing its CZM decision. This practice ensures that a proposed project is consistent with all of the applicable enforceable policies of Washington's CZMP. Ecology welcomes further discussions with the Navy about the federal consistency process, especially in light of the CZMA's call for early coordination and cooperation.

If you have questions about this Conditional Concurrence, please contact Terry Swanson at (360) 584-3744 or via email at terry.swanson@ecy.wa.gov.

YOUR RIGHT TO APPEAL

You have a right to appeal this decision to the Pollution Control Hearing Board (PCHB) within 30 days of the date of receipt of this decision. 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 decision:

File your appeal and a copy of this decision 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 decision 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
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	Department of Ecology Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
Pollution Control Hearings Board 1111 Israel RD SW STE 301 Tumwater, WA 98501	Pollution Control Hearings Board PO Box 40903 Olympia, WA 98504-0903

Sincerely,



Brenden McFarland, Section Manager
Environmental Review and Transportation Section
Shorelands and Environmental Assistance Program

E-CC: Frank Nichols, U.S. Navy
Jason McKinney, U.S. Navy
Jason Sweeney, U.S. Army Corps of Engineers
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