

When Recorded Mail To:

Snohomish County Diking Improvement District No. 5
c/o Heather Griffin, City of Everett Public Works
3200 Cedar Street, Everett WA 98201

**DECLARATION OF LAND USE RESTRICTION
AND REAL PROPERTY COVENANT**

Declarants: Snohomish County Diking Improvement District No. 5 (DID-5), a special purpose district of the State of Washington formed pursuant to Ch. 85.08 RCW, and Snohomish County, a political subdivision of the State of Washington.

Beneficiaries: State of Washington Department of Ecology (Ecology), including any successor agencies; United States Army Corps of Engineers, including any successor agencies.

Assessor's Tax Parcel ID#: This agreement affects portions of Snohomish County Assessor Parcel Numbers 29050900100200, 29050900100300, 29051000200200, 29051000200300, 29051000300400, 29051000300500 in Sections 9, 10, Township 29N, Range 5E, Snohomish County, WA.

This Declaration of Land Use Restriction and Real Property Covenant (the "Real Property Covenant") is made this 14 day of March 2023, by Snohomish County Diking Improvement District No. 5, a special purpose district of the State of Washington, and Snohomish County, a political subdivision of the State of Washington ("Declarants"), for the benefit of the State of Washington Department of Ecology; and the United States Army Corps of Engineers, referred to herein as "the Beneficiaries".

WHEREAS, the Declarants make the following recitals:

A. The Declarants are creating a Real Property Covenant on that Property more particularly described in Exhibit A attached hereto in accordance with the *Smith Island Estuary Restoration Advance Mitigation Plan* ("Wetland Mitigation Plan"), approved by and developed in compliance with United States Army Corps of Engineers Reference# NWS-2019-

500. This Real Property Covenant is a condition of Reference# NWS-2019-500 that will be issued to DID-5. This real property covenant is also executed pursuant to Ecology Agreed Order # 19517, attached as **Exhibit C**.

B. Declarant, Snohomish County, holds title in fee simple of the real property located in Snohomish County, Washington, legally described in **Exhibit A** (“the property”), for the benefit of Declarant, DID-5. Declarant, DID-5 holds the beneficial interest in the Property and desires to use the same as an Advance Mitigation Site as more fully set forth herein, pursuant to which this Real Property Covenant is required. Snohomish County consents and authorizes the recording of the Real Property Covenant as a covenant binding upon, and appurtenant to the Property for all purposes mentioned herein and to be bound by the real property covenant; Provided, however, that implementation of the Wetland Mitigation Plan shall be the sole and separate obligation of DID-5. A map of the Property is attached to and made a part of this real property covenant, as **Exhibit B**.

C. The Property possesses natural, open space, ecological, and recreational values that are of great importance to Declarants and the Beneficiaries.

D. DID-5 intends to use the Property as an Advance Mitigation Site (AMS) to generate aquatic resource mitigation credits adequate to compensate for anticipated DID-5 projects with unavoidable impacts, and therefore agrees to this covenant for those purposes. To that end, DID-5 has removed a section of dike, constructed starter channels through dike and toe-ditches, graded to create estuary habitat, and removed riprap. DID-5’s mitigation credits depend on the Property being conserved in perpetuity to protect DID-5’s re-establishment, rehabilitation, and enhancement of interspersed estuarine wetland and aquatic habitat on the Property.

E. The AMS and its governing Wetland Mitigation Plan are established pursuant to the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1311, et seq., Chapter 90.48 RCW, and 33 C.F.R. Part 332.

NOW, THEREFORE, in consideration of the above, and the covenants, terms, conditions and restrictions contained herein, Declarants, do hereby establish a real property covenant on the Property as follows:

1. Declaration of Real Property Covenant

Declarants, on behalf of themselves and all heirs, assigns, and successors in interest into whose ownership the Property might pass, freely and voluntarily establish this real property covenant in perpetuity over the Property on the terms and conditions set forth herein exclusively for the purpose of conserving the Conservation Values of the Property. For those purposes, it is the intent of the Declarants that such covenants shall supersede any prior interests the Declarants have in the property and shall run with the land and be binding on all current and future owners of any portion of, or interest in, the Property.

The Conservation Values are the estuarine wetland and aquatic habitat that are being and have been re-established, enhanced, and rehabilitated on the Property pursuant to Ecology Agreed Order # 19517, including estuarine channel, mudflat, vegetated marsh, and upland buffer elements, and native tidal marsh species.

2. *Purpose*

It is the purpose of this Real Property Covenant to ensure that the Property will be retained forever in a natural, open space and scenic condition and to prevent any use of the Property that will impair or interfere with the Conservation Values of the Property. Declarants and the Beneficiaries intend that this real property covenant will confine the use of the Property to such activities as are consistent with the purpose of this real property covenant.

3. *Rights of the Beneficiaries*

To accomplish the purpose of this Real Property Covenant the following rights may be exercised by the Beneficiaries:

(a) To preserve and protect the Conservation Values of the Property;

(b) To enter upon the Property at reasonable times in order to monitor Declarants' compliance with and otherwise enforce the terms of this Real Property Covenant in accordance with Section 9; provided that, except in cases where the Beneficiaries determine that immediate entry is required to prevent, terminate, or mitigate a violation of this real property covenant, such entry shall be upon prior reasonable notice to Declarants. This right of entry extends to Beneficiaries' authorized representatives;

(c) To conduct, with reasonable prior notice to Declarants, survey, site preparation, removal of invasive non-native riparian vegetation, installation of native plants, and other activities associated with wetland mitigation. Nothing herein shall be deemed to imply any obligation to perform such restoration activities; and

(d) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Real Property Covenant and to require the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use, pursuant to the remedies set forth in Section 9.

4. *Prohibited Uses*

Any activity on or use of the Property inconsistent with the purpose of this Real Property Covenant is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited, except as permitted in Sections 3 and 5:

(a) *Construction and Improvements.* The placement or construction of any buildings, structures, or other improvements of any kind, including, without limitation, utilities, septic systems, communication lines, communication towers, storage tanks and pipelines.

(b) *Paving and Road and Trail Construction.* The paving or covering of any portion of the Property with concrete, asphalt, gravel, crushed rock, wood shavings or any other paving or surfacing material or the construction of a road or trail.

(c) *Commercial Development.* Any commercial or industrial use or activity on the Property, including, but not limited to, commercial recreational activities involving active recreation.

(d) *Agricultural Activities.* Any domestic animal grazing or agricultural activities of any kind; and application of biocides except when determined by the Beneficiaries to be necessary for the eradication of invasive non-native plant species and such application is by the narrowest spectrum, least persistent material appropriate for the target species.

(e) *Introduced Vegetation.* The planting or introduction of non-native species of plants.

(f) *Waste Disposal.* The disposal, storage, or release of yard waste, hazardous substances, rubbish, garbage, debris, vehicles, abandoned equipment, parts thereof, or other unsightly or offensive waste or material on the Property. The term "release" shall mean any release, generation, treatment disposal, storage, dumping, burying, abandonment, or migration from off-site. The term "hazardous substances" as used in this real property covenant shall mean any substances, materials, or wastes that are hazardous, toxic, dangerous, harmful or are designed as, or contain components that are, or are designated as, hazardous, toxic, dangerous, or harmful and/or which are subject to regulation as hazardous, toxic, dangerous or harmful or as a pollutant by any federal, state, or local law, regulation, statute, or ordinance, including, but not limited to, petroleum or any petroleum product.

(g) *Active Recreation.* Conducting activities, such as golf courses, ball fields, motocross, equestrian, campgrounds or any other activity involving individuals or the public or private clubs or associations engaging in organized active recreation.

(h) *Hunting.* Conducting or allowing hunting activities, including construction of blinds, camping areas, access trails, and any other hunting related activities; PROVIDED THAT, water fowl hunting is allowable pursuant to the Reserved Rights in Section 5 hereof.

(i) *Signs.* The placement of commercial signs, billboards, or other commercial advertising material on the Property, except in connection with the sale or lease of the Property.

(j) *Mineral Development.* The exploration for, or development and extraction of, any minerals or hydrocarbons.

(k) *Vehicles.* The operation of motorized vehicles except as part of any wetland creation or maintenance activity authorized by Beneficiaries.

(l) *Vegetation Removal.* Timber harvest or other removal of vegetation, except as allowed by the Wetland Mitigation Plan or otherwise authorized by Beneficiaries.

(m) *Stockpiling Materials.* The stockpiling or depositing of any material within the existing wetlands and their buffers, except as part of any wetland creation or maintenance activity authorized by Beneficiaries.

(n) *Certain Herbicides.* The use of polyacrylamide or polyacrylamide-containing herbicides, except as approved by Ecology.

5. *Reserved Rights*

Declarants reserve to themselves and to their members and their personal representatives, heirs, successors and assigns, any use of, or activity on, the Property that is not inconsistent with the purpose of the real property covenant and that is not prohibited herein. Without limiting the generality of the foregoing, Declarants specifically reserve the following uses and activities:

(a) *Maintenance, Monitoring and Emergencies.* The right to undertake activities necessary to maintain and monitor the Conservation Values and to protect public health, property improvements, or human safety, or which are actively required by and subject to compulsion of any governmental agency with authority to require such activity. For any emergency or significant change in site conditions due to acts of nature resulting in a violation of this Covenant, Declarants are authorized to respond to such an event in accordance with state and federal law. Declarants must notify Beneficiaries in writing of the event and response actions planned or taken as soon as practical but no later than within 24 hours of the discovery of the event.

(b) *Fence.* The right, but not obligation, to install and maintain fences around the Property, and the Beneficiaries agree not to remove or damage said fences.

(c) *Waterfowl hunting.* The right, but not obligation, to allow waterfowl hunting activity in a manner similar to the Washington State Department of Fish and Wildlife managed waterfowl hunting on adjacent lands and waters. Declarants may post signage informing hunters and the public of the location of the mitigation area where practicable but is not required to do so. Declarants may enter into a management agreement to allow for limited waterfowl hunting with the Washington State Department of Fish and Wildlife and/or Snohomish County.

6. *Responsibilities of Declarants Not Affected.*

Other than as specified herein, this real property covenant is not intended to impose any legal or other responsibility on the Beneficiaries, or in any way to affect any existing obligation of Declarants as owner of the Property, or as easement holder. This shall apply to:

(a) *Taxes.* Declarants shall continue to be solely responsible for payment of all taxes and assessments levied against the Property.

(b) *Upkeep and Maintenance, Costs, Legal Requirements, and Liabilities.* Declarant DID-5 shall retain all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property subject to the terms of the

Wetland Mitigation Plan. Declarant DID-5 shall remain solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted by this real property covenant and conducted by Declarants, their agents, or employees.

(c) *Remediation.* If, at any time, there occurs, or has occurred, a release in, on, or about the Property of any hazardous substances, Declarant DID-5 shall agree to take all steps necessary to assure its containment and remediation, including any cleanup that may be required. Should Declarants become aware of the release of any hazardous substances on the Property, Declarants shall make best efforts to inform the Beneficiaries of such release as soon as possible. Nothing in this covenant is intended to limit the Beneficiaries' regulatory or remedial authority as to Declarants, as authorized by law.

(d) *Control.* Nothing in this Real Property Covenant shall be construed as giving rise to any right or ability in Beneficiaries to exercise physical or managerial control over the day-to-day operations of the Property, or any of Declarants' activities on the Property, or otherwise to become an operator with respect to the Property within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), or the Model Toxics Control Act, as amended ("MTCA").

7. *The Beneficiaries' Right to Restore the Property*

In the event that any of the Conservation Values of the Property are impaired, the Beneficiaries shall have the right, but not the obligation, to restore all or portions of the Property.

8. *Access*

No right of access by the general public to any portion of the Property is created by this real property covenant.

9. *Enforcement*

The Beneficiaries shall have the right to prevent and correct violations of the terms of this real property covenant as set forth below.

(a) *Notice of Failure.* If the Beneficiaries determine that a Declarant is in violation of the terms of this Real Property Covenant or that a violation is threatened, the Beneficiaries shall give written notice to Declarants of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Real Property Covenant, to restore the portion of the Property so injured to its prior condition in accordance with a plan approved by the Beneficiaries.

(b) *Declarants' Failure to Respond.* In addition to the rights granted in Section 3, including the right of entry, the Beneficiaries may bring an action as provided for in Section 9(c) below if Declarants fail to cure the violation within thirty (30) days after receipt of notice thereof from the Beneficiary; fails to begin curing such violation within the thirty (30) day period under

circumstances where the violation cannot reasonably be cured within the thirty (30) day period; or fails to continue diligently to cure such violation until finally cured.

(c) *The Beneficiaries' Action.* The Beneficiaries may bring action at law or in equity in a court of competent jurisdiction to enforce the terms of this real property covenant, to enjoin the violation, *ex parte* as necessary and as allowed under the applicable civil rules, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Real Property Covenant or injury to any of the Conservation Values protected by this Real Property Covenant, including damages for the loss of the Conservation Values; and to require the restoration of the Property to the condition that existed prior to any such injury; Provided, however, Declarant County shall have no liability for any claims, causes of action or damages relating to or arising out of the implementation or compliance with that Wetland Mitigation Plan as set forth above, which shall remain the sole and separate obligation of Declarant DID-5, or for damages to the Conservation Values unless such damages are the proximate cause of some action or negligent inaction by the County. The Beneficiaries, in their sole and absolute discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Property. All such actions for injunctive relief may be taken without the Beneficiaries being required to post bond or provide other security.

(d) *Immediate Action Required.* If the Beneficiaries, in their sole and absolute discretion, determine that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Property, the Beneficiaries may pursue remedies under this Section 9 without prior notice to Declarants or without waiting for the period provided for cure to expire.

(e) *Nature of Remedy.* The rights under this Section 9 apply equally in the event of either actual or threatened violations of the terms of this Real Property Covenant. Declarants agree that the remedies at law for any violation of the terms of this real property covenant are inadequate and Beneficiaries shall be entitled to the injunctive relief described in this Section 9 both prohibitive and mandatory, in addition to such other relief to which Beneficiaries may be entitled, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The remedies described in this Section 9 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(f) *Costs of Enforcement.* Provided the Beneficiaries first provide Declarants with a Notice of Failure and Declarants fail to respond, all reasonable costs incurred by the Beneficiaries in enforcing the terms of this real property covenant against Declarants, including, without limitation, costs and expenses of suit and reasonable attorney's fees and reasonable consultant's fees, and any costs of restoration necessitated by a Declarant's violation of the terms of this real property covenant shall be borne by that Declarant. The substantially prevailing party in a judicial enforcement action regarding this real property covenant shall be entitled to reimbursement of all reasonably incurred attorney's fees and litigation expenses.

(g) *The Beneficiaries' Discretion.* Any forbearance by the Beneficiaries to exercise rights under this real property covenant in the event of any violation of any terms of this real property covenant shall not be deemed or construed to be a waiver of such term or of any rights under this real property covenant. No delay or omission by the Beneficiaries in the exercise of any right or remedy shall impair such right or remedy or be construed as a waiver.

(h) *Acts Beyond Declarants' Control.* Nothing contained in this real property covenant shall be construed to entitle the Beneficiaries to bring any action against Declarants to abate, correct, or restore any condition on the Property or to recover damages for any injury to or change in the Property resulting from causes beyond Declarants' control, including, without limitation, fire, flood, storm, and earth movement, nor shall Declarants be required to take steps to abate or mitigate injury to the Property resulting from such causes.

10. Alternate Dispute Resolution

If a dispute arises between the parties concerning the consistency of any proposed use or activity with this real property covenant, the parties shall attempt to resolve the dispute through informal discussion. The parties may also agree to refer the dispute to mediation and shall select a single mediator to hear the matter. Each party shall bear its own costs, including attorney's fees, if mediation is pursued under this Section 10. The parties shall share equally the fees and expenses of the mediator.

11. Notice and Approval

(a) *Notice.* Whenever notice is required under this real property covenant, the party required to give notice ("Notifying Party") shall give reasonable written notice prior to the date the Notifying Party intends to undertake the use or activity in question. The notice shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit the other party to make an informed judgment as to its consistency with the purpose and terms of this real property covenant.

(b) *Evaluation of Proposed Activities.* The purpose of requiring the Notifying Party to notify the other party prior to undertaking certain permitted uses and activities is to afford the other party an opportunity to ensure that the use or activity in question is designed and carried out in a manner consistent with the purpose and terms of this real property covenant.

(c) *Reporting Violations.* Should a Declarant become aware of any violation of this Covenant, that Declarant shall promptly report such violation in writing to Beneficiaries.

12. Transfer or lease of Property by Declarant and Successor and Assigns

(a) Declarants shall not convey any interest in any portion of the Property without providing for the continued preservation and maintenance of the Conservation Values and continued compliance with this real property covenant.

(b) The Declarant(s), when conveying any interest in any part of the Property, including but not limited to title, easement, leases, and security or other interests, must:

i. Provide written notice to Beneficiaries of the intended conveyance at least sixty (60) days in advance of the conveyance.

- ii. Include in the conveying document a notice in substantially the following form, as well as a complete copy of this Covenant:

NOTICE: THIS PROPERTY IS SUBJECT TO A CONSERVATION COVENANT GRANTED BY [DECLARANTS] ON [DATE] AND RECORDED WITH THE SNOHOMISH COUNTY AUDITOR UNDER RECORDING NUMBER [RECORDING NUMBER]. USES AND ACTIVITIES ON THIS PROPERTY MUST COMPLY WITH THAT COVENANT, A COMPLETE COPY OF WHICH IS ATTACHED TO THIS DOCUMENT.

- iii. Unless otherwise agreed to in writing by Beneficiaries, provide Beneficiaries with a complete copy of the executed document within thirty (30) days of the date of execution of such document.

(c) Declarants shall restrict any lease for any portion of the Property to uses and activities consistent with this real property covenant and will notify all lessees of the restrictions on the use of the Property.

13. Termination of Real Property Covenant

(a) *Frustration of Purpose.* This real property covenant may only be terminated in the event the purpose for this covenant can no longer be fulfilled due to circumstances beyond the Declarants' control but not to include a failure to enforce the terms of this restrictive covenant. In that event, concurrence with the termination of this real property covenant must be received from Beneficiaries.

(b) *Economic Value.* The fact that the Property may become greatly more economically valuable if it were used in a manner that is either expressly prohibited by this real property covenant or inconsistent with the purpose of this Real Property Covenant, or that neighboring properties may in the future be put entirely to uses that would not be permitted hereunder, has been considered by the Declarants in granting this Real Property Covenant. It is the intent of both Declarants and the Beneficiaries that any such change in the economic value of the Property from other use shall not be assumed to be circumstances justifying the termination or extinguishment of this real property covenant pursuant to this section.

14. Modification

This real property covenant may be amended only with the concurrence of the Beneficiaries, provided that any such amendment shall be consistent with the purpose of the real property covenant and shall not affect its perpetual duration. All amendments shall be in writing, approved by the Beneficiaries and recorded in the real property records of Snohomish County, Washington.

15. Interpretation

This Real Property Covenant shall be interpreted under the laws of Washington, resolving any ambiguities and questions of the validity of specific provisions so as to give maximum effect to its conservation purposes.

16. *Perpetual Duration*

This Real Property Covenant shall be a binding servitude running with the land in perpetuity.

17. *Notices*

Any required written notice, approval, reporting or other communication shall be personally delivered or sent by first class mail to the following persons. Any change in this contact information shall be submitted in writing to all parties to this Real Property Covenant. Upon mutual agreement of the parties to this real property covenant, an alternative to personal delivery or first class mail, such as e-mail or other electronic means, may be used for these communications.

To Declarant Diking Improvement District #5:

Vic Loehrer
Diking Improvement District #5
20607 State Route 9 SE
Snohomish, WA 98296
vicwithsatocorporation@comcast.net

Peter Ojala, DID5 Counsel
Ojala Law Inc PS
PO BOX 211
Snohomish, WA 98291
peter@ojalalaw.com

Heather Griffin, Mitigation Credit Manager
City of Everett
Public Works Department
3200 Cedar Street
Everett, WA 98201
(425) 257-7206
HGriffin@everettwa.gov

To Declarant Snohomish County:

Snohomish County Property Officer
Drewel Administration Building
3000 Rockefeller Avenue, M/S 404
Everett, WA 98201
Property.Officer@co.snohomish.wa.us

To Beneficiary Department of Ecology:

Washington State Department of Ecology
SEA Program
P.O. Box 47600
Olympia, WA 98504 – 7600
Phone: (360) 407-6076
Email: fednotification@ecy.wa.gov

To Beneficiary United States Army Corps of Engineers:

U.S. Army Corps of Engineers Regulatory Branch
4735 East Marginal Way South, Bldg 1202
Seattle, Washington, 98134-2388
Phone: (206)764-3495

18. Severability

If any provision of this real property covenant is found to be invalid, illegal or unenforceable, that finding shall not affect the validity, legality or enforceability of the remaining provisions.

19. Entire Agreement

This instrument sets forth the entire agreement of the parties with respect to the terms of this Agreement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the terms of this Agreement, all of which merge herein.

IN WITNESS WHEREOF, the Declarant has set its hands on the date first written above.

Declarant:

Snohomish County Diking Improvement District No. 5

By: *Victor Loehrer*

Name: Victor Loehrer

Title: District Commissioner

STATE OF WASHINGTON :
 :
 : ss
County of Snohomish :

On this 3rd day of January, 2023, before me the undersigned, a Notary Public for the State of Washington, personally appeared Victor Loehrer who stated on oath that he is Snohomish County Diking Improvement District No. 5 Commissioner and authorized to execute the within instrument on behalf of said district and acknowledged said instrument as the free and voluntary act of the district for the uses and purposes mentioned therein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.



Beverly J Van Valkenburg
Notary Public for the State of Washington
Residing at Renton WA
My Commission expires: 10-16-25

IN WITNESS WHEREOF, the Declarant has set its hands on the date first written above.

Declarant:

Snohomish County

By: *Steven Tease*

Name: *STEVEN TEASE*

Title: *PROPERTY OFFICER*

STATE OF WASHINGTON

SS

County of Snohomish

On this *14th* day of *March*, 2023, before me the undersigned, a Notary Public for the State of Washington, personally appeared *Steven Tease* who stated on oath that he is *Property Officer* and authorized to execute the within instrument on behalf of said County and acknowledged said instrument as the free and voluntary act of the County for the uses and purposes mentioned therein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.



Lynda Thomas
Notary Public for the State of Washington
Residing at *Snohomish*
My Commission expires: *8-23-26*

EXHIBIT A

Legal Description

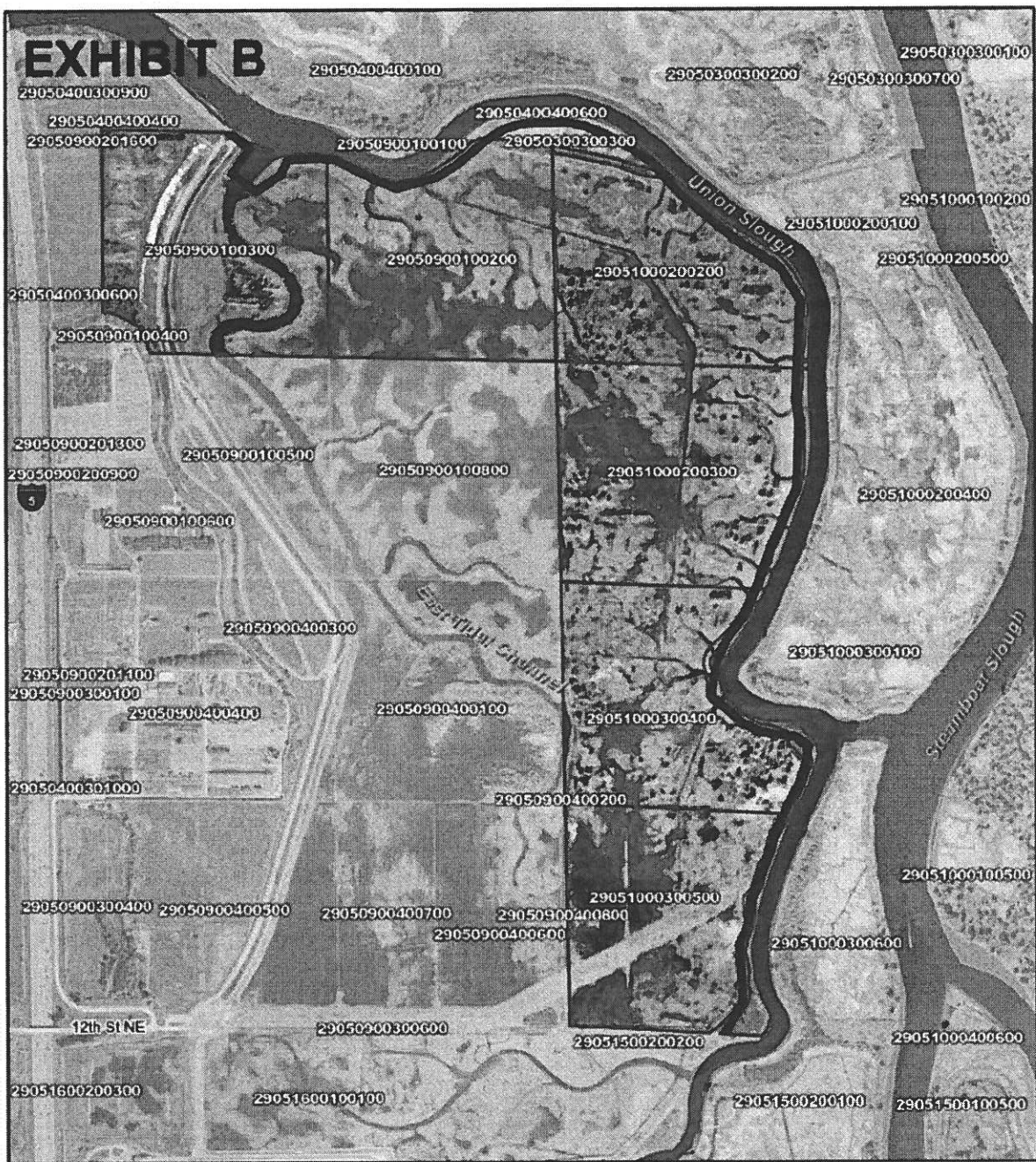
All of the dike corridor lying within that area in Section 3 government Lot 12, Section 9 government Lot 1 and 3, Section 10 government Lot 4, 5, 13, and 14, conveyed to Snohomish County for the benefit of Diking District 5 of Snohomish County, by deed recorded under Auditor's File Number 511130 all as depicted on the amended record of survey recorded under Auditor's File Number 201909185002, records of Snohomish County, Washington.

Situate in the County of Snohomish, Washington.

EXHIBIT B

Property Map

EXHIBIT B

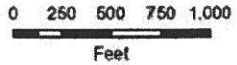


- Legend**
- Dike Deed AF# 511130
 - Affected Parcels
 - Parcel Boundary

Aerial imagery date: 2020

Note:
Figure is for illustrative purposes only.

Dike Deed AF# 511130



Snohomish County
Conservation & Natural Resources
Surface Water Management
425-388-3464

EXHIBIT C

Ecology Agreed Order # 19517

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

IN THE MATTER OF THE REQUEST BY)
SNOHOMISH COUNTY DIKING) AGREED ORDER
IMPROVEMENT DISTRICT No. 5 TO) DOCKET #19517
IMPLEMENT AN ADVANCE WETLAND)
MITIGATION SITE)

To: Diking Improvement District #5
Attn: Vic Loehrer
20607 State Route 9 SE
Snohomish, WA 98296

Site Name	Smith Island Estuary Restoration Advance Wetland Mitigation Site
Location	Parcel numbers 29050900100200, 29050900100300, 29051000200200, 29051000200300, 29051000300400, 29051000300500 in Sections 9, 10, Township 29N, Range 5E, Snohomish County, WA
Description	Re-establish, rehabilitate, and enhance estuarine wetland and aquatic habitat onsite to establish an advance mitigation site.

I. INTRODUCTION

The mutual objective of the Washington State Department of Ecology (Ecology) and the Snohomish County Diking Improvement District No. 5 (Diking Improvement District #5) under this Agreed Order (Order) is to establish the Smith Island Estuary Restoration Advance Wetland Mitigation Site (AWMS) to provide compensation acreage and to develop a framework for using that acreage to compensate for wetland impacts associated with future Diking Improvement District #5 projects.

II. RECOGNITION OF ECOLOGY'S JURISDICTION

This Order is issued pursuant to the authority vested in Ecology by the Federal Water Pollution Control Act (FWPCA), 33 USC sec 1311, et seq.; and by Chapter 90.48 RCW.

III. COMPLIANCE WITH APPLICABLE LAWS

This Order does not exempt and is provisional upon compliance with other applicable statutes and codes administered by federal, state, and local agencies.

IV. SCOPE OF WORK

In accordance with RCW 90.48, IT IS AGREED that Diking Improvement District #5 shall take the following actions. These actions are necessary to satisfy the requirements of Chapter 173-201A WAC. The Diking Improvement District #5 has participated in defining these actions and the schedule by which they shall be completed.

A. Implementation: The Diking Improvement District #5 agrees to implement and maintain the AWMS consistent with the project description contained in the *Smith Island Estuary Restoration Advance Mitigation Plan*, (hereafter called the "Mitigation Plan"), prepared by the Diking Improvement District #5, and dated September 2019, or as otherwise revised by this Order.

B. Advance Wetland Mitigation Site Conditions:

1. Unapproved deviations from the Mitigation Plan may result in a revision to anticipated compensation credit.
2. The Diking Improvement District #5 will ensure that no material is stockpiled or deposited within existing wetlands and their buffers at the AWMS at any time, unless provided for in the Mitigation Plan.
3. The Diking Improvement District #5 will not use polyacrylamide or polyacrylamide-containing herbicides at the AWMS, unless otherwise approved by Ecology.
4. Aquatic herbicides can be used or applied only by certified applicators or persons under the direct supervision of a certified applicator, and only for those uses covered by the certified applicator's license category.
5. Herbicide applicators are required to be permitted under Ecology's Noxious Weed Control General Permit and shall comply with all conditions of Ecology's Aquatic Noxious Weed Management General Permit.
6. Within 30 days of the date of this Order, the Diking Improvement District #5 will submit to Ecology (see contact information section) a draft restrictive covenant for Ecology's review and approval.
7. Within 60 days of receiving Ecology's approval of the restrictive covenant, the Diking Improvement District #5 will sign and record the restrictive covenant ^{copy} of this Order, and the site map from the Mitigation Plan indicating the location of wetlands and their buffers.
 - a. These documents must be recorded with the County Auditor's Office.
 - b. The Diking Improvement District #5 will submit a copy of the recorded restrictive covenant to Ecology.

Reporting

8. After completing construction and planting of the AWMS, the Diking Improvement District #5 shall submit to Ecology an as-built report, including plan sheets, documenting site conditions at Year Zero. The as-built report must:
 - a. Be submitted within 90 days of the date of this Order.
 - b. Include the information listed in Attachment A (Information Required for As-built Reports).
9. The Diking Improvement District #5 will submit to Ecology monitoring reports documenting AWMS conditions for years 1, 3, 5, 7, 10. The monitoring reports must:
 - a. Be submitted by December 31 of each monitoring year.
 - b. Include the information listed in Attachment B (Information Required for Monitoring Reports).

Monitoring and Maintenance

10. The Diking Improvement District #5 will monitor the AWMS for a minimum of 10 years. The Diking Improvement District #5 shall use the monitoring methods described in Chapter 6.4, on pages 6-5 to 6-7 of the Mitigation Plan.
11. The Diking Improvement District #5 agrees to implement the Mitigation Plan's contingency measures if the Mitigation Plan's goals, objectives, or performance standards are not being met.
12. Prior to implementing contingency measures not specified in the Mitigation Plan, the Diking Improvement District #5 will consult with and obtain written approval from Ecology to implement such contingency measures.
13. Any Class A noxious weeds found on the AWMS must be mapped and eradicated during the monitoring year that they are discovered. Future monitoring will include inspecting such areas for recurrences of Class A weeds.

D. Mitigation Value Generation:

1. Ecology agrees to the current baseline conditions described in Chapter 2 of the Mitigation Plan.
2. Assuming the Diking Improvement District #5 completes the work proposed in the Mitigation Plan and achieves the performance standards set forth therein, Ecology agrees to the proposed Compensatory Mitigation Credits included in the Mitigation Plan (see Table 7-2).

3. Assuming performance standards are met as outlined in the Mitigation Plan and documented in the most recent monitoring report, Ecology agrees to the credit use ratios in the Mitigation Plan (see Chapter 7.3 on page 7-10). Ecology reserves the right to visit the site to confirm whether the monitoring report reflects conditions at the site.

E. Mitigation Acreage Use:

1. All future Diking Improvement District #5 projects that propose to impact wetlands and use the AWMS to offset those impacts will be evaluated individually under applicable state regulations and will be required to avoid and minimize wetland impacts to the greatest extent practicable.
2. Ecology will determine, on a case-by-case basis, whether compensation credit generated by the AWMS will be considered suitable compensation to offset the Diking Improvement District #5's proposed wetland impacts. This Order does not guarantee that Ecology will deem the compensation credit generated at the AWMS to be suitable compensation for any given wetland impact.
3. No compensation credit may be used to offset wetland impacts until after the Ecology-approved restrictive covenant has been recorded per Condition C.13 above and a copy submitted to Ecology.
4. The Diking Improvement District #5 must maintain a ledger of all compensation credit available, used, and remaining at the AWMS. The Diking Improvement District #5 must submit an updated copy of this ledger to Ecology each time compensation credit is used at the site and include a current copy of the ledger with each monitoring report.
5. Only the Diking Improvement District #5 will be allowed to use compensation credit at the AWMS to offset wetland impacts associated with Diking Improvement District #5 development projects. No other entity can use or purchase compensation credit generated at the AWMS.
6. Documentation demonstrating attainment of performance standards will be submitted to Ecology for review and approval as a condition of Ecology's authorization of use of compensation credits to offset wetland impacts. Documentation can typically be included in required monitoring reports. Ecology reserves the right to visit the site to confirm whether the monitoring report reflects conditions at the site.

V. TERMS AND CONDITIONS

The Diking Improvement District #5 agrees to undertake all actions required of it by the terms and conditions of this Order and not to contest the Department's jurisdiction and authority to administer this Order.

A. Amendment of Order

1. Ecology and the Diking Improvement District #5 may verbally agree to minor changes to the work to be performed without formally amending this Order. Minor changes will be documented in writing by Ecology within seven (7) days of verbal agreement.
2. Substantial changes to the work to be performed shall require formal amendment of this Order and may only be formally amended by the written consent of both Ecology and the Diking Improvement District #5.
3. When requesting a change to the Order, the Diking Improvement District #5 shall submit a written request to Ecology for approval. If Ecology agrees with the change, Ecology shall transmit its approval to the Diking Improvement District #5 in writing within 30 days after it receives the written request. If Ecology determines that the change is substantial, then the Order must be formally amended. If Ecology does not agree with the proposed change, Ecology will transmit its reason(s) for the disapproval of the proposed change in writing within 30 days of receiving request. If either party does not agree to a proposed change, the disagreement may be addressed through the dispute resolution procedures identified below in section D, Dispute Resolution.
4. To be effective, all amendments must be signed by the persons with signature authority for each party and attached to this Order.

B. Extension of Schedule: Extension of deadlines imposed by this Order shall be granted when requests for extensions are submitted in writing within 30 days of the Diking Improvement District #5's becoming aware of a circumstance which may result in non-compliance with the schedule, or at least 30 days prior to the deadline(s) identified within this Order, whichever comes first. If circumstances beyond the control of the Diking Improvement District #5 occur that require an extension of a deadline(s) less than 30 days prior to the deadline(s), the Diking Improvement District #5 must notify Ecology as soon as the circumstance occurs and Ecology shall consider such circumstances in deciding whether to extend the deadline.

C. Access: Ecology shall have access to enter and freely move about all property at the AWMS that the Diking Improvement District #5 either owns, controls, or has access rights to at all reasonable times for the purposes of inspecting the work being performed pursuant to this Order; reviewing Diking Improvement District #5's progress in carrying out the terms of this Order; conducting such tests or collecting such samples as Ecology may deem necessary;

using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by the Diking Improvement District #5, among other things. The Diking Improvement District #5 shall make all reasonable efforts to secure access rights for those properties within the AWMS not owned or controlled by the Diking Improvement District #5 where mitigation activities or investigations will be performed pursuant to this Order. Ecology shall give reasonable notice before entering the AWMS unless an emergency prevents such notice. All persons who access the AWMS pursuant to this section shall comply with any applicable health and safety plan(s). Ecology employees shall not be required to sign any liability release or waiver as a condition of AWMS property access.

D. Effective Date: This Order is effective on the date the agreement has been signed by both parties.

E. Expiration: This Order shall expire twenty (20) years from the effective date. If the Diking Improvement District #5 has not used all the available mitigation credit, Ecology may grant an extension of the expiration date if the Diking Improvement District #5 requests an extension at least 60 days prior to the expiration. No extension shall be granted if the request is made after the expiration date.

VI. FAILURE TO COMPLY WITH THIS ORDER

Failure to comply with this Order may result in civil penalties or other actions by Ecology, whether administrative or judicial, to enforce the terms of this Order.

VII. THIRD-PARTY RIGHT TO APPEAL

By signing this Order, the Diking Improvement District #5 may not appeal this Order; however, a third party may. A party other than the Diking Improvement District #5 has a right to appeal this Order to the Pollution Control Hearing Board (PCHB) within 30 days of the date of execution of this Order.

VIII. CONTACT INFORMATION

Please direct all questions and submittals regarding this Order to:

Patricia Johnson
Department of Ecology
SEA Program
(360) 407-6140
Patricia.johnson@ecy.wa.gov

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Diking Improvement District #5
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Include e-cc: to fednotification@ecy.wa.gov

All submittals shall reference Order No. 19517.

Notices to be sent to the Diking Improvement District #5 as required by this Order shall be sent to the following:

Vic Lochrer
Diking Improvement District #5
20607 State Route 9 SE
Snohomish, WA 98296
vicwithsatocorporation@comcast.net

Peter Ojala, DID5 Counsel
Ojala Law Inc PS
PO BOX 211
Snohomish, WA 98291
peter@ojalalaw.com

Heather Griffin, Mitigation Credit Manager
City of Everett
Public Works Department
3200 Cedar Street
Everett, WA 98201
(425) 257-7206
HGriffin@everettwa.gov

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IX. SIGNATURES

Lauren Driscoll

Lauren Driscoll
Wetlands Section Manager
Shorelands and Environmental Assistance Program
Headquarters

12/21/2020

Date

Vic Loehrer

Vic Loehrer
Diking Improvement District #5

DECEMBER 17, 2020
Date

Attachment A
Information Required for As-built Reports

Smith Island Estuary Restoration Advance Wetland Mitigation Site
Water Quality Certification Order # 19517
And
Corps Reference #NWS-2019-500

Ecology requires the following information for as-built reports submitted under this Order. Ecology will accept additional information that may be required by other agencies.

Background Information

- 1) Project name.
- 2) Ecology Order number and the Corps reference number.
- 3) Name and contact information of the person preparing the as-built report. Also, if different from the person preparing the report, include the names of:
 - a) The applicant
 - b) The landowner
 - c) Wetland professional on site during construction of the mitigation site(s).
- 4) Date the report was produced.

Mitigation Project Information

- 5) Brief description of the **final** mitigation project with any changes from the approved plan made during construction. Include:
 - a) **Actual** acreage of Cowardin classes and mitigation type(s) (re-establishment, rehabilitation, creation, enhancement, preservation, upland, buffers).
 - b) Important dates, including:
 - i. Start of project construction.
 - ii. When work on the mitigation site began and ended.
 - iii. When different activities such as grading, removal of invasive plants, installing plants, and installing habitat features began and ended.
- 6) Description of any problems encountered and solutions implemented (with reasons for changes) during construction of the mitigation site(s).
- 7) List of any follow-up actions needed, with a schedule.
- 8) Vicinity map showing the geographic location of the site(s) with landmarks.
- 9) Mitigation site map(s), 8-1/2" x 11" or larger, showing the following:
 - a) Boundary of the site(s).
 - b) Topography (with a description of how elevations were determined).
 - c) Installed planting scheme (quantities, densities, sizes, and approximate locations of plants, as well as the source(s) of plant material).
 - d) Location of habitat features.
 - e) Location of permanent photo stations and any other photos taken.

Include the month and year when each map was produced or revised. The site map(s) should reflect on-the-ground conditions after the site work is completed.

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- 10) Photographs taken at permanent photo stations and other photographs, as needed. Photos must be dated and clearly indicate the direction from which each photo was taken. Photo pans are recommended.
- 11) A copy of any deed notifications, conservation easements, or other approved site protection mechanism.

Attachment B
Information Required for Monitoring Reports

Smith Island Estuary Restoration Advance Wetland Mitigation Site
Ecology Order # 19517
And
Corps Reference #NWS-2019-500

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

Background Information

- 1) Project name.
- 2) Ecology Order number and the Corps reference number.
- 3) Name and contact information of the person preparing the monitoring report. Also, if different from the person preparing the report, include the names of:
 - a) The applicant
 - b) The landowner
 - c) The party responsible for the monitoring activities.
- 4) Dates the monitoring data were collected.
- 5) Date the report was produced.

Mitigation Project Information

- 6) Brief description of the mitigation project, including acreage of Cowardin classes and mitigation type(s) (re-establishment, rehabilitation, creation, enhancement, preservation, upland, buffers).
- 7) Description of the monitoring approach and methods. For each performance standard being measured provide the following information:
 - a) Description of the sampling technique (e.g., monitoring point for soil or hydrology, line or point intercept method, ocular estimates in individually placed plots). If you are using a standardized technique, provide a reference for that method.
 - b) Size and shape of plots or transects.
 - c) Number of sampling locations and how you determined the number of sampling locations to use.
 - d) Percent of the mitigation area being sampled.
 - e) Locations of sampling (provide a map showing the locations), how you determined where to place the sampling locations (e.g., simple random sample), and whether they are permanent or temporary.
 - f) Schedule for sampling (how often and when).
 - g) Description of how the data was evaluated and analyzed.
- 8) Summary table(s) comparing performance standards with monitoring results and whether each standard has been met.

- 9) Discussion of how the monitoring data were used to determine whether the site(s) is meeting performance standards.
- 10) Goals and objectives and a discussion of whether the project is progressing toward achieving them.
- 11) Summary, including dates, of management actions implemented at the site(s), for example, maintenance and corrective actions.
- 12) Summary of any difficulties or significant events that occurred on the site that may affect the success of the project.
- 13) Specific recommendations for additional maintenance or corrective actions with a timetable.
- 14) Photographs taken at permanent photo stations and other photographs, as needed. Photos must be dated and clearly indicate the direction the camera is facing. Photo pans are recommended.
- 15) Vicinity map showing the geographic location of the site(s) with landmarks.
- 16) Mitigation site map(s), 8-1/2" x 11" or larger, showing the following:
 - a) Boundary of the site(s).
 - b) Location of permanent photo stations and any other photos taken.
 - c) Data sampling locations, such as points, plots, or transects.
 - d) Approximate locations of any replanted vegetation.
 - e) Changes to site conditions since the last report, such as areas of regrading, a shift in the location of Cowardin classes or habitat features, or a change in water regime.Include the month and year when each map was produced or revised. The site map(s) should reflect on-the-ground conditions during the most recent monitoring year.