

From: Scott Thomas
Sent: Friday, June 13, 2008 1:28 PM
To: [MULTIPLE RECIEPIENTS]
Subject: RE: PSE, Additional Flood Storage and Corps GI Process

A few additional comments:

1. First, as Will points out, additional flood storage will only be made available after arrangements have been made to compensate PSE for that storage. Compensation has typically been arranged through the Bonneville Power Administration. Unfortunately, Bonneville has stated that it is not interested in spending any additional monies at this time (Larry Kunzler has information on this topic on his [web site](#).) Further, the Corps' legal counsel has stated that an act of Congress would be required for the Corps to provide this compensation (although PSE is compensated for lost power at the upper Baker reservoir, the congressional authorization is limited to the upper reservoir, and is not applicable to lower Baker.) Thus, another vehicle to pay for that storage, if it were ever to be feasible, would likely be required. Given the increasing importance of renewable energy sources, one may well expect that the cost of storage will increase over the years.

2. During a flood event, the Corps is currently authorized to assume control of the upper Baker project, and operate that dam in the best interests of the community to prevent flooding. However, according to the Corps, its authority does not extend to lower Baker. Again, an act of Congress would be required for the Corps to assume control of lower Baker, which is very likely to substantially delay the implementation of any flood storage regardless of the outcome of the G.I. study. This is significant, because tort liability follows the operator of the dam, and PSE is unlikely to assume that liability voluntarily. Moreover, as those of you who attended the Dike conference in St. Louis earlier this year can attest, the Corps' position seems to be that additional liability should be avoided by the Corps as well. The assumption of risk is always compensable, and so there may be an additional financial component to include in the calculus. If you are keeping track, that's two acts of Congress so far.

3. When reviewing a project pursuant to the G.I., the Corps considers the "economic, environmental, and social considerations" of the project. Under these criteria, as the cost of a project rises and the benefits decline, the project becomes less likely to be approved. In our case, the Corps has publicly stated that under these criteria, it is questionable that additional flood storage at lower Baker will be approved. This is due in part to the fact that the cost of modifying lower Baker will rise (see point next below), while the benefits will decline as a consequence of the amount of water that is expected under the Corps' expected hydrology. In other words, increased storage would not be able to obtain a significant reduction in flood flows, and thus it would be cheaper to build other types of projects.

The Corps' hydrology is a moving target, and we are not yet absolutely certain where the Corps will end up. That caveat being stated, I think it is accurate to say that all of the technical consultants engaged by local governments have questioned the numbers that we have seen proposed by the corps as being too high (although there are differences in opinion as to how far out of line the Corps' numbers are.) Another way of looking at this is to say that if the Corps implements an artificially high hydrology, that hydrology may very well eliminate the option of additional flood storage at the Baker project. Thus, one of the questions that must be answered is whether or not the G.I. process will specifically preclude the provision of additional flood storage in the Baker system.

4. When the County and PSE negotiated an agreement in which 29,000 AF of storage was to be added at lower Baker (actually, the storage was relocated from upper Baker to lower Baker), the County and PSE assumed that the only modifications that would be necessary would be the modification of a spillway; the cost estimate was pegged, in 2004 dollars, at approx. \$13M. The parties also assumed that the Corps would be happy to operate lower Baker (see point No. 2 above.) Under the G.I. study, the Corps performed some additional work, and a number of \$100M for necessary dam modification work began to be discussed. Subsequent to that, PSE mentioned that the number may be much higher - on the order of \$200M. These higher numbers were apparently based on the standards that the Corps used to evaluate the dams.

Unfortunately, even if the G.I. process results in Corps approval of additional flood storage, it is not clear that the FERC-issued license would not have to be amended. PSE and other parties to the settlement agreement have adopted the position that Art. 107 of the settlement agreement is a "placeholder" for future action relative to additional storage. Skagit County vehemently disagreed with that position. It is not clear to us that FERC itself has adopted that position, or the numerous parties to the settlement agreement. From our perspective it seems likely that challenges to the implementation of flood storage will depend on whether or not there are incentives provided to other settlement parties.

5. The statement that the cities and the dike districts did not sign the original CSA in 2004, and objected to the fact Skagit County did so is not quite correct. Neither the cities nor the dike districts were parties to the negotiation of the settlement agreement, and could not sign the agreement (I understand that the dike districts were not even notified that the process was underway.) In addition, the cities did not oppose the County signing the settlement agreement. We think that the County believed it was looking out for the best interests of the cities at the time. We also believe the County signed in good faith, and that the issue of the G.I. process came up later.

6. We understand that PSE's position regarding the G.I. process as the pathway to gaining additional flood storage was not pursuant to article 107 (it is interesting to note that the term G.I., or General Investigation, does not appear in the settlement agreement.) At the time, the County worked

specifically to exclude any language in the document that referenced the G.I. process. It was the hope of the County that approval of additional storage could be provided by the Corps, without a G.I. process; in part, that was due to the Corps' statement that study of the environmental consequences of additional storage would take "years." The County asked the Corps, as a "cooperating partner" in the FERC NEPA process, to request the environmental effects of additional Lake Shannon flood storage be studied in the FERC NEPA process. The County also asked the federal delegation to [sign a letter \(attached\)](#) asking the Corps to do this. Unfortunately, our congressional delegation declined to sign the letter. Ultimately, the Corps refused to ask FERC to study the environmental effects within the FERC NEPA process, instead determining that the additional storage could only be looked at outside of the licensing process, and specifically with the G.I. process (see letters from Col. Lewis, attached, [August 9, 2004 letter](#) and the [Jan. 3, 2005 letter](#)).

Later, the County solicited all the cities and dike/drainage districts in the county to request help from our federal delegation. See "[05-2-14 Chal Ltr to Mayors DD Comm's. . .](#)" Congressman Larsen's and Senator Murray's staff saw an advance copy of this letter/petition, and asked the County not to "officially" send it. But it is important to note that at the time, the County was out front on this issue and doing everything it could to try to salvage the Baker storage. I think that all of the cities and dike districts supported the County's efforts.

At the beginning, it was the County's assertion that the G.I. process was not agreed upon as the mechanism to get the additional flood storage outlined in article 107 approved, nor was it required as a mechanism to approve additional flood storage. As to the current situation, it is debatable whether coalescing behind an effort to move the G.I. process forward is the only likely pathway to obtain additional flood storage. If the G.I. process were abandoned tomorrow, the language in the settlement agreement would still exist. It has been the Corps' unofficial opinion that if the G.I. process were to be abandoned, it would still need to undertake a kind of "mini-GI" focused solely on the provisions of the settlement language. In truth, no one knows what the process would be to pursue the additional flood storage in article 107 if the G.I. study was abandoned. But meanwhile, we believe that the Corps of Engineer's hydrology for the Skagit River basin continues to be significantly overstated. Those knowledgeable about the ramifications of this tell me that this inflated hydrology will make getting a regional flood project in place, virtually impossible. Moreover, the Corps has unofficially signaled that it will not change its hydrology for the G.I. study, even if FEMA directs the Corps to change its hydrology for the Flood Insurance Study. Continuing the G.I. process with data that has been rejected by FEMA would seem to make little sense.

7. A comment on funding flood control projects. Those of you who have attended the Corps' "briefings" probably realize that federal funding is not quite as easy to come by as it used to be. Congress generally authorizes Corps water resources projects before considering them in the annual appropriations process. In other words, flood control projects have to be approved by Congress first; after that initial approval, Congress will appropriate funding to actually build those projects. It's a two step process, and the first step is

called a Water Resources Development Act bill (WRDA, in federal bureaucratise). WRDA legislation provides the Corps with authority to study water resource problems, construct projects, and make major modifications to projects.

The appropriations process, on the other hand, determines which studies and projects receive federal funds. Many activities authorized by a WRDA never receive federal funding. Fiscal priorities and public attitudes have resulted in declining federal funding for water resources projects. The result has been increasing competition for available funding among authorized activities. To illustrate, the Congressional Research Service reported in 2006 that the Corps' civil works budget suffered a substantial decline in real dollars as annual funding for the Corps' construction account fell from an average of \$4 billion (in 2000 dollars) in the 1960s and 1970s to less than \$2 billion recently. Moreover, during the last decade, Congress has authorized not only navigation and flood control projects - the traditional meat and potatoes projects that have been funded, and undertaken, by the Corps - but also ecosystem restoration, environmental infrastructure assistance, and other nontraditional activities. These additional types of projects have exacerbated the competition for project construction dollars. As of 2006, the Corps had a backlog of over 500 authorized projects that did not consistently receive construction funding; estimates of the size of this backlog vary from \$11B to over \$60B, depending on which projects are included. Of course, the cost of these projects will rise, perhaps significantly, as they are delayed. This is a significant consideration, given that there will be a local dollar match for any project that ultimately makes it to construction.

WRDAs historically followed a loosely biennial schedule, as both parties in Congress concluded that there was more to gain by passing this legislation than battling over them. That changed after the 2000 WRDA. The Bush Administration expressed concerns about WRDA bills' level of authorizations creating false expectations for federal appropriations, and about the backlog of authorized Corps projects not being built due to a variety of factors. Stated another way, the Bush Administration was concerned that there will never be enough money to fund the projects that have already been authorized by a WRDA, and the authorization of additional projects will necessarily result in bitter disappointment by those who believe that a federal answer to flooding issues is forthcoming, but will never arrive. Acting true to his word, President Bush vetoed the 2007 WRDA (the first WRDA enacted by congress since 2000), calling the anticipated spending that would be required (\$23B) excessive. The house and the senate overrode the veto last November, over the objections of taxpayer organizations. Local Corps representatives have said the same thing in their briefings. During the tenure of Col. Lewis, Corps staff told us that the Corps was then working on projects that resulted in a 1\$ cost/3\$ benefit ratio, and that they expected Skagit projects to have something close to a 1/1 ratio. The message to us was very clear - don't plan on receiving federal dollars any time soon. And the box score is now 3 acts of Congress, 4 if the G.I. takes off into uncharted territory.

8. I'll close this message with a comment on timing. What we are seeking to do, at a minimum, is protect our communities from the mythical 100-yr flood (I know that it is not called that by FEMA anymore, but I think that

everyone is familiar with the concept, and so I will stick with it.) The G.I study will be completed some time in the next 4 - 5 years, assuming that funding is appropriated by the federal government and local government. Engineering and design, pre-construction studies, and budgeting will likely take a couple of years on top of that (which also requires a 35% local dollar match.) Using very rough calculations, the Corps representative stated earlier this year that construction costs would probably be on the order of \$100M in current dollars. A portion of this amount would have to be obtained through Congress (see discussion of WRDA's, above.)

Again, we are attempting to protect against a flood that has a 1% chance of occurring in any given year. The cumulative probability of such a flood occurring during the life of (what used to be) a standard 30 year mortgage is 26%. Stated another way, living in a house for 30 years gives Mother Nature 30 different tries to bring a big flood through your home. As the scope of the flood event decreases (50-year flood, 25-year flood, and so on), the likelihood increases. While the chance of a 50 year flood occurring in any one year is 2%, the chance of a 50 year flood occurring during the standard 30 year mortgage is 45%. Indeed, time is of the essence.

At the end of the day, the issue this community will have to grapple with is how to best obtain flood protection in a timely fashion. As part of that debate, questions that must be resolved is whether or not it is likely that additional flood storage will ever be obtained at the Baker project, and whether the hoped-for results of the G.I. may be obtained more economically, and more efficiently, through other means. Keep in mind that as of March 31, 2008, the cost of the G.I. project had reached \$7,024,503.03, with Skagit County paying \$1,103,501 in cash and contributing the rest of its 50% share of the total in in-kind services. Of course, additional funds will be required to complete the G.I. process over the next few years.

On the other hand, we know that additional flood storage at the Baker project would likely be far cheaper to protect the Skagit Valley from flooding than is constructing a flood control project on the scale that would seem to be indicated by the G.I. process. Finally, we are aware that a single act of Congress could be crafted to eliminate these perceived shortcomings of the G.I.; on this point, at least, the Corps has agreed with us.

I hope that this message has shed light on some of the problems that we have observed. As I said above, all of our communities and their residents that will have to wrestle with these important issues. It is my belief that a serious discussion can not be undertaken if we do not have a common understanding of the issues. Although I have pointed out a number of problems that face us, and I have focused particularly on the G.I. process, please do not assume that we have completely written that process off. We have not. Clearly, there are advantages and disadvantages that accompany any course of action. However, I did want you to understand that the G.I. is not a panacea, and that there are considerable risks with that process.

Scott G. Thomas
City Attorney
City of Burlington