

**BEFORE THE HEARING EXAMINER OF SKAGIT COUNTY**

In the Matter of the Remand of the  
Application of

**SKAGIT COUNTY DIKE,  
DRAINAGE AND IRRIGATION  
DISTRICT NO. 12**

For a Shoreline Substantial Development  
Permit for improvements to a portion of  
dike along the Skagit River

**PL 12-0191**

**RESPONSE OF SKAGIT COUNTY  
DIKE, DRAINAGE AND  
IRRIGATION DISTRICT NO. 12  
TO INTERVENOR KUNZLER'S  
MOTION TO DISQUALIFY  
EXPERT NHC**

COMES NOW the Applicant, SKAGIT COUNTY DIKE, DRAINAGE AND IRRIGATION DISTRICT NO. 12, by and through its attorney of record JOHN R. SHULTZ of SHULTZ LAW OFFICES and submits this Response to Intervenor Kunzler's Motion to Disqualify Expert NHC. This Response is based on the records, following legal authorities, and files herein.

**I. INTRODUCTION**

Facts and legal arguments provided in Intervenor City of Burlington's Response will not be reiterated herein, for sake of brevity. Facts and legal arguments made by Intervenor City of Burlington are incorporated herein by reference, as if fully set forth herein, and are adopted by Skagit County Dike, Drainage and Irrigation District No. 12 (hereinafter "DD12") in support of its Response to Intervenor Kunzler's Motion to Disqualify Expert NHC. For the following reasons, DD12 respectfully requests that the Motion by Intervenor Kunzler (hereinafter "Intervenor") be denied.

RESPONSE OF DIKE DISTRICT NO. 12 TO INTERVENOR  
KUNZLER'S MOTION TO DISQUALIFY EXPERT NHC - 1

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1 **II. LEGAL AUTHORITY**

2 **A. Intervenor Kunzler Has Failed to Provide Adequate Legal or Factual**  
3 **Authority That a Conflict Exists With NHC.**

4 Intervenor Kunzler alleges a conflict of interest against NHC, the Applicants retained consultant  
5 and expert, based on the argument that NHC had performed hydrology work for upstream property  
6 owners, in the *Halverson* lawsuit, and subsequent consulting contracts with Skagit County, the Army  
7 Corps of Engineers, and now DD12 and the City of Burlington. He alleges that somehow NHC did not  
8 notify prior parties of a conflict of interest, or present parties in this permit remand regarding the fact  
9 that they had provided engineering work for other entities, and that this constitutes a conflict of interest.  
10 Intervenor apparently disregards the fact that these projects were at different times since 1995, involved  
11 different areas of the Skagit River, the engineering consultation involved different scopes of work, that it  
12 was common knowledge amongst all of the various parties that NHC had provided engineering, and  
13 without any allegation that there were any conflicts of interest.

14 Intervenor seeks disqualification of NHC, apparently for work which dates back to the *Halverson*  
15 lawsuit in 1995, and further seeks to admit into evidence in the current proceedings, numerous  
16 depositions taken in 1995, and the trial transcript for the *Halverson* matter from 17 years ago. This, in  
17 Intervenor's mind will somehow prove that a prior or current conflict of interest exists so that the drastic  
18 and premature measure of disqualification of NHC as an expert will occur. The Motion also disregards  
19 the fact that Intervenor was involved in the *Halverson* lawsuit, has commented in the 2010 EIS, closely  
20 follows hydrology and flood issues in Skagit County on his website, and has provided testimony and  
21 comment in these proceedings as an Intervenor, and has never previously raised an issue of conflict of  
22 interest. Intervenor's Motion should be rejected as unfounded, unwarranted, an endeavor lacking in any  
23 relevance to the present proceedings, and wholly unnecessary for a resolution of the subject matter of  
24 issuance of a permit, and responding to an appeal remand which are the issues in these proceedings.

1 The City of Burlington's Response filed herein analyzes the citation of the code of ethics of the  
2 American Society of Civil Engineers submitted by Intervenor Kunzler as support for the argument that  
3 there is a conflict of interest. The code of ethics for the ASCE does appear applicable in these  
4 proceedings. Intervenor City's Response notes that under the Washington Administrative Code § 196-  
5 27A-020(2)(i), and RCW 18.43.105(6), rules have been promulgated which govern professional  
6 engineers in the State of Washington, relating to conflicts of interest. These references include WAC  
7 196-27A-020(2)(i) which sets forth the engineers requirement to **notify employers or clients** of  
8 circumstances which may influence their decision to avoid conflicts of interest, as follows:

9 (i) Registrants shall avoid conflicts of interest, or the appearance of a conflict of  
10 interest with their employers or clients. Registrants must promptly inform their  
11 employers or clients of any business association, interest, or circumstances that  
12 could influence their judgment or the quality of their services or would give the  
appearance that an existing business association, interest, or circumstances could  
result in influencing their judgment or the quality of their services.

13 Also, under RCW 18.43.105(6), the State Board of Registration may take discipline action for engineers  
14 having a conflict of interest as follows:

15 [h]aving a financial interest in bidding for or performance of a contract to supply  
16 labor or materials for or to construct a project for which employed or retained as  
17 an engineer except with the consent of the client or employer after disclosure of  
such facts; or allowing an interest in any business to affect a decision regarding  
engineering work for which retained, employed, or called upon to perform;

18 Here, Intervenor Kunzler has not set forth any facts, or authority to determine that in fact a conflict of  
19 interest existed or exists with NHC or with any of its consultants or clients. There is no factual evidence  
20 of any financial interest, any failure to notify employers or clients, and no factual support for any  
21 influence on NHC's judgment or quality of their services. Even if there were facts for a claim of a  
22 conflict of interest or ethics violation, Intervenor's proper action would be to make a claim with the  
23 Washington State Board of Registration for Professional Engineers and Land Surveyors. These  
24 proceedings are not a proper forum for such a claim.  
25

1           Intervenor Kunzler provides his conflict of interest analysis, and reasons that since NHC  
2 provided engineering services at various times for upriver property owners, the County, the Corps, and  
3 DD12, that there must be a conflict between these various entities, who paid NHC to provide hydrology  
4 analysis on the same river. Intervenor disregards the fact that these customers were at different times  
5 over many years, and like any engineering analysis, if different scopes of work are requested, then there  
6 may be different conclusions.

7           Differing engineering results can be based on different areas, river levels, whether analyses are  
8 for peak flow, or for a 100-year event, or a 50-year event. Generally, the scope of work between the  
9 client and the engineer will outline certain parameters, which change on occasion, or may be expanded  
10 due to new recent findings in the engineering, new evidence, hydrology, or different risk assessments.  
11 What may be specific in one area of the river, can change in another area, due to obstructions, bridges,  
12 debris build-up, tides, storm or weather patterns, and the hydrology is a fluid concept which is subject to  
13 differing conclusions, when affected by other unforeseen factors.

14           Work done by NHC for *Halverson*, and subsequently in the EIS for Skagit County, and now for  
15 Burlington and DD12 for this permit are all separate and different projects for different areas and  
16 different scopes of work. The Skagit River and the effects of its flows are not an exclusive property or a  
17 project for any entity. Work by NHC for *Halverson* in 1995 is not the same hydrology which has or will  
18 be used to the present date. Subsequent work for the County and the Corps uses hydrology, some of  
19 which was not finalized until August 2013. Presently, current hydrology is being updated along with the  
20 Corps model, and is not yet complete for this permit action. There can be no conflict of interest where  
21 we are dealing with different projects, for different clients, at different times, with different scopes of  
22 work. In particular, any hydrology work done during *Halverson* is significantly out-dated, technical  
23 advances have overtaken the old data, and nothing can be gained in these proceedings with any  
24 comparison of advanced current hydrology to out-dated hydrology. This is the reason that the present  
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1 parties at the direction of the Board of County Commissioners will be using the most current 100-year  
2 Corps hydrology.

3 In this particular case, Intervenor, at most, **can only speculate** about a conflict of interest, but  
4 there can be no possibility of proving a conflict of interest where there has been no completion of the  
5 study. These allegations are merely speculation, used to assert unfounded allegations of wrongdoing or  
6 failure to provide information of a conflict, when the accuser has no idea whether or not there are facts  
7 to justify these allegations. Accordingly, this Disqualification of NHC from further work should be  
8 dismissed out of hand. In particular, where Intervenor states apologetically that he did not wish to bring  
9 this Motion, and that it is clearly "**premature**". The Hearing Examiner should allow NHC to continue  
10 its work obtain the engineering analysis and conclusions being requested by the County Commissioners.

11 It is important to note that NHC has undertaken this task on behalf of Applicants, and the Board  
12 of County Commissioners has requested engineering analysis in this permit appeal remand. Specific  
13 directions have been given by the County Commissioners, including the direction to use "current Corps  
14 hydrology" recently contained in the letter from the BCC dated February 11, 2014. To say that  
15 somehow the Applicants are influencing or directing NHC in what to study in its analysis, before the  
16 report is even done, and then stating that NHC's failure to notify parties of prior work done over 17  
17 years ago is somehow a conflict of interest, and they should be disqualified from analysis, is simply  
18 misguided and ill-conceived. This is not to mention the fact that since NHC has done so much analysis  
19 along the Skagit River in various areas, that they are clearly the most qualified to do the work, the prior  
20 work done was quite obvious to subsequent clients, and no client in 17 years has complained or asserted  
21 a conflict, including Intervenor. NHC in fact has the most experience in this area, has provided the most  
22 analysis, and is the likely choice to do the best analysis for what the County Commissioners have  
23 requested in this remand.

24 Intervenor notes that he would be "... happy to set aside this motion so long as the Hon.  
25 Examiner guarantees that NHC will present their findings before the Examiner in person." See

1 Intervenor's Motion to Disqualify NHC at page 9, line 14-16. It should be obvious to Intervenor that  
2 given the BCC directive to provide an analysis of the pre-and post-project events, that the analysis of  
3 NHC will be presented by the Applicants, for ultimate approval by the Hearing Examiner and BCC  
4 before the permit is issued. Also, by then, all appropriate notifications to avoid a conflict will have been  
5 given, the report will be completed, and issues of a conflict of interest will never materialize. Given  
6 Intervenor's willingness to set aside this Motion so long as NHC's finding will be presented at hearing,  
7 the BCC's three-issue directions, and Intervenor's admitted reluctance to bring this Motion which he  
8 characterizes as premature, it may be appropriate for Intervenor to honor his offer to set aside this  
9 Motion.

10 **B. The Hearing Examiner Should Accept Intervenor's Assertion That This**  
11 **Matter Is Premature Based on the Fact That No Work Product Has Been**  
12 **Completed By NHC and Should Rule Accordingly.**

13 Of course, there can be no factual basis for showing that NHC's judgment or quality of their  
14 services has been influenced by the scope of work or Applicant's directions, **because their report has**  
15 **not been completed or approved.** Intervenor Kunzler acknowledges this obvious fact, in the third  
16 sentence of his Motion where he states "One, **I think it is pre-mature to bring a motion until the**  
17 **work product by nhc could be analyzed** to see if it would be in conflict with previously submitted  
18 testimony on the subject of the levees to upstream property owners, ..." See Intervenor Motion to  
19 Disqualify Applicant Expert NHC Due to Conflict of Interest at page 1, lines 20-22.

20 In addition, in his conclusion, Intervenor Kunzler states again that: "as previously stated I  
21 believe that requiring **this motion be filed now is premature, ...**" See Intervenor Motion to Disqualify  
22 at page 8, line 18. But again, Intervenor misinterprets and misapplies the legal requirements as showing  
23 a conflict of interest by adding "... because the applicant has presented no evidence that nhc has  
24 complied with its code of ethics, nor have they shown what they have directed nhc to do or more  
25 importantly not to do."

1 Again, this is a mischaracterization of the test for conflict of interest, and inappropriately  
2 suggests that the Applicant must present evidence that NHC has complied with the code of ethics.  
3 Intervenor Kunzler would urge that the burden of proof of a conflict of interest with NHC be shifted to  
4 the client in these proceedings. Simply by his stating or speculating that there may be a conflict of  
5 interest does not shift the burden to Applicant to prove that there is no conflict of interest, particularly in  
6 the context of this Motion without further proof. However, more importantly, regardless of the test of  
7 conflict of interest or the circuitous logic provided by Intervenor, he agrees that his Motion is  
8 **premature, because NHC's work product has not been completed.** We would also agree. The  
9 Motion should be dismissed.

10 We should take Intervenor Kunzler at his word, that **his Motion is premature** and rather than  
11 making a snap, uninformed and premature decision to disqualify NHC, his Motion should be denied and  
12 NHC's analysis should be allowed to proceed. Starting over with a new engineering firm, would cost  
13 untold financial losses to Applicants, without any benefit to the residents of Skagit County. On the other  
14 hand, continuing with NHC's work and analysis, which can be vetted and considered by all the parties at  
15 the time the analysis is completed will benefit all parties concerned in the goal of reaching the best  
16 hydrology acceptable to all involved, and to intelligently consider approval or imposition of conditions  
17 to the permit, to resolve this permit appeal.

18 **C. Intervenor Kunzler Has Improperly Made Ex Parte Contact With**  
19 **Applicant's Expert Witness, NHC, and Has Made Allegations and Implied**  
20 **Threats of Asserting a Conflict of Interest.**

21 In Intervenor's Motion and at a Pre-Hearing Conference held on January 28, 2014, Intervenor  
22 Kunzler noted that he had made the Hearing Examiner aware of a potential conflict of interest of NHC.  
23 However, Intervenor failed to also disclose that he sent an email to NHC alleging a conflict of interest in  
24 December 2013, with no notice to Applicants. Applicants consider this to be an improper contact with  
25 their expert witness, which made accusations of a conflict of interest directly to NHC. These were  
allegations that because of prior representation in *Halverson*, that this was a conflict of interest for NHC.

1 Further, that Intervenor “has introduced into the record” information prepared by Dr. Mutter, a former  
2 NHC employee and that he is “going to introduce all the testimony in depositions and at trial...”, and  
3 that he was giving NHC a “heads up”. NHC’s response was that there could be no conflict of interest,  
4 because no one involved in the current work had any prior involvement in the *Halverson* matter. Also,  
5 that the engineers now have a “better understanding of the technical issues” than existed at the time of  
6 *Halverson*. See attached Email dated December 28, 2013, marked Exhibit “A.”

7 Intervenor has made ex parte contact with Applicant’s experts, which elicited a response, while  
8 there is a current consultant contract with Applicants, without disclosing this to the parties. This contact  
9 and statements appear designed to imply to NHC that they are violating ethics due to a conflict of  
10 interest by working with Applicants, and that Intervenor intends to file evidence, including prior  
11 testimony of their employee to prove a conflict of interest against them in litigation. This is clearly a  
12 veiled threat of litigation based on unsupported claims to intimidate the witness. This is not to mention  
13 the fact that Intervenor stated that he had “introduced into the record the impacts of the levees prepared  
14 by Dr. Mutter”, NHC’s employee, which appears to be false, because at the time Intervenor had not  
15 done so but now is attempting through this Motion to introduce documents regarding the depositions and  
16 the trial transcripts.

17 In Washington, improper conduct or attempts to influence witnesses is prohibited. The  
18 Washington Supreme Court has held that ex parte contact with the opposing parties consultants is  
19 improper. See Matter of Firestorm, 129 Wash.2d 130, 916P.2d 411 (1996). In the Firestorm case, the  
20 Court noted that:

21 The plain language of CR26(b)(5), however, indicates ex parte contact with the  
22 experts of an opposing party is not allowed...

23 Based on the plain language of the rule, we hold as a general principle ex parte  
24 contact with an opposing party’s expert witness is prohibited by CR26. See  
25 *Campbell Indus. v. M/V Gemini*, 619F. 2d 24 (9<sup>th</sup> Circuit 1980).

In re Firestorm, 129 Wn.2d 130 at 137.



1 In that case an attorney had made contact and obtained information from opposing counsel's  
2 expert witness. Counsel for plaintiffs had conducted an ex parte interview with an expert hired by the  
3 opposing counsel's law firm. In our case Intervenor had sent an email ex parte to NHC without  
4 disclosing this to the parties, alleging that the Applicant's engineer had a conflict of interest and would  
5 be drawn into a court proceeding.

6 This ex parte contact, without advising Applicants was a veiled threat, which showed intent  
7 consistent with the present Motion to Disqualify and eliminate NHC as an expert witness. To contact  
8 Applicant's expert witness, and making an allegation that the expert has violated ethical standards and  
9 engaged in a conflict of interest, would tend to cause concern, and to a reasonable person could be  
10 perceived as a threat or intimidation for continuing the work. It could also tend to impact the engineers  
11 professional judgment, and the resulting engineering report that the expert is to provide to Applicants in  
12 the hearing, and necessary to satisfy the Board of County Commissioners. The contact was improper,  
13 and the Hearing Examiner should acknowledge the impropriety of this contact and admonish Intervenor  
14 to make no further contact with threats of litigation or disparaging accusation.

15 **D. Intervenor Mischaracterizes Hydrology Evidence in His "HYDRAULIC**  
16 **CONUNDRUM".**

17 Intervenor provides hydrology and hydraulic evidence in text and tables in his Motion to  
18 Disqualify NHC. He cites various analyses by NHC subsequent to *Halverson*, analysis of the 1990  
19 flood effects, information contained in the FEIS in 2010, and an 8/2013 Hydrology Technical  
20 Documentation Report which he seeks to admit in these proceedings. He submits and misinterprets this  
21 data to conclude that: "Add to that, as the evidence clearly shows above, NHC being involved with all  
22 three projects has arrived at different sets of figures for each client." See Intervenor's Motion to  
23 Disqualify NHC at page 8, lines 9 and 10. In summary, Intervenor reasons that if an engineer works on  
24 three different projects, on the same river, even though at different times and different clients, there is  
25

1 automatically a conflict of interest unless the results are exactly the same, irrespective of location, time,  
2 scope of work or differing conditions.

3 In fact, if one reviews the changes which have transpired in the last 20 years, it is apparent that  
4 there have been substantial and numerous changes in hydrology, river analysis, and studies, including  
5 the Skagit GI 2012 Study, a Levee Reliability Report in 2011, analyses at Sterling, and numerous  
6 changes in the Corps hydrology since 2001 which have yielded differing results in differing scenarios.  
7 In fact, after changes in the GI Study and Corps hydrology, the actual peak flows and surface water  
8 elevations have **increased**. If Intervenor is claiming that somehow NHC is preparing hydrology which  
9 changes to benefit the particular client, or that any of the parties in these proceedings are attempting to  
10 influence or change hydrology to benefit themselves, then it has not been a very successful enterprise.  
11 Over time, changes in hydrology have only resulted in higher elevations requiring more flood control  
12 improvements and protection.

13 A look at the facts reveals that the official Corps 100-year hydrology was changes from 180,000  
14 cfs to 220,000 cfs by the Corps in 2001 and has continued to be increased and reevaluated since. The  
15 present 100-year hydrology figure was established by the Corps Skagit GI H & H 2012 report completed  
16 by NHC under contract to the Corps. The Corps hydraulic model has also been revised several times  
17 during the same period with the most notable change due to the completion of the Corps' Levee  
18 Reliability Report in 2011. This report established the existing spill volumes at Sterling with were  
19 previously nonexistent because of the Corps' position that the downstream levees would fail before any  
20 significant spill at Sterling.

21 The revision of the debris blockage analysis has also impacted both the spilled discharge rate and  
22 spill volumes. The debris uncertainty is one of the major uncertainties in the model. That, along with  
23 the antecedent soil/rainfall conditions can have a significant impact on the ability of the  
24 Skagit/Nookachamps basin to handle high flows during any significant high flow event. NHC is very  
25

1 familiar with the Corps analysis of these variables making them the most qualified to perform the  
2 analysis requested by the County.

3 The improvements to the DD17 levees has also impacted the flows downstream as an example of  
4 the need to update the Corps Levee Reliability analysis. The primary reason NHC was selected as the  
5 consultant firm to conduct the analysis of the District's project was due to their familiarity with Corps  
6 hydraulic models which have been recently updated and there familiarity with ongoing and recently  
7 completed levee improvement projects which the Corps GI Study has now identified and provided the  
8 design criteria. These include the District 3 levee setback, Anacortes WTP improvements, the Mount  
9 Vernon Flood Wall project, DD1 and 17 levee improvements and the ongoing DD12 levee projects.  
10 These projects were identified as some of the solutions and improvements required to protect people and  
11 property under the ongoing Skagit GI Study.

12 The established Dike Districts and Cities have a long history of working within the framework of  
13 the Corps Levee Maintenance Programs and implementing flood protection/infrastructure improvements  
14 as the information has become available to the community through the Skagit GI. NHC is a very  
15 respected consulting firm both locally, nationally and internationally and has no personal or professional  
16 ties to the outcome of the requested analysis. On the contrary, using a less experienced firm which is  
17 not familiar with Skagit GI models and proposed GI projects does not serve the best interests of the  
18 constituents of Skagit County. It should be remembered that the proposed project is consistent with the  
19 preferred flood protection project identified for this specific levee segment by the Skagit GI Study.

20 It should also be noted that all past, present and future flood projects will, by physical and  
21 financial constraints continue to be constructed on a project-by-project basis with some unavoidable  
22 impacts to other areas within the current GI Study area. As always, some communities will prioritize  
23 public funding towards flood protection more than others, and based on their differing economic  
24 circumstances. Critical infrastructure both local and regional that is protected by selective flood projects  
25 vary greatly District by District, and can have a profound impact on the economy of the entire region as

1 the collapse of the I-5 Bridge recently demonstrated. Differing locations have differing requirements for  
2 flood protection improvements, along with different hydrologic analysis at different locations, created  
3 by differing conditions.

4 The goal in this permit, and moving forward for the protection of communities is to have the best  
5 and greatest level of currently available data. There is no point in analyzing or submitting out-dated  
6 data, under different conditions obtained decades ago, or irrelevant data to support agenda-driven  
7 preconceived perceptions of past events, to arrive at erroneous conclusions. The best flood protection  
8 and flood risk analysis can only be done by having the most current hydrologic analysis, data, and  
9 novels prepared by the most qualified engineers to reach the best conclusions and the best available  
10 engineering analysis. In our case, this is satisfied by retaining NHC, and denying Intervenor's Motion to  
11 Disqualify NHC.

12 **E. Intervenor's Motion Will Have the Effect of Circumventing Court Rules, As**  
13 **Well As Deviating From the BCC Three-Issue Directions, By Requiring the**  
14 **Possible Addition of a New Party, NHC, Along With New Claims and Issues**  
15 **Through The *Halverson* Material.**

16 Intervenor Kunzler, by these allegations of conflict of interest against an entity which is not a  
17 party of these proceedings, attempts to circumvent Court Rules, amend the original Remand Order of  
18 these proceedings, and to add additional claims and parties, as well as evidence outside this closed  
19 record appeal. These claims are not consistent with CR18, Joinder of Claims and Remedies, or CR19,  
20 Joinder of Persons Needed For Just Adjudication. Intervenor's allegation of conflict of interest adds  
21 entirely new issues in this case, with the need to potentially add NHC as a third party. This should be  
22 rejected by the Hearing Examiner.

23 Further, the Motion to add substantial documentation, deposition transcript, and trial transcripts  
24 of the *Halverson* matter, comprising hundreds of pages of testimony, court filings, court transcripts from  
25 Snohomish County, and numerous exhibits has relevance only to the *Halverson v. Skagit County* matter  
under Snohomish County Cause No. 93-2-05201-2. In addition, these transcripts, vary in period of time

1 from 10/2/1995 through 4/8/1997, and would lack relevance to the current matters involving NHC for  
2 the current permit project under review on this Appeal Remand.

3 Since 1995, nearly 20 years ago, there have been numerous successive reviews and studies of  
4 hydrology, under various Corps hydrologic models and revised models. There are continuing changes in  
5 accuracy and analysis, including EIS analysis, additional flood studies, modeling, and the addition of 20  
6 years of additional hydrology and historical flood data. What may have been found or said in 1995  
7 would have little relevance to studies, analysis, and **improved current hydrology** required in the  
8 present permit remand.

9 This is particularly so, based on the Board of County Commissioners restriction of this remand to  
10 three specific issues, with the further refinement of the hydrology issue that it be based on "current  
11 Corps hydrology". There would seem to be no relevance, or usefulness to review or compare the  
12 present analysis, with what may have been studied, concluded or stated 17 years ago. It would be an  
13 interesting academic and historic study, but of no relevance or usefulness to the current appeal remand.  
14 Accordingly, DD12 requests that the Motion for Disqualification of NHC and rejection of its analysis,  
15 along with supplanting and comparing current hydrology, for which no conclusions have yet been  
16 reached, with outdated prior studies 17 years ago should be rejected out of hand. The Hearing Examiner  
17 should reject Intervenor Kunzler's Motion to Disqualify and to add any additional transcripts from the  
18 *Halverson* matter.

19 **F. The Hearing Examiner Has Powers Under Skagit County Rules of Procedure**  
20 **For Hearings to Admit or Exclude Evidence, and Should Deny Inclusion of**  
21 **the Halverson Material.**

22 Furthermore, the Hearing Examiner has the powers under the Skagit County Rules of Procedure  
23 for Hearings for the Office of the Hearing Examiner, which include but are not limited to: (c) To rule on  
24 all procedural matters, objections and motions; and (d) To admit and exclude evidence. See §1.01,  
25 Powers of Hearing Examiner, and §1.11 Evidence, in the Skagit County Rules of Procedure for  
Hearings. Further, the Hearing Examiner has powers to exclude evidence that: (b) The Examiner may

1 exclude evidence that is irrelevant, unreliable, immaterial, or unduly repetitious. See §1.11, Evidence,  
2 Skagit County Rules of Procedure for Hearing.

3 The Trial Court, in its gate keeping role, must decide if evidence is admissible. ER 102; ER  
4 104(a). To satisfy the pursuit of truth, evidence must meet certain criteria. Evidence must be probative,  
5 relevant and meet the appropriate standard of admissibility. ER 401; ER 402; ER 403; See e.g. *State v.*  
6 *Riker*, 123 Wash.2d 351, 359, 869 P.2d 433 (1994). Expert testimony, in addition, must be helpful. ER  
7 702.

8 Under Washington Rules of Evidence, ER 403, the Court or tribunal has authority to exclude  
9 evidence on grounds of prejudice, confusion, or waste of time, even though the evidence is relevant. ER  
10 403 states as follows:

11 Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or  
12 Waste of Time.

13 Although relevant, evidence may be excluded if its probative value is  
14 substantially outweighed by the **danger of prejudice, confusion of the issues, or  
misleading the jury, or by considerations of undue delay, waste of time or  
needless presentation of cumulative evidence.**

15 Emphasis added. See Washington Rules on Evidence ER 403. Rule 403 established the principle that  
16 evidence even though relevant, may be excluded if its relevance is outweighed by its negative effect on  
17 the fact-finding process. Rule 403 applies during all stages of all proceedings, civil and criminal. The  
18 rule contemplates a balance in process. Specifically, Rule 403 authorizes exclusion of relevant evidence  
19 if “its probative value is substantially outweighed by the danger of confusion of the issues or misleading  
20 the jury.” This portion of the Rule 403 has traditionally meant that the Court has discretion to control  
21 distracting “side issues”. The rule has traditionally meant that the Court has discretion to control  
22 distracting side issues, and to exclude evidence that, for one reason or another is misleading.

23 In *Public Utility District No. 1 v. International Insurance Company*, 124 Wash.2d 789, 881 P.2d  
24 1020 (1994) insurance companies sought to introduce evidence of how other insurers had handled their  
25 settlement negotiations of similar claims. The Trial Court excluded the evidence and the Supreme Court

1 affirmed. The Court noted with approval that the Trial Judge had excluded the evidence on the basis  
2 that other insurers had different policies with different terms, and that any reference to the other policies  
3 would only confuse the issues in the present case.

4 In the present case, evidence is sought to be submitted relating to an alleged conflict of interest  
5 with an engineer who had provided engineering to previous clients. Introduction of this evidence would  
6 be confusing, because transcripts and depositions of the Halverson matter, would bear on NHC's work  
7 with that client, but would have no bearing on any subsequent contracts or engineering, which related to  
8 different parts of the River, different scopes of work, different clients, different times and could form no  
9 basis for a present conflict of interest, but only present confusion of the issues. Here, the probative  
10 value of the *Halverson* material is substantially outweighed by considerations of undue delay, waste of  
11 time, or needless presentation of cumulative evidence. *Id.* at page 214.

12 **G. Under ER 702 Testimony of Expert Witnesses May Be Allowed at Trial if**  
13 **Qualified By the Court, and the Expert's Knowledge, Skill and Experience**  
14 **Will Assist the Trier of Fact to Understand the Evidence.**

15 Under Washington Rules of Evidence ER 702, so long as an expert possesses scientific, technical  
16 or specialized knowledge to assist the trier of fact, then he may be qualified as an expert.  
17 Disqualification of the expert before trial is not appropriate so long as the expert can be qualified as an  
18 expert at time of trial. Conflict of interest, if alleged, can be explored at trial to disqualify the expert, but  
19 it is not appropriate, and is premature to disqualify an expert prior to trial. Rule 702 provides as follows:

20 Rule 702. Testimony by experts. If scientific, technical or other specialized  
21 knowledge will assist the trier of fact to understand the evidence or to determine a  
22 fact at issue, a witness qualified as an expert by knowledge, skill, experience,  
23 training, or education may testify thereto in the form of an opinion or otherwise.

24 See Washington Practice, Volume 5D Courtroom Handbook on Washington Evidence (October 2007  
25 edition at page 334.) Qualification of the expert is established at time of trial by showing that he or she  
has sufficient expertise to state a helpful and meaningful opinion. *Sehlin v. Chicago, Milwaukee, St.  
Paul & Pacific Railroad Company*, 38 Wn. App. 125, 686 p.2d 492 (1984). It is clearly settled law in

1 the State of Washington that an expert witness's opinion is admissible if the witness qualifies as an  
2 expert and testimony would be helpful to the trier of fact. The determination of allowing expert  
3 testimony is made at the time of trial, when the expert is ready to provide testimony. See ER 702; *Reese*  
4 *v. Stroh*, 128 Wash.2d 300 (1995); *Wlasiuk v. Whirlpool Corporation*, 81 Wash. App. 163 (1996);  
5 *Henricksen v. ConocoPhillips Co.*, 65F.Supp.2d 1142 (2009).

6 The rules for permitting expert testimony are as provided in Rule 702, and do not specifically  
7 include allegations of conflict of interest. If an expert is otherwise qualified under Rule 702, as found by  
8 the trial court at the time of eliciting testimony, then he can be qualified by the Court. Issues of conflicts  
9 of interest can be raised at that time and addressed by the Court. This issue was addressed in the case of  
10 *Marriage of Irwin* 64 Wash. App. 38, 822p.2d 797 (1992). Although this is a case regarding testimony  
11 of an expert witness at time of trial in a marriage, the result is informative. The court noted that one of  
12 the spouses had asserted a conflict of interest in allowing an expert accountant to testify against her.  
13 The court addressed the ethical rules applying to certified public accountants, and disclosure of  
14 information which could constitute a conflict of interest, and after these issues were raised, rejected the  
15 challenge and stated:

16 In addition, it also seems obvious that legal process, *i.e.*, the courts need to fairly  
17 and equitably divide the Irwins' property, required Alegria's disclosures. There  
18 was no violation of a client confidence nor any conflict of interest. The trial court  
did not err in admitting Alegria's testimony.

19 See 64 Wash. App. 38 at 52.

20 The point of this citation is that rules determining admissibility for an expert witness's testimony  
21 are determined at the time of trial, when the testimony will be elicited, and the court makes a decision at  
22 that time. So long as an expert qualifies under ER 702 criteria, any allegation of conflict of interest  
23 appropriately raised at the time of testimony, can be addressed by the Court and disregarded, if  
24 appropriate. In the present case, allegations even before hearing or trial, of a conflict of interest, which  
25



1 are unfounded by fact or evidence, and merely speculative, clearly should not be the basis for a trier of  
2 fact to disqualify the witness prematurely.

3 A foundation for entering expert testimony is accomplished by questioning the witness before  
4 giving expert testimony. Rules 702 states very broadly that the witness may qualify as an expert by  
5 virtue of knowledge, skill, experience, training, or education. At the time of qualifying an expert at trial,  
6 the qualification can be challenged by questioning. If there is allegation of conflict of interest, then this  
7 can be decided. It is inappropriate and premature to disqualify an expert before any challenge of any  
8 completed reports, or anticipated testimony can be made. Disqualification of the expert here is  
9 premature, and in particular the grounds for disqualification are vague, speculative, without any proven  
10 basis in fact or law, and no disqualification should be made at this time. Intervenor Kunzler's Motion  
11 should be denied.

### 12 III. CONCLUSION

13 Intervenor Kunzler has failed to provide adequate legal or factual authority that a conflict exists  
14 with NHC. Intervenor seeks disqualification of NHC, currently for work which dates back to the  
15 *Halverson* lawsuit in 1995, and seeks further to admit evidence in the current proceedings of numerous  
16 depositions and the trial transcript for the *Halverson* matter from 17 years ago. This is intended to  
17 disqualify NHC for use by Applicants of engineering services in this permit matter.

18 Professional engineers in the State of Washington are governed under WAC § 196-27A-020(2)(i)  
19 and RCW 18.43.105(6) relating to conflicts of interest. Engineers must avoid conflicts of interest or  
20 appearance of conflicts, and promptly inform clients of circumstances which influence their judgment or  
21 quality of services. Further disciplinary action can result from financial interests in bidding or  
22 performance of contract without disclosure.

23 Intervenor has not set forth any facts or authority to support a claimed conflict of interest in these  
24 proceedings to warrant disqualification of the Applicant's expert. Prior relationships cited by  
25 Intervenor, including work in the *Halverson* litigation, Skagit County, the Corps of Engineers, City of  
Burlington, and DD12 all involve different contracts, scopes of work, time for performance, location of  
work, and analysis, which preclude any claim of conflict of interest.

1 Further, the work undertaken by NHC now on behalf of Applicants in this permit process, is also  
2 subject to the Board of County Commissioner's request for specific use of "current Corps hydrology"  
3 for purposes of the permit remand. This would preclude any basis for a conflict of interest.

4 In Intervenor's Motion to Disqualify NHC, Intervenor has clearly acknowledged and stated that  
5 he believes his own Motion is premature. The Motion is premature because any impact on NHC's  
6 judgment and quality of services cannot be determined because their report and work product has not  
7 been completed or approved.

8 Further, Intervenor has clearly stated in his Motion that if NHC provides a risk analysis, relating  
9 to pre- and post-permit improvements, and this is presented in the hearing, then he will withdraw his  
10 Motion. In fact, the County Commissioners have directed that the flooding effects relating to pre- and  
11 post-permit improvements be analyzed by NHC using Corps hydrology, and at time of hearing, this will  
12 be required to be submitted to the hearing for review and approval. Therefore, it would be appropriate  
13 for Intervenor to set aside his Motion accordingly, or dismiss his premature Motion. In the alternative,  
14 the Hearing Examiner should dismiss Intervenor's Motion as being premature.

15 It appears that preliminary to Intervenor's Motion to Disqualify and attempt to eliminate NHC as  
16 Applicant's expert witness, that Intervenor made ex parte contact without disclosure to NHC. This was  
17 by email which is filed herein, and which evidences statements which appear to be threatening and  
18 intimidating to the expert that Intervenor has and will introduce deposition evidence from NHC's own  
19 employee, along with a trial transcript, in order to assert a conflict of interest claim against NHC. The  
20 implication is that NHC has a conflict of interest and cannot be Applicant's expert, which are the same  
21 allegations made by this Motion to Disqualify NHC and eliminate NHC as Applicant's expert.

22 Court Rules and case law state that ex parte contact with an opposing party's expert witness is  
23 prohibited by CR 26. Such ex parte contact is improper, as is implying or making any threat or  
24 intimidation of a witness. Here such threat and allegation of conflict of interest, and statement that  
25 document and trial transcripts will be filed to pursue a claim of conflict of interest constitute improper  
contact.

This would further tend to impact the engineers professional judgment in the resulting  
engineering report that the expert is to provide to Applicants, and to satisfy the Board of County  
Commissioners directions. The Hearing Examiner should acknowledge this improper contact, and  
admonish Intervenor from any further contacts or intimidation.

1 Intervenor's Motion to admit extensive evidence of prior depositions and trial transcript of the  
2 *Halverson* matter which occurred nearly 17 years ago have the effect of circumventing Court Rules, as  
3 well as deviating from the BCC three-issue directions in these hearing procedures. If allowed this could  
4 require possible addition of a new party NHC, along with new claims and issues, which are not  
5 consistent with CR 18 Joinder of Claims or CR 19 Joinder of Persons Needed for Just Adjudication.  
6 The Hearing Examiner has powers under Skagit County Rules of Procedure for Hearings to admit or  
7 exclude evidence, and should deny inclusion of the *Halverson* material.

8 Inclusion of the *Halverson* depositions and trial transcript should also be excluded on the  
9 grounds of prejudice, confusion or waste of time under ER 403. Although relevant, evidence for which  
10 the probative value is substantially outweighed by the danger of the prejudice, confusion of the issues or  
11 misleading the tribunal, or by considerations of undue delay, waste of time or needless presentation of  
12 evidence can and should be rejected under ER 403. Here, based on the goal of using the "current Corps  
13 hydrology", there is no probative value, and it will result in confusion of issues, undue delay, waste of  
14 time, and significant impact on the present proceedings, since the *Halverson* hydrology was completed  
15 and submitted over 17 years ago. This information and hydrology is outdated, and has no probative  
16 value in comparing to the current hydrology, with its technical advances, for purposes of proving  
17 conflict of interest, or any comparison to current hydrology.

18 Under ER 702, testimony of an expert witness is allowed at trial if qualified by the Court and the  
19 experts knowledge, skill and experience will assist the trier of fact. Here, the engineering firm with the  
20 best and longest term of technical knowledge, skill and experience on the Skagit River is NHC. To  
21 allow Intervenor's Motion to Disqualify and Eliminate NHC would impair the goals being sought in this  
22 permit proceeding as well as the directions of the Board of County Commissioners to use the most  
23 "current Corps hydrology".


24 To eliminate NHC and start over with hydrology will result in untold costs to Applicants and  
25 uncertainty to the citizens of Skagit County, to no useful purpose. In any event, if Intervenor wishes to  
26 challenge NHC, Applicant's expert in terms of qualifications or conflict of interest, then the appropriate  
27 challenge to expertise would be made at the time of testimony at trial. Disqualification of expert, based  
28 on vague and speculative grounds at the present time, well in advance of trial, or preparation of the  
29 engineering analysis is clearly premature, unwarranted, and should be rejected by the Hearing Examiner.

30 //

1 Respectfully submitted this 3<sup>d</sup> day of April, 2014.

2 SHULTZ LAW OFFICES

3  
4 By:

  
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6 JOHN A. SHULTZ, WSBA #42542  
7 Attorneys for Skagit County Dike, Drainage  
8 and Irrigation District No. 12  
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**John R. Shultz**


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**From:** Malcolm Leytham [MLeytham@nhcweb.com]  
**Sent:** Tuesday, April 01, 2014 1:23 PM  
**To:** John R. Shultz  
**Subject:** Re: Motion to Disqualify

John:

Thanks for forwarding the Motion to Disqualify. Following, as discussed, is the relevant part of the e-mail communication with Larry Kunzler re conflict of interest.

**Malcolm Leytham, Ph.D., P.E. | Principal**

	northwest hydraulic consultants 16300 Christensen Rd, Ste 350   Seattle, WA 98188-3422   United States Tel: (206)241-6000   Fax: (206)439-2420 mLeytham@nhcweb.com   www.nhcweb.com   ftp.nhc-sea.com
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----- Forwarded by Malcolm Leytham/NHC on 04/01/2014 01:17 PM -----


**From:** Malcolm Leytham/NHC  
**To:** "Larry Kunzler" <larryk@comcast.net>  
**Date:** 12/29/2013 09:57 PM  
**Subject:** RE: BNSF Bridge Debris and River Stages during 1990/1995 Skagit River floods.

Larry: Thanks for the heads-up. I am fully aware of the work being done for Burlington - although I'm not actually doing the analysis myself, I am responsible for that assignment. I had never thought about a possible conflict of interest in taking on the work for Burlington and I frankly don't see any conflict now given that nobody involved in the current work had any previous involvement in the law suit, Gerry (Dr. Mutter) retired a couple of years ago, and I think (hope?) we have a better understanding of the technical issues than we had back then (at least I think we have a better appreciation of what we don't know). We have more or less finished the work for Burlington so I expect you'll see the results in due course.

Best wishes for the New Year - perhaps there'll be some progress in 2014?

Malcolm

**Malcolm Leytham, Ph.D., P.E. | Principal**

	northwest hydraulic consultants 16300 Christensen Rd, Ste 350   Seattle, WA 98188-3422   United States Tel: (206)241-6000   Fax: (206)439-2420 mLeytham@nhcweb.com   www.nhcweb.com   ftp.nhc-sea.com
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From: "Larry Kunzler" <floodway@comcast.net>  
To: "Malcolm Leytham" <MLEytham@nhcweb.com>  
Cc: "Larry Kunzler" <floodway@comcast.net>  
Date: 12/28/2013 03:51 PM  
Subject: RE: BNSF Bridge Debris and River Stages during 1990/1995 Skagit River floods.

Hi Malcolm,

I don't know if you are aware but the City of Burlington/Dike 12 has hired nhc to do some analysis of the levees for them. As you know nhc represented the plaintiffs upstream of the levees. I think this presents a conflict of interest for your firm especially since I have introduced into the record the impacts of the levees prepared by Dr. Mutter. I am also going to introduce all the testimony in depositions and at trial by Dr. Mutter and Dr. Meione. I just thought I would give you a heads up because no one has mentioned the hydrologist working on the project for Burlington. The upstream property owners are the ones opposing the Burlington project.

Larry