

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
RECUSE/DISQUALIFY HEARING
EXAMINER**

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 Recuse/Disqualify Hearing Examiner. This Response is based on the records, following legal authorities, and files herein.

I. INTRODUCTION

The facts of this controversy are set forth under "II. FACTS" in Intervenor City of Burlington's Response, and will not be reiterated herein. This outline of facts is incorporated herein by reference as if fully set forth herein, and is adopted by Skagit County Dike, Drainage and Irrigation District No. 12 (hereinafter "DD12"). Further, legal arguments made by Intervenor City of Burlington, for the sake of brevity, are also incorporated herein by reference, as if fully set forth herein, and are adopted by DD12 in support of its Response to Intervenor Kunzler's Motion to

RESPONSE OF DIKE DISTRICT NO. 12 TO
INTERVENOR KUNZLER'S MOTION TO
RECUSE/DISQUALIFY HEARING EXAMINER - 1

1 Recuse/Disqualify of Hearing Examiner. For the following reasons, DD12 respectfully requests that
2 the Motion by Intervenor Kunzler (hereinafter "Intervenor") be denied.

3 II. LEGAL AUTHORITY

4 A. The Intervenor's Motion to Recuse/Disqualify Hearing Examiner Should Be 5 Denied.

6 1.) Authority Under Skagit County Local Rules and Hearing Examiner's Rules of 7 Procedure.

8 Pursuant to § 14.02.070 of the Skagit County Code, the Hearing Examiner is empowered to
9 "adopt such procedural rules as are reasonably necessary to carry out the duties and responsibilities of
10 the office." In addition, the Hearing Examiner has the powers under the Skagit County Rules of
11 Procedure for Hearings for the Office of the Hearing Examiner, which include but are not limited to: (c)
12 To rule on all procedural matters, objections and motions; and (g) To regulate the course of hearings and
13 the conduct of participants. See § 1.01, Powers of Hearing Examiner.

14 Under Rules of Procedure for Hearings, at §1.03 governs Disqualification of Hearing Examiner
15 for matter dealing with bias, prejudice, or a conflict of interest. That section provides as follows:

16 Any person acting as Hearing Examiner subject to disqualification for bias,
17 prejudice, conflict of interest, or any other cause for which a judge can be
disqualified.

18 (a) Whenever the Examiner believes that his relationship to participants or
19 financial interests in the subject of a hearing create the appearance that the
20 procedures will not be fair the Examiner shall either: (1) voluntarily step down
from the case, or (2) disclose, the relationship or interest on the record, stating a
bona fide conviction that the interest or relationship will not interfere with the
rendering of an impartial decision.

21 (b) Any party or interested person may petition for the disqualification of an
22 Examiner promptly after receiving notice that the individual will preside or, if
23 later, promptly upon discovering grounds for disqualification. The Examiner for
whom the disqualification is requested shall determine whether to grant the
petition, stating facts and reasons for the determination.

24 See Skagit County Rules of Procedure for Hearings § 1.03.

1 Here, Intervenor has shown no factual or legal support for disqualifying the Hearing Examiner
2 for bias, prejudice, or conflict of interest or any other reason. Further, there can be no Appearance of
3 Fairness claim, which is what Intervenor appears to rely on to argue for disqualification. His arguments
4 and evidence wholly fail to satisfy an Appearance of Fairness violation.

5 In addition, Intervenor has cited no alleged personal interest that disqualifies the Hearing
6 Examiner, as well as no basis for the appearance that the Hearing Examiner has prejudged any of the
7 issues. In fact during this process, involving difficult and complex issues and hydrology evidence, the
8 Hearing Examiner, in particular in his Findings of Fact and Conclusions of Law, had an excellent grasp
9 and knowledge of these complex issues and evidence which enabled him to render a decision which
10 fairly and comprehensively addressed the issues in the case. Intervenor, however, does not agree and
11 will not accept the decision. He now seeks to recuse and disqualify the decision-maker.

12 **2.) Intervenor Has Failed to Allege or Prove Any Appearance of Fairness Violation, or**
13 **Any Claim of Bias, Prejudgment, Prejudice, or Conflict of Interest Sufficient to**
14 **Warrant Recusal or Disqualification of the Hearing Examiner.**

15 An Appearance of Fairness claim requires evidence of the judicial officer's actual or potential
16 bias. *State v. Dugan*, 96 Wn.App. 346, 354, 979 P.2d 885 (1999); A party challenging a judge's
17 impartiality bears the burden of presenting evidence of actual or potential bias. *State v. Post*, 118
18 Wn.2d 596, 618, 619 n.9, 826 P.2d 172 (1992); Recusal decisions lie within the sound discretion of the
19 trial court. *In re Marriage of Farr*, 87 Wn.App. 177, 188, 940 P.2d 679 (1997); Intervenor has not
20 sufficiently alleged a personal interest that disqualifies the Hearing Examiner. *See Buell v. Bremerton*,
21 580 Wn.2d 518, 525, 495 p.2d 1358 (1972); Intervenor has failed to demonstrate that the Hearing
22 Examiner has prejudged the issues. *See Anderson v. Island County*, 81 Wn.2d 312, 501 p.2d 594
23 (1972). *See also* legal arguments presented in Intervenor City of Burlington's Response, pages 1-14,
24 which are incorporated herein by reference as if fully set forth herein and adopted by DD12.

1 In point of fact, not only does Intervenor fail to satisfy an Appearance of Fairness Doctrine
2 violation or claim of bias, or prejudgment, he has failed to even show any basis as grounds for
3 disqualification. Under § 1.03, there is no claim of financial interest or any appearance that the
4 proceedings will not be fair or that there is any identification of any improper relationship or interest
5 which would interfere with an impartial decision. In one pre-hearing conference, when Intervenor stated
6 that he would seek recusal and disqualification at some future time, he cited the reasons as relating to
7 lack of knowledge, unfamiliarity with flood control issues, and inability to render a decision. Then,
8 came the decision, and it appears now that Intervenor's primary difficulty is that he does not like the
9 ruling.

10 Now, Intervenor proceeds on a mission to disqualify the Hearing Examiner so that all of the
11 parties can start over. He cites a number of arguments, some rational and others not, some without
12 basis, and some that mischaracterize the proceedings and the evidence. In reality, the primary
13 complaints for recusal are based on the fact that much of the evidence and arguments submitted by
14 Intervenor have been addressed and rulings have been made, to which Intervenor simply does not agree.
15 So Intervenor argues that the evidence was simply "ignored", "failed to address", "limited" or Applicant
16 evidence was lacking or "no supporting evidence".

17 These are complaints about the procedure and decisions reached by the Hearing Examiner which
18 do not rise to the level of Appearance of Fairness violation or grounds for recusal. See Intervenor
19 Motion to Recuse, page 2, issues at lines 9-31 (issue #1 decision based on no "supporting evidence";
20 issue #2 "Examiner did not require the hearing be held over" and "refused to make his assistant's notes
21 ... available"; issue #3 "ignored crucial evidence"; issue #4 "examiner failed to address the floodway
22 issue"; issue #5 "examiner ignored provisions of the SMA", and "by limiting the testimony to just the
23 first three issues identified by the County Commissioners") The last allegation is somewhat remarkable,
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1 given the fact that the County Commissioners directed only that the three issues be identified and the
2 Hearing Examiner did not decide this.

3 There is nothing in Intervenor's arguments which show any basis for disqualification or any
4 improprieties of the Hearing Examiner. These include the allegation that the Hearing Examiner "based a
5 decision on the Applicant's word while not having any supporting evidence." See Intervenor Motion to
6 Recuse at page 3, line 14. Although Intervenor claims that there is no supporting evidence, in fact these
7 proceedings contain mountains of evidence, hundreds of pages of documents, including the FEIS,
8 substantial hydrology analysis by engineers and the Corps, and a lengthy record stretching back prior to
9 2009, wherein Intervenor himself has made numerous comments. There have also been numerous other
10 parties who have submitted information in these proceedings, and substantial amounts of hydrology data
11 in this permit action.

12 Intervenor has failed to demonstrate that the Hearing Examiner is biased. It cannot be concluded
13 that a reasonable person with knowledge of the relevant facts would question the judge's impartiality in
14 this case. Intervenor has provided no factual or legal evidence to support disqualification, nor has there
15 been enunciated any coherent argument for recusal or disqualification. Accordingly, the Motion to
16 Recuse/Disqualify should be denied.

17 **3.) Any Challenge Raised Under Appearance of Fairness Doctrine or Other Grounds**
18 **For Recusal or Disqualification Must Be Raised Promptly After Receiving Notice That**
19 **There Are Potential Grounds For Disqualification.**

20 Under Skagit County Rules of Procedure for Hearings noted above it is required that:

21 (b) Any party or interested person may petition for the disqualification of an
22 Examiner **promptly after receiving notice that the individual will preside or, if**
23 **later, promptly upon discovering grounds for disqualification...**

24 See Skagit County Rules of Procedures for Hearings § 1.03. See also RCW 42.36.080. Here, Intervenor
25 has known for many months that this particular Hearing Examiner has presided, and he failed to
promptly assert any grounds for disqualification. What Intervenor did do, however, is to wait for the

1 decision in this matter to which he strongly disagrees, and now seeks, after an additional extended
2 period of time, to disqualify or eliminate the decision-maker.

3 It is this type of conduct that Courts have addressed, to eliminate moving for recusal or
4 disqualification under the guides of Appearance of Fairness violation or conflict of interest, where the
5 intent is really one to attack or change the decision, or the decision-maker. A challenge based on the
6 Appearance of Fairness Doctrine must be raised as soon as the person seeking disqualification knows of
7 the basis for disqualification. RCW 42.36.080. Further, where the basis for disqualification "is known
8 or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be
9 relied on to invalidate the decision." RCW 42.36.080. **"When a party does not take advantage of the
10 opportunity to preclude a decisionmaker from participating in a decision on Appearance of
11 Fairness grounds, that party waives the right to later challenge the decision on such grounds."**
12 *Growth Management Hearings Board*, 91 Wash.App. at 34, 951 P.2d 1151 (1998); *Kitsap Citizens for
13 Equitable Land Use v. Kitsap County*, 92 Wash. App. 1048 (1998).

14 A party must raise the claim that the Appearance of Fairness Doctrine has been violated as soon
15 as the party has information supporting the allegation. Failure to do so waives the right to assert an
16 Appearance of Fairness claim in a later proceeding. *City of Mill Creek v. Washington State Boundary
17 Review Bd For Snohomish County*, 165 Wash. App. 1003 (2011). RCW 42.36.080 (barring individuals
18 from raising Appearance of Fairness claims when known and not raised prior to issuance of a decision);
19 *City of Bellevue v. King County Boundary Review Bd.*, 90 Wash.2d 856, 863, 586 P.2d 470 (1978). **"A
20 party with such information may not sit back, hoping to achieve a desirable result from the board
21 despite the perceived unfairness, and then use that information to challenge an adverse result." *Id.***

22 Where the basis is known or should reasonably have been known prior to the issuance of a
23 decision and is not raised, it may not be relied on to invalidate the decision. Further, an Appellant's
24 failure to challenge the adequacy of an adjudicator's disclosure of ex parte communication precluded a
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1 challenge. See *Organization to Preserve Agricultural Lands*, 128 Wn.2d 869, at 888, 913 P.2d 793
2 (1996). Also, the Court held that a **failure to raise a Hearing Examiner's financial interest barred a**
3 **challenge where not raised timely.** See *Lakeside Industries v. Thurston County*, 119, Wash. App. 886,
4 904, 83 P.3d 433 (2004). In the present case, Intervenor, even if there was a valid basis for recusal or
5 disqualification, has not timely asserted the claim and cannot claim to be aggrieved by the decision, or
6 allege this as a basis for recusing or disqualifying the Hearing Examiner.

7 III. CONCLUSION

8 Intervenor has failed to factually or legally support any violation of Appearance of Fairness
9 Doctrine, or any claim of bias, prejudgment, prejudice, or conflict of interest, or any other cause for
10 which a judge can be disqualified, which are sufficient to seek recusal and disqualification of the
11 Hearing Examiner. Intervenor has failed to satisfy the requirements under Rules of Procedure for
12 Hearings at § 1.03, under the Skagit County Code, § 14.02.070, or ample case law interpreting these
13 issues to warrant recusal or disqualification of the Hearing Examiner.

14 In making a claim for recusal/disqualification, Intervenor, in reality, argues points relating to
15 issues with review of evidence, and decisions to which Intervenor does not agree. Intervenor argues that
16 evidence was simply "ignored", "limited", with "no supporting evidence", and that the Hearing
17 Examiner "ignored crucial evidence", "ignored provisions of the SMA", and failed to provide copies of
18 his notes which supported the decision. These are all complaints regarding evidence, and review of the
19 evidence, and do not rise to the level of proving an Appearance of Fairness Doctrine violation, or bias,
20 prejudice, conflict of interest, or any other grounds for recusal and disqualification.

21 Further, even if there was adequate proof of Appearance of Fairness violation or other grounds
22 for recusal/disqualification, Intervenor has failed to promptly raise these issues after receiving notice
23 that an individual will preside over the hearing, or promptly upon discovering grounds for
24 disqualification. The Hearing Examiner has presided over these proceedings for nearly a year, and
25 Intervenor has failed to promptly assert any grounds for disqualification.

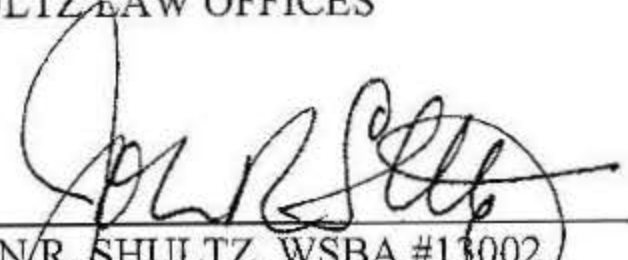
Intervenor, in fact has waited until a decision has been made, and now, after strong disagreement
with the decision, brings this motion to recuse or disqualify the Hearing Examiner. Not agreeing to the
decision, Intervenor now seeks to attack the decision and eliminate the decision-maker.

1 DD12 respectfully requests that the Hearing Examiner deny Intervenor's Motion to
2 Recuse/Disqualify Hearing Examiner.

3 Respectfully submitted this 3d day of April, 2014.

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6 By:


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