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**UNOFFICIAL TRANSCRIPT OF APRIL 9, 2014 MOTION HEARING
BEFORE THE SKAGIT COUNTY HEARING EXAMINER,
RE: SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT PL12-0144.**

Attached hereto is an “Unofficial” Transcript of the April 9, 2014 Skagit County Hearing Examiner Motion Hearing. The tape of the hearing was made by myself since the County’s recording equipment has proven to be unreliable on more than one occasion. The recording was transcribed by SkagitRiverHistory.com. After the initial transcription we listened to the recording six more times for accuracy purposes. Where the recording was weak and we could not understand or had to guess at what the person said we inserted the word “**Unintelligible**”. We have published a link to the audio itself which can be found **here**. If anyone feels they can do a more accurate transcript please feel free to give it a go.

The recording and the transcript are in keeping with the public service efforts of www.SkagitRiverHistory.com to keep citizens informed on the Skagit River flood issue. An annotated version with hyperlinks to documents where the information came from will be submitted shortly.

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3 **BEFORE THE SKAGIT COUNTY HEARING EXAMINER,**

4 **RE: SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT PL12-0144.**

5 SKAGIT COUNTY HEARING EXAMINER WICK DUFFORD (HE): Alright, good
6 afternoon. My name's Wick Dufford, I'm the county's hearing examiner
7 and we're here today to have a motion hearing with regard to certain
8 matters that have been raised preliminary to a hearing on the remand
9 of an application by Dike District Number 12 which was sent back to
10 the Hearing Examiner by the County Commissioners to look at three
11 particular questions. We've had several pre-hearing conferences and
12 this motion hearing probably in an excess of optimism was designed to
13 simplify matters before we went to the hearing itself.

14 Just before we begin, let me make a few comments. So far in our
15 record there are thirty-nine exhibits that have been admitted. Two
16 since the hearing concluded. One is a partial transcript of the
17 first day of the hearing and the other is a letter from the county
18 commissioners saying, 'Use the latest Corps hydrology in evaluating
19 our remand. I'd just like to make a note that we have these motions
20 and voluminous materials attached to them. None of the things
21 attached to these motions are really exhibits in this proceeding.
22 They're useful as background for understanding what's being argued in
23 the motions, but they are not in of themselves part of the record.
24 Likewise, the record before the County Commissioners is not part of
25 our record. They fielded them and apparently they received some
26 documents in addition to what had been issued by the Hearing Examiner
27 - I don't know what those were, I've never seen them, and they're not
28 part of our record.

29 So... we're limited to what's gone on before the Examiner. In that
30 regard, the transcript of the second day of hearing is not a part of

1 the record, at least it's not at this time, it's never been admitted,
2 and so we don't have that to rely on as an exhibit.

3 I wanted to make a brief comment on the first day of hearing. That
4 is that as you know, something went wrong with the recording
5 equipment. Most of the hearing that day wasn't recorded, although
6 there was a good deal of testimony. I have looked at my notes and
7 the records that we have and it appears that there really just two
8 witnesses that didn't appear at the second of the sessions we had.
9 The purpose of the second session was to provide an opportunity for
10 those who maybe didn't get recorded the first time around to get on a
11 recorded record. The two that did not reappear were a gentleman
12 named Kenneth Johnson who's a dairyman who recited his experience
13 with the 1990 flood and expressed the opinion that they needed some
14 help there in the Nookachamps.

15 The other was a fellow named Bill McCord who had mostly questions to
16 ask, questions whether the notice had been adequate. He had some
17 questions about the motives of the applicants here, their
18 relationships to the Corps and to the business community in
19 Burlington. Some additional questions were about the whole
20 accreditation and certification process. So that's basically all the
21 record that those guys made. I certainly listened to them and I took
22 notes of what they had to say. Beyond that, we have testimony on the
23 record from everybody that's appeared at these proceedings. So with
24 that, let's proceed.

25 I have it in mind that once we're through here we should spend a
26 little time figuring out what our next step must be but I don't think
27 that should take us very long. As you know, I put out a memo going
28 through all of the motions that I had received and setting kind of a
29 schedule for how they would be presented. So that's dated April 2nd
30 if you mind. If you have that, we will follow that, that course.

1 I'm hoping that everybody can keep their argument to about 10 minutes
2 or a little **[Unintelligible]** than that and that then we can get
3 through all this in a relatively reasonable period of time.

4 So without further ado, let's find out who's here. Who's
5 representing the Dike District?

6 **John Schultz (JS):** Your Honor, I am John Schultz.

7 **HE:** Okay, with the City of Burlington?

8 **Scott Thomas (ST):** Scott Thomas, City of Burlington.

9 **HE:** Okay and for the City of Sedro-Woolley?

10 **Craig D. Sjostrom (CS):** Craig Sjostrom for the City of Sedro-Woolley.

11 **HE:** And for the Intervenor?

12 **Larry Kunzler (LK):** Larry Kunzler

13 **HE:** And for the County?

14 **Jill Dvorkin (JD):** Jill Dvorkin.

15 **HE:** Okay. Well, according to my list the first thing we want to hear
16 is the Dike District's and the City of Burlington's Motions to Strike
17 Allegations Regarding A District Commissioner and this is in the
18 initial motion made by the Intervenor Kunzler. There was some
19 suggestion regarding position of one of the Dike District
20 Commissioners so I'll give it to you gentlemen to argue that.

21 **ST:** Mr. Examiner, before we begin, may I ask for a bit of a
22 clarification? I spoke to my colleague Mr. Schultz earlier today
23 with regard to the order of the motions to be heard and we looked at
24 Number Five and Number Six. Those are respectfully the City's Motion
25 in Limine to limit testimony and exhibits to those relevant to the
26 matters remanded and Number Six is the Dike District's and the City's

1 Motions to Restrict Hydrology Data. It occurred to us that these
2 were one and the same.

3 **HE:** Okay. If that's what you think, that's what they are.

4 **ST:** I haven't spoken to Mr. Sjostrom or Mr. Kunzler but if it's all
5 the same to you, we would...

6 **HE:** Sure.

7 **ST:** Combine those. Thank you.

8 **HE:** Yes.

9 **JS:** Your Honor, I have spoken to Mr. Thomas, my colleague and about
10 this and some other things too. We do agree that those two issues
11 could be combined.

12 In terms of breaking up the time, here's what we would like to
13 propose if this would be acceptable to you so on the first issue:
14 Since it's regarding one of my commissioners, I would lead off.

15 Your Honor, are we allotted ten minutes apiece?

16 **HE:** Well yes, sure. I don't think you're going to need that on this.

17 **JS:** I think you're right and here's what I would propose. The first
18 argument, I would take the lead on that and I should take six to ten
19 minutes and then Mr. Thomas would add some additional information.
20 The second one, this, that's the Dike District's motion, that one
21 would take me about 10 to 15 minutes. I don't think any longer but
22 it's hard to limit that to 10 minutes especially if I have to, you
23 know, do some overhead. I assumed the overhead would be available.

24 **HE:** I think so. I think Mr. Kunzler has already tested it out.

25 **JS:** Okay, good. Then the next issue would be Mr. Kunzler's motion to
26 disqualify, and then forward to Mr. Kunzler's motion to disqualify

1 expert. Now are we permitted response to that, brief response to his
2 motion?

3 **HE:** I said in my memo, argument for each motion should be made by the
4 moving party followed by response by parties desiring to respond.

5 **JS:** I just wanted to make sure that's still applicable. Then as we
6 said, 5 and 6 maybe combine, I would, uh, Mr. Thomas would plan on
7 talking for a period of time, then I would talk for a period of time.
8 Hopefully not more than ten minutes evenly.

9 **HE:** I would think not.

10 **JS:** Yeah.

11 **HE:** Okay, so we're ready to start and Mr. Schultz, I guess you're the
12 laborer in order here.

13 **JS:** Mr. Hearing Examiner, for the record, my name is John Schultz,
14 I'm an attorney from Burlington, Washington, 160 Cascade Place,
15 Burlington, Washington. I'm the Attorney for Dike District 12. Your
16 Honor, when I argued number one and number two, these raise some
17 issues that I had never seen before. I think because Mr. Kunzler's
18 ownership of the website, because of the, what I see as the ambiguity
19 between what documents you have filed and documents on his website,
20 his filings which hyperlink to his website, I think we've got some
21 real issues here that I think have muddied the record. I do have
22 some proposals so we can clean up this record and move forward.
23 Having said that, that's the problem I see in addition to the what I
24 refer to as the plethora of documents that are critical, attacking,
25 disparaging, and some other things which I don't think should be part
26 of this proceedings which have now been filed and been posted to the
27 website. So with that background, we have made the first motion to
28 strike improper allegations regarding the dike district commissioner.
29 I'm sorry that is directed to Commissioner Eddie Tjeerdsma we need to

1 identify who he is. Information that's been posted on the website of
2 course to discern his identity.

3 But I want to step backwards for a minute here. Mr. Hearing
4 Examiner, I don't have to tell you what your powers are as far the
5 conduct of these proceedings. You know probably better than anybody,
6 but I will point out that you have the power to regulate the course
7 of hearings and the conduct of the participants. [Unintelligible] You
8 also have the powers Your Honor under one point eleven to exclude or
9 add evidence of the submission of outdated material from 1995. Your
10 Honor I would also submit that another regulation that governs these
11 proceedings is CR Eleven. The court rules that under these
12 proceedings, but it deals with certain conduct in hearings. CR
13 Eleven generally is the drastic sanction but it deals with certain
14 conduct in hearings. CR Eleven simply says that any attorney and it
15 includes pro se litigants, so anyone who's not an attorney must
16 comport themselves with the rules of evidence as if there were
17 [Unintelligible]. The rules under CR Eleven provide that any party
18 signing documents certifies that what they sign to the best of their
19 knowledge is certifies that number one, well-grounded in fact, number
20 two warranted by existing law, number three not intended for any
21 improper purpose such as harassing, causing unnecessary delay, or
22 [Unintelligible].

23 In the Intervener's conclusion in page seventeen on one of his
24 motions he entered into the record, (Unintelligible) there's a
25 portion of the conclusion that says, "Did the honorable Hearing
26 Examiner even make a determination of what portions of Burlington
27 would be taken out of the floodplain?" In bold print: "Does it
28 involve property that one of the Dike District Commissioners who
29 works for one of the major developers in the Valley owns or has an
30 interest in?"

1 Now, when this came out, I had a blistering phone call from my
2 commissioner. He said I've had twenty people contact me and call me
3 by telephone and say, 'What is this? Are you helping this developer,
4 are you doing this for the purposes of financial gain?' Caused him a
5 great deal of embarrassment. He said to me, quote, he says, "What's
6 wrong with this person who makes these allegations which have nothing
7 to do with any of these proceedings, nothing." There's the
8 implication that the District Commissioner owns property in the
9 district, and that there's no flood control, but they're doing this
10 so he can develop his property or the implications for financial
11 gain. But Intervenor failed to note that for commissioners to serve
12 as commissioner, he must own property. So that was part of, one part
13 of his accusation that is salacious. When I say accusation, that's I
14 mean, that's what I mean because that's how my commissioner took it.
15 It caused him embarrassment, it's caused erosion of some of his
16 authority in the community, this is a public official who has to run
17 for office again, he's got some people angry now at him because they
18 believe this stuff. Again, it is inserted in pleadings, it has
19 nothing to do with this action, it was signed by a person who has the
20 same responsibility in these hearings to be honest, truthful and
21 factual. This is clearly beyond the pale as far as accusations.
22 Under CR 12 F which is what we requested you have the power to strike
23 redundant, immaterial, impertinent or scandalous material. We view
24 this as scandalous and both Mr. Thomas & I have cited case law on
25 this, the definition of scandalous is any allegation that
26 unnecessarily reflects on the moral character of an individual that
27 states anything in repulsive language. Furthermore there's a case,
28 *Magill v. Appalachia Intermediate*, 646 F. Supp. 339 that's been
29 cited, that case says striking allegations are permitted, quote, that
30 "reflect adversely on the moral character of an individual who is not
31 a party to this suit and unnecessary to the decision on the matter in
32 question". Now Mr. Tjeerdsma is not a party to this lawsuit, Dike

1 District 12 is, so there's no reason to point out to a commissioner
2 and defame him in this salacious language. I walked in the courtroom
3 and people were here and I submit to the record people in this room
4 heard what Mr. Kunzler said to me when I walked in today.

5 So Your Honor, I would, I would request that this reference in the
6 conclusion, page 17, lines 4 through 12, be excised and be stricken.
7 It has no business being in the pleading, in particular since Mr.
8 Kunzler gets these pleadings, post them on this Internet, on his
9 website, and communicates otherwise defamatory material to third
10 parties. Now I have never seen anything like this in litigation, so
11 that's where we make the point to excise this, this derogatory
12 material. Your Honor, I would request and this is in my motion, Your
13 Honor, it would be better to refer to my motion as to Mr. Kunzler's
14 statement.

15 **HE:** Doesn't matter.

16 **JS:** Okay, that would be page 17 line 4 through 12.

17 **HE:** That's in Mr. Kunzler's?

18 **JS:** Yes. That's what we'd like to seek to have seen stricken from
19 record. I would also ask you to admonish Mr. Kunzler from further
20 disparagement or defaming parties. Or further action or statements
21 that are outside from what we're trying to decide here. It muddies
22 up the record, this information is communicated to third parties.
23 For example, his response has been circulated to the county
24 prosecutor, to the county, to the cities, the newspapers asked for
25 copies of it, and if someone's on trial, this transcript or this
26 supposed transcript that's been altered, you can envision there would
27 be testimony by a policeman that says that 'yeah I saw this person
28 and I don't think they committed this crime'. Then you have a
29 footnote on the bottom that's circulated to everybody and the

1 footnote says, 'Yeah right, I know this guy's guilty as sin!' That's
2 communicated to third parties on a website that's filed in
3 proceedings ostensibly showing that there's a transcript or a
4 reference in the document. Your Honor, my next segment I will go
5 into the transcript portion of this because I think it's more
6 serious. Your Honor, I want to request that you strike that material
7 on those lines. I would request that you note for the record that
8 these statements that have been made to a party not part of
9 proceedings, admonish Intervenor to essentially conduct himself like
10 a gentleman, [Unintelligible] CR 11 like we all do in these
11 proceedings. Thank you.

12 **HE:** Thank you. Well within your time. Mr. Thomas?

13 **ST:** Thank you, Mr. Examiner, I'll be brief. Your honor I point out
14 that the purpose of this remand proceeding is to consider three
15 issues. The first issue is the actual effects of the levee
16 modification, the second issue is the analysis of the pathway and the
17 volume of the floodwaters, the third issue is the compliance with the
18 NMFS - National Marine Fisheries Service - BIOP. These were all the
19 issues that were outlined in Skagit County's Order of Remand. These
20 issues all arise in the context of the Shoreline Management Act as
21 well as the Skagit County Shorelines Master Program.

22 Mr. Kunzler, however, raises additional issues and he takes a far
23 different approach, one that I don't believe is supported by the law
24 asking you the Hearing Examiner to consider several ancillary issues.
25 Such as the decision made in 1985 or thereabouts to designate Gages
26 Slough under the Shoreline Management Act, and whether the applicants
27 are motivated by flood control or flood insurance or something else
28 entirely in applying for this Shoreline Substantial Development
29 Permit and whether the employer of one of the Dike District
30 Commissioners will have property that benefits from the flood

1 protections that will be afforded them in this Shoreline Substantial
2 Development Permit. This latter issue does nothing more than impugn
3 the motives of the applicant. There's no evidence in the record or
4 elsewhere to support such an allegation. Intervenor has not pointed
5 to anything and can point to nothing to support this allegation. The
6 purpose is simply to embarrass and we join with Dike District in
7 asking this sentence to be struck. Thank you.

8 **HE:** Sedro-Woolley have any position on this?

9 **CS:** Well Mr. Examiner, I don't disagree with anything that either
10 gentleman has said but beyond that [**Unintelligible**].

11 **HE:** Mr. Kunzler?

12 **LK:** Mr. Honorable Examiner, I submit to you that evidently our local
13 attorneys never took Attorney 101 which says that never ask a
14 question unless you already know the answer. I asked three questions
15 in that motion. Could it be that the entire façade of flood control
16 is actually more about flood insurance and promoting more
17 irresponsible development in the floodplain? The applicant has
18 stated several times large portions of Burlington would be taken out
19 of the flood plain. Did you ever Mr. Examiner make a determination
20 or did the planning department ever make a determination what
21 portions of Burlington would be taken out of the floodplain? Then
22 this is the one that seems to set Mr. Schultz off and his
23 commissioner, does it involve property that one of the dike district
24 commissioners who works for one of the major developers in the valley
25 owns or has an interest in?

26 They state that by implying that the permit is being obtained for a
27 public official who is employed by a land developer in any other
28 context would be libelous and inappropriate. Really? Skagit Valley
29 Herald first brought this issue to my attention where it says,

1 "Tjeerdsma, 57, manager with Hansell Mitzel Homes. ... Tjeerdsma said
2 he wants to make District 12 dikes federally certified to eliminate
3 flood insurance in the district. The levees need to be raised." Does
4 that sound like flood control or does that sound like getting
5 yourself out of paying flood insurance? Does Mr. Mitzel, the man
6 that Mr. Tjeerdsma work for, own property in the City of Burlington?
7 According to the Skagit County Tax Assessor, yes he does. The
8 location of that property is highlighted in the little dollar signs.
9 Most notably - I'm sorry, having problems with this mouse - this is
10 Gages Slough, this is a large office complex, this is another house
11 and you might remember from the testimony that you heard Mr. Examiner
12 that in 1985 no water crosses the freeway in the south part of
13 Burlington from Gages Slough to what was then the motion picture
14 theater but now is the Target store. So this, when you ask the State
15 Department of Transportation why did they do that, they said they had
16 to let the floodwaters flow over that area. So this is both a
17 natural and a man-made floodway. Here is the Cascade Mall and this
18 is his other property.

19 Now this is the two and a half million dollar office complex that he
20 owns. Some very big names that I'm sure travel in Mr. Mitzel's
21 company have their offices there - including our Mr. Schultz, Dike
22 District 12 attorney, personal injury and bankruptcy attorney.
23 Again, Mr. Examiner, here's the river, no water passes over the
24 Interstate until it gets to Gages Slough so this building is in
25 jeopardy. I will say this for Mr. Schultz; at least he has an office
26 on the 2nd floor.

27 Let's revisit this flashpoint that these guys are so upset about.
28 Could it be because this entire façade of flood control is actually
29 more about flood insurance? Well the dike district commissioner
30 himself said this is about flood insurance. Does it involve property
31 that one of the dike district commissioners who works for a major

1 developer owns or have an interest in? I just showed you, yes it
2 does.

3 This is what this whole façade is really all about. Homeowners face
4 hikes as high as 18 percent a year after year until the government is
5 collecting what needs to be paid out in claims. They are \$24 Billion
6 dollars in deficit. This is the City of Burlington who has used the
7 National Flood Insurance Program to develop all of that irresponsible
8 development in the floodplain. They have used it and now they want
9 to get out of it so that they don't have to pay their fair share of
10 the \$24 Billion dollar deficit.

11 Remember, Mr. Examiner, when Mr. Semrau, the only gentleman on the
12 opposing side that I actually had respect for - he, again I'm having
13 problems with this mouse, he pointed to this area right here,
14 adjacent to the railroad bridge, and he very proudly stated that his
15 hydraulic model did not take into account putting any fill material
16 there. That was because they, it would have extreme impacts on the
17 upstream property owners, well what is this if this is not fill
18 material? The dike district has done this time after time after
19 time. This is the area Mr. Semrau pointed to, this is the area in
20 that smoke and mirrors hydraulic that they submitted to you didn't
21 put any fill there. There's 3 feet, 4 feet of fill material. I
22 don't care whether fill material is put up with a bulldozer or it's
23 put in little green bags. It's still fill material and the hydraulic
24 model should include that. One of the reasons that they want to go
25 forward with the Corps of Engineers hydrology is that the Corps'
26 hydrology also does not count this material. I submit that to you
27 that when we get to that argument, I want NHC here to say what it was
28 they took into account and what they didn't. Again, more landfill in
29 little green bags along Highway 20 and then to cap all this off about
30 how scandalous there was and I submit to you that there is in fact a
31 scandal. But it doesn't come from me. The scandal comes from Dike

1 District 12. This is the Nookachamps Wetland Mitigation Bank and I
2 don't know Mr. Examiner if you have had anything at all, if you made
3 any rulings or not.

4 **HE:** I spent about a year of my life.

5 **LK:** Really? Well I'm sorry Sir but evidently that at any point in
6 time did they tell you they were going to take hundreds of truckloads
7 of dirt out of that mitigation bank, drive it down Francis Road, over
8 to Highway 9, to Sedro-Woolley, back down Highway 20, and dump it in
9 the Dike District 12's levee? I doubt seriously if they did.

10 Who owns the Wetlands Mitigation Bank? Here's our good friend Mr.
11 Mitzel once again. One of the major players he, Mount Vernon-based
12 developer, who partnered with the Wildlands and the Nookachamps Bank
13 - Mr. Mitzel. October 20th, 2009. When did Burlington start
14 publishing their BS DEIS? That was 2009. You see how all this has
15 been going on for many years behind the scenes and they never told
16 you the Examiner what their plans were. They have used the process
17 and abused the process.

18 So in this den of inequity, what do we have? We have Mr. Mitzel,
19 major developer in Skagit County. We have Mr.

20 **HE:** Two minutes.

21 **LK:** I only need 30 seconds. Mr. Mitzel's manager of Dike District 12
22 is also the Commissioner for Dike District 12. Dike District 12
23 attorney, we assume he pays rent to Mr. Mitzel for his office space
24 in the building. We have them stealing soil - soil, not dirt, soil -
25 from the Nookachamps in order to do what? Flood the Nookachamps.
26 They want to call me scandalous? Now we have a County Senior Planner
27 who has attended every single meeting you've had and yet she's listed
28 as the Senior Planner for the Wetlands Mitigation Bank.

1 Mr. Examiner, I ask you to please deny their motion to strike because
2 everything I have said in that motion is the truth.

3 **HE:** Alright, thank you.

4 Okay, on this motion you describe, I am going to grant the motion.
5 As far as I can see however, insofar as we're dealing with this Dike
6 District Commissioner in regard to lines 11 & 12, that contain an
7 allegation relating to the commissioner so those lines will be
8 stricken.

9 **LK:** May I ask Mr. Examiner, your reasoning there?

10 **HE:** That's, they moved to strike what they considered to be
11 scandalous references...

12 **LK:** Right.

13 **HE:** To this commissioner. When I look at the motion, maybe I am
14 mistaken, but on page 17 of your motion, [Unintelligible] line 4 of
15 page 17, starts, "One has to give oneself, ask oneself given the
16 amount of time... why doesn't the applicant simply wait for the GI
17 Study". Then there's the other remark, finally in lines 11 and 12,
18 "Does it involve property that one of the Dike District Commissioners
19 who works for one of the major developers in the Valley owns or has
20 an interest in?" That's... but well they were complaining...

21 **JS:** Can I respond to that?

22 **HE:** And so that's what I'm striking.

23 **JS:** Yeah, I would agree with you entirely. But now that I look at
24 it, I'm wondering would the Commissioner also would be willing to
25 strike lines 6 through 8? "Could it be that this entire façade of
26 "flood control" is actually more about flood insurance and promoting

1 more irresponsible development in the floodplain?" The words facade
2 and irresponsible are, I think...

3 **HE:** Well, I'm just going to limit my ruling to what I've done and
4 I'll admit there's some kind of colorful language there but it isn't
5 really inflammatory. I think we'll just delete those two lines.

6 **JS:** Okay, thank you your honor.

7 **HE:** That brings us to the next matter which is the Dike District's
8 motion to strike references to altered, unofficial transcript. This
9 again, I think, relates to that same initial motion to recuse and
10 disqualify the Hearing Examiner so I understand that's what those
11 references were.

12 **JS:** Your Honor, I think so but it appears that these allegations have
13 spread somewhat. I think **[Unintelligible]**, it's been very difficult
14 to track where this information's going and what is an exhibit, where
15 on Mr. Kunzler's website, what's an exhibit, what isn't. But I think
16 I can walk us through several improprieties that I would submit.

17 **HE:** Okay, with respect to that initial ruling I just made, I agree
18 with the characterization of counsel that it is essentially lacking
19 any other foundation scandals, however the more persuasive reason for
20 Intervenor is simply irrelevant. It doesn't matter what the motives
21 of the applicant are for wanting to raise this dike. The issue for
22 us is whether or not **[Unintelligible]**

23 **JS:** Along those lines, I'd like to make one comment about Mr.
24 Kunzler's last presentation if I could. Mr. Kunzler, he's a great
25 historian and he has a great deal of information about these issues
26 but he can't seem to control himself as far as accusations. In his
27 argument, he argued a number of things. He argued the apparent
28 financial interest of Mr. Mitzel. He hasn't proving anything about
29 that. **[Unintelligible]** ...That I pay for, too much as a matter of

1 fact. If he has allegations against Mr. Mitzel, he can make those.
2 As far as problems of corruption of some manner in Skagit County, he
3 can make those. Every single one of his points including attacks on
4 the county planner, attacks on myself, attacks on Mr. Mitzel, again
5 I'm not part of this proceeding. Ordinarily I would move to strike
6 this entire argument but what's the point in that?

7 **HE:** Well, you know, I understand what you're saying and I guess I
8 should caution that I made this ruling because I think that there was
9 material that the statement was irrelevant - and I would say the same
10 as to all of the discussion of this sort of motives and character of
11 people.

12 **LK:** So the truth has no place in this hearing?

13 **HE:** What's that?

14 **LK:** Is that what you're saying, sir? I just want to make sure I...

15 **HE:** I...

16 **LK:** You're saying the truth has no place in this hearing.

17 **HE:** I'm not saying the truth...

18 **LK:** That's what I asked.

19 **HE:** I'm saying relevant material has a place and that's not relevant
20 the allegation of the Dike District Commissioner.

21 **LK:** Alright sir, thank you.

22 **JS:** So Mr. Examiner, I'll go to my second argument. I presume I
23 don't need to state my credentials.

24 **HE:** No you don't.

1 **JS:** Okay. Mr. Examiner, I've spent a lot of time on this motion and
2 I think it poses a real serious problem in terms to the record of
3 this proceeding, in terms of moving forward, in terms of allegations
4 what the record are, and most notably by the apparent tacit merging
5 of the court document and the record as limited as it is with Mr.
6 Kunzler's website. Now you've gone through the history before of
7 having two hearings before in this matter. We of course have no
8 objection to April 24th, we think Mr. Kunzler downloaded that and
9 transcribed it accurately, and we have no question about that. But
10 we have serious reservations about the 2nd one. June 12th hearing was
11 to correct defects in the prior hearing. You know that there is no
12 official transcript of these proceedings. There were some things in
13 the record and some things not. But the problem of the second
14 hearing is this: Mr. Kunzler's taken it upon himself to transcribe
15 the testimony from that hearing. Now if we had a transcript that's
16 accurate and didn't put additional things into the testimony that be
17 one thing. But here, if you go to Mr. Kunzler's website and the
18 documents filed in these proceedings are linked to his website. So
19 when he files a document, he puts Exhibit, Exhibit A or transcript he
20 links it to his website so you have to go to his website and download
21 it. There's not an actual, official transcript of these proceedings
22 and so what's happened is that there are actually three transcripts
23 that Mr. Kunzler's submitted, all different.

24 We have one transcript that is a transcript of the written hearing
25 and I want to make clear the importance of this because the
26 transcript is viable so to speak, it's the roadmap. It's the
27 document that people testify to under oath. It's used for appeals;
28 it's used for citation and reference. But what Mr. Kunzler has done
29 here and one of the transcripts he's typed out, it has it's 76 pages
30 long, it has 47 insertions of hyperlinks. In other words, you go
31 through the testimony and all the sudden Mr. Kunzler has submitted

1 citations in the transcript which if you click on it, you go to his
2 website. Who knows what it's going to say? But obviously the
3 problem [**Unintelligible**]. It has 86 footnotes in the transcript.
4 There's no way possible this can purport to be and be even closely to
5 be an accurate transcript of the proceedings. There's a second
6 transcript that has 72 pages, it has 45 citations with 7 footnotes.
7 There is a third transcript Mr. Kunzler's recent Motion in Response
8 has filed for the purpose of testimony. To paraphrase his testimony
9 he said "Well, these attorneys don't know anything about these
10 transcripts but okay, I'll submit a complete unedited transcript."
11 Now this is after we've gone through all these proceedings, filed
12 motions and some of which Mr. Kunzler has filed with the court or
13 with the Hearing Examiner. Some of which reside on his website which
14 are not filed, and are called in the category, quote, documents but
15 they haven't been filed. Including these exhibits, these exhibits
16 which reside in another place. I did find on his website that Mr.
17 Kunzler has a CD of the testimony; he could easily and fairly have
18 downloaded it. But instead he has these other two transcripts which
19 he's filed and these transcripts I'm going to go through a couple
20 entries here I have submitted these in my motion. These transcripts
21 are lurid, they're scandalous, they attack, there are attacks in the
22 original transcript, so there's the transcript and at the bottom he
23 has these footnotes. These footnotes call our engineer a liar, call
24 myself and Dike 12 several times - they say we lie, there's this
25 allegation of misuse of taxpayer funds, there's profanity, there's
26 disparagement of Dike District 12 commissioners. Now if he downloaded
27 the transcript, without these lurid accusations, that'd be one thing.
28 I wouldn't complain too much about it. But he's referenced the
29 transcript in documents, he's also sent them to everyone, there is a
30 memorandum in support of Sedro-Woolley - the transcript is attached,
31 I mean it's hyperlinked to his website, and this one continues 86
32 footnotes and disparaging comments, and he circulated that to the

1 county prosecutor, to the county, to the mayors, and to other people.
2 So this defamatory conduct I was talking about in the first part of
3 my motion continues to explode on a magnificent scale.

4 I wanted to show if I can use the overhead projector? Mr. Examiner,
5 you have these for the record, should I put them up here for public
6 consumption?

7 **JS:** I don't know how to work this.

8 [Colloquy]

9 **JS:** We got one screen.

10 [Colloquy]

11 **HE:** Hey, I've got the same screen.

12 **JS:** I'll just go ahead and...

13 **HE:** Now moving around on the screen.

14 **JS:** Okay, I'll put it back.

15 [Colloquy]

16 **JS:** So this is part, this is part of what Mr. Kunzler considers a
17 transcript. In normal text we have the testimony **[Unintelligible]**
18 "probably the best explanation of freeboard and how it's applied" so
19 and so forth and then he inserts a citation so somebody can go over
20 to his website. I'm sure that the person testifying didn't say that.
21 Then you look at the bottom and he has all these footnotes. He has
22 86 of these footnotes and here's an example of one of the footnotes.
23 Somebody testifies, I believe this is an engineer and Mr. Kunzler has
24 put on the bottom, "Clearly the City of Burlington government public
25 employees and DD12 do not care what the people want." So we can have

1 testimony in the record, we have his comment which refutes the
2 testimony.

3 We have another one here where we're discussing the project, and
4 we're discussing Dike 12 and he puts on the bottom, oh this is the
5 engineer talking, "And the hell with the impacts to anyone else? This
6 will makes the 4th time DD12 changed the natural course of the Skagit
7 River." I won't say whether it's true or not but I think it's a
8 baseless allegation.

9 **JS:** There's another one on page 65: "There are a lot of people who
10 are being hurt by DD12. They expect that DD12 would not hurt them."
11 There's another entry on page 69, the engineer's talking and he says,
12 "No he didn't. He lied." So he says the testimony the engineer gave
13 is a lie, his opinion. Commissioner Ellestad is making statements
14 and he has a quote here, "Let me know if anyone can figure out what
15 she's saying."

16 **HE:** Okay, Mr. Schultz, how about getting to the point? You have
17 reached your limit.

18 **JS:** I have, okay.

19 **HE:** You have anything, some conclusions?

20 **JS:** I have some additional things.

21 So, in any event, I have a list here of like a whole number of
22 allegations he's made of people lying and so and so forth. So
23 clearly this cannot be an accurate transcription, although Mr.
24 Kunzler implies that it is.

25 So, I guess the problem here is the merging of the record and on his
26 website which creates confusion in the testimony, it creates danger
27 that somebody in the future would read that and think that this is
28 the testimony. Or a newspaper will pick it up and the newspaper did

1 ask for copies of these by the way - and so this salacious
2 allegations that are unfounded could be, could and have been
3 disseminated through the county. What we would seek Your Honor is -
4 we have these footnotes, the ones I've cited - and we have, we would
5 like you to strike those from the record, on page 9, footnote 13 -
6 there's 6 of them here, Does the Hearing Examiner have a copy of
7 that, of the areas in, that we elect to strike in the testimony?

8 **HE:** If they're part of your motion?

9 **JS:** They are. And, um, find those in a second - Scott Thomas will
10 talk for a little bit and then I'll find that reference for you - but
11 we would move to have those entries stricken as not related to the
12 issues we're talking about. But, as the last matter Your Honor, I
13 would say that only you can clean up this record. The record I think
14 has been contaminated by cross-pollination of these documents with
15 the website and all these salacious allegations. A record that has
16 86 personal footnotes cannot be any way, shape or form record. So
17 what I request of the Hearing Examiner is that you strike any exhibit
18 submitted by Mr. Kunzler which links to this altered record because
19 that exhibit if it's used in these proceedings is there for the world
20 to see how the Dike District Commissioners are corrupt, commissioners
21 lie, for some reason I rent property from Mitzel so I'm a criminal,
22 these other things that are not part of these proceedings. So I
23 would suggest that you strike any place Mr. Kunzler asserts Exhibit
24 A. I would request that you strike these allegations on page 9, 8,
25 12, 13, which I'll provide you in a second.

26 But moreover Your Honor I think to make sure that we have a clean
27 record I would submit that maybe what we do is we commission somebody
28 who could type that transcript a neutral third party that's reliable
29 to type that transcript. Then we know what that transcript is and we
30 can all cite to that. But at this point I would submit that all of

1 Mr. Kunzler's motions if they cite to this are defective and
2 shouldn't be part of this record. That's what I would ask.

3 I would also request going forward that you issue an order that there
4 be no hyperlinks to Mr. Kunzler's website. The information that is
5 there is unreliable can be changed by him changing the hyperlink -
6 I'm not saying that he's doing that but I think there is a danger
7 that would further exacerbate the situation.

8 Lastly, Your Honor, been trying to figure out how to salvage this
9 record and move forward. I think maybe a suggestion would be from
10 here on out we only print out hard copies with exhibits. Allow no
11 links to documents that could be altered. It's just a suggestion,
12 then we would know clearly what the record is, you could address it,
13 we would know the exhibit, you could accept it. Because the current
14 situation is we have no formal record, we have scandalous allegations
15 made on the website, we have this has been disseminated.

16 **HE:** You're going to have to stop.

17 **Unknown Voice:** Okay, come on.

18 **JS:** Okay and lastly I did ask for an Order in Limine and I have a
19 proposed order that I would submit to the court for your
20 consideration.

21 **HE:** Okay

22 **JS:** Can I hand that up to you, okay?

23 **HE:** Sure. Thank you.

24 Okay, Mr. Thomas, you have something to add?

25 **ST:** Yes, Your Honor, I do. I understood your comments at the outset
26 of the hearing that the exhibits for [Unintelligible] transcripts are
27 not part of the record. That it would seem that the issue is one

1 going forward what that transcript looks like. I agree with my
2 colleague that the record in this matter is quite important. Our
3 system of law is based on the record.

4 I point out that Mr. Kunzler has notified us that he intends to
5 perhaps appeal this matter to the Board of Commissioners, to the
6 Shorelines Hearings Board, to Thurston County Superior Court and
7 perhaps a separate action in United States District Court. That
8 record developed in this proceeding will be used in all of those
9 subsequent proceedings if that should come to pass. As such, an
10 accurate record is very important. What I assume would be the case
11 is that if this matter is appealed, then we will secure copies of the
12 tapes that are prepared, we will order the record transcribed and
13 filed with the Shorelines Hearings Board or the Superior Court or
14 whatever it may be. The concern of course is that the record that it
15 is transcribed -is going to be different then perhaps the records
16 developed here below which will cause confusion going forward. So we
17 would seek to prevent that from occurring.

18 I think that's all I have to say Your Honor.

19 **HE:** Okay.

20 **JS:** But I did have citations to the ones to strike. May I enter
21 those in my motion?

22 **HE:** Sure.

23 Alright, anything from Sedro-Woolley?

24 **CS:** No, Mr. Examiner, just what I said before, I don't disagree with
25 what Mr. Schultz and Mr. Thomas have said, beyond that we don't have
26 any additional comment.

27 **HE:** Okay, Mr. Kunzler.

1 **LK:** I never realized what a terrible guy I was until this afternoon.
2 I never realized how easy it was to befuddle and confuse the Dike
3 District 12 Attorney. I had on my webpage clearly marked LJK
4 Transcript With Comments. Mr. Schultz evidently has not heard of the
5 Constitution and the right of free speech. He is purposefully
6 mischaracterized what I'm entitled to as my opinion and it is labeled
7 as my opinion on the webpage. As far as I'm concerned, this entire
8 issue is moot because I didn't want to confuse local counsel with
9 hyperlinks to exhibits, which, you know, anyone outside of lawyering
10 in Skagit County - in federal court they use hyperlinks all the time.
11 So what I did, Mr. Examiner, was prepare for you a transcript of the
12 hearing, no hyperlinks, no footnotes and I also included a copy of
13 the motion that I submitted to you with the correct cite to the exact
14 page in the transcript. This is just another red herring by Mr.
15 Schultz that doesn't want the truth to be known by the people of
16 Skagit County.

17 So I would move that his motion be dismissed in its entirety. It's
18 ridiculous.

19 **JS:** Can I add some comment on that? Can I comment on that?

20 **LK:** He's already had his shot.

21 **HE:** He has but I will allow him to make a brief response.

22 **JS:** Your Honor, I think Mr. Examiner that Mr. Kunzler has misled the
23 court here about three times. It is true that his website says that
24 one of the transcripts says "LJK Comments" on it, but when you
25 hyperlink from the documents he sent it doesn't go to that. It goes
26 directly to the document. What the document says, all the documents
27 say, "Transcript of June 12, 2013 Public Hearing." It doesn't say
28 anything about his comments. It doesn't say anything about
29 footnotes. These all purport to be the transcript. So if you go to

1 his website you can see actually where he says that he has these
2 citations - it's easy because then I can see it was altered, but for
3 the uninitiated who will look at one of his motions or the motions
4 that we've received by e-mail, if you click on that hyperlink it goes
5 to here and it purports to be the transcript. It is true that Mr.
6 Kunzler in response has filed a new, quote, 'unedited transcript' but
7 it's edited as well. The engineer that he seeks to recuse NHC.
8 Anytime there's NHC it's highlighted. [Unintelligible] Oh, NHC did
9 my work, highlight that, highlight my name. There is an abridgment
10 of the testimony in the beginning, as you recall, there was testimony
11 on another matter you heard first, all that's been excised. But I'm
12 not sure if there's been any additional information excised or not.
13 So that's an alteration. He also has in a number of places where he
14 testifies, he puts it in italics.

15 So anybody reading this transcript will see NHC's highlighted, they
16 would see his testimony in italics and they would see missing
17 portions of it. So Mr. Kunzler can't help himself from amending
18 documents and changing information. That's why we need someone, a
19 third party who's reliable; a third party that can do this properly.

20 **LK:** Mr. Examiner, I would submit to you that this salacious comments
21 by this small town attorney I've had just about enough of it. He is
22 way out of bounds here. There's nothing wrong with the transcript
23 that I gave to you for this hearing. Now if he wants to pay or he
24 wants to take the time to transcribe the hearing itself, that's fine,
25 I've got no objections to that whatsoever. But his personal attacks
26 on me I'm not going to tolerate much longer.

27 **JS:** It's not personal and you can see it there. The highlighting of
28 NHC, the engineer he wants to recuse.

29 **HE:** Yes, I think you know we're adults. Let's do our very best to
30 keep this as civil as we can. I don't think that we're really

1 dealing with personal attacks here but we are dealing with the
2 reliability of certain documents.

3 In the matter of these references to the transcript which apparently
4 had some additional material. I think this is all with relation to
5 an argument that has to do with disqualifying the Hearing Examiner
6 ultimately. I think it's - the appropriate thing to do is just to
7 take that information and say that those references in that document
8 which is not part of the record but which was part of the argument
9 for the motion, that it just goes to the weight that is to be given
10 to the information that's presented and that there's no real point in
11 striking anything.

12 **LK:** Right.

13 **HE:** I know that it's probably upsetting that there are documents out
14 there in 'Computer Land' that say all sorts of things that various
15 people here wouldn't want the world to see. But I do think that is
16 just the nature of our society and that we can't, we can't put a stop
17 to what people are doing in that way - at least not through this
18 venue. So that's what I'm going to do on the second of the motions
19 and that brings us to the motion of Mr. Kunzler to recuse the Hearing
20 Examiner.

21 Again, we're looking at about 10 minutes tops.

22 **LK:** No problem. Except his watch must be broke. There we go.

23 Mr. Examiner, I've worked for attorneys for 34 years. This is the
24 very first time I've ever been involved in asking an adjudicator to
25 recuse himself and really the only reason I'm doing so is to preserve
26 this for the record. I truly do believe that you were led down the
27 garden path by these dike district people that you, they pretty much
28 snowed you and did not tell you the truth. I think I proved that in
29 my first presentation today.

1 I believe that the Honorable Examiner based your decision on the
2 Applicant's word while not having any supporting evidence. Where are
3 the floodplain permits; they were never produced? What kind of a
4 lawyer goes to a public hearing, says he has permits and then doesn't
5 produce them? How can an adjudicator - with all due respect Mr.
6 Examiner, how can an adjudicator make a decision based with, 'trust
7 me, the check is in the mail'? They never produced any evidence that
8 they had permits for their levee system and I know for a fact that
9 there were other people besides myself that raised that issue. You
10 would think they would have taken this opportunity to cure that by
11 producing the permits, but they have not. Without all the necessary
12 permits, aren't you in fact as the adjudicator legitimizing previous
13 illegal activity by this dike district?

14 The second point was the electronic records. What I don't understand
15 is what did you utilize to make your decision besides the staff
16 report and the misleading information you were given by the Dike
17 District and the City of Burlington? What specific information did
18 you utilize from the general public? I don't see anything in your
19 decision that references any document or any testimony from the
20 public. Only from the government.

21 The Honorable Examiner like the City of Burlington, the Dike
22 District, the Skagit County Planning Department, ignored crucial
23 evidence that was submitted regarding the hydraulic impacts of the
24 levees on upstream property owners. You, I for one, showed you the
25 impacts of the levee system in place in 1990 and since 1990 according
26 to Mr. Schultz he is, they have made substantial improvements to that
27 levee system. Wasn't that important to you that you would have at
28 least said something in your decision that there appears to be very
29 severe impacts to upstream property owners and this needs to be
30 thoroughly vetted.

1 Mr. Halverson, who's in the audience here today, has spent hundreds
2 of dollars taking surveys of the Skagit River. He submitted those
3 surveys to you as evidence. They clearly show that the Mount Vernon
4 gage was 37.3 at the height of water around the man-made storage
5 basin was almost 42 feet. Does that not show you Mr. Examiner the
6 impacts of that levee system on the man-made storage basin? Wasn't
7 that important enough for you to at least acknowledge Mr. Halverson
8 who took time off from his farm and came in to testify and show you
9 the hundreds of dollars he spent on this. It's a crucial piece of
10 evidence.

11 The fourth point I made was that you failed to address the floodway
12 issue which is crucial to any work being proposed on the levee
13 system. I submitted several letters from FEMA headquarters in
14 Washington D.C., you didn't mention those. When controversy presents
15 itself in front of an adjudicator is it not your job to settle it and
16 not to ignore it? Burlington says it cut a deal with FEMA; where's
17 the deal? The same place as the permits?

18 The fifth point I raised was that the Honorable Examiner ignored
19 provisions of the SMA and especially with respect to improvements
20 versus maintenance by the applicant. The applicant has an employee
21 that shows up at flood meetings and testifies, 'All we ever do is
22 maintenance! Ha ha ha ha! We never do improvements, we just do
23 maintenance!' That's a big joke to them. That way they don't have
24 to get permits but I submit to you that the WAC is very, very
25 specific with respect to what constitutes maintenance and normal
26 repair. What they have done is anything but maintenance.
27 Maintenance is mowing the grass. Maintenance is fixing your levee
28 after it has been damaged. Maintenance is not adding four feet of
29 fill to your levee system.

1 The Honorable Examiner, by limiting the testimony to just the first
2 three issues identified by the county commissioners is denying the
3 citizens' right to express themselves. I firmly believe government
4 should never limit the public testimony. The citizens have a right
5 to be heard. With all due respect Mr. Examiner, I am concerned that
6 you have not listened to the citizens of Skagit County. That you
7 have only listened to what the applicants and the Skagit County
8 Planning Department Staff Report have told you.

9 When I left here Mr. Examiner, I'm sorry I left my notes at my seat
10 but you ended the hearing by making the statement, 'I've already read
11 everything that was submitted at the previous hearing. I don't think
12 it will take very long to make a decision'. I know I left that day
13 feeling that, 'Wow what the hell did I come for?' He's already made
14 up his mind. That was how several people in the audience that I
15 spoke to, that is how they felt. So again I apologize but you know
16 as well as I do that if this issue is going to go forward on appeal,
17 it has to be raised. I have told you in the parking lot at our *ex*
18 *parte* meeting that it is nothing personal sir.

19 Thank you.

20 **HE:** Thank you.

21 Does anybody want to respond to this?

22 COLLOQUOY

23 **HE:** Okay, Mr. Thomas?

24 **ST:** Your honor, we believe that Mr. Kunzler brought his motion on a
25 fundamental flaw and basis. What Mr. Kunzler does is he relies on
26 the decision that the Hearing Examiner has already made to allege
27 that you have violated the Appearance of Fairness doctrine.
28 Essentially, he seeks to reargue the matter that's already been

1 decided. In other words, he's unhappy after reading your decision
2 with the outcome in that decision.

3 In particular, he's unhappy that the Hearing Examiner did not
4 assigned more importance to a dated graphic that he describes as
5 flood impacts that he had submitted. He is unhappy that a different
6 decision was not reached by the hearing examiner admitting the
7 designation of Gages Slough under the Shorelines Management Act.
8 Unhappy you did not reach a different conclusion as to the work
9 allowed in the floodway. But the remedy for being unhappy with a
10 decision is an appeal. Mr. Kunzler's taken a different path - he
11 seeks to have the hearing examiner, the person that decided these
12 issues removed after reading the decision. He provides no evidence
13 of any bias, any personal interest or any prejudgment in the issues.
14 He failed to allege any facts to support any theory of bias. There
15 is none. There's been no allegation of a personal interest. We can
16 dismiss with that one right away. That's one of the categories that
17 our Supreme Court has identified as violation of appearance of
18 fairness.

19 With regard to prejudgment, he points to the fact that a second
20 hearing was required at which two of the individuals did not testify
21 once again. As a corollary, he argues that the Hearing Examiner's
22 failure to release his notes constitutes evidence of bias. In other
23 words, there must be something either hidden in those notes and
24 there's no available method determining what the decision was based
25 upon, what the Hearing Examiner decision was based upon. But
26 equipment failure, such as the recording equipment, is not an
27 uncommon event. It happens all the time in the Superior Courts. In
28 the course of appeals, they've addressed a rule, adopted a rule to
29 address the preparation of a record. In those bodies, the parties
30 are to agree what constitutes the record. If they cannot agree, then
31 the judge or the master who conducted the hearing resolves the issue.

1 In this instance, you decided to conduct a second hearing. That's an
2 appropriate method of going forward but it does fall short of
3 demonstrating that a decision has already been made.

4 With regard to bias or prejudice, and the issue of having all of the
5 permits, I have to admit that in this instance I'm the one that's
6 confused and befuddled. I'm not entirely sure what permits we're
7 referring to here. I can find nothing in the Shoreline Management
8 Act or the County Shoreline Master Program that requires an agency to
9 review all the permits over the past century or more when considering
10 a substantial development permit. On the other hand, if Mr.
11 Kunzler's arguing that additional permits are required before a
12 Shorelines Substantial Development Permit may be issued, and that
13 would violate the vesting requirements. Those permits must proceed
14 at the same time, they cannot be required to be obtained before the
15 Shoreline Substantial Development Permit is issued.

16 Mr. Kunzler makes an argument that the hydraulics and the hydrology
17 were ignored but that's addressed in the Hearing Examiner's decision.
18 In particular, the Hearing Examiner selected the PIE hydrology,
19 Pacific International Engineering hydrology as being consistent and
20 that's acceptable. Selecting one party's evidence over another
21 party's evidence is what courts do every day of the week.

22 With regards to the floodway, Mr. Kunzler argues that you do not
23 consider the floodway issue but this is outside your authority.
24 That's not something subject to the shoreline permit.

25 Finally, Mr. Kunzler argues that there's a distinction between
26 maintenance and improvements - and indeed, there is a distinction.
27 But here Dike District 12 has applied for a Shoreline Substantial
28 Development Permit. It's not exempt as under a maintenance action -
29 it's actually seeking for an improvement.

1 Finally, Mr. Kunzler just sat on his rights. He failed to petition
2 for disqualification promptly at the time of the remand.

3 We ask the Hearing Examiner to deny this motion. Thank you sir.

4 **JS: [Unintelligible]** ...the City of Bellevue vs. King County Boundary
5 Review Board where it states explicitly in the context of the
6 conflict of interest in the **[Unintelligible]**. The party with such
7 information cannot sit back hoping to achieve a desirable result
8 before despite the perceived unfairness and then use the information
9 to challenge an adverse result. In another case, Kitsap or Growth
10 Management Hearings Board 91 Wn.App. **[Unintelligible]**. A party that
11 does not take advantage of the opportunity to preclude a decision-
12 maker from participating in the decision on an appearance of fairness
13 grounds, that party waives the right to later challenge the decision
14 on appeal. The cases are, there are a number of cases that say when
15 a party is going to seek recusal or disqualification, it must be that
16 either promptly at the time when they learned that the Hearing
17 Examiner was judged **[Unintelligible]** to preside or promptly after
18 discovering the grounds for disqualification.

19 I agree with Mr. Thomas that there have been absolutely no grounds
20 for disqualification for yourself. Intervenor constantly uses
21 phrases like 'simply ignored evidence', 'limited evidence', 'no
22 supporting evidence', 'really ignored crucial evidence', 'ignored
23 provisions of the SMA', that's part of the decision making process.
24 You decide those things. His primary argument is that there's a
25 violation of appearance of fairness doctrine. But that isn't true.
26 All of his information - in the very few cases he cites - all his
27 information relates to simply ignoring evidence. The bottom line is
28 Mr. Kunzler didn't like the decision so now he's trying to eliminate
29 the decision maker. That's what it really comes down to. So we
30 would request you deny that motion now.

1 **HE:** Alright, thank you.

2 It's rather difficult to deal with a motion that's directed to
3 yourself but that my conclusion that the motion should be denied.
4 There is a strong theme that I was just wrong the first time and I
5 can be wrong without being subject to a motion to disqualify because
6 it's just a different view of the way things came out.

7 I would say as to the business about the, uh, um, improvements versus
8 the maintenance. All those things that have been done out there on
9 site before this application are really not relevant to this
10 application. This is not a case about those actions; it's a case
11 about what the dike district is proposing to do now. I'm in no
12 position to rule on whether they behaved well or badly in the past.
13 I'm just looking at the application. That's what I intend to
14 continue to do.

15 I know that the three issues the Commissioners sent back - at least
16 the one about upstream affects - was something that was at least
17 looked at before and they're going to say you just didn't have the
18 whole story and you didn't do it right. So get more information and
19 then look at it again and tell us what you think. That's exactly
20 what I intend to do. I have not prejudged that matter at all. There
21 wasn't, well that's what I want to say about that, I'm perfectly
22 happy to listen to what the parties bring forward and in that regard.
23 I don't regard, well no, I guess I'm getting ahead of myself, so
24 that's my ruling on the motion to disqualify.

25 Let's move on to, let's take a break for about five minutes and allow
26 everybody to walk around. We'll come back and do the Intervenor's
27 motion to disqualify the applicant's expert.

28 [RECESS]

1 **HE:** Mr. Kunzler, the next item is your motion to disqualify
2 applicant's expert.

3 **LK:** This was a motion that I did not want to file and would not have
4 filed had the attorneys not made such a big deal out of it. All I
5 was trying to do at the prehearing conference was to alert you to the
6 possibility of there being a conflict of interest because NHC had
7 done work for the Corps, they'd done work for the plaintiffs in the
8 former litigation, and now when the City of Burlington hired them I
9 thought that there would possibly be a conflict. So I was forced
10 into filing this motion. I believe NHC is perhaps the best hydraulic
11 people that you can possibly use. They certainly did good work in
12 1995 when they put together the graphic that everyone seems to want
13 to ignore and so I would really like to withdraw the motion.

14 **HE:** Alright, that does sort of abridge the time we need to go after
15 that.

16 **LK:** Yes, it does.

17 **HE:** Good, thank you very much. So that motion is withdrawn and that
18 brings us to the City of Burlington's motion, the Dike District's
19 motions to - basically about limiting testimony. So you guys can
20 split it up the way you want to.

21 **JS:** Before we get there, can I make, can I address another matter?
22 It relates to Mr. Kunzler's withdrawing his motion. In my materials,
23 you may recall there was a contact by Mr. Kunzler, *ex parte* contact
24 of our expert, an e-mail he sent that was threatening because the e-
25 mail indicated - and Mr. Kunzler sent the e-mail threatening to
26 disqualify, threatening the expert with charges of conflict of
27 interest, saying he'd submit documents [Unintelligible] and whatnot.

28 I could point out, this was in our last motion and we felt that was
29 clearly under C.R. 26 an improper *ex parte* contact. [Unintelligible]

1 We would ask for some terms on that. Since Mr. Kunzler has withdrawn
2 his motion, we will withdraw our references to that but I just wanted
3 to bring it, in case this is to be argued later I wanted to make a
4 presentation saying that.

5 **HE:** Okay.

6 **LK:** If the Examiner would allow me, I would like to introduce the e-
7 mail exchange that I made. Malcolm Leytham is a personal friend of
8 mine.

9 **HE:** I don't think...

10 **LK:** Really, you don't want the . . .?

11 **HE:** Let's go to the next

12 **LK:** The e-mail?

13 **HE:** I do not.

14 **LK:** So he's alleged I did something wrong and you don't want to see
15 what I said in the e-mail?

16 **HE:** No one is following up on his allegations either.

17 **LK:** Okay, thank you.

18 **HE:** We're just letting it drop.

19 **JS:** Point of fact, NHC sent that e-mail that this is not a conflict-
20 of-interest so if Mr. Kunzler withdraws his motion, I'm fine.

21 **HE:** Alright then, we proceed.

22 **ST:** Sir, you combined the last two matters, numbers 5 and 6, which
23 I'm going to address. City's Motion in Limine and Motion to Restrict
24 to my knowledge. Again I would reiterate that in this matter
25 irrelevant evidence is just unhelpful. Here, the City argues that

1 evidence that is unrelated to the issues on remand should not be
2 allowed. Again I pointed out those issues earlier today contained in
3 the Board of Commissioners' Remand Order or Resolution.

4 Here we make two arguments. The first argument is that old data, old
5 data sets, old hydrology reports is irrelevant. It's been superseded
6 by more recent data, more recent computer runs. The second argument
7 we make is that testimony should be limited to the remanded issues so
8 let me get to the first argument that the old data is irrelevant. We
9 understand from the hearings held to date that hydraulics and
10 hydrology parts that predate the time the permit was vested or
11 intended to be submitted into evidence. Mr. Kunzler has submitted
12 old testimony in the form of trial testimony, deposition transcripts
13 from a lawsuit that is from 1997. This is not the forum to retry
14 that old lawsuit, nor is it the forum to retry issues that have
15 already been decided. These old reports have no significance, they
16 can't not impact the decision coming forward, they don't relate to
17 those three issues. Moreover, they're just confusing. The amount of
18 data, the amount of briefing submitted in this matter is significant
19 and it will be more so towards the end and additional motion papers
20 will just clog up the record without providing any assistance to
21 anybody.

22 A second argument is to limit testimony to the remand issues. For
23 this argument, I would rely upon regulatory reform. That's a series
24 of statutes that was adopted some number of years ago. The essence,
25 one of the requirements of that statute is to limit hearings to one
26 open record hearing, one closed record appeal hearing. Mr. Kunzler
27 asks the Hearing Examiner not to limit testimony to the remand items
28 but rather to open up the hearings to allow testimony on any topic.
29 But the public has already had such an opportunity to testify.
30 Knowing that the hearing is closed, an appeal was taken and that
31 closed record appeal hearing was also closed. While in the

1 subsequent hearing to take, to receive testimony on any aspect of any
2 issue, it would violate the statute to allow a second hearing, to
3 constitute a second hearing in violation of the statute and should
4 not be allowed.

5 **HE:** Okay, Mr. Shultz?

6 **JS:** Yes, Your Honor. Just a couple of brief points. I agree
7 wholeheartedly with Mr. Thomas's arguments and I think they're very
8 well taken. I would point out that under **[Unintelligible]** ...104, you
9 may admit or exclude evidence. You have discretion to determine
10 what's admitted or, or precluded. Under ER 403, the guideline is,
11 even if it is irrelevant, evidence for which prohibitive value
12 substantially outweighed by the danger of prejudice, confusing of
13 issues or misleading tribunal or considerations of undue delay,
14 wasted time, needless presentation of evidence, can be rejected under
15 DR 402. It almost seems like this ruling is made for this situation.
16 Because to introduce it is between about 6 depositions and a 3-week
17 trial transcript which I haven't seen and I'm assuming is hundreds of
18 pages of documents.

19 **LK:** 14,000.

20 **JS:** Oh, okay. **[Unintelligible]**

21 **LK:** Thank you.

22 **JS:** 14,000 pages of documents. That makes it even more telling that
23 it should not be admitted. That was a trial almost 20 years ago.
24 It's not only old hydrology, it's ancient hydrology. It's before the
25 EIS. NHC certainly has worked with different clients to update that
26 hydrology. The whole goal of this process is to find the best
27 hydrology to deal with what's best for the community. Dike 12 has no
28 interest in flooding people or any of the allegations made here; we

1 just want to get it on to protect Skagit County from flooding.
2 That's why we're here.

3 So I would submit that introducing that whole testimony and hydrology
4 is not useful, a waste of time. Even if introduced, it will have no
5 effect on [Unintelligible] NHC or the hydrology they're going to
6 provide. So it is absolutely useless to enter that testimony.

7 Further, and I guess this is the main point, the Board of County
8 Commissioners said, 'NHC is a client of Burlington, Dike 12. They're
9 going to do their best hydrology, the most current hydrology'. But
10 that was their direction, that's what we're doing under NHC. Mr.
11 Kunzler's withdrawn his motion about NHC, so I think we're good to
12 go. There's no reason to admit any of this testimony so I question
13 the validity of that motion.

14 **HE:** Okay. Mr. Kunzler?

15 **LK:** My argument is I just don't think that government should be
16 limiting the testimony of the citizens. As far as NHC, I mean the
17 information that I submitted to you, it's been submitted since 2009
18 in Burlington's EIS. Clearly Mr. Schultz does not understand the
19 graphic or he just chooses to ignore it which is what Burlington did
20 and Dike 12 has done. The issue that before you as far as the County
21 Commissioners are concerned, they said that any issue not decided by
22 them at that point in time would still be open for the record. So
23 clearly there's going to be more testimony.

24 I submit to you that there is nothing wrong with what NHC did, the
25 only reason I submitted the testimony of the depositions and the
26 trial testimony - by the way, the trial lasted five and a half months
27 John - it's relevant from the standpoint of that it proves this dike
28 district has already had a terrible impact on the upstream property
29 owners. Now they're asking four more feet of fill, and now because

1 of the Corps hydrology, which I've got no problem with them using,
2 they're going to have to add more than four feet of fill for what
3 purpose? To protect them from floods or to protect them from flood
4 insurance? That's what this is all about. This has nothing to do
5 with flood control. This is about flood insurance. They know that
6 and I believe that you know that. So other than that sir, I have
7 nothing more.

8 **JS:** Mr. Examiner, can I clarify something I misstated previously?

9 **HE:** Yes.

10 **JS:** I think I said that we would, we would, uh want the motion
11 denied. I obviously meant to say we wanted it granted.

12 [Unintelligible.]

13 COLLOQUOY

14 **HE:** I'm glad you mentioned it.

15 **LK:** I'm glad you recognized it.

16 **JS:** The last point is, it is true portions of the testimony have been
17 submitted including this map since 2009. But what we're being asked
18 here is [Unintelligible] the 14,000 pages of documents.

19 **HE:** I am a little unclear as to where all this prior depositions,
20 portions of the previous trial were submitted. They were submitted
21 in connection with some of the motions?

22 **JS:** I wondered that myself but it seems to me the one map Mr. Kunzler
23 referred to, that's been submitted..

24 **HE:** And that map, I think, is already in the record.

25 **LK:** Correct.

26 **HE:** So we don't have a problem with that being part of the record.

1 **LK:** Okay, good.

2 **HE:** Where did the other stuff come in?

3 **LK:** That's, it was submitted to you in the motion for the
4 disqualifying the expert and that's what I made hard copies of. The
5 only reason I did it was because he obviously didn't understand the
6 graphic so here's the hydraulic engineers telling you what they did.

7 **HE:** I think that since that motion's been withdrawn, we don't need to
8 really worry about any of that anymore. So we're looking at the
9 business of what hydrology we use and limiting testimony to things
10 that are relevant to the questions with remand.

11 **LK:** I have no problems with that. None whatsoever.

12 **CS:** [Unintelligible] Sedro-Woolley does have one point we wanted to
13 raise about the flood hydrology too.

14 **HE:** Yeah and why don't you raise that point?

15 **CS:** I'd be happy to. This is an argument that was raised in
16 Burlington's motion paragraph F and I didn't see the argument in the
17 district's paperwork but to the extent they want to make the same
18 argument, then we would, this would apply to them as well. Basically
19 the argument that the City of Burlington is making is the hydrology
20 that was in force at the time of permit application [Unintelligible].

21 **LK:** That's number seven.

22 COLLOQUOY

23 **HE:** I can maybe short-circuit this because I've read the motion and I
24 have read your response and I agree with you that the vesting
25 document doesn't really apply. [Unintelligible, Colloquoy] So, the
26 facts of what's going on in the world may evolve and I guess we,
27 [Unintelligible].

1 **JT:** Can I go on the record in that, Your Honor? With regard to
2 vesting, vesting is a bright, vesting is a bright line rule it's
3 established by our Supreme Court. It's intended to protect against
4 arbitrary action. It's a matter of constitutional magnitude. While
5 the Sedro-Woolley makes the argument that hydrology is a data set,
6 and not a land use control subject to vesting, really that's a
7 distinction without a difference.

8 Sedro's case or rather its argument is [Unintelligible] Washington
9 cases. It's called *Newcastle Investments v. City of La Center*. In
10 that case, an applicant sued to be vested to a particular fee rate.
11 While the court denied, denied the applicant's lawsuit what it did
12 say was that the new fee rate they wished to be vested to would not
13 force the applicant to use its land differently, if built differently
14 or build differently or redesigned in the plans, but that's not true
15 here. In fact, different hydrology would have that impact. Now I
16 understand that Dike District 12 has contracted with NHC as has the
17 City of Burlington as a way of figuring out the GI hydrology utilized
18 in this matter. So from that standpoint I suppose it's moot. But
19 the reason it still has significance is because agreeing to use
20 different hydrology, GI hydrology, I'll call it, is different than
21 having County Law impose, impose that hydrology. The reason it's
22 different is because the county's changed it once. It can do it
23 again. It can do it again and it can do it again. The permit can be
24 delayed inevitably and forever. That's the issue that still remains
25 live and is not moot.

26 **HE:** Okay, you have made your record. I have made my ruling. I can't
27 say I'm... does that conclude what we're here to do?

28 **JS:** Your Honor, I wasn't quite sure about the last motion to *in*
29 *limine* or exclude. I think we excluded the Halverson deposition
30 [Unintelligible].

1 **HE:** Yes. They're not in. They're not in because they were
2 withdrawn.

3 **ST:** The issues at that hearing, is that opened up to any matter - I
4 wasn't clear on that. Or is it limited to?

5 **HE:** No, I... on that subject I'm going to limit the hearing to those
6 issues that were remanded by the County Commissioners and to the best
7 of my ability at a public hearing - the public isn't always grasping
8 that concept. But I will do my very best to hold the hearings to
9 those issues because that's what my jurisdiction is, is essentially
10 to look at those particular matters that are remanded to.

11 As far as the quote from the remand where, "All matters not decided
12 herein expressly are referred for further proceedings" Mr. Kunzler
13 says - let me see that - that's what we're doing. We're having
14 further decisions but really this is the commissioner making its
15 order of remand and what they're saying is that the issues they
16 didn't decide if this ever comes back to them are reserved for
17 further proceedings before them but it isn't a limit. It is not a
18 direction to me. So that isn't going to expand the kind of universe
19 that these hearings are going to be about.

20 Now I guess if that takes care of our business here today, I guess we
21 should ask somebody - maybe Mr. Schultz to give us a reading of where
22 we are on getting this report that we're waiting for.

23 **LK:** Excuse me, Mr. Examiner but do you want to close the motion
24 hearing before you ask him that question?

25 **HE:** I thought I had done.

26 **LK:** I'm sorry sir. Alright.

27 COLLOQUOY

1 **JS:** I'll tell you what I know.

2 **ST:** My understanding is this, Your Honor.

3 **HE:** You're not going to get a chance!

4 **JS:** Don't want to be on the hot seat.

5 **ST:** Just very briefly my understanding is this, Your Honor: NHC was
6 originally contracted by the City of Burlington to perform the
7 analysis during this process we came to the conclusion that Dike 12
8 should also engage NHC for a variety of issues not related to this
9 hearing so much, having them as a client, hope we would both be able
10 to contact NHC for example. So unfortunately that delayed the
11 preparation of the report by a certain amount of time that's
12 precisely now - I don't know, but I understand that it is now assumed
13 to be underway. We had expected the report actually this week.
14 That's been delayed. I believe and this is the part that I'm a
15 little bit unsure about but I was told the latter part of this month,
16 the month of April now but I'll double check with my clients to firm
17 that date up.

18 **HE:** Alright, what I want to do is as soon as that report is out it'll
19 be distributed to everybody that's involved here at the least. Then
20 we need to schedule the hearing. So when that happens we'll see but
21 maybe **[Unintelligible]** telephone conference and figure out some
22 dates. But in any event we won't do anything until that report has
23 been submitted.

24 So thank you all. It was a lot of fascinating reading and I
25 appreciate your efforts and we're adjourned.

26 **LK:** Thank you sir.

27 [1:59:06.146]

