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BEFORE THE HEARING EXAMINER FOR 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
APPLICANT/RESPONDENT DIKE
DISTRICT NO. 12'S RESPONSE TO
SKAGIT COUNTY'S FINDINGS OF FACT

COMES NOW, Respondent, SKAGIT COUNTY DIKE, DRAINAGE AND IRRIGATION DISTRICT NO. 12, by and through their attorneys, JOHN R. SHULTZ and JOHN A. SHULTZ of SHULTZ LAW OFFICES, and hereby provides written response to the Skagit County Findings of Fact dated December 9, 2014. These comments addressed issues raised by Skagit County in the Findings of Fact as follows:

1. In the BCC decision issued under Resolution #R20130278 on September 24, 2014, at paragraph c), the Hearing Examiner was to analyze, consider and render specific findings that document compliance with the County's obligations under the NMFS BiOp. See County Findings of Fact at pages 4-5.

1 2. Under the NMFS BiOp, local governments must comply with Element 3 regarding
2 development criteria to regulate flood plain development. Affected jurisdictions must show compliance
3 and have three options to comply with BiOp requirements. Jurisdictions could elect one of three
4 “doors” for compliance. A jurisdiction could choose to 1) adopt a model ordinance drafted by NMFS
5 (Door 1); 2) adopt a programmatic approach utilizing existing regulations and supplementing of new
6 regulations and policies (Door 2); or 3) undertake a project-by-project review to determine compliance
7 with the BiOp (Door 3). See County Findings of Fact page 5.

8 3. On September 20, 2011 Skagit County adopted ordinance #O20110008 to achieve
9 compliance under Door 2, the programmatic approach. The ordinance amended portions of the flood
10 damage prevention ordinance, SCC 14.34 as well as the critical areas ordinance, SCC 14.24. See
11 County Findings of Fact page 6.

12 4. Shortly thereafter on November 11, 2011 Skagit County was notified that additional
13 changes would be necessary before Door 2 programmatic approach was approved. See County Findings
14 of Fact page 6.

15 5. During the pendency of this permit application process, the County has been analyzing
16 the permit under Door 2, a programmatic approach. This has led to prior hearings, where the County
17 has recommended approval for the permit.

18 6. Subsequently, the County adopted recommendations to require a habitat assessment to
19 determine adverse effects, which is a provision within Flood Damage Prevention Ordinance SCC
20 14.34.220(1). See County Findings of Fact page 6.

21 7. The County requested that Dike District 12 assess the impacts of the proposal on habitat
22 and evaluate the impact on ESA list of species and fish habitat. See County Findings of Fact at page 7.

23 8. In response the District submitted a Fish and Wildlife Habitat Site Assessment by
24 Graham Bunting Associates dated February 27, 2013, and the County determined that the Site

1 Assessment met the requirements of SCC 14.34.220(1). It was concluded that the project “may affect
2 but is not likely to adversely affect” fish habitat. Therefore, a habitat mitigation plan was not required
3 by the County. See Findings of Fact at page 7.

4 9. The County also noted that biological assessments had been prepared by Anchor QEC,
5 dated October 2009, a Biological Opinion by Fish and Wildlife Service, and another Biological Opinion
6 by NMFS, which reached the same findings of the assessment by Graham Bunting Associates. See
7 County Findings of Fact at page 7.

8 10. The County determined that: “In reviewing the totality of the project documents
9 submitted, the Department concluded that the requirements of the BiOp are satisfied.” See County
10 Findings of Fact page 7.

11 11. The County also stated:

12 It is ultimately the County’s role to determine whether a specific project proposal
13 complies with the standards of the Bi-Op. In making a recommendation on the
14 project proposal under the Shoreline Master Program, the Department concluded
15 the applicants had satisfied this burden after review of environmental and project
16 documents.

17 See County Findings of Fact at page 7.

18 12. In the County’s conclusion at page 7, the County noted that “In making a
19 recommendation on the project proposal under the Shoreline Master Program, the Department
20 concluded the applicant’s had satisfied this burden after review of the environmental and project
21 documents. See County Findings of Fact page 7.

22 13. Recently, however, the County has now contacted and received a letter from Tom Sibley
23 of NMFS. It was noted that: “According to a preliminary review, Tom Sibley from NMFS concluded
24 that the project may not meet the “no adverse effect standards”. See County Findings of Fact at page 7.
25

1 14. Mr. Sibley responded in a two page letter which has been submitted by the County with
2 Findings of Fact which appears to address three general questions. Sibley acknowledged that he "... did
3 not take time to complete a rigorous assessment of this project ...", and provided general comments.

4 15. The Sibley response included vague general responses such as "... it is difficult to
5 imagine how they could place that quantity of fill without having impacts." Potential adverse effects
6 include "... hydraulic alterations including increased flow velocity that would increase erosion
7 downstream." Also, "... high flows may also have adverse effects." Also, at the BNSF Bridge, "...
8 additional water that is stored upstream will take a longer time to be released. And "... high flows may
9 cause greater erosion ..." Removal of fill "could have adverse or beneficial effects to fish habitat but
10 neither have been evaluated." See Tom Sibley DD12 Levee Expansion Letter, undated.

11 16. Sibley then goes on to state that: "NMFS, resource agencies and tribes have expressed
12 concern that the proposed mitigation is insufficient to offset adverse effects associated with maintaining
13 existing levees. Also, that "... levees that provide additional protection are likely to have adverse effect
14 to habitat".

15 17. Sibley also noted that the levee cannot be certified by FEMA. Also that the "... project
16 appears to create additional risk both upstream and downstream of the site." Sibley also notes that
17 certification by FEMA, is not a NMFS issue, in any event.

18 18. On the general question of whether there has been ESA consultation, Sibley noted that
19 the NFIP consultation resulted in "... a jeopardy Biological Opinion from NMFS identified numerous
20 adverse effects on listed species."

21 19. Sibley then notes that under FEMA, projects with an adverse effect in the floodplain
22 require a habitat assessment and mitigation, and that "It is unclear if any assessment has occurred for
23 this major project." Also that "EIS does not complete their requirement to consult under ESA and we
24 are unaware of any consultation for this project."

1 20. The tone of the letter from Sibley include general and nonspecific answers to general and
2 vague questions. The Sibley response elicited by the County, has turned permit approval into
3 uncertainty and contradiction. Sibley is clearly stating that there are adverse effects generally to habitat,
4 there are concerns from NMFS, the tribes and resource agencies that these effects have not been
5 addressed with proper mitigation, and that he is "unaware of any consultation for this project." The
6 clear implication is that Sibley on behalf of NMFS does not believe that the County has adequately
7 satisfied its obligation to consult with NMFS under the BiOp.

8 21. On the other hand the County has on prior hearings, consistently noted that all the
9 requirements of the BiOp were satisfied, and recommended approval of the permit, all of which was
10 under a Door 2 analysis, which the County had previously approved.

11 22. It is only recently that the County now has contacted NMFS, and Tom Sibley and
12 requested an opinion on approval and the response is that he is "unaware of any consultation" on the
13 project. So having proceeded on a Door 2 analysis, for some time during these proceedings, the County
14 has now switched to a Door 3 (permit-by-permit) analysis by requesting and receiving a response from
15 NMFS implying that there has been no adequate consultation and that the habitat assessment should
16 occur.

17 23. In summary here is the problem: The County proceeded on Door 2 to analyze and
18 approve the permit, which complied with all current regulations. The permit should be approved. Then
19 at this late date contact is made with NMFS, which raises issues about any consultation and adequate
20 assessments being performed. By making this request the County changes the analysis to Door 3.
21 Skagit County has only approved analysis under Door 2 and appears not to have passed a resolution
22 allowing consideration under Door 3.

23 24. This puts the present status and the upcoming hearing in a state of uncertainty with no
24 answer to the BCC issues c). If we go to the hearing spending time and expense, we encounter a road

1 block with the County approval under Door 2, and then switching to Door 3 analysis and then Sibley
2 responding under a Door 3 analysis that there has been no adequate consultation or habitat assessments.

3 25. In this scenario all parties can accomplish little, until there is clarification between the
4 County and NMFS whether or not there has been adequate consultation, and whether Door 2 or Door 3
5 applies. Clearly from the tenor of Sibley's letter, no adequate consultation has occurred, and no
6 adequate habitat assessment has been provided. This of course conflicts and is directly opposite to the
7 County's position that they have approved the permit. No decision can be made on issue c) until there is
8 clarification.

9 26. Also added to this confusion, is that under the GI Study, the Comprehensive Urban Levee
10 Improvement Alternative (CULI) has been selected as the plan which the Army Corps will support and
11 seek funding for. This plan adopts nearly all elements of the present permit project, with additional
12 enhancements to other Districts and to other entities within Skagit County, but which essentially adopts
13 this project as the plan to be approved by the Army Corps of Engineers. A Chief's Report approving
14 this and sending it to Congress for funding is anticipated in 2015.

15 27. However while this is going on, there is uncertainty and confusion between the County
16 and NMFS regarding whether or not this permit should be approved or should undergo further studies,
17 which presumably would take many months to complete.

18 28. Accordingly, if the County and NMFS cannot determine the status of this project before
19 hearing, or if NMFS cannot provide immediate approval of consultation, then there is little point to
20 proceed to hearing on February 4 if the result will be simply to have the parties be told to wait several
21 months so that the County can properly consult, with a habitat assessment, which would satisfy NMFS
22 to then give or condition approval for the permit. Absent this scenario, the parties will go to hearing and
23 can provide no answer to this question of whether the County is adequately consulted or not, under BCC
24 issue c).

