

BEFORE THE HEARING EXAMINER FOR SKAGIT COUNTY

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In re 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

**INTERVENOR REPLY TO DD12 AND CITY OF
BURLINGTON MOTIONS TO STRIKE AND
MOTIONS IN LIMINE**

COMES NOW Intervenor Larry Kunzler in response to the Motions to Strike and
Motions in Limine filed by DD12 and the City of Burlington. The motions should be denied in
their entirety for the reasons stated herein.

INTRODUCTION

I am not going to waste the Hon. Examiner’s time in going over the sordid history of the
last year of hearings and remands as the City of Burlington and DD12 (hereinafter “Applicants”)
have done in their ridiculous and, as will be proven at oral argument, “scandalous” motions as
they continue their quest to mislead the Hon. Examiner into believing that the issue before him
has to do with flood control instead of economic gain. While I appreciate the accolades
bestowed upon me by learned counsel for the applicants about all the “knowledge” I supposedly
have about the legal process, in truth and in fact I am a legal investigator, not familiar with all
“legal procedures” nor do I deal with very many “legal issues”. I deal with evidence, a paper
trail chaser who finds information for attorneys that support their argument or shows the fallacy
of their opponent’s arguments. In the instant case there is more than enough real “evidence” and

1 “facts” to support everything I have stated and presented to the Honorable Examiner and I am
2 prepared to present same at oral argument.

3 **Reply to Motion to Strike Derogatory and Scandalous Reference Made Against DD12**
4 **Commissioner**

5 How anyone could consider a question as a scandalous reference to an individual is
6 beyond the scope of my imagination. What I find most telling in both the motions is that neither
7 one makes an attempt at answering the question. I want to know as the Hon. Examiner should
8 want to know, as the Skagit County Planning Department should have wanted to know, and as I
9 am sure when these proceedings go back to the County Commissioners they will want to know
10 exactly what property does the intended project by the applicant take out of the 100 year
11 floodplain? Most importantly does that removal benefit a Dike District Commissioner’s
12 employer? The question has honorable merit, is probative of the factual basis on the motivation
13 of this entire façade of “flood control” and the public deserves an answer. Therefore the Motion
14 to Strike should be denied.

15 **Reply to Motion to Strike References**

16 To prove that no good deed goes unpunished the applicants raise objections to the
17 transcript of the proceedings that I prepared at great expense and time and labor in the interest of
18 providing the public with information. I prepared an accurate transcript of both proceedings.
19 One of which (April 24, 2013) the Hon. Examiner has seen fit to enter into the record as Exhibit
20 #38. I would like to thank the Hon. Examiner for doing so. It shows very clearly some of the
21 misleading testimony that was presented by some of those testifying.

22 I also provided a complete transcript of the hearing on June 12, 2013 and used it as an
23 Exhibit to my motion in support of Sedro-Woolley’s appeal before the Board of County

1 Commissioners. Prior to submitting it and while reviewing the Examiner’s file I informed the
2 Hon. Examiner’s very competent legal assistant/clerk/technical assistant/coordinator, Ms. Betta
3 Spinelli, of the existence of the transcript and she wrote down the link in case anyone wanted to
4 review it.

5 The transcript that I quoted from in my motion for the recusal of the Hon. Examiner was
6 Exhibit A, which as stated, was submitted to the County Commissioners. Notably no objection
7 was submitted to said transcript by the applicants during that hearing. As far as the outrageous
8 allegation that I altered the oral testimony that is nothing short of preposterous, derogatory,
9 scandalous, attacks my moral character, and an implied allegation of wrongdoing. What
10 applicants characterize as “alterations” are enhancements (i.e. links to documents and exhibits;
11 highlighting to show important testimony) all made to assist the reviewer. Admittedly the
12 footnotes are my own observations and were identified as such. Unlike the applicants I’m not
13 trying to hide anything from anyone or trying to confuse anyone. If it will make the befuddled
14 and confused DD12 attorney happy I will now attach as **Exhibit A** the complete transcript with
15 no footnotes, highlighting, or hyperlinks to exhibits. Attached as **Exhibit B** is the Motion with
16 the appropriate references to the transcript. If the Hon. Examiner would like to enter same into
17 the record please feel free to do so. I guess I don’t have quite the familiarity with “legal issues”
18 as the applicants’ attorneys give me credit for.¹

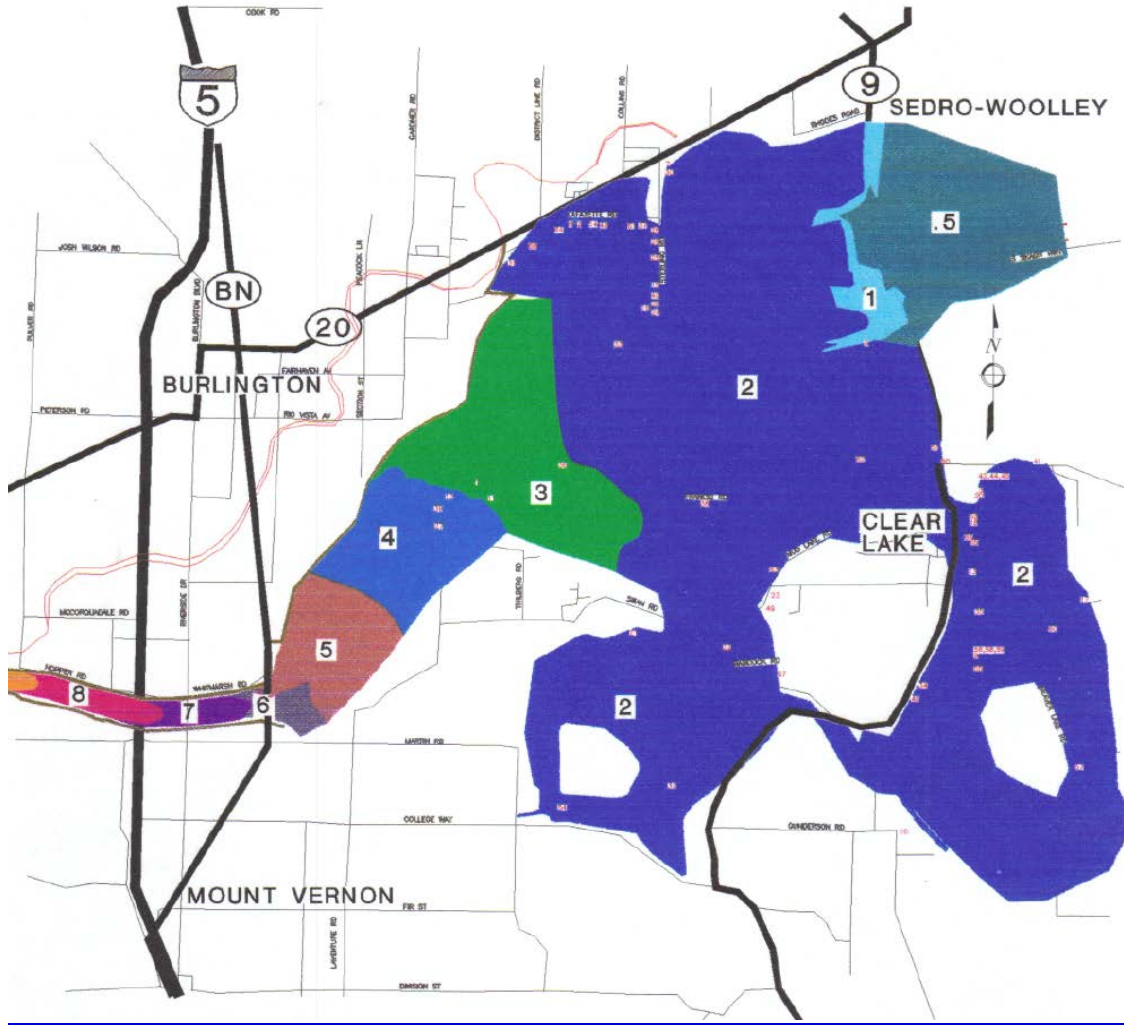
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¹ By the way, one other quick comment I would like to make is that it appears that the attorneys have a problem with posting pleadings and exhibits on the internet. I am of the firm belief that every public hearing on any issue should have a complete transcript of all exhibits and testimony posted so that the public can have a true public record of what transpired. Every piece of paper submitted in the instant case has and will be published for the public record. Every motion for or against any aspect of the instant proceedings as well as any rulings/decisions made for or against any motion will all be published. It is being done as a public service and as I have proudly stated on my web page since its conception, “Knowledge is only knowledge when knowledge is shared.”

1 **Reply to Motion to Exclude Testimony Already In The Record**

2 One of the largest burr in the britches of applicants attorneys is the references to the
3 below graphic.

GRAPHIC SUMMARY OF
INCREASES IN 1990 FLOOD LEVELS
DUE TO LEVEE SYSTEM



4
5 I have been submitting this graphic at every opportunity I have had for 14 years. Every
6 public presentation of which there have been many, including ones where both attorneys have
7 been present, every aspect of the instant case all the way back to 2009 as comments on their

1 pitiful excuse of a DEIS. For purposes of brevity I will not again cite all the times it has been
2 submitted as EVIDENCE, I will just refer the Hon. Examiner to the Intervenor Motion for
3 Recusal Paragraph #3 Page 5 Line #18 through Page 9 Line #12. I submit to the Hon. Examiner
4 that the time to object to a piece of evidence, a factual account of the impacts of DD12's levees
5 on upstream property owners has long since passed. Objecting to the evidence now would be
6 like them objecting to the inclusion of the Stewart data in the Corps hydrology. Surely you must
7 remember the argument made by the learned counsel for the DD12 about nhc's work product
8 was just like "Goldilocks". "Not too hot, not too cold." ²

9 If I was trying to substitute the exhibit for any "new hydrology" that would be one thing,
10 but I am not. If I was trying to stop the Corps hydrology from being used like the applicants
11 tried unsuccessfully to do, that would be one thing, but I am not. What the exhibit which is
12 already in the record multiple times shows is what the impact of the levee system had on the
13 1990 flood which carried 152,000 cfs. According to the applicant the Corps hydrology will be
14 carrying a lot more water and they want to add 4 feet of fill to those levees. The graphic, already
15 in evidence, also is a very good example of just why the levee system is backing up the water not
16 only on upstream property owners but into the town of Burlington as well. One picture worth
17 10,000 words from applicants trying to hide evidence from the general public. Applicants
18 points go to the contents of the exhibit not to its admissibility. The only way the hydrology used
19 to analyze the impacts of the 1990 flood event could be considered "outdated" is that it does not
20 take into account the admitted "major improvements" made to the levee system since 1990 and
21 as alleged, presumed to be without the benefit of all the required permits since no permits have

² See attached Exhibit A page 10 line 25.

1 yet been introduced into the record. The applicants Motions in Limine are just another attempt
2 to hide the truth from the general public and should be denied in their entirety.

3 **Reply to Motion to Prevent Questioning of Witnessess**

4 The City of Burlington states that it wants an Order in Limine to prevent **any argument,**
5 **questioning of witnesses** by the Parties to this appeal, or irrelevant evidence concerning
6 hydrology other than that as established by Skagit County’s Shoreline Management Program as
7 applicable to this project. Any astute adjudicator has to question the motivation for such a
8 request. What is it they are trying to hide? What is it they are afraid their witnesses might be
9 asked? I respectfully submit to you that this is just another attempt at depriving the public of the
10 truth. The issue that applicants are trying so hard to keep the public from knowing is how much
11 water does the levee system store on upstream property owners. An issue that they have been
12 directed to answer by the County Commissioners.

- 13 a. DD12 shall present analysis of the actual effects of the levee modifications envisioned
14 under the Shoreline Permit, applying Corps hydrology, **comparing actual pre-project**
15 **conditions and post-project conditions**, ...

16 Pre-project conditions would mean how much water is the current levee system storing on
17 upstream property owners property now vs. how much additional water will be stored by the
18 project during a flood carrying 235,000 cfs at Sedro-Woolley and because of that figure being
19 larger than any looked at before will require their project to be even larger (i.e. more than 4 ft.
20 razing).

21

1 As the Hon. Examiner is aware the hearing examiner rules require the following:

2 **2.08 Cross Examination**

3 Expert witnesses and County staff are subject to cross examination. Cross
4 examination of other participants shall be allowed only at the discretion of the
5 Examiner Members of the public shall not be subject to cross examination unless
6 a person testifying expressly consents.

7 **3.15 Cross Examination**

8 Witnesses presented by the parties are subject to cross examination

9 Applicants request violates both rules. First the applicants want to limit the testimony
10 and now they want to limit the questioning of their experts. Again, what is it they are trying to
11 hide? What are they afraid of?

12 **CONCLUSION**

13 All evidence should be heard. The Hon. Examiner may weigh that evidence in reaching
14 his decision. The granting or denial of a motion in limine is within the discretion of the trial
15 court (in the instant case the hearing examiner), subject only to review for abuse.³ The motion
16 should be denied if a proper ruling depends upon a factual background to be developed at trial⁴
17 (i.e. the hearing). Credibility is a matter for the trier of fact to determine, after direct and cross-
18 examination.⁵ In short, applicant's motions are an attempt to preclude the truth to be known by
19 the public for evidence that is already in the record of the city of Burlington and the Hon.
20 Examiner. Any legitimate objection to said evidence has long since passed. Their motions in
21 limine should be denied in their entirety.

³ See *Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 286, 686 P.2d 1102 (1984); *Fenimore v. Donald M. Drake Construction*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976)

⁴ See *Amend v. Bell*, 89 Wn.2d 124, 570 P.2d 138 (1979)

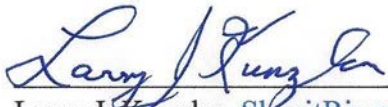
⁵ See *State v. Gosby*, 11 Wn.App. 844, 526 P.2d 70 (1994)

1 With respect to the objection to putting in hyperlinks and footnotes that apparently
2 befuddled the local small town attorney that he couldn't quote from the right one, that problem
3 has been cured by the submission of Exhibit A and Exhibit B attached hereto and by this
4 reference incorporated herein.

5 And lastly, the outrageous, defamatory, salacious, downright scandalous accusations that
6 I attacked the moral character of a Dike District Commissioner when all I did was ask a question,
7 a question that neither attorney tried to answer, should be stricken in their entirety. There is
8 nothing scandalous about asking a question. If the Hon. Examiner had the power to assess
9 sanctions against the attorneys involved they should be sanctioned for their accusation. If the
10 Hon. Examiner does not have that power perhaps the Washington State Bar would be a better
11 place to seek appropriate measures.

12 In the instant case there was no "scandalous conduct" by the Intervenor. The Intervenor
13 looks forward to demonstrating this to the Hon. Examiner at oral argument. There is no merit to
14 any of the arguments made by the applicants and their Motions In Limine and Motion to Strike
15 should be dismissed in their entirety.

16 Respectfully submitted this Fourth Day of April 2014.



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18 Hand delivered to the Skagit County Hearing Examiner w/hard copy exhibits

19 Electronically Served on:

20 Skagit County Commissioners via Clerk Linda Hammons, lindah@co.skagit.wa.us;

21 Will W. Honea, willh@co.skagit.wa.us;

22 Jill M. Dvorkin jillo@co.skagit.wa.us

1 John Cooper, johnc@co.skagit.wa.us;
2 Craig D. Sjostrom, cdsjostrom@comcast.net;
3 Sedro-Woolley Mayor Mike Anderson, manderson@ci.sedro-woolley.wa.us;
4 Eron Berg, eberg@ci.sedro-woolley.wa.us;
5 John R. Shultz, shultzja@comcast.net
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EXHIBIT A

2 **TRANSCRIPT OF JUNE 12, 2013 PUBLIC HEARING BEFORE THE SKAGIT**
3 **COUNTY EXAMINER, RE: SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT**
4 **PL12-0144.**

5 **SKAGIT COUNTY HEARING EXAMINER WICK DUFFORD (HE):** Good morning, my
6 name's Wick Dufford and I'm the Hearing Examiner for the county.
7 We're here today to hear our regular land use agenda and what we have
8 on the agenda is two items. One is an application for a special use
9 permit by the Conway School District, and the other is to continue a
10 hearing that was begun in late April on the application of Skagit
11 County Dike and Drainage and Irrigation District Number 12 for
12 improvements to the Skagit River dike that is just beyond the
13 Burlington city limits upriver. So first of all, we'll do the Conway
14 School District matter because I think that will be pretty quick and
15 then we'll take up the second one.

16 So, um, just by way of introduction this will apply to both of the
17 hearings. What we do is we have the staff summarize their analysis
18 of the application and what they have to say is largely shown in a
19 staff report of which I think there are copies in the back of the
20 room. Once we've heard from the staff, we'll ask the applicant - in
21 the first case, it'll be the school district to uh, give their, uh,
22 pitch on what they're applying for and to tell us what they think
23 about what the staff had to say. Then we'll hear any members of the
24 public that want to testify about these requests. At the end of
25 that, we'll let the applicant and the staff respond to any public
26 comments that they want to respond to and then we'll close the
27 hearing. We'll take the record then with all of the exhibits that
28 are a part of that record and then I will make a written decision
29 which will be within about two weeks of the hearing.

1 Now in, starting with the uh, Conway School District matter I have
2 the staff report and it has listed ten exhibits. So, and those are
3 all matters from the uh, the city's, excuse me the county's official
4 file so they're, they're, materials that were used by the staff in
5 reaching the decision that they came to. Those will be all included
6 in the record and given exhibit numbers as shown on the staff report.
7 Then if anyone has any additional information they want to include in
8 the record, when they get an opportunity to speak they should bring
9 that material to my attention and we'll deal with getting it into the
10 record at that time.

11 These cases are decided by the Hearing Examiner and then are
12 appealable to the County Commissioners. But the appeals to the
13 Commissioners are on the record made here. So it's important that we
14 have a good record for them to review in case they have to and, uh
15 all they're really doing when they hear an appeal is deciding whether
16 the things that were done here were done right. That is to say
17 whether the correct decision was reached on the evidence given but
18 you don't get to put a new case on these appeals. The evidence is
19 already in, it's just an argument over what the result was. So
20 that's the way it works, after that then things go on to the court
21 system if indeed they go any further. So, we'll start with the
22 Conway School District matter and then take up the Dike District 2nd.

23 [ABRIDGED FROM 0:04:43 TO 0:21:30]

24 **HE:** Call the hearing to order. On April 24th, we had a hearing about
25 the application of Dike, Drainage and Irrigation District Number 12
26 to, uh, do some shoreline stabilization and dike improvement on the
27 Skagit River Dike that extends from Lafayette Road in the north to
28 Gardner Road in the south just east of Burlington. After the
29 hearing, we discovered that some of the record that we had hoped we
30 were making on the machinery wasn't too intelligible. So we decided

1 to continue the hearing and take another crack at making sure that we
2 have a good record and, um, on that subject I guess I should say that
3 we do have a lot of documentary evidence as well as pretty good notes
4 about what everybody said last time so I think that we can recapture
5 that fairly clearly but in case anybody wants to say it again and
6 make sure that they get a verbatim transcript then this is an
7 opportunity to do that.

8 In between, at the end of the hearing I left the record open for a
9 week for additional comments because there was some suggestion there
10 was some problem with notice of the hearing and people felt they
11 needed more time. Just in order to deal with that, as a, I am going
12 to include as a, we are up to exhibit 30 I think aren't we?

13 **HE AIDE:** 29, 29 is the last.

14 **HE:** So the next one would be 30. Uh, what I'm going to do is mark
15 the notice of the April 24th hearing and the, uh, that was published
16 in the paper as well as the notice that was sent out to people as
17 Exhibit 30 so that will be in the record that those notices were in
18 fact made. Then for today's hearing I'm going to do the same thing
19 as Exhibit 31 - Notice of Continued Hearing June 12th, both the
20 published version and the mailed & posted version. So, uh, those two
21 additional items will be in the record and we're up to Exhibit 31
22 now.

23 I, note that during the interim while the record was open there were
24 several additional exhibits that were submitted. So we have three
25 from John Semrau - I have not seen these so I don't know what they're
26 about - but one from Margaret Fleek, a letter from John Schultz; the
27 Corps of Engineers sent a letter on the 1st of June; another letter
28 from, another two letters from John Schultz; and finally a
29 communication from Chal Martin, the City of Burlington. So we have
30 all those items and they are now part of our record. We will expand

1 our record by whatever happens here today. I'm going to ask the
2 County to sort of recapitulate what they did last time and so
3 speaking for the County we have...

4 [0:25:36]

5 **John Cooper [JC]:** John Cooper.

6 **HE:** Alright Mr. Cooper, do you swear and affirm that the testimony
7 you'll give you'll tell the truth, the whole truth and nothing but
8 the truth, so Help you?

9 **JC:** I do.

10 **HE:** Okay, why don't you go back over your staff findings?

11 **JC:** Okay, I'll just be brief. This is a continuance for the hearing
12 for the Shoreline Substantial Development Application PL12-0191.
13 This is for Skagit County Dike, Drainage and Irrigation District
14 Number 12. The area is subject to the proposed shoreline
15 stabilization and flood protection improvements. It's located along
16 the right, which is the north and west, bank of the Skagit River
17 extending from Lafayette Road in the north to Gardner Road in the
18 south, which is east of Burlington. The project is an eastern
19 extension of the levee maintenance project initiated by the City of
20 Burlington and the Skagit County Dike, Drainage and Irrigation
21 District Number 12. It's intended to increase flood protections for
22 the City of Burlington. Skagit County Dike and Drainage District
23 Number 12 proposed to enlarge both the width and the height of the
24 existing Skagit River levee along a 1.3 mile long project site. The
25 elevation at the top of the levee will be increased by approximately
26 4 feet and the toe or base of the levee will be increased by
27 approximately 60 feet. The widening of the dike will be limited to
28 an area landward of the existing levee toe. The purpose of the
29 improvement is provide structural reinforcement of the levee system

1 to prevent failure during elevated flood events and to obtain, see,
2 levee certification from the United States Army Corps of Engineers.
3 The subject property is designated as agricultural, natural resource
4 lands as indicated in Comprehensive Plan Zoning Maps as adopted
5 December 23rd, 2008. The subject site has a shoreline designation of
6 rural as indicated in the current shoreline county or Skagit County
7 Shoreline Management Master Program. You'll note the Skagit River is
8 considered a shoreline of statewide significance. A determination of
9 significance was issued by the City of Burlington and a Draft
10 Environmental Impact Statement was completed on February 13, 2009 for
11 the dike stabilization project. The Final EIS or Final Environmental
12 Impact Statement was issued on July 16th, 2010.

13 We reviewed the application according to the criteria in the
14 shoreline management master program, and in general found the
15 application to be in compliance with that criteria. Based on that
16 information we went ahead and recommended approval of the, this
17 shoreline management or shoreline substantial development permit with
18 the inclusion of seven conditions which are included in the staff
19 report. That concludes this summary. I can try to answer any
20 additional questions that may have resulted.

21 **HE:** I think the record is unclear on a couple of things so I wanted
22 to ask you about the different kinds of hydrology studies that have
23 made with respect to the river. The Corps has done their work and
24 then there's something called nhc.

25 **JC:** Right.

26 **HE:** Then there's something called PIE.

27 **JC:** Yes.

28 **HE:** Now as I understand it, the PIE, uh, hydrology is basically the
29 basis for the City's application here. Is that right?

1 **JC:** They've used a lot of the Pacific International's hydraulic
2 information. They also provide the Army Corps of Engineers model um,
3 or flood evaluation, use their numbers for evaluation of the impacts
4 that may result in the surrounding area from the, uh, increase in
5 height of the dike.

6 [0:30:15]

7 **HE:** I know they've done that analysis as well.

8 **JC:** Okay.

9 **HE:** The one that isn't explained is the **nhc** which is kind of the
10 middle range of numbers. Who did that and why?

11 **JC:** Let's see, that was Northwest Hydrologic Consultants I believe.
12 I think this was, uh, I don't know a lot about that, I really don't
13 but I believe that there were three, um, the City of Burlington had
14 Pacific International do their modeling to figure out the maximum
15 flood could be. The Corps provided theirs, which was the upper end,
16 the higher volume, and then I think there was, a, the third, the
17 consultant was, uh, they took all the information and tried to figure
18 out what the flow would be and they came in the middle range for the
19 maximum flow in a 100 year flood that came in the middle range. So.

20 **HE:** I just didn't know kind of what to do with that piece of
21 information.

22 **JC:** Okay. (Chuckling)

23 **HE:** I may be, somebody can explain it, maybe it doesn't matter.

24 **JC:** I guess I thought it might have...

25 **HE:** I thought it might have been done for the GI work.

26 **JC:** I think it was done for the GI work.

1 **HE:** What the deal was, we'll find out.

2 Uh, okay, uh, in just a couple of questions of you and then I'll
3 leave you alone. On the noticing of things at this time, uh, there
4 is a notice that is published in the paper and there is a notice that
5 is mailed to people in the area as well as posted?

6 **JC:** Yes.

7 **HE:** And, uh, who does that? How can I be sure that sort of
8 activities really happened?

9 **JC:** Um, the list of people that were included in the mailings was
10 provided with the application. I sent out those mailings.

11 **HE:** So you do that?

12 **JC:** I did it all. I posted, I got it in the paper, I, yes.

13 **HE:** Okay, so you can testify those things were done with respect to
14 the April 24th hearing?

15 **JC:** Yes. Yes, absolutely.

16 **HE:** You are testifying?

17 **JC:** I am testifying, yes.

18 **HE:** And also with respect to today's hearing?

19 **JC:** Yes, that was put out in the paper as well.

20 **HE:** Alright then, let's hear from the applicant then, whatever it is
21 they may want to add to what they've already said or repeat.

22 [0:32:59]

23 **John Schultz [SCHULTZ]:** Mr. Hearing Examiner, could I go up there or...

24 **HE:** I think you're fine where you are Mr. Schultz.

1 **SCHULTZ:** Okay, thank you.

2 **HE:** Identify yourself for the record if you will.

3 **SCHULTZ:** Yes, my name is John Schultz, I'm an attorney in Burlington.
4 My address is 160 Cascade Place in Burlington, Washington. I've been
5 an attorney for the Dike District 12 and other dike districts for
6 many years.

7 **HE:** Okay assuming that you are testifying I'm going to swear you in.

8 **SCHULTZ:** Yes.

9 **HE:** You swear the testimony you give you'll tell the truth, the whole
10 truth and nothing but the truth so Help you?

11 **SCHULTZ:** I do.

12 Mr. Hearing Examiner, I wanted to make just a few brief comments. We
13 did have the gap in the record and I wanted to make sure that, um,
14 that after myself and Mr. Semrau discuss this we've filled all those
15 gaps in the record. So what I wanted to do is just summarize what
16 I've seen so far and I will try to be brief.

17 I notice the process is a little different than court. In a court
18 process people testify or submit documents, they're ruled on at the
19 time. They're either objected to or accepted or excluded. It seems
20 to be a little different process here where, um, I think we're in a
21 search for the truth here but it seems like in many of these hearings
22 kind of go afield as far as emotional comments, derogatory comments,
23 some things that are stated that are not under oath, and so that
24 prompted our submitting comments after the hearing about some of one
25 commentator we have some disagreements regarding what was factual and
26 what was emotional. So I'm hoping that my letter of April...

1 **HE:** So these letters that we, that I'm noting, that have been
2 submitted, refer to things like that?

3 [0:34:59]

4 **SCHULTZ:** Yes. So I just wanted to recap that. I don't think I need
5 to remind the Hearing Examiner but, you know, this should be
6 determined on, the permit should be determined on the facts of the
7 case. I look at this and I see just a huge amount of facts that
8 militate in favor of submitting and approving this permit. I'll go
9 through a couple of these things that are self-evident because the
10 county's discussed these and these are part of the record.

11 The EIS has been approved in July 2010 and I would submit that all
12 the comments that we're hearing today and at the prior hearing in
13 written comments have already been addressed in the EIS including
14 some of the commentator's submitted voluminous information at the
15 time of the EIS and those have been dealt with. So nothing new under
16 the sun here as far as the evidence.

17 This project has been going on since 2007 and when I say this project
18 I mean Phase I of the project where there's been some widening. Thus
19 far there hasn't been any raising of the height of the levee and I
20 wanted to make sure that the Hearing Examiner knew about the concept
21 of freeboard. There's a certain height that has to be met if we're
22 going to certify the levee. That doesn't mean that willy-nilly the
23 Dike District's going to go out and raise the levee 4 feet. It means
24 that some areas would not be raised because they're already at the
25 submission height, other areas would be filled in, other areas would
26 be raised possibly 3 feet. So, the heightening of the levee, the
27 height of the levee would increase later and the EIS looked at this
28 and said there would be some minor impacts to folks downriver but not
29 a great deal of impact. We have wetlands assessments that have been
30 approved - they're in the record, we have fish and wildlife

1 assessment and in the record by Graham Bunting, we have - there was
2 some reference that the Dike District is working without a permit. I
3 think Mr. Semrau testified that as far as the number of permits and
4 the date of issuance and the whole thing - all the permits that we
5 needed were applied for and the fill & grade permits were all
6 appropriate.

7 I wanted to, just briefly, look at oversight here. This project has
8 had just unbelievable oversight since early 2000s when it was
9 proposed. We have PIE Engineering doing engineering and Mr. Semrau
10 will discuss the issue that you just raised with the County and I'll
11 tell you what I know as far as the long and short of it. The Army
12 Corps of Engineers has done hydrology which included four historic
13 biblical floods, huge in proportion to all the rest. You see the
14 graph of these four floods stand out like this - everything else is
15 pretty much consistent? PIE Engineering did probably 4, 3 or 4 years
16 of work on this, spent many - a couple of million dollars and they
17 found that these historic floods weren't necessarily accurate so they
18 lowered those a little bit. By the evidence that we've seen in
19 various studies, uh, there was a prior geologist who walked the site
20 many years ago and so the PIE lowered those amounts a little bit. nhc
21 - and you heard Mr. Cooper refer to this - nhc was hired by the
22 county, they're the county's engineer and they took a second look at
23 this so we have the Corps up here, we have PIE here and the
24 difference really is maybe, well, it's not a great deal of difference
25 between those two. nhc was kind of in the middle. They were not too
26 hot, not too cold, but just right like Goldilocks. The Dike District
27 is okay with that, we've incorporated that in our work so we looked
28 at all these issues and there have been many millions of dollars
29 spent on nhc, and on PIE to get the engineering right and we're pretty
30 close to getting it right. As right as anybody else has gotten it
31 the last 20 years.

1 We also had oversight with Golder and Associates, Riechert and Ebey
2 Engineers were on this.

3 US Army Corps of Engineers has been a partner with us for many years
4 and you heard at the last hearing that Doug Weber - he's one of the
5 officials from Seattle District Army Corps of Engineers, he came and
6 testified, 'Yeah, this is good project.'

7 [0:39:53]

8 We've talked about the GI Study, that's somewhat of a red herring
9 because the GI Study's been in process for 17 years, they have not
10 yet identified a project, they're starting to cut down the time
11 period to 3 years now. So we're working with them but there's no
12 guarantee the GI Study will be completed or when or if it is
13 completed there will there be funding or if there is funding that
14 dike districts will or any dike district in the county will reach
15 cost-benefit ratio accepted, acceptable to getting funding from the
16 Corps. In the meantime, Dike 12 has been working on this project
17 diligently with Burlington to get levee certification. Once we get
18 levee certification that's going to affect the FEMA flood rating for
19 the entire valley. It will, uh, Dike 12 work will be a component of
20 the GI study if it gets done but I want to make one thing clear: The
21 GI Study is part of this but it is not a precondition for Dike 12
22 doing its work. There is no contingency for Dike 12 doing their work
23 as conditioned upon the GI Study. So I wanted to make that point
24 clear because I don't think that was made clear.

25 In any event, um, we've had other people testify here, we've had
26 let's say Doug Weber from the Corps, Tom Sheehan - he goes way back
27 he knows a lot about flooding, Margaret Fleek testified, Chal
28 Martin's been involved - he was employed with the County, he worked
29 on these issues for many years and then he went to Burlington and
30 he's worked on the certification. So they're a lot of people in

1 favor; I think those opposed may have, um, other issues or other
2 agendas but I would submit to you that all the evidence points in
3 favor of approving this permit as evidenced by the fact that the
4 county does recommend it. The county says 'we've looked at all this,
5 the evidence is submitted, it's consistent with all the regulations
6 and this permit should be issued'. If it's not issued that stymies
7 Dike 12 because we can't complete projects now, we can't work for
8 levee improvement, urban levee protection, the next several years, uh
9 and so what if, what if at the end of the day the GI Study's not
10 approved and we're stopped from doing work? The people in Skagit
11 County will suffer because there will not be this added protection
12 for the river and once we have this added protection we can embellish
13 that and add other protections to other areas because they'll be more
14 certainty about [the] river, the hydrology, and the certification of
15 levees. FEMA would be happy because we're doing what we need to do
16 to certify our levees.

17 So with all that I know I repeat myself but I would urge the
18 Commissioner, er, the Hearing Examiner to approve the permit and
19 there are conditions to the permit. They're fine with Dike 12.
20 We've already complied with most of those anyway but we certainly
21 would work with the county to comply with anything they're required
22 to help us get this job done.

23 **HE:** Thank you. Mr. Semrau?

24 Alright, state your name.

25 [0:43:35]

26 **JOHN SEMRAU [SEMRAU]:** John Semrau.

27 **HE:** Right. Do you swear and affirm the testimony you give in this
28 hearing is the truth, the whole truth and nothing but the truth so
29 Help you?

1 **SEMRAU:** I do. I had a fairly lengthy presentation the last time, um,
2 I have updated it in written form and will submit this at the end but
3 I want to make sure that some of these things, uh, are brought into
4 the record to this recording also. Uh, so, I did mention the last
5 time that I've been working on this project since, uh, about 1997.
6 I've been a consultant for Dike District 12 throughout this process.
7 Um, this portion of the plan, uh, that we're dealing with this permit
8 is found on pages 68 through 76 of the EIS. " This project, uh, is
9 located both within Skagit County and the City of Burlington. The
10 plan for this portion in the City of Burlington is found on pages 62
11 through 68 in the EIS. That portion is permitted under shoreline
12 substantial development permit SMA 1 dash 12 through the City of
13 Burlington. This hearing was permitted on June, or heard on June
14 20th, 2012 and the appeal period ended in July 2012. I previously
15 submitted a copy of the, uh, of the minutes from that hearing and
16 that's Exhibit 18 in the record.

17 [0:45:16]

18 I also showed you this vicinity map which is Figure 2 in the Golder
19 Report and then the red here is the area in question on this
20 shoreline substantial development permit. This area right here, this
21 is the portion that's already been permitted to the City of
22 Burlington. Of course these studies also include other areas - the
23 Three-Bridge Corridor and other things that are included in the EIS.

24 This project relates strictly to the enlarging of both width and
25 height of the existing levee in place for the 1.53 mile portion
26 within Skagit County. Project extends from the Burlington City
27 Limits at Gardner Road north to the terminus south of the Burlington
28 Northern Sante Fe Railroad on Lafayette Road. Construction will
29 occur on top of and landward of the existing levee. This project is
30 undertaken for the protection of life and property in the City of

1 Burlington and Skagit County and for maintenance of flood control
2 facilities relating to the Skagit River.

3 Okay, this is Figure 13 in the Golder Report which I showed you at
4 the previous hearing. Again, these are the areas, this is the area
5 that's being worked on and you'll see in the red, the pink, and the
6 green these are the type of cross-sections in the work that will
7 occur along this portion of the levee.

8 Then I, uh, I'm just skipping through because you can read what I
9 submit to you. I also, uh, spent some time explaining the difference
10 between certification and accreditation and also I think there was
11 some confusion about the third component which is community rating.
12 I want to make sure that we're clear on these different, uh,
13 descriptions. The certification, that's the portion that the design
14 team, the engineers, the geotechnical engineers, and things - that's
15 where we take and study the existing facility, we do borings, lots of
16 soils tests, do the engineering analysis, and do the design criteria
17 to build these levees to meet the requirements of the Corps of
18 Engineers. Then we go out and we build these levees to those through
19 maintenance and through this construction process and then the
20 engineering team we certify that this meets that criteria. That's
21 what we're proposing to do. We're proposing to take these levees to
22 the Corps' certification standard. You have a new exhibit that, that
23 apparently you haven't seen yet, that, um where the Corps of
24 Engineers concurs that they expect us to be building these uh, levees
25 through maintenance and through these construction process and
26 bringing them up to their standards.

27 Now the accreditation, that's what FEMA does. We take this
28 certification package, these 300 documents that we're gonna have, and
29 the last 10 years of work plus our construction process and we're
30 going to have 15 to 20 years of update plus the GI Study. We're not

1 gonna, we're not gonna get accreditation until after the GI Study's
2 essentially done, alright, okay but we're positioning ourselves to do
3 what we know we have to do, we have to do it whether or not the GI
4 Study is finished or not but that's bringing these levees up to the
5 Corps' standards. Um, but once we take this package, the GI Study's
6 done, then we can go to FEMA for the accreditation.

7 [0:49:57]

8 Essentially when these levees are accredited, then they're actually
9 included in the computer modeling that FEMA does or their consultants
10 but the modeling that is done to develop the flood rate insurance
11 maps or the flood insurance rate maps, the FIRM.

12 Now there's also community rating process and we don't want to
13 confuse the flood levels we say in community rating with
14 accreditation or certification flood levels. But that's a process
15 that Margaret can better explain because she's actually in the
16 process of it right now with these updates and things. That's where
17 when these levees get certified or accepted to a certain flood level
18 then they are, the community gets a break on the insurance, they are
19 able, they accept a certain level of protection. One of the goals
20 that Burlington has is to get these levees to a 25 year acceptance.
21 We know they've, they've come through flood events of from 25 to 50
22 years but until we do this maintenance work and have these levees
23 built to a better standard of the Corps', we're not going to get that
24 25 year acceptance for the rating. So we've got those 3 different
25 things out there.

26 FEMA does not include nonaccredited levees in their flood modeling.
27 Currently there are no certified and accredited levees along the
28 Skagit River. Once levees are accredited by FEMA, they can be
29 included in the hydraulic modeling that is conducted to define the
30 100-year floodplain. This is found on page 10 of the EIS. The

1 Golder geotechnical study found that the levees in general were
2 already constructed soundly enough to withstand significant flooding
3 which has been confirmed in the 1990, 1995, 2003, and 2006 flood
4 events. These floods have return intervals ranging from 25 to 50
5 years. The primary constriction in the floodway is the Burlington
6 Northern Santa Fe Bridge. This bridge can only pass 150,000 CFS.
7 That's found on pages 11 and 12 in the EIS.

8 Um, probably the best explanation of freeboard and how it's applied
9 in this situation is found on page 10 of the EIS. FEMA requires
10 riverine levees to have a minimum freeboard of three feet and in some
11 cases a half a foot in addition along the length of the tieback
12 levees and an additional foot either side of structures such as
13 bridges. In other words, the top 3 to 4 feet of this levee will be
14 freeboard to the Corps and FEMA guidelines for certification and
15 accreditation. This portion of the levee is above the floodwater
16 level and does not change the flow of the floodwaters. This is what
17 prevents the overtopping and potential catastrophic failure or breach
18 of the levee during a flood event.

19 At this point there's no proposal for a tieback levee and Burlington
20 and Dike District 12 are hopeful FEMA will consider benefits of
21 conveying some of the peak out of the system. This discussion you'll
22 find on pages 10 and 11. The tieback levees can affect upstream and
23 downstream properties. If the GI Study determines that a tieback
24 levee is required then this would also be needed to be constructed
25 before accreditation. If a high ground tieback is required, this
26 could occur to Sedro-Woolley, Sterling Hill, or Burlington Hill.
27 This is really a GI question that needs to be answered. The proposed
28 project will take from the current; the project we're proposing now
29 is going to take us from 5 to 6 years to build. If they tell us we
30 need to go even higher because of the hydrologic things that work
31 would need to occur. But even in addition to that, if a tieback

1 levee is required that's going to take additional time. What we do
2 know is these levees need to be brought to the certification levels
3 and the standards. This project has always been an integral part of
4 the GI Study. The discussion on page 10 of the EIS also answers the
5 questions raised by the County on the exceptions to the tieback
6 because a tieback will likely affect upstream and downstream
7 properties, we've been leaving this question to the GI study to
8 answer.

9 [55:00]

10 A key component - and again I'm quoting from the EIS - a key
11 component of develop, developing the levee certification project is
12 addressing impacts of the proposed action on the upstream and
13 downstream areas. The choose, the choice to proceed with work to
14 certify the current levee gives the GI another 5 to 6 years to
15 determine the bigger flood picture. Reducing the flood risk every
16 year, sorry I missed some of that, but, okay... hydrology, okay, the
17 Skagit, uh, the hydrology for this project has been performed by
18 three different entities. We've got the Corps of Engineers, the nhc
19 or Northwest Hydraulic Consultants, and Pacific International
20 Engineering or PIE. The best kind of the, and they call it the
21 synopsis, the difference of the work is found on page 44 of the EIS.

22 There's also if you look on page 9 of the EIS, you'll find little
23 more brief table um, this particular project - the choice that
24 Burlington made and it's all based on the, the conclusions of the
25 EIS, PIE was a consultant for the County at first, they came up with
26 flood numbers that differed from the Corps. Lower numbers. They
27 were a little more realistic numbers in my opinion but that's not to
28 say being a little more conservative than that you can still have
29 flood events greater than a 100 year event. Northwest Hydraulics or
30 nhc was the next and I think they're still the current consultant for

1 the county, um, they essentially came in between the two. They said,
2 you know, made some adjustments on the PIE numbers but still came in
3 below the Corps of Engineers. Now I did submit to you and its
4 Exhibit 19 in the record, I submitted a draft report dated January
5 12, 2012 from **nhc**. Now it's my understanding **nhc** at that time they
6 were using the Corps' hydrology. The County and the GI Study moving
7 forward is using those larger numbers. This project because of the
8 decisions made initially - we've gone with the lower numbers partly
9 because we want to reduce as much risk as we possibly can to the City
10 of Burlington in this floodplain area and to do that we don't feel we
11 need to build it to the higher level now. We can wait until the GI
12 Study's done and if they tell us they're going to use those Corps
13 numbers which is very likely then we will be raising the levee. The
14 levee design has, is incorporated so that it can accommodate that
15 additional 2 or 3 feet, whatever it ends up being to meet the
16 certification and the accreditation at that higher levee standard.

17 But all this project is about is reducing the risk to the City of
18 Burlington and actually Dike 12 when you start looking at the
19 floodplain maps especially the Dike District maps, if we breach then
20 Dike 1's affected, most of the, every dike district on the west side
21 of the Skagit River is going to be affected because we're upstream of
22 them. If we, if our levees fail, there's other dike districts that
23 are going to be affected.

24 [1:00:00]

25 Okay, this is the important part of the, um, EIS showing the effects
26 of this proposed project so this is found on page 47 of the EIS.
27 This is the effects of an uncertified levee using the Corps of
28 Engineers' hydrology.

1 This map is found on page 48 of the EIS, this is the uncertified
2 levee using the PIE hydrology. The difference between the two is
3 basically most of the area floods and there really is no difference.

4 Okay, this is the - found on page 49 of the EIS - this is the effects
5 of flooding, you can see the flooding through the Gages Slough. This
6 is a proposed certified levee using the PIE hydrology. This is the
7 project that we're proposing at this time.

8 This is found on page 50 of the EIS, this is the same project that
9 we're proposing but the effect of this levee with the Corps
10 hydrology. As you can see there, a large portion of Burlington under
11 the PIE hydrology is affected by this, the higher flows and the Corps
12 hydrology.

13 I also just wanted to note we spent an awful lot of time talking
14 about the 100 year events here, something that we've not experienced,
15 um, and most of these events are, that we've experienced are you know
16 25 to 50 year events so we're talking about a theoretical event.

17 Okay this map is found on page 57. This is a base flood elevation map
18 and it shows the impact upstream based on the proposed project and
19 this is to the PIE hydrology. It's showing a .1 foot base flood
20 elevation impact and this is alternate number 2 that we've, that was
21 included in the EIS and this is the impact by the PIE hydrology for
22 the upstream. Now I did and the EIS was completed in 2010 and I
23 submitted that January 2012 Northwest Hydraulics report prepared for
24 Skagit County. Now that was using the Corps' hydrology and that's
25 your Exhibit 19. In that report that called, it was called the
26 northeastern levee, or the Burlington Urban Levee and they performed
27 analysis for both the 50-year and 100-year events. On page 16 the
28 results were .1 foot and .4 feet respectively at the Sterling area.
29 That's for the 50-year and the 100-year events. I also wanted to
30 note that study also included projects; the Mount Vernon floodwall

1 which is now under construction. The measures considered in the
2 final work by Northwest Hydraulic Consultants were defined in a
3 series of meetings of the Skagit River Flood Risk Management GI
4 Project Delivery team and discussions with several of the project
5 stakeholders. None of that work has been held back from all these
6 stakeholders that have been involved in this project from the start.

7 [1:05:10]

8 Are you just confirming that it's Exhibit 19 there? Okay?

9 Have I answered your question in regard to the hydrology?

10 **HE:** Yes

11 **SEMRAU:** Okay.

12 Alright, in summary, and I'm going to start with quoting again page
13 11 of the EIS, in the case of the riverine levee and the Skagit River
14 delta area, the protection goal for Burlington is to have a levee
15 system that will solidly withstand the 100-year flood event, lower
16 base flood elevations in the City, remove a percentage of the City
17 from the 100 year floodplain, and ensure that the established base
18 flood elevations adequately communicate the best estimates of the
19 100-year water surface elevations to property owners. I think that,
20 that paragraph summarizes our project. You know, we're proposing the
21 PIE hydrology because we felt at the time that was the best estimate
22 of the 100-year. That's a reasonable 1st target for us to be spending
23 the public's money to build these levees to. If we're told we need
24 to go higher, we will go higher. If we're going to use the Corps
25 hydrology which is pretty apparent that the GI Study is using that,
26 that's what we'll do.

27 The, we've got a project here that removes a good portion of the City
28 from the flood maps, um, we can't build these things in 1 or 2 years.

1 We got 5 to 6 years here just to do what we've got, we know we've got
2 more work, we need to continue to do work every year to continue to
3 reduce the risk to these areas. Essentially you have a levee
4 improvement project that proposes to minimize the upstream and
5 downstream impacts on existing conditions while maintaining or
6 enhancing current levels of flood protection in achieving FEMA
7 accreditation of a segment of levee. Most of the new height is
8 freeboard required to certify the levees to the current level of
9 protection, it has no more impact on the upstream and downstream
10 portions of the system as indicated by the nhc 2012 report. The 20-
11 foot top will provide more stability during an overtopping situation
12 and the levee can be further raised in the future to meet the crest
13 of the higher Corps' hydrology. This alternative of enlarging, of
14 enlarging the upstream levee will not remove the risk of flooding,
15 however it will reduce the risk of a catastrophic levee failure and
16 make the specific flood risk for each individual property easier to
17 quantify through modeling of surface water elevations at various
18 river discharges and that's from page 17 of the EIS. So in regard to
19 this actual permit, the Shoreline Substantial Development Permit, I
20 did comment in regard to page 2 that the parcel numbers weren't
21 complete. I did submit additional, um, exhibit letter that
22 summarized those as of the date that I did that work. We have been
23 in the process of doing, continuing with some purchases and exchanges
24 of land so I can't guarantee that they're going to be the same next
25 week. But we will, um, they have been updated.

26 **HE:** So this lists the parcel numbers? Is a list of those parcels
27 that are affected by this project?

28 **SEMRAU:** There they list, yes. That are, that are, that the levee is
29 on or contiguous ownerships of the, of the, uh, dike district. Now
30 you did have a question in regard to the, you know the mailings and
31 things and that and the process we prepare that for the county and we

1 give that to the county. The process that we used is we used the
2 title company to prepare those for us and then we went individually
3 to the assessor maps and pulled up every one of those parcel numbers
4 and confirm that everyone was included. Now we did that, we did an
5 update of that before this last, before this third mailing. This was
6 the third time we mailed out to that list. The first list was
7 prepared, updated in October and then the 2nd list was I guess the 1st
8 weekend, the middle of May that we re-updated that list.

9 [1:10:10]

10 Developments scheduled, previously we said construction would start
11 mid-July 2013 that's not going to happen. [Chuckling] So we're
12 probably middle of August at the earliest, if not next year um, so,
13 we'll wait until we get your findings before we can really update our
14 schedule but we have, we're kind of in a bind getting fill and grade
15 permits and NPDS permits and things so it will start as soon as we
16 can and we have the weather. Pretty much this work occurs from July
17 to September and that's when it will occur as we finish this
18 permitting process. So I also commented on number 11.

19 Um, my comment there because we had submitted the 2012 Northwest
20 Hydraulics, we felt that section should reference that because that
21 was part of our materials that we had submitted.. Number 13 on Page 10
22 I wanted to make sure that the wording in that section does not
23 preclude us from being able to get the 1 year extension that says 5
24 years. Current code language is, and also the, can't remember if
25 it's the WAC or the RCW, it's 5 years plus a 1 year extension - we
26 certainly have enough work under this permitting that we would want
27 to make sure that we have that option for that 6th year and that's
28 from when we pull the permit so if we get into a situation where we
29 can't effectively do work this summer we're going to pull the permit
30 next summer and we need that five to six years to do that work.

1 I also, just briefly, in summary, those exhibits 22, 23 and 24, were
2 letters prepared by myself, um, one was the parcel number
3 discrepancies, um, one was in regard to fill and grade permit
4 0702067, that permit I mentioned in the previous hearing that we had
5 applied for the extension of that permit - we have now received that
6 extension and that permit will expire November 14th, 2013 - again
7 that's new information since the previous hearing and since I
8 submitted that last letter so but that permit has been extended and
9 that work will continue this summer. I also submitted, there's a
10 summary of our permitting activity within this area - there was some
11 other testimony about areas outside of this particular area and we're
12 just trying to limit it to here. We do an awful lot of, we permit
13 everything that we're expected to permit here so unless you have any
14 other questions...

15 **HE:** Uh, only one. Just going back to the very beginning of your
16 testimony. You were trying to tell me what the difference between
17 certification and accreditation are.

18 **SEMRAU:** Uhum.

19 **HE:** Certification is, you went into how it has to do with how its
20 designed and somebody can take a look if its properly built from an
21 engineering standpoint. Who does the certifying - is that the Corps,
22 is there a, do you get certification from somebody?

23 **SEMRAU:** No, it's the engineering design team.

24 **HE:** Okay, it's a team of people that are working on the levee.

25 **SEMRAU:** That's correct, it's the same team that has prepared the
26 plan, and, and, there's a Corps standard and we've studied it and
27 designed it, the improvements to meet that Corps standard. Now the
28 District needs to build it.

1 **HE:** Uhum.

2 **SEMRAU:** Then once it's built and it actually meets that standard that
3 was outlined in the, in the design - then the engineering team is the
4 one that certifies it. The Corps of Engineers no longer certifies
5 levees. They used to in the past. But they don't anymore.

6 **HE:** Okay, so, if then assuming that all happens then you take that
7 certification that the engineering team has given you to FEMA and
8 they then look at the question of accreditation, is that right?

9 **SEMRAU:** That's correct.

10 [1:15:10]

11 **HE:** That, sort of, two terms, two terms of different meaning.

12 **SEMRAU:** Right and, but then again if again you get to the GI Study,
13 we need to be consistent with the GI Study, so if the height isn't
14 correct, I mean, once we've certified it to the level we have
15 designed today.

16 **HE:** I understand that if the GI comes up with something else, you may
17 have to go back to the drawing board.

18 **SEMRAU:** Right. But the City after we certify it can take it for
19 community rating so there's, there's still every part of this process
20 is going to give the public benefit. That's why we're doing this.

21 **HE:** Alright, thank you very much.

22 Anything else on behalf of the applicant there? Sir?

23 **HE:** Okay, now this is a written version of basically of the kinds of
24 things you were just telling me?

25 **SEMRAU:** Yes sir.

1 **HE:** Okay. So what exhibit number are we up to?

2 This will be exhibit 32 and we'll admit it to the record.

3 Now, sir would you state your name?

4 [1:16:55]

5 **Dan Lefeber:** [DL]: Yes, my name is Dan Lefeber, I'm the Operations
6 Manager for Dike District 12.

7 **HE:** Okay let me swear you in. Do you swear affirm the testimony
8 you'll give the truth, the whole truth, and nothing but the truth so
9 Help you?

10 **DL:** I do.

11 **HE:** Okay.

12 **DL:** Okay, I have because the question has come up - and I thought it
13 might based upon the last hearing and these are copies of recent, the
14 notice mailings that came to the Dike District because the Dike
15 District owns many of the parcels adjacent to and where the levee is
16 situated so right in the corridor of the project that's proposed and
17 so I have substantiation as far as that mailing took place. Uh, if
18 there's a question you know, for the properties all in general, not
19 just the ones that the dike district own. But if you would like that
20 as an exhibit, I'm not sure.

21 **HE:** It's up to you.

22 **DL:** So...

23 **HE:** It would be fine.

24 **DL:** Okay, then uh, I'd like to again, uh, show on a map. I brought a
25 larger rendition so maybe it will show a little bit better those
26 parcels that these mailings connect to. So that there's a good

1 understanding of the lay of the land and the impacts of the project
2 on the neighboring lands.

3 **HE:** Okay you have a map?

4 **DL:** Yes, I do.

5 **HE:** Okay so we'll call your mailing notices [unintelligible] Exhibit
6 33 and then the map will be Exhibit 34.

7 **DL:** Okay. Would you like them now or would you like me to show the
8 map and then bring them to ya? Okay?

9 **HE:** You, uh, you have more testimony while you're there?

10 **DL:** Not really more testimony. I could either show the map on the
11 overhead or just include it and you can recognize the parcels?

12 **HE:** Show it to me and I'll take a look at it.

13 **DL:** Okay, great.

14 [1:19:10]

15 [COLLOQUOY]

16 **HE:** We don't need to make them a separate exhibit.

17 [COLLOQUOY]

18 **DL:** South Gardner Road.

19 [UNINTELLIGIBLE]

20 **HE:** Okay, great. So what the witness was showing me is properties
21 that the District owns on the map that are within the project.

22 **DL:** ...And show clearly Dike District 12.

23 [1:20:07]

1 **HE:** Okay, great. Alright, so, thank you.

2 [UNINTELLIGIBLE]

3 **DL:** A bit more time to speak.

4 **HE:** Okay, sure.

5 **DL:** Okay, so I would also like to state for the record that I
6 believe, uh, the dike district's mission all along is to have
7 consistent effort towards improving public safety for lives,
8 property, infrastructure, I think we're all pretty aware of what
9 happens to the community if a little infrastructure is damaged these
10 days. Uh, that we desire to do our best to protect those types of
11 things - as mentioned earlier because of the weather and what happens
12 with soil moisture for the materials being imported and existing
13 conditions at the site, we usually only have 2 to 3 months a year so
14 we have to, um, be as efficient as we can and take advantage of those
15 work window opportunities to have this consistent effort. That's why
16 it's been ongoing for many years as the dike district was originally
17 formed in 1895 by farmers to protect farm area and the surroundings
18 and so it's, uh, you know, it's just this consistent effort that's
19 been ongoing and I don't think, um, is really out of line with what
20 the district was formed back all those years ago when - and is
21 continuing to do. I think that really is the gist of it. Thank you.

22 **HE:** Alright, thank you very much.

23 [1:22:30]

24 Uh, alright if that concludes the applicant's - does anybody have
25 something else?

26 [UNINTELLIGIBLE]

27 **Lorna Ellstad [LE]:** I'm with Dike District 12.

1 **HE:** Kinda speak into the mike, it's important that the machine hears
2 you.

3 [Colloquy]

4 **HE:** Okay, I got 'em both wrong. Uh, alright. Let me swear you in if
5 I may. Raise your right hand and swear the testimony you give you'll
6 tell the truth, the whole truth and nothing but the truth so Help
7 you? Okay.

8 [DEAD SPOT 1:23:22 to 1:23:45]

9 **HE AIDE:** This one's not picking up.

10 **LE:** This one's better.

11 **HE AIDE:** Yes.

12 **LE:** Okay, Thanks Betta.

13 Because of differences in hydrology as has been discussed today it
14 kind of delayed, funding delayed, but, uh, I would like to point out
15 that the community has been utilizing information from this GI and
16 I'll just throw out there since 1999 when they completed a work group
17 where a lot of the community and particularly dike district
18 commissioners were involved and Dike 12 started to purchase
19 properties in anticipation of some of these larger projects - City of
20 Burlington put a building moratorium in place and, uh, Dike 3 down
21 below Mount Vernon utilized Corps information, water surface
22 elevations to establish a new levee height when they installed a
23 setback levee. The City of Mount Vernon utilized Corps information,
24 GI information, when they, um, began designing their floodwall - they
25 currently have a four-foot extension on their levee system as well.
26 It's the enhanced brick concrete wall.

27 [1:25:00]

1 **LE:** Looks a little different than what the structure we're proposing
2 is but again that structure is parallel to the flow, and the
3 structure we're proposing is directly perpendicular to the main
4 course of the Skagit River - a breach at that point has the potential
5 to capture the entire river and you know, then it's not always so
6 easy to put things back as we're finding.

7 I'd also like to mention a couple other projects that have utilized
8 Corps or the GI information to date. Um, the, any, I don't want to
9 say, any improvement work but the majority of the improvement work
10 completed by other districts have engaged the county technical staff.
11 In particular when Torey Nelson was working on the GI and myself
12 would provide the water surface profiles, developed by the GI, we
13 would work with them to establish a levee profile and in particular
14 in the rural levees we do not put this freeboard - the purpose of
15 this Skagit GI was to try to provide 100 year protection for our
16 urban areas and less than that to the rural areas.

17 A point I'd like to make on that is that when the GI is completed the
18 purpose of the GI from the federal standing is to establish a federal
19 interest or the economic interest in assisting a local community
20 provide flood protection. They will do so at whatever the benefit-
21 to-cost ratio supports. So when they finish which is currently what
22 they're attempting to identify, we've been looking at damage areas
23 and they're currently looking to identify the benefit area from the
24 proposed alternatives and then they will come up with a curve that
25 will establish at what level they will participate in funding those
26 projects. If at the end of the day, worst case scenario for our
27 urban areas that the Corps determines that they can't justify 100-
28 year protection - there's two things the community could do:

29 1. They could accept that.

1 2. Or they could then buy up the project and assume 100% of the
2 cost of the difference in that.

3 So as a member of the responsible party, as a dike district
4 commissioner, we are taking our annual budgets and I'm sorry that
5 Steve Sexton had to leave but working as diligently as we can to
6 participate at a norm level when projects are identified, when areas
7 have been determined to be beneficial or an integral component of
8 whatever the final alternative would be. That is where we're at and
9 I'd like to thank our engineer John Semrau for going through some of
10 those alternatives because there is an alternative in this levee cert
11 project that could extend and I noticed the Corps has actually picked
12 one of those alignments as part of their alternative that would then
13 make a determination on where the rest of the water goes - I believe
14 the current modeling is 52,000. Existing conditions would leave the
15 system at Sterling. But our District and our City - going to speak
16 for Burlington - that has chosen to wait and participate in the
17 bigger study to determine what is the cost-effective, most beneficial
18 to our community on how - and Sterling is the big unknown.

19 So the other thing I would like to, um, mention is that, um, that, 1
20 other project, the Anacortes Water Treatment Plant also utilized
21 Corps information, the GI information when they put in their \$60
22 Million dollar improvement, and so they too, um, couldn't really wait
23 for the GI to maybe reroute water away from their structure but had
24 to move forward because economically, risk-wise, sometimes you just
25 have to do these things and they have too been collecting kind of a
26 war chest to get that done. As our engineer spoke, we've been
27 working on this project acquiring land since 1999 we still are
28 probably halfway there when it comes to this construction phase where
29 we can start constructing this.

1 I'd also like to address the FEMA risk mapping that's going on. I
2 think most of the folks in this room have seen some type of
3 presentation on what the preliminary new base flood elevations would
4 be. They're significantly higher than the current ones and I know
5 one of the concerns in this project was, 'Does this project raise the
6 base flood elevation by a foot and then be in violation of the flood
7 ordinance I believe?'

8 [1:30:20]

9 The new flood, base flood elevations would be 3 to 4 foot higher in
10 Burlington and even higher in this location. By constructing this
11 project, and this community was very instrumental in getting FEMA to
12 readdress their levee mapping policy, because they completely ignored
13 these levees that have withstood some significant flood events and by
14 getting this type of geotechnical work in place and levees
15 constructed we can ensure that our community is able to have this
16 levee represented in those flood models not at the 100 years
17 certified level but at the current level of protection. Currently
18 their mapping policy removes the entire levee so that is the
19 significant benefit to the community and it also is able then to
20 provide a known geotechnical structure.

21 One of the things I've been back to DC several times and I'm part of
22 the national levee task force. I'm also a member of the national
23 levee safety committee and we've been looking at ways to utilize both
24 local information, utilize Corps information under PL 84-99 program
25 so that we can start building a database so they can make a
26 determination on what level existing levees will be included in the
27 mapping. In particular for our community that is a real big deal.

28 Ummmmmm, I think I've covered - and again I think I heard at some
29 point earlier in the conversation that hydrology and hydraulics was
30 kind of being used interchangeably. I just wanna make note that

1 while there are some disagreements over the hydrology, it's the
2 hydraulic modeling that has been performed for this project.
3 Basically, in a nutshell difference hydrology is how much, hydraulics
4 is how deep and where and that this project has had multiple
5 hydraulic modeling runs performed - nhc through the county's contract
6 is the Corps' contractor as well. So we think we've kind of landed
7 on some common ground on how to address this but one other reason for
8 the amount of freeboard that is required by FEMA is that there's an
9 8% uncertainty band in all of this data that we would like to take as
10 you know, verbatim that we have something we can count on. But an 8%
11 uncertainty band when you're looking at the 235,000 CFS is a
12 significant degree of uncertainty and that is one of the other
13 reasons why you want to have this freeboard and the reason why we're
14 also going with the long overtopping slope is in the event we do get
15 some overtopping our levee can withstand and doesn't start on a
16 breach that would widen at a rate of like 100 feet a minute. I mean
17 they have calculations on that and we would end up with the entire
18 river running through on out, flooding La Conner.

19 Oh, that was one other point I wanted to make on the GI that it's
20 been a two-way street on the technical exchange and that as part of
21 the GI, we incorporated the City of Sedro-Woolley's sewer treatment
22 plant ring configuration that they've been kind of looking at over
23 the last 10 years. We've incorporated the ring dike that Dike 12 has
24 been working with United General Hospital to develop in the past -
25 the GI incorporated again the floodwall, they incorporated all the
26 soil work, the hundreds of thousands of dollars' worth of soil work
27 that has been performed by the City of Burlington and Mount Vernon.
28 They incorporated La Conner's flood study on the ring dike that they
29 are proposing, and then eventually they incorporated the Anacortes
30 Water Treatment. So our community has had this hand-in-hand working
31 relationship with the, uh, well the Corps-slash-County GI and that it

1 hasn't been this wait and you're going to get this mystery, I refer
2 to it as the 'silver bullet' and so I see our community continuing to
3 work through this, to support our Congressionals as we work to finish
4 this and get it approved and get it authorized but you know, right
5 now, we're in a situation where we can.

6 [1:35:18]

7 I think this bridge and I thank Dan for bringing it up, we can't wait
8 and have, expect to have someone come in with a large checkbook and
9 fix things because if that was at all true we would be getting a new
10 bridge over I-5 that was longer in length to accommodate an eventual
11 flood risk reduction project similar to how the Mount Vernon bridge
12 was built so that there were additional piers put, so it could be
13 extended if necessary but that's just not a current, a realistic
14 immediate financial prospect and that we're going to have to
15 continue. This is a lifelong endeavor, I personally have been
16 involved with flood fights for, I think I was probably about 6, 1st
17 time - my Dad went to, living on Fir Island and my father was Virgil
18 Ellstad was involved with levee repairs for probably 30 years before
19 I went to school to be able to have some technical input into solving
20 the problem. So I'd also like to ask if there's any questions you
21 think I could help answer or...?

22 **HE:** I don't think so.

23 **LE:** Alright. Okay, thank you for giving the opportunity to enter
24 some technical information into the record.

25 **HE:** Alright, anybody else on the applicant team wants to speak? If
26 not, uh, let's take 5 minutes to relax and then come back and we'll
27 hear public testimony and then we'll finish up, thank you.

28 [1:37:06]

1 **HE:** I don't know what's happened to our [COLLOQUOY]. Uh, yeah.
2 [UNINTIPELLIBIBLE] Council and the Engineer. We can start.
3 [1:37:25]
4 **HE:** Okay I'm calling the hearing back to order and this is the time
5 for public testimony, so anyone who wants to be heard on this matter
6 should come up there and give their testimony at that microphone. I
7 guess we have a gentleman who beat you to his feet.
8 **Larry Kunzler ("LK"):** Mr. Examiner, you want to swear me in before my
9 name or...
10 **HE:** Just tell me who you are.
11 **LK:** Okay, yeah. Do you wanna.
12 **HE:** I will swear you in. Do you swear or affirm that the testimony
13 you are about to give is the truth, the whole truth and nothing but
14 the truth, so Help you?
15 **LK:** Absolutely sir. I have some exhibits I want to enter.
16 **HE:** I still need your name.
17 **LK:** Larry Kunzler. I thought you said you knew who I was. I do
18 have exhibits I would like to submit into the record.
19 **HE:** Okay.
20 **LK:** They are in the order that I will be submitting them.
21 **HE:** Where are we at?
22 **EXAMINER AIDE:** The next exhibit would be 35.
23 **HE:** Alright, Mr. Kunzler, go ahead.

1 **LK:** Thank you sir. In late 1999 I was approached by the Chairman of
2 Dike District 12. He was a farmer and a good man and a good friend.
3 He told me that he had found some "mystery mud" while putting in a
4 keyway project and he knew I was working with geologists down in
5 Kelso on that huge landslide that took place where over 57 homeowners
6 lost their homes because a city councilman fired a geologist who told
7 him not to build there. So he (Chuck Bennett) gave me a huge chunk of
8 this mud, it was like the size of a soccer ball, I took it and I gave
9 it to the geologist, the same one that is working with Dike District
10 12 now.

11 [1:40:00]

12 He stated that "the hand specimen is composed of a yellowish gray,
13 weakly indurated, silt size, non-plastic, monolithologic sediment. I
14 guess that means a lot to Mr. Cooper, it doesn't mean much to me.
15 Apparent glass shards are visible under the handheld lens. No
16 stratification was observed. Based on these observations, the sample
17 appears to be a volcanic ash deposit or tephra. I brought an actual
18 jar of the mud, this is the jar of the mud in question that he found.

19 **HE:** I don't really know how to deal with a jar of mud.

20 **LK:** I don't either. I also brought, this was given to me, a sample
21 by the Anacortes Water Treatment Plant on August 18th, 1992 when the
22 Skagit River ran chocolate brown and all of that material that came
23 down was from the Chocolate Glacier on Glacier Peak. If you feel the
24 difference between the two, the problem I have with the Golder Report
25 that the Dike District relies on, all 393 pages of it, is that it
26 only mentions the word lahar twice. In one of those that they
27 mention the lahar it states, anyway it says that they treated the
28 entire valley floor as glacial, I mean not glacial but volcanic
29 outwash. In other words they did not make a distinction between the
30 actual volcanic lahar and the stuff that comes down the river from

1 the volcano on every single flood event which is what this little jar
2 would be and then this would be the actual lahar that Chuck had me
3 get tested for him.

4 Five days after I got that letter Chuck Bennett asked me to give a
5 presentation to the Skagit River Flood Control meeting on what I
6 found. You can see that begins on page 6. It says, "Kunzler then
7 presented a short presentation on the volcanics of the Skagit River
8 floodplain. He had been contacted by flood committee Chairman Chuck
9 Bennett about some strange "mud" Chairman Bennett found while working
10 on a keyway project in the vicinity of the Burlington Sewage
11 Treatment Plant. I had mud analyzed by geologist who found the mud
12 to be "volcanic tuff" or in translation for a laypersons terms, it is
13 a volcanic lahar. It's, what I did was and I won't do it here today
14 but I used my Mr. Rodgers interpretation, I took the mud out, put it
15 into my hand, shook it to show the liquefaction part and I know that
16 Mr. Cooper you have no idea how envious I am of you having a geology
17 degree because Skagit County is one big geologic happening. You've
18 got everything here, you've got active earthquake faults, you've got
19 volcanoes, you've got floods. In my public presentations I always
20 use the comment that Mother Nature has left Her footprints in the
21 sand, walk in Her moccasins. She will show you your past, and in so
22 doing She shows you your future.

23 I found it interesting in the FEIS that they gave some smart-aleck
24 answer to some of my concerns on the Draft EIS and it was said that
25 "There is lots of information out there about the geology of the
26 area. See Beget - B-E-G-E-T is how I think you say it - and
27 Dracovich. What evidently they don't know is that I had been in
28 personal contact with Mr. Dracovich over 13 years ago. He gave me a
29 portion of his study for DNR before it actually was released
30 publicly. I quoted from it in this, at this meeting, "The sediments
31 contained abundant dacite fragments that appear to be lahar runoff

1 deposits. These deposits are exposed in 10 to 50 feet high terraces,
2 you can see them in the, the county had a project, they were looking
3 at buying out Cockreham Island, and it shows these lahar deposits all
4 along Highway 20. It goes on to say that, the floodplain, the lahars
5 underlies the floodplain that sits the Cities of Burlington, Sedro-
6 Woolley, Lyman, Hamilton, and much of the agricultural area of the
7 lower valley. We have traced the stratum its both exposed and buried
8 to the vicinity of La Conner. So this is something that's missing in
9 the Golder Report that the Dike District's relying on, they should
10 have located the lahars especially near the sewage treatment plant,
11 and under Dike District 12's levees.

12 [1:45:05]

13 Okay enough about mud. So, I'm probably going to be the most
14 controversial speaker you have here today. It's a hat I'm used to
15 wearing. There's a huge question as to whether or not any of Dike
16 District 12's levees should be raised because of one word: Floodway.

17 This actually first came to the valley in 1981 when we had a very
18 controversial building official in the City of Mount Vernon, he wrote
19 to FEMA if the designated floodway included all of our existing
20 dikes, would we be able to maintain the dikes, repair the dikes, or
21 increase the dikes as needed? Later on July 17th 1981 FEMA responded,
22 'If a floodway is designated in the future and the dikes are included
23 in that zone, you would be able to maintain and repair the dikes to
24 their present profile elevation. Raising the dikes is another
25 matter, hydraulic studies of the river have shown that increasing the
26 height of the dikes would cause an increase in flood levels upstream.
27 On that basis, your ordinance would have to prohibit such
28 improvements.

29 Later, 1982 FEMA wrote a letter to the Mayor of the City of
30 Burlington, 'Concerning floodways in the Skagit River Lower Delta, we

1 have ruled out floodways developed either through the conventional
2 equal conveyance methods or through unsteady state flow modeling at
3 this time. Instead we had decided to build on and refine your
4 thoughts regarding density criteria in conjunction with establishing
5 a minimum floodway that will encompass the channel and overbank areas
6 including the levees.

7 In April 1982, FEMA had hired Dames & Moore, to do the hydraulic
8 analysis for the density floodway. The instructions Dames & Moore
9 received was "as a result of meetings held in the Region 10 during
10 the week of March 15th 1982, it was determined that a conventional
11 floodway would not be established for the communities within the
12 Skagit Valley area. These include Skagit County, the Cities of
13 Burlington, Mount Vernon and possibly others. These communities
14 should show floodways delineated to include only the main channel of
15 the Skagit River *and the levees*.

16 At this time I think it's appropriate I explain to you the difference
17 between a conventional floodway - I don't know how familiar you are
18 with Skagit County but take Hamilton and there's a mountain, there's
19 a land, the town, the river, more land, and then, other mountains on
20 the other side. They take that floodplain the conventional way they
21 squeeze it together until the water surface raises one foot and then
22 everything in between that, is prohibited from putting landfill in
23 that area.

24 This is the next exhibit, is the Dames & Moore Report in December of
25 1982. The good ole boys in Skagit County at that time had thought
26 that they could put a floodway using the density criteria and leaving
27 25% of each parcel of property open and then they could develop the
28 rest of it.

29 On the next page, page 9 it states the density criteria - now
30 remember they took into consideration the entire lower valley. The

1 density criteria varies from 5% to 14% depending on the flow path and
2 the collapse size. For example, suppose a landowner wishes to
3 construct a building on a 1-acre lot in Flowpath 4, the table shows
4 that the owner can raise a maximum of 10% of his property. So to
5 make floodplain management regulations easier to enforce a 10%
6 density criteria, outflow of all lot sizes is recommended. Needless
7 to say, that was not adopted in Skagit County.

8 [1:50:01]

9 I do think for purposes of the record, that if you drive over to
10 Burlington and just look east of Interstate 5 you can determine that
11 more than 10% of that community has been developed.

12 In August of 1983, FEMA and I don't know what the proper terminology
13 here, if John or I were in court we would ask you to take judicial
14 notice but I'm asking you just to recognize that all these letters
15 I'm going to submit to you from this point on come from Washington
16 DC, they made the decision to designate the levees as part of the
17 freeway, er, as part of the floodway. They said that because of the
18 lack of adequate topographic mapping and field survey data, it is not
19 possible to determine the distribution of flood flows between
20 Burlington proper, Gages Slough, and overbank areas. The 63,000 CFS
21 discharge identified by John Norman who was a hydrologist with the
22 Corps of Engineers before he had his own firm, hired by the Cascade
23 Mall Developers, is not supported by any scientific or technical data
24 and must be considered as speculation. But that didn't stop
25 Burlington from building the Cascade Mall. From a qualitative
26 perspective we agree with your conclusion Gages Slough is a
27 conveyance area which should be protected. Then it goes on to say
28 part of this requirement will be to ensure no new construction
29 improvements or other development including fill is permitted in the
30 zones of the flood insurance rate maps unless it is demonstrated that

1 the cumulative impact of a proposed development when combined with
2 all other development will not increase the water surface elevation
3 of the base flood more than one foot *at any point in the community*.
4 That last part is perhaps the most important - because if you raise
5 your levee to 100-year event, are you not raising your, the level at
6 that part in your community and then the ramifications of that is
7 *you're done building*. Burlington will not issue another single
8 building permit. So they haven't really thought this through the way
9 they should have.

10 December 15th, 1983 again it says Section 60 c 3 10 of the program
11 regulations, that is quoted substantially throughout the EIS and
12 again the most important thing to me is that it states the base flood
13 at more than 1 foot *at any point in the community*.

14 February 1st, 1984 letter to the Mayor of the City of Burlington:
15 Conventional floodway analysis was not consider appropriate due to
16 the unpredictability and the variability of the flow paths between
17 various flood events which is complicated by uncertainties about
18 where the levee failure will occur. The sequence of barriers and
19 volumes of flow thus only lands within and including the Skagit River
20 levees were designated as floodways in the conventional manner. That
21 throws us back to the example I gave you in Hamilton that no fill is
22 allowed in the conventional manner of determining a floodway. I
23 raised the question about who's the legal authority, well I'm getting
24 ahead of myself, however FEMA recognizes the majority of the overbank
25 flow occurs over Interstate 5 in the vicinity of the George Hopper
26 Interchange between Gages Slough and the drive-in theater, the drive-
27 in theater is now the Target store. From near Edison High School to
28 just south of Cook Road, there's all kind of developments that have
29 been put in that location as well. Approximately 80% of the total
30 overbank flow crosses the highway in those segments.

1 April 9th, 1984 a letter to the State Department of Ecology, they
2 objected as I objected to FEMA's flood insurance study and they state
3 the elevation of the [UNINTELLIGIBLE] intersection and they're
4 talking about downtown Burlington is 34 feet mean sea level which
5 would make the flood elevation be about 37 feet. The FEMA map showed
6 the elevation of the 100-year frequency flood of 240,000 cfs to be
7 about 31 feet in that location.

8 [1:55:25]

9 On May 22nd, 1984 again FEMA from Washington D.C. wrote to the Mayor
10 of the City of Burlington. This was a response to the Department of
11 Ecology letter, "Since the Skagit River levees are inadequate to
12 contain the local 100-year discharge of 240,000 CFS our hydraulic
13 analysis was performed as though the levees did not exist. That's
14 always been a huge contention of mine. It's why when the Burlington
15 Planner makes statements in the Draft EIS as well as at many public
16 hearings I've attended that FEMA adopted a project failure point of
17 Sterling, that's untrue because they determine their flood elevations
18 as if the levees did not exist at all. So when the City of
19 Burlington issues letters to developers that they can tell the people
20 that buy these homes that they're out of the 100 year floodplain when
21 they're really only maybe 100 yards away at the most from the levee
22 itself - uh, those levees break and those people are definitely in
23 the 100 year floodplain.

24 FEMA's on the next page, paragraph 6, FEMA's analysis which assumes
25 failure of all levees along the Skagit River therefore results in
26 lower elevations for the Avon area. Any given area near a levee that
27 fails may experience flooding more severe than that shown in the
28 preliminary FIS, Flood Insurance Study.

29 November 1st, 1984 conventional analysis floodways are to be kept free
30 of encroachment that would include the levees themselves. Here's a

1 memorandum for the record, fast forward to 1996 from the Joseph
2 Weber, the program manager, he used to be a hydrologist with FEMA,
3 then he went to work as a floodplain manager for the Corps of
4 Engineers, then he went back to work for FEMA and now he's retired
5 but this was pulled out of the Corps' files. Conventional floodways
6 were not adopted for the entire delta downstream of Sedro-Woolley and
7 this area of the Skagit River proper, the levees confining the
8 channel and adjacent areas have been designated as floodways. In the
9 vicinity of Whitmarsh Road and this is when I first started
10 complaining about 4 feet of fill on the riverward side of the levee
11 along Whitmarsh Road. That wasn't there during the 90 flood event.
12 What the dike district has never told the residents of the City of
13 Burlington is that the floodwaters were in the process of crossing
14 Whitmarsh Road in that location so I understand them wanting to put 4
15 feet of fill but they're still putting 4 feet of fill in the
16 floodway. The reason I know that the water was crossing is because I
17 drove over there and you can tell exactly where the high water line
18 was from the river at that time.

19 Joe Weber goes on to state as long as any repairs we make to the
20 Skagit River levees replace them in kind we comply with that
21 standard. They, all of the work that they have been doing is
22 improvements - they're not maintenance. Why the County and the City
23 of Burlington issued them permits for maintenance work, I don't know.
24 But they, when I told, when I stated that they didn't have permits, I
25 mean where are the floodplain permits? I don't really blame Mr.
26 Semrau or even Mr. Schultz because if I had a client and a city
27 government official tells me I don't need a permit, why the hell
28 would I want to go and force them to get a permit. So I don't really
29 blame them or the dike district, I do blame the county and city
30 officials that have allowed this to continue for so many years.

31 [1:59:55]

1 This you're going to find kind of humorous, this is a nasty e-mail
2 exchange between myself and FEMA in 2001. This is a response by a
3 young man called Patrick Massey who worked for FEMA. He says first
4 your entire long argument about the lack of enforcement of cumulative
5 rise standard of Section 3 c 10 is wrong. Section 3 c 10 only
6 applies in floodplains where a floodway has not been designated,
7 since a floodway has been designated along the lower Skagit within
8 the levee c 10 doesn't apply. Yes, the floodway established in 1985
9 is located between the landward toe of the levee so yes this means
10 that there can be no fill or other kind of development outside of the
11 original cross-section located within this designated floodway. By
12 the way, there is a regulatory floodway, I don't know what your point
13 is just being a floodway, not a regulatory floodway but the two terms
14 are synonymous. If the development has occurred between the levees,
15 this would be a NFIP compliance issue. Have the levees been raised
16 or widened since the community joined the NFIP and the FIRMS were
17 published in 1985? If so, this would be a violation of d 3.

18 Were these fills used to improve the levees or simply return them to
19 their previous condition? Obviously four feet of fill on the
20 riverward side of a levee is an improvement. I don't know why the
21 words maintenance and improvement are so difficult for some to
22 understand. Maintenance given its ordinary definition means you have
23 something, it breaks, you fix it. Improvement is when you make
24 something better so when you put in keyways, that is an improvement.
25 When you put in extra 4 feet of fill, that is an improvement. That
26 is not maintenance. This entire charade of smoke and mirrors by the
27 City of Burlington and Dike District 12 is really, I just don't
28 understand, it's not a maintenance project, they're not fixing
29 anything, and they're improving it.

30 So that requires permits, it requires floodplain permits on behalf of
31 the County and the City, there are none. The grading permits, who

1 goes out and inspects that what they did was what the grading permit
2 authorized them to do? I know for a fact that when they put in their
3 keyways they backfilled onto the levee, in the floodway, next to the
4 Skagit River. They did not take that material out of the river
5 channel; they put it in the river channel.

6 Then Mr. Massey goes on to call me a Muslim, so I don't know what
7 that was all about but he's evidently got a problem. The fact is a
8 lot of the letters that I've submitted to you, I submitted these same
9 letters to FEMA, I've been submitting them to the City of Burlington
10 for many years, I submitted them in on my comments to the Draft
11 Environmental Impact Statement, I will submit them to you here today,
12 this whole notion I heard earlier testimony from the applicant that
13 everything was addressed that was on the Draft EIS, these people
14 didn't address half of what I stated in here. As you as an examiner
15 and Mr. Schultz as an attorney and me as a person who worked for
16 attorneys for the last 34 years sometimes it's much more important
17 what they do not say than what they do say. I submitted in here
18 portions of the letters that I've given you today, they ignored them,
19 you won't see those addressed anywhere in the FEIS, you will not see
20 the map that I submitted anywhere addressed in their EIS, and then
21 here, this to me is an example of an applicant speaking out of both
22 sides of its mouth at the same time. On page 14, I quote from the
23 draft EIS and it says extensive levee enlargement work has been in
24 the process since 1990 by Dike District 12. Well of course it was,
25 that includes that 4 feet of fill they put along Whitmarsh Road
26 riverward of the existing levee. But again extensive levee
27 enlargement, that's not maintenance work, that's an improvement and
28 improvements require permits.

29 [2:05:14]

1 Their final environmental impact statement again to me and you know
2 who I used to work for, and my job for 20 years was to review
3 environmental impact statements. The attorney would come in, drop
4 the draft on my desk and say take it apart. That's what I did for
5 them for their clients and a lot of their clients had big Ws in front
6 of their names and/or very important companies in the State of
7 Washington. We built developments; we also built all the Eagle
8 Hardware stores in the State of Washington. The one permit they kept
9 away from me was the Mount Vernon permit because that permit got
10 approved in 12 days and they knew I would be opposed to putting all
11 that fill in the floodplain. So I didn't really find out about it
12 until the construction took place.

13 It says in the EIS that in addition FEMA included a floodway area
14 aligned within 300 feet of the landward toe of the levee. That would
15 be the area that now they want to put fill in and again, I have
16 nothing against them turning their levees into overtopping levees, I
17 really don't. That's a sound, safe thing to do. But the regulations
18 of the Federal Government have said you can't put fill in that area
19 and yet they are anyway.

20 Then, this is, I find an interesting comment, Burlington recently
21 conducted a study to determine the cumulative amount of fill from
22 1985 to the present. The documented rise across Burlington's .371
23 feet. That's, I really looked, I spent a lot of time, on, over the
24 weekend, going through all of their documentation. I don't see that
25 study anywhere in the EIS. I'm hoping that you would require that as
26 part of, before you would approve their permit so it can receive
27 public scrutiny because it is one thing to make a statement, it is
28 something else to have the engineering to back it up. They again
29 make the same statement on page 38 where based on the record of
30 cumulative fill from 1985 Burlington is well below the limit. Again
31 I submit to you that if you raise the 100 year flood level on the

1 levee, are you not raising it cumulatively to above the 100 year
2 flood level & the answer has to be yes. Why else would you raise it?
3 Finally, I'd like to submit to you what I consider; this is one of
4 the things that Mr. Schultz in his letter to you being so outraged of
5 my comments I submitted to you the last time. He doesn't mention
6 this. In fact I submitted it to the City of Burlington, they don't
7 mention it. I submitted it to Dike District 12, they don't mention
8 it. This is the results of a hydraulic analysis performed by **nhc** on
9 how much the levees already impact the upstream property owners. This
10 is, it was entered into a court of law in Snohomish County Cause 93-
11 2-05201-2 so it is a matter of public record. **Nhc** was paid
12 approximately \$250,000 dollars to conduct this. So if you follow the
13 river down, Burlington in their EIS and the Dike District
14 Commissioners want to continually blame the railroad bridge and
15 something I have to add that was stated here earlier was that
16 Burlington's using the January 12, 2012 **nhc** report. In that report in
17 January 2012, Dr. Leytham did not know that the railroad bridge does
18 not back up any water onto anybody it is the constriction of Dike 17
19 and Dike 12 just west of the freeway where the two come together.
20 That's what's backing the water up as well as the current levee out
21 there.

22 [2:10:14]

23 You can see it as you go down the channel; it's already been raised 7
24 feet, 8 feet. Where does that fit into allowing them to raise it
25 even more?

26 One other last thing that was stated about they used **nhc**'s report of
27 January 12th. This is before Dr. Leytham realized that the water does
28 not flow that goes out at Sterling, does not flow between Burlington
29 Hill and Sterling Hill, it goes straight to Gages Slough to Gages

1 Slough straight out to Bayview Ridge, from Bayview Ridge it splits to
2 the Samish and Padilla Bay. Like the young man said from FEMA, I
3 would have put a floodway through there 20 years ago because that's
4 where it belongs. So in reality when you look at this the water
5 that's going out in Sterling and flooding the area north of Highway
6 20, *the Dike District is flooding their own people.* If I was a
7 resident along Dike District, along Highway 20 and a lot of those
8 people are inside Dike District 12, *I'd be suing the shorts off that*
9 *Dike District* because *I've been paying that Dike District all these*
10 *years for protection and they are the ones responsible for backing*
11 *the water up into my house.*

12 So with that sir, thank you very much and I really applaud your
13 decision to reopen the hearing so that people that have worked on
14 this issue for over thirty or forty years can come forward and
15 testify. You have any questions, I'd be happy to try and answer
16 them. If not...

17 **HE:** Maybe you could clarify what you just said because I kind of lost
18 it on water that breaks through at Sterling and where it goes. You
19 were saying something.

20 **LK:** The water that currently goes across Highway 20 as it did in 1990
21 after the dike district ran out and put up a bunch of sandbags on the
22 railroad to try and keep the river from flooding. It goes there but
23 it's because the water is being backed up by the levee system that
24 these people are being flooded across this area here. They are
25 flooding themselves, they are flooding the City of Burlington and yet
26 they come up here and try and tell you with this smoke and mirrors
27 approach that they're not harming anyone.

28 Oh and the reason this is such a red flag and such a tender issue for
29 me is because 40 years ago I sat in a room in the Skagit County
30 Courthouse and had the Skagit County Flood Engineer say that we're

1 gonna do this ourselves and we're going to provide 25-year flood
2 protection for everyone. Even as a Nookachamp resident that sounded
3 okay with me that 25-year flood protection. I asked him how much
4 more floodwater would that put on the Nookachamp-Clear Lake-Sterling
5 community and he said, 'Oh maybe half an inch'. Then they went ahead
6 and we had the 90 and 95 floods and these people suffered 100-year
7 event levels because FEMA never took the levees into consideration.
8 So all that talk in the EIS is so much BS. They did not take the
9 levees into consideration so Sir I'm trying to be as diplomatic as I
10 can but this whole project is outrageous. How they've tried to
11 present it is outrageous. That's why I said the comment that I did
12 that I was personally outraged at this. Because I don't know how
13 somebody sleeps at night that puts water in a 98-year-old
14 grandmother's house and thinks that's okay. Because that's exactly
15 what happened on Francis Road where a lady who moved her house to a
16 location along Francis Road, she moved it in 1911 from Clear Lake,
17 she moved it into the Nookachamps. She had to be rescued from her
18 house through her kitchen window by the Clear Lake Fire Department.
19 Never had water in her house before. So all this work that Burlington
20 had been doing before the 90 flood event they've never seen a flood
21 that big. I don't know, I can't treat people like that.

22 [2:15:15]

23 **HE:** Thank you.

24 **LK:** Thank you sir.

25 **HE:** What I'm going to do because I don't quite know how else to deal
26 with this, what exhibit are we up to? 35?

27 **HE AIDE:** 34 was the last one.

28 **HE:** Okay 34 was the last one so I'm just going to include your packet
29 as an exhibit which will be Exhibit 35, Kunzler Packet.

1 Okay, who's next then?

2 **Roger Ridgeway [RR]:** Hi, my name is Roger Ridgeway and I'm not really
3 offering testimony so much as a request.

4 **HE:** Let me swear you in any event if I may: You swear and affirm the
5 testimony you give will be the truth, the whole truth and nothing but
6 the truth, so Help you?

7 **RR:** Yes. So I have a relatively much shorter presentation here. I'm
8 here to express my desire that the, that there's some assurance that
9 this Dike improvement project makes provision for public access to
10 the Dike. State law provides, except of course, in times when there
11 are danger of a flood or an actuality of a flood. So it's important
12 to those of us concerned about trails and public access that public
13 benefit that the, um, that this dike and eventually others as well
14 but specifically this dike at this point make provision for public
15 access in some sort of a trail along the top of the dike.

16 **HE:** Okay, what you're talking about is a pathway along the top of the
17 dike?

18 **RR:** Yes. Thank you.

19 **HE:** Thank you.

20 **Mike Anderson [MA]:** Hello, my name's Mike Anderson.

21 **HE:** Alright. You swear and affirm the testimony you give you'll tell
22 the truth, the whole truth and nothing but the truth so Help you?

23 **MA:** Yes.

24 **HE:** Thank you.

25 **MA:** Okay I'm going to wear two hats today. First, I'm going to start
26 off with the Mayor's Hat. As a Mayor of Sedro-Woolley I'm concerned

1 about anytime you might slow up or back up water towards our
2 community. We've worked with Burlington and Mount Vernon over the
3 flood issues, we've spent our own money going back to Washington D.C.
4 to try to work with our congressional delegation and work with
5 Burlington and Mount Vernon with the idea of working together and
6 not, uh, and solving this problem. It's kind of ironic now though
7 that I'm hearing like it's every city for their selves. Oh yeah when
8 I heard them talk about that we don't have time to wait for the GI
9 Study or to do it right, we're gonna raise the dike; I'm thinking of
10 the iceberg effect when any time you raise anything in water it's
11 going to push water back somewhere else. That's east and that's
12 toward our community upriver and, um, Clear Lake and um, so I'm
13 against that.

14 I'm really concerned we just had this bridge failure here on I-5 and
15 we've had some ambulance issues because of the traffic and then
16 there's obviously no freeway so we've been taking some of our
17 ambulances to Bellingham and I have seen and I've lived here 33
18 years, I've seen the Cook Road flooded, I've seen Highway 20 where
19 the water crossed over, I'm concerned the safety issues and I was
20 looking in your county's report and they were saying there really was
21 no public safety concern in their report. Well, there is. Because
22 obviously we're a, we're right now having that issue, we're just
23 having a little traffic on 9 and in the freeways in the traffic out
24 on Riverfront, Riverside. So this is a big deal for our community
25 that if more water's pushed back and Highway 9 is closed and then
26 Cook Road could be closed and Highway 20, I want to work with our
27 neighboring communities - and we have but I think we should work for
28 the final solution and it doesn't' make sense to, I heard a comment
29 that Mount Vernon and Dike District 3 raised theirs 4 feet so now
30 Dike District 12 in Burlington wants to raise theirs 4 feet. Then in
31 a few more years or 5 years someone else is going to want to raise,

1 it's just insanity to keep raising it when we should work for a
2 solution to get the water out and then we don't back water up on
3 everybody in the Nookachamps and Sedro-Woolley and Upriver.

4 [2:20:35]

5 I'm going to go on my own personal issue. I own a piece of property
6 just to the east of the dike, 21421 Lafayette. I've owned it for 30
7 years now, and we've had, never flooded until 1990 and it flooded
8 twice and then in 95 it flooded twice so my wife and I we decided to
9 raise it because we were tired of you know, dealing with the flooding
10 inside. So we decide to spend money out of our own pocket and we
11 raised it and we went to the County, we went to FEMA, we got to hire
12 a surveyor to get it the right elevation and we did. We were 1 foot
13 above the 100-year flood. We're right there about District Line
14 Lafayette and the water would go over the railroad tracks and
15 couldn't get into our property because we were a foot above the
16 railroad tracks and it would always cross over. Well then, I don't
17 know what year that was, in 2003 or something Dike District 12 came
18 up and started sandbagging that, pushing the water back on our house
19 property. It didn't flood but, I'm thinking why would we spend all
20 that money to raise it and then have them push the water back and so
21 I'm concerned that if you're gonna, they keep saying it's not a big
22 deal where they're going to raise it but why are they going to raise
23 it if it's not going to push water back. I mean obviously it's going
24 to push water back and someone's going to suffer and I think we
25 should work towards the final solution and not these Band-Aid
26 approaches. There you go.

27 **HE:** Thank you.

28 **MA:** Thank you.

29 [2:22:26]

1 **HE:** State your name.

2 **DB:** My name is Dan Berentson.

3 **HE:** You swear and affirm the testimony you give you'll tell the
4 truth, the whole truth, and nothing but the truth so Help you?

5 **DB:** I do. My name is Dan Berentson, I'm the natural resources
6 division manager for Skagit County. I've been involved in working on
7 the General Investigation for approximately 11 years with a number of
8 you. I would just like to just make a few clarifications as I did
9 last time.

10 First thing I'd like to clarify is that during the course of the GI,
11 we have never from the Public Works perspective, we have never
12 requested that a city or dike district wait on any plan they may have
13 until the GI is completed. Now we're fairly confident the GI's going
14 to be completed in a timely fashion by 2015, and hopefully it'll give
15 us a comprehensive roadmap for flood protection for everyone. We do
16 appreciate the support from cities and dike districts in that effort.

17 But I'd really like to clarify or add some clarity is to the
18 hydrology issue. We've heard today mentioned PIE's hydrology, nhc's
19 hydrology, and the Corps' hydrology. A few years ago in 2002 the
20 county contracted with PIE to take a look at the Corps' hydrology and
21 after a significant amount of work PIE's findings came in
22 substantially lower than the Corps' hydrology. In 2005 the county
23 discontinued work with PIE, and hired nhc to take another look at the
24 hydrology since there was substantial difference between PIE and the
25 Corps. So we contracted nhc and the numbers they came up fell
26 somewhat in the middle. We had never adopted nhc's hydrology or PIE's
27 hydrology. We have supported the Corps' hydrology for the General
28 Investigation. The, so, I guess I just liked to clarify that also nhc
29 right now is contracted with the Corps of Engineers to do the

1 modeling for the three alternatives and they are using the Corps'
2 hydrology.

3 So I'd like to make that clarification because I'm hearing that, you
4 know, all three are being utilized and also another question I would
5 like to ask is that for this project as you seek certification,
6 you're seeking certification to the PIE level or I heard you say it
7 at a later date if that is not the acceptable level you want to
8 rebuild the levee to meet that standard, is that what I'm hearing?

9 Just a question.

10 [2:25:40]

11 **HE:** Okay. Thank you.

12 **LH:** Leonard Halverson.

13 **HE:** Let me swear you in sir. You swear and affirm the testimony you
14 give you'll tell the truth, the whole truth and nothing but the truth
15 so Help you?

16 **LH:** Yes, I do. Just a few words here to clarify the stuff that's
17 been said and done, and 19 well something Halverson versus Skagit
18 County courtroom, Skagit County surveyed the floor, the first floor
19 of my house at 39 and 87 hundreds inches. Here too later Chuck
20 Bennett was asked in this same room what the Dike District's
21 elevation was, he said 46 feet, give or take so the way I read this
22 thing here now is that we're going to have about a 50-foot elevation
23 on the dike or that's what they're asking for. Well if you add that
24 to my floor level and I got 8-foot ceiling to get to the upstairs of
25 my house and I sleep there, that puts a foot and a half of water in
26 my bed what they're asking for. I think that's a hair excessive.

27 Lot of the, lot of our infrastructure here is in your, I feel is in
28 danger from this. United General Hospital Life Care Center, Sedro-

1 Woolley Sewage Treatment Plant and the school in Clear Lake
2 definitely are in harm's way from raising this dike. Thank you.

3 **HE:** Thank you.

4 [2:28:00]

5 **HE:** Uh okay, who else? Your name sir?

6 **Keith Waggoner [KW]:** Sir, Keith Waggoner, Commander, United States
7 Navy retired and City Councilman for Sedro-Woolley.

8 **HE:** You swear and affirm the testimony you give you'll tell the truth
9 the whole truth and nothing but the truth so Help you?

10 **KW:** I do. I'll try and keep this short. I took a lot of notes.
11 First, I want to tell you that I am a graduate of the Naval Academy
12 with a degree in physical oceanography and my masters is from the
13 University of San Diego so I know something about fluid dynamics and
14 fluid statics and I think I can speak with some credibility.

15 Mr. Kunzler had a lot of data up here, I kind of would like to
16 distill how I see that and I talk about this last time. The way the
17 water in the river works when its backed up by a dam or by a dike
18 system which acts just like a dam is it makes a wedge that goes back
19 upstream and I know there's been arguments about hydrology reports
20 and data. But the last slide that Mr. Kunzler showed, this is a
21 fact. This already happened. So we know what happened with the
22 dikes at their state in 1990. This water backs up to my town Sedro-
23 Woolley, that's a fact so there's no argument about what model may or
24 it might not do, *it's already done it.*

25 Now Mr. Schultz asked us to not take emotional things into account
26 here and just deal with the facts.

27 [2:30:00]

1 I agree with that. But then immediately afterwards he went on to
2 dismiss some of these, some actual documented events as biblical to
3 give you the idea that well that'll never happen but I want to tell
4 you that a 100-year flood doesn't mean you're going to get 1 of those
5 in 100 years. You might get three of them in the next 3 years or you
6 might not get one for 500 years, we really don't know. They're
7 talking about raising the dikes whatever, 3, 4 feet as if that's just
8 a wall above the water that isn't going to have any effect -
9 freeboard they're calling it as if it has no effect. At the same
10 time the dike district commissioner mentioned there, at least she has
11 8% error rate and they talk about overtopping. That tells me that
12 there's a possibility even in Burlington's mind that all of that
13 freeboard might be used up. If this is the result of the 1990 dikes,
14 clearly it's going to be worse if it's raised another 4 or 5 feet.

15 Now if I were Burlington and Burlington was operating in a vacuum, in
16 isolation, I think this is a great plan. It's well thought out, it
17 will protect at least the people downstream of the dikes, we've seen
18 it causes some havoc upstream so I don't really blame them for that
19 but human beings and organizations tend to act in their own best
20 interests. In common language, we call that selfishness and we all
21 know that selfishness is not the best way for communities to work
22 together. That's why this is a county issue and that's why we're
23 sitting here in front of you to help solve this.

24 I thought about what a Sedro-Woolley solution might look like
25 hypothetically if we decided in Sedro-Woolley that we ought to dig a
26 big ditch below our town and dump the water outside the City Limits
27 say over by Cook Road somewhere - that'd solve the problem for us.
28 But it's not a very good solution for everybody else.

29 That's why I think Burlington's sort of has the cart ahead of the
30 horse. I think that their dike improvement or dike maintenance might

1 be part of the total solution. I think we should wait for the GIS
2 and see where it fits in, in a coordinated flood prevention plan so
3 it helps all of the cities it wants. Right now, it's like if you and
4 I had a washbucket between us filled to the top with water and we
5 need to move it somewhere, neither one of us wants to get wet. Well
6 if we're careful and we work together, we can do that. But if I get
7 the bright idea, hey I can not get wet if I just lift my end of it up
8 that's not going to make you very happy. That's what I feel
9 Burlington is trying to do to us right now on this go-it-alone
10 solution.

11 The proponents act like all this dike does is protect Burlington and
12 downstream and they don't want to talk about what happens upstream.
13 That's because this is a fact that already happened, that Mr. Kunzler
14 talked about. It's going to exacerbate that situation. We have some
15 pretty high value assets up there, I think that the County missed a
16 couple of things, Mike Anderson already alluded to it but I'll hit it
17 again - item G and item H on the document signed by Senior Planner
18 March Lindh [sic] and John addressed it earlier. If you look at
19 those items, it says the proposed use is not in conflict with the
20 health and safety of the community, Mike's already talked about what
21 can happen to our Ambulance System and we've got United General up
22 there. We also have our Water Treatment Plant that the Commissioner
23 alluded to earlier, the Dike Commissioner. Item H says will not
24 adversely impact public services or the surrounding areas or
25 conditions could be established to mitigate those impacts. I don't
26 think that's been demonstrated and based on those two items alone, I
27 think you should rule against this project. Thank you sir.

28 **HE:** Thank you.

29 **SCHULTZ:** Mr. Examiner, I would like to comment on something this
30 commentator said.

1 **HE:** Well, you'll have a chance.

2 **SCHUTZ:** Okay.

3 **HE:** Let's let other people testify.

4 [2:34:58]

5 **HE:** Any other persons wishing to speak?

6 **Thomas J. Sheehan [TS]:** Thomas J. Sheehan.

7 **HE:** Alright, Mr. Sheehan. Raise your right hand, you swear, affirm
8 and testify the testimony you give you will tell the truth, nothing
9 but the truth and the whole truth so Help you?

10 **TS:** Yes I do.

11 First of all I want to clarify I am a native of Skagit County and
12 I've lived here my entire life along with my 13 brothers and sisters.
13 I went to work for Skagit County in 1969 in the engineering
14 department which I spent 17 years in engineering and a great deal of
15 time working on flood projects. I was there for a total of 42 years.

16 One of the 1st projects that I was called out on in engineering was
17 Cook Road in 1969 we started that project where we were going to
18 rebuild Cook Road. With a great deal of frustration after about a
19 year of engineering it was tabled because certain people didn't want
20 to sell their right of way. I'll come back to that. But that
21 project was built in 2000.

22 In 1983, I became the Director of Emergency Management, Fire
23 Marshal's Office, Homeland Security, and I was a major player in the
24 development of 911. As the Director of the Department of Emergency
25 Management, I don't want to give you the, um, portrait that I just
26 sat in my office and pushed paper because when there was a disaster,

1 I didn't and that was probably one of my downfalls when it come to
2 the elected officials.

3 As an engineering part, in the early part of my career, the West Side
4 Bridge in Mount Vernon, coming north from there, on the opposite side
5 of Mount Vernon, we build a levee and what we would do in the
6 summertime - we would go out and do the engineering, surveying,
7 dadada and accumulated all the information when it took to build a
8 dike - and then, in the wintertime I should say. In the summertime,
9 we would go out and build the project. I was the inspector on that
10 project - and Ms. Ellstad said her father was on that project as
11 well. We took the dike down to ground level. We graded all the
12 river from the edge of the water back to the dike and dug down into
13 the dike and made a core about 8 to 10 feet wide and filled it up
14 with clay. We built that because behind that levee, the water was
15 perking through and popping up the road and lot more water was going
16 on the outside of the dike then there was on the inside of the dike.
17 So we rebuilt that project. It's a relatively stable dike at this
18 time in life compared to some others.

19 In the, in my career also, was the, um, we have the Emergency
20 Operations Center - you have heard that term, it's the EOC and, uh,
21 in that Emergency Operations Center when there's a disaster such as
22 the bridge falling down all of the players that are important part of
23 the players come together and determine what shots should be called.
24 In that Emergency Operations Center there's Mayors or Mayors'
25 appointed officials, other city officials, Dike Districts have a
26 representative there, da, da, da, da and they respond to the
27 different emergencies.

28 The three major players in that, that actually will call the shots is
29 the Sheriff, the Public Works Director, and the Director of Emergency
30 Management. And, um, in this disaster, in a disaster, uh, before,

1 and during and after a disaster - that's three parts. Before you
2 have plans - and the plans is are how you are going to function
3 during a disaster - and one is the operation of that Emergency
4 Operations Center. The next is, uh, during a disaster, you have the
5 warning system which is how you are going to let the people know that
6 there's a flood that's eminent. Then, after the disaster, is a lot
7 of the mitigation stuff. One example of that is Sedro-Woolley during
8 one of the major floods their sewer outfall was broke. We can blame
9 Dike Districts for building dikes but I kind of think it's Mother
10 Nature's fault for letting it rain so hard. But nevertheless, uh,
11 we, we're the avenue for the federal money coming to our office and
12 giving it back to the communities. An example of that was the flood
13 of 1990, there was \$54 Million Dollars distributed to the cities, the
14 counties, and the dike, and the dike districts.

15 [2:40:01]

16 There's a flood warning that's put out at 28 feet. That's the 28
17 feet in Concrete. Well 28 feet in Concrete is one thing, but 28 feet
18 down in Burlington and Mount Vernon it's not a big deal. But I'm
19 here to tell ya that in Concrete 28 feet it is because that means the
20 people in Marblemount and Rockport and Darrington and Sauk-Suiattle -
21 they're already being flooded. I would take my vehicle and I would
22 drive up there and I would try to determine how much water was really
23 coming because that's just showing what's in the river. The
24 tributaries below the, below this point is really important. How
25 much water is coming down those tributaries? How much of a flood are
26 we really going to have?

27 The other thing I would do is right below the gauge is the community
28 called Cape Horn, Cape Horn to me is probably one of the scariest
29 parts on Skagit River. There's hundreds of people that live in this
30 development and what happens when it floods the water runs across the

1 back of Cape Horn and it cuts these people off. You go and ask them
2 to evacuate, most of the time: 'We've seen it, we experienced it,
3 it's going to be okay'. I'm here to tell ya that many times they
4 said it was okay and it wasn't okay. We had Army rescue trucks up
5 there, we've had Search and Rescue Boats in there in the middle of
6 the night pulling people out because they didn't leave.

7 Anyway, um, 28 foot is the flood fight and in my opinion, um, 38 feet
8 is about where it starts overtopping down on the dikes down here.
9 Keeping those numbers in perspective a little bit.

10 In 1975, there was a flood that impacted and there was a statement in
11 the last hearing about United General being flooded. That's United
12 General Hospital, which is out towards Sedro-Woolley. It did flood.
13 The water did flow back into the basement. Uh, they did have their
14 generator in the basement. They did lose their emergency generator
15 but we were able to get a generator in the parking lot and allow that
16 to run. That was with the existing dike system that we have now.
17 It's just the water coming down the river is more water than the
18 capacity of the two dikes - the dike on the left and the dike on the
19 right. It runs around the end of the dike, just up above Burlington,
20 we've talked about Highway 20, and the Mayor's talked about he's
21 raised his property, and the gentleman sitting right beside him I've
22 stood on his front porch when it was flooding. Talked about, because
23 his garage was about to be flooded. But this is outside the existing
24 dike.

25 Mr. Halverson, I drove back to his property during a flood. We asked
26 him to evacuate him and his family. I drove back there and the water
27 was up to my headlights in my vehicle to get them to come out. His
28 family came out, he stayed.

29 The 28 foot warning is just exactly what it is: That's to let people
30 know that there's going to be a flood. 30 to 32 to 34 feet you start

1 talking about evacuation and 38 *you should be gone. I'm telling you*
2 *should be gone.* The floodwater naturally backs up into the
3 Nookachamps, you heard a little talk a bit about the Nookachamps.
4 One of the things I would do, I would go out in my vehicle and I
5 would drive out in the Nookachamps and you can actually see the water
6 pushing back through the Nookachamps, goes into, around the back of
7 the hills and it comes back around into Clear Lake and then into Mud
8 Lake and it's just a natural pushback because of the levees. I'm
9 sorry, the levees on both sides. That's, it's a natural thing. They
10 get more water; they're complaining that they get more water than
11 they ever had. Well it's the fact is we're getting more rain than
12 what we've ever had. It's a natural thing.

13 The present levee system we have is a very false sense of security
14 for the people. Here's what I believe the people think: The people
15 of Skagit County could care less if it's gonna flood.

16 [2:45:02]

17 They aren't thinking about it. They're thinking about their families,
18 they're thinking about their jobs, they're thinking about Church,
19 they're thinking about birthdays, they're thinking about soccer, *they*
20 *don't care* because they expect the people in this room to take care
21 of them if there's a flood and that means levees.

22 In 1980 or so, the population was probably about 65,000. When I
23 first started my job it was 50,000 people. I think it's up to about
24 120 or 130,000 people and I'm telling ya that the people in the
25 130,000, everything above that 50,000 people, they're not really
26 familiar with flooding. They have no idea what that Skagit River can
27 do to them and I think it's our responsibility to do something.

28 The water that backs up and runs through Highway 20 that Dike
29 District 12 is responsible, no. The water that's coming down Highway

1 20 is more capacity that can go through the 2 levees. It's gotta go
2 around. That's exactly what it's doing. You talked about it goes
3 out to the Bayview Area. Or it goes out to Samish Area. I live in
4 the Samish; I'm here to tell ya it does go out there. There's no
5 place for it to go. I get flooded. But I expect that. But that's a
6 natural thing for it right now, it runs down Highway 20.

7 I'm not here to testify on behalf of Dike District 12 or on the
8 behalf of anybody that's against it, I'm here to say something needs
9 to be done and I believe that the proposal is an approach to *start*
10 *the process*. *Start the process*. How many years are you going to
11 study it?

12 The Cook Road project, you heard me mention that when I first
13 started, 39 years we dealt with Cook Road as a 2-lane road. I can't
14 tell you how many fatality accidents that I went to on Cook Road. It
15 never happened until 2000 that they rebuilt that road. There was no
16 reason for, the only reason there was the politicians got enough
17 pressure from the people that they did not want it. They didn't want
18 people to buy their right of way. They wanted to keep their lawns
19 clear out to the edge of the road. The only accidents that we have
20 on Cook Road right now is the backup from the railroad tracks. Cook
21 Road, Old Highway 99, those are rear end collisions. Before we used
22 to have T-bone accidents, head-on collisions, what we called
23 grinders, all kinds of accidents. I think that if these parties will
24 come together and this is allowed, I think this is the beginning
25 point for Skagit County to develop a diking system that they'll be
26 proud of. I think they all need to be in concert on that.

27 With that, I don't have anything more to say, thank you very much.

28 [2:48:28]

1 **HE:** Thank you. Are there other people who want to be heard here?
2 Any public testimony?

3 Well, as I mentioned at the outset, it's about noon but I don't see
4 any reason why we can't just finish up and eat lunch late. I would
5 let the applicants respond, I hope briefly, to what they've heard and
6 let the county respond with and get to make any responsive remarks
7 they might want to.

8 So we'll do that now. Who wants to talk first? I see a hand raised,
9 Mr. Schultz?

10 **SCHULTZ:** Can I do that here? From here?

11 **HE:** You can do that there.

12 **SCHULTZ:** My comment will be about 15 seconds. Um!

13 **HE:** Let's see here.

14 **SCHULTZ:** Okay. [Chuckling] I do have to object a little bit to, uh,
15 to Mr. Keith Waggoner. Mr. Waggoner's, I think, unfair
16 mischaracterization of my testimony saying I just dismissed factual
17 evidence when I was talking about the engineering.

18 If he was listening, I did not dismiss out of hand the, quote,
19 biblical proportions found by the Army Corps. What I did was I
20 explained the three positions. You were interested why we had three
21 different hydrology's. I explained that the Corps hydrology was very
22 high because of that, because of those floods. The PIE hydrology
23 after several years and millions of dollars, even when they were the
24 county engineers determined that those numbers probably were not
25 correct and **nhc** came in the middle.

26 [2:50:10]

1 So any implication I was dismissing the facts, I think was inaccurate
2 and little unfair given the caliber of the education of that witness,
3 I think.

4 **HE:** Alright. Mr. Semrau?

5 **SEMRAU:** Yes, I'm going to submit to you for the record a copy of the
6 1984 Flood Insurance Study for the City of Burlington. Mr. Kunzler
7 showed you several documents that were prior to that flood insurance
8 study. The flood insurance study is the, kind of the starting point
9 for the professionals - you know, as a professional engineer, I
10 don't, there's certain points in our regulatory stream of how we
11 regulate things from the sitting county and federal standpoint that I
12 have to accept as an engineer. Most of those documents he submitted
13 to you have no bearing on where we're at today and what's required by
14 the county and the cities, and by FEMA and the Corps in regulating
15 that.

16 The questions in regard to the floodway, we've answered those
17 questions. We've answered the questions as to where the special
18 flood risk areas are, they are mapped on the FIRM, the Flood
19 Insurance Rate Map. Unfortunately I don't have a copy to give you,
20 but we've even heard testimony from some people off Lafayette Road
21 that it made revisions to their house and things, yet we've heard
22 testimony from Mr. Kunzler that we shouldn't be allowed to place fill
23 in the same area. That area's not in the floodway. It's not even
24 within 200 feet of the river; it's not within shoreline's
25 jurisdiction of the Skagit River. It is within shoreline
26 jurisdiction of Gages Slough.

27 So, but I'll submit this Flood Insurance Study, we have defined the
28 floodway, the floodway is basically riverward of the levee, we are
29 allowed to make improvements to the levee, we make those improvements
30 according to the Corps' requirements, we make those improvements when

1 the Corps tells us to make those improvements. But we're covered
2 through the WAC 1, the WAC 173.27.040, our shorelines substantial
3 development permit process in the RCW 90.058.030 we've got these
4 definitions and we work within those. So here's the flood insurance
5 study July 3rd, 1984.

6 **HE:** Alright, we'll call this Exhibit 36.

7 **SEMRAU:** There was a question in regard to what hydrology we'll use
8 when we certify. The certification, the only hydrology that'll be
9 accepted when certification occurs is the Corps'. Certification will
10 be to the 100-year Corps hydrology. When a levee's certified it's
11 basically certified - or when it's accredited they take the level of
12 the levee and they reduce, they remove the freeboard from it. If the
13 levee's accredited, they take the level of it, move the freeboard and
14 then they stick that into the computer model to determine the Flood
15 Insurance Rate Maps. So whatever level it's at when that's the
16 certification and the accreditation occurs. That's what level it'll
17 be at and the modeling of the river flows or the flood flows will
18 occur from that. The exhibits that I showed you from the EIS showing
19 where the floodwaters go, they're still floodwaters going through
20 Burlington and down Gages Slough even with these levee improvements.
21 That's because we don't have the tieback yet. There are modeling
22 scenarios in the EIS of the tieback but those are not being proposed
23 at this time.

24 [2:55:00]

25 Then, just a quick comment on the 1990 flood map. The flood maps
26 that I showed as well as the FIRM - the Flood Insurance Rate Map -
27 they show a whole lot of other areas that are going to be flooded at
28 the 100-year flood event. Those are the maps people need to be
29 looking at. I'm a certified LOMA administrator, I have, I do a lot
30 of flood works, elevation certificates, when I do an E-LOMA I

1 actually am preparing the LOMA - the Letter of Map Amendment for the,
2 for FEMA, and I get that immediately. I do a lot of flood map work
3 as a consultant and unfortunately there's a lot of people in this
4 county that are in denial that they're in the floodplain. People
5 argue with me everyday that, you know, they've never flooded, they're
6 never gonna flood, and, you know, those flood maps there's portions
7 of Sedro-Woolley that are gonna flood in a 100-year flood event and
8 it's not going to be because of this levee system. As I showed in
9 those exhibits on page 48 and 49, they're well upstream of the 1/10th
10 of a foot impact. Those areas are going to flood in those larger
11 events unless something else is done in those areas. But the, but
12 the whole concept behind the flood insurance, the FIRM, is flood
13 damage reduction. FEMA would like to change that to flood damage
14 elimination but we just don't have the means to provide flood
15 protection to that, to that level in most parts of the country. Just
16 because somebody is built to one foot above the base flood elevation,
17 doesn't mean that they're not going to get wet during a flood event.
18 One of the reasons why, well, I don't want to, well it's probably not
19 important.

20 That's all I'll address.

21 [2:57:31]

22 **HE:** Alright, thank you very much. [UNINTELLIGIBLE] We have some
23 other remarks? You're still under oath.

24 **LE:** Okay. Just a couple points.

25 One, Mr. Kunzler was using some older documents and I need to point
26 out that topographic information wasn't available. In those early
27 FEMA maps they used a 5-foot contour, we now have contours to the
28 basically I guess the 100th of a foot but more common we use like a
29 10th of a foot, we have LIDAR, these topographic maps that have been

1 provided by the cities and the county so we have state of the art
2 digital topography that modeling is conducted on which are to great
3 improvement over what was available in the past.

4 Another comment is that FEMA did use a split flow. They no longer
5 use that method, they haven't used that method for years - again they
6 use a FLO2D model and they use the more current, accurate digital
7 topography. The statement was made that the water doesn't flow out
8 to the Samish, that it flows to Gages Slough - you can look at county
9 tax records, and this is I have kind of a poor map that I could
10 share, I say poor map because it was generated for another purpose
11 and only includes parcels in the Dike District. But it shows the Joe
12 Leary drainage that is District 14 that runs out towards the Samish
13 and runs along the north side of, um, I can just, I'll give you this
14 for lack of something better.

15 **HE:** On the like, show up? Yeah. You can point out what you're
16 talking about.

17 **LE:** Okay. [UNINTELLIBLE] So I just wanted to point that this blue is
18 Joe Leary Slough's assessment area that is in the Dike District, it
19 goes beyond this and runs up to capture up above the United General
20 Hospital and that the flow, the reason that drainage area starts up
21 there is because the flow does go out Joe Leary and out towards
22 Padilla Bay into the Samish watershed while Gages Slough runs down
23 through Burlington City proper.

24 [3:00:16]

25 The other thing that this map shows is that a lot of these areas
26 aren't in Dike 12 but that the benefit area for this project, the
27 yellow, let me see, the yellow here is Dike 1, now here's La Conner,
28 and should there be a breach, water would want to run through the
29 path of least resistance. But currently because the levee system

1 stops here, the flow that is predicted to be 52,000 CFS out, Malcolm
2 Leytham, **nhc**, is very aware of the conditions at the railroad bridge.
3 Part of the uncertainty that I spoke to the 8% is because of the
4 debris load on that railroad bridge which really does have an impact
5 on how much water gets backed up. Some of the hydraulic modeling
6 shows up to a 4 foot difference in the water surface elevations with
7 the low debris flow versus the high debris and the folks that were
8 around the 95 became 100% debris blockage that backed up and I'm sure
9 Tom was probably an eyewitness to a lot of that event. That, um and
10 those are conditions that you can research, you can bring in every
11 expert you want, we've been in rooms full of people that work for the
12 county that maintain the bridges, people that, DNR that do timber
13 assessment. But you have to have a degree of uncertainty in your
14 modeling because there's just too many conditions that you can't put
15 an exact number on. I know that's been some of the delay and some of
16 the technical work coming out of the GI is getting everyone to agree
17 on how you can model and assess the damages happen where because of
18 the debris uncertainty.

19 The other one is, is the comment about Sedro-Woolley and folks not
20 doing things to protect themselves versus Burlington. Years ago,
21 Brickyard was rerouted because it was flooding Sedro-Woolley and a
22 ditch was dug around and had it entered the Skagit below Sedro-
23 Woolley. So whereas people have the wherewithal and have localized
24 flooding experience, communities do work to try to improve their
25 localized flooding. One of the other, I guess I'll say half
26 [unintelligible] term from Thomas, is years ago as a member of a
27 county advisory committee I chaired the frequently flooded areas
28 committee as part of the environmental element of the Growth
29 Management Act and you could take these - and that's one of the
30 precursors of the drainage utility so that there was a way to help
31 these localized flooding things that happen and you're going to have

1 large projects and you're going to have smaller projects then to
2 address some of these areas that - 'Devil in the Details' - but need
3 to be dealt with on a more of a localized impact.

4 And I think...

5 **HE:** You want to submit this?

6 **LE:** You know I can't, I can because I spoke about it but because it
7 doesn't show the blue extending up.

8 **HE:** I, I.

9 **LE:** I could ask that?

10 **HE:** It does show. That's fine.

11 **LE:** Okay.

12 **HE:** You could.

13 **LE:** I'm fine.

14 **HE:** You don't have to make it into an exhibit unless you want to.

15 **LE:** I guess I would like ask my attorney would you like me to submit
16 this, or?

17 **SCHULTZ:** Yeah, that'd be a good idea. You could get a better copy.

18 **LE:** I could ask maybe the county to maybe provide a map of Drainage
19 District 14.

20 **HE:** This would be Exhibit 37.

21 **SCHULTZ:** You testified to this so go ahead and submit that.

22 **HE:** Sure. What I kind of you want you to tell me is kind of what it
23 is, though.

1 **LE:** This shows the parcels that are assessed and that contribute to
2 Dike 12. It shows the overlap with the drainage districts in the
3 county and so while these in the white are still blue, there are
4 still in the drainage district, they aren't in the dike district.
5 Since the primary mapping is the dike district, it didn't show all
6 these other districts in their entirety.

7 **HE:** What's the source of this?

8 **LE:** The source of this, I believe it's from the county GIS
9 department.

10 **HE:** Okay. Dike Drainage Assessment is what it says.

11 **LE:** Right. It's just to show basically an overlap and basically the
12 drainage utility prepared for a taxation assessment purpose, not to
13 try to show the boundaries. It could be, if you want to make a note
14 to have us provide you with a map that shows the drainage area in its
15 entirety. I'd be happy to work with Kara.

16 **HE:** Well I think we're going to have to close our record after this
17 hearing, so thank you.

18 **LE:** Alright.

19 **HE:** Exhibit 37. Okay, I think we've reached the end of the road here,
20 at least as far as this hearing is concerned. Has the county have
21 anything they want to add?

22 **JC:** I don't think so.

23 **HE:** We're concluded.

24 **JC:** I think a lot's been said today, enough to digest.

25 **HE:** Well thank you all for your patience, I have had a fair amount of
26 time to look at the material I've already received so I don't

1 anticipate it'll take very much longer for me to get a decision.

2 Thank you very much.

3 [3:06:48]

4 #####

5

EXHIBIT B

BEFORE THE HEARING EXAMINER FOR SKAGIT COUNTY

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In re 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

**INTERVENOR MOTION TO
RECUSE/DISQUALIFY HEARING
EXAMINER**

Before I begin the motion and the brief in support I feel compelled to inform the reader of a couple of salient points: (1) I am not an attorney and have never held myself out to be an attorney. Given some of the ridiculous statements and assumptions made by the lawyers in the instant case I want to take away the issue that I am engaged in the “unauthorized practice of law”. Simply put I am a layperson participant, not representing anyone other than myself in the above referenced hearing who has dedicated nearly 40 years of my life in studying all issues and gathering all information I can concerning the Skagit River. (2) On January 28, 2014 I had an ex-parte 15 second meeting with the Honorable Examiner wherein he asked me if the “issue” I had referenced in the meeting on said day involved the Cascade Mall wherein I answered yes and I wanted him to know that this subsequent Motion to Recuse was nothing personal, it was simply to preserve the issue for appeal. The Honorable Examiner said that he understood what I had to do and took no offense to me doing so. I would hope that if any of the other parties have had ex-parte contacts with the Hearing Examiner that they would be so forthcoming. (3) This motion is

1 made in a timely manner contrary to the opinion of the Burlington attorney. The “fatal flaw” in
2 his thinking is that the decision made by the Examiner was rejected for further hearings by the
3 Board of County Commissioners on September 24, 2013 thereby staying the decision and
4 requesting the Honorable Examiner to make further decisions. It is those further decisions that I
5 am asking the Examiner to recuse himself from making. Having stated those three points:

6 Comes now the **INTERVENER, LARRY KUNZLER**, and makes this motion for
7 recusal based on perceived violations of the States Appearance of Fairness Doctrine due to the
8 following:

- 9 **1. The Honorable Examiner has based a decision on the Applicants word while not**
10 **having any supporting evidence.**
11
- 12 **2. Electronic Records required by SCC 14.06.240(8) could not be made available**
13 **however the Hon. Examiner did not require that the hearing be held over or to**
14 **require that all the same individuals testify, and to date has refused to make his and**
15 **his assistants notes taken at the first hearing available to the public thereby keeping**
16 **the public from knowing what testimony he relied upon to make his decision.**
17
- 18 **3. The Hon. Examiner like the City of Burlington, the Dike District, and the Skagit**
19 **County Planning Department ignored crucial evidence that was submitted**
20 **regarding the hydraulic impacts of the levees on upstream property owners**
21
- 22 **4. The Hon. Examiner failed to address the floodway issue which is crucial to any**
23 **work being proposed to the levee system.**
24
- 25 **5. The Hon. Examiner ignored provisions of the SMA with respect to the floodway**
26 **issue and improvements versus maintenance by the applicant.**
27
- 28 **6. The Hon. Examiner by limiting the testimony to just the first three issues identified**
29 **by the county commissioners is denying citizens the right to express themselves in**
30 **accordance with the last directive from the county commissioners in which they**
31 **stated all matters not decided herein are expressly reserved for further proceedings.**
32
33
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1
2 **WASHINGTON STATE APPEARANCE OF FAIRNESS DOCTRINE**

3 The appearance of fairness doctrine (“the Doctrine”) requires that hearings and decisions **appear**
4 **to be fair as well as being fair in fact.**⁶ Ironically and some would say appropriately the Doctrine
5 had its birth in Skagit County.⁷ To state it in rule form as it applies to land-use decisions,
6 the **appearance of fairness doctrine** is that, when a hearing “or other contested case
7 proceeding” is held by a local legislative body, planning commission, **hearing examiner**, zoning
8 adjuster, board of adjustment, or other local body in connection with an individual application
9 for official action, the action taken as a result of such hearing is void if the conduct of the hearing
10 or circumstances surrounding it would make it **appear** to a reasonable person who was informed
11 of the facts that one or more of the members of the body may have acted out of improper
12 motives.⁸ To state this in layperson terms if a disinterested party looking from outside the
13 window in would feel that the hearing was unfair then that is an issue that must be addressed.
14 Such is I believe the instant case.

15 **1. The Honorable Examiner has based a decision on the Applicants word while not**
16 **having any supporting evidence.**

17 At the first hearing wherein there was an inadequate recording, as required by SCC
18 14.06.240(8) held on Wednesday, April 24, 2013 there was testimony presented by citizens and
19 myself that the Applicant did not have all their permits they needed to have in order to proceed
20 with their application. A rather outraged attorney and consultant sent the Examiner comments

⁶ Carolyn M. Van Noy, The Appearance of Fairness Doctrine: A Conflict in Values, 61 Wash. L. Rev. 533, 534 (1986)

⁷ Smith v. Skagit Cnty., 75 Wn.2d 715, 453 P.2d 832 (1969) holding modified by State v. Post, 118 Wn.2d 596, 826 P.2d 172 (1992)

⁸ 17 Wash. Prac., Real Estate § 4.14 (2d ed.)

1 denying that they did not have all their permits.⁹ As was pointed out to the Examiner at the pre-
2 conference meeting on January 28, 2014 no permits were ever reviewed by the Examiner or this
3 Intervener. No permits were submitted or evidently reviewed by the Skagit County Planning
4 Department for its staff report. The applicant never produced copies of any SEPA checklist,
5 floodplain management permits or grading permit required before all the construction over the
6 last 24 years could take place. Where is the cumulative impact analysis that would be required
7 for all that fill material? The question that all this raises is how does an adjudicator (i.e. Hearing
8 Examiner) make a rational, fair or at least appear to be fair decision without reviewing all the
9 appropriate evidence?

10 **REMEDY:** I would be happy to withdraw all of this section of the motion for recusal if the
11 Honorable Examiner requires that all SEPA files, floodplain management permit files and
12 grading permit files used by Dike District 12, City of Burlington, and the Skagit County
13 Planning Department for all levee work performed within the boundaries of Dike District 12
14 from the I-5 bridge upstream to Highway 20, since the 1990 flood event be made available for
15 public review and consideration and ultimate review by the Hearing Examiner.

16

17 2. **Electronic Records required by SCC 14.06.240(8) could not be made available**
18 **however the Honorable Hearing Examiner did not require that the hearing be held**
19 **over or to require that all the same individuals testify, and to date has refused to**
20 **make his and his assistants notes taken at the first hearing available to the public**
21 **thereby keeping the public from knowing what testimony he relied upon to make his**
22 **decision.**

23 Washington State case law has long held that complete recording of public testimony is
24 necessary and when that does not happen the “record of the proceedings are inadequate.”¹⁰

⁹ **See** Exhibit 23 dated 4/29/2013.

¹⁰ **Byers v. Bd. of Clallam Cnty. Comm'rs**, 84 Wn.2d 796, 529 P.2d 823 (1974)

1 Further, without a transcript of the hearing in question the hearing held would be insufficient to
2 affect a proper review by a court of record.¹¹ A full and complete record is important in all types
3 of proceedings. However, the necessity of an adequate record is especially acute when the court
4 is called upon to review adjudicatory proceedings.¹²

5 In the instant case before us the Honorable Examiner held a second hearing once the
6 electronic failure at the first hearing was brought to his attention.¹³ However, the Honorable
7 Examiner did not require the hearing to be held over, nor require the same individuals to testify,
8 nor upon request produce a copy of his and his legal assistant's notes that he relied upon to write
9 his decision to be made public. This raises the question of rather are not the second hearing was
10 for show only, meaning the Examiner's mind was already made up. This also raises the question
11 how can the public know what the Examiner relied upon to make his decision. Here is a classic
12 example: the Examiner states in his decision that "the levee system involved has existed for
13 more than 100 years. This part of the Dike District No. 12 system was established in 1895".¹⁴
14 This is a classic example of false and misleading testimony that was given to the examiner. The
15 district was in fact formed more than 100 years ago however this part of the levee system that is
16 the subject of this controversy in the instant case was not put into place until 1955. Until that
17 time the levee system sat at its Northern terminus on Lafayette Road approximately 4,000 feet to
18 the West.

19 **3. The Honorable Examiner like the City of Burlington, the Dike District, and the**
20 **Skagit County Planning Department ignored crucial evidence that was submitted**
21 **regarding the hydraulic impacts of the levees on upstream property owners.**

¹¹ Bennett v. Bd. of Adjustment of Benton Cnty., 23 Wn. App. 698, 597 P.2d 939 (1979)

¹² 23 Wash.App. 260, 263, 595 P.2d 58, 60

¹³ [Hearing Examiner Cover Letter, Re: Public Recording/Transcript of Public Hearing in re Shoreline Development, Substantial Development Application PL12-0144](#)

¹⁴ See H/E decision page 3 paragraph 10.

1 There was never a hydraulic analysis and certainly never a “risk analysis” performed on
2 this section of the levee on its impacts to upstream property owners until 1995, which determined
3 the impacts of the levee system on upstream property owners as a result of the 1990 flood event
4 which according to USGS records carried 146,000 cfs at Concrete and 152,000 cfs at Mt.
5 Vernon. This would mean that cumulatively all the “improvements” to the levees have already
6 had an impact on any flows above 152,000 cfs at Mt. Vernon. The results of that hydraulic
7 analysis were submitted to the city of Burlington for its draft EIS in March 2009.

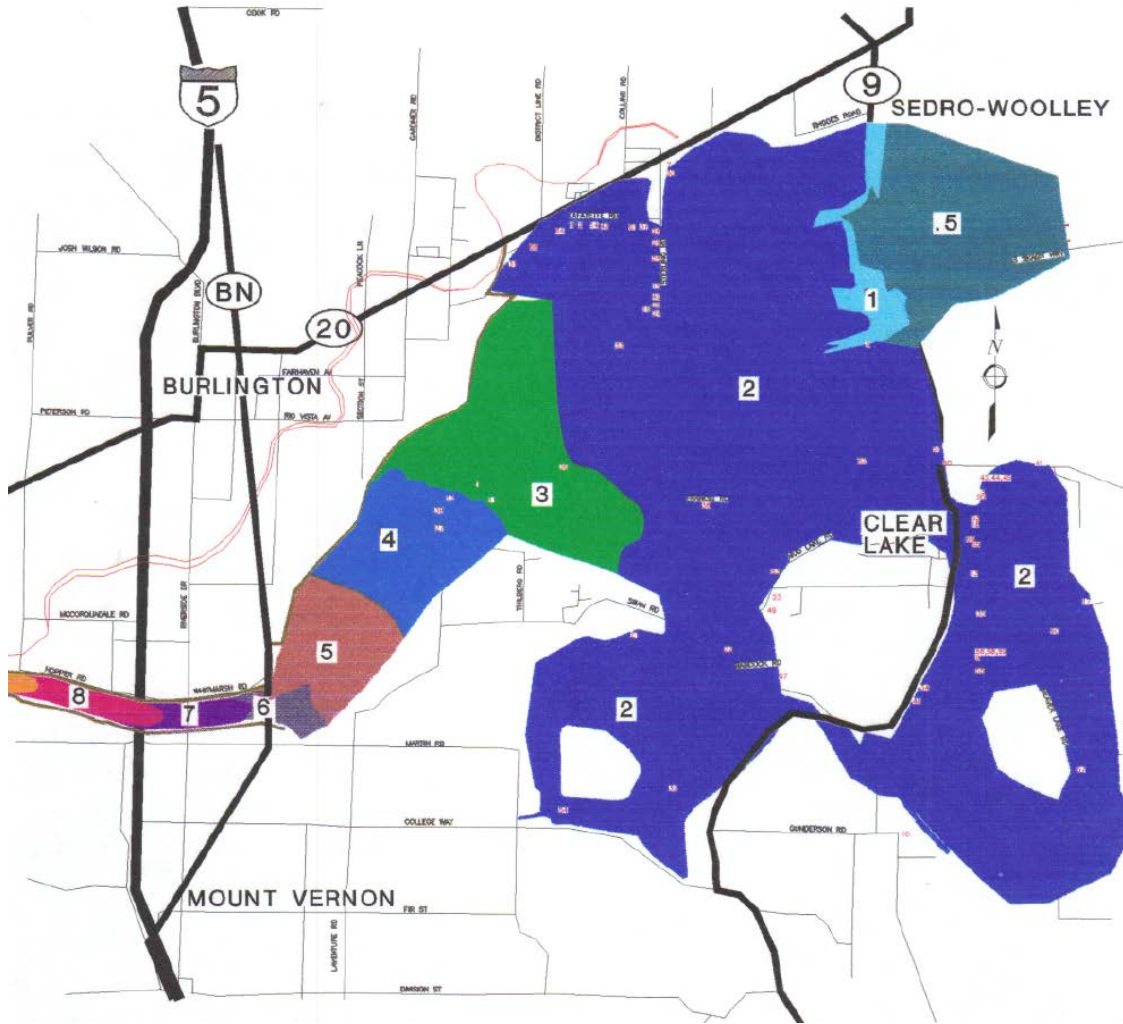
8 Those comments contained the following paragraph:

9 **COMMENT #26:** As the below diagram shows it is not the BNSF railroad
10 bridge that is the restriction to flood conveyance as much as it is the configuration
11 of Dike 12 and Dike 17 levees. The below diagram was provided by a hydraulic
12 analysis performed by nbc of the impacts of induced flooding due to the current
13 levee system. Even if you accept the argument that the bridge acts as an
14 impediment to flood flows the impacts of said impediment are minuscule as
15 compared to the levee system itself as the flood waters simply scour out the area
16 under the bridge. The FEIS needs to identify the amount of levee setbacks
17 planned by the City of Burlington, Mt. Vernon, Dike Districts 12 & 17 and the
18 WSDOT.¹⁵

19
20

¹⁵ See comment letter submitted to Burlington dated March 8, 2009.

GRAPHIC SUMMARY OF
INCREASES IN 1990 FLOOD LEVELS
DUE TO LEVEE SYSTEM



1
2 The exact same exhibit was submitted to the Hon. Hearing Examiner and the Skagit
3 County Planning Department on April 22, 2013 with the following verbiage:

4 “Below is a graphic summary prepared by Skagit County and the Corps of
5 Engineers hydraulic consultant (nhc) on the impacts of the current levee system
6 on upstream property owners. The numbers represent the amount in feet of
7 additional water the levee system described above currently artificially stores
8 upstream this artificial storage impacts not only did look at
9 champs/sterling/Clearlake/Sedro Woolley communities but is responsible for

1 pushing floodwaters over Highway 20 the north and thus flooding the old natural
2 channel of the Skagit River gauges slough...”¹⁶

3 At the public hearing on June 12, 2013 the above referenced exhibit was again submitted
4 to the hearing examiner with the following verbiage:

5 Finally, I'd like to submit to you what I consider; this is one of the things that Mr.
6 Schultz in his letter to you being so outraged of my comments I submitted to you
7 the last time. He doesn't mention this. In fact I submitted it to the City of
8 Burlington, they don't mention it. I submitted it to Dike District 12, they don't
9 mention it. **This is the results of a hydraulic analysis performed by nhc on how**
10 **much the levees already impact the upstream property owners.** {See
11 **1995 Graphic Summary of Increases in 1990 Flood Levels Due to Levee**
12 **System**} This is, it was entered into a court of law in Snohomish County Cause
13 93-2-05201-2 so it is a matter of public record. **Nhc** was paid approximately
14 \$250,000 dollars to conduct this. So if you follow the river down, Burlington in
15 their EIS and the Dike District Commissioners want to continually blame the
16 railroad bridge and something I have to add that was stated here earlier was that
17 Burlington's using the **January 12, 2012 nhc** report. In that report in January
18 2012, Dr. Leytham did not know that the railroad bridge does not back up any
19 water onto anybody **it is the constriction of Dike 17 and Dike 12 just west of the**
20 **freeway where the two come together. That's what's backing the water up as well**
21 **as the current levee out there.** You can see it as you go down the channel; it's
22 already been raised 7 feet, 8 feet. Where does that fit into allowing them to raise
23 it even more?

24 One other last thing that was stated about they used **nhc's** report of
25 January 12th. This is before Dr. Leytham realized that the water does not flow
26 that goes out at Sterling, does not flow between Burlington Hill and Sterling Hill,
27 it goes straight to Gages Slough straight out to Bayview Ridge, from Bayview
28 Ridge it splits to the Samish and Padilla Bay. Like the young man said from

¹⁶ See April 22, 2013 comments submitted to the hearing examiner re: Shoreline substantial development application's PL 12 – 0191.

1 FEMA,¹⁷ I would have put a floodway through there 20 years ago because that's
2 where it belongs. So in reality when you look at this the water that's going out in
3 Sterling and flooding the area north of Highway 20, *the Dike District is flooding*
4 *their own people*.¹⁸

5 At one point during the prehearing conferences the Hon. Examiner stated words to the
6 effect that the public does not seem to be actively following this issue. Based on the discussion
7 above one has to ask the question what good does it do to attend public hearings or participate in
8 public hearings if the evidence you are submitting is ignored by all the participating parties as
9 well as the adjudicator? The hydraulic analysis performed by **nbc** was not even mentioned let
10 alone analyzed for the upstream impacts to the property owners which is the main subject of this
11 controversy. I would submit that to a person from outside the window looking in, it would not
12 appear to be fair to the citizens who did participate or to the upstream property owners.

13 There were several more pieces of crucial evidence that were submitted to the Hon.
14 Examiner that were evidently ignored in their entirety as did the applicant and the Skagit County
15 Planning Department. One of those is reprinted below and should be familiar to the Hon.
16 Examiner as it was first submitted to him in 1985 during the hearings before the pollution control
17 hearings board regarding Gages Slough and its importance as a floodwater conveyance corridor.

¹⁷ See Exhibit #35.

¹⁸ See Transcript SkagitRiverHistory.com Partial Transcript of June 12, 2013 Public Hearing Before the Skagit County Hearing Examiner, Re: Shoreline Substantial Development Permit PL12-0144, Pages 46-47.



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There has been a lot of water under the bridge so to speak since the 1985 hearings on the Cascade Mall where the current Hon. Examiner first viewed the above referenced piece of evidence. The issue at that time was should Gages Slough be designated under the states Shoreline Management Act (“SMA”) by virtue of the fact that the slough was a floodwater conveyance system and a series of wetlands that needed protection under the Act. Then like now a substantial amount of evidence was submitted into the record. Evidence that was ignored by the Hon. Examiner at that time and is evidently being ignoring once again. Since the hearing in 1985 wherein the Hon. Examiner and other board members got it wrong as well as the Skagit County Planning Department, and the local Hearing Examiner at the time who was the former Director of the Planning Department, the city of Burlington has designated the Gages Slough

1 area under the states Shoreline management program. In fact Burlington even used the above
2 referenced exhibit in their justification for designating the slough under the SMP.¹⁹

3 It was difficult in 1985 to understand the decision made by the Hon. Examiner at that
4 time as it is now when previous to the mall hearings the Federal Emergency Management
5 Agency (“FEMA”) in its 1984 flood insurance study (“FIS”) for the city of Burlington
6 recognized the area as a “drainage channel”.²⁰ In a letter subsequent to the adoption of the FIS
7 for Burlington FEMA referred to the Gages Slough area as a “conveyance area” and “secondary
8 drainage channel”.²¹ It would appear to a party standing outside the window looking in that the
9 Hon. Examiner just accepts whatever government tells him and completely ignores the testimony
10 of citizens who for whatever reason are opposed to whatever project is at hand which would
11 make the hearing appear to be unfair.

12 **4. The Hon. Examiner failed to address the floodway issue which is crucial to any**
13 **work being proposed to the levee system.**

14
15 Many letters both pre and post the 1984 FIS²² were submitted to the Hon. Hearing
16 Examiner and were essentially hidden from public viewing by putting all of them under one
17 exhibit labeled “Kunzler Folder”.²³ This seems a bit strange as all of the exhibits submitted by
18 the applicant were given individual numbers and descriptions and would appear to have the
19 effect of trying to keep the public from seeing the evidence against approval of the project. The

¹⁹ As a sidebar I would like to point out that the hand written notes contained on the right-hand side of the exhibit came directly from the hydraulic analysis prepared for the building of the Cascade Mall. Figures that were subsequently rejected by FEMA however, that did not prevent the city of Burlington from approving the building permit for the cascade mall.

²⁰ **See** Exhibit 36.

²¹ **See** Exhibit 35.

²² **See** Exhibit 36.

²³ **See** Exhibit 35.

1 Hon. Examiner while not mentioning any part of the evidence simply states “The Examiners
2 jurisdiction here is limited to SMA compliance under State law.”²⁴

3 Part of the multiple exhibits filed under Exhibit 35 included an **October 10, 1996 USACE**
4 **MFR Re: Skagit River Levee Repairs.**²⁵ The author, states in part the following:

5
6 1) Because of the unique characteristics of the Skagit River Delta,
7 conventional floodways were not adopted for the entire delta downstream of
8 Sedro Woolley. In this area, **for the Skagit River proper, the levees confining the**
9 **channel and adjacent areas have been designated as floodways.** In the vicinity of
10 Whitmarsh Road and old the U.S. Highway 99 bridge, the most landward levees
11 were used to establish the floodway. (Emphasis added.)

12 I also introduced a copy of an e-mail exchange I had with a FEMA employee regarding
13 the floodway designation dated **October 15, 2001 E-mail RE: NFIP Policy Enforcement and**
14 **Floodways**²⁶ some 17 years after the adoption of the FIS²⁷ entered into the record by Applicant.
15 The FEMA representative states very clearly:

16 “ **Yes, the floodway established in 1985 is located between the**
17 **landward toe of the levee so yes this means that there can be no fill or other**
18 **kind of development outside of the original cross-section located within this**
19 **designated floodway.** (*Emphasis added*)
20

21 And then of course there is the 1984 FIS itself that was introduced by the applicants
22 which again states very clearly:

23
24 For the study area downstream of Sedro Woolley, flood plain
25 encroachment must be restricted in certain definitive areas. **For the Skagit River**

²⁴ See H/E decision page 7 paragraph 5.

²⁵ See TR Pg. 48 Ln’s 28-29.

²⁶ See TR Pg43 Ln’s 1-17.

²⁷ See Exhibit 36.

1 proper, the levees confining the channel and adjacent areas have been designated
2 as floodways. In the vicinity of Whitmarsh Road and the old U.S. Highway 99
3 Bridge (Garl Street), the most landward levees were used to establish the
4 floodway boundary. . . . Suggested measures include design of new roads and
5 streets to be at grade in order that obstructive fills not be placed perpendicular to
6 local flow pass, preservation or swale areas and existing drainage channels such
7 as Gages Slough, and a minimization of development density in currently zoned
8 agricultural areas (*Emphasis added.*)²⁸
9

10 The Applicant wanted the Hon. Examiner to believe that a “compromise” was reached
11 with FEMA yet like the SEPA checklist, the floodplain management permits, and the grading
12 permits, no document from Washington DC, FEMA Headquarters who made the decision to
13 designate the levees as part of the floodway, was submitted supporting the alleged
14 “compromise”. When did that compromise occur and what documentation and/or justification
15 were there for the change other than a potential phone call from the Burlington Planner and a
16 former FEMA employee? None was submitted into the record. As stated above the Hon.
17 Hearing Examiner simply ignored the evidence presented to him and implies that it’s not his
18 job.²⁹ I would respectfully submit that the SMA is not now nor ever has been a vehicle for local
19 governments to break the law irrespective of whether or not they are federal, state or local. And
20 when those kinds of conflicts exist and arise in a public hearing it is indeed the Hearing
21 Examiners responsibility to examine those issues and reach an adequate resolution. Clearly that
22 did not happen in the instant case and would appear to a person looking from outside the window
23 in that the hearing was unfair.
24

²⁸ See TR Pg64 Ln’s 5-8. See also Exhibit 36 page 18.

²⁹ See decision page 17 para 5.

1 **5. The Hon. Examiner ignored provisions of the SMA with respect to the floodway**
2 **issue and improvements versus maintenance by the applicant.**

3
4 The consultant for the applicant referenced RCW 90.058.030 when he stated “we’ve got
5 these definitions and we work within those.”³⁰ Really?? That would be the same section of the
6 State Shoreline Management Act that states at §.030(2)(d)(i) “*Any county or city may determine*
7 *that portion of a one-hundred-year-flood plain to be included in its master program as long as*
8 *such portion includes, as a minimum, the floodway AND THE ADJACENT LAND*
9 **EXTENDING LANDWARD TWO HUNDRED FEET THEREFROM.** (*Emphasis added.*)

10 Clearly even if you accepted applicants foolish designation of where they think the floodway is,
11 their levees fall within the 200 feet of the requirement of the State Shoreline Management Act.

12 The consultant also referenced WAC 173-27-040 Developments exempt from substantial
13 development permit requirements as a definition Respondent’s work within. The only section
14 that addresses levees is §.040(2)(k) which states:

15 (k) **Operation and maintenance** of any system of dikes, ditches, drains, or other facilities
16 existing on September 8, 1975, which were created, developed or utilized primarily as a part of
17 an agricultural drainage or diking system; (*Emphasis added.*)

18 Maintenance is defined by the same WAC at §.040(2)(b) which states in part:

19 (b) Normal maintenance or repair of existing structures or developments, including
20 damage by accident, fire or elements. “**Normal maintenance**” includes those usual acts to prevent
21 a decline, lapse, or cessation from a lawfully established condition. “**Normal repair**” means to
22 **restore a development to a state comparable to its original condition, including but not limited to**

³⁰ See TR Pg65 Ln’s 3-4.

1 its size, shape, configuration, location and external appearance, within a reasonable period after
2 decay or partial destruction... (*Emphasis added.*)

3 Clearly the entire project and or projects described in the Applicants DEIS and FEIS do
4 not constitute maintenance however it does explain their infatuation with the word. The four feet
5 of fill material placed on the riverward side of the levee along Whitmarsh Road after the 1990
6 flood event was not maintenance but an illegal improvement to their levee system. Just like the
7 installation of keyways that used the material removed from the keyway areas to place on the
8 riverward side of the levee. One such keyway was within the project area near to and adjacent to
9 the Burlington Sewage Plant. No permits regarding said keyway were submitted during the
10 course of the hearing and none were asked for by the Hon. Examiner. A keyway is clearly not
11 normal maintenance or normal repair under the Act and is just as clearly an improvement that
12 needs proper permits. The Hon. Examiner, by not requiring copies of permits for such activity
13 appears to make decisions only on “trust me the check is in the mail” statements made by local
14 governments. This would appear by a disinterested individual looking from outside the window
15 in as being unfair to citizens and participants who painstakingly researched the issues and
16 submitted evidence contrary to the Applicants.

17
18 **6. The Hon. Examiner by limiting the testimony to just the first three issues identified**
19 **by the county commissioners is denying citizens the right to express themselves in**
20 **accordance with the last directive from the county commissioners in which they**
21 **stated all matters not decided herein are expressly reserved for further proceedings**

22 :

23 At the very first prehearing conference dated October 23, 2013, the first words out of the
24 Dike District attorney’s mouth was that the next public hearing should be limited to the three
25 issues labeled a., b, and c., on page 5 of the county’s resolution on Dike District 12 Shoreline

1 permit appeal. The Hon. Examiner agreed with the Dike district attorney to limit the testimony
2 without acknowledging paragraph number three which stated all matters not decided herein are
3 expressly reserved for further proceedings. The question now arises is another public hearing
4 considered a further proceedings? Any time an adjudicator limits the testimony of the general
5 public the general public should be suspicious of that decision. Suppose a citizen wants to tell
6 the examiner that the applicant is receiving dirt for its project from the Nookachamps community
7 which will be used to further flood the upstream property owners. Would that testimony be
8 allowed? Suppose an upstream property owner wants to testify that there is no such thing as 12
9 year certified levees? Would that be allowed? Like the Mayor of Sedro Woolley testified to
10 suppose another homeowner comes forward and shows the Examiner that they have spent
11 thousands of dollars razing their house and another half an inch will put water into their house
12 again. Would that be allowed? This is one more example of why the Hon. Examiner should
13 consider recusing himself from further proceedings. So long as any public testimony deals with
14 the flooding issue in general there should be no restrictions on public testimony. Clearly in the
15 instant case such a decision to limit public testimony would appear to the uninterested observer
16 looking from outside the window in that the Hon. Examiner has made all his decisions in favor
17 of the applicant while ignoring citizen concerns about induced flooding by the applicant.

18 **CONCLUSION**

19 For the record, I want to restate my position that this motion is made without any malice
20 towards the Hon. Hearing Examiner. I have known Mr. Dufford for almost 30 years and respect
21 and admire his long career of public service. However, as any seasoned land-use lawyer would
22 agree with the issue of appearance of fairness violations must be preserved for the record and no
23 matter which way the Hon. Examiner decides this issue, the issue will be preserved for appeal to

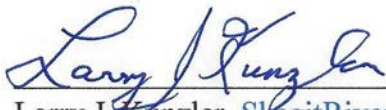
1 the County Commissioners, the Shoreline Hearings Board, Superior Court in Thurston County,
2 the Washington Court of Appeals and in all likelihood since the appeal before the Shoreline
3 Hearings Board would be De Novo and constitutional rights are being violated that have not
4 been alleged to date, the U.S. District Court for the Western District of Washington. One has to
5 ask oneself given the amount of time and expense to get this through the process why doesn't the
6 applicant simply wait for the GI Study to be completed? What's the rush? Could it be that this
7 entire façade of "flood control" is actually more about flood insurance and promoting more
8 irresponsible development in the floodplain? The applicant has stated several times that "large
9 portions of Burlington would be taken out of the floodplain". Did the Hon. Hearing Examiner
10 ever make a determination of what portions of Burlington would be taken out of the floodplain?
11 Does it involve property that one of the Dike District Commissioners who works for one of the
12 major developers in the Valley owns or has an interest in?

13 I realize that with the exception of number 1 above, any of the individual events
14 discussed herein would not probably be justification for recusal however, cumulatively I think
15 that an unbiased observer could only come to the conclusion that based on the record, the hearing
16 process described herein has not been fair. I do thoroughly believe that the Hon. Examiner has
17 been misled by the Applicants and not forcefully pursued the necessary evidence he should have
18 and therefore should consider recusing himself from all further proceedings in the instant case.

19 Therefore I respectfully request the Hon. Examiner to consider recusing himself from any
20 further proceedings in the instant case based on the verbiage contained herein.

21
22

1 Respectfully submitted this Tenth Day of March 2014;



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2

3 Hand delivered to the Skagit County Hearing Examiner

4 Electronically Served on:

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