

A photograph of a flooded street in Mount Vernon, Washington. The water is murky and turbulent, flowing down the street. In the background, there are several buildings, including a prominent red brick building on the left and a taller, light-colored building. A wooden fence runs along the left side of the street. The sky is overcast with grey clouds. A semi-transparent blue box with white text is overlaid in the center of the image.

**FEMA CLOMR REVIEW –  
MOUNT VERNON DOWNTOWN  
FLOOD PROTECTION PROJECT**

# Project Overview

- Objective: To protect downtown Mount Vernon and the Waste Water Treatment Plant from flooding, and improve riverfront for public access and use.
  - Eliminate need to deploy over 2000 volunteers and 150,000 bags of sand at a budget of over \$250,000 to protect downtown from a major flood event.
- Goal: Provide 100-year certified flood protection and remove downtown from the 100-year FEMA mapped floodplain.
  - Eliminate need to purchase flood insurance and allow for redevelopment of waterfront and downtown without floodplain elevation requirements.

# Public Review Process

- SEPA /EIS – Initiated June 2006 / Completed July 2007
  - Agency/Public comments – FEMA, DOE, Tribe, COE
  - City responses and follow up meetings
- NEPA – Completed August 2008
- FEMA consultation on CLOMR process – 10/30/06 and 6/20/08

# CLOMR PROCESS

- Conditional Letter of Map Revision (CLOMR)  
Submission of CLOMR application – February 25, 2009 for 90 day review.
- May 25<sup>th</sup> received request from FEMA for additional 30 days to complete review because of the “complexity of the proposed project...”
- June 23, 2009 letter from FEMA HQ

# Mount Vernon Downtown Flood Project and the NFIP

Kevin Rogerson

City Attorney

July 15, 2009

# Federal Emergency Management Agencies Response to Mount Vernon Request for Conditional Letter of Map Revision

The letter Suspends the City's CLOMR Request until the following "steps" can be taken:

- The City of Burlington, who is pursuing a separate, independent flood protection project upstream of Mount Vernon. Any cumulative effects of the two proposed projects must be considered before acting on the City's request.
- There is an ongoing Flood Insurance Study ("FIS") (beginning in 1997) that has not yet been completed. Because there is a possibility that the current FIS (effective 1-3-85) will be modified the FIS **must** be completed prior to a CLOMR decision on the City's CLOMR request.
- There is an ongoing study by The United States Army Corps of Engineers known as a General Investigation Study ("USACE GI") of the entire Skagit River. This has not been completed and only a 'comprehensive' CLOMR request covering all existing and proposed flood protection projects for the Skagit River can be considered by FEMA.

\* See FEMA Letter dated June 23, 2009

# Suspension of City's Request

- Taken at face value- results in the imposition of an indefinite, ***de facto moratorium upon any*** further CLOMR requests from all potential applicants along the Skagit River.
- No legal basis for FEMA's decision- Arbitrary, capricious and unreasonable
- Exceeds the authority of FEMA granted by federal law and is therefore "ultra vires."
- It improperly creates new FEMA regulations or rules
- It improperly interprets FEMA rules
- It may cause adverse impacts to property owners



# Gauging the Flood Threat to Downtown Mount Vernon

**There is a High Frequency of a Skagit River  
Flooding.**

Since 1908 maximum safe channel capacity of  
the Skagit has been exceeded 17 times or  
once every 6 years.\*

\* Statistics Provided By USACE Information Paper Dated April 2007 by Linda Smith.



# Gauging the Flood Threat to Downtown Mount Vernon

## **The Threat to Downtown Mount Vernon is Substantial**

- November 1990, flood peaked at 9.4 feet above flood stage in the City of Mount Vernon\*
- November 1995, flood peaked at 9.3 feet above flood stage in the City of Mount Vernon\*

\* Statistics Provided By USACE Information Paper Dated April 2007 by Linda Smith.

# Gauging the Flood Threat to Downtown Mount Vernon

## **Damages And Costs As Result of Flooding *and* Flood Fighting are Considerable**

- October 2003 flood fighting costs were estimated at an additional \$9.5 million\*
- Average annual flood damages total \$54 million\*

\* Statistics Provided By USACE Information Paper Dated April 2007 by Linda Smith.



Photo From West Mount Vernon Bridge



National Guard Deployed



Sandbagging





Sandbagging and Staging Along Revetment



Staging Goes Into the Night



Flooding Under New "Old 99" Bridge





Car Impound



Water Reaching The Revetment

# Name the Flood Event?

November 2006

Photos Taken by Scott David Patterson\*

- \* The use of these photos are for educational purposes only and considered fair use under federal copyright law. The City has obtained permission by the author for the use of those photos. Permission granted 7-14-09.





Flooding of 2003

# What Does The Downtown Project Protect?

The Project Protects ***Critical*** Infrastructure Necessary for the Functioning of Entire Region

- City's wastewater treatment plant
- Skagit County Courthouse (District and Superior)
  - City Hall, City Public Works
    - Federal post office
  - County jail (and new jail site)
- County Law Enforcement and Prosecutor
  - Fire and Emergency service facilities
    - Sections of Interstate 5
- Sections of the BNSF main line track that provides both freight and passenger transport along the Pacific Coast (including the Vancouver B.C. to Portland, Oregon service)
  - Regional multi-modal transportation station
    - Historic Downtown (Lincoln Theatre)

# What a CLOMR is not.

- Not a Requirement to Build a Flood Project
- Not a Requirement to Obtain Necessary Permits
- Not a Requirement to Obtain Funding
- Not Even a Requirement to Obtain A Change in Flood Insurance Rate Maps (that is a LOMR).

# What is a CLOMR?

- It is the process that FEMA sets forth in its regulation to have a project reviewed **before** you construct
- It is substantively identical with a Letter of Map Revision process with exception of no as built certifications required. 44 CFR § 65.8
- It is a process recognized by FEMA regulations to review new technical information when submitted by a requestor asking it to be used to change FIRMS that are different from the an effective Flood Insurance Study (FIS). 44 CFR § 65.6
- It is also the process to obtain a “first look” from FEMA and opinion from FEMA that should you build a flood project based on the submissions whether or not the project will result in a change in FIRMS and what that change will be.

# The Project's Design is Based on the Most *Conservative* Technical Case

- City Has Employed Current USACE Modeling and USGS Data points
- No person or Agency has suggested that a 1% flood would be larger in terms of flood depths or in terms of hydrology than the flood modeled for this Project
- Only other studies known suggest ***lower*** volumes of water and ***lower*** base flood elevations
- FEMA has failed to address these facts and the merits of the Project in its response





# FEMA has Failed to Comply with Its Own Regulations

“The purpose of this part is to **outline the steps a community needs to take in order to assist the Agency’s effort in providing up-to-date identification and publication**, in the form of the maps described in part 64, on special flood, mudslide (i.e., mudflow) and flood-related erosion hazards.” See 44 CFR § 65.1

FEMA regulation set out general conditions and data requirements to revise base flood elevations.

“This may involve the requestor’s performing ***new*** hydrologic and hydraulic analysis and delineation of ***new*** flood plain boundaries and floodways, as necessary.” 44 CFR § 65.6 Id. Emphasis Added.

# FEMA Previously Represented to the City that the CLOMR/LOMR Process Is the Process to Use When Reviewing New Data During an Ongoing FIS

“[C]ities may follow the LOMR-PMR process. In this instance, the data will be evaluated in the context of the current FIS and the preliminary FIS study. There may be fees collected for this review. Any proposed revisions to the published **or preliminary base flood elevations** must meet section 65.6 of 44 Code of Federal Regulations. **Either as an appeal or a LOMR, FEMA will consider your information and will revise the maps if the data provided warrants such a change.** “\*

\* See last paragraph of September 2007 Letter by Carl Cook Director of Mitigation Division to Mayor Norris. Emphasis added.

# FEMA Has Created New and Improper Rules

- Congress created a regulatory process that requires agencies to learn from experience and input of the public and to maintain a flexible and open-minded attitude toward their own rules. Chocolate Manufacturers Association v. Block, 755 F.2d 1098, 1103 (4<sup>th</sup> Cir. 1985).
- Agencies may not circumvent the rulemaking requirements of the United States Administrative Procedures Act. N.L.R.B. v. Wyman-Gordon Co., 394 U.S., 764, 764-66 (1969); Anaheim, et al. v FERC, 723 F.2d 656, 659 (9<sup>th</sup> Cir. 1984).
- A change in law may not be made by informal letter-writing. Christensen v. Harris County, 529 U.S. 576, 587-88, 120 S. Ct. 1655, 146 L.Ed. 2d 621 (2000).

# FEMA “Steps” Add New Substantive Criteria For a CLOMR Not Found in Any Regulation

These new “steps” include:

- Requiring the City to wait for federal processes, one of which is beyond FEMA’s control and authority (i.e. FEMA’s own FIS and the USACE GI process)
- A requirement that the City consider in its CLOMR request all **potential** flood protection measures along the Skagit River no matter how remote or speculative so long as they are a part of the USACE GI
- A requirement that the City obtain consensus with other communities beyond its jurisdiction to solve **all** matters related to flooding along the river in one comprehensive CLOMR in order to ensure that its own CLOMR is reviewed.

# The New Rules Are Arbitrary

No longer Based on the Technical Merits of the  
Project

Example: A Flood Project in 2001 that can be shown to receive 500 year protection or a protection at Biblical Proportions would have been suspended from review over the past eight years with no date certain.



## Requiring Review of Effects of Remote and Speculative Flood Measures as “Anticipated Development” is Unreasonable

- Must be defined as “***reasonably*** anticipated development”
- It is patently unreasonable to consider flood protection measures so remote and speculative that they are yet to be recommended, approved, or funded over the last twelve years.
- G.I. is too remote and speculative to be considered “***reasonably*** anticipated development”
- G.I. began in 1997, cost \$6,638,000 by 2007, no recommended measures have been produced, no cost benefit analysis Corps undergoes has been performed, 2014 is scheduled date for completion, will need acts of Congressional Approval for funding of process *and* any local funding needed has not been identified.



# Inclusion of Future Remote Flood Projects Contrary to FEMA Regulations

“Revisions cannot be made based **on the effects of proposed projects or future conditions**. Section 65.8 [the CLOMR regulation] of this subchapter contains the provisions for obtaining conditional approval of proposed projects that may effect map changes when they are completed.”

44 CFR 65.6(a)(3) emphases added.



# FEMA's Actions Toward the Request Which City Relied on Contradict Their Suspension Decision

- April 28, 2008 and May 8, 2008 City specifically and formally seeks guidance in the process and about the issue of how to address new hydrology in light of ongoing FIS. E-mail From Jana Hanson Community Economic Director
- A meeting with FEMA officials to discuss guidance occurs June 20, 2008. See E-mails between Ryan Ike and Jana Hanson
- After meeting, on June 24, 2008 City Consultant, Albert Liou **confirms** from FEMA officials what model is needed and request to keep the City informed of changes.
- FEMA accepts City CLOMR application
- FEMA processes the CLOMR application for over four months
- FEMA seeks an additional 30 days due to the projects “complexities”
- FEMA then indefinitely suspends project on the grounds of ongoing studies which were **facts known to them for the past twelve years.**
- FEMA's act of suspension was not in good faith.

# Impacts

- LOMR and CLOMR review are substantively identical
- No LOMR/CLOMR along the entire Skagit River indefinitely
- Any property owner who would otherwise be entitled to a revision would not obtain that relief.
- The Jail?

# Support of Local Jurisdictions

- Is a recognized measure with the County Flood Advisory Committee who has preliminary approved this.
- Special Purpose Districts: Dike 17, 12, 1, and 3.
- General Purpose Governments: Sedro Woolley, Burlington and Skagit County (concurrency letter)
- Private interests: Chamber, Downtown Business Association and Commercial Businesses
- More to follow.

# Conclusion

- No legal basis for FEMA's decision- Arbitrary, capricious and unreasonable
- Exceeds the authority of FEMA granted by federal law and is therefore "ultra vires."
- It improperly creates new FEMA regulations or rules
- It improperly interprets FEMA rules
- Cause adverse impacts to property owners
- Fundamental Fairness is at issue, FEMA did not use good faith efforts to process the City's request

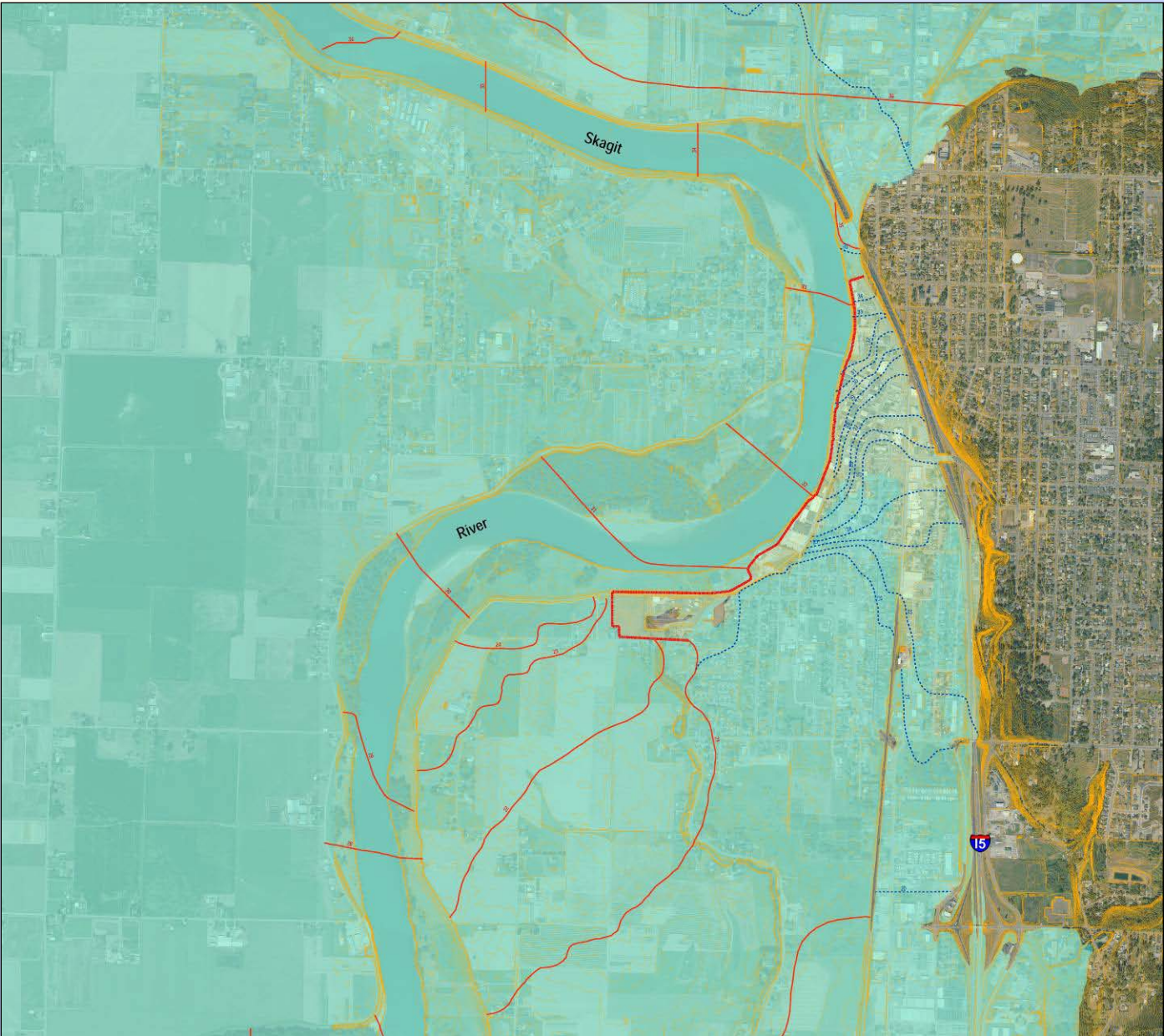
# Mount Vernon Flood Protection Project

## Base Flood Elevation (BFE) Maps



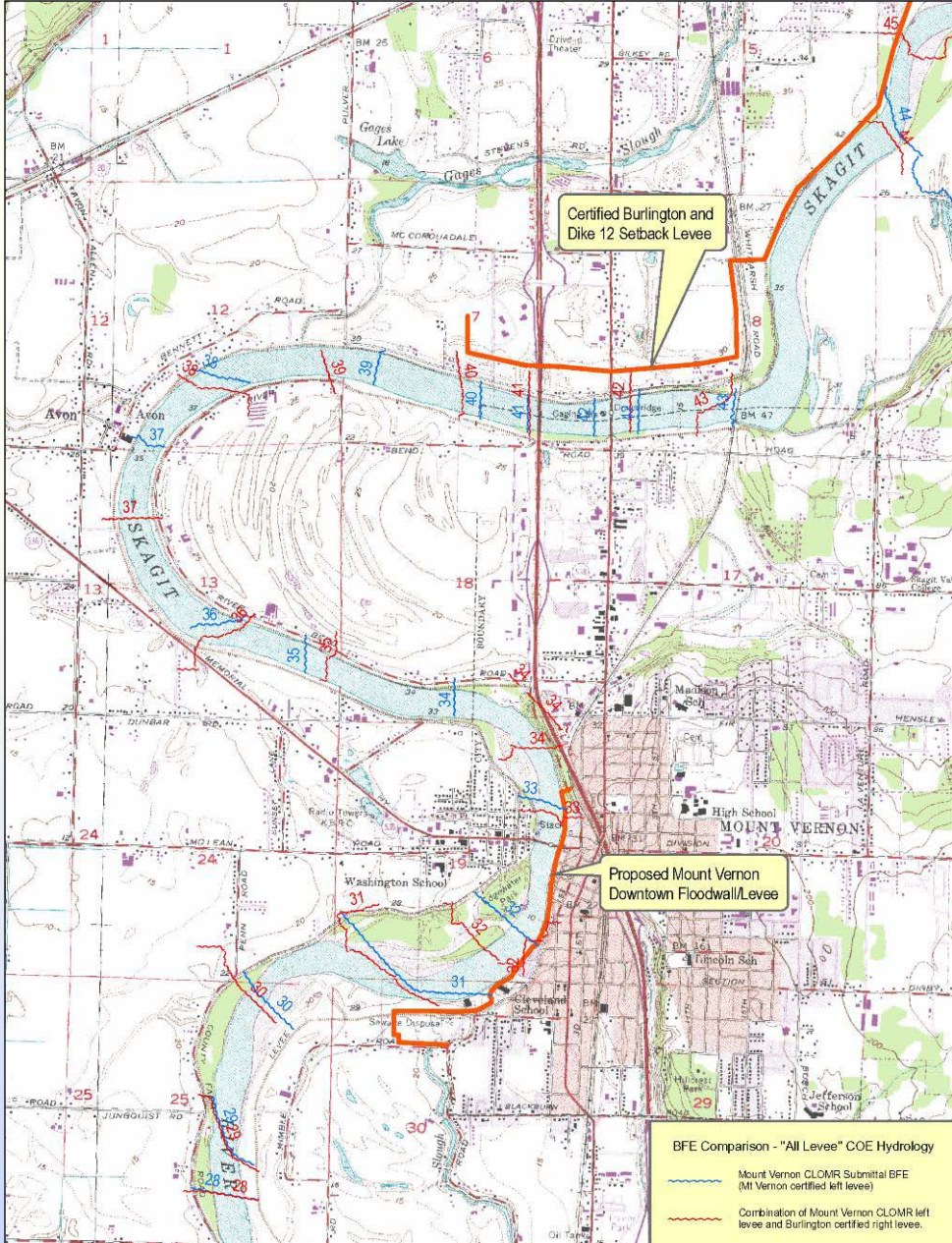
July 15, 2009

# BFE map for existing and post-project conditions, COE hydrology





# Cumulative effects of anticipated Burlington levee development





# Potential upstream development projects causing BFE increases

