

Skagit

February 20, 1987

Headquarters
Skagit County Flood Control District
County Administration Building
Mount Vernon, Washington 98273

Dear Sir:

On February 11, 1987 we received your "Notice of Public Hearing" in the Remand of Floodplain Appeal #FP-86-002, regarding the placement of fill by the Burlington Northern Railroad in the Gages Slough. We regret that staff from our office are unable to attend because we are hosting a four-State meeting of National Flood Insurance Program (NFIP) State Coordinators on February 25 and 26. In lieu of our testimony, following is a written summary of our comments on the proposed action.

First, enclosed is a copy of a November 10, 1986 letter from our office to Mr. Newall D. Smith of the Burlington Northern. This letter spells out the basic standard relating to encroachments in effective flow area found at Section 60.3(c)(10) of the Federal Regulations and Section 15.20.205 of the Skagit County Code. We request that this letter be added to the record, which includes our testimony at the September 1, 1986 public hearing in Skagit County.

The Burlington Northern has violated the flood plain permit requirement and the encroachment standard of Section 60.3(c)(10). This is a very serious violation, in view of the extensive hearings and other meetings over a 4-year period that went into the negotiated agreement among Skagit Valley communities in lieu of a conventional floodway designation. The encroachment remains a violation until either the fill is removed from the Slough, or a scientific, technical engineering analysis is provided demonstrating that the cumulative effect of the proposed fills, combined with all existing and anticipated development, will not increase water surface elevations of the back flood more than one foot. Such an analysis would, of course, have to apply to the entire reach of the Skagit River in the Delta, as explained at our recent negotiation session with the County and the Railroad.

Recalling that it is necessary to preserve all effective flow areas available and not worsen the situation, the County has determined that fill be prohibited in the Gages Slough as part of the settlement. Other areas are similarly designated, and standards are prescribed in yet other areas. Because we have adopted to assure compliance with NFIP Regulations, on advice of our Office of General Counsel we remind you that Section 60.1 of the Federal Regulations requires that we must review your participation against the local requirements, as is made clear in the following excerpt from Section 60.1(d): "Therefore, any floodplain management regulations adopted by a State or a community which are more restrictive than the criteria set forth in this part are encouraged and shall take precedence" (emphasis added).

The only mechanism available to the Railroad for skirting the law is the [REDACTED] here again, however, we urge your most careful [REDACTED] action does not fit into any variance criteria [REDACTED] regulations at Section 60.6 FEMA National has recently [REDACTED] guidance in the form of a policy memorandum dated July 22, [REDACTED] copy is enclosed since it sheds further light on the case in [REDACTED].

All that has been argued to date by the Railroad is economic hardship. Our view of this in the variance context is made clear on page 3 of the new guidance, wherein it is stated that a variance request must be exceptional to the property involved, not to the requestor, and that mere economic or financial hardship alone is not exceptional. Indeed, this is now even a provision in the FEMA Region X model ordinance.

Also important to note is the requirement that variances not result in additional threats to public safety (see Section 60.6(a)(3) and page 4 of the guidance). Clearly, the applicant has not provided information demonstrating that additional threats to public safety based on the cumulative impact would not occur as discussed above; what also must be considered in the variance context is the additional threat to public safety for adjacent property owners in more frequent floods that are smaller than the base flood, and associated drainage problems.

For these reasons, FEMA guidance on variances quite clearly does not lead one to conclude that a variance is justifiable in this case. The guidance, likewise, provides the County with a perspective on how we would review their handling of such a request in our periodic enforcement inspections.

We again remind the County of the serious ramifications a probation/suspension action would have, such actions being the enforcement tool available to FEMA. Skagit County has more flood insurance policies than any County in the State, with the exception of Cowlitz County (because of the effects of Mt. St. Helens). A probation action would require a surcharge of \$25 on all new and renewal policies for an entire year; a suspension would mean insurance availability would be withdrawn for all, with the resultant impacts on Federal and Federally related loans, grants and mortgage monies (see attached sheet on "Effects on Nonparticipation in the NFIP"). Clearly, this would result in a severe impact on the 1400+ policyholders in the County, [REDACTED] some \$56.4 million in insurance coverage.

Finally, [REDACTED] whether into applicability of the Federal Executive Order [REDACTED] in flood hazard areas (E.O. 11988). We cannot [REDACTED] Executive Order may affect the Railroad at this time, [REDACTED] not yet invoked any arguments prescribing special [REDACTED] to interstate commerce or like matters. If that does become a factor, it would be our intention to be sure the appropriate regulatory measures of the involved Federal agency mandating sound flood plain management in Federal and Federally related actions be communicated to the Railroad.

We have discussed this proposed action through this letter and the situation is clear. Please feel free to call us (206) 483-7282 if you need any clarification or additional information.

Sincerely,

151 R. W. Steele

Charles L. Steele, Chief
Natural and Technological
Hazards Division

Enclosures

Copy to: Jerry Louthain, Department of Ecology, Olympia, Washington
Frank Thomas, Assistant Administrator, FIA, Washington D.C.
John Scheibel, Office of General Counsel, Washington D.C.

OFS: NTH MR

NTH/Steele/wlf/2/20/87

10 NOV 1986

Mr. Lowell D. Smith
220 First Interstate Center
1000 First Avenue
Seattle, Washington 98104

Dear Mr. Smith:

This is in response to your October 24, 1986 letter concerning Burlington Northern bridges over the Gages Slough in Skagit County.

We recognize that the Skagit County Commission requested additional dialogue between the railroad, the County and FEMA. However, because the railroad is primarily concerned with meeting a local ordinance, we do not feel that it is necessarily appropriate for FEMA to be a negotiating entity. Also, our basic arguments at the September 17, 1986 public hearing in Skagit County would appear to leave little room for negotiation.

First, the County's ordinance, derived after four years of negotiating among local bodies, prohibits fill in the Gages Slough. Making an exception for the railroad clearly leaves the door open for exceptions to anyone. The primary Federal regulation addressed by the prohibition of fill in the Gages Slough is Section 60.3(c)10, which reads as follows:

Require until a regulatory floodway is designated that no new construction, substantial improvements, or other development (including fill) shall be permitted within Zones AI-30 and AE on the community's FIRI, unless it is demonstrated that the cumulated effect of the proposed development, when combined with all other existing and anticipated development, will not increase the water surface elevation of the base flood more than one foot at any point within the community.

The specific measure in the Skagit County code that addresses this regulation requirement is found in ordinance number 10331 at section 15.20.205, which reads as follows:

"No new construction, substantial improvements, or other development (including fill) shall be permitted within Zones AI-30 on the community's FIRI, unless it is demonstrated that the cumulative effect of the proposed development, when combined with all other existing and anticipated developments, will not increase the water surface elevation of the base flood more than one foot at any point within the community."

Allowance of these relatively major, blocking fills, in an effective flow area cannot be analyzed in isolation. It must be assumed that once the railroad is permitted to undertake such fills, any and all others who similarly want the fill in the slough must likewise be permitted, thereby creating a situation where it would be impossible to comply with the cited criterion.