

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
DISQUALIFY APPLICANT EXPERT
nhc DUE TO CONFLICT OF INTEREST**

INTRODUCTION

The issue presented before us is whether or not an engineering firm can work both sides of a conflict and not be considered a conflict of interest. I want to state for the record that I did not want to bring this motion. One, I think it is pre-mature to bring a motion until the work product by **nhc** could be analyzed to see if it would be in conflict with previously submitted testimony on the impact of the levees to upstream property owners and two, I don't know why it seems beyond the comprehension of local attorneys to negotiate and arrive at a comprehensive solution instead of filing motions and wasting the time of the Hon. Examiner and the taxpayers. This is especially true in the instant case as the Applicants have known since at least 2009, and I am sure that the Dike District many years before, that **nhc** had determined the impacts of the levee system on the 1990 flood event. At the "pre-hearing conference" held on January 28, 2014, I simply made the Hon. Examiner aware of the potential for a conflict of interest because **nhc** had performed hydrology work for the upstream property owners including the Mayor of

1 Sedro-Woolley in the Halverson vs. Skagit County case several years before. In fact, that work
2 product has been part of the instant case since 2009 when it was first introduced to the City of
3 Burlington as part of comments to their DEIS.

4 Those comments contained the following paragraph:

5 **COMMENT #26:** As the below diagram shows it is not the BNSF railroad
6 bridge that is the restriction to flood conveyance as much as it is the configuration
7 of Dike 12 and Dike 17 levees. The below diagram was provided by a hydraulic
8 analysis performed by **nhc** of the impacts of induced flooding due to the current
9 levee system. Even if you accept the argument that the bridge acts as an
10 impediment to flood flows the impacts of said impediment are minuscule as
11 compared to the levee system itself as the flood waters simply scour out the area
12 under the bridge. The FEIS needs to identify the amount of levee setbacks
13 planned by the City of Burlington, Mt. Vernon, Dike Districts 12 & 17 and the
14 WSDOT.¹
15

16 After I made the statement concerning a potential conflict of interest to the Hon.
17 Examiner, the attorneys for the applicant went completely off the chains and instead of
18 discussing the issue and reaching a reasonable compromise the attorneys demanded this issue be
19 decided through “the motion process”.

20 For the record I want to state that over the last 34 years of working for attorneys I have
21 worked with many “experts” and there was no other consultant firm that I had/have more respect
22 for due to their integrity than **nhc**. I simply made the inquiry to be sure that any determination
23 by **nhc** could not be overturned or challenged due to a conflict of interest.

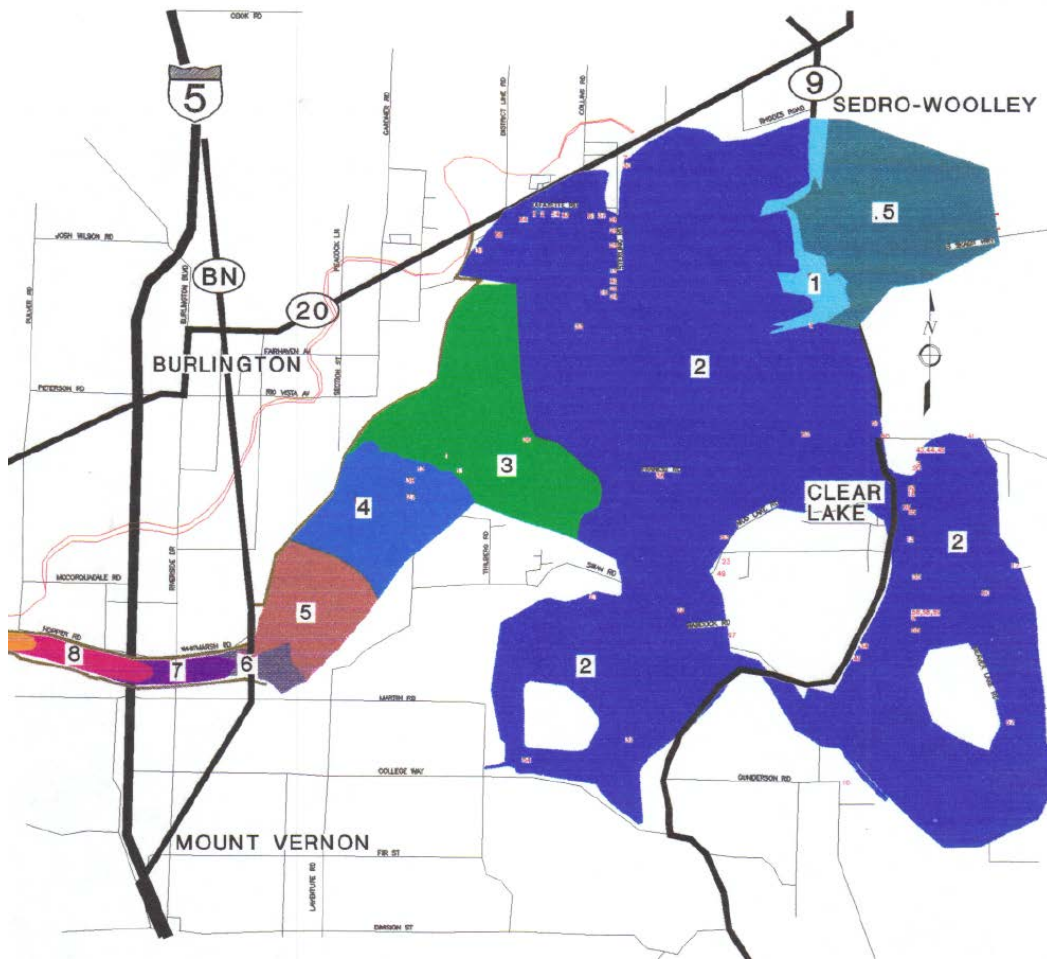
24 **BACKGROUND**

25 Following the devastating floods of 1990, citizens upstream of the Dike District 12
26 levees, many of which for the first time had floodwaters in their homes, filed suit alleging that

¹ See comment letter submitted to Burlington dated March 8, 2009.

1 the levees had been the cause of induced flooding.² The engineering firm of **nhc** was hired to
2 perform a hydraulic impact analysis of the levee system on the amount of water that the levee
3 system artificially stored on the upstream property owners. When **nhc** was asked to perform the
4 work on behalf of the upstream property owners they replied, “If we cannot prove that the levees
5 during the 1990 flood event stored additional water on your plaintiffs property then that is what
6 we will have to say. We will report what our scientific analysis shows.” What the scientific
7 analysis showed is the graphic illustration depicted below:

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



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² Snohomish County Cause 93-2-05201-2

1 **ENGINEERS, LIKE ATTORNEYS HAVE A CODE OF ETHICS.**

2
3 Canon #4 of the Engineers Code of Ethics states in part: “Engineers shall act in
4 professional matters for each employer or client as faithful agents or trustees, and shall avoid
5 **conflicts of interest.**”³ (Emphasis added.)

6 Under Canon #4 there are 7 elements (a through g) of compliance. Element 4(a) states:

- 7 a. Engineers shall avoid all known or potential conflicts of interest with their employers
8 or clients **and shall promptly inform their employers or clients** of any business
9 association, interests, or circumstances which could influence their judgment or the
10 quality of their services.⁴ (Emphasis added.)
11

12 Clearly based on nothing more than the statements of the Dike District attorney at the last
13 pre-hearing conference on January 28th **nhc** has violated Canon #4 ¶a. Like so many other things
14 in this case, there is nothing placed in the record that shows element (a) has been complied with.
15 The attorney pleads ignorance and said he did not know that **nhc** had analyzed the impacts of the
16 levee system on Clear Lake. I don’t know if **nhc** failed to notify the attorney or this is one more
17 strong example of just how much the attorney has ignored the evidence presented above that has
18 been in his possession and the City of Burlington’s possession and part of this record since at
19 least 2009.

20 The graphic above, prepared by **nhc**, clearly shows that during the 1990 flood event the
21 levees owned and operated by the Applicant put an additional 4 feet of water just upstream of the
22 BNSF bridge to ½ foot of water at the Sedro-Woolley sewage treatment plant and **2 feet of**
23 **water in the town of Clear Lake.** To say that the Applicant didn’t have knowledge that **nhc**
24 conducted an analysis of anything but the Nookachamps is nothing more than a tribute to sloppy

³ <http://www.asce.org/ethics/code-of-ethics/>

⁴ Id.

1 lawyering or public employees not doing their job by ignoring the obvious of the evidence
2 presented to them.

3 Element 4(b) of the Engineers Code of Ethics states the following:

4 Engineers shall not accept compensation from more than one party for
5 services on the same project, **or for services pertaining to the same project**, unless
6 the circumstances are fully disclosed to and agreed to, **by all interested parties**.⁵
7

8 In the instant case **nhc** has worked for the upstream property owners to determine the
9 impacts of the levees on the 1990 flood event; Skagit County to determine what the correct level
10 of the 100 year flood should be; USACOE (“Corps”) to determine what the 100 year flood
11 should be and now it is being proposed that **nhc** work for the Dike District to:

12 “...present analysis of the actual effects of the levee modifications envisioned
13 under the Shoreline Permit, applying Corps hydrology, comparing actual pre-
14 project conditions and post-project conditions, taking into consideration and
15 depicting (i) upstream impacts to the City of Sedro-Woolley and environs as well
16 as the Nookachamps Basin, including but not limited to impacts to United
17 General Hospital and the Sedro-Woolley wastewater treatment plant; and (ii)
18 downstream impacts.”⁶

19 I am unaware of any of **nhc**’s current or former clients being notified by **nhc** that they are
20 undertaking this assignment. The assignment that involves the same set of levees they have
21 looked at since 1990 although not including the massive set of improvements made and admitted
22 to by the applicant since 1990.

23 **THE HYDRAULIC CONUNDRUM**

24 As stated numerous times, the above graphic, prepared by **nhc**, shows the impacts of the
25 levee system that existed in 1990 on the upstream property owners during the 1990 floods.

⁵ Id.

⁶ See Skagit County Comm. Resolution #R20130278.

1 Subsequently **nhc** submitted a report to Skagit County relied upon by the Applicant to
 2 show 100 year flood flows.

100-Year Regulated (includes effect of dam storage) Peak Flow Estimates

Consultant	Location		
	Concrete	Sedro-Woolley	Mount Vernon
Corps of Engineers	209,490	215,270	192,900*
Northwest Hydraulic Consultants	191,400	196,690	176,250*
Pacific International Engineering	184,400	184,700	162,200

*this flow is not possible at this location

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 4
 5 And now **nhc** will be asked by the Applicant to utilize the following flows determined by
 6 the Corps and reportedly assisted by **nhc**:

TABLE 22 – PEAK FLOWS (CFS) AT CONCRETE, SEDRO-WOOLLEY, AND MOUNT VERNON

Recurrence	Unregulated Concrete	Regulated Concrete ¹	Unregulated Sedro-Woolley	Regulated Sedro-Woolley ¹	Unregulated Mount Vernon	Regulated Mount Vernon ¹
2-year	77,300	77,300	80,500	80,500	76,400	76,900
5-year	120,500	101,100	125,600	105,200	110,500	92,900
10-year	153,300	127,700	159,400	133,000	142,600	119,000
25-year	201,200	165,300	211,700	169,800	169,900	149,800
50-year	229,300	189,100	235,000	197,400	210,200	167,600
75-year	255,500	211,400	261,200	220,000	220,800	192,300
100-year	272,400	225,900	280,100	235,700	236,400	206,500
250-year	325,400	279,700	320,100	289,400	278,100	244,700
500-year	363,600	324,400	356,900	325,400	320,900	282,600

7
 8 So what this should tell any observer is that if the funnel effect created by the Applicant
 9 and illustrated by the “Graphic Summary”, shown above on the 1990 flood by the Applicants
 10 levee system was determined by using the flows of the 1990 flood event which was 152,000 cfs
 11 at Mt. Vernon, prepared by **nhc**, and now is going to be analyzed by using a levee system 4 feet
 12 higher with an approximately additional 5 feet (54,000 cfs) of water in the system, clearly the

⁷ See Applicant FEIS page 44.

⁸ See Exhibit B pg 57 Table 22

1 upstream property owners as well as the City of Burlington itself as well as the Samish River
2 valley residents will be greatly impacted by the Applicant’s project. After the testimony of the
3 Dike District Commissioner that this is only the first step in a project that will take place before
4 they tie into high ground either Burlington Hill, Sterling Hill or to high ground along Highway
5 20 to Sedro-Woolley, all of those projects would have devastating impacts to the upstream and
6 Samish River farming community, is it any wonder that the upstream property owners are
7 “outraged” that this kind of pompous arrogant attitude towards their property rights is upsetting?
8 Add to that, as the evidence clearly shows above, **nhc** being involved with all three projects has
9 arrived at different sets of figures for each client. I personally having worked with **nhc** in the
10 past believe that they will do the right thing. What I am concerned about is the perceived lack of
11 integrity that the Applicant has shown and will try and twist and turn and control the outcome of
12 **nhc**’s work product. This is why at this time if the Hon. Examiner determines that there is no
13 conflict of interest with the Applicant using **nhc** then I would respectfully request that the Hon.
14 Examiner requires **nhc** to verbally address the Examiner in the public hearing process to present
15 their findings.

16 CONCLUSION

17 As previously stated I believe that requiring this motion to be filed now is premature
18 because the Applicant has presented no evidence that **nhc** has complied with its Code of Ethics
19 nor have they shown what they have directed **nhc** to do or more importantly not to do.

20 Clearly since the County mandates the use of the Corps hydrology (attached hereto as Exhibit B
21 and by this reference incorporated herein)⁹ that was determined by **nhc** and **nhc** created the

⁹ See Exhibit B **Skagit River Flood Risk Management Feasibility Study: HYDROLOGY TECHNICAL DOCUMENTATION FINAL REPORT**

1 above referenced graphic utilizing only 152,000 cfs as its flow at Mt. Vernon and now they will
2 be using more water (according to Exhibit B 206,000 cfs) and at a minimum 4 ft. higher levees
3 then the end result will have to be more water on the upstream property owners and if that would
4 be proven not to be true then the only other result would be a significant amount of water being
5 transferred to the north and west across Highway 20.

6 Recognizing that the Corps then uses their hydrology to determine how high the levees
7 have to be as well as performing a “risk analysis/assessment” to other property owners, both
8 upstream and downstream. This alone should be enough for the Hon. Examiner to require that
9 the applicant delay its project until the risk analysis/assessment has been performed especially
10 since the Corps is basing the risk assessment on **nhc**’s work. However, if the Applicant is saying
11 that they will ask **nhc** to analyze and perform a risk analysis of the impacts of their levee system
12 as it currently impacts upstream property owners as well as their “improvement project” then I
13 am happy to set aside this motion so long as the Hon. Examiner guarantees that **nhc** will present
14 their findings before the Examiner in person. Once the risk assessment is completed then the
15 Hon. Examiner could determine if the Applicant should be required as a condition to approving
16 their project to compensate impacted property owners for the unconstitutional temporary taking
17 of their property in accordance with recent case law.¹⁰ Perhaps we could also determine if **nhc**
18 had presented its report to the Applicants and had it rejected and was told to re-write portions of
19 it and if that was the case, determine if that in and of itself a violation of their professional ethics
20 code.

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¹⁰ Arkansas Game & Fish Comm'n v. United States, 736 F.3d 1364, 1369 (Fed. Cir. 2013). See also
Fitzpatrick v. Okanogan Cnty., 169 Wn.2d 598, 603, 238 P.3d 1129, 1132 (2010)

1 Respectfully submitted this Seventeenth Day of March 2014;



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

4 Electronically Served on:

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14

EXHIBIT A

Hydraulic Testimony RE: Halverson et. al. VS Skagit County et. al. Snohomish County Cause 93-2-05201-2			
1.	10/2/1995	RULE 26(B)(4) STATEMENT REGARDING EXPECTED OPINIONS OF PLAINTIFFS' EXPERT WITNESSES	
2.	10/12/1995	October 12, 1995 Dr. Mutter Deposition	
3.	12/04/1995	December 4, 1995 Dr. Melone Deposition	
4.	12/19/1995	December 19, 1995 Dr. Mutter Deposition	
5.	1/09/1996	January 9, 1996 Dr. Mutter Deposition	
6.	1/07/1997	January 7, 1997 Afternoon Trial Transcript	Dr. Regan testimony, starting on page 40
7.	1/08/1997	January 8, 1997 Morning Trial Transcript	Dr. Regan testimony
8.	1/08/1997	January 8, 1997 Afternoon Trial Transcript	Dr. Regan testimony
9.	1/09/1997	January 9, 1997 Morning Trial Transcript	Dr. Regan testimony
10.	1/9/1997	January 9, 1997 Afternoon Trial Transcript	Dr. Regan testimony
11.	1/13/1997	January 13, 1997 Trial Transcript Part A	Dr. Regan testimony
12.	1/14/1997	January 14, 1997 Trial Transcript Part B	Dr. Regan testimony until page 18, then Dr. Mutter of nhc
13.	1/14/1997	January 14, 1997 Trial Transcript Part C	Dr. Mutter Testimony
14.	1/15/1997	January 15, 1997 Morning Trial Transcript	Dr. Mutter Testimony from page 2
15.	1/15/1997	January 15, 1997 Afternoon Trial Transcript	Dr. Mutter Testimony from page 13
16.	4/7/1997	April 7, 1997 Morning Trial Transcript	Dr. Mutter Testimony until page 44
17.	4/7/1997	April 7, 1997 Afternoon Trial Transcript	Dr. Melone Testimony from page 41
18.	4/8/1997	April 8, 1997 Morning Trial Transcript	Dr. Melone Testimony from page 31

EXHIBIT B

8/2013	Skagit River Flood Risk Management Feasibility Study: HYDROLOGY TECHNICAL DOCUMENTATION FINAL REPORT
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