

RESOLUTION #

**A Resolution Pertaining to the Closed Record Appeal (PL13-0265)
Of Hearing Examiner Approval of Shoreline Substantial Development Permit (PL12-0191)**

WHEREAS, Skagit County Dike, Drainage and Irrigation District No. 12 (hereinafter, “**DD12**”) sought and obtained approval by the Skagit County Hearing Examiner for a Shoreline Substantial Development Permit (PL12-0191) (the “**Shoreline Permit**”), to engage in shoreline stabilization and flood protection improvements along a 1.53 mile stretch of the Skagit River, to increase flood protection for the City of Burlington (“**Burlington**”), proposing to increase the height of existing dikes up to four (4) feet, widening the dikes by approximately sixty (60) feet (hereinafter, the “**Project**”).

WHEREAS, the City of Sedro-Woolley (hereinafter, “**City**”), after participating in the proceedings before the Hearing Examiner, timely filed this appeal (PL13-0265) to the Board of County Commissioners (“**Board**”) pursuant to Skagit County Code (SCC) 14.06, alleging the Shoreline Permit to be inconsistent with the Skagit County Shoreline Master Program, SCC 14.26, contending that the upstream impacts of the Project have not been adequately analyzed or addressed, requesting that the Board impose one or more of the following:

- (a) As a condition of permit approval, require additional protective measures to ensure that the project does not result in additional flooding to upstream areas, specifically the City’s wastewater treatment plant and United General Hospital;
- (b) Require that the project only proceed in conjunction with construction of the setback levee in the Three Bridge Corridor;
- (c) Require that the project be delayed until completion of the GI process, so as to ensure that the project does not proceed in isolation and that the comprehensive approach is not jeopardized.

See, Appellant’s Memorandum dated August 15, 2013, at 5:23-28.

WHEREAS Mr. Larry J. Kunzler of Sedro-Woolley, after participation in the proceedings before the Hearing Examiner, submitted briefing and argument in this appeal as an intervenor, which was accepted by the Board without objection from either party.

WHEREAS, the Board conducted a hearing on this matter on September 10, 2013, after considering the parties’ submissions and the record below.

WHEREAS, DD12 contends that the City lacks standing to pursue this appeal, on grounds the City cannot demonstrate actual injury.

WHEREAS, Washington law provides that “[a] person has standing to obtain judicial review of an agency action if that person is aggrieved or adversely affected by the agency action.” RCW

34.05.530. A person is aggrieved if the agency action “(1) has prejudiced or is likely to prejudice that person; (2) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.” *Id.*

WHEREAS, the City meets the legal standing test. The nature of the City’s grievance is not merely speculative. Upstream and downstream impacts are the essence of the impacts that the Board is required to consider when considering an appeal to a flood infrastructure-related shoreline permit. See SCC 14.26. Among other things, the environmental analysis associated with this proposal recognize the existence of significant likely adverse upstream impacts. HE Exh. 6 at 12, 156.

WHEREAS, in opposition to the City’s appeal, DD12 further contends that the upstream effects of the Project have been adequately addressed, pointing to a Final Environmental Impact Statement dated July 10, 2010 (hereinafter, the “**FEIS**”), which, DD12 contends, “clearly shows minimal or no effect” in the upstream areas at issue. Respondent’s Response Memorandum dated August 26, 2013 at 5:19.

WHEREAS, the FEIS, done by DD12 in conjunction with Burlington, purports to consider the impact of various potential flood protection projects under different hydrology scenarios (hereinafter, the “**FEIS**”). See, Hearing Examiner Exhibit 6, which includes DD12’s Draft Environmental Impact Statement dated February 13, 2009 (“**DEIS**”) and comment letters thereto.

WHEREAS, the FEIS considers three different hydrological datasets, developed by, respectively, (1) the U.S. Army Corps of Engineers (“**Corps**”); (2) Northwest Hydraulic Consultants, a private firm engaged by Skagit County (“**NHC**”); and (3) Pacific International Engineering, a private firm engaged by DD12 and Burlington (“**PIE**”). The Corps analysis uses the highest river flow predications and PIE the lowest, with NHC falling in the middle. HE Exh. 6 at 9 (Table). The differences between the three analyses stems principally from disagreement over the proper mechanism to measure historical floods occurring prior to reliable gauge data. HE Exh. 7-9. The Corps hydrology relies on published U.S. Geological Survey data, while the PIE analysis relies on interviews of local residents done in 1922 by Mr. James Stewart. HE Exh. 6 at 9.

WHEREAS, the stated purpose of the FEIS is to analyze potential projects, including the levee improvement project now proposed under the Shoreline Permit, which is intended to “protect the existing urban built environment [within the City of Burlington] against the Base Flood” by, *inter alia*, “achieving FEMA accreditation of a segment of Dike District #12’s levee system.” HE Exh. 6 at 1. For reference, this project objective will be referred to herein as “100-year certified levees.”

WHEREAS, the FEIS, as well as both appellant and respondent at the hearing, agree that FEMA will utilize Corps hydrology in developing Flood Insurance Rate Maps. HE Exh. 6 at 9.

WHEREAS, the DEIS states that DD12’s construction of 100-year certified levees will create unacceptable upstream and downstream impacts if Corps hydrology becomes the basis for FEMA flood maps. HE Exh. 6 at 155, 156 (In the event that Corps hydrology is applied, according to the

FEIS, there is “[n]o plausible scenario of levee improvements without significant detrimental impacts to upstream and downstream neighbors.”) This statement contained in the DEIS appears to have been deleted in the FEIS without comment.

WHEREAS, in seeking the Shoreline Permit, DD12 contends that the FEIS furnishes requisite analysis of the Project, demonstrating the absence of adverse upstream and downstream impacts. The FEIS recognizes that this conclusion is entirely dependent on the use of PIE hydrology, noting that “using Corps hydrology of 192,900 cfs will certainly result in significantly larger flood measures with associated impacts.” HE Exh. 6 at 12.

WHEREAS, DD12’s map analysis of the Project appears to reflect unanalyzed impacts upstream of the area considered by the analysis. HE Exh. 6 at 50.

WHEREAS, the FEIS appears to predicate a conclusion of no significant upstream and downstream adverse impacts on the construction of levee setbacks in the Three Bridge Corridor, work that has yet to be considered or proposed. HE Exh. 6 at 11.

WHEREAS, the FEIS does not apparently analyze, applying Corps hydrology, upstream and downstream impacts of the proposed Project under the actual conditions in existence at the time of the Shoreline Permit’s issuance.

WHEREAS, under conditions on the ground as they now exist, the FEIS does not appear to identify a flood path capable of accepting flood flow in excess of the 150,000 cfs, the volume of water that the FEIS contends is the maximum capacity of the Three Bridge Corridor. HE 6 at 12.

WHEREAS, the Shoreline Management Act (hereinafter, the “**Shoreline Act**”) exists, among other things, to “prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020.

WHEREAS, the Shoreline Act requires Skagit County to adopt a State-approved Shoreline Master Program (“SMP”). Once approved by the State, the SMP becomes an enforceable use regulation for the shorelines of the State. RCW 90.58.100. Substantial shoreline development may not be undertaken without issuance of a permit consistent with the SMP. RCW 90.58.140(2). A permit applicant begins construction prior to permit issuance at the applicant’s own risk, and is subject to judicial order directing removal of the construction should the work proceed prior to permit issuance. RCW 90.58.140(5)(d).

WHEREAS, Skagit County’s SMP, approved by the State, is codified at Skagit County Code 14.26.

WHEREAS, SMP § 7.16 governs Shoreline Stabilization and Flood Protection projects within the shoreline zone.

WHEREAS, SMP § 7.16(2)(B)(1) provides that the Shoreline Permit is required to ensure that “[f]lood protection measures are consistent with the [SMP] as required by [State law].”

WHEREAS, SMP § 7.16(1)(B)(1) provides that “[a]ll... flood protection measures should be constructed to comply with the design and location standards and guidelines of applicable agencies.”

WHEREAS, SMP § 7.16(2)(B)(5)(d) provides that “[a]ll works shall be designed and constructed to meet the requirements and standards of the... Corps of Engineers...”

WHEREAS, SMP § 7.16(2)(B)(3) provides that “[t]he County may require professional design of shoreline stabilization and flood protection works where such projects will cause interference with normal river geohydraulic processes.”

WHEREAS, SMP § 7.16(2)(B)(5)(c) provides that “[a]ll works shall allow for the passage of surface and ground waters.”

WHEREAS, the environmental decision documents appear to be engaged in an analysis to determine which set of data better supports a pre-determined course of action, rather than an analysis of likely impacts.

WHEREAS, the State Environmental Policy Act (“SEPA”), pursuant to which the FEIS was prepared, is intended to systematically consider the impact of project proposals on the natural and human environment. RCW 43.21C.030. SEPA is designed to objectively inform the decision-making analysis. Accordingly, SEPA’s purpose is defeated if it is allowed to become an outcome-oriented exercise aimed at justifying a pre-conceived decision. WAC 197-11-406 (SEPA review “is not to be used to rationalize or justify a decision already made.”) See, *Metcalf v. Daley*, 214 F.3d 1135 1142 (9th Cir. 2000)(“Environmental review must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.”)

WHEREAS, a federal court found that FEMA’s National Flood Insurance Program (“NFIP”) incentivizes and encourages floodplain development, thereby harming species listed under the U.S. Endangered Species Act (“ESA”), holding that FEMA has a responsibility to consult with the U.S. National Marine Fisheries Service (“NMFS”). *National Wildlife Federation v. FEMA*, 345 F.Supp.2d 1151 (W.D. Wash. 2004). Resultantly, NMFS issued a biological opinion (“NMFS Bi-Op”) under the ESA, finding that FEMA’s floodplain mapping and development standards jeopardize ESA-listed species, directing FEMA to adopt regulations that significantly tighten local government floodplain development standards.

WHEREAS, FEMA developed a program, reviewed and approved by NMFS, by which local governments may attain compliance with the ESA: Either (1) adopt a model floodplain ordinance proposed by FEMA; (2) demonstrate that the community’s existing regulations (including Shoreline master program) provide the necessary protection; or (3) review permit applications on a case-by-case basis, with a Habitat Assessment prepared for each application. Skagit County has applied for approval by FEMA under Option 2, but approval has not yet been granted by FEMA, and FEMA maintains that Skagit County must proceed under Option 3 in the interim.

WHEREAS, in considering this appeal, pursuant to Skagit County Code 14.06.170(10), the Board may take one of the following actions:

- (1) Deny the appeal and affirm the decision of the Hearing Examiner;
- (2) Find the Hearing Examiner's decision clearly erroneous, adopting its own findings, conclusions and decision based on the record before it; or
- (3) Remand the matter for further consideration by the Hearing Examiner.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. City's Standing. The Board concludes as a matter of law that the City has standing to maintain this appeal. DD12's request to deny the City's appeal for lack of standing is denied.
2. Remand to Hearing Examiner for Further Consideration. The Board hereby remands this matter to the Hearing Examiner for consideration of the following:
 - a. DD12 shall present analysis of the actual effects of the levee modifications envisioned under the Shoreline Permit, applying Corps hydrology, comparing actual pre-project conditions and post-project conditions, taking into consideration and depicting (i) upstream impacts to the City of Sedro-Woolley and environs as well as the Nookachamps Basin, including but not limited to impacts to United General Hospital and the Sedro-Woolley wastewater treatment plant; and (ii) downstream impacts.
 - b. DD12 shall provide analysis of the pathway and volume of water that will be diverted outside the main river channel in a 100-year flood event before and after the Project, applying Corps hydrology.
 - c. In considering this Shoreline Permit, the Hearing Examiner shall analyze, consider and render specific findings that document compliance with the County's obligations under the NMFS bi-op.

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]

3. All matters not decided herein are expressly reserved for further proceedings.

WITNESS OUR HANDS AND THE OFFICIAL SEAL OF OUR OFFICE this
24th day of September 2013.

**BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON**



Sharon D. Dillon, Chairman

OPPOSED

Kenneth A. Dahlstedt, Commissioner



Ron Wesen, Commissioner



ATTEST:



Linda Hammons, Clerk of the Board

APPROVED AS TO FORM:



Will Honea, Chief Civil Deputy
Skagit County Prosecutor's Office