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BEFORE THE HEARING EXAMINER OF SKAGIT COUNTY

In 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

**MOTION OF SKAGIT COUNTY
DIKE, DRAINAGE AND
IRRIGATION DISTRICT NO. 12
TO STRIKE PURSUANT TO
CR12(f), RULES OF PROCEDURE
FOR HEARINGS; AND MOTION IN
LIMINE**

COME NOW the Applicant, SKAGIT COUNTY DIKE, DRAINAGE AND IRRIGATION DISTRICT NO. 12, by and through its attorney of record JOHN R. SHULTZ of SHULTZ LAW OFFICES and submits this Motion to Strike Pursuant to CR12(f), Rules of Procedure For Hearings, §1.01 and §1.11, and Motion in Limine. These motions are based on the records, following legal authorities, and files herein.

I. INTRODUCTION

This matter involves a Permit submitted for levee improvements by Skagit County Dike, Drainage and Irrigation District No. 12 (“DD12”). DD12 has worked in cooperation with the City of Burlington for construction work on levees inside the City limits, as well as in other areas within the boundaries of DD12. DD12 has submitted its Permit application, prior FEIS approval has been obtained, and the Permit approval was recommended by Skagit County Planning Department on April 22, 2013. This was approved by the Skagit County Hearing Examiner on June 28, 2013.

MOTION OF DD12 TO STRIKE PURSUANT TO CR12(f), RULES OF PROCEDURE FOR HEARINGS; AND MOTION IN LIMINE- 1

1 This approval was appealed by the City of Sedro-Woolley on July 2, 2013, and the Permit
2 matter was remanded by the Board of County Commissioners on September 24, 2014. In this remand
3 process one participant sought clarification on the nature of the "Corps hydrology" and analysis to be
4 used. Further clarification was sought from the Board of County Commissioners, which was issued
5 by the BCC on February 11, 2014. The Hearing Examiner further filed a report on prehearing
6 conference and scheduling order dated February 4, 2014. In the scheduling order, the parties were
7 allowed to file and serve motions on or before March 20, 2014. Responses to such motions were due
8 on or before April 4, 2014, and this matter has been set for hearing April 9, 2014 for hearing on the
9 motions. The following constitutes Motion filings by Skagit County Dike, Drainage and Irrigation
10 District No. 12.

11 II. LEGAL AUTHORITY

12 A. Motion to Strike Improper Allegations Against DD12 Pursuant to CR12(f), 13 Skagit County Rules of Procedure for Hearings, §1.01, and 1.11, and CR11.

14 1.) Authority to Strike Under CR12(f).

15 Pursuant to §14.02.070 of the Skagit County Code, the Hearing Examiner is empowered to
16 "adopt such procedural rules as are reasonably necessary to carry out the duties and responsibilities of
17 the office." In addition, and pursuant to §1.01 of the Hearing Examiners Rules of Procedure for
18 Hearings, the Hearing Examiner is empowered to "regulate the course of hearings and the conduct of
19 participants." The Hearing Examiner has previously done so, adopting applicable Washington Court
20 Rules, including applicable Rules of Evidence and Superior Court Civil Rules.

21 Under Civil Rule 12(f), upon motion made by a party ... "the Court may order stricken from any
22 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." See
23 CR12(f). DD12 herein incorporates by reference material in the City's Motion/Response submittal
24 herein, outlining the definition of "scandalous" as "... generally refers to any allegation that
25 unnecessarily reflects on the moral character of an individual or states anything in repulsive language
that detracts from the dignity of the Court." While motions to strike are generally disfavored, "the
disfavored character of rule 12(f) is relaxed somewhat in the context of scandalous allegations and

1 matter of this type will often be stricken from the pleadings in order to purge the Court's files and
2 protect the subject of the allegations." See 5A C. Wright and A. Miller Federal Practice and Procedure
3 (Civil) 2nd §1382 at 714 (1990).

4 The striking of offensive material is particularly appropriate when the offensive material is not
5 responsive to an argument but, rather, constitutes an inappropriate attempt to abuse process to attack an
6 individual personally. See, e.g., *Magill v. Appalachia Intermediate Unit 08*, 646 F. Supp. 339, 343
7 (W.D. Pa. 1986) (striking allegations that "reflect adversely on the moral character of an individual who
8 is not a party to this suit" which were "unnecessary to a decision on the matters in question"); See also
9 *Pigford v. Veneman*, 215 F.R.D. 2, 4-5 (D.D.C. 2003) (striking unfounded accusations that opposing
10 counsel was racist); *Murray v. Sevier*, 156 F.R.D. 235, 258 (D. Kan. 1994) (striking allegation that
11 defendant and his counsel "bought off" and paid "hush money" to prospective witnesses); *Cairns v.*
12 *Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998) (striking allegation that "defendants are
13 '[l]ike vultures feeding on the dead'"). See City's First Motion in Limine submittal herein, and citations
14 at page 2-4, which are incorporated herein by reference.

15 2.) Skagit County Rules of Procedure For Hearings.

16 Furthermore, the Hearing Examiner has the powers under the Skagit County Rules of Procedure
17 for Hearings for the Office of the Hearing Examiner, which include but are not limited to: (c) To rule on
18 all procedural matters, objections and motions; and (d) To admit and exclude evidence. See §1.01,
19 Powers of Hearing Examiner, and §1.11 Evidence, in the Skagit County Rules of Procedure for
20 Hearings. Further, the Hearing Examiner has powers to exclude evidence that: (b) The Examiner may
21 exclude evidence that is irrelevant, unreliable, immaterial, or unduly repetitious. See §1.11, Evidence,
22 Skagit County Rules of Procedure for Hearing.

23 3.) Requirements of CR11 For Attorneys and Pro Se Litigants.

24 In the first paragraph of Intervenor Kunzler's Motion, he notes that he is not an attorney, and has
25 never held himself out as an attorney, but is simply a lay person participant. However, in his Motion he

1 characterizes himself as an Intervenor, and he is recognized as a party in these proceedings, who is
2 entitled to notice of all proceedings, and has made several filings of Comments and has testified in these
3 proceedings as an Intervenor. Also, Intervenor has worked for several years in a Seattle law firm,
4 regularly deals with legal issues, is knowledgeable about legal procedures, and should be held to a
5 higher standard in the context of filing documents and serving as a pro se litigant.

6 As a pro se litigant, the rules of the tribunal which govern an attorney, also govern the conduct of
7 a pro se litigant. It is well-established the civil rules are applicable in these circumstances to all litigants.
8 There must be the exercise of good faith, candor to the Court and tribunal, the same as required by an
9 attorney, and both are officers of the Court in terms of pleadings, testimony, submission of documents,
10 and documents signed and filed with the Court. Conduct of pro se litigants, as well as attorneys is
11 specifically governed by CR 11, which provides as follows:

12 Rule 11. Signing and Drafting of Pleadings, Motions and Legal Memoranda;
13 Sanctions. (a) ... a party represented by an attorney shall be dated and signed by
14 at least one attorney of record in the attorneys individual name, whose address in
15 Washington State Bar Association membership number shall be stated. A party
16 who is not represented by an attorney shall sign and date the party's pleading,
17 motion or legal memorandum and state the party's address... The signature of a
18 **party** or of an attorney constitutes a certificate by the **party** or attorney that the
19 **party** or attorney has read the pleading, motion, or legal memorandum, and that
20 to the best of the **party's** or attorney's knowledge, information and belief, formed
21 after an inquiry reasonable under the circumstances: (1) It is well grounded in
22 fact; (2) It is warranted by existing law or a good faith argument for the extension,
23 modification or reversal of existing law or the establishment of new law; (3) It is
24 not interposed for any improper purpose, such as to harass or cause unnecessary
25 delay or needless increase in the cost of litigation; and (4) The denials of factual
contentions are warranted on the evidence or, if specifically so identified are
reasonably based on a lack of information or belief...

21 See CR11. This citation is made solely for the purpose of noting the rule that not only attorneys, but
22 **parties** not represented by an attorney, or **pro se litigants** are also bound by the civil rules that govern
23 Court proceedings and litigation. No CR11 motion or request for sanctions are being made herein by
24 reference to this citation.

1 **4.) Motion to Strike Derogatory and Scandalous Reference Made Against DD12**
2 **Commissioner.**

3 In Intervenor Kunzler's Motion, it is noted in his Conclusion at page 17 the following statement:

4 Could it be that the entire façade of "flood control" is actually more about flood
5 insurance and promoting more irresponsible development in the floodplain? The
6 Applicant has stated several times that "large portions of Burlington would be
7 taken out of the floodplain". Did the Hon. Hearing Examiner even make a
8 determination of what portions of Burlington would be taken out of the
9 floodplain? **Does it involve property that one of the Dike District**
10 **Commissioners who works for one of the major developers in the Valley**
11 **owns or has an interest in?**

12 See Intervenor Motion For Recusal of Hearing Examiner at page 17 lines 8-12.

13 Aside from the fact that a Dike District Commissioner **must own property** in the District in
14 order to be elected and serve as a Commissioner, this reference is derogatory, and can be considered
15 scandalous. More specifically however, this allegation unnecessarily reflects on the moral character of
16 an individual who is a party in these proceedings. Under CR12(f) this may be stricken as "**redundant,**
17 **immaterial, impertinent, or scandalous matter**", and under the Hearing Examiner rules as evidence
18 that is "**irrelevant, unreliable, immaterial, or unduly repetitious.**"

19 These comments about a current Dike District Commissioner, whose identity can be easily
20 ascertained by this implication, are unfounded, and unnecessary. With no evidence, Intervenor seeks to
21 unreasonably defame the character of an opponent in these proceedings in order to take advantage of his
22 right to make comments in these proceedings. By implying that the Permit is being obtained for benefit
23 by a public official, who is employed by a land developer, in any other context would be libelous and
24 inappropriate. DD12 would request that the Hearing Examiner strike lines 4 through 12 on page 17 of
25 Intervenor's Motion to Recuse/Disqualify Hearing Examiner.

 In addition, Intervenor Kunzler owns, operates and manages the SkagitRiverHistory website. A
copy of the Intervenor's Motion to Recuse/Disqualify has now been posted on the website. By making
statements in this Motion concerning a DD12 Commissioner, in the context of legal proceedings, and

1 then posting this pleading on his website, Intervenor has used the legal process to then broadcast an
2 otherwise defamatory and libelous statement, and to communicate this to third parties through the
3 internet. The Hearing Examiner should correct this situation, by striking this inappropriate and
4 immaterial statement in Intervenor Kunzler's Motion to Recuse/Disqualify.

5 In this Motion and in other comments, testimony, and filings made by Intervenor, there is a
6 pervasive plethora of ad hominem attacks, scandalous allegations, and direct and implied allegations of
7 wrongdoing, directed at the parties, including the Hearing Examiner, the attorneys for the parties, Dike
8 District Commissioners, Skagit County, the City of Burlington, and including references and filing of
9 irrelevant, prejudicial, and unreliable information. Based on this and similar references in Intervenor's
10 Motion to Recuse/Disqualify, the Motion should be summarily denied. This Motion is simply another
11 example of continuing scandalous allegations and character attacks, based solely on opinion and not by
12 factual statements supported by evidence, which has continued throughout this proceeding, and will
13 likely continue in the future, unless addressed. As an alternative, the requested portions of testimony in
14 this Motion should be stricken and purged from the record.

15 **B. Motion to Strike References and Citations From Outside of the Record, and**
16 **Also Based on Unofficial and Altered Hearing Transcript Prepared By**
17 **Intervenor Kunzler.**

18 There was a recent decision made by the Hearing Examiner on March 19, 2014. This references
19 the fact that there were transcription problems with the first hearing on April 24, 2013. Mr. Kunzler
20 detected this problem, and contacted the Hearing Examiner's office, and submitted a hearing transcript
21 in written format. The Hearing Examiner has now accepted this as Exhibit 38. This transcript appeared
22 to be an accurate transcript of the oral testimony, and contains no alterations of text, or edits by
23 Intervenor. DD12 and the City of Burlington have raised no objections regarding this filing and
24 numbering of the exhibit.

25 A substantial problem, however, relates to the second hearing date of June 12, 2013, which was
the hearing to correct testimonial defects in the first hearing. There appears to be no accurate, unedited

MOTION OF DD12 TO STRIKE PURSUANT TO CR12(f), RULES
OF PROCEDURE FOR HEARINGS; AND MOTION IN LIMINE- 6

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1 written transcript of the 6/12/2013 hearing, marked as an exhibit in the record. There are, however, two
2 transcripts which Mr. Kunzler has cited from, which are transcripts that have been altered and amended
3 by adding numerous citations, highlights, and footnotes containing information in addition to the oral
4 testimony, and which Mr. Kunzler has used for citations to support his Motion to Recuse/Disqualify.

5 After the June 12, 2013 hearing, in Comments and in this Intervenor's Motion to
6 Recuse/Disqualify, Intervenor has quoted extensively from a transcript that he prepared and posted on
7 his SkagitRiverHistory.com website. Two versions of this transcript were posted twice on Intervenor's
8 website. There is one entry posted under "Larry Kunzler Generated Documents/Reports" dated
9 6/12/2013, entitled "Hearing Transcript with LJK Footnotes". **This consists of 76 pages purporting to**
10 **be a transcript of the hearing of 6/12/2013, with 47 additional separate citations inserted, and 86**
11 **footnotes inserted by Intervenor.** A second transcript dated 6/12/2013 and entitled
12 "SkagitRiverHistory.com Partial Transcript of June 12, 2013 Public Hearing Before the Skagit County
13 Hearing Examiner, ..." is posted, **consisting of 72 pages, 45 citations and 7 footnotes inserted by**
14 **Intervenor.** These transcripts have been prepared and altered by Intervenor, and neither one appears to
15 have been included on the official exhibit list, or adopted as the official written transcript of the
16 6/12/2013 hearing. Also, nowhere in Intervenor's Motion does he disclose that this transcript he cites
17 was prepared by him, with numerous additions and alterations. See example pages at Exhibit "A,"
18 attached hereto and incorporated herein by reference.

19 In prior Comments and in the present Motion, Intervenor quotes liberally from this transcript,
20 giving the impression that this is citation to the accurate transcript of the oral testimony at hearing. In
21 fact, there are two oral recordings on CD of the hearings, but no accurate, unedited transcript of the June
22 12, 2013 proceeding has been accepted as the official transcript. The only transcript of the second
23 proceeding in this record is one claimed to be submitted by Intervenor Kunzler in Exhibit 35, but even
24 this transcript does not appear in the list of exhibits printed by the Hearing Examiner's office, as late as
25 March 19, 2014.

MOTION OF DD12 TO STRIKE PURSUANT TO CR12(f), RULES
OF PROCEDURE FOR HEARINGS; AND MOTION IN LIMINE- 7

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1 It appears that on September 2, 2013, Intervenor posted on his website a document entitled
2 Participant Larry J. Kunzler's Memorandum in Support of Appellant City of Sedro-Woolley's Appeal.
3 This Memorandum does not appear to be in the official list of Exhibits Received Prior to or at Hearing
4 in the record. Although this Memorandum in Support states at page 2 that documents were submitted
5 under Exhibit #35, along with an Exhibit A which is an altered version of the transcript of the June 12,
6 2013 hearing, this document does not appear in the most recent copies of the hearing record Exhibit #35.

7 In any event, even if accepted as an exhibit from which parties could cite references and
8 testimony, it is clear that even this exhibit is not an accurate transcript of the record, but is the reference
9 transcript wherein testimony has been altered by the addition of 47 separate citations, and 86 footnotes
10 inserted by the Intervenor. This is clearly not an accurate transcript of the testimony, and any citation,
11 reference or use of testimony from this transcript will clearly result in inaccurate, erroneous, biased, and
12 misleading references, which should not be used in argument, or memorandums which result in
13 decisions by the Hearing Examiner or subsequent appellant courts.

14 Even in Intervenor's Memorandum, he acknowledges that this transcript is not a completely
15 accurate transcript of the oral testimony, and states:

16 "Exhibit A was prepared by www.skagitriverhistory.com and was submitted as a
17 public service by same. Comments in the form of footnotes are entirely my own.
18 We also provided links to the documents referenced before the Hearing
19 Examiner."

20 See Participant Larry J. Kunzler's Memorandum in Support of Appellant City of Sedro-Woolley's
21 Appeal, at page 2. As noted above, this document can be found on the SkagitRiverHistory.com website,
22 under the section titled "Dike District 12 Shoreline Substantial Development Permit Documents."
23 However, it would appear that this document does not appear in the list of official documents in these
24 proceedings. What is important, however, is that in the above quote, Intervenor even acknowledges that
25

1 the exhibit was prepared by his website, was submitted only as a public service, and he acknowledges
2 that the footnotes were inserted as his own opinion.

3 It appears possible that there are some documents filed and accepted in the Appeal proceedings
4 and/or referenced in exhibits, and other documents which reside on the website, and reference and
5 citation is being made to both types of documents. This blurs the line between what has been filed in the
6 proceeding and accepted as exhibits, and what may reside on the website, and there are times that there
7 is citation to one or the other or both, in these proceedings. To a degree this confuses what is the actual
8 transcript, documents filed, testimony, and documents which are strictly used in this closed record
9 appeal. This can then result in confusion, and inaccuracy as well as misleading or accusatory statements
10 which may not be filed in the proceedings, but which become part of the proceedings thus confusing the
11 record. There should be no question that this revised, altered transcript of 6/12/2013 hearing testimony
12 is not an accurate transcript, and cannot be subject to citations, or reference in these proceedings, and in
13 the current motion by Intervenor as accurate evidence which would be used to support decisions in this
14 tribunal. These references should be stricken.

15 Citation to the oral testimony, or an accurate transcript strictly containing the oral testimony
16 would be one thing, but to insert additional citations and reference to documents in the proceedings,
17 along with footnotes, refuting testimony of various witnesses, with disparaging remarks, and biased
18 commentary only serve to mislead anyone reading the text, distorts the testimony, may unduly influence
19 opinions in further proceedings or appeals, and may cause a record of improper or edited testimony by
20 those who rely on Intervenor's heavily edited and altered transcript.

21 In this regard, any citation to or reference to any altered or edited transcripts, which have not
22 been accepted as official exhibits, have not been approved as an official written transcript of the record
23 or proceedings, would constitute introducing evidence and documentation outside the record of these
24 proceedings. With these alterations and insertions, there could be no assurance of accuracy and no
25

1 ability to challenge these references, footnotes or comments. Any citation or references to transcripts
2 which have not been accepted and approved by the Hearing Examiner should be wholly stricken.

3 Also, in reviewing Intervenor's Motion to Recuse/Disqualify, and the reference on page 9,
4 footnote 13, there is no such quote at pages 40-50 of the altered transcript. Also, at page 12, footnote
5 20, there is no such reference at page 45 of the altered transcript. At page 12 of Intervenor's Motion,
6 footnote 21, there is no such reference at page 46 of the transcript. On page 13 at footnote 23, of
7 Intervenor's Motion, there is no reference to this citation or text on page 69 of the transcript. At page 14
8 of Intervenor's Motion, at footnote 25, there is no such reference at page 69 of the transcript. Each one
9 of these footnotes in Intervenor's Motion referred to pages in the edited and altered transcript where
10 there were no such citations.

11 It may be that these citations can actually be found elsewhere, and changes and pagination were
12 a result of the alterations of the transcript by insertion of citations and footnotes, but this proves the
13 point. The point is that this transcript has been so heavily altered, revised and edited that it no longer
14 bears any resemblance to the actual oral testimony and clearly cannot be used for any purpose for
15 citation, and evidentiary support. More importantly, the altered record should simply not be cited in
16 Intervenor Kunzler's present Motion, and such misleading, inaccurate and confusing citations should be
17 stricken in their entirety.

18 This would include numerous the citations to this altered transcript in the Intervenor's Motion to
19 Recuse/Disqualify, all of which should be stricken from this record including the following:

20 Intervenor's Motion to Recuse/Disqualify, at the following pages:

21 Page 9, footnote 13, and associated text at lines 24-28 on page 8, and lines 1-4 on
page 9;

22 Page 12, footnote 20, and associated text at lines 3-4;

Page 12, footnote 21, and associated text at lines 13-14;

23 Page 13, footnote 23, and associated text on page 12 lines 24-25, and page 13
lines 1-8;

24 Page 14, footnote 25, and associated text at lines 4-5;

1 The written transcripts prepared by Intervenor are littered with many pages of additional entries,
2 footnotes, critical comments relating to parties in these proceedings, and no reference or citation to these
3 misleading, edited written transcripts should be allowed. It is requested that the Hearing Examiner make
4 a finding that the transcripts cited by Intervenor Kunzler have not been approved as accurate written
5 transcripts of the proceedings and that no citation to these transcripts be allowed in these proceedings.
6 Further that they shall be subject to being stricken from motions filed herein and purged from the formal
7 public record pursuant to CR12(f).

8 Further, that these transcripts, because of the manner in which they were prepared lack the
9 necessary accuracy, objectivity and integrity of the oral testimony itself. It is requested that a finding be
10 made that any reference to this transcript in support of Intervenor's own Motion, and which transcript he
11 himself created and edited, should be stricken and disallowed for purposes of a decision on his Motion.
12 In the alternative, it is requested that the Hearing Examiner acknowledge and note that the inherent
13 unreliability of this edited and altered transcript should go to the weight of the testimony in any decision,
14 and any references to this transcript be disregarded in making a decision on Intervenor's Motion.

15 It is important that there be an accurate and unedited transcript of the proceedings. The current
16 written transcript would clearly affect a proper review by a Court of record. See *Bennett v. BD. of*
17 *Adjustment of Benton Cnty*, 23 Wn.App. 698, 597 P.2d 939 (1979); 29 Wn.App. 753, 631 P.2d 3
18 (1981).

19 **C. Motion in Limine to Exclude, or Limit Testimony, Claims, and Evidence.**

20 A motion in limine is properly used "to exclude incompetent or prejudicial evidence." 5K
21 Tegland, Wash. Prac., §9, 14 (1982):

22 Motions in limine allow for more deliberate evidentiary rulings, a greater degree
23 of fairness due to the exclusion of collateral, prejudicial evidence, and a more
24 expeditious use of judicial time by reducing the possibility of the need for new
25 trials due to the introduction of prejudicial evidence.

1 5K Tegland, Wash. Prac § 9, 14 (1982). Motions in Limine have been approved as a necessary pretrial
2 means of disposing of inadmissible evidence. *State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937).

3 This matter was remanded to the Hearing Examiner for further hearing by the Skagit County
4 Commissioners Resolution R20130278, dated September 24, 2013. Prehearing conferences for
5 purpose of determining progress by the Applicant and County on remand questions were held on
6 October 23, 2013, December 16, 2013, and January 28, 2014. In the remand process, one participant
7 sought clarification of the nature of the "Corps hydrology" and analysis to be used.

8 On February 4, 2014, a request was made to the Board of County Commissioners seeking
9 direction on what "Corps hydrology" would be used for purposes of responding to the remand,
10 whether the "original" Corps hydrology used for the FEIS or more current data which will be
11 accepted by the Corps after completion of NHC analysis.

12 On February 11, 2014, the County Commissioners responded to this request for clarification and
13 stated as follows:

14 The parties should use the most recent hydrology data set accepted by the Corps,
15 not the Corps hydrology used for the 2010 FEIS. This is due to the fact that the
16 most recent hydrology data set incorporates information that has been collected
17 since the issuance of the FEIS.

18 See Exhibit "B," Letter dated February 11, 2014 from Skagit County Board of Commissioners.

19 DD12 would request that the Hearing Examiner issue an order restricting the hydrology data set
20 to be that which will be the most recent to be accepted by the Corps. There has been acknowledgement
21 that the City of Burlington has NHC under contract to model the impact of the proposed project, to be
22 submitted and accepted by the Corps and that that will be the governing data set once approved by the
23 Corps.

24 There should be a limitation placed on submitting any evidence, testimony, or documentation
25 pre-dating, or used to refute or challenge the 2010 FEIS. This would preclude any testimony,
documentation, or any claims submitted by any parties which would put in issue, or dispute or challenge
the findings of the FEIS which have previously been accepted. The purpose for this is based on the fact

1 that the 2010 FEIS has already been approved, and no one appealed the FEIS, and the time period for
2 attacking or appealing the FEIS has passed.

3 Also, any engineering or hydrology analysis prior to the FEIS would be old data which will now
4 be updated, revised and completed by NHC in its contract with the City of Burlington. This new data,
5 based on updated models and new information, will be more current and revised compared to old data
6 prior to the FEIS. It would be non-productive, and not relevant to use or submit this old data. At a prior
7 meeting between the parties and the Hearing Examiner, Intervenor noted that he intended to make a
8 Motion to admit documents from the trial of a prior action, entitled *Halverson v. Skagit County,*
9 *Snohomish County Cause No. 93-2-05201-2.* Any such attempt to introduce testimony or to make a
10 motion to this effect should be stricken, and rejected as being immaterial, not relevant, and in conflict
11 with the decision of the Board of County Commissioners as referenced above. A proposed suggested
12 Order in Limine is suggested as follows:

13 The Skagit County Board of Commissioners, passed Resolution #R20130278, in
14 reference to the Shoreline Substantial Development Permit for Skagit County
15 Dike and Drainage District No.12 remand, and the Board has made the decision
16 as follows: "The parties should use the most recent hydrology data set accepted
17 by the Corps, not the Corps hydrology used for the 2010 FEIS. This is due to the
18 fact that the most recent hydrology data set incorporates information that has been
19 collected since the issuance of that FEIS." That the City of Burlington is
20 currently under contract with NHC to model the impacts of the proposed project.
21 That any party is precluded from admitting testimony, documentation or evidence
22 inconsistent with the order of the County Commissioners decision to limit
23 hydrology to that which will be completed by NHC for the City of Burlington.
24 Further that no evidence, testimony or documentation shall be submitted which
25 disputes the validity of the FEIS, which has not been appealed, nor any evidence
of hydrology analysis prior to the date of the 2010 FEIS.

21 As an alternative to said order, it would be requested that the Hearing Examiner, consider
22 evidence as going to the weight of the testimony, and to consider any such evidence to be unnecessary,
23 immaterial, and not relevance to the present proceedings, and to give the evidence either little, or no
24 weight in decisions moving forward.

1 In addition, in reference to those portions of this Motion under paragraph B., To Strike
2 References Outside of the Record and Based on Unofficial Hearing Transcript Prepared By Intervenor
3 Kunzler, it is requested that an Order in Limine be issued, disallowing and striking any references
4 purporting to be from the oral hearings in this matter, when in fact the references are heavily edited and
5 altered written transcripts of the proceedings by Intervenor. As noted previously, the Intervenor has
6 transcribed the June 12, 2013 oral testimony of the hearing, and heavily edited and altered the transcript,
7 with insertion of 47 separate citations, and 86 footnotes, in two different versions, which renders the
8 written transcript unrecognizable with the audio testimony. This represents a transcript which is devoid
9 of accuracy, and meaningless from an accurate evidentiary standpoint for citation in these proceedings.
10 Intervenor liberally cites from these altered transcripts and an order should be entered excluding from
11 citation, reference, or as evidence the use of these transcripts for any motion to be considered in this
12 matter. Suggested language for an Order in Limine could be as follows:

13 That there has been no official written transcription approved in these
14 proceedings, and that the only written transcript thus far has not been
15 acknowledged as an exhibit, and was produced from the SkagitRiverHistory.com,
16 Intervenor's website. This transcript has been heavily edited, and altered, with 45
17 citations added, and 86 footnotes inserted, which render it potentially misleading,
18 distorting this testimony, and potentially influencing reviewers of the transcript
19 who may rely on this for further appeals. Due to the lack of assurance of
20 accuracy, any citation or reference to these transcripts in pleadings in these
21 proceedings shall be stricken, disallowed, or disregarded from the weight of
22 evidence and from an evidentiary standpoint should not be relied upon for
23 decisions.

24 **D. The Intervenor's Motion to Recuse/Disqualify Hearing Examiner Should Be**
25 **Denied.**

26 An appearance of fairness claim requires evidence of the judicial officer's actual or potential
27 bias. *State v. Dugan*, 96 Wn.App. 346, 354, 979 P.2d 885 (1999); A party challenging a judge's
28 impartiality bears the burden of presenting evidence of actual or potential bias. *State v. Post*, 118
29 Wn.2d 596, 618, 619 n.9, 826 P.2d 172 (1992); Recusal decisions lie within the sound discretion of the
30 trial court. *In re Marriage of Farr*, 87 Wn.App. 177, 188, 940 P.2d 679 (1997); Intervenor has not

31 MOTION OF DD12 TO STRIKE PURSUANT TO CR12(f), RULES
32 OF PROCEDURE FOR HEARINGS; AND MOTION IN LIMINE- 14

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1 sufficiently alleged a personal interest that disqualifies the Hearing Examiner. See *Buell v. Bremerton*,
2 580 Wn.2d 518, 525, 495 p.2d 1358 (1972); Intervenor has failed to demonstrate that the Hearing
3 Examiner has prejudged the issues. See *Anderson v. Island County*, 81 Wn.2d 312, 501 p.2d 594
4 (1972). Intervenor has failed to demonstrate that the Hearing Examiner is biased. It cannot be
5 concluded that a reasonable person with knowledge of the relevant facts would question the judge's
6 impartiality in this case. Accordingly, the Motion to Recuse/Disqualify should be denied.

7 III. CONCLUSION

8 DD12 respectfully submits Motions to strike testimony and evidence pursuant to CR12(f), the
9 Skagit County Rules of Procedure for Hearing §1.01 and 1.11, and CR11. Under CR12(f) the Court
10 may order stricken any redundant, immaterial, impertinent or scandalous material. Pursuant to the
11 Skagit County Rules of Procedure for Hearings for the office of the Hearing Examiner, the Hearing
12 Examiner has authority to admit and exclude evidence under §1.01, and this provides for excluding
13 evidence that is irrelevant, unreliable, immaterial or unduly repetitious under §1.11. Finally under
14 CR11, the rules for submitting evidence, and signing documents submitted in litigation provide that they
15 be well-grounded in fact, not interposed for improper purpose or to harass or delay, and these rules
16 apply not only to attorneys, but also to litigants who represent themselves, or pro se litigants.

17 Intervenor Kunzler has included in his Motion scandalous and derogatory claims reflecting on
18 the moral character of a DD12 Commissioner, party in these proceedings. The Hearing Examiner
19 should strike this derogatory and scandalous reference from Intervenor Kunzler's Motion. This
20 authority is warranted under CR 12(f), and the Rules of Procedure for Hearings for the office of Hearing
21 Examiner.

22 Statements arguably constituting defamation or attacks on the credibility on the moral character
23 of a party where not necessary for the present proceedings should not be allowed under the shield of
24 litigation when there is no purpose for this testimony. This particularly so where Intervenor operates a
25 website on which he downloads documents of Court records where the statement is made, to be
communicated to third parties on the internet.

Further, there has been no approved official written transcript of the 6/12/2013 proceedings
approved by the Hearing Examiner. Despite this, Intervenor has prepared two written transcripts of
proceedings purporting to be the oral testimony of the hearing on 6/12/2013. These transcripts, have

MOTION OF DD12 TO STRIKE PURSUANT TO CR12(f), RULES
OF PROCEDURE FOR HEARINGS; AND MOTION IN LIMINE- 15

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1 been edited and altered with 86 footnotes, and 45 insertions of citations, bear no resemblance to the oral
2 testimony at hearing. Accordingly, DD12 seeks to have the Hearing Examiner strike all references and
3 citations to this hearing transcript and to the recent Motion, or future motions made by Intervenor.

4 Further, there should be Motions in Limine to exclude, or limit testimony claims and evidence
5 pursuant to Washington case law. In this case, a Motion in Limine is requested precluding any further
6 derogatory, defamatory, or attacks on moral character made against and regarding any of the current
7 Dike District No. 12 Commissioners.

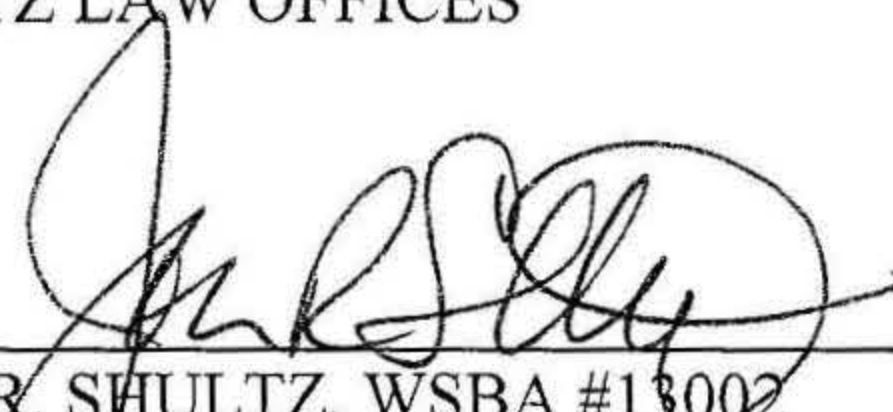
8 There should also be an Order in Limine issued consistent with the Board of County
9 Commissioners decision on February 4, 2014 that the hydrology used in these proceedings should be the
10 current hydrology, which will be provided by NHC for the City and approved by the Corps. That only
11 evidence or documentation consistent with this hydrology shall be admitted, and all other evidence
12 excluded and subject to a Motion in Limine. This should also limit any evidence to attack or challenge
13 the FEIS, which has already been approved and was not appealed, as well as any hydrology evidence
14 and data pre-dating the 2010 FEIS, and also including evidence submitted relevant to the *Halverson v.*
15 *Skagit County* lawsuit and transcript.

16 Finally, it is also submitted that as a matter of law, Intervenor Kunzler has failed to demonstrate
17 the impartiality, bias, prejudice or appearance of fairness claims in the Hearing Examiners decision-
18 making process, and that the Motion to Recuse/Disqualify the Hearing Examiner should be denied.

19 Respectfully submitted this 20th day of March, 2014.

20 SHULTZ LAW OFFICES

21 By:

22 
23 _____
24 JOHN R. SHULTZ, WSBA #13002
25 JOHN A. SHULTZ, WSBA #42542
Attorneys for Skagit County Dike, Drainage
and Irrigation District No. 12

1 the GI study if it gets done but I want to make one thing clear: The
2 GI Study is part of this but it is not a precondition for Dike 12
3 doing its work. There is no contingency for Dike 12 doing their work
4 as conditioned upon the GI Study. So I wanted to make that point
5 clear because I don't think that was made clear.

6 In any event, um, we've had other people testify here, we've had
7 let's say Doug Weber from the Corps, Tom Sheehan - he goes way back
8 he knows a lot about flooding, Margaret Fleek testified, Chal
9 Martin's been involved - he was employed with the County, he worked
10 on these issues for many years and then he went to Burlington and
11 he's worked on the certification. So they're a lot of people in
12 favor; I think those opposed may have, um, other issues or other
13 agendas but I would submit to you that all the evidence points in
14 favor of approving this permit as evidenced by the fact that the
15 county does recommend it¹⁰. The county says 'we've looked at all
16 this, the evidence is submitted, it's consistent with all the
17 regulations and this permit should be issued'. If it's not issued
18 that stymies Dike 12 because we can't complete projects now, we can't
19 work for levee improvement, urban levee protection, the next several
20 years, uh and so what if, what if at the end of the day the GI
21 Study's not approved and we're stopped from doing work? The people
22 in Skagit County¹¹ will suffer because there will not be this added
23 protection for the river and once we have this added protection we
24 can embellish that and add other protections to other areas because
25 they'll be more certainty about [the] river, the hydrology, and the

¹⁰ All that is really evidence of is that the county planning department is just as willing to look the other way as DD12 and Burlington.

¹¹ The truth of the matter is that the "people" of Skagit County and Burlington said no to this project in 1979. Clearly the City of Burlington government public employees and DD12 do not care what the people want.

1 found on pages 62 through 68 in the EIS {See FEIS Page 62}. That
2 portion is permitted under shoreline substantial development permit
3 SMA 1 dash 12 through the City of Burlington. This hearing was
4 permitted on June, or heard on June 20th, 2012 and the appeal period
5 ended in July 2012. I previously submitted a copy of the, uh, of the
6 minutes from that hearing and that's Exhibit 18 in the record.
7 {NOTE: INSERT LINK}.

8 [0:45:16]

9 I also showed you this vicinity map which is Figure 2 in the Golder
10 Report {See Golder Report} and then the red here is the area in
11 question on this shoreline substantial development permit. This area
12 right here, this is the portion that's already been permitted to the
13 City of Burlington. Of course these studies also include other areas
14 - the Three-Bridge Corridor and other things that are included in the
15 EIS. {See FEIS}

16 This project relates strictly to the enlarging of both width and
17 height of the existing levee¹⁴ in place for the 1.53 mile portion
18 within Skagit County. Project extends from the Burlington City
19 Limits at Gardner Road north to the terminus south of the Burlington
20 Northern Sante Fe Railroad on Lafayette Road. Construction will
21 occur on top of and landward of the existing levee. This project is
22 undertaken for the protection of life and property in the City of
23 Burlington and Skagit County and for maintenance of flood control
24 facilities relating to the Skagit River.¹⁵

25 Okay, this is Figure 13 {See Golder Report} in the Golder Report
26 which I showed you at the previous hearing. Again, these are the
27 areas, this is the area that's being worked on and you'll see in the

¹⁴ In other words an improvement.

¹⁵ The project as described has nothing to do with maintenance.

1 certification of levees. FEMA would be happy because we're doing
2 what we need to do to certify our levees¹².

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

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

10 Alright, state your name.

11 [0:43:35]

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

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

16 **SEMRAU:** I do. I had a fairly lengthy presentation the last time, um,
17 I have updated it in written form and will submit this at the end
18 {See Exhibit 32: Presentation Notes of John Semrau} but I want to
19 make sure that some of these things, uh, are brought into the record
20 to this recording also. Uh, so, I did mention the last time that
21 I've been working on this project since, uh, about 1997¹³. I've been
22 a consultant for Dike District 12 throughout this process. Um, this
23 portion of the plan, uh, that we're dealing with this permit is found
24 on pages 68 through 76 of the EIS {See FEIS Page 68}. " This
25 project, uh, is located both within Skagit County and the City of
26 Burlington. The plan for this portion in the City of Burlington is

¹² Not if they realized that all the work you are doing was supposed to be prohibited.

¹³ Didn't the attorney say 2000? So they have been lying to the county and the Corps and the flood committee for over a decade?

1 included in the hydraulic modeling that is conducted to define the
2 100-year floodplain²¹. This is found on page 10 of the EIS. **{See FEIS**
3 **Page 10}** The Golder geotechnical study found that the levees in
4 general were already constructed soundly enough to withstand
5 significant flooding which has been confirmed in the 1990, 1995,
6 2003, and 2006 flood events. These floods have return intervals
7 ranging from 25 to 50 years.²² The primary constriction in the
8 floodway is the Burlington Northern Santa Fe Bridge. This bridge can
9 only pass 150,000 CFS²³. That's found on pages 11 and 12 in the EIS.
10 **{See FEIS Page 11}**

11 Um, probably the best explanation of freeboard and how it's applied
12 in this situation is found on page 10 of the EIS. **{See FEIS Page 10}**
13 FEMA requires riverine levees to have a minimum freeboard of three
14 feet and in some cases a half a foot in addition along the length of
15 the tieback levees and an additional foot either side of structures
16 such as bridges. In other words, the top 3 to 4 feet of this levee
17 will be freeboard to the Corps and FEMA guidelines for certification
18 and accreditation. This portion of the levee is above the floodwater
19 level and does not change the flow of the floodwaters. This is what
20 prevents the overtopping and potential catastrophic failure or breach
21 of the levee during a flood event.²⁴

22 At this point there's no proposal for a tieback levee and Burlington
23 and Dike District 12 are hopeful FEMA will consider benefits of
24 conveying some of the peak out of the system. This discussion you'll
25 find on pages 10 and 11. **{See FEIS Page 10}** The tieback levees can
26 affect upstream and downstream properties. If the GI Study

²¹ Yes, the 100 yr fld plain not the 25 year flood plain.

²² While I personally believe that the floods were larger then 25-50 year events no government agency has stated that any of the floods mentioned were 50 year events.

²³ The primary constriction point is created by the levee system primarily DD12 changing the natural course of the river and throwing additional water towards the corridor that they created.

²⁴ Thats true for the 100 yr event but what about the 150 or 500 yr event? All you've accomplished is creating the "potential catastrophic" flood event. Levees are the worse form of flood control.

1 or Northwest Hydraulic Consultants, and Pacific International
2 Engineering or PIE. The best kind of the, and they call it the
3 synopsis, the difference of the work is found on page 44 of the EIS.²⁸

4 {See FEIS Page 44}

5 There's also if you look on page 9 of the EIS, {See FEIS Page 9}
6 you'll find little more brief table um, this particular project - the
7 choice that Burlington made and it's all based on the, the
8 conclusions of the EIS, PIE was a consultant for the County at first,
9 they came up with flood numbers that differed from the Corps. Lower
10 numbers. They were a little more realistic numbers in my opinion but
11 that's not to say being a little more conservative than that you can
12 still have flood events greater than a 100 year event. Northwest
13 Hydraulics or **nhc** was the next and I think they're still the current
14 consultant for the county, um, they essentially came in between the
15 two. They said, you know, made some adjustments on the PIE numbers
16 but still came in below the Corps of Engineers. Now I did submit to
17 you and its Exhibit 19 in the record, {See Exhibit 19} I submitted a
18 draft report dated January 12, 2012 from **nhc**. Now it's my
19 understanding **nhc** at that time they were using the Corps' hydrology.
20 The County and the GI Study moving forward is using those larger
21 numbers. This project because of the decisions made initially -
22 we've gone with the lower numbers partly because we want to reduce as
23 much risk as we possibly can to the City of Burlington in this
24 floodplain area and to do that we don't feel we need to build it to
25 the higher level now²⁹. We can wait until the GI Study's done and if
26 they tell us they're going to use those Corps numbers which is very
27 likely then we will be raising the levee³⁰. The levee design has, is

²⁸ And that difference is anything but "Goldilocks" in nature.

²⁹ So if you don't build it now how are you going to get it certified? Sounds like to me that they are saying something different out of both sides of their mouth at the same time.

³⁰ So what the dike districts have done is use the taxpayers to fund a 13 million dollar engineering plan so that they can raise the levees on their own.

1 incorporated so that it can accommodate that additional 2 or 3 feet,
2 whatever it ends up being to meet the certification and the
3 accreditation at that higher levee standard.

4 But all this project is about is reducing the risk to the City of
5 Burlington and actually Dike 12 when you start looking at the
6 floodplain maps especially the Dike District maps, if we breach then
7 Dike 1's affected, most of the, every dike district on the west side
8 of the Skagit River is going to be affected because we're upstream of
9 them. If we, if our levees fail, there's other dike districts that
10 are going to be affected.³¹

11 [1:00:00]

12 Okay, this is the important part of the, um, EIS showing the effects
13 of this proposed project so this is found on page 47 of the EIS {See
14 FEIS Page 47}. This is the effects of an uncertified levee using the
15 Corps of Engineers' hydrology.³²

16 This map is found on page 48 of the EIS, {See FEIS Page 48} this is
17 the uncertified levee using the PIE hydrology. The difference
18 between the two is basically most of the area floods and there really
19 is no difference.

20 Okay, this is the - found on page 49 of the EIS {See FEIS Page 49}-
21 this is the effects of flooding, you can see the flooding through the
22 Gages Slough. This is a proposed certified levee using the PIE
23 hydrology. This is the project that we're proposing at this time.

24 This is found on page 50 of the EIS, {See FEIS Page 50} this is the
25 same project that we're proposing but the effect of this levee with
26 the Corps hydrology. As you can see there, a large portion of

³¹ And if you raise you levees you will also be impacting the other districts.

³² What the map clearly shows us is that it is Burlington, not the Nookachamps that is the lower area.

1 all these stakeholders that have been involved in this project from
2 the start.³⁵

3 [1:05:10]

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

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

6 **HE:** Yes

7 **SEMRAU:** Okay.

8 Alright, in summary, and I'm going to start with quoting again page
9 11 of the EIS, in the case of the riverine levee and the Skagit River
10 delta area, the protection goal for Burlington is to have a levee
11 system that will solidly withstand the 100-year flood event, lower
12 base flood elevations in the City, remove a percentage of the City
13 from the 100 year floodplain³⁶, and ensure that the established base
14 flood elevations adequately communicate the best estimates of the
15 100-year water surface elevations to property owners. I think that,
16 that paragraph summarizes our project. You know, we're proposing the
17 PIE hydrology because we felt at the time that was the best estimate
18 of the 100-year. That's a reasonable 1st target for us to be spending
19 the public's money to build these levees to. If we're told we need
20 to go higher, we will go higher.³⁷ If we're going to use the Corps
21 hydrology which is pretty apparent that the GI Study is using that,
22 that's what we'll do.

³⁵ But it was held back from the flood committee by the public works department who sits on the GI Project Delivery team.

³⁶ He left out the part about what area would be out of the 100 year floodplain with this project. He left out the part about that kind of project opening up ag lands to development or forcing floodwaters into the Samish Basin or the Nookachamps.

³⁷ And the hell with the impacts to anyone else? This will make the 4th time DD12 changed the natural course of the Skagit River.

1 it's the WAC or the RCW, it's 5 years plus a 1 year extension - we
2 certainly have enough work under this permitting that we would want
3 to make sure that we have that option for that 6th year and that's
4 from when we pull the permit so if we get into a situation where we
5 can't effectively do work this summer we're going to pull the permit
6 next summer and we need that five to six years to do that work.

7 I also, just briefly, in summary, those exhibits 22, 23 and 24 {**See**
8 **Exhibit 22, Exhibit 23 & Exhibit 24**}, were letters prepared by
9 myself, um, one was the parcel number discrepancies, um, one was in
10 regard to fill and grade permit 0702067, that permit I mentioned in
11 the previous hearing that we had applied for the extension of that
12 permit - we have now received that extension and that permit will
13 expire November 14th, 2013 - again that's new information since the
14 previous hearing and since I submitted that last letter so but that
15 permit has been extended and that work will continue this summer. I
16 also submitted, there's a summary of our permitting activity within
17 this area - there was some other testimony about areas outside of
18 this particular area and we're just trying to limit it to here. We
19 do an awful lot of, we permit everything that we're expected to
20 permit here so unless you have any other questions...⁴¹

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

24 **SEMRAU:** Uhum.

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

⁴¹ Why weren't copies of the actual permits submitted? How does the H/E know that they actually exist and the work authorized was performed in accordance with the permits.

1 away at the most from the levee itself - uh, those levees break and
2 those people are definitely in the 100 year floodplain.

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

8 November 1st, 1984 {See Letter from FEMA to Skagit County Planning}
9 conventional analysis floodways are to be kept free of encroachment
10 that would include the levees themselves. Here's a memorandum for
11 the record, fast forward to 1996 from the Joseph Weber {See
12 10/10/1996 USACE MFR Re: Skagit River Levee Repairs⁵⁶}, the program
13 manager, he used to be a hydrologist with FEMA, then he went to work
14 as a floodplain manager for the Corps of Engineers, then he went back
15 to work for FEMA and now he's retired but this was pulled out of the
16 Corps' files. Conventional floodways were not adopted for the entire
17 delta downstream of Sedro-Woolley and this area of the Skagit River
18 proper, the levees confining the channel and adjacent areas have been
19 designated as floodways⁵⁷. In the vicinity of Whitmarsh Road and this
20 is when I first started complaining about 4 feet of fill on the
21 riverward side of the levee along Whitmarsh Road. That wasn't there
22 during the 90 flood event. What the dike district has never told the
23 residents of the City of Burlington is that the floodwaters were in
24 the process of crossing Whitmarsh Road in that location so I
25 understand them wanting to put 4 feet of fill but they're still
26 putting 4 feet of fill in the floodway. The reason I know that the
27 water was crossing is because I drove over there and you can tell
28 exactly where the high water line was from the river at that time.

⁵⁶ This letter was sent after the 1984 FIS was issued that Mr. Semrau entered into the record.

⁵⁷ So 12 years after the FIS a former FEMA employee knows that the levees were designated as part of the floodway.

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⁵⁷ So 12 years after the FIS a former FEMA employee knows that the levees were designated as part of the floodway.

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

13 [1:59:55]

14 This you're going to find kind of humorous, this is a nasty e-mail
15 exchange between myself and FEMA in 2001. {See LJK Exchange With FEMA
16 Region X Official, RE: NFIP Policy Enforcement and Floodways} This
17 is a response by a young man called Patrick Massey who worked for
18 FEMA. He says first your entire long argument about the lack of
19 enforcement of cumulative rise standard of Section 3 c 10 is wrong.
20 Section 3 c 10 only applies in floodplains where a floodway has not
21 been designated, since a floodway has been designated along the lower
22 Skagit within the levee c 10 doesn't apply. Yes, the floodway
23 established in 1985 is located between the landward toe of the levee
24 so yes this means that there can be no fill or other kind of
25 development outside of the original cross-section located within this
26 designated floodway.⁵⁸ By the way, there is a regulatory floodway, I
27 don't know what your point is just being a floodway, not a regulatory
28 floodway but the two terms are synonymous. If the development has
29 occurred between the levees, this would be a NFIP compliance issue.

⁵⁸ So now we are 17 years after the 1984 FIS and a FEMA employee acknowledges that the levees were designated as floodways.

1 was up to my headlights in my vehicle to get them to come out. His
2 family came out, he stayed.

3 The 28 foot warning is just exactly what it is: That's to let people
4 know that there's going to be a flood. 30 to 32 to 34 feet you start
5 talking about evacuation and 38 you should be gone. I'm telling you
6 should be gone. The floodwater naturally backs up into the
7 Nookachamps,⁶⁹ you heard a little talk a bit about the Nookachamps.
8 One of the things I would do, I would go out in my vehicle and I
9 would drive out in the Nookachamps and you can actually see the water
10 pushing back through the Nookachamps, goes into, around the back of
11 the hills and it comes back around into Clear Lake and then into Mud
12 Lake and it's just a natural pushback because of the levees⁷⁰. I'm
13 sorry, the levees on both sides. That's, it's a natural thing. They
14 get more water; they're complaining that they get more water than
15 they ever had. Well it's the fact is we're getting more rain than
16 what we've ever had. It's a natural thing.

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

20 [2:45:02]

21 They aren't thinking about it. They're thinking about their families,
22 they're thinking about their jobs, they're thinking about Church,
23 they're thinking about birthdays, they're thinking about soccer, they
24 don't care because they expect the people in this room to take care
25 of them if there's a flood and that means levees.⁷¹

⁶⁹ There is nothing natural about the water backing up into the Nookachamps.

⁷⁰ What is natural about the "pushback" of the levees? This shows the culture of the bureaucratic mind, blame Mother Nature for mans mistakes.

⁷¹ There are a lot of people who are being hurt by DD12. They expect that the DD12 would not hurt them.

1 The questions in regard to the floodway, we've answered those
2 questions. We've answered the questions as to where the special
3 flood risk areas are, they are mapped on the FIRM, the Flood
4 Insurance Rate Map. Unfortunately I don't have a copy to give you,
5 but we've even heard testimony from some people off Lafayette Road
6 that it made revisions to their house and things, yet we've heard
7 testimony from Mr. Kunzler that we shouldn't be allowed to place fill
8 in the same area⁷⁷. That area's not in the floodway. It's not even
9 within 200 feet of the river; it's not within shoreline's
10 jurisdiction of the Skagit River. It is within shoreline
11 jurisdiction of Gages Slough.⁷⁸

12 So, but I'll submit this Flood Insurance Study, we have defined the
13 floodway, the floodway is basically riverward of the levee, we are
14 allowed to make improvements to the levee, we make those improvements
15 according to the Corps' requirements, we make those improvements when
16 the Corps tells us to make those improvements. But we're covered
17 through the WAC 1, the WAC 173.27.040, our shorelines substantial
18 development permit process in the RCW 90.058.030 we've got these
19 definitions and we work within those. So here's the flood insurance
20 study July 3rd, 1984⁷⁹.

21 **HE:** Alright, we'll call this Exhibit 36. {See Exhibit 36}

22 **SEMRAU:** There was a question in regard to what hydrology we'll use
23 when we certify. The certification, the only hydrology that'll be
24 accepted when certification occurs is the Corps'. Certification will
25 be to the 100-year Corps hydrology. When a levee's certified it's
26 basically certified - or when it's accredited they take the level of
27 the levee and they reduce, they remove the freeboard from it. If the

⁷⁷ No he didn't. He heard that the levees were part of the floodway. Not peoples property on Lafayette Road. He lied.

⁷⁸ Like the house the County permitted in Gages Slough, in the wetland.

⁷⁹ That's the same flood insurance study that says the levees are in the floodway.

1 address some of these areas that - 'Devil in the Details' - but need
2 to be dealt with on a more of a localized impact.

3 **And I think...**⁸⁶

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

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

7 **HE:** I, I.

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

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

10 **LE:** Okay.

11 **HE:** You could.

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

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

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

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

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

19 **HE:** This would be Exhibit 37. {See Exhibit 37}

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

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

⁸⁶ Let me know if anyone can figure out what she is trying to say.



SKAGIT COUNTY
BOARD OF COMMISSIONERS

RON WESEN, First District
KENNETH A. DAHLSTEDT, Second District
SHARON D. DILLON, Third District

February 11, 2014

Wick Dufford, Hearing Examiner
1800 Continental Place
Mount Vernon, WA 98273

Re: Resolution # R20130278
Shoreline Substantial Development Permit for
Skagit County Dike and Drainage District No. 12 Remand

Dear Mr. Dufford,

This correspondence is in response to your letter dated February 4, 2014 where you request clarity on how the term "Corps hydrology" should be construed.

The parties should use the most recent hydrology data set accepted by the Corps, not the Corps hydrology used for the 2010 FEIS. This is due to the fact that the most recent hydrology data set incorporates information that has been collected since the issuance of that FEIS.

Northwest Hydraulic Consultants (NHC) was previously under contract with the Corps to build the hydrology data set. Both NHC and the Corps would have this information. It is our understanding that the City of Burlington now has NHC under contract to model the impacts of the proposed project.

Thank you for the request for clarification.

Sincerely,

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

Handwritten signature of Ron Wesen in cursive.

Ron Wesen, Chair

Abstain

Kenneth A. Dahlstedt, Commissioner

Handwritten signature of Sharon D. Dillon in cursive.

Sharon D. Dillon, Commissioner