

**RECORD OF THE PROCEEDINGS
SKAGIT COUNTY BOARD OF COMMISSIONERS
TUESDAY, JANUARY 10, 2006**

9:00 a.m. – 10:00 a.m. Closed Record Appeal (PL05-0814) by Michael E. Haffey Regarding Special Use Request (PL05-0065), Submitted by Kimberly Johnson

*T 10:00 a.m. – 11:00 a.m. Public Works Department – Chal Martin, Director
1. Discussion/Possible Action – Funding Request For Nutria Trapping in Skagit County
2. Discussion – Update Lake Shannon Road Establishment
3. Discussion – Solid Waste Request For Proposals
4. Miscellaneous

11:00 a.m. – 12:00 p.m. Department Head Meeting

2:00 p.m. – 3:00 p.m. Closed Record Appeal No. PL05-0722 by Skagit County Dike District Nos. 1, 12, and 17, the City of Mount Vernon, and the City of Burlington Regarding Hydropower Shoreline Exemption No. PL05-0295, Submitted by Puget Sound Energy

3:00 p.m. – 4:30 p.m. Executive Session – Personnel, Litigation and Land Acquisition

The Skagit County Board of Commissioners met in regular session on Tuesday, January 10, 2006, with Commissioners Kenneth A. Dahlstedt, Ted W. Anderson and Don Munks present.

CLOSED RECORD APPEAL (PL05-0814) BY MICHAEL E. HAFFEY REGARDING SPECIAL USE REQUEST (PL05-0065), SUBMITTED BY KIMBERLY JOHNSON.

Closed record appeal No. PL05-0814 was submitted by Michael E. Haffey of the Hearing Examiner's decision to approve a Special Use Request No. PL05-0065 submitted by Kimberly Johnson. The Special Use Request is to operate Avant Garden, which is a display garden open for viewing in which outdoor events may be held. These events would include workshops/seminars, gardening classes, outdoor meetings, weddings, family reunions, arts/crafts or plant sales.

Mr. Haffey's appeal application items were indicated that he felt the Hearing Examiner made an error in law and an error in judgment. Mr. Haffey feels that this proposal allows for disruption of neighborhood activities because of the size of the lot, the size of the events, and the parking situation. He also questioned the interpretation by the Department of the definition of "Display Garden." However, Mr. Haffey did not provide a detailed explanation in regard to these issues with the appeal application.

The application was reviewed and determined that the proposal is compatible with existing and planned land uses and does comply with Skagit County Code and the Comprehensive Plan. The Hearing Examiner placed 23 conditions in his conclusion.

Holly Haffey, 13920 Avon Allen Road, Mount Vernon, submitted rebuttal materials to the Hearing Examiner's Findings of Fact, Conclusions of Law, and Conditions. After Ms. Haffey addressed the conditions as set forth, she and her husband urged the Commissioners to consider all exhibits contained in the record.

David Hough, 17483 W. Big Lake Boulevard, Mount Vernon, spoke on behalf of Kimberly Johnson. Based on the recommendations of staff from Planning and Development Services and comments received, Mr. Hough reviewed several modifications and conditions that are being proposed.

Commissioner Anderson questioned the distinction between large and small events. He asked Mr. Hough if according to the record, small events (50 or less attendees) could be held every day, May through

**RECORD OF THE PROCEEDINGS
TUESDAY, JANUARY 10, 2006
PAGE NO. 2**

October. Mr. Hough agreed that they could and added that an adjacent property owner would have the ability to revoke parking privileges if he so desires.

Commissioner Anderson next questioned the residential lot owned by John and Margaret Byfield that is being used as a parking area. Chairman Dahlstedt asked if the Byfield's needed to apply for a Special Use Permit. Mr. Hough indicated that it was included in Kim Johnson's application and noted that if the parking agreement goes away then the special use permit goes away. Ms. Johnson could then apply for a modification under the same process.

Ms. Haffey asked the Commissioners to reconsider the Hearing Examiner's decision. She said she strongly feels this type of business in the right location with more acreage might work.

Michael Haffey read a statement from Jerry Windsor, who said he wasn't notified of the closed record appeal.

Commissioner Anderson motioned to render a decision on Tuesday, January 17, 2006, at 2:00 p.m. Commissioner Munks seconded the motion, which passed unanimously.

PUBLIC WORKS DEPARTMENT – CHAL MARTIN, DIRECTOR

1. Discussion/Possible Action – Funding Request For Nutria Trapping in Skagit County.

Dave Brookings, Public Works Administrator, discussed the possibility of obtaining funding for Nutria trapping. Mr. Brookings explained that he recently attended a meeting concerning the short term approach of continuing to trap into the spring of 2006.

Mr. Brookings said that a USDA trapper is costing approximately \$5,000 per month and Dike District #12 has supported the project and will contribute \$15,000 to this cause.

Mike Davidson from the Washington State Department of Fish and Wildlife explained the techniques which are allowed with trapping. He said the technique allows for use of steel traps which are set in the water.

The Commissioners expressed their concerns regarding the cost of trapping the nutria and the need to have a full program.

Commissioner Anderson motioned to provide one year of funding in the amount of \$15,000 and then review the success prior to going further with the project. Commissioner Munks seconded the motion, which passed unanimously.

2. Discussion – Update Lake Shannon Road Establishment.

Engineering Division Manager Burt Reanier updated the Board on the Lake Shannon Road Establishment Project. He shared a map of the entire project and explained that the work is currently under way with the preparation of right-of-way deeds for each property owner to grant a right-of-way easement for the new county road.

Mr. Reanier explained that meetings are being scheduled with the property owners to explain the process, answer their questions, and obtain the deeds. He also said that one parcel of land (former Crown Pacific land) was recently sold by a bid process in December. Mr. Reanier said he is working on contacting the new owners to obtain a right-of-way deed from them for the portion of Lake Shannon Road and the boat launch road that is on their property.

Mr. Reanier went on to say that it is his goal to bring the process to a state of completion that will allow the public hearing process to begin in March, 2006.

**RECORD OF THE PROCEEDINGS
TUESDAY, JANUARY 10, 2006
PAGE NO. 3**

Chairman Dahlstedt shared concerns with the costs of the project since nothing was showing what the actual costs will be.

Mr. Reanier explained that the costs are presently less than \$20,000. He will provide a better projection for the next update in March.

3. Discussion – Solid Waste Request For Proposals.

Mr. Brookings introduced Debra Chase of HDR Engineering who has been working to develop the RFP (Request for Proposal) to look at options for the existing transfer station.

Ms. Chase shared a presentation, which covered the areas of the scope of the RFP, transfer station operations, submittal information, the selection process, coordination with the AFSCME Union, as well as final legal review. She also shared with the board the current RFP timeline.

Ms. Chase stated that the current timeline for the final RFP to be presented to the board for final review is no later than January 31, 2006.

The Board expressed concerns regarding the future for current employees at the existing transfer station. They said they would prefer absorbing those employees into other County jobs; however, positions with the new vendor may be a better option.

4. Miscellaneous.

Public Works Director Chal Martin presented an emergency resolution from the Department of Emergency Management.

Commissioner Anderson motioned to approve the resolution, which stated that due to heavy rains in Skagit County on January 9-10, 2006, that caused low lying areas to flood and steep banks to slide in various locations throughout the County, it is necessary to review damage and take corrective actions in flooded areas of the Skagit River Basin.

Commissioner Munks seconded the motion, which carried. **(R20060018)**

DEPARTMENT HEAD MEETING.

Dan Berentson, Communications Director, discussed the 2005 United Way campaign and stated that the County is approximately \$5,000 short of their goal. He asked departments to make sure to turn in their forms and thanked everyone for their participation.

Director of Public Health Peter Browning discussed the recent active tuberculosis case, which generated a lot of discussion within the County. He explained that because of the immigration status of the patient and the nature of the illness, there were a number of inaccuracies spread throughout the community. Mr. Browning shared a fact sheet, which addressed some of the most frequently heard rumors and concerns.

Mr. Berentson shared a brief Methamphetamine awareness video.

Gary Rowe, County Administrator, gave an update on the 2006 budget. He asked the departments to provide feedback about how the process went so he can continue to see how the process is working to make it as smooth as possible. Mr. Rowe said the Commissioners want to improve citizen involvement and stated that he will begin putting a committee together to help citizens to better understand the budget process. He then thanked everyone for helping make the 2006 budget process go smoothly.

**RECORD OF THE PROCEEDINGS
TUESDAY, JANUARY 10, 2006
PAGE NO. 4**

Mr. Rowe reminded Department Heads and Elected Officials of the retreat previously scheduled for February 10, 2006, and advised them that the date has tentatively been changed to February 17, 2006. He said a revised notice will be sent out as soon as the date is confirmed.

Chairman Dahlstedt thanked the Department Heads for coming and announced that the next Department Head Meeting will be held on Tuesday, March 14, 2006, at 11:00 a.m.

MISCELLANEOUS.

1. Vouchers audited and certified by the auditing officer as required by R.C.W. 42.24.080, and those expense reimbursement claims certified as required by R.C.W. 42.24.090, have been recorded on a listing, which has been made available to the Board.

As of this date, January 10, 2006, the Board by majority vote, did approve for payment those vouchers included in the above-mentioned list and further described as follows:

Payroll warrants numbered 968985 through 969138 from Clearing Fund 699 in the total dollar amount of \$303,507.73 (Transmittal No. P-02-06); and

ACH Transfer Request Form and Certification to Premera Blue Cross from Clearing Fund 696 in the total dollar amount of \$108,186.99 (Transmittal No. C-02-06).

CLOSED RECORD APPEAL NO. PL05-0722 BY SKAGIT COUNTY DIKE DISTRICT NOS. 1, 12, AND 17, THE CITY OF MOUNT VERNON, AND THE CITY OF BURLINGTON REGARDING HYDROPOWER SHORELINE EXEMPTION NO. PL05-0295, SUBMITTED BY PUGET SOUND ENERGY.

On March 15, 2005, Puget Sound Energy, Inc. (PSE) submitted an application (PL05-0154) for a shoreline permit exemption. On May 5, 2005, the County administratively denied the shoreline exemption application, which was appealed to the Hearing Examiner on May 20, 2005, by PSE (PL05-0294). On October 5, 2005, the Skagit County Hearing Examiner upheld the appeal. On October 10, 2005, Davis Write Tremaine, consul representing Skagit County, filed a Request for Reconsideration to the Hearing Examiner (PL05-0695), which was denied on October 17, 2005. On October 21, 2005, Dike District Nos. 1, 12, 17 and the Cities of Burlington and Mount Vernon appeal the Hearing Examiner's decision to the Skagit County Board of Commissioners (PL05-0722).

The issues being appealed are as follows:

- The Hearing Examiner erred in holding that no regulated development or use is being proposed within Skagit County.
- The Hearing Examiner erred in holding that the project's proposed changes to the flow, release, and storage of water are not regulated "Development" or "Use."
- The Hearing Examiner erred in holding that Skagit County's regulatory authority does not include a comprehensive review of all activities occurring as a result of project operations.
- The Hearing Examiner erred in holding that all other project components proposed to occur in Skagit County are not subject to shoreline review.

The appellants request that the Skagit County Board of Commissioners find that the Hearing Examiner's decision is clearly erroneous based on substantial errors of fact and law that are contained within the decision. In addition, the appellants request the following:

1. The Parties further request that the Board find that the Baker Project is regulated by Skagit County and includes uses and development within the County, such as the storage and release of water to produce electricity by artificial means.

**RECORD OF THE PROCEEDINGS
TUESDAY, JANUARY 10, 2006
PAGE NO. 5**

2. The Parties further request that the Board find that other project-related features will occur within the County and must be regulated as part of the County's shoreline permitting process for the Baker Project.
3. The Parties further request that the Board find that the Baker River Project, and the improvements contemplated by PSE be found to have a substantial impact on the Skagit River, and areas within the jurisdiction of the parties, resulting in substantial impacts and effects on the Skagit River, and issues relating to flood control of the parties and various jurisdictions in Skagit County.
4. Further, that the Board find that PSE's projects involve substantial impacts, impairment, and adverse consequences on the activities of the parties in reference to protection of persons and property and flood control in Skagit County, which needs to be addressed in the context of PSE's application and contemplated activities.

John Shultz, Attorney for Appellants Skagit County Dike District No. 1 and No. 12, stated that the Appellants request that the Hearing Examiner's decision be reversed and that PSE be required to submit to the jurisdiction and permitting regulation of Skagit County, including a Conditional Use Permit and a determination of the impacts on the shorelines of Skagit County in connection with its Baker River Project.

PSE's Baker Project is a vast project in terms of cost and complexity. It involves new turbines at the Lower Baker Dam, but also involves water storage protocols for the Lower Baker Reservoir (Lake Shannon) under Article 107, new and substantially increased flood flow regimes under Article 106, flood draw down targets and cooperation for flood control under paragraph 4.1.1, and cooperation for amendment to the Army Corps of Engineers Water Control Manual under 4.1.2, provisions for flood storage, a new power house with turbines at the Lower Baker Dam, a \$50 million upstream improvement and fish hatchery, Upper Baker and Lower Baker improvements, installation of a boat launch on Lake Shannon, gravel augmentation, construction of a Lower Baker trail, and other related activities, all totaling over \$60 million, in a project which will be relicensed for 50 years and will affect over 60 miles of the Skagit River.

However, PSE relates this project as simply consisting of "an Osprey nest and Common Loon nesting platforms." PSE argues that because of this, Skagit County has no jurisdiction, no regulation, has no right to obtain permits from PSE, no right to analyze shoreline impacts in Lake Shannon or 60 miles of the Skagit River, and has no oversight even though the Department of Ecology is required to make an analysis on a consistency determination with shoreline regulations. To make matters worse, even the Osprey nest and Common Loon nesting platforms are exempt as habitat restoration. The net result of the Hearing Examiner's decision is that Puget Sound Energy's vast, costly and complex project, including Lake Shannon developments and 60 miles of the Skagit River, are left completely unregulated by any entity or any jurisdiction, including Skagit County. The Hearing Examiner agreed with PSE's analysis.

Mr. Shultz stated that for the safety of residents in Skagit County, and lives and property, the Hearing Examiner's decision must be reversed and PSE and its project be subject to analysis and review under Skagit County Shoreline Regulations. There are no real or meaningful mechanisms for flood control in the Settlement Agreement that was entered into on November 30, 2004, and the parties who have an interest in flood control – the municipalities and Dike Districts – have never been parties to the Agreement or consulted in the implementation of the Agreement, said Mr. Shultz.

Mr. Shultz went on to comment on the Clam Shacks v. Skagit County decision and how it affects the closed record appeal.

Reference was also made by Mr. Shultz regarding the flooding event that happened in 2003. There was a rising river level and the Commissioners had the foresight to send a letter to PSE asking them to hold back water.

**RECORD OF THE PROCEEDINGS
TUESDAY, JANUARY 10, 2006
PAGE NO. 6**

Mark Quehrn, Attorney for Puget Sound Energy, asked Mr. Shultz if this information was contained in the record. Mr. Shultz said he believed that it was. Mr. Quehrn raised an objection to the extent that Mr. Shultz was making reference to evidence that is not in the record. Mr. Shultz said he would withdraw the exhibit.

Mr. Shultz said in reality, it is known that PSE was contacted, the water in Lake Shannon was drawn down by 5 feet and then 10 feet after there was a report of flooding. The lesson that was taught was that whatever PSE does at the dams has a substantial affect on the water down below. Mr. Shultz said that to say Skagit County should not have jurisdiction is ludicrous.

Mr. Quehrn said it would be helpful when making references to facts that references be made to the information that is contained in the record only. After Mr. Quehrn raised his first objection, he said he heard a discussion about flood events in 2003 that he doesn't believe is in the record.

Scott Thomas, Attorney for the City of Burlington, referred to the facts of the Hearing Examiner's Finding #15, where it states "the rehabilitation of the power generating facilities will permit the project to meet the flow regime changes dictated by the Settlement Agreement. However, no increase in the power production of the Project is contemplated." Mr. Thomas said #15 demonstrates that the flow regimes are going to be changed and flooding will occur. At the time of flooding, the shorelines are going to be impacted; therefore, the City's property will be damaged as a result of changing flow regimes.

Kevin Rogerson, Mount Vernon City Attorney, spoke of piecemealing and speculative proposals, which don't enable anyone to look at the cumulative or adverse affects of the project. . The Baker Project viewed in its entirety, without piecemealing or allowing for speculative projects is not exempt from the Shoreline Management Act (SMA) because it is regulated "use" under the County's Shoreline Management Master Program.

Mr. Rogerson also indicated that under SMA, substantial development requires a permit; however, Clam Shacks by the Supreme Court broadened the regulatory measures of the SMA, not only to include development but the methods used in an activity can also trigger the regulatory authority of the SMA.

According to Mr. Rogerson, this is a \$60 million project that is going to affect only those downstream, which is the City of Mount Vernon, the City of Burlington and where all of the Dike Districts reside.

Mr. Querhn provided a map and an excerpt from the County's Shoreline Master Program. He stated that because this is a record only appeal, it means evidence can be considered only if it was presented to the Hearing Examiner. He said he received briefs yesterday from both cities and one on behalf of the dike districts. Mr. Querhn said there are a number of factual assertions in those briefs that aren't tied to the record. Therefore, the decision the Commissioners make should not be based on how it was written in the briefs, but what is written in the record about what testimony was provided to the Hearing Examiner.

The decision the Board is making as an appellant body is whether the decision of the Hearing Examiner was clearly erroneous. Mr. Querhn then referenced a vicinity map and a portion of the Shoreline Management Code that contains the definition of Hydropower, which is the generation of electricity from the energy of flowing water by means of diversion structures, flowlines, powerhouses, and associated facilities. The County's definition of what a hydropower use is makes reference to the means of generation. As the use of hydropower is defined in the County's code, it is presented in the Town of Concrete and Whatcom County. These uses are heavily regulated by the Federal Energy Regulatory Commission.

Mr. Querhn said he has not suggested that flooding isn't a serious issue that causes serious injury to people and property damage. Those are real concerns and his client doesn't dispute those concerns. But in this appeal, rather than taking their concerns to the Department of Ecology or the Town of Concrete or to FERC, they are asking the Commissioners/County to regulate the flows directly. There is no dispute on the evidence, but the powerhouses aren't in the County's jurisdiction. As a legal matter, the SMA does not give local jurisdictions the authority to regulate flows or reservoir levels in the river. There is a statute

**RECORD OF THE PROCEEDINGS
TUESDAY, JANUARY 10, 2006
PAGE NO. 7**

that is cited in the brief that specifically says that notwithstanding any other provision of the law, the Department of Ecology's jurisdiction to regulate flows is exclusive.

Mr. Querhn continued to argue points he made in the brief that was submitted on December 8, 2005.

Chairman Dahlstedt indicated that a significant amount of information has been received; therefore, the Board may want to postpone their decision for a couple of weeks.

Commissioner Anderson motioned to render a decision on Monday, February 6, 2005, at 1:30 p.m. Commissioner Munks seconded the motion, which passed unanimously.

ADJOURNMENT.

Commissioner Anderson made a motion to adjourn the proceedings. Commissioner Munks seconded the motion, which passed unanimously.

**BOARD OF COMMISSIONERS
SKAGIT COUNTY, WASHINGTON**

Kenneth A. Dahlstedt, Chairman

Ted W. Anderson, Commissioner

Don Munks, Commissioner

ATTEST:

JoAnne Giesbrecht, Clerk of the Board
Skagit County Board of Commissioners