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JUL 28 2011

SKAGIT COUNTY
PDS

July 25, 2011

Brian Lipscomb
27765 West Gilligan Creek
Sedro-Woolley, WA. 98284

To: Skagit County Planning Commission
1800 Continental Pl
Mount Vernon, WA. 98273

Re: NMFS/FEMA BiOp

Dear Commissioners,

I write to thank you for extending the comment period regarding the Flood Ordinance and share my concerns with the proposed changes to the SCC 14.34 and 14.24 development regulations that were initiated by the interpretation of the NMFS BiOP and the NFIP. The burden of proving through extensive FWHCA studies that no adverse impacts might occur to a habitat based on a parcels once in a hundred years chance of a flood is truly onerous. This FWHCA study would be required regardless of how small the scope of development. Many landowners will be forced to seek variances and Hearing Examiner decisions on trivial development projects such as carports and sheds. The expense of this would likely exceed the project materials and labor costs.

The reliance upon maps from the 1960's & 70's to designate floodway and floodplain buffers adds to this unreasonable burden. We have expended considerable effort and funds to correct an obvious error on the FEMA map and have still not completed what should have been a simple task. No other mapping is available to the general public for these determinations.

FEMA Map errors

Best Available Science was not used to determine the floodway in 1985 or in 2010. In 1981 Skagit Co. requested the floodway follow physical ground features in cross sections D - Q and T - AB. Not using the HEC-2 methodology created a political floodway and not a scientific one and amounts to just drawing a line on a map (*Pg 31, 1985 FIS*). The 2010 FIS did use HEC-RAS in these cross sections but these new maps were not adopted.

There are conflicting explanations of how the cross sectional data was determined for the flood maps, for example the 2010 FIS states the data was developed in 1975 using 52 cross sections from the 1984 study (*Pg 37, 2010 FIS*). The 1984 study states the detailed study data for 32 cross sections between Sedro-Woolley and Concrete was developed in 1963, with another 10 cross sections determined in 1977 (*Pg 26, 1985 FIS*). The 2010 FIS appears to be in error as there are only 43 cross sections available in the study between RM 22.4 and RM 55.35 and not 52.

The flood maps that will be used to manage the SFHA have errors and there lacks an efficient process to correct these mapping errors. In the SFHA a LOMA can be used to correct some errors, but a floodway correction requires the FEMA MT2 process, a large engineering effort, and community sponsorship for the correction, even for the most obvious of errors.

Baseline conditions

Existing site conditions and there habitat value are not a consideration with the proposed changes. These would prohibit rebuilding any existing structure damaged by fire, any remodeling, the building of a simple 200 sq ft. roof only structure, etc. unless a expensive FWHCA site assessment is undertaken costing thousands of dollars.

Not all landowners treated the same

14.34.150 (4)(a) exempts areas landward of a COE approved levy from the storage requirements while landowners with equivalent flood protection that lack COE approval must comply. Landowners outside the dike districts have greater restrictions than those included in the the district regardless of the quality of the on site habitat. It is unclear if the 'other side of public road' exemption in 14.24 would exist for critical habitat.

Model FWHCA

When something so complex as a FWHCA is required it would serve the public to have example FWHCA assessments that PDS feels is acceptable for a residence, accessory building, and other minor development.

Community Rewards

The only upside to adopting these regulations is a more favorable CRS number for PDS and potentially lower flood insurance rates for some in the community. These changes have nothing to do with flood risk and should not hide the true cost to provide insurance. The FEMA benefits from no development not the local community.

Public Notice

Although these regulations would affect my immediate neighbors none of them were aware of the BiOp, the proposed regulations or there impact. The County did a great job notifying the land owners affected by the SMP and held 4 workshops to solicit public input for developing new regulations. These BiOp regulations affect far more members of the public than just those with shorelines yet virtually no notification has been provided to affected landowners of the BiOp.

The one size fits all BiOP would force small landowners to implement costly studies and mitigation schemes for properties that provide no habitat value. I urge the Commission to delay any decisions on these proposed changes and have PDS reach out to affected landowners and solicit greater input from the public.

Respectfully,

Brian Lipscomb
Skagit River Landowner

Johnson Road and the confluence of the two forks is due to overtopping of the levees. Depth of flow in this area was approximated. The remaining area south of Johnson Road is subject to tidal flooding.

The overtopping and breach of levees along the Skagit River and its tributaries will result in overland flow with an initial high velocity. This high velocity will occur over a short distance until it merges with the floodwater of lower velocity flowing towards the coast. The high velocity zone starts at the levee and ends at a point where the depth of water is 3 feet. The overland flow velocity was computed for a small section of the levee using Manning's equation, with the energy slope defined as the difference in elevation between top of levee and the point of merge with the main overland flow.

$$V = \frac{1.486 (R)^{2/3} (S)^{1/2}}{n}$$

$$R = \frac{\text{Cross Sectional Area}}{\text{Wetted Perimeter}}$$

Where: V = Velocity of Flow

n = Roughness Coefficient

R = Hydraulic Radius

S = Hydraulic Gradient

Flooding of the area inside the meander loop, east of Avon, is caused by ponding due to overtopping of the Skagit River levees. The ponding elevation of this area is controlled by the minimum ground elevation of the point of exit from the channel between Interstate Highway 5 and the levee system.

Shallow ponding occurs near Mount Vernon, south of Kimble Road, and between the Skagit River and Britt Slough Road, due to overtopping of levees along the Skagit River. The 100-year elevation used for this area was related to ground-surface elevations to determine the depth of flooding and is controlled by the top of high ground enclosing it.

For detailed study reaches, excluding the delta area, all channel cross sections were field surveyed, and most overbank cross sections were developed photogrammetrically from aerial photographs (Reference 15). Most of the cross sections were determined in 1977, except on the Skagit River downstream of Concrete. On the Skagit River, between Sedro Woolley and Concrete, 10 cross sections determined in 1977 were supplemented with 32 cross sections developed in 1963.

the economic gain from floodplain development against the resulting increase in flood hazard. For purposes of the NFIP, a floodway is used as a tool to assist local communities in this aspect of floodplain management. Under this concept, the area of the 100-year floodplain is divided into a floodway and a floodway fringe. The floodway is the channel of a stream, plus any adjacent floodplain areas, that must be kept free of encroachment so that the 100-year flood can be carried without substantial increases in flood heights. Minimum Federal standards limit such increases to 1.0 foot, provided that hazardous velocities are not produced. The floodways in this study are presented to local agencies as minimum standards that can be adopted directly or that can be used as a basis for additional floodway studies.

The floodways presented in this study were computed on the basis of equal-conveyance reduction from each side of the floodplain. The results of these computations are tabulated at selected cross sections for each stream segment for which a floodway is computed (Table 4).

In June 1981, Skagit County officials requested widening of floodway boundaries in some reaches of the main stem of the Skagit River between Sedro Woolley and Concrete to follow physical ground features. At the direction of FEMA, these changes were made within the unincorporated areas of Skagit County from cross sections D through Q and T through AB; therefore, because the floodway was not generated using HEC-2 methodology, data shown in Table 4 pertain only to the political floodway boundaries.

For the study area downstream of Sedro Woolley, floodplain encroachment must be restricted in certain definitive areas. For the Skagit River proper, the levees confining the channel and adjacent areas have been designated as floodways. In the vicinity of Whitmarsh Road and the old U.S. Highway 99 bridge (Carl Street), the most landward levees were used to establish the floodway boundary. The purpose of these floodway designations is to preclude any encroachment which would reduce the capacity of the river channel or jeopardize the integrity of the levee system.

Conventional floodways are not appropriate for the Skagit River delta area for a number of reasons. Although flood elevation and depth criteria can be established for the delta based on general flood risk assessments that consider possible modes and locations of levee failure in flowpath computations, such analyses are not appropriate for establishing floodways on the delta. Unlike typical valley situations, the exact location of flowpaths during any particular flood event on the delta cannot be known in advance due to the uncertainty of where levee failures will occur, the relative sequence of levee failures, and the volumes of flow that will result. Likewise, because of the topographic nature of the delta, flooding occurs in sheetflow patterns and no one particular

Skagit River (RM 22.4 to RM 56.61)

Water surface elevations of floods for the selected recurrence intervals for the portion of the Skagit River between RM 22.4 and 55.35 were computed using HEC-RAS 4.0 (Reference 34) using the unsteady flow analysis routines.

Cross sectional data from the upstream boundary to the downstream boundary was developed in 1975 for the Flood Insurance Study (FIS) for Skagit County (Reference 1). This data was collected by Seattle District of the USACE's Survey Branch. Floodplain geometry was obtained via aerial photogrammetry, while channel cross sections were field surveyed. All of the 52 cross sections from Concrete to Sedro-Woolley (RM 55.35 to RM 22.4) from the 1984 study are used for this study. In addition, 57 cross sections for the Skagit River from Marblemount to Concrete, 10 cross sections for the Cascade River, 13 cross sections on the Sauk River, and 4 cross sections on the Baker River are used from the 1984 study.

Supplemental bridge data was field surveyed in 1998 by USACE - Seattle District's Survey Section for the State Route 9 (SR-9) crossing at Sedro-Woolley, while bridge data (station, elevation, and distance to adjacent cross sections) for the former Great Northern Railroad Bridge just upstream of the SR-9 crossing was estimated from field measurement, photographs, USGS topographic maps, and profile point data. Bridge low and high chords are modeled along with bridge piers.

Overbank and channel distances between cross sections were assigned by scaling the linear channel and overbank distances between sections on a topographic map. Overbank distances were adjusted according to the presumed flow path. Due to the relatively confined nature of the floodplain from Concrete to Sedro-Woolley and the somewhat steep channel gradient, no HEC-RAS defined off-stream storage areas are used for that reach.

Manning's n values were estimated based on engineering judgment from field assessments of the channel and overbanks of the reach and from interpretation of topographic maps. Manning's n values of 0.035 and 0.04 are typical, while overbank resistance factors of 0.08 to 0.15 are assigned based on judgment dependant primarily on land use, land cover, topography, and historic and expected depth of flooding.

Both upstream and downstream boundary conditions are required for an unsteady flow model. For the Skagit River an upstream hydrograph was developed Marblemount. Additional flow hydrographs were developed for the Cascade River at Marblemount, the Sauk River at Sauk, and the Baker River at Concrete into order to account for these tributary flows to the Skagit River. The stages produced by the lower basin FLO-2D model at the upstream location were used as the downstream boundary condition on the HEC-RAS model since the FLO-2D water surface elevations determined from a 2-dimensional model will be more accurate than 1-dimensional model. This also ensures consistency between the stages upstream and downstream of Sedro-Woolley.

The HEC-RAS model was calibrated to the 2003 flood and verified with the 1995 flood. The calibration results show that the HEC-RAS model is able to appropriately match the observed stage (Reference 26).

Skagit River (RM 56.61 to RM 74)

Water-surface elevations of floods for the selected recurrence intervals for the portion of the Skagit River between RM 55.35 and RM 74 were computed by Steady Flow Backwater

My name is Stephen Burgess and I own a 20 acre parcel of land at Clear Lake. In 1912 the property was platted into nine lots and a sizable agricultural area. It was recorded as such. It was part of a larger dairy farm and remained that way until the early 1960's. In 1965 the property was purchased by my parents. In the 1980's the property was given to my sister, my brother, and myself. Over the years the property has been rented to various farmers for pasture and the occasional crop. Today it is a lovely, large grass field which abuts Clear Lake. My family thinks of it as an heirloom. We have been responsible stewards of the land. Busy with careers and children in college we delayed developing the property. Now with some of us reaching retirement age and wanting to live in the quiet of the countryside we find ourselves having to face a regulatory system that arouses real dread. A few years ago several of our designated lots were uncertified due to changes in the zoning rules. It was never our intention to maximize the development of the property, or we would have done it years ago, but the event certainly had the effect of making us anxious that what had been settled wasn't settled. Now we are in the process of getting a permit for just one house. It's definitely a nervous process. What is a wetland? Every little undulation suddenly seems ominous. If mitigation is necessary which rules must be followed, are they fair, and which government entity has the final say? It doesn't seem to be a co-operative effort when setbacks can be 250 feet, plus another 15 feet, and rules are written so scrupulously and yet ambiguously that one must adhere to a standard of absolute perfection without knowing if such a thing is even possible. You do fear that you've lost your way.

Stephen Burgess
3508 96th Ave SE.
Mendenhall, WA

CarlyRuacho

From: Planning & Development Services
Sent: Tuesday, July 19, 2011 10:55 AM
To: CarlyRuacho
Subject: FW: PDS Comments

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JUL 19 2011

SKAGIT COUNTY
PDS

-----Original Message-----

From: website@co.skagit.wa.us [<mailto:website@co.skagit.wa.us>]
Sent: Tuesday, July 19, 2011 9:20 AM
To: Planning & Development Services
Subject: PDS Comments

Name : WSDOT, Elizabeth Sjostrom

Address : 1043 Goldenrod Road, Suite 101 City : Burlington State : WA Zip : 98233 email : Sjostre@wsdot.wa.gov Phone : (360) 757-5984 PermitProposal : Proposed Amendments to existing Skagti County Code Title 14 Comments : Thanks for sharing. The following is an excerpt of the language proposed from below:

(e) Normal street and road maintenance, including filling potholes, repaving, and installing signs and traffic signals, but does not include expansion of gravel or paved areas.

(f) Normal maintenance of a levee or other flood control facility prescribed in the operations and maintenance plan for the levee or flood control facility.

The above proposed exempt language seems consistent with our maintenance program activities. If we replace damaged highway back to pre-existing conditions (e.g. no expansion) then the work is exempt from a flood plain permit. A valid suggestion that might further clarify the exempt language above would be to include "Normal street and road maintenance, including repair of the entire road structure back to pre-existing conditions (e.g. repairing shoulder and drainage washouts?... ? a normal act of maintenance in flood plains.

Thanks for keeping me in the loop on this, and feel free to contact me if you have any questions.

From Host Address: 164.110.26.142

Date and time received: 7/19/2011 9:17:21 AM

To: Tim DeVries

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SKAGIT COUNTY
PDS**SEPA THRESHOLD DETERMINATION
DETERMINATION OF NON-SIGNIFICANCE (DNS)**

DESCRIPTION OF PROPOSAL: A non-project legislative action to consider amendments to Skagit County Code (SCC) 14.04 *Definitions* and SCC 14.34 *Flood Damage Prevention* and SCC 14.24 *Critical Areas*. The proposed amendments revise Flood Damage Prevention and Critical Areas regulations in order to comply with the Federal Endangered Species Act as required by Federal Emergency Management Agency / National Flood Insurance Plan.

PROPONENT/LEAD AGENCY: Skagit County Planning and Development Services

APPLICABILITY: The proposed action affects lands governed by Skagit County Code Title 14 located within the unincorporated areas of Skagit County, WA.

TITLE OF DOCUMENT: Proposed Amendments to existing Skagit County Code Title 14.

DOCUMENTS ARE AVAILABLE AT: Skagit County Planning and Development Services, 1800 Continental Place, Street Mount Vernon, WA 98273 or at www.skagitcounty.net

FINDINGS: The lead agency for this proposal has determined that the proposed new regulations and amendments do not have a probable adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21C.030(2)(C). This decision was made after review of a completed environmental checklist and other information on file with the lead agency. This information is available to the public upon request. This DNS is issued under the provisions of WAC 197-11-630.

COMMENT PERIOD: July 5, 2011 – July 19, 2011

You may appeal this threshold determination by addressing those criteria as set forth in Skagit County Code 14.06, 14.08 and 14.12 and then by filing such with the Skagit County Planning and Development Services for service to the SEPA responsible official. Comments may also be submitted online via a standard form at www.skagitcounty.net/pdscomments. To ensure comments are received and processed properly, comments sent by email are not accepted.

APPEAL PERIOD: None

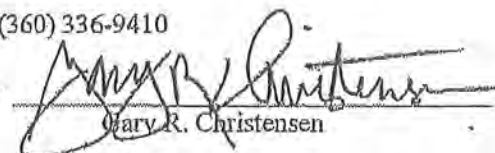
CONTACT PERSON: Tim DeVries, Building Official, Skagit County Planning and Development Services

SEPA RESPONSIBLE OFFICIAL: Gary R. Christensen, AICP, Director of Planning

ADDRESS: 1800 Continental Place, Mount Vernon, WA 98273

PHONE: (360) 336-9410

Signature:


Gary R. ChristensenDate: June 28, 2011

cc: ECY, DOC, FEMA, NMFS, Dike Districts, Drainage Districts, Affected Cities, Affected Tribes

Transmitted to the Skagit Valley Herald on June 28, 2011
To be published on June 30, 2011

Sjostrom, Elizabeth

To: TimDevries
Subject: RE: Skagit proposed Flood Damage Prevention Ordinance discussed today-

Tim, I will fax this e-mail to you now. Thank you for letting me know. Elizabeth

ELIZABETH SJOSTROM | WSDOT MT. BAKER AREA PLANNING
1043 Goldenrod Road, Suite 101, Burlington, WA 98233-3415
W: 360-757-5984 | SJOSTRE@WSDOT.WA.GOV

From: TimDevries [mailto:timd@co.skagit.wa.us]
Sent: Tuesday, July 19, 2011 8:52 AM
To: Sjostrom, Elizabeth
Subject: RE: Skagit proposed Flood Damage Prevention Ordinance discussed today-

Good morning Elizabeth,

Since we have already published our draft documents, the best way to propose a change to them would be as a comment within the SEPA comment period. That comment period ends today, so if you wish to, you could fax a comment to my attention. I'm sorry but emails do not meet the requirements for a legal comment.

Tim DeVries, CBO, ACO
Building Official
Floodplain Manager
Skagit County Planning & Development Services
1800 Continental Place
Mount Vernon, WA. 98273
(360) 336-9410 ext. 3489
timd@co.skagit.wa.us

From: Sjostrom, Elizabeth [mailto:SjostreE@wsdot.wa.gov]
Sent: Monday, July 18, 2011 1:06 PM
To: TimDevries
Subject: RE: Skagit proposed Flood Damage Prevention Ordinance discussed today-

Tim – I was out of the office the rest of last week- but am back now. If you have any questions, please let me know. I appreciate your help! Elizabeth

ELIZABETH SJOSTROM | WSDOT MT. BAKER AREA PLANNING
1043 Goldenrod Road, Suite 101, Burlington, WA 98233-3415
W: 360-757-5984 | SJOSTRE@WSDOT.WA.GOV

From: Sjostrom, Elizabeth
Sent: Wednesday, July 13, 2011 11:32 AM
To: 'timd@co.skagit.wa.us'

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Subject: FW: Skagit proposed Flood Damage Prevention Ordinance discussed today-
Importance: High

Tim- Thank you so much for walking us through this proposed amendment yesterday- I think it was helpful. I wondered if we could suggest a language modification to this proposal? I can write up something formal if you want- or just suggest it through this e-mail exchange.

We would encourage the addition of the language in red below. Do you think that would be possible? I appreciate your help. Elizabeth

ELIZABETH SJOSTROM | WSDOT MT. BAKER AREA PLANNING
1043 Goldenrod Road, Suite 101, Burlington, WA 98233-3415
W: 360-757-5984 | SJOSTRE@WSDOT.WA.GOV

From: Myhr, Gregor
Sent: Wednesday, July 13, 2011 10:19 AM
To: Glass, Kim
Subject: RE: Skagit proposed Flood Damage Prevention Ordinance discussed today-

Thanks for sharing. Attached is the letter from FEMA to WSDOT. The following is an excerpt of the language proposed from below:

- (e) Normal street and road maintenance, including filling potholes, repaving, and installing signs and traffic signals, but does not include expansion of gravel or paved areas.
- (f) Normal maintenance of a levee or other flood control facility prescribed in the operations and maintenance plan for the levee or flood control facility.

The above proposed exempt language seems consistent with our maintenance program activities. If we replace damaged highway back to pre-existing conditions (e.g. no expansion) then the work is exempt from a flood plain permit. To further protect maintenance program interest.... A valid suggestion to the County, might further clarify in the exempt language above "Normal street and road maintenance, including repair of the entire road structure back to pre-existing conditions (e.g. repairing shoulder and drainage washouts.....)" – a normal act of maintenance in flood plains. Thanks for keeping me in the loop on this, and feel free to contact me if you have any questions.

Gregor Myhr
Water Quality Manager / ESA Program
WSDOT HQ Maintenance and Operations
Office 360-705-7853
Cell 360-561-6290

From: Sjostrom, Elizabeth
Sent: Tuesday, July 12, 2011 1:56 PM
To: Glass, Kim; Pulst, Marv; Tellesbo, John; Storme, Roland
Subject: Skagit proposed Flood Damage Prevention Ordinance discussed today-

FYI- the county exemption does include signage and other items that would be important to us. - I included list below.
Elizabeth

Blue is what has been added, Red is what is deleted:

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14.34.100 Development Floodplain 1 development permits.

A floodplain development permit, processed per Chapter 14.06 SCC, shall be obtained prior to construction or development on any property within a special flood hazard area as established in SCC 14.34.050. The permit shall be required for all structures and development activities as defined in Chapter 14.04 SCC. (Ord. 020070002 (part); Ord. 17938 Attch. F (part), 2000), as well as those activities listed in subsection (1) below that may or may not otherwise require a development permit.

(1) Activities.

- (a) Septic tanks and drain fields.
- (b) Dumping or storage of toxic or hazardous waste materials, or other contaminants, in any quantity.
- (c) Utility and road maintenance work not exempted pursuant to subsection (2) below.

(2) Exemptions. The following activities are exempt from the requirement to obtain a floodplain development permit.

- (a) Routine maintenance of landscaping that does not involve grading, excavation, or filling.
- (b) Removal of noxious weeds and hazard trees and replacement of non-native vegetation with native vegetation, provided the applicant complies with SCC14.24, Critical Areas Ordinance.
- (c) Normal maintenance of structures, such as re-roofing and replacing siding, provided such work does not require a building permit and does not qualify as a substantial improvement.
- (d) Normal maintenance of above ground public utilities and facilities, such as replacing downed power lines.
- (e) Normal street and road maintenance, including filling potholes, repaving, and installing signs and traffic signals, but does not include expansion of gravel or paved areas.
- (f) Normal maintenance of a levee or other flood control facility prescribed in the operations and maintenance plan for the levee or flood control facility.
- (g) Planting, harvesting, livestock management, and other normal farm or agricultural practices and activities, other than structures and filling for structural support, provided that compliance with SCC14.24 Critical Areas Ordinance is met.

ELIZABETH SJOSTROM | WSDOT MT. BAKER AREA PLANNING
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July 19, 2011

Web Form Submission Results

Your submission was successfully received. Here is the information that was submitted:

Name: WSDOT, Elizabeth Sjostrom
Address: 1043 Goldenrod Road, Suite 101
City: Burlington
State: WA
Zip: 98233
email: Sjostre@wsdot.wa.gov
Phone: (360) 757-5984

PermitProposal: Proposed Amendments to existing Skagti County Code Title 14

Thanks for sharing. The following is an excerpt of the language proposed from below: (e) Normal street and road maintenance, including filling potholes, repaving, and installing signs and traffic signals, but does not include expansion of gravel or paved areas. (f) Normal maintenance of a levee or other flood control facility prescribed in the operations and maintenance plan for the levee or flood control facility. The above proposed exempt language seems consistent with our maintenance program activities. If we replace damaged highway back to pre-existing conditions (e.g. no expansion) then the work is exempt from a flood plain permit. A valid suggestion that might further clarify the exempt language above would be to include ☐ Normal street and road maintenance, including repair of the entire road structure back to pre-existing conditions (e.g. repairing shoulder and drainage washouts ☐... ☐ ☐ a normal act of maintenance in flood plains. Thanks for keeping me in the loop on this, and feel free to contact me if you have any questions.

Comments:

Timestamp: 7/19/2011 9:17:21 AM

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Puget Sound Energy
P.O. Box 90868
Bellevue, WA 98009-0868
PSE.com

Puget Sound Energy
1660 Park Lane
Burlington, WA 98233-4618

July 18, 2011

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JUL 19 2011

SKAGIT COUNTY
PCC

Dear Skagit County Planning Commission,

RE: Endangered Species in Special Flood Hazard Areas

Puget Sound Energy has reviewed the County's documents on this issue, as well as FEMA's draft and final Floodplain Model Ordinances. PSE appreciates the County's thorough approach to this issue, and is aware of the significance of proper land use planning and its relationship to floodplain management and emerging issues related to the Endangered Species Act. Many utility facilities are compatible with floodplains if designed correctly and if construction impacts are properly restored and/or mitigated.

To avoid unintentional restrictions on utility operations, PSE requests that Skagit County consider making a minor revision to the proposed section 14.34.100(1)(d):

Normal maintenance of above ground ~~public~~ utilities ~~and~~ facilities, ~~such as replacing downed power lines~~

FEMA's draft model ordinance used the phrase "public utilities" but their final model ordinance document dropped the word "public." This clarification is important so that PSE's operations are included within this section of regulation. Regarding the phrase, "such as replacing downed power lines," the reason to omit this is because there are other routine activities that would not have an adverse effect on endangered species. Every year, PSE replaces hundreds of old power poles throughout the service area because they have decayed to the point of not being reliable. Replacement activities utilize construction storm water BMPs to ensure that there are no temporary or permanent discharges of pollution from the replacement work.

Please do not hesitate to contact me with any questions or comments about this letter. Thank you for the opportunity to comment.

Sincerely,

Cory Ertel

Skagit County Community Services Manager
Puget Sound Energy

July 18, 2011

RE; NMFS Biological Opinion on National Flood Insurance Comments;

A. Public process- Concerned why people effected by this proposal were not informed similar to what was done in notifying residents about the pipeline safety proposal where over 3,000 notices were mailed to residents within 1000 feet of pipelines. This proposal is much more far reaching and proposes a takings of private property.

B. Takings- 250 foot Protected Review Area, 250 foot Riparian Buffer Zone, 250 foot Riparian Habitat Zone, all a word game, all meaning the same. Is this a government takings of private property?

1. The (Dolan v Tigard) 1994 US Supreme Court case needs to be considered. The nexus has not been established.

2. Proposed is removal of native vegetation must leave 65% of surface area of portion of private property in floodplain in an undeveloped state. A takings of private property.

C. Property owner Fish and Wildlife site assessments will be expensive.

D. This proposal will prohibit new farm Ag buildings and additions.

- (a). Prohibits expansion of my barn facilities beyond 10% of existing footprint.

- (b). To add 15 feet will require full scale professional biological habitat and floodway analysis, assessing project impacts and making a defensible determination regarding risk to salmon and whale. This will have to be approved by U.S fish and Wildlife.

- (c). Will require consultant, attorney and 2 to 3 year wait to get permits approved..

- (d). Cost 20,000 to 30,000 dollars or more, making new agriculture buildings and additions cost-prohibitive.

E. Science -

- (a). NMFS failed to use true field science in forming Biological Opinion. BiOp relied on political junk science from swinomish tribe and others.
- (b). Field tested science shows this proposal will not protect floodplain habitat as intended goals claim.
- (c). Hard to believe language in this proposal allows recreational facilities that can remove native vegetation next to creeks.
- (d). During flooding, fish are displaced onto farmlands, are stranded in low field areas, never make it back to creek, these low areas dry up by evaporation and seepage, fish are eaten by birds and wildlife. When advised Fish and Wildlife, Dept. of Ecology, Swinomish tribe all have no concern what so ever about the loss of these dead fish claiming act of nature.

F. It will be up to Skagit County to submit rules and regulations and to provide true sound science to satisfy floodplain habitat requirements. Skagit County already has Washington State Supreme Court ruled peer reviewed Best Available Science protecting the critical habitat areas, showing what Skagit County already has is adequately protecting critical area habitats. Skagit County can demonstrate the CAO science record is more applicable to site specific problems in the floodplain and use the CAO record as checklist for entire floodplain area. No need for more regulations.

G. Legal Opinion- Very informative Comments from legal offices of GordonDerr on FEMA's model Biological Opinion Ordinance addressing the following issues FEMA is trying to comply with concerning NMFS Biological Opinion.

- (a). Explains how recommendations from FEMA far exceeds Biological Opinion goals needed to protect habitat of salmon and whale.
- (b). Questions FEMA's legal authority to require ESA compliance.
- (c). No link between regulations and restrictions and intended benefits

to habitat.

- (d). Addresses regulatory takings with no benefit to species, with county held responsible for takings.
- (e). Explains how these regulations and restrictions are going to have adverse effect on intended habitat.
- (f). Property owners will face huge financial burden. Data, studies and mapping will result in tens of thousands of dollars and upwards in costs.
- (g). Raises issues with compensatory storage requirements.

H. Skagit County Planning needs to slow down, notify affected property owners and completely analyze and understand the consequences of this far reaching proposed ordinance. Questions such as?

- (a). Will DNR map satisfy FEMA or will new FEMA mapping be required?
- (b). Does FEMA have legal authority to require compliance with ESA?
- (c). Will property owner be required to provide mapping at owners expense? Cost to do full scale analysis? Costs to Planning Dept?
- (d). Why isn't true field tested science being used to guide this BiOp proposal instead of junk science? How can properties completely disconnected from habitat areas have impact on fish?
- (e). Is Skagit County going to be reliable and willing to compensate for this private property takings?
- (f). Could the 250 foot (PRA) become no touch by Administration Official decision?

I. Encourage consideration to drop FEMA coverage and consider private insurance companies for flood insurance. Would prevent another layer of

bureaucracy, Skagit County takings of private property, ridiculous regulations and restrictions and financial disaster to landowners and to Skagit County government.

Thank You for opportunity to comment.

Randy Good
Aileen Good

Randy Good and Aileen Good

25512 Minkler Rd.

Sedro Woolley, WA. 98284

360-856-1199

Submitted into record-- 11page, GordonDerr Attorney's at Law Comments
Regarding FEMA's Model BiOp Ordinance.

Submitted for Public Record
Randy Good 7/19/2011

April 8, 2010

FEMA Region 10
Mitigation Division
ESA Comments
130 228th Street SW
Bothell, WA 98021-8627

Re: Comments regarding FEMA's Model BiOp Ordinance

Dear Mitigation Director Carey:

I am submitting this comment letter on behalf of the Washington REALTORS®, several local associations of the Washington REALTORS, the Master Builders Association of King and Snohomish Counties, several local building associations, and several private property owners with property in King, Snohomish and Skagit counties.¹ While we appreciate FEMA's effort to comply with the direction set forth in the Biological Opinion issued by the National Marine Fisheries Service ("NMFS") regarding the National Flood Insurance Program ("NFIP") (entitled the "Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Ongoing National Flood Insurance Program carried out in the Puget Sound Area of Washington State," dated September 22, 2008) (hereinafter "BiOp"), we urge FEMA to substantially revise (or abandon) the Model Ordinance for the reasons set forth herein. As explained below, the Model Ordinance far exceeds what is in fact necessary or appropriate in the Puget Sound region to achieve the BiOp's goals of protecting the habitat of endangered species. To the extent FEMA decides to continue to pursue a model ordinance, FEMA should use the NEPA process to identify and consider multiple alternative means to achieve the BiOp's goals that provide greater flexibility and opportunities to Puget Sound jurisdictions and property owners.

¹ In addition to the entities expressly named above, this letter is submitted on behalf of: Building Industry Association of Whatcom County, Jefferson County Association of REALTORS®, Kitsap Alliance of Property Owners, Kitsap County Association of REALTORS®, San Juan Association of REALTORS®, Mason County Association of REALTORS®, North Puget Sound Association of REALTORS®, North Peninsula Building Association, Port Angeles Association of REALTORS®, Snohomish County-Camano Association of REALTORS®, Seattle-King County Association of REALTORS®, Tacoma-Pierce County Association of REALTORS®, Thurston County REALTORS Association, Washington REALTORS®, Whatcom County Association of REALTORS®, Whidbey Island Association of REALTORS®.

1. FEMA's Model Ordinance Carries Forward the Fundamental Flaw of the BiOp.

As a foundational comment, FEMA's Model Ordinance suffers the same fatal flaw as the BiOp itself: it is bipolar. On the one hand, the BiOp repeatedly acknowledges that the majority of the 100 year floodplain and floodplain habitat in the Puget Sound region has been modified, channelized or otherwise developed and, therefore, provides no habitat functions or benefits for endangered species. BiOp at 146. *At the same time*, the BiOp asserts that virtually every inch of the 100 year floodplain in the Puget Sound region should be protected from development to achieve the BiOp's goal of ensuring that development in the floodplain "will not result in adverse habitat effects." BiOp at 156.

FEMA's Model Ordinance carries forward this fundamental contradiction, treating every inch of the 100 year floodplain or otherwise "Protected Areas" as important habitat for endangered species. One need only look at the Green River Valley or the Ports of Seattle and Everett to recognize that not all areas mapped within the 100 year floodplain or otherwise Protected Areas provide fish habitat or habitat benefits. (Indeed, the BiOp acknowledges that it is harmful, not beneficial, to endangered species to enter these developed areas).

Based on numerous discussions with FEMA Region 10 staff over the past eighteen months, I had anticipated that the Model Ordinance would differentiate between floodplain areas with ongoing habitat value, and those developed areas that do not provide any habitat or habitat benefits. Instead, the Model Ordinance treats all floodplain areas similarly – irrespective of whether they are pristine backwater habitat immediately adjoining the channel, or fully developed industrial land a ¼ mile or more away from the nearest river. Rather than applying one size fits all regulations to the entire floodplain, the Model Ordinance should recognize differences within the mapped floodplain or otherwise Protected Areas and provide flexibility to achieve the BiOp's goal of protecting actual habitat and habitat functions but without effectively eviscerating already developed areas and otherwise unnecessarily limiting development.

2. FEMA's Model Ordinance Should Deviate From RPA 3 and Only Require Mitigation For Actual Impacts of Floodplain Development.

The BiOp paints with too broad a brush. It identifies the myriad habitat benefits of a relatively small subsection of the floodplain (e.g., river channels, near channel habitat, and other regularly inundated areas), but then proposes to restrict development within the entire floodplain with minimal evidence or analysis to demonstrate that these areas provide similar habitat benefits. The BiOp explains with reasonable specificity why preserving *existing* habitat areas in the Riparian Buffer Zone is important to protecting endangered species, but then proposes to apply the same habitat protection and creation measures across the entire floodplain – to areas that are completely disconnected from habitat areas and that may only play *any* role in floodplain habitat once in 100 or once in 50 years. The link between development of these areas, which are beyond the relatively narrow habitat corridors adjoining the river channel, and adverse impacts to functional habitat is simply not adequately demonstrated in the BiOp.

While we acknowledge FEMA's decision to take some action to address the BiOp, FEMA is not required to follow the recommendations of the Reasonable and Prudent Alternative ("RPA") Element 3, which conflates true habitat areas with the entire floodplain. As the Ninth

Circuit Court of Appeals has explained, “A Secretary can depart from the suggestions of a biological opinion, and so long as he or she takes ‘alternative, reasonably adequate steps to ensure the continued existence of any endangered or threatened species,’ no ESA violation occurs.” *Tribal Villages of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988). Rather than imposing the BiOp’s overbroad RPA Element 3 on local jurisdictions and property owners, FEMA should permit local jurisdictions and property owners to analyze how future development of their floodplains or otherwise Protected Areas *will actually impact habitat area and functions* and mitigate accordingly.

As currently drafted, the Model Ordinance takes a “both/and” approach. Project proponents must both comply with all of the one-size fits all development regulations in the Model Ordinance and prepare a habitat assessment evaluating the impacts of their development.² See Section 7.3. This is unnecessarily duplicative, and is likely to result in mitigation that exceeds or misses the actual impacts. While some may want to see floodplain habitat restored, that is outside the purview of the BiOp and its RPA and, thus, the Model Ordinance. The BiOp reviews the impacts generated by the proposed future action above current conditions (baseline conditions), and proposes modifications to that future action to avoid adverse impacts to endangered species and critical habitat due to that future action. It is overreaching to try to require restoration below baseline conditions, which is what the “both/and” approach attempts to achieve. Instead, the Model Ordinance should require only that local jurisdictions and developers analyze the impacts of their future development on endangered species habitat and habitat functioning and mitigate for any impact generated by that development.

3. FEMA Lacks the Authority and Has Failed to Follow the Process Necessary to Propose the Model Ordinance.

The legal authority behind FEMA’s approach in the Model Ordinance is suspect at best. First, FEMA attempts to rely on 44 C.F.R. 60.3(a)(2) as providing it authority to require local permittees to conform to the analysis and recommendations in the BiOp when obtaining a flood hazard permit. There is no such legal link. 44 C.F.R. 60.3(a)(2) requires that the local community “[r]eview proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law, including section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334.” There is no “ESA permit,” however.

Instead, ESA consultation, and the potentially corresponding development limitations, are triggered only where a federal agency authorizes, funds, or carries out an action. 16 U.S.C. §1536(a)(2). In many, if not the majority, of instances, development on property within the floodplain will not require any permits other than a local flood hazard permit. In such instances, there will be no federal nexus triggering ESA review. Only in those cases where a floodplain development also involves a federal permit, such as a Clean Water Act Section 404 Permit, will the applicant be required to consult with NMFS regarding the impacts of its development.

² If, as part of this effort, FEMA would like to incorporate portions of the one-size fits all standards from RPA Element 3 into a revised Model Ordinance, it should provide property owners the flexibility to choose between applying the BiOp-based development restrictions *or* conducting a specific analysis of the impacts of their proposed development and corresponding mitigation.

Thus, FEMA's alleged authority to require ESA compliance under 44 C.F.R. §60.3(a)(2) is suspect at best.

Moreover, to date FEMA has failed to follow the requisite procedures to propose the Model Ordinance. As FEMA is well aware, it has not gone through the standard rule making process required to legally modify its minimum standards. Similarly, it does not appear that FEMA has conducted any NEPA analysis regarding the environmental impacts of the Model Ordinance. By comparison, the Federal Insurance Administration prepared a Final Environmental Impact Statement when it last updated the NFIP's minimum standards. *See* Final Environmental Impact Statement, Revised Flood Plain Management Regulations of the National Flood Insurance Program, September 2006.

The federal Bureau of Reclamation was recently ordered to undertake NEPA review to evaluate the environmental effects of program changes implemented to comply with a biological opinion and corresponding reasonable and prudent alternatives. *San Luis & Delta-Mendota Water Authority, et al. v. Salazar*, ___ F.Supp.2d ___, 2009 WL 3823934 (E.D. Cal. 2009). The Court held that if implementation of the biological opinion and its reasonable and prudent alternative triggered significant changes to the operational status quo of an existing project or program, NEPA review was required. *Id.* at 14. Here, the programmatic changes proposed as part of the Model Ordinance will significantly change the status quo regarding implementation of the NFIP in the Puget Sound region. Consequently, FEMA must complete NEPA review prior to issuing the Model Ordinance for consideration by local jurisdictions adoption. To date, FEMA has not indicated that it has initiated, much less completed, this NEPA review.

Until FEMA has taken these steps - both formal rule making and NEPA analysis - it cannot legitimately assert any authority over local governments to threaten, much less suspend, their NFIP coverage for failure to implement the Model Ordinance, or take any other steps to implement FEMA's obligation to comply with the BiOp.

Rather than evading its NEPA obligations, FEMA should view NEPA review as an opportunity to consider the alternative ways in which it could achieve the objectives of the BiOp other than implementation of RPA 3. This process would identify alternative means to protect habitat and habitat functioning with less draconian implications for local governments and property owners.

4. The Commentary on Page 23 Is Not an Adequate Exception for Developed Areas. Local Jurisdictions Need Flexibility to Divide the Floodplain and Other Protected Areas into Different Zones or Classifications Based on Their Actual Habitat Effects.

Since beginning my review of the Model Ordinance, I have heard some assert that the "commentary" on page 23 of the Model Ordinance is intended to give local jurisdictions the flexibility to recognize and reduce the regulatory burden on already developed areas. Specifically, the commentary on p. 23 provides in relevant part: "As an alternative to this section C.1 [regarding riparian habitat zones], a community may prepare a map showing a smaller riparian habitat zone, based on best available science. Such a map could exclude bluffs, steep slopes, and/or developed areas that have no effective riparian habitat functions."

This commentary provides little to no actual relief. First, the commentary only allows jurisdictions to exclude developed areas from the definition of Protected Areas as part of the riparian habitat zone. These areas remain within the Special Flood Hazard Area ("SFHA"), and as such remain subject to all of the BiOp-based development regulations set forth in the Model Ordinance. *See, e.g.*, Section 5 ("The provisions of this Section 5 shall apply to the Regulatory Floodplain"); Section 6 ("The provisions of this Section shall apply to the Special Flood Hazard Area"); Section 7 ("The provisions of this Section shall apply to the Regulatory Floodplain").

Rather than providing local jurisdictions an illusory "escape valve" through alternative mapping for the riparian habitat zone, the Model Ordinance should allow local jurisdictions to first determine which floodplain areas and otherwise Protected Areas within their jurisdictions provide actual habitat for endangered species; which floodplain areas and otherwise Protected Areas, although not containing actual habitat, may have an effect on habitat; and which floodplain areas and otherwise Protected Areas have little or no effect on habitat or habitat functioning. Based on this evaluation, local jurisdictions could create alternative "zones" or classifications within the floodplain and otherwise Protected Areas that reflect actual habitat values and effects. Development standards could then be established based on these different zones to address the actual impacts of future development on habitat and habitat function in those areas (e.g., areas of existing habitat could be preserved; areas with flood storage or water quality impacts could be required to mitigate those impacts; already developed areas could be conditioned to address water quality and quantity impacts; etc.). Again, there is no basis in the BiOp or the ESA for requiring application of development restrictions that do not have corresponding benefits to endangered species or their habitat. Too many of the provisions of RPA 3 show no link between the restriction and the intended benefit.

5. The Model Ordinance Exposes Local Jurisdictions to Takings and Substantive Due Process Challenges for Overreaching Development Restrictions.

By requiring adherence to the BiOp-based development regulations irrespective of the actual impacts of the proposed development on habitat, the Model Ordinance exposes local governments to inverse condemnation and substantive due process claims. While it is permissible for local governments to adopt development regulations as part of their exercise of the police power, those regulations must be narrowly tailored and the least intrusive means of accomplishing the government's objective. In the case of the Model Ordinance, the obligation to comply with BiOp-based development regulations irrespective of the actual impacts of a project on habitat or habitat functions violates these requirements.

While generally the burden of proof in such instances is on the property owner claiming a regulatory taking, "in a challenge to a government exaction of land to mitigate for adverse impacts from a proposed land use activity, the burden is on the government to identify a specific impact that needs to be mitigated and demonstrate that the exaction is roughly proportional to the identified impact." Washington State Attorney General Rob McKenna, *Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property*, December 2006, at 13. In this case, multiple provisions of the Model Ordinance in effect exact property without any demonstrated link to protecting habitat and habitat functions. For example, the Model Ordinance would mandate that property owners set aside at least 65% of their land containing native vegetation as no-development zones. Section 7.4. Further, the Model Ordinance would require subdivision

developers to dedicate one or more lots within the floodplain for open space. Section 5.1(B). Also, the Model Ordinance would mandate that on lots partially within and partially outside the floodplain, development be limited to only the non-floodplain portion. Section 5.2(1). (Of note, the Model Ordinance implies, but does not expressly state, that subdivisions of property entirely within the floodplain would be prohibited completely.)

All of these BiOp-based restrictions effectively take property from the land owner without first demonstrating any nexus to impacts actually generated by the proposed development. The land is simply deducted from the developable area of the property without first reviewing whether and how the development of the remaining land or the deducted land might impact habitat or habitat function. Similarly, there is no analysis of whether restricting or exacting the property is the least intrusive means to protect habitat or habitat functions. Before a government may restrict property in this way, it must demonstrate a nexus between the restriction and the impacts of the development, and show that the restrictions are not broader than necessary to achieve the goal.³

Rather than asking local governments to expose themselves to such takings and substantive due process claims, the Model Ordinance should provide local governments with flexibility to create mitigation obligations that are commensurate with the actual habitat impacts of the proposed future development.

6. Rather than Improving Habitat Conditions In the Floodplain, the Model Ordinance Is Likely to Trigger Disrepair and Corresponding Degradation.

The BiOp and Model Ordinance are premised on the vision that implementation of the BiOp-based development standards will improve floodplain habitat and habitat function. In fact, the strict application of these standards is likely to stymie some projects that could have beneficial impacts.

The BiOp and corresponding Model Ordinance have already begun to cause numerous Puget Sound region property owners to conclude that they will be effectively prohibited from developing, redeveloping or selling their properties. For example, the Green River Valley is currently pending remapping into the floodplain. As FEMA is aware, the vast majority of the Green River Valley in Kent is developed as industrial land with nearly 100% impervious surface and little or no native vegetation. In most cases, the existing grade is several feet below the anticipated base flood elevations for the region. Property owners in the Valley have already begun to conclude that the Model Ordinance will act as a virtual bar on the future redevelopment of their property, effectively eviscerating its value. They simply cannot foresee how they will be able to meet the Model Ordinances 10% impervious surface limitation, or its compensatory flood storage requirements (even if they flood proof to the base flood elevation, the Model Ordinance implies they will be required to compensate for the loss of flood storage capacity created by the buildings themselves). The likely result is that the existing buildings in the Valley will be occupied for the balance of their useful lives and then largely abandoned pending reaccreditation of the levees along the Green River. This will provide no habitat benefits for endangered species

³ Of note, Section 7.6 regarding compensatory flood storage appears only to require compensatory storage where the proposed development actually displaces effective flood storage volumes. This connection – between removing land from development and actual impacts – should be duplicated throughout the Model Ordinance.

and in fact the lack of upkeep and repair are more likely to cause harm to habitat (e.g., poorly maintained stormwater systems discharging greater sediments and pollutants). This result is counter to the goals and objectives of the BiOp.

By comparison, if the Model Ordinance recognized existing developed areas and provided reasonable avenues to maintain and redevelop those areas, those redevelopment projects could integrate features that could improve habitat. For example, redevelopments would be required to comply with upgraded stormwater standards, which would reduce the water quality and water quantity impacts compared to the existing development. As currently drafted, the Model Ordinance is a significant impediment to these improvements.

7. The Model Ordinance Should Permit the Local Jurisdiction to Evaluate the Environmental Impacts of Development Proposed within the Floodplain.

The Model Ordinance provides that an applicant may forego a habitat assessment if it has gone through an individual consultation with NMFS regarding the impacts of its proposal on floodplain habitat. As a preliminary matter, if an applicant has gone through consultation with NMFS, the applicant should be exempted from *all* BiOp-based provisions of the Model Ordinance – not just preparation of the habitat assessment. If the applicant has consulted with NMFS, the applicant has reviewed the impacts of its proposed project on endangered species and critical habitat; has demonstrated that its project will have no effect or may, but is not likely to adversely affect endangered species and critical habitat; has mitigated for any effect; and/or has obtained an incidental take statement from NMFS. In such instances, it is illogical and overreaching to require that applicant to meet *any* of the BiOp-based development regulations contained in the Model Ordinance.

Moreover, NMFS simply lacks the resources to consult regarding all of the flood hazard permits issued by the more than 125 jurisdictions participating in the NFIP in the Puget Sound region. Except as an act of spite (either aimed at NMFS or local property owners), it is ridiculous for the Model Ordinance to propose consultation with NMFS as an alternative to compliance with the development regulations in the Model Ordinance. For those permits where there is no federal permit (e.g., Clean Water Act Section 404 Permit), the local jurisdiction, not NMFS, should act as the agency with jurisdiction to evaluate the impacts of a proposed development on endangered species and critical habitat. The local jurisdictions are much more likely to be familiar already with the floodplain areas at issue and potential environmental impacts of development of those areas. There is simply no reason that NMFS is the only agency, or even the preferred agency, to conduct this review, when the local jurisdiction, not NMFS or any other federal agency, is responsible for issuing the flood hazard permit.

To the extent local jurisdictions may currently lack expertise to conduct this analysis, requiring local review of these issues will provide them an opportunity to get educated and hire or contract with the appropriate staff. Most important for the applicant, it should reduce the review time from NMFS's current one to two year period to a more reasonable timeframe.

8. The Model Ordinance Shifts an Unwarranted Mapping Burden to Private Property Owners. In Some Instances, These Provisions Amount to a Defacto Moratorium.

The Model Ordinance contains various provisions that would require individual applicants to generate floodplain data before they can apply for a flood hazard permit. For example, Section 3.5(D) would require applicants for subdivisions or developments larger than five acres to map the regulatory floodway as part of its application submittal. Section 3.4(B) is a de facto requirement to map the floodway in riparian areas – or else have all property within the floodplain be considered part of the “Protected Area.” Also, Section 4.2(A)(3) requires applicants to prepare maps depicting the elevation of the 10-, 50-, 100-, and 500-year floods; and Section 4.2(A)(4) requires applicants to provide “the boundaries of the Regulatory Floodplain, SFHA, floodway, riparian habitat zone, and channel migration area.”

Requiring individual applicants – rather than FEMA or the local jurisdiction – to produce this information can be a tremendous financial burden. In relatively simple cases, preparing this data can cost tens of thousands of dollars and, as FEMA is well aware, in more complicated areas, preparing this data can cost hundreds of thousands of dollars. Moreover, in some areas the mapping of a floodway is as political as it is scientific. FEMA recently issued floodplain maps depicting the regulatory floodway for Lewis County which have created a political fire storm. Similarly, FEMA has spent the better part of a decade attempting to remap the floodplain in Skagit County and has not yet begun to wrangle with the floodway. In areas without a mapped floodway, application of the Model Ordinance’s mapping requirements would amount to a de facto moratorium on all developments of five acres or more for the foreseeable future.

Further, in preparing the mapping for riverine SFHAs, the Model Ordinance purports to require the applicant to consider not only its own project, but also “all other past and future similar developments.” Section 7.5(B). What this actually means is not defined in the BiOp or the Model Ordinance. Are applicants free to assume that all undeveloped floodplain areas will be limited to ten percent development due to the impervious surface restriction in the Model Ordinance; or should they assume thirty five percent development based on the restrictions on removal of native vegetation? This sort of effort – predicting future development patterns – should not be the burden of an individual permit applicant, but rather should rest with FEMA or the local government. This is particularly true considering the number of mapping disputes that are erupting in the Puget Sound region. In the current environment, it is nonsensical either to burden or empower an individual applicant with the authority to create binding floodplain mapping.

9. The Model Ordinance is Internally Inconsistent with regard to Sequencing.

The Model Ordinance and associated guidance provide inconsistent direction to local governments and applicants regarding whether and how sequencing is required. Sections of the Model Ordinance state and/or expressly imply that it is possible for applicants to deviate from the BiOp-based development restrictions provided that the applicant provides mitigation. *See, e.g.,* Section 5.2(B)(2) regarding impervious surface, and Section 7.4 regarding native vegetation. By comparison, the Floodplain Habitat Assessment and Mitigation Regional Guidance effectively mandates that a jurisdiction and applicant first avoid all floodplain impacts to the greatest extent feasible before they may consider off-setting mitigation. Further, Section

7.8(A)(1) regarding the Habitat Mitigation Plan provides: “the mitigation plan shall include such avoidance, minimization, restoration, or compensation measures as are appropriate to the situation.” This ambiguity and internal inconsistency needs to be addressed.

As stated throughout this comment letter, the Model Ordinance should allow future development and redevelopment provided the corresponding impacts are mitigated. Why should an applicant be required to avoid floodplain development if that development in fact has no habitat impacts? Similarly, why should an applicant be required to avoid floodplain development where it is able to otherwise mitigate all of its adverse impacts on habitat? Again, in such instances, a blanket obligation to avoid first overreaches the goals and stated objective of the BiOp. FEMA’s obligation under the BiOp is to avoid adverse habitat impacts. That does not translate into or necessitate avoiding floodplain development.

10. The Model Ordinance Should Clarify that Development on Properties Outside the Protected Area and Above the BFE Do Not Require a Flood Hazard Permit.

Section 4.1 of the Model Ordinance provides: “A floodplain development permit shall be obtained before construction or development begins within the Regulatory Floodplain. The permit shall be for development as set forth in Section 2. Definitions.” Section 3.2(B), however, provides that “[a] development project is not subject to the requirements of this ordinance if it is located on land that can be shown to be (1) Outside the Protected Area and (2) Higher than the base flood elevation.” As currently drafted, it is difficult to reconcile these provisions. To correct this ambiguity, the Model Ordinance should be modified to clarify that an applicant must submit a flood hazard permit application to confirm that its property is outside the Protected Area and above the BFE. Once confirmed, that applicant and property are not required to obtain a flood hazard permit or to comply with the standards in the Model Ordinance. (As Section 3.2(B) notes, the applicant may still need to obtain flood insurance.)

11. The Variance Criteria in FEMA’s Model Ordinance Are Flawed and Overreaching.

The revisions to the variance criteria proposed as part of the Model Ordinance are flawed for several reasons. First, the Model Ordinance provides that a variance “shall not result in a violation of this ordinance.” Section 4.9(A)(11). By its very nature, however, a variance requests a deviation from the standards of the subject ordinance. Thus, this provision effectively nullifies the variance authorization.

Second, as with other provisions of the Model Ordinance, the variance criteria mandates that a variance may not be issued unless “[t]he development project cannot be located outside the Regulatory Floodplain.” Section 4.9(B)(1). Again, absent a showing that the development project will have an adverse effect on habitat, however, there is no basis in the BiOp for requiring such avoidance. This again overreaches beyond the requirements of the BiOp.

12. The Model Ordinance Creates Confusion regarding the Obligation to Provide Compensatory Flood Storage.

The compensatory storage requirements set forth in Section 7.6 appear to contradict the one-foot rise standards otherwise permitted in FEMA's minimum standards. Specifically, on the one hand, applicants for development in the riverine floodplain where no floodway has been mapped need only demonstrate that their project will not result in an increase of flood levels during the 100 year flood by more than one foot. By comparison, the compensatory storage standards require applicants to replace any flood storage volume lost by their proposed development. These two provisions are not consistent. One permits up to a one-foot rise in floodwaters, while the other effectively mandates zero-rise. Overall, the compensatory storage requirement has the effect of rendering every floodplain a "zero-rise floodplain." These provisions should be reconciled consistent with FEMA's existing minimum standards.

13. FEMA's Model Ordinance Should Not Commingle the BiOp-Based Restrictions with FEMA's Standard Minimum Criteria.

A final, but critical comment concerns the organization of the Model Ordinance. As drafted, the Model Ordinance commingles FEMA's adopted minimum standards with the BiOp-based development standards. This creates significant and unnecessary confusion. Rather than commingling these standards, FEMA should maintain its existing minimum standards as is and adopt as a separate section any provisions attempting to implement the BiOp. This is because if an applicant can demonstrate that it has already gone through consultation with NMFS or otherwise mitigated the impacts of its development on endangered species and habitat, there is simply no basis for applying any of the BiOp-based standards to that development.

By integrating the BiOp-based standards within FEMA's existing minimum standards, the Model Ordinance virtually guarantees overreaching and/or double dipping where the applicant has also completed a separate ESA consultation or other comparable review and mitigation. Further, by keeping the checklists in Appendix B (FEMA's minimum standards) and Appendix F (BiOp-based standards) separate, FEMA has demonstrated that it is not necessary to integrate FEMA's minimum standards with the BiOp-based standards.

We hope that FEMA will take these comments to heart and seriously consider revising entirely and/or abandoning the Model Ordinance. To the extent FEMA continues to pursue a model ordinance, that model should provide local jurisdictions with flexibility to recognize the developed condition of much of the Puget Sound floodplain and to require mitigation only for the actual impacts of future development. The one-size fits all BiOp-based regulations currently carried forward in the Model Ordinance are unnecessarily overreaching to achieve the BiOp's goals. Further, to the extent FEMA persists with a model ordinance, FEMA should utilize the NEPA review process as an opportunity and avenue to review alternative means to achieve the BiOp's goals.

Very truly yours,

Molly A. Lawrence

MAL:mal

cc: Vivian Henderson, Kitsap Alliance of Property Owners
Mike Eliason, Kitsap County Association of Realtors
Darrell Mitsunaga, Builders Association of King and Snohomish Counties
FaLeana Wech, North Peninsula Building Association
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Cory Ertel, Skagit/Island Counties Builders Association
Catherine Rudolph, Tacoma Pierce County Association of Realtors
Rebecca Jarvela, Thurston County Realtors Association
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CITY OF MOUNT VERNON

JUL 07 2011

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July 5, 2011

Jana Hanson
Director, Community & Economic Development Dept.
City of Mount Vernon
P. O. Box 809
Mount Vernon, WA 98273

Re: Property Owners for Sensible Floodplain Regulation
Status of Implementation of the NFIP Biological Opinion

Dear Ms. Hanson:

I am writing to you today for three reasons. First, I would like to introduce the City of Mount Vernon to Property Owners for Sensible Floodplain Regulation ("POSFR"). POSFR is a new Washington non-profit corporation formed by property owners and industry groups concerned about the potential unnecessary over-regulation of floodplain areas in the Puget Sound region. Second, I would like to provide a brief preview of POSFR's legal position regarding the City of Mount Vernon's obligations relative to the Biological Opinion issued by NOAA-National Marine Fisheries Service ("NOAA-Fisheries") in September 2008 to the Federal Emergency Management Agency ("FEMA") regarding the National Flood Insurance Program ("NFIP"). As explained more fully below, POSFR believes that FEMA and NOAA-Fisheries are reaching beyond their legal authority in suggesting to local jurisdictions that they have an obligation to implement the recommendations set forth in the NFIP Biological Opinion. Third, I am requesting that you add POSFR as an "interested party" or "party of record" regarding any efforts by the City of Mount Vernon related to the NFIP Biological Opinion.

I. Who is POSFR?

For the last several years, numerous industry groups, including the Association of Washington Business, the Washington REALTORS, the Building Owners and Managers Association of Seattle-King County, and the Master Builders Association of King and Snohomish Counties (to name a few), have been tracking two related activities affecting floodplains in the Puget Sound region. First, we have been tracking FEMA's efforts to update the Flood Insurance Rate Maps ("FIRMs") for many of the jurisdictions in the Puget Sound region, including King, Snohomish, Pierce and Skagit counties and the cities within those counties. Initially we had significant concerns regarding the preliminary FIRMs that FEMA produced for much of the Puget Sound region. At this time, however, it seems that our concerns have been allayed – or at least deferred – by FEMA's recent decision to re-evaluate its "without levees" policy. Until FEMA issues a decision regarding how it will account for non-accredited

levees in its upcoming FIRMs, it is our understanding that FEMA's mapping efforts are "on hold" in much of the region.

Second, we have been tracking FEMA's efforts to implement the NFIP Biological Opinion issued by NOAA-Fisheries related to the operation of the NFIP in the Puget Sound region. As you know doubt know, FEMA has been pressing local governments to modify their development regulations to implement Element 3 of the "Reasonable and Prudent Alternative" set forth in the Biological Opinion ("RPA Element 3").

POSFR came together earlier this year to provide a vehicle for the various industry groups, as well as myriad property owners who may be affected by the remapping, BiOp implementation, or both, to more intentionally track and weigh in on these activities. To be clear, POSFR understands and supports sensible floodplain regulation. We do not, however, believe that RPA Element 3 represents sensible floodplain regulation. RPA Element 3 proposes to severely restrict nearly all development in floodplains irrespective of existing conditions or actual habitat impacts -- and goes beyond what FEMA or NOAA-Fisheries can legally require of local jurisdictions under the NFIP as currently enacted. Consequently, POSFR is reaching out to local jurisdictions to encourage you to evaluate carefully both the legal and technical bases underpinning RPA Element 3 and FEMA's efforts to implement it.

II. Local Government Duty Relative to the Biological Opinion

Right now POSFR's key concern is how local jurisdictions respond to the Biological Opinion. We want to be sure that local governments do not misunderstand their legal obligations and overreact to perceived pressure.

As you know, FEMA has offered local jurisdictions participating in the NFIP three options to implement RPA Element 3:

- (1) Adopt a Model Ordinance prepared by FEMA.
- (2) Demonstrate how their existing regulations satisfy RPA Element 3. To the extent FEMA determines there are gaps between a local jurisdiction's existing regulations and the requirements of RPA Element 3, FEMA is proposing that local jurisdictions modify their flood hazard regulation to fill those gaps.
- (3) Demonstrate ESA compliance within the floodplain on a permit-by-permit basis. FEMA has articulated that this may occur in one of two ways: (a) direct consultation pursuant to ESA Section 7(a)(2) for projects with a federal nexus (i.e., projects authorized, funded or carried out by a federal agency); or (b) review by the local jurisdiction (without NOAA-Fisheries involvement).¹

¹Because flood hazard permits are issued by the local jurisdiction, not any federal agency, they do not trigger a federal nexus. A project may, however, include a separate federal component (e.g., a Section 404 Clean Water Act permit), which would trigger a federal nexus and ESA consultation regarding that federal permit.

Since FEMA began offering local jurisdictions these three options, POSFR has been actively monitoring local jurisdictions' decisions regarding which option to pursue and their progress toward implementation. As part of this monitoring, we have seen significant confusion and ambiguity regarding FEMA's and NOAA-Fisheries' interpretation and explanation of what exactly RPA Element 3 requires. Recent meetings and conferences sponsored by FEMA and NMFS (the March 1 & 2 "Demystifying the NFIP Alignment with ESA" in Edmonds, and the several "Biological Assessment Workshops" held throughout the region in April and May) had left POSFR feeling optimistic that FEMA and NMFS were moving away from "one size fits all" prescriptive standards toward environment-specific, function-based performance standards (i.e., conserve floodplain functions as they currently exist where they currently exist) that acknowledge local circumstances and past development.

FEMA and NMFS, however, have been reluctant to memorialize this interpretation of RPA Element 3 in a meaningful way on which local jurisdictions and property owners may rely. Further, we understand that FEMA has been unwilling, in reviewing several local jurisdictions' option 2 checklists, to accept local jurisdictions' scientific rationale for something different than the "one size fits all" buffers set forth in RPA Element 3. Consequently, we are increasingly skeptical of whether FEMA and NMFS actually intend to offer the flexibility and environment-specific, function-based approach outlined during the meetings earlier this spring.²

Until FEMA and NMFS are willing to take a more sensible (and legally defensible) approach to RPA Element 3, local jurisdictions should reflect on the scope of FEMA's legal authority to attempt to demand compliance with RPA Element 3. Review of FEMA's existing NFIP regulations demonstrates that FEMA does not have the authority to require local governments to implement RPA Element 3. Instead, pursuant to FEMA's existing regulations, FEMA may only require that local governments require project applicants to obtain all other "necessary permits" from applicable federal and state agencies. In the context of the ESA, the only "permit" that could be required is an Incidental Take Permit – which is only "necessary" if required under Section 10 of the ESA.³ See 44 C.F.R. §60.3(a)(2). Pursuant to Section 10, an Incidental Take Permit *is only required for projects that "take" endangered species*. This is a very different standard than the "no adverse effects" standard set forth in RPA Element 3.

It is also notable that this is not a new requirement. Since the various ESA fish listings in the Puget Sound region (beginning in the late 1990s), local jurisdictions have borne the obligation to ensure that permits they issue for development proposals throughout their jurisdictions – not just in floodplains – do not trigger "take." 16 U.S.C. §1538. To date, we are not aware of any

² We understand that the Washington State Department of Commerce and the National Fish and Wildlife Foundation recently initiated a "Technical Assistance Project" aimed at helping local jurisdictions work through option 2 using an environment-specific, functions-based approach. We will continue to monitor this effort and suggest that local jurisdictions do the same before proceeding with option 2.

³For projects with a federal nexus (i.e., that are authorized, funded or carried out by a federal agency), the project applicant has an independent obligation to consult regarding impacts to endangered species and critical habitat pursuant to Section 7(a)(2) of the ESA. This obligation rests with the applicant, not the local jurisdiction.

jurisdiction in the Puget Sound region that has been challenged for failing to meet this requirement.

We understand that the ESA is complicated with numerous technical terms and requirements. We would suggest that if you have questions about this, you review FEMA's regulations (44 C.F.R. §60.3(a)(2)) and the ESA (16 U.S.C. §1531, *et seq.*) with your City Attorney. The bottom line is that FEMA has not taken the necessary steps to require any jurisdiction to implement RPA Element 3, but only to require an Incidental Take Permit where necessary because a project causes "take." Consequently, POSFR asks that local jurisdictions not overreact to the Biological Opinion by unnecessarily restricting either existing or future development in the floodplain.

III. Notice of Activities related to the NFIP Biological Opinion

Finally, please add me on behalf of POSFR to the list of interested parties or parties of record on any effort that your jurisdiction may undertake related to RPA Element 3 or other provisions of the NFIP Biological Opinion. To date, FEMA has not engaged in a public process in which all interested persons may participate. One of POSFR's goals is to ensure public participation in this process and ultimately the adoption of sensible floodplain development standards. Notice is a critical step.

Thank you in advance for your consideration. We anticipate that this will be the first of several communications between the City of Mount Vernon and POSFR. We would also welcome the opportunity to meet with appropriate members of your staff to discuss these issues if that would be useful at this point. Otherwise, we look forward to hearing from you regarding any efforts related to the NFIP Biological Opinion or other efforts affecting floodplain development.

Very truly yours,



Molly A. Lawrence

cc: POSFR Board of Directors

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July 19, 2011

Skagit County Planning and Development Services
c/o Tim DeVries
1800 Continental Place
Mount Vernon, WA 98273

Re: **Our Client: Skagit County Dike Districts 1 and 12**
Matter: Comments to Amendments to Skagit County Flood Damage Prevention and Critical Areas Regulations; NMFS/FEMA Biological Opinion/ESA Compliance

Dear Mr. DeVries:

Our office represents Skagit County Dike District No. 1, and Skagit County Dike, Drainage and Irrigation District No. 12. Please find attached comments regarding the County's Draft Proposals to Address Federally and Protected and Endangered Species in Special Flood Hazard Areas.

These comments, on behalf of the Diking Districts address issues raised as a result of the new federal rules and the 2008 lawsuit which was filed against the Federal Emergency Management Agency (FEMA), and its regulatory effort required to protect endangered species. As a result of this, numerous communities in Puget Sound are affected by the National Marine Fisheries Services (NMFS) issuance of a Biological Opinion which provides guidance and options for local governments to comply with the Endangered Species Act. Skagit County has jurisdiction and authority, as well as regulatory responsibilities for development activities within this jurisdictional boundary. The following Comments relate to the new Draft changes to County regulations.

Under revisions to SCC 14.34.055, it is provided as follows:

14.34.055 Protected Review Area

The Protected Review Area is comprised of, and shall be the greater of those lands that lie within the boundaries of the flood way, the Riparian Habitat Zone (RHZ), and the Channel Migration Area (CMA). The Riparian Habitat Zone and Channel Migration Area are defined as follows:

- (1) The Riparian Habitat Zone includes streams, water courses and adjacent land area within the Special Flood Hazard Srea (SFHA). The width of the RHZ shall be 250 feet from all Waters of the State (as defined under WAC 222-16-030) within the SFHA as determined under SCC 14.24.500.
- (2) The Channel Migration Area (CMA) shall be the Channel Migration Zone plus 50 feet, where such migrations zones have been delineated on a map or maps

that have been adopted by Skagit County for regulatory purposes. When such maps become adopted they shall be incorporated as a part of this chapter and shall be used in accordance with this section.

(a) Exception. Maintained levees subject to annual Corps of Engineers inspection shall be deemed to be the boundaries of the Channel Migration Area.

Additional changes are contained in SCC 14.34.100. This provides as follows:

14.34.100 Floodplain Development Permits

A Floodplain Development Permit processed per chapter 14.06 SCC shall be obtained prior to construction or development on any property within a special flood hazard area as established in SCC 14.34.050. The Permit is required for all structures and development activities as defined in chapter 14.04 SCC, as well as those activities listed in subsection (1) below that may or may not otherwise require a development permit.

...

(2) Exemptions. The following activities are exempt from the requirement to obtain a Floodplain Development Permit.

...

(f) Normal maintenance of a levee or other flood control facility prescribed in the operations and maintenance plan for the levee or flood control facility.

This change is generally acceptable to the Dike Districts as it redefines Floodplain Development Permits, but exempts from these activities “normal maintenance of a levee or other flood control facility prescribed in the operations and maintenance plan for the levee or flood control facility.” However, for clarification, it would be recommended that this paragraph be revised as follows:

(f) Normal maintenance of a levee or other flood control facility prescribed in the operations and maintenance plan for the levee or flood control facility, **and as may be managed to meet federal standards required by the U.S. Army Corps of Engineers, PL84-99, Inspection Programs, and Vegetation Management Guidelines, Regulations, and Engineering Standards.** (Addition – emphasis added)

SCC 14.34.220 has been amended to require, unless exempted, that any Floodplain Development Permit application, “shall include an assessment of the impact of the project on water quality and aquatic and riparian habitat of salmon and Orca species protected under the Endangered Species Act.” The process for meeting this assessment requires:

(a) If the proposed development is within the Protected Review Area as defined in SCC 14.34.055, a Fish and Wildlife Habitat Conservation Area (FWHCA) Site

Assessment will be required pursuant to SCC 14.24.520. If the proposed development is **not within** the Protected Review Area, but within the SFHA, the applicant shall submit a SFHA Habitat Impact Assessment checklist to determine whether a FWHCA Site Assessment pursuant to SCC 14.24.520 is required. This checklist will evaluate habitat functions and values present on-site and the potential impacts to these functions and values based on the project description. Department staff will determine whether a FWHCA Site Assessment is necessary based on a review of a complete checklist. (Emphasis added).

Although maintained levees will generally be within the Channel Migration Area, and this exception establishes the levees as the boundaries for the Channel Migration Area, this still does not address the Riparian Habitat Zone. See SCC 14.34.055. In this Zone, the width of the RHZ shall be 250 feet from all Water of the State, and since the measurements start at the river edge, which could be far waterward from the toe of the levee, and therefore outside of the 250 foot distance, the levees, therefore, could be outside of the Protected Review Area (PRA). In this case, and under SCC 14.34.220, in cases where the proposed development may be **outside** of the PRA, then this would trigger the application of a SFHA Habitat Impact Assessment Application to determine whether a further Site Assessment is required. In this case, the diking districts would, arguably, need to make application which would be time consuming and costly, in cases where only maintenance of the levees was an issue.

Arguably, this adds a good deal of confusion and lack of clarity as to whether or not a maintained levee, or diking district maintenance activities, which may be within the boundaries of the Channel Migration Area, but may be out of the Riparian Habitat Zone, and the Protected Review Area, and may trigger the need to apply for a SFHA Habitat Impact Assessment checklist to determine whether an FWHCA Site Assessment is required.

Normally, diking districts will likely always be in the Channel Migration Zone under SCC 14.34.055(a). Also, normal maintenance of a levee or flood control structure would be exempt from Floodplain Development Permits. See SCC 14.34.100. In the case, however, where maintenance and vegetation removal may be on a levee that is outside of the Riparian Habitat Zone, there may be asserted the requirement for submitting an SFHA Habitat Impact Assessment checklist. This would cause undue difficulty, delay and expense in simple maintenance activities. To clear up this confusion, and potential unnecessary application of a Habitat Impact Assessment, it would be simple to add as an exemption under paragraph SCC 14.34.220, (2) as follows:

(3) Exemptions from Habitat Impact Assessments. ...

- (a) ...
- (b) ...
- (c) ...
- (d) ...

(e) Normal maintenance of a levee or other flood control facility prescribed in the operations and maintenance plan for the levee or flood control facility, **and as may be managed to meet federal standards required by the U.S. Army Corps of Engineers, PL84-99, Inspection Programs, and Vegetation Management Guidelines, Regulations, and Engineering Standards.** (Addition – emphasis added)

The County is also submitting a “Biological Opinion Compliance Checklist: Skagit County Proposed Draft Submittal.” Certain references are unclear relating to the Biological Opinion Provision. The first provision, under “1. ACTIVITIES AFFECTED” provides a new definition for “development” under the new definition in the FEMA BiOp which adds to the definition of development as follows:

Any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, storage of equipment or materials, subdivision of land, and **removal of substantial amounts of vegetation, or alteration of natural site characteristics.** (New provision – emphasis added.)

In the annotations, there is a note that this is a proposed definition of “development” within the Model Ordinance. However, the County is not adopting the model ordinance in this case. Also, the annotation correctly notes that additional revisions are in SCC 14.34.100. At SCC 14.34.100 (f) is the exemption for normal maintenance of levee or flood control facilities. Normal maintenance of levee and flood control facilities normally involves management of noxious weeds, small, damaged, dangerous or dead trees and foliage, and other vegetation removal required by Army Corps of Engineers inspections and regulations. This should be noted in the “1. ACTIVITIES AFFECTED” to give guidance that despite the change in definition, that normal maintenance and operations of diking districts and flood control entities are exempt. This would save considerable confusion and time in permit applications.

Also, the annotation notes that under SCC 14.24.070, which lists exceptions of: “Activities allowed without standard review.” Under SCC 14.24.070(7), there are exemptions for maintenance for public and private diking and drainage systems, along with operation and maintenance managed to meet federal standards under the U.S. Army Corps of Engineers, public law 84-99, and other federal laws and regulations regarding diking and drainage, which would include Vegetation Management. The U.S. Army Corps of Engineers has a general Federal nationwide policy for management of vegetation and variance applications, along with PL84-99 Repairs and Inspection Programs, and these would override local activities. These exemptions should be noted in “1. ACTIVITIES AFFECTED”.

Accordingly, it would be recommended that the above addition regarding “removal of substantial amounts of vegetation, or alteration of natural site characteristics” be eliminated. To begin with, there are value judgments and subjective difficulties in determining what is “substantial amounts

of vegetation,” as well as “alteration of natural site characteristics.” “Substantial amounts of vegetation” could be a large amount of grass clippings resulting from mowing a mile of the levee. It could also mean thistles, or other invasion knot weed, or noxious weeds which are required to be removed by not only local regulations, but Army Corps’ regulations. There is very little way to quantify what this paragraph means, and the Biological Opinion provision has recently added these lines, which only adds confusion and lacks any objective clarity to consider this provision.

Furthermore, in the Appendix 4, it notes that “restrictions in this area apply to all development, per the definition of development.” And, “this area” applies to the Riparian Buffer Zone, which is erroneously listed as RBZ, and notes 150 feet, when the new attachment of May 14, 2009 specifies 250 feet. Clearly, this provision under Appendix 4 needs more work and clarification, and to avoid confusion, it simply should be eliminated from “1. ACTIVITIES AFFECTED” until further clarification can be made.

More importantly, whether this is deleted or included, there clearly should be reference to the exempt activities under the definition of a development. Under “1. ACTIVITIES AFFECTED,” and at the end there should be clarification as follows:

- a. Normal maintenance of levee or other flood control facilities are exempt from the definition of developments in flood damage prevention regulations. SCC 14.34.100(f)
- b. Activities allowed without standard review include maintenance of public and private diking and drainage systems, **and as may be managed to meet federal standards required by the U.S. Army Corps of Engineers, PL 84-99, Inspection Programs, and Vegetation Management Guidelines, Regulations, and Engineering Standards. Critical areas ordinance, SCC 14.24.070(7).** (Addition – emphasis added)

Under the Biological Opinion Compliance Checklist, at “2. Mapping Criteria (2), there is reference to the Channel Migration Zone (CMZ) plus 50 feet” In the annotations there is a note that this is a proposed new definition of the Channel Migration Area, and which has not yet been mapped or adopted by Skagit County, and that the Shoreline Master Program is scheduled for completion in June 2013.

Given the fact that there is a new definition in the County ordinance relating to the Channel Migration Zone, it would be advisable to include this definition in the Biological Opinion Provision at “2. Mapping Criteria (2)”. There should be an addition as follows:

Any maintained levees subject to annual Corps of Engineers inspections shall be deemed to be the boundaries of the Channel Migration Zone. Maintenance, operation, and inspection **are managed to meet federal standards required by the U.S. Army Corps of Engineers, PL 84-99, Inspection Programs, and**

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Vegetation Management Guidelines, Regulations, and Engineering Standards. (Addition – emphasis added)

Under Biological Opinion provision “4. General Development Standards d.” there should be a reference stating as follows:

Exception: Areas located landward of maintained levees subject to annual Army Corps of Engineers inspections, including areas within the levee right of way, need not provide compensatory storage. SCC 14.34.150(4)(a).
(Addition – emphasis added)

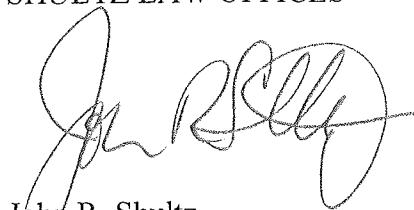
In reference to “5. Habitat Protection Standards, c,” there is reference to prohibiting development in the CMZ unless there is no adverse effect of water quality, flood volumes, or impact on species. As noted above, in comments to SCC 14.34.100, and SCC 14.24.070, it needs to be made clear, including in this provision, that any activities regarding maintenance of flood control structures, are exempt, and not subject to the requirements under SCC 14.34.220.

Under “5. Habitat Protection Standards, b.” there is a reference that removal of native vegetation must leave 65% of the surface area undeveloped. There needs to be more analysis of this, given the possibility that in a given case, this may be extreme, and with lack of clarification as to what is “removal of native vegetation”. Would this be grass, invasive weeds or vegetation, small trees, or large stands of timber? There needs to be more clarification under this provision, before new definitive guidelines are adopted.

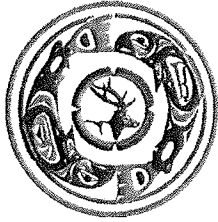
Thank you for accepting the above comments. Please advise if we can be of further assistance in providing guidelines, explanations, or underlying data, or legal opinions supporting the above comments.

Very truly yours,

SHULTZ LAW OFFICES



John R. Shultz
JRS:ees
c:client



Skagit River System Cooperative

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July 18th, 2011

Mr. Tim DeVries
Building Official
Skagit County Planning and Development Services
1800 Continental Place
Mount Vernon, WA. 98273

Re: Skagit County BiOp submittal

Dear Tim;

As you know, the Skagit River System Cooperative (SRSC) and our member tribes, the Swinomish Indian Tribal Community and the Sauk-Suiattle Indian Tribe, are intent on protecting habitat for salmon and steelhead in the Skagit Basin and beyond. To that end we have carefully reviewed the proposed amendments to the Skagit County code relating to floodplain management. These code changes are intended to bring Skagit County into compliance with the biological opinion (BiOp) issued by the National Marine Fisheries Service for the National Flood Insurance Program under the Federal Emergency Management Agency (FEMA). Adherence to the BiOp will go a long way toward protecting fish habitat in the Skagit watershed, and would represent a significant advancement toward recovery for threatened chinook, steelhead, and other fish on which the tribes depend.

Overall we think that Skagit County has taken an important first step in complying with the BiOp, but several shortcomings still remain. First among these is a failure to adopt protection standards that go beyond the County's existing regulations and actually implement the BiOp requirements. The County standards for habitat assessments, and the standards for habitat protection, need to be brought closer in line with BiOp standards. Also, a failure to map channel migration zones, or to specify a clear process or deadline for doing so, will prevent full compliance with the BiOp in several respects. The process for subdividing property needs to be modified slightly to prevent future development that is inconsistent with the BiOp. Clear professional standards for both the writing and the review of habitat assessments need to be established. These and other issues, detailed below, will prevent Skagit County from attaining compliance with the Endangered Species Act, and could have negative consequences for fish and fish habitat for many years to come.

In addition to the considerations outlined below, SRSC has previously commented extensively on the development of the critical areas regulations. We hereby resubmit by reference to the record all items placed into the County's record during the initial subsequent adoptions of the Skagit

County Critical Areas Ordinance either in whole or in part by our predecessor in name, Skagit System Cooperative, and any items accepted or proposed as evidence in WWGMHB Case Nos. 96-2-0025, 00-2-0033c, 01-2-0004c, and 02-2-0012c.

Habitat protection standards

Several aspects of the existing Skagit County Code, and the draft code amendments, are more lenient, and less protective of habitat, than the standards provided by FEMA and NOAA in the BiOp, the checklist, the model ordinance, and the assessment guidance¹.

The BiOp and the assessment guidance require that habitat impacts be assessed in the entire floodplain. Stringent standards of protection apply in the riparian buffer zone (RBZ) and less stringent standards apply in the (usually broader) floodplain. The Skagit County code amendments require a full assessment in the RBZ, but only a checklist in the floodplain. As detailed below, the difference between the less-regulated floodplain and the more-regulated RBZ will often be determined by the channel migration zone, which Skagit County has not committed to mapping. It will be impossible to effectively and consistently comply with the BiOp until the CMZs are mapped.

The Skagit code amendments propose that developments in the protected area are subject to a habitat assessment prepared according to existing critical areas code (SCC 14.24.520) for fish and wildlife habitat conservation areas (FWHCA). Substantial differences exist between the FWHCA assessments and the requirements of the BiOp. Habitat assessments that comply with the BiOp are detailed in a FEMA guidance document for local governments (see footnote 1). The FEMA guidance emphasizes the importance of floodplain refugia, off-channel habitat, floodplain connectivity, CMZs, and the "primary constituent elements" of spawning, rearing, and migration habitats. These elements are not required, and are usually lacking, in FWHCA reports. Several of the allowed structures and uses in FWHCAs are not allowed in protected areas under the BiOp. Also emphasized in the FEMA guidance is the correct determination of direct, indirect, and cumulative effects, and the critical importance of an "effects determination" consistent with the endangered species act. These determinations are not explicitly considered in FWHCA reports. The Skagit draft code amendments would be more consistent with the BiOp if habitat assessments were prepared according to the FEMA guidance, rather than the Skagit critical areas ordinance.

The standards of protection in the existing Skagit critical areas ordinance is not sufficient to meet BiOp requirements. For instance the Skagit buffer standards are substantially narrower than those in the BiOp (Appendix 4, and the NOAA errata letter of 4/15/2009). The variance procedures in the Skagit CAO (SCC 14.24.140) are but one avenue for avoiding the higher regulatory standards contained in the BiOp. The CAO exemptions (SCC 14.24.070) allow many activities that are specifically prohibited under the BiOp. Likewise the protection standards for FWHCAs allow roads, bridges, docks, bulkheads, utilities and other structures that are prohibited in the BiOp, unless they can be shown to have no adverse impact, which is often unlikely. The buffer averaging standards (SCC 14.24.530) allow substantial divergence from the BiOp buffers. If the CAO standards are used for review rather than the BiOp standards, then there is little likelihood of the County actually adhering to many requirements of the ESA. The Draft Administrative

¹ Federal Emergency Management Agency (FEMA). 2011. Floodplain habitat assessment and mitigation, draft regional guidance. FEMA Region 10, Bothell WA. 33pp.

Interpretation (AOI) makes clear that Skagit County will “rely on existing language contained in the CAO” to guide preparation and interpretation of habitat assessments. The AOI specifies that existing documents adopted as part of the CAO will be used to establish sufficient buffer widths. This business-as-usual approach, despite the requirements for a habitat assessment, will assure that few if any changes will be made in floodplain developments, and that the protective provisions of the FEMA BiOp will for the most part be waived.

Another example of where the existing Skagit CAO does not meet the BiOp requirements is in vegetation removal. The BiOp (Appendix 4, Section 3.7) requires that at least 65 percent of the lot in the floodplain (including that in the RBZ) be left in an undeveloped state, and native vegetation is not to be removed. The Skagit CAO has instead several provisions that would allow native vegetation to be removed, either through variances, buffer averaging, or in areas beyond the narrow CAO buffer boundaries. Likewise, new road crossings over streams are prohibited in the BiOp (Appendix 4, Section 3.10) but are specifically allowed in the CAO (SCC 14.24. 540(5)).

Perhaps the most important discrepancy between the BiOp and the existing CAO is in the requirements for impact mitigation. The proposed Skagit code would require a habitat mitigation plan for any development that is expected to have adverse impacts on aquatic or riparian habitats. However, as the BiOp and the FEMA guidance make clear, *adverse effects are not allowed* in the protected area, and so mitigation is relevant only in the less-protected floodplains. Thus the Habitat Mitigation Plan section in the Flood Damage Prevention code (draft 14.34.220(3)) is partly misleading and contradicts one of the most important sections of the BiOp (RPA 3, page 154, and Appendix 4). Again, adoption of the assessment and mitigation standards in the FEMA guidance for local governments would bring Skagit County closer to BiOp compliance. In this regard the proposed changes to the Skagit code are not sufficient to comply with BiOp requirements.

Channel migration zones (CMZs)

The mapping of channel migration zones (CMZs) is an oversimplified and underestimated task in the Skagit draft code amendments, yet failure to correctly map CMZs, in and of itself, could prevent compliance with the BiOp. Mapping CMZs is a technical exercise requiring expertise in geology, hydrology, and fluvial geomorphology, and is not to be undertaken by the uninitiated. Nor can CMZs be mapped accurately or consistently on a case-by-case basis. The Skagit draft code amendments (SCC 14.34.055) propose that “when such maps become adopted, they shall be incorporated as a part of this chapter” and will be used to delineate the protected area. Until that time it will be impossible to accurately (or consistently) determine exactly which properties are inside or outside of the protected area, thus it will be impossible for staff to determine which standard of protection is required.

According to the draft code amendments, the Channel Migration Area shall be “the channel migration zone plus 50 feet, *where such migration zones have been delineated on a map or maps that have been adopted by Skagit County*” (draft SCC 14.34.055) for regulatory purposes (emphasis added). Thus if the CMZs have not been mapped, or the maps have not been adopted, then the regulatory channel migration area does not exist, and can be ignored. The Skagit checklist (Section 5c) repeats that CMZs will be included only once they have been mapped. This creates a perverse incentive for the County to postpone delineating CMZs, so to avoid the difficulty of regulating floodplain development.

In the draft code amendments, maintained levees subject to annual Army Corps of Engineers (ACOE) inspections are deemed to be the boundaries of channel migration areas. This provision ignores two important aspects of hydrology and channel migration. First, levees in the ACOE PL 84-99 program need only provide a 5-year level of flood protection (ER 500-1-1, Section 5-3), so levees can actually be quite low and be included. Second, channel migration can easily erode or circumvent small levees and "avulse" to create new channels behind, and sometimes through, existing flood protections. The Skagit County standard is far too inclusive. The FEMA BiOp instead requires, under natural and conservancy shoreline designations, a 100-year level of flood protection before areas behind levees can be considered beyond the CMZ (BiOp Appendix 4, note 22). Significant portions of the Skagit floodplain (mostly upstream of Sedro Woolley) are designated conservancy under the current shoreline plan, and none of those areas are protected by 100-year levees.

Substantial improvement is wrong standard for development

Any construction deemed less than a "substantial improvement" is exempt from obtaining a floodplain permit (14.34.100), and exempt from submitting a habitat impact assessment (14.34.220), regardless of the impact such development may cause. Skagit County should be careful to adhere to the 10% footprint expansion threshold explicit in both the BiOp and the draft code amendments. Substantial development includes remodeling and additions for which the cost equals or exceeds 50% of the market value of the building before construction. Note that in practice this includes only the work specified in a building permit (such as structural and electrical work), and may not include many costly improvements such as drywall, insulation, windows, roofing, painting, millwork, siding, flooring, kitchens, etc. Thus the cost of development is irrelevant in terms of habitat impact or protection. The BiOp standard (and a draft code provision) limits additions, expansions, and remodeling to no more than 10% of the existing footprint. The existing code and draft code amendments, in several sections (14.34.100(2)(c); 14.34.190; 14.24.230(a), among others) uses the "substantial development" threshold for activity, so the County should be careful to avoid allowing those impacts to go unmonitored and unregulated.

Non-compliant subdivisions

In the General Standards for special flood hazard areas (14.34.150) the draft code amendments are quite clear in requiring that if a lot has a buildable site out of the SFHA, then all new structures must be located in that area. However, the draft code stops short of preventing new lots from being created that will not comply with the BiOp. Such provisions were included in the FEMA draft ordinance (Section 5.1, subdivisions), but were omitted from the checklist. It would be wise at this juncture for Skagit County to include such provisions in the flood code, to prevent future floodplain development that is prohibited by the BiOp.

A related issue is that of vesting. As Skagit County continues to issue floodplain development permits they will be doing so under the standards in effect when the application was submitted, or in some cases when the lot was platted. Often this represents a lag time of several years. So even if the critical areas, shorelines, floodplain, and grading ordinances fully implemented the BiOp (which they certainly do not) the vesting issue would allow development that the BiOp seeks to

prevent. We are not aware of any aspect of the Skagit draft code that would address this apparent loophole.

Complete exemption for agriculture

The NOAA definition of "development" that is governed by the BiOp includes

"any man-made change to improved or unimproved real estate, including but not limited to ... storage of equipment or materials, or any other activity which results in the removal of substantial amounts of vegetation or in the alteration of natural site characteristics..." within the floodplain (BiOp Appendix 4, note 23).

There is nothing in the above definition that would suggest that agriculture is not included as "development" under the BiOp. Yet most agricultural activities are exempted from the Skagit shorelines, critical areas, and floodplain regulations. Without including the barns, sheds, plowing, clearing, and other development activities inherent in agriculture, many of which occur on floodplains up to the water's edge, Skagit County has little chance of fully complying with the requirements of the FEMA BiOp.

Standards of review

Finally, implementation of the FEMA BiOp will require changes in Skagit County procedures, and will require substantial familiarity with fisheries habitat concepts. As the FEMA guidance for local governments makes clear, site assessments should be written *and reviewed* by qualified professionals. The tribes and WDFW may be of assistance in reviewing certain habitat assessments. FEMA suggests a minimum of four years experience as a practicing fish and wildlife habitat biologist. Note that this does not include many wetlands biologists, unless they have broader experience than most. The County would be well served to establish criteria for professional fisheries biologists and fluvial geomorphologists (for CMZ delineations), and to develop a roster of professionals qualified to conduct BiOp compliant assessments.

In summary, the less stringent habitat protection standards of the existing Skagit CAO are not sufficient to comply with the requirements of the FEMA BiOp, so habitat assessments prepared according to CAO standards will not satisfy the County's responsibilities under the Endangered Species Act. The Skagit FWHCA assessments fall short of what is required for BiOp habitat assessments, and the FEMA guidance on assessments should be used instead. Another major challenge lies in mapping channel migration zones. CMZ delineation should not be underestimated, either in the complexity of the task nor in the importance for complying with the BiOp. It will be virtually impossible to determine either the reporting or the protection standards on a property without accurate reach-scale CMZ maps having been prepared in advance. The code for land division could be easily modified, consistent with the FEMA model ordinance, to prevent non-complaint building lots in the future. Professional standards for those who write and review habitat assessments need to be established.

Finally, we at SRSC and Swinomish would like to again thank you and your colleagues for meeting with us to explain your procedures, and for your attention to these comments. We genuinely appreciate your effort in keeping communication open and we look forward to

continuing a collaborative working relationship. If you have any questions about our comments, or if there is anything that we can provide, please don't hesitate to call me at (360) 466-7308 or email at thyatt@skagitcoop.org

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Hyatt", with a long, sweeping horizontal line extending to the right.

Tim Hyatt
Skagit River System Cooperative

cc: Alix Foster, Swinomish Indian Tribal Community
 Jan Mabee, Sauk-Suiattle Indian Tribe
 Mark Carey, FEMA
 Tom Sibley, NMFS
 Jim Weber, NWIFC
 Jan Hasselman, Earthjustice
 Dan Siemann, National Wildlife Federation

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RECEIVED
JUL 26 2011
SKAGIT COUNTY
PDS

Skagit County Planning and Development Services
1800 Continental Place
Mount Vernon, Washington 98273

26 July 2011

Re: Skagit County Planning Commission Hearing on NMFS/FEMA Biological Opinion Project

Dear Skagit County Planning Commission:

Thank you for allowing me to share my opinions with you. Unlike some other parts of our local government, your recent deliberation on the pipeline safety proposal demonstrated that the Planning Commission is listening to interested and informed citizens. I very much appreciate and thank you for that.

Once again, I am deeply concerned about yet another proposal from the Skagit County Planning and Development Services Department (Planning Department). Their proposal, attempting to comply with new federal rules promulgated to protect Chinook salmon and Orca whales, has undesirable elements that are becoming all too familiar to interested citizens in our county. Once again, the onus, responsibility, and cost of compliance are shifted to the affected property owner. Once again, the affected property owner is subject severe land use regulations and restrictive "buffer zones" which effectively are a regulatory taking with no just compensation. Once again, little opportunity for input has been provided to interested and knowledgeable citizens of our county. Notably, if you reviewed the County website, today, you would find no mention that public comments are solicited, no mention of how or where to submit comments, or no indication of any deadline for the comment period.

I also find it disturbing that we apparently are so bereft of talent that we cannot draft amendments to County Code ourselves, tailoring them to our unique Skagit County needs, rather we must always import what some ideologue has drafted elsewhere. In this case, we are presented with just three options or "doors" in an attempt to emulate the TV show, "Let's Make a Deal". None of the "doors" is satisfactory but if forced to choose only between these three, "door number three" is the least objectionable. It allows each project to be reviewed and evaluated individually rather than the "one size fits all" approach of "doors" 1 and 2.

Once again, the agriculture community and other economic engines of our county will be the most adversely affected by this proposal. If we continue to batter these property owners, income producers, and revenue and employment providers, we will eventually drive them out of business and the county will suffer the revenue and employment losses.

As a highly trained, highly experienced scientist, I am also concerned that, once again, ideologically driven "junk science" is the underpinning of the proposal rather than peer reviewed, real, field science. In several instances, one has to question whether the proposed regulations would truly have any effect on protecting the salmon and orcas it ostensibly is intended to do. It also appears likely that the increasingly popular "unintended consequences" factor might just create worse habitat for the very species that "need" our protection.

It also appears to me that fine-tuning the County's existing Critical Areas Ordinance would largely meet our needs.

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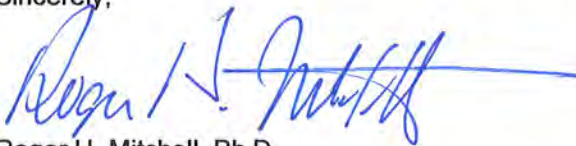
JUL 26 2011

SKAGIT COUNTY
PDS

In summary, I believe that the Planning Department has overstepped once again, generating an unsatisfactory, unworkable, and unnecessary proposal. The proposal potentially creates real hardship on property owners, may create regulatory takings, and is detrimental to the economy of the property owner and of the County. This proposal should NOT be adopted.

Thank you for your time and consideration of my opinions on this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Roger H. Mitchell", with a long horizontal flourish extending to the right.

Roger H. Mitchell, Ph.D.