

**BEFORE THE SKAGIT COUNTY HEARING EXAMINER**

In the Remand of the Application of	)	
	)	PL 97-0205
<b>SKAGIT COUNTY DEPARTMENT</b>	)	PL 97-0206
<b>OF PARKS AND RECREATION</b>	)	PL 97-0207
	)	HE 97-00001
For a Shoreline Substantial Development	)	
And Variance Permit, Critical Areas	)	
Variance Permit and Special Use Permit	)	
To Develop a Shooting Range near	)	
Frailey Mountain	)	
	)	
<b>CITIZENS TO SAVE PILCHUK</b>	)	
<b>CREEK,</b>	)	
	)	
Appellant,	)	
	)	<b>FINDINGS OF FACT,</b>
v,	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND DECISION</b>
<b>SKAGIT COUNTY,</b>	)	
	)	
Respondent.	)	

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This matter involves the remand of appeals to the State Shoreline Hearings Board in SHB No. 98-004.

The remand hearing was held on December 6, 7 and 8, 2004, and January 6, 2005. Final arguments were heard on February 15, 2005. In the remand proceedings, the appellants, Citizens to Save Pilchuk Creek, were represented by Jeffrey Eustis, Attorney at Law. The Department of Parks and Recreation was represented by Paul Reilly, Prosecuting Attorney’s Office Civil Litigator. The Planning and Permit Center was represented by David Hough, Consultant.

**PROCEDURE**

Three applications to authorize the construction and operation of a shooting range at the Frailey Mountain site were submitted on May 19, 1997, by the Skagit County Parks and Recreation Department (Parks). The applications sought a Shoreline Substantial Development/Variance Permit, a Critical Areas Variance Permit, and a Special Use Permit

A Final Environmental Impact Statement (FEIS) evaluating the Frailey Mountain site was prepared and issued before the applications were filed.

Consolidated hearings were held before the County's Hearing Examiner in July and August 1997, on an appeal of the adequacy of the FEIS and on the merits of the three applications. The SEPA appellants were Citizens to Save Pilchuk Creek (CSPC). Decisions were issued on October 14, 1997. The Hearing Examiner approved the three applications and upheld the adequacy of environmental review. Appeals of all these decisions were taken to the Board of County Commissioners which affirmed the Hearing Examiner's decisions on December 22, 1997.

CSPC appealed the shorelines permit and the adequacy of the EIS to the State Shorelines Hearings Board. At the same time they filed a Land Use Petition with the Snohomish County Superior Court appealing the Special Use Permit and Critical Areas Variance Permit. The LUPA action questioned the adequacy of the FEIS to support the permit decisions.

In the Superior Court, the parties by stipulation agreed that the final determination of the Shorelines Hearings Board on the adequacy of the FEIS would be dispositive of the substantive issues raised in the LUPA action.

After a de novo hearing, the Shorelines Hearings Board entered its final decision on March 9, 1999. The shoreline permit was remanded to the County for amendment of the shoreline application to provide adequate detail, and for review of potential safety impacts from operation of the firing range under both SEPA and the Shoreline Management Act.

The LUPA action was thereupon dismissed by agreed order and the County's decision as to FEIS adequacy for the Special Use Permit and the Critical Areas Variance Permit was remanded for further proceedings consistent with the final order of the Shorelines Hearings Board.

Thereafter, Parks caused survey and design work to be performed. A critical areas assessment of the preliminary access route was completed in March of 2001. An Addendum to the FEIS was issued in September 2001.

Initial efforts to schedule the remand hearing were then made. A hearing date was scheduled for November 2001, but continued in anticipation of a motion on the legal sufficiency of the original permit applications. Subsequently Parks sought to have the hearing rescheduled and CSPC moved to terminate review on the basis that the proposed use is not permitted in the applicable zone. Their argument was, in effect, that the vested rights doctrine does not apply to the Special Use permit.

Oral argument on pending motions was heard on September 18, 2002. The Examiner ruled that the original applications are still alive and pending, but concluded that review should be terminated because the County is not entitled to rely on the vested rights doctrine in support of issuance of the Special Use Permit. On appeal, the County Commissioners overruled the Examiner by an order dated December 9, 2002, and the matter was returned to the Examiner for further processing.

On February 19, 2003, the Citizens filed a motion to deny the Special Use Permit. A briefing schedule for this motion was established at a prehearing conference on February 18, 2003, and the hearing on the merits was scheduled for April 30 and May 1, 2003.

The motion to deny the Special Use Permit was based on the assertion that the proposal was not a permissible use under the zoning that was in effect for the site on May

22, 1997, the date the applications were deemed complete by the County. The Examiner denied the motion by order dated March 27, 2003 on the grounds that the remand order circumscribes the range of issues that can now be considered. He concluded that an attempt on remand to litigate whether the proper zoning designation was applied at the outset came too late.

On April 24, 2003, the Examiner entered an indefinite continuance of the hearing at the request of Parks. After a hiatus of nearly a year, a prehearing conference was held on April 15, 2004, resulting in a schedule for hearings commencing in September 2004. Two rescheduling orders were subsequently entered with the eventual commencement date being set for December 6, 2004.

On August 13, 2004, the County issued Addendum 2 to the FEIS. This document contained a range safety evaluation report and preliminary plans for the rifle range.

CSPC filed another motion to deny the Special Use Permit on October 7, 2004, basing its request on a decision of the Western Washington Growth Management Hearings Board issued on September 21, 2004. (WWGMHB #04-02-0011). This motion was denied on November 12, 2004, on essentially the same basis as the previous denial of the same request.

At the hearings on December 6, 7, 8, 2004, January 6, 2005, and February 15, 2005, twenty-seven witnesses were heard. Of these 16 were members of the general public. There were objections from the public to the shortness of time to comment in light of publication of the hearing notice on November 11 and 18. The Examiner therefore allowed public comment to be received through December 20, 2004.

On the last day for receiving live testimony – January 6, 2005 – the Examiner required the Planning and Permit Center to submit a final staff report by January 20, 2005, containing a updated site plan reflecting the current proposal and a final list of recommended conditions. At the same time, he provided the public until January 28, 2005, to make additional comments on the revised proposal.

Closing arguments were heard on February 15, 2005, and the record of the proceedings then closed.

## **EXHIBITS**

Exhibits in the remand proceedings were identified by the letter “R.” They are as follows:

R-1 – Staff Report, for October 25, 2004 hearing date.

R-2 – Public comment letters

- (a) Roger Pederson, 11/26/04
- (b) Michael Baldwin, 11/30/04
- (c) Ron Carlson, 11/23/04
- (d) Don Saben, 11/19/04
- (e) Ron Carlson, 12/04/04
- (f) David Peterson, 12/02/04
- (g) Cathy Katte, 12/02/04
- (h) Dennis Katte, 12/02/04

- (i) Don & Teri Saben, 12/06/04
- (j) Don & Teri Saben, 12/08/04
- (k) Ron Carlson, 12/07/04
- (l) Peter Anderson, 12/02/04 and 12/07/04
- (m) Lake Cavanaugh Improvement Association, 2/17/04
- (n) John Semrau, article "Highpower Basics."
- (o) Friends of Skagit County, 12/08/04
- (p) Peter Anderson, Joy Shrilla, 11/03/04
- R-3 – FEIS Addendum, September 2001
- R-4 – Contour map, Skagit Surveyors and Engineers, 7/23/01
- R-5 – Wetland Delineation and Fish & Wildlife Report, Earth Systems Science, 3/09/01
- R-6 – FEIS Addendum 2, August 13, 2004, including preliminary range plans and Kramer One Shooting Range Safety Evaluation, dated 7/10/ 03
- R-7 – Best Management Practices Plan (lead plan, water quality protection), Environmental & Turf Services, 7/22/98
- R-8 – Rifle range contour map
- R-9 – SCC 14.04.190 (in effect as of 10/95)
- R-10 – SCC 14.16.850 (current)
- R-11 – Photo montage of site
- R-12 – Declaration of Chris Hagedorn, 12/06/04
- R-13 – Rifle range contour map (with additional cross section)
- R-14 – Excerpts from National Rifle Association Range Source Book, 4 sheets (also in FEIS Addendum)
- R-15 – Kenmore shooting range layout
- R-16 – Emergency communication and range master building
- R-17 – Letter, Kramer One to Reilly, 8/20/04
- R-18 – Range diagrams of John Crossman (a), (b), and (c)
- R-19 – Article "Bouncing Bullets," FBI Law Enforcement Bulletin, October 1969
- R-20 – Crossman Safety Evaluation Report, October 2004
- R-21 – Tacoma Rifle and Revolver Club Range Rules
- R-22 – Tacoma Rifle and Revolver Club facilities photos and descriptions
- R-23 – Enlargement of firing line photo from Tacoma Rifle and Revolver Club
- R-24 – Vicinity map and range plan, prepared by Dennis Katte
- R-25 – Range profile (see R-6), annotated by Jack Cross
- R-26 – Article re: stray shots at shooting ranges with summary cover prepared by Jack Cross
- R-27 – Comprehensive Parks and Recreation Plan, May 17, 2004, excerpts
- R-28 – List of Changes in range proposal, submitted by Parks
- R-29 – Map reflecting changes
- R-30 – Excerpt, Section 105 International Building Code
- R-31 – Kenmore Ranges Rules and Policy booklet
- R-32 – Resume of Jack J. Giordano
- R-33 – Public comment letters received during December 6 – December 20 extended comment period

- (a) Mary Goodlet, 12/09/04
  - (b) Ron Carlson, 12/10/04
  - (c) Peter Anderson, 12/10/04
  - (d) Jan Gordon, 12/13/04
  - (e) Gloria Carlson, 12/13/04
  - (f) Rick Grimstead, Skagit County Sheriff, 12/16/04
  - (g) Cathy Katte, 12/17/04
  - (h) John Hunter, 12/20/04
  - (i) Ron Carlson, 12/20/04
  - (j) Arvid Tellevik, 1/13/05
- R-34 – Department of Ecology (Fritzen) letter, 12/14/04
- R-35 – Staff Report, January 20, 2005 with Vaux letter of January 18 enclosing revised conceptual site plan and Parks’ requested permit conditions
- R-36 – Public comment letters following final Staff Report
- (a) Ron Carlson, 1/24/05
  - (b) Ron Carlson, 1/26/05
  - (c) Becky Brown, 1/26/05
  - (d) Jack Cross, 1/27/05
  - (e) Dennis Katte, 1/28/05
  - (f) Ron Carlson, 1/28/05
  - (g) Peter Anderson 1/28/05
- R-37 – Department of Natural Resources (Kurowski), 1/27/05

## **FINDINGS OF FACT**

1. Prior to remanding this matter to the County, the State Shorelines Hearings Board (SHB) conducted a de novo review. Their findings are therefore accepted and adopted. The decision of the Shoreline Hearings Board in SHB No. 98-004 is appended hereto as Attachment A.

2. The SHB proceedings involved a review of the Shorelines Substantial Development/Variance Permit under the Shoreline Management Act. At the same time, the Board reviewed whether the FEIS was adequate. The impact statement provided an information base for all of the permits applied for, including the Special Use Permit and Critical Areas Variance Permit.

3. The purpose of the remand was twofold: to allow for amendment of the shoreline permit application to provide adequate detail per WAC 173-27-180(9), and to review potential of safety impacts from operation of the firing range under both the State Environmental Policy Act (SEPA) and the Shoreline Management Act.

4. The Superior Court appeals of the Special Use Permits and Critical Areas Variance were limited to the issue of SEPA compliance. If the safety impact information developed on remand is sufficient to support a determination of adequacy for the impact statement, SEPA compliance for all three permits would be achieved.

5. The safety impact for purposes of compliance with the Shoreline Management Act is a separate question.

6. The SHB noted that the shoreline permit is conditioned on:

[A] design consistent with the more current version of the NRA Range Manual and principles that minimize the potential for rounds to escape a rifle range. These design limitations include side berms, overhead baffles and a target backstop with an eyelid angled up and back towards the firing station. The overhead baffles would be arrayed down the range from the firing station and prevent a rifle from being fired at an angle towards what is referred to in shooting range parlance as “blue sky.”

7. The SHB found that the angle of trajectories that might impact Lake Cavanaugh would be very unlikely to occur. However, they noted that none of the above-noted design features are specifically required in the permit application or the permit. They determined that relying simply on NRA consultations for final design planning was not enough to assure that safety concerns are adequately addressed at the permit approval stage insofar as potential impacts on Pilchuk Creek east of the proposed high powered rifle range are concerned. In that area, the Board found that private property owners and others use the creek “for a wide variety of recreational activities.”

8. The SHB also noted that the central requirement for a shoreline permit application is the inclusion of a site plan. They explained that “the guiding principle is that the site plan and application together with any associated documents must provide sufficient detail to evaluate a proposed development under applicable shoreline policies and regulations.” They found that the application in this case falls short of this requirement with respect to the bridge, the existing contours of the site, and many of the anticipated firing-range structures.

9. The SHB directed the County to resubmit an application that will satisfy WAC 173-27-180(9)’s minimal requirements regarding: “the proposed bridge and its relation to the shoreline, the existing and proposed land contours, the dimensions and locations of all existing and proposed structures and improvements and the quantity and source of any fill or excavated material.”

10. Three parallel rifle ranges are contemplated. A 100 yard range, a 300 yard range and a 1,000 yard range. After the SHB decision, the position of these three ranges was reversed, so that the 100 yard range will now be on the north and the 1,000 yard range will be on the south. In addition, the three ranges were reoriented by moving the target areas so that shooting is in a more southerly direction away from the creek and toward the highest land features at Frailey Mountain. The rotation of the axis of the ranges was accompanied by moving all of the ranges a little further to the south.

11. The moving and reorientation of the ranges resulted in the aim point being shifted away from the creek and from the two private parcels in the vicinity. The area of the SHB's concern is now to the northeast of the ranges.

12. The redesign of the ranges includes berms, overhead safety baffles and an "eyebrow" (ricochet catcher) at the top of the impact area. The new layout positions the target area against a natural feature that is higher than the "eyebrow" and the surrounding area. The new layout makes the shoulder of a 900-foot promontory the backstop to the longest range.

13. Parks commissioned a safety evaluation of the reconfigured ranges by an architecture and planning firm recognized for expertise in shooting range design (Kramer One, Inc.) Their report, submitted in October 2003, was included in Addendum 2 to the FEIS, dated August 13, 2004.

14. Kramer One's report is intended to address the SHB's concern that "applicable information and permit conditions are inadequate to address safety concerns relating to stray bullets exiting the high power rifle range to the east." The report assumes the outdoor rifle ranges will include overhead baffles, that the targets will be placed near to and in front of the intended impact area on all three ranges, that shooting at targets on the ground will not be permitted, that berms will be placed along the north side of the ranges, and that the 1,000 yard range will be significantly below grade.

15. The report stressed the importance of proper range management and supervision. Assuming this will be provided, Kramer One concluded that "it is extremely unlikely personal injury or property damage would occur in the adjacent area of Pilchuk Creek, to include the two adjacent private parcels of land, as a result of proper use of the ranges proposed for this recreational facility."

16. The County provided Kramer One with a document entitled "Narrative to Range Design Alterations." This document was ultimately bound into the Kramer One report as Appendix C. The narrative was the joint product of a number of County employees and consultants. Among other things, it discusses the issue of ricochets and concludes that with the repositioning of the proposed ranges, there is little chance of ricochets reaching the private property along the creek or the creek itself. Appendix C also contains a discussion of the abandonment of the idea of a "safety fan" as a design component of a shooting range. The use of baffles and berms to restrict the risk of bullet escapement has effectively been substituted for the "safety fan" concept.

17. By letter dated August 20, 2004, Kramer One advised Parks that they had reviewed the "Narrative to Range Design Alterations" as revised to August 2004, and that "we see nothing in this revised document that changes our opinions" as expressed in their October 7, 2003 report.

18. At the remand hearing, it became apparent that Parks has significantly reduced the scope of its firing range proposal. One change is to eliminate a caretaker who lives on the property. In response to this alteration, the August 20, 2004, Kramer One letter stated: "A live-on-site caretaker is helpful in reducing potential after-hours vandalism, but is not necessary for range supervision and control. Range supervision can be provided by qualified persons controlling firing range activities, but who live elsewhere."

19. In addition to eliminating the live-on-site caretaker, the scope of the project sought by the present application has been reduced from the proposal presented to the SHB by deleting the following: the sporting clay range; the muzzleloader range; one-half of the trap stations, together with one-half of the skeet towers; the outdoor law enforcement training range; the campgrounds and RV parking area; the indoor pistol range; the indoor archery range.

20. The only building now sought is a range master's hut to be situated at the northwest corner of the 100-yard range, with a glass half wall fronting the range to allow for the range master to observe the firing line and target areas at the 100-yard range. The range master's hut would be a single-story affair for day use only with a footprint of approximately 12 feet by 12 feet. The hut would house equipment for emergency communications and a loud speaker system.

21. In sum, the facilities of the reduced proposal include only the rifle ranges, part of the trap and skeet ranges, the archery field range, associated parking areas, the range master's hut, and the access road and bridge. A final site plan was submitted with just these remaining project features.

22. Drawings and data were presented showing the existing and proposed contours and amount of excavation and filling within the project boundaries. Under present plans, the earthen berms protecting the creek area have been increased to 24 feet in height all along the north side of the rifle ranges. Initial plans had these berms at 8 to 15 feet. The 1,000 yard range has been reduced in width from 100 feet to 80 feet in order to allow the higher berm on its north side.

23. The topography along the re-configured shooting ranges will require excavation along portions of their length. The County's calculations are that, because of this, range construction will not require the importation of any material for construction of the berms. In some areas of the 1,000-yard range, the cut will be so deep as to render unnecessary any built-up berm at all. The Citizens claimed that the County's calculations are wrong and that material really will need to be imported to build the berms.

24. The precise number and location of the baffles and eyebrows to be installed have not been identified, but samples of designs to be used and a general description of their placement were provided. The designs are taken from the National Rifle Association Range Source Book. If these design features are specifically required by the



permit and NRA consultation is continued, the Examiner was persuaded that their placement will insure that potential safety concerns are adequately addressed. The Examiner finds that the final site plan and other information supplied adequately disclose the structures which the applicants rely upon for protection of public safety.

25. Three experts testified about the safety of the reconfigured ranges. One of these was a principal author of the Kramer One report. The experts agreed that the use of berms, baffles, high backstops and eyebrows as proposed would minimize the risk of offsite impacts from the range. The preponderance of evidence was that for a bullet to escape from a range so constructed and to reach the edge of the private property or creek to the northeast cannot altogether be ruled out as a possibility. But the likelihood is extremely remote. The number of such escaping bullets, if any there were, would be miniscule.

26. Considering the written evidence and oral testimony, the Examiner finds the following as to design safety. The baffles will eliminate the availability of “blue sky.” The eyebrows and backstops will prevent downrange escapement. The means by which a bullet might leave the range would be to the side through a ricochet. The 24-foot high berm – significantly higher than at most ranges – may act as a barrier to all such escapement. But, if a ricocheting bullet were to escape, the likely maximum distance of its travel would be no more than 250 yards from the range. At that outer edge of flight, the velocity of any ricocheting bullet would be much reduced. There was some dispute as to the distance of the private properties from the nearest range point, but they are at least 250 yards away, if not more. The creek is more than 250 yards distant. There was no evidence concerning the probability that an errant round ricocheting off the range would injure anything or anyone. Considering the extreme rarity of such escapement (if it were ever to happen), the likelihood of its doing any harm is infinitesimal.

27. Moreover, activity at the ranges would be closely monitored by the range master and, at the competitive ranges, by others overseeing the shoots. This supervision, combined with active orientation and training programs, would add a layer of protection to the design features.

28. The Kenmore Range, located in a suburb of Seattle, was the first range with overhead baffles in the West. It has since been used as an example of the effectiveness of that design feature. The Kenmore Range is operated under what are considered to be model safety rules. Parks intends to pattern the rules for Frailey Mountain after the Kenmore rules.

29. Testimony about the Kenmore range and the Tacoma Rifle and Revolver Club range provided a basis for discounting concerns about off-site safety near the Frailey Mountain range. The Kenmore and Tacoma facilities have both been in existence for many years and are both located adjacent to densely populated residential areas. Neither has anything like the 24-foot-high berms planned for Frailey Mountain. Yet, at

neither Kenmore nor Tacoma is there any record of a stray bullet causing injury to anyone outside of the range.

30. In contrast to the Kenmore and Tacoma sites, the Frailey Mountain site is relatively remote. The site was selected because it is not close to residential development and because residential development is not likely to develop in the vicinity. The zoning of the land at and surrounding the site is Industrial Forest- Natural Resource Land (IF-NRL). It is outside the boundaries of a fire district. On such property, residential dwellings are prohibited. See Comprehensive Plan Policy 5B-5.4, SCC 14.16.410(3)(c)(ii). The record of this case discloses no examples of building permits for residences issued on IF-NRL land outside a fire district.

31. The evidence of danger from shooting ranges was all anecdotal, and widely scattered in time and place. Some of the incidents reported occurred within the confines of ranges. Some involved deliberate acts. None of the incidents reported were tied to discrete analysis of the design of ranges involved.

32. When all was said, the safety information and analysis provided in the Kramer One report was not significantly impeached. That information provides a reasonably thorough discussion of the probable safety impacts of construction and operation of the proposal.

33. A number of testifiers raised a separate safety concern not discussed by Kramer One – the possibility that the shooting range may act as a sort of attractive nuisance, luring people onto the grounds after hours and resulting in unsupervised and dangerous shooting that might bypass the safety features of the range design. Common experience gives this greater credence than mere speculation. However, conditions of approval can address the concern. The safety of the facility would be facilitated by requiring fencing completely around the range area, locked gates, and appropriate warning signs.

34. All of the shooting range features other than the bridge and access road are beyond the 200-foot jurisdictional shorelines area. The SHB pointed out that its Shoreline Management Act review of the proposed upland development was limited to the extent, if any, of adverse effects on the shoreline. They stated that the only adverse impact demonstrated to them was “the use and enjoyment of the shoreline of Pilchuk Creek east of the high power rifle range.” The additional information provided on remand shows that the adverse effects of the upland development on that shoreline are likely to be minimal.

35. Beyond the safety issue, the only shoreline matters remaining are those dealing with the completeness of the application as it relates to the bridge and access road. These are the only components of the development that lie within the shoreline area. The SHB made note that reviewers for the Skagit County and the Department of Ecology thought enough information was provided for the proposal to be reviewed under the Shoreline Management Act. Apparently the SHB disagreed.

36. The SHB drew attention to the conceptual nature of the plans for the bridge. They remarked that the drawing supplied did not reflect anything more than what a bridge might look like for the access road. They said there was no information relating to the location of the OHWM in relation to the bridge,

37. The FEIS Addendum of September 2001 identifies the informational “shortfalls” in respect to the bridge as follows: “no identification of bridge location, its length or other dimensions, or characteristics of the shoreline at a specific location.” The Addendum then provides some additional information.

38. According to the Addendum, the bridge alternative chosen was the west bridge alternative analyzed in the Supplemental Draft EIS. This alternative would allow construction of clear-span across Pilchuk Creek with minor, if any intrusion into the creek or its flood zone. The bridge approach would be at grade requiring minimal cuts and fills. The simple span would be supported on each end by cast-in-place concrete abutments. Excavation depths for the abutments would likely not extend more than one or two feet beneath the surface. The depth of the bridge footings would be determined in the final engineering and review; the deepest portion of excavation would occur on the south bank of the creek.

39. The Addendum states that site preparation pending final engineering and geotechnical analysis, is expected to require falling trees encroaching on the construction area. It says that one or two feet of soil would be stripped of vegetation and topsoils. If there are silty clay soils, over-excavation would occur, along with the import of a coarser foundation material for footing and foundation structures. Driven pile length and size would depend on site soils.

40. Bridge abutment and approach construction is expected to require 170 cubic yards of fill material. The expected bridge span would be 150 feet. A preliminary bridge design, showing the estimated structure length and the fill quantity, as well as some topographic detail is included as Figure 4 in the Addendum. The drawing shows the ordinary high water mark (OHWM) and the bridge abutments more than ten feet landward of the OHWM on both sides of Pilchuk Creek.

41. The Addendum also provides more information on the access road. The roadway is described as 32 feet wide, including two 12-foot travel lands and four-foot shoulders constructed to County private road standards. The access road would be about 1,500 feet in length and would cover 1.07 acres. It would descend steeply before it crosses the bridge to enter the site. The road would be constructed at a grade of 12 percent or less. Detail as to the topography along the access road on either side of the bridge was provided.

42. A Wetland Delineation/Fish and Wildlife Report for the shooting range was prepared by Earth Systems Science, Inc. in March of 2001. Pilchuk Creek is a Type 2

water with a 200 foot buffer – a fish and wildlife habitat conservation area under the County’s Critical Areas Ordinance. The critical area buffer is conterminous with shoreline jurisdiction. The report concluded that the access route selected creates the least impact possible in terms of contact with critical areas and their buffers.

43. The Fish and Wildlife Report’s investigators visited the site of the proposed bridge at approximately “river mile 15.” This is above the falls which blocks anadromous fish passage in a reach where only resident fish populations are found. The access road was described as within typical Cascade foothill forest. Recent on-site logging was noted. No likely effects on endangered or threatened species were identified.

44. The main impacts from the access road and bridge construction were predicted to be short-term construction impacts. Species within the area would be only temporarily disturbed by noise. Increased sedimentation is a concern, but can be minimized by standard control methods. A Temporary Erosion Control and Spill Response Plan is recommended prior to beginning the project. A Wetland and Critical Area Mitigation and Monitoring Plan is to be prepared based on the final project design. The construction window is to be between May 15<sup>th</sup> and September 15<sup>th</sup>. With the conditions suggested, adverse effects to aquatic life are not expected to be significant.

45. There is no evidence that the soils at the bridge site were specifically examined. Also, the OHWM was not delineated on the ground. Nevertheless, in the Examiner’s view, the information provided on remand provides a reasonably thorough discussion of the probable environmental impacts of the bridge and access road. Furthermore, the level of detail is sufficient to evaluate these development features under applicable shoreline policies and regulations.

46. Except for the two private parcels to the northeast, all of the land in the vicinity is owned and managed by the State Department of Natural Resources (DNR). The plan here is to affect a transfer of the rifle range site from DNR to Skagit County. Eventually Parks intends to hand operation of the facility over to a concessionaire.

47. The impact statement Addendum and the Staff Reports have characterized the site as a 273-acre site. However, after DNR asked Skagit County to provide a survey of the original acreage to be transferred out of DNR’s trust capacity, it was discovered that a survey by reference to section lines would be much less expensive. Accordingly, such a survey was done with the result that the parcel now to be transferred to the county’s ownership is 400 acres. Because of the new property lines at least half of the land initially designed for a muzzleloader “walk and shoot” range and campground has been lost. Of the 400 acre total, the amount of acreage to be developed for the rifle ranges and trap and skeet ranges, together with parking for each will amount to approximately 80 to 85 acres.

48. Immediately following the SHB hearings, the original site was clear-cut by DNR leaving only the required forest buffer along the creek. The current development plan calls for about 90 percent of the 80-85-acre developed area to be hydro-seeded in grass once the ranges are created. The balance of the 400 acres will remain available for forest resource use.

49. Any conclusion that may be deemed a finding is hereby adopted as such

## CONCLUSIONS OF LAW

### *Form of Remand Submissions*

1. The County's Planning and Permit Center (now Planning and Development Services) reviewed the information developed after the SHB's remand and determined that it did not substantially change the initial environmental or shorelines analysis. For this reason, they prepared Addenda to the FEIS rather than a Supplemental EIS.

2. Substantial changes to the proposal have been made, but they are changes that reduce impacts. They do not alter the proposal such that there are significant new adverse impacts not previously disclosed. The information generated during this remand process adds to the analyses and information about the proposal. Nevertheless, the Examiner agrees that it does not substantially change the analysis of significant impacts and alternatives in the pre-existing environmental documents.

3. The thrust of the SHB's direction to prepare a "supplemental EIS" regarding safety concerns was not to the form of the documents prepared, but to the substance. The Examiner concludes that use of the Addenda was correct under WAC 197-11-706, 197-11-600, and meets the aims of the SHB's remand order.

4. Neither Parks nor the Planning and Permit Center packaged the additional information provided on remand as an amended permit application. Despite this formal shortcoming, the materials presented in the hearing process constitute the functional equivalent of an amended permit application and were offered and considered with this function in mind. The Examiner concludes that the materials submitted satisfy the SHB's direction to submit an amended application.

5. The objections to the Addenda and to the lack of a discrete amended application are largely based on the idea that the approaches used interfered with the opportunity for appropriate public comment. The Examiner attempted to cure whatever problems there might have been in this regard by providing several extended periods for public comment.

### **Adequacy of Shoreline Application**

6. The SHB asked for an application that satisfies WAC 173-27-189(9)'s minimal requirements regarding the proposed bridge and its relation to the shoreline and the existing and proposed land contours. The regulation by its terms allows the location of the OHWM to be approximate. The key thing is to provide sufficient detail to evaluate the proposal under applicable shoreline policies and regulations. Here the primary shoreline concerns are erosion and sedimentation and harm to the biota. See Skagit County Shoreline Master Program (SMP) 7.17(1)(A)(6),(9), (C)(1), (D)(1); (2)(A)(4),(B)(4). As to the bridge and access road, information on length, dimensions, location, contours, and general design characteristics was provided. The Examiner concludes that the additional information submitted meets the minimum requirements. There is adequate information to evaluate shoreline compliance.

7. The application information needed in regard to the range itself is of a different order. Except for the bridge and access road, the entire proposal is outside of shoreline jurisdiction. The information on land contours, dimensions of structures and fill and excavated material on the range proper is of relevance only insofar as it may influence how such features are likely to affect the shoreline area.

8. The SHB's only professed concern on this score is how application information and permit conditions address safety concerns relating to stray bullets exiting the high power rifle range to the east. The location and reorientation of the proposed ranges have been clearly identified. A site plan has been submitted showing remaining project features, such as archery range, trap and skeet area, range master's hut and parking lots. The applicant has expressed an intention to use overhead baffles sufficient to eliminate blue sky, and to install target backstops, eyebrows and massive side berms. These features will be required by express conditions. Additional conditions will be added pertaining to fencing and gates. For purposes of evaluating shoreline safety impacts, the Examiner concludes no additional application information is needed.

9. The SHB asked for information on the quantity and source of any fill or excavated material. The County's response was that the excavation of the ranges will provide enough material to build the berms. Their calculations show no need for the importation of any material to the site. Citizens disputes their figures. The Examiner sees no reason to try to resolve this difference. The application at present is, in effect, for a project that imports no fill. If that is wrong, then a formal process will be required to amend the permit. At present, however, further information on the quantity and source

of fill or excavated material on the range site is not needed to evaluate the question of safety on the shoreline.

### **Reduction in Scope of Project**

10. The project revealed in Parks' ultimate submission – the revised site plan and requested permit conditions (Exhibit R-35) – differs significantly from the project presented to the SHB. All enclosed structures have been removed except the small (12' by 12') range master's hut. Some public witnesses urged that the changes in what is applied for ought not to be allowed at this time. The Examiner disagrees. The whole purpose of the remand is to ask the applicant to re-evaluate the project. For whatever reason, the re-evaluation here has produced a project that is smaller and less complex. The quantum of information about likely environmental impacts has been increased. But the likely impacts have not. There is no basis for objecting to the smaller project simply because it is smaller.

11. The fear is that the smaller project represents a kind of foot in the door approach and that the project will be expanded later to include all of its original components. No substantial change in the range can be made in the future without a thorough permit review process. Moreover, whatever changes may be sought will only be permissible under the land use regulations in effect when they are applied for. If the regulations now preclude features that have been eliminated, they will do so then unless there are legislative changes. The supervision that the Growth Management Hearings Board is exercising over County legislation makes amendments authorizing more structures unrelated to forestry in IF-NRL zones highly unlikely.

### **Compliance with Zoning**

12. The major difficulty of this case on remand has not been with the safety issue on the merits. It has been with the zoning of the property and what that zoning allows and does not allow. Under SCC 14.16.410(k) the following are permitted as Hearing Examiner Special Uses in an IF-NRL zone:

(k) Shooting clubs (outdoor) with no associated enclosed structures except as needed for emergency communications equipment or conversion of resource land allowed.

13. CSPC has maintained that at the present juncture Parks must start over with a new application for a Special Use Permit and that the application ought to be governed by the present zoning restrictions as set forth in the above-quoted language. They have also argued that the shooting range proposal has to be reviewed anew under the Special Use Permit criteria of the code. In preliminary rulings, the Examiner has held that the original Special Use Permit application is still alive and pending and that all questions regarding it were decided in the initial permit decision except those matters that were appealed. As to

the matters appealed, the only issues surviving are those covered by the SHB's remand order.

14. Much of the public comment in these remand proceedings has been directed to permit issuance issues that were previously decided and not appealed or that have already been decided on appeal. Even if these comments make arguments that might have had merit originally, consideration of them now is foreclosed to the Examiner. The principle of finality bars evaluation now of issues for which the appeal time has long since run. The same principal bars evaluation of issues that the SHB has already resolved. Thus, questions about noise or lead accumulation cannot be entertained again.

15. Early in these remand proceedings the County took the position that the range is permissible because the initial proposal vested to a more permissive set of zoning rules than were in effect when the application became legally final. Gun clubs and rifle ranges were expressly allowed as special uses in the prior Forestry zoning district. It is now clear that the IF-NRL zoning has been effective for the property since before the applications were filed. Nevertheless, the issue of zoning compliance was not raised in the initial permit proceedings, nor in the appeals of the initial permit decisions. So any question regarding vesting is beside the point. The problem again is that the time to raise the question of zoning compliance has long since past.

16. The scope of these remand hearings is, accordingly, circumscribed by the remand orders of the SHB and the Superior Court. The remand is limited to shoreline permit issues and the issue of compliance with SEPA. Zoning compliance or conformity with the Special Use Permit criteria are not before the Examiner. This limitation of scope has proven difficult to understand and frustrating to the citizens participating.

17. The Western Washington Growth Management Hearings Board decision of September 21, 2004 (No. 04-02-0011) concluded that the provision of the Parks and Recreation Plan element of the County Comprehensive Plan that allows for the siting of a shooting range at the Frailey Mountain site on IF-NRL land is not consistent with the mandate of the Growth Management Act (GMA) to preserve forest lands, and that this feature of the Park Plan is internally inconsistent with the County's adopted Comprehensive Plan policies, land use map and development regulations.

18. However, the Growth Board particularly noted that SCC 14.16.410(k) has been determined to be compliant with the GMA. The Growth Board's ruling was based on the assumption that the proposed range would include a number of enclosed structures. The rule they were looking at disallows outdoor shooting clubs having associated enclosed structures, with narrow exceptions. Therefore, approval of a proposal that removed all enclosed structures except those within the exceptions presumably would not violate the Board's ruling.



### *Policy Issue*

19. The County, through Parks, has persevered in pursuing this project despite the knowledge that initial approval was very likely based on an erroneous application of the zoning regulations then in effect. They are able to do this because on a technical legal basis there is no way to challenge the mistake initially made. Apparently there is a very strong belief in the need for this rifle range, notwithstanding the regulatory framework dictated by the Growth Management Act in recent times. Public sentiment expressed in these hearings has questioned the propriety of the government acting in this way. The argument is that the government has a moral responsibility to take the lead in conforming to the law and should conform to the law as it is.

20. To the County's credit, they appear to have attempted to modify the project so that it will comply with the present language of the zoning code at SCC 14.16.410(k). Whether they have succeeded, however, is doubtful. The range master's hut is the sticking point. It is clearly an enclosed structure. Further, its prime purpose is without question to provide a place for the range master to exercise range supervision. It may also house emergency communications equipment. But to assert that is why it is being built would be disingenuous. Whether the shooting range could be operated without it has not been discussed.

21. The proposed firing range is outside a fire district where the basic rule is that building permits are not issued. SCC 14.16.850 (b) provides exceptions to this rule, but those exceptions are irrelevant here. The question of whether a use is allowed by Special Use Permit is separate from whether a building permit is needed. SCC 14.16.410(k) governs the special use question.

22. The range master's hut raises the issue of whether certain small enclosed structures can be overlooked as de minimis for purposes of the special use analysis. To operate the outdoor range, Parks will be required to install at least some sanitary facilities and even if sani-cans are used, the structures involved will of necessity be enclosed. Are necessary minor structures of this kind, including the range master's hut, too insignificant to conflict with the purpose of the zoning provision? The argument would have to be that unless such structures are construed as outside the "enclosed structure" limitation, SCC 14.16.410(k) would be meaningless because no shooting ranges could be built consistent with its terms.

23. Nevertheless, the Examiner is not tasked here with deciding whether the reduced application does or does not comply with the zoning code as presently written. His job is to determine if the information added to the record allows a conclusion that environmental review was adequate and whether the application information presented permits the issuance of shoreline permits.

### **Need for Shoreline Variance**

24. The County now argues that the Shoreline Variance that they applied for and received is not legally needed. The variance was initially sought because the access road and bridge are located within the shore setback of 150 feet for Conservancy areas as set forth in Table TF at SMP 7.17(2)(C). Their new argument is that there is an exception to the setback for “approved water crossings.”

25. The Examiner takes the same approach to this assertion that he has taken to the decided issues that were not timely appealed. The law of the case includes the variance consideration and the Examiner does not believe he has the authority to disregard or overrule the SHB’s review of the issue.

26. This is important because the Shoreline Variance as reviewed by the SHB contained a number of conditions the SHB felt were important in determining the potential for lead to leach from the site. On any issued permit, those conditions need to be retained in order to preserve the integrity of the SHB’s decision.

### **Merits of the Case**

27. The Hearing Examiner holds that adequate detail has been provided in the shoreline application to evaluate the proposal under the applicable shoreline policies and regulations.

28. The Hearing Examiner holds that the environmental information provided contains a reasonably thorough discussion of the significant aspects of the probable environmental impacts. The EIS is adequate under the “rule of reason.”

29. On the evidence presented, the Examiner is convinced that no fair assessment could conclude that the safety risks created by this proposal are likely to be substantial. Some possibility of harm is presented by all human undertakings. There is no way to authorize any project that is absolutely risk free. Here the case was simply not made that allowing this proposal at the locale chosen would create extraordinary danger to off-site owners or recreationists. If the Frailey Mountain range is to be rejected on the merits because of the dangers it poses, then there is no way to approve any outdoor shooting range and those that exist should all be closed.

30. The adequacy of the impact statement is dispositive of the issues raised in the Land Use Petition action in Snohomish County No 98-3-00246-6. The permits which are the subject of that action should be conditioned as set forth below.

31. Given the additional information provided, and considering the modifications to the proposal and the conditions set forth below, the Examiner concludes that the project does not present potential adverse safety impacts to private property owners and

others on Pilchuk Creek which will unreasonably interfere with public use and enjoyment of the shoreline under RCW 9.58.020. Further, in light of the record, the proposal, as modified and conditioned, will meet the variance criterion of WAC 173-27-170(2)(c) requiring compatibility with adjacent authorized shoreline uses.

32. The proposal, as modified, is consistent with the policies and regulations of the Shoreline Management Act, with the policies and regulations of the local shoreline master program, and with the applicable criteria for shoreline variances, provided that the conditions set forth below are imposed.

33. Any finding herein which may be deemed a conclusion is hereby adopted as such.

### **CONDITIONS**

1. The project shall be constructed according to and shall conform generally with the site plan presented on remand as Exhibit R-35.

2. The applicant shall apply for and secure an easement to access the proposed shooting range along the route proposed in the site plan.

3. Fencing shall be erected along completely around the area of the range facilities with appropriate signs posted to warn persons who might encounter the range in connection with their use of the Pilchuk Creek area that they should not proceed further.

4. All entrances to the range facilities area shall be gated. A locking gate shall be installed on the main entrance road to the range in order to prevent access when there is no qualified Range Master on site. Additional locking gates, to be unlocked only by authorized DNR or Parks Department personnel, shall be maintained at all access roads entering the range area. The gates should be designed and positioned to prevent all types of vehicle access. The Parks Department shall be responsible for installing the gates and for maintaining them until such time as management of the range may be transferred to a concessionaire.

5. Compliance with all operational conditions herein and adopted range rules shall be made a condition of any concessionaire's right to operate the range. Failure to comply with any such rules shall be grounds for termination of the concession.

6. A trained and experienced Range Master shall be present on the site during all hours that the range is open for use. The hours of operation shall generally be from 9 a.m. to 6 p.m. No operations shall be conducted during times of darkness.

7. No use of any rifle range shall be made unless a trained and experienced Range Master is present on site. Persons using the shotgun range must check in with the

Range Master, be identified and pay a user fee. The Range Master shall have full authority to exclude any person from use of any range.

8. Range rules shall be established as are commonly in effect at NRA-affiliated ranges. The rules shall provide for safe handling of firearms, including but not limited to a prohibition against weapons being loaded until checked into the firing lines. The rules shall provide appropriate sanctions for violations. The rules adopted for the “Kenmore Range: shall be used as a model (Exhibit R-31).

9. Range Safety Officers shall supervise the shooting on the 300 and 1000 yard rifle ranges, with the following exception: persons who display an identity card showing that they have passed an orientation and proficiency qualification for these ranges. Any person wishing to access the 300 or 1000 yard rifle ranges shall check in with the Range Master on duty and obtain permission.

10. A chain-link fence shall be constructed so as to preclude entry to either the 200/300 yard or the 1000 yard rifle ranges without first passing through a gate controlled by the Range Master at the Range Master’s hut.

11. A Range Safety Officer shall approve the setting of 200 yard targets on the 300 yard range and supervise shooting at that distance.

12. The operator of the range shall offer regular programs of training in gun safety.

13. A regular program of grooming the surface of the rifle ranges shall be established to prevent the accumulation of rocks or other hard objects that might cause ricochets. The grooming will be done with professional grooming equipment. Shooting at targets on the ground shall be prohibited.

14. All rifle ranges shall be constructed so as to present a 24-foot high earthen berm the entire length of their north sides and a backstop behind the targets of at least 24 feet in height. The 24 feet shall be measured from the surface of the range. The 1000 yard range shall be aligned so that the high ground to the east of the target area serves as an additional backstop.

15. Each of the rifle ranges shall have installed at their backstops an “eyebrow” ricochet catcher of a design and construction appropriate to each range, following the models illustrated in the NRA Range Source Book.

16. Each rifle range shall be appropriately equipped with overhead baffles constructed of materials and consistent with plans illustrated in the NRA Range Source Book. The overhead baffles shall be placed so as to establish “no blue sky” conditions so that no direct fire can escape the range, in particular in the direction of Pilchuk Creek and the private parcels located to the northeast. The distance that baffles extend downrange

shall be consistent with the recommendations of a professional range design consultant. The design and construction of the baffles shall be approved by the professional range design consultant.

17. The overhead baffles shall be constructed of materials chosen to withstand the types of ammunition permitted on each range by the established range rules.

18. The baffles and other projectile escapement preventive features shall be inspected and approved by the professional range design consultant prior to public use of the individual rifle ranges. A program of inspection and upkeep shall be established and carried out for the baffles and other projectile escapement preventative features.

19. Final construction designs for project features shall be submitted to Planning and Development Services for review and approval prior to any construction on site.

20. A Forest Management Plan for the open space and buffer areas shall be submitted to Planning and Development Services for review and approval prior to any construction on site.

21. On-site fire protection shall be provided in accordance with the provisions contained in SCC 14.16.410(3)(C)(viii). If possible, an agreement for fire protection shall be entered into with a fire protection district.

22. A Wetland and Critical Areas Mitigation and Monitoring Plan shall be prepared based on final project design and submitted to Planning and Development Services for review and approval prior to any construction on site.

23. The construction-timing window shall be between May 15 and September 15.

24. All critical areas shall be placed in a Protected Critical Area (PCA) as required by the County Critical Areas Ordinance.

25. The applicant shall comply with all provisions of Chapter 14.32 SCC, the County Drainage Code. A Temporary Erosion Control and Spill Prevention Plan shall be submitted and approved prior to construction of the access road and bridge.

26. Final engineering shall be approved by the Department of Public Works prior to construction of the access road and bridge.

27. Annual monitoring for contaminants in the major drainage areas adjacent to and on the site shall be completed and submitted to the Department of Health. The project shall use the Best Management Practices described in the plan submitted by Environmental and Turf Services, Inc. (Exhibit R-7).

28. The applicant shall comply with all requirements of jurisdictional health authorities regarding sanitary facilities.

29. The range shall be reviewed every five years after operation commences to determine if the mitigation measures imposed are adequate. Planning and Development Services shall submit a report to the Hearing Examiner, if after the review additional permit conditions are recommended. As a minimum the review shall include:

- A. Traffic impact
- B. Ground Water Quality
- C. Drainage and Erosion Control
- D. Noise levels
- E. Maintenance of range facilities

Nothing shall prevent the County from reviewing the operation in advance of the scheduled five year review.

30. The conditions imposed by the Department of Ecology on the original Shoreline Variance Permit shall remain conditions of these permits.

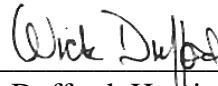
31. All additional required permits and approvals shall be obtained prior to construction and their conditions shall be observed.

32. No changes shall be made in these conditions or in the facilities offered at the range except by application to Planning and Development Services for amendment of the Special Use Permit. Such changes shall be subject to the rules and regulations in effect at the time they are filed and to the opportunity for public review and comment.

33. Failure to comply with any conditions may be grounds for permit revocation.

### **DECISION**

The adequacy of the EIS is affirmed. Subject to the conditions set forth above, the Special Use Permit, the Critical Areas Variance Permit, the Shorelines Substantial Development Permit and the Shoreline Variance are all approved.



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Wick Dufford, Hearing Examiner

Date of Action: May 23, 2005

Date Transmitted to Parties: May 23, 2005

### **RECONSIDERATION/APPEAL – SPECIAL USE/ CAO VARIANCE**

As provided in SCC 14.06.180, a request for reconsideration may be filed with Planning and Development Services within 10 days after the date of this decision. As provided in SCC 14.06.120(9), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with Planning and Development Services within 14 days after the date of the decision or decision on reconsideration, if applicable.

### **RECONSIDERATION/APPEAL – SHORELINES PERMITS**

As provided in the Skagit County Shoreline Master Program, Section 13.01, a request for reconsideration may be filed the Planning and Development Services within five (5) days after the date of this decision. The decision may be appealed to the Board of Commissioners by filing a written Notice of Appeal with Planning and Development Services within five (5) days after the date of decision or decision on reconsideration, if applicable.

### **DEPARTMENT OF ECOLOGY REVIEW**

If a decision to approve the Shoreline Variance becomes final at the County level, the Department of Ecology must approve or disapprove it, pursuant to RCW 90.58.140.