



SKAGIT COUNTY

March 13, 2009

Margaret Fleek, Planning Director
City of Burlington
833 South Spruce Street
Burlington, WA 98233

Dike District # 12
1317 South Anacortes Street
Burlington, WA 98233

RE: Skagit County Consolidated Comments to City of Burlington / Dike District 12 Draft Environmental Impact Statement Regarding Proposed Flood Control Measures

Please find Skagit County's consolidated comments regarding the City of Burlington / Dike District 12 "Draft Environmental Impact Statement to Adopt a Strategic Program for Comprehensive Flood Hazard Mitigation in the Burlington Urban Area and Adjacent Land with a Range of Structural and Non-Structural Components," dated February 13, 2009.

Please make these comments a part of the official record of this action. Please direct all comments and questions to the undersigned. Skagit County requests to be made a party of record to the proposed action.

1. Clarification – Scope of Skagit County Participation in DEIS.

The DEIS states at 7 that the Proponent of the DEIS is "[t]he City of Burlington in cooperation with Skagit County." This requires clarification.

Skagit County supports and encourages all reasonable efforts to protect the City's existing built urban environment from the threat of catastrophic flooding. Skagit County considers itself a partner on flood control issues with each and every municipality within its corporate limits, and, to that end, has an obligation to promote flood control solutions that consider broader regional needs and impacts countywide.

Skagit County and the City of Burlington are moving forward in partnership on a range of issues such as securing additional flood storage in the Baker River hydroelectric system. In addition, the City of Burlington and Dike District 12 are actively participating in the Skagit County Flood Control Zone District Advisory Committee ("Advisory Committee"), through their participation in technical sub-committees.

With the foregoing in mind, Skagit County is not a co-lead, co-drafter, or participant in the Burlington DEIS. Skagit County's participation in and engagement with the Burlington DEIS and the proposed action is strictly limited to Skagit County's formal comments in the record and the County's land use authorities as prescribed under the Growth Management Act, Countywide Planning Policies, Skagit County Comprehensive Plan, and Skagit County Code.

2. DEIS Requires More Analysis of Connection Between Plausible Scenario For Contemplated Levee Improvements and Estimated 100 Year Peak Volume Discharge.

The DEIS at page 20 lists the 100 year event peak volume discharge at Sedro-Woolley predicted by, respectively:

- The U.S. Army Corps of Engineers ("Corps"), 215,270 cfs;
- County consultant Northwest Hydraulic Consultants ("NHC"), 196,690 cfs; and
- City consultant Pacific International Engineering ("PIE"), 184,700 cfs.

In the table at page 20 the DEIS makes conclusions regarding the ultimate effect should federal agencies decline to accept PIE's estimate rather than the Corps' estimate.

According to the DEIS (table at 20):

- If the Corps' predicted 100 year peak volume discharge estimate remains the basis for federal regulatory decisions, this will mean there is "no plausible scenario of levee improvements [around the City of Burlington] without significant detrimental impacts to upstream and downstream neighbors." DEIS, table at 20.
- If PIE's predicted 100 year peak volume discharge estimate is adopted by federal agencies as the basis for regulatory decisions, this will mean that "effects on upstream water levels" created by the City's proposed levee improvement will be "minimal." *Id.*
- Accordingly, "[l]evee certification along river front [will be] feasible" only if PIE's predicted peak volume discharge is ultimately adopted by federal agencies as the basis for various flood-related regulatory decisions. *Id.*

The foregoing analysis is not complete for the following reasons:

- a. *DEIS Fails To Discuss, Analyze, or Establish 100 Year Peak Volume Discharge Above Which There Would Be No Plausible Scenario of Levee Improvements Without Detrimental Impacts To Upstream and Downstream Neighbors.*

As previously discussed, the DEIS appears to be centrally focused on the idea that there may be no “plausible scenario of levee improvements without significant impacts to upstream and downstream neighbors,” depending on the 100 year peak volume discharge estimate adopted by federal agencies as the basis for their regulatory decisions.

However, the DEIS does not predict or analyze the peak volume discharge threshold, or “tipping point”, above which there is no plausible scenario of levee improvements without detrimental impacts to upstream and downstream neighbors. Instead, the DEIS appears to simply predict that PIE’s peak volume discharge estimate equates to a plausible scenario, while the Corps’ estimate does not.

Because it forms a central decision point in the analysis the DEIS purports to undertake, the DEIS should discuss and analyze the threshold 100 year peak volume discharge beyond which no plausible scenario of levee improvements is feasible without detrimental impacts to upstream and downstream neighbors.

- b. *The DEIS Fails To Consider Whether Adoption Of NHC’s Predicted 100 Year Peak Volume Discharge Means No Plausible Scenario Of Levee Improvements Without Significant Detrimental Impacts To Upstream And Downstream Neighbors.*

As communicated to the City on many prior occasions, Skagit County intends to continue to rely on NHC to provide the technical basis for our regional effort to develop flood control strategies feasible from an economic, engineering, and environmental perspective. NHC’s credibility with federal agencies and regulators is unchallenged.

Skagit County is unable to concur in or support the DEIS to the extent it fails to consider, predict and analyze whether NHC’s predicted 100 year peak volume discharge, if adopted by federal agencies as the basis for regulatory decisions, would in the City’s view equate to a “plausible scenario of levee improvements without significant detrimental impacts to upstream and downstream neighbors.”

3. DEIS Appears To Be Outcome-Oriented With Reference To A Particular Project Course Of Action.

The DEIS proposes to “construct 100-year certified levees in appropriate locations and provide other flood measures as necessary and appropriate based on FEMA’s final Flood Insurance Study, when this study is adopted following resolution of any appeals.” DEIS at 14. The DEIS expressly recognizes that the proposed action cannot proceed until the hydrology used by federal agencies as the basis for their regulatory decisions is conclusively established. See, e.g., DEIS at 11 (“[T]he options for effective flood hazard mitigation are significantly different depending on the assumptions about hydrology.”) See also DEIS at 10 (discussing idea that “there is a need to lower the estimate” of the Flood Frequency Analysis.)

The sole difference between the two DEIS alternatives appears to be the data set on which they rely. With that in mind, the DEIS appears on its face to be engaging in a decision analysis to determine which set of data better supports a proposed course of action. This is a problematic use of SEPA.

SEPA is intended to systematically consider the impact of project proposals on the natural and human environment. RCW 43.21C.030. SEPA is designed to objectively inform the decision-making analysis. Accordingly, SEPA's entire purpose is defeated if it is allowed to become an outcome-oriented process aimed at justifying pre-conceived decisions. WAC 197-11-406 (SEPA review is "not to be used to rationalize or justify decisions already made.") Federal courts have made this same idea clear in the context of NEPA as well. See, *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)(Environmental review "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.")

Skagit County fully supports and applauds the City's continued efforts to develop relevant technical information. However, it is premature to make decisions on specific flood control projects – let alone at unspecified "appropriate locations" – until such time as the hydrology and base flood elevations underlying federal regulatory decisions have been conclusively established.

4. The DEIS Does Not Provide A Mechanism For Coordinating Flood Projects Among Various Jurisdictions. The City Should Continue Its Participation On The Skagit County Flood Control Zone District Advisory Committee.

The DEIS recognizes that "impacts on upstream and downstream neighbors" is a central concern, and further recognizes that the City's flood control plans will have impacts on a wide range of surrounding jurisdictions, agencies, entities, and landowners. Among other things, the DEIS explicitly contemplates that the proposed action will involve:

- Backwater impacts on the City of Sedro-Woolley;¹
- Utilization of the Nookachamps Basin for flood storage;²
- Levee setbacks in the City of Mount Vernon, which levees are owned by Dike District 17;³
- Establishing overbank spill pathways through privately-owned farmland that will direct flood waters into the Samish River Basin, in lieu of a regulatory floodway through the City of Burlington. According to the DEIS, this will create "unavoidable adverse impact on frequently flooded farmland and rural residential areas";⁴
- Modifications to the flow control regime by which Skagit mainstem and Baker River hydroelectric projects are managed;⁵

¹ DEIS at 6.

² DEIS at 6.

³ DEIS at 6.

⁴ DEIS at 6, 18.

⁵ DEIS at 10.

- Incorporation of Skagit County agricultural (Ag-NRL) land into the City's Urban Growth Area.⁶

The only meaningful way to consider, analyze and balance these significant adverse impacts on the City's neighbors is to engage in a basin-wide planning process that involves and includes the jurisdictions and entities that are on the receiving end of these impacts, in a manner calculated to produce mutually agreeable, regionally applied mitigation measures and implementation solutions. For this reason, Skagit County is committed to the Corps' General Investigation process and our comprehensive flood planning efforts, which envision a holistic, basin-wide approach.

Skagit County fully agrees with and supports the City's ongoing efforts to "evaluat[e] options for the future to protect the urban area from flooding."⁷ As the DEIS correctly observes, protecting our community's existing built urban environment "fit[s] into what is generally perceived to be the long term regional strategy."⁸

That being noted, the complex and often contentious details of a long term regional strategy cannot be realistically managed absent a mechanism for developing a flood control plan that considers the interests of the entire community – including other cities, towns, rural landowners, tribes, the business community, state and federal transportation officials, and regional utility providers such as PUD No. 1, the City of Anacortes, and Puget Power..

For this reason, Skagit County respectfully requests that the City of Burlington re-commit to participation in the Skagit County Flood Control Zone District Advisory Committee. While the City and Dike District 12 have already been participating in the Advisory Committee through their positions on various technical sub-committees, Skagit County is open to a forthright discussion involving the other members of the Advisory Committee (including the City of Mount Vernon) as to whether the City of Burlington holding a seat on the overall Advisory Committee is indispensable to an effective regional strategy.

5. Any Plan To Spill Water Onto Rural Agricultural Lands Requires Consideration Of The Impacted Drainage Districts and Landowners.

The DEIS appears to envision directing floodwaters from the Sterling area toward the Samish River Basin. Depending on the plan proposed, this may require the agreement of and appropriate compensation for the impacted drainage districts and landowners.

6. Incorporation of New Agricultural Land Into City of Burlington Is Subject To An Independent Public Process.

The DEIS contemplates incorporating land currently zoned agricultural (Ag-NRL) into the City of Burlington. This includes Ag-NRL designated parcels in the vicinity of the Raspberry Ridge migrant farmworker housing project, land purchased by the Burlington-

⁶ DEIS at 6, 14-15

⁷ DEIS at 9.

⁸ *Id.*

Edison School District in the vicinity of Pulver Road and Peterson Road,⁹ as well as land south of SR 20 and east of Pulver Road.

Any decision to amend the Skagit County Comprehensive Plan and/or rezone land within unincorporated Skagit County is an independent process subject to independent public notice, hearing and opportunity to be heard in accordance with the Growth Management Act, RCW 36.70A, the Countywide Planning Policies¹⁰, the Skagit County Comprehensive Plan¹¹, and the Skagit County Code. This would include, among other things, review by the Skagit County Planning Commission and the multi-jurisdictional Growth Management Act Steering Committee established pursuant to interlocal agreement,¹² and its formally adopted "Criteria and Procedures for Urban Growth Area Boundary Modifications."¹³

As a general matter, Skagit County's Comprehensive Plan discourages the conversion of productive agricultural land to non-agricultural uses.¹⁴

7. The DEIS Provides No Mechanism That Would Enforceably Constrain The City's Continued Expansion.

In the DEIS, the City offers the other citizens of the Skagit River Basin community a *quid pro quo*: if the City is supported in an effort to proceed independently with levee improvements that protect the City's existing built urban areas, the City is willing to permanently end outward expansion into surrounding flood-prone farmland. This will simultaneously limit the scope of the already-daunting flood control challenge, and help protect the region's dwindling agricultural land base from urban encroachment. Both are broadly-accepted public policy objectives. See, e.g., DEIS at 18 ("[c]ontinued increase in commercial activity and residential density will occur, but it will be confined to the existing urbanized area.").

⁹ DEIS at 6.

¹⁰ CWPP, October 10, 2007

¹¹ Skagit County Comprehensive Plan, October 10, 2007, or as thereafter amended

¹² '2002 Framework Agreement' Among Skagit County, the City of Burlington, the City of Mount Vernon, the City of Anacortes, the City of Sedro Woolley, and the Town of LaConner Regarding Coordinated Planning, Urban Services, and Countywide Planning Policies, as recorded with the Skagit County Auditor file number 200211270010.

¹³ Resolution of the Growth Management Act Steering Committee Adopting Criteria and Procedures for Urban Growth Boundary Modifications, June 27, 2007.

¹⁴ To the extent the subject EIS purports to accomplish SEPA review of a proposed incorporation of Ag-NRL land into the City of Burlington UGA, Skagit County does not concur or agree that the present SEPA review is a substitute for or in any way replaces, supersedes or renders unnecessary SEPA review associated with any proposed GMA action to amend the Skagit County Comprehensive Plan or rezone land that would add, modify or transfer Ag-NRL zoned land to Burlington's UGA. Any such action or proposal must be initiated, considered and reviewed on its own merits in full compliance with GMA and SEPA. Among other things, Skagit County is obligated to consider the cumulative impacts on a region wide basis. Skagit County expressly reserves all rights, power and authority to conduct SEPA review associated with any later proposal to add new Ag-NRL land to Burlington's UGA, and does not waive any rights, power or authority by commenting on this SEPA review.

Skagit County supports this concept in principle, as long as it is memorialized in an interlocal agreement. Doing so will ensure that the benefits and burdens shared by our community are clearly defined and enforceable.

To accomplish permanent constraint on the City's future expansion into flood-prone farmland, the DEIS proposes to extinguish development rights on farmland surrounding the City with a voluntary transfer of development rights program, the "Burlington Agricultural Heritage Credit Program." DEIS at 15 and Appendix E. For the reasons discussed below, Skagit County supports exploration of innovative planning tools to protect farmland, but is skeptical that such a program, standing alone, will adequately assure constraints on the City's future expansion into surrounding flood-prone agricultural land.

The success of the City's transfer of development rights (TDR) program would require an unequivocal, lasting commitment by the City to refrain from incorporating new agricultural land in the City's UGA, now or in the future.

Even the mere *possibility* that new agricultural land will be incorporated into the City's UGA would substantially inflate the value of agricultural land adjoining the City, likely beyond the reach of a transfer or purchase of development rights (PDR) program, potentially compromising the viability and effectiveness of the Skagit County Farmland Legacy program as well. In turn, the Farmland Legacy program is proposed to be the purchasing agent for farmland development rights under the City's Agricultural Heritage Credit Program.

The School District property on Pulver Road provides a case in point. The 28.9 acre property consisting of four parcels was purchased in July 2007 for a total purchase price of \$1,830,970.¹⁵ This equates to \$63,355 per acre. The DEIS assumes that agricultural land is valued at \$6,000 per acre absent development potential. See, "Skagit Valley Agricultural Land Value Analysis" at 1, attachment to DEIS Appendix E. In broad terms, the price differential between \$63,355 per acre paid by the School District and the \$6,000 per acre assumed by the DEIS represents a price premium that exists solely as a result of speculation that the property will be incorporated in the City and rezoned to more intensive non-agricultural uses at some later date.

As long as agricultural land on the City's periphery has the potential of a tenfold increase in value as a result of a potential incorporation and upzone, it is a virtual certainty the City will continue to expand into surrounding flood-prone farmland in future years. While we do not question the good intentions expressed in the DEIS, the global history of municipal willpower in preventing urban encroachment into surrounding flood-prone farmland demands skepticism.¹⁶

¹⁵ According to records filed with the Skagit County Assessor, parcel nos. P62593 (9.37 acres) and P62595 (6.29 acres) were purchased together for \$1,000,000, while P62594 (8.34 acres) and P62596 (4.88 acres) were purchased together for \$830,970.

¹⁶ On March 11, 2009, as this comment letter was being drafted, the Washington State House of Representatives passed HB 1967, which, if passed by the Senate and signed by the Governor, would prohibit the expansion of municipal UGAs into the 100 year flood plain. Exceptions in the bill include UGAs that are surrounded by 100 year floodplain, which would appear to exempt the City of Burlington from the bill's ambit.

In our view, the first indispensable step toward problem solving is to stop making the problem worse. With that principle in mind, it is essential that we engage honestly in a difficult but unavoidable discussion as to how to permanently and lawfully constrain further incorporation and conversion of surrounding flood-prone agricultural land into the City's UGA.

The Burlington City Council cannot permanently prohibit incorporation of surrounding agricultural land by simply passing an ordinance to that effect. It is well-established that a municipal legislative authority cannot permanently constrain the legislative zoning acts of future City officials:

The power of a municipal legislative body to amend the zoning regulations is legislative in character. Therefore, it is not exhausted when it has been used once. Rather, a legislative body can reconsider its passage or rejection of a proposed amendment.

Thus a zoning amendment may be valid although it was rejected by the same legislative body on an earlier occasion. . . . It is a matter peculiarly within the discretion of the legislature, and that body is free to change its mind without a demonstration that its earlier decision was demonstrably wrong, or that circumstances have changed since the earlier action.

Anderson, *American Law of Zoning*, s 4.28 (1st ed., 1968). Thus, even if the City Council passed an ordinance banning new incorporation of agricultural land, the City Council would be free to simply amend that ordinance, or eliminate it altogether, at any time. As a result, surrounding agricultural land values would continue to incorporate a very high speculative rezone value factor even if the City goes so far as to pass an ordinance precluding incorporation of more surrounding farmland.

It is also a matter of substantial doubt as to whether such an ordinance would be enforceable standing on its own. Pursuant to the Growth Management Act, counties and the cities within its corporate limits, working together, are statutorily obligated to provide sufficient land to accommodate countywide population growth as forecasted by the State Office of Financial Management. RCW 36.70A.110, .115. It is far from clear that a city has the legal authority to unilaterally constrain its urban boundaries on a permanent basis, and it is virtual certainty that doing so would be subjected to legal challenge by surrounding agricultural landowners and other parties that support future conversion of agricultural land to urban uses.

However, it is entirely possible for the City to, permanently and enforceably constrain the expansion of its urban growth area into flood-prone farmland by executing an interlocal agreement to that effect. See, *State ex rel Myhre v. City of Spokane*, 70 Wn.2d 207, 216 (1968); *Swinomish v. Skagit County*, 138 Wn. App. 771, 776-77 (2007).

The *Swinomish v. Skagit County* decision is particularly instructive and on-point. Skagit County is party to a 1996 interlocal agreement between Skagit County and Skagit PUD No. 1, the City of Anacortes, various state agencies, and local tribes, an agreement that envisions joint water resources planning in the Skagit River Basin consistent with the Growth Management Act (hereinafter, the "Interlocal Agreement").

In 2003, Skagit County sought to have the Interlocal Agreement judicially invalidated on grounds it was an improper “granting away” of the County’s legislative authority by a prior Board of Commissioners.

The Court of Appeals rejected Skagit County’s argument, holding that the Interlocal Agreement was a proper, lawful and binding agreement, fully consistent with the GMA. Following is the relevant portion of the Court of Appeals decision:

The County asserts that the [Interlocal Agreement] is contrary to public policy and therefore void and unenforceable. It argues that the County cannot grant away its legislative authority or limit its ability to protect the health, safety, and welfare of its population. It further argues that it is prohibited from contractually limiting its governmental capacity when so doing could prevent it from enacting legislation that may become necessary to protect the welfare of its citizens.

.....

Far from being arbitrary and unreasonable, the [Interlocal Agreement] in the present case has a substantial relation to public health, safety, morals, and general welfare. It represents, not a limitation on the County’s legislative and police powers, but a commitment to follow and enforce specific statutory requirements. There is abundant statutory authority to support a conclusion that the [Interlocal Agreement] is not contrary to public policy. The GMA itself specifies coordinated planning. “ It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning.” The GMA mandates county-wide planning in cooperation with cities located within the county.

.....

The [Interlocal Agreement] comports squarely with the public policy aims of the GMA, the Interlocal Cooperation Act, and the Water Resources Act. Given the manifest legislative intent favoring cooperation and joint planning in the above acts, the [Interlocal Agreement] is not void as against public policy.¹⁷

Simply put, the City can bind itself to stop growing into surrounding flood-prone farmland by signing a GMA interlocal agreement to that effect.

In the present circumstances, there is little question that protecting the community against catastrophic flooding while engaging in cooperative growth planning and protection of agricultural land all have a “substantial relation to public health, safety, morals and general welfare,” in accordance with “specific statutory requirements.” Accordingly, entering a properly-drafted interlocal agreement to accomplish these ends is entirely lawful, necessary, and desirable.

¹⁷ *Swinomish v. Skagit County*, 138 Wn. App. at 776-78.

At its essence, the proposed action discussed in Burlington's DEIS is a proposed set of mutual promises:

- A promise that the City will permanently end further expansion into flood-prone farmland, thereby ensuring that the flood control risks and challenges the DEIS seeks to address will not grow worse and even more difficult for the community to address in the years and decades to come;
- In exchange for this promise, the City asks that the broader Skagit River Basin community agree to prioritize the City's effort to protect its existing built urban environment from the threat of catastrophic Skagit River flooding.

This concept has merit if the City is willing to commit to an enforceable agreement, i.e., put it in writing. Absent such an agreement, the DEIS presents no realistic mechanism to stop the City from continuing to expand into surrounding flood-prone farmland in future years.

As the DEIS highlights, protecting the City of Burlington's existing built urban areas against the risk of catastrophic flooding is perhaps the most difficult problem facing our region, both from the standpoint of public health and safety as well as the economic vitality of our community.

An agreement as discussed would constrain this problem to its existing footprint. It would send a strong message to federal and state officials who are concerned about enabling further urban sprawl into flood-prone agricultural land that our community is willing to make the hard decisions necessary to address our flood control challenges. It would provide quantifiable boundaries to the complex environmental, engineering and economic factors local officials must grapple with in planning to protect the City of Burlington and other communities in the Skagit River Basin from catastrophic flooding. At the same time, an enforceable agreement would substantially reduce pressure to convert flood-prone delta farmland surrounding the City, helping to safeguard a vibrant and viable agricultural economy within Skagit County.¹⁸ Skagit County would continue to accept growth allocations consistent with the GMA, directing growth to areas that are not farmland under risk of catastrophic flooding.¹⁹

¹⁸ A long-term commitment to halting expansion of a city's urban boundaries into flood-prone farmland does not constitute regulatory taking as to the surrounding farmland. A law in general creates a regulatory taking only where property is deprived of all economically viable use. *Guimont v. Clark*, 121 Wn.2d 586, 605 (1993). A landowner has no legally-cognizable economic expectation that flood-prone farmland will be incorporated into a UGA and rezoned to urban use. See, *Peste v. Mason County*, 133 Wn. App. 456 (2006). The extent of the necessary process, notice and opportunity to be heard prior to effecting the agreement discussed herein is a topic that merits further analysis and discussion.

¹⁹ Allocating new growth to areas other than flood prone farmland would benefit the finance, insurance and real estate (FIRE) sector in Skagit County by promoting higher overall property values. First, directing growth to non-flood prone areas would eliminate the negative value adjustment associated with development on land at risk of catastrophic flooding. This would simultaneously protect the agricultural community that plays a central role in making Skagit Valley's quality of life attractive to home buyers and businesses.

For all foregoing reasons, the City and the County should consider negotiations toward an interlocal agreement that formalizes and memorializes the City's proposals set forth in the DEIS. This may require consulting our partners on the Growth Management Steering Committee. This is an indispensable first step toward securing Skagit County's support for the proposed actions discussed in the DEIS.

We thank you for the opportunity to comment on the DEIS, and look forward to continuing to work with the City and Dike District 12 toward a regionally supportable flood hazard mitigation program. Please do not hesitate to contact the undersigned with questions, comments, or concerns.



David Sheridan, Interim Director
Skagit County Public Works
1800 Continental Place
Mount Vernon, WA 98273
daves@co.skagit.wa.us



Will Honea, Chief Civil Deputy
Skagit County Prosecuting Attorney
605 S. Third
Mount Vernon, WA 98273
willh@co.skagit.wa.us



Gary Christensen, Director
Skagit County Planning and Development Services
1700 E. College Way
Mount Vernon, WA 98273
garyc@co.skagit.wa.us