

To: Lara Fowler, Chehalis River Basin Flood Authority
From: Glenn Carter, Lewis County Deputy Prosecuting Attorney
Re: Installation, Operation and Maintenance of Rain Gage on Cedar Creek Property
Date: November 18, 2011

I've reviewed the draft license governing the installation, operation and maintenance of a rain gage on the Cedar Creek property owned by the Department of Natural Resources.

This past legislative session, the State Legislature directed the funding of flood control measures in the Chehalis River Basin, including installation of a flood warning system. The rain gage to be installed on DNR property is part of this warning system.

Lewis County is not funding the purchase, installation, operation or maintenance of the rain gage, and County personnel will not enter onto DNR property. WEST Consultants will purchase, install, operate and maintain the facility with funding from the State. Although WEST is a "contractor" for the Chehalis Basin Flood Authority, the County is merely the "*fiscal agent*" for the Authority and a *conduit* of State funding for this project. The County does not determine what the contractor will or will not do, as those decisions are made by the Authority as a group and executed by the County solely in its capacity as fiscal agent. In the case of this particular project, the State has required the completion of the warning system is funding the project and is the appropriate licensee.

The State has funded the purchase, installation, operation and maintenance of the rain gage. For as long as the State is funding the installation, operation and maintenance of the gage, the State should be the "licensee." When the State ceases to do so, the entity assuming the operation and maintenance of the rain gage presumably would enter into an appropriate license.

My specific comments follow and I attach a red-lined draft with changes.

PAGE 1:

Lewis County is not purchasing, installing, operating or maintaining the Rain Gage and is not going onto the DNR property. The license is most appropriately issued to the State of Washington.

PAGE 2:

The form of license assumes a private licensee. Private entities purchase commercial general liability policies. The county is a political subdivision of the State of Washington. Like the State, the county does not insure through such a private insurer. The insurance requirement is not suited to a political

subdivision of the State. In the case of the County, it is “insured” through a Risk Pool of all but the largest counties in the state. It is not the type of insurance contemplated by this provision.

Further, the County has no “insurable interest” in this project. It is not “acting” so as to trigger the policy. It is not entering onto the property. It is not operating or maintaining the machinery. There is no act of the county for the county’s insurance to attach. The “insurance” required by the State will be a nullity. The County cannot give what the State is looking for.

WEST Consultants was required to provide insurance for this project. It has the insurance. If DNR wishes effective insurance coverage, it should request the appropriate certificate from WEST.

ADDENDUM A; TERMS; SECTION 4:

The State is funding the purchase, installation, operation and maintenance of the gage. The license is most appropriately issued to the State.

ADDENDUM A; CONDITIONS; SECTIONS 4 AND 12:

The county does not insure through a private insurer and the requirements of this section are not apt.

SECTIONS 5 AND 6

The county cannot legally indemnify any entity, including the State, against anything other than the county’s own willful or negligent acts. No county personnel will enter onto DNR property, install, operate or maintain the rain gage. The County cannot legally indemnify DNR from whatever happens on the site or as a result of the project.

SECTION 9

The term “handouts” in the original may not be qualified by advertising. This change attempts to clarify the intent of the provision.