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SEP 09 2009

September 9, 2009

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Whatcom County PDS

Mr. David Stalheim, Director
Whatcom County Planning & Development Services
5280 Northwest Drive
Bellingham, Washington 98226

Re: City of Lynden Water Rights and UGA Process

Dear Mr. Stalheim:

The purpose of this letter is to respond to your request sent by August 14, 2009 e-mail to City of Lynden Planning Director Amy Harksell for a short paper providing the City's position on the above-referenced topic in response to comments received by the County to the Draft Environmental Impact Statement ("DEIS").

The City of Lynden ("City") has completed its 2009 Water System Comprehensive Plan, which addresses service to the requested UGA, and received comment thereon by the Washington State Department of Ecology ("Ecology").¹ In its comments on the City's Water System Plan, Ecology noted that "the two entities officially 'agree to disagree' about the extent of the city's water rights" and that despite the disagreement, **"Ecology will not take water right enforcement action, nor shall it recommend denial or conditioning of the current water system plan on grounds of insufficient water rights."** *See Attachment B, Letter from Ecology to Health, dated March 17, 2009 (bold emphasis in original).* Unless Ecology issues an appealable order to Lynden disputing Lynden's water rights, Health will generally adopt the water rights has provided by municipal provider, i.e. Lynden, for the purposes of quantifying the available water to serve customers within its service area defined under a water system plan. *See Attachment C, Departments of Health and Ecology Joint Review Procedures for Planning and Engineering Documents, dated April 2007.*

Ecology's acceptance of the City Water System Plan is borne from a Memorandum of Agreement ("MOA") entered into between Ecology and Lynden on January 20, 2004: "The purpose of this MOA is to provide a cooperative framework within which Ecology and Lynden can together explore and execute the water supply strategy intended to achieve water supply solutions and to avoid disputes over existing interpretations of Lynden's existing water rights." *See Attachment D, MOA, p. 1.* The latter portion of the statement is particularly important; the parties chose to avoid adjudication in favor of a cooperative approach.

It is important to understand that unlike other basins in the state of Washington with significant

¹ The City also received approval of its sewer system plan from Department of Ecology on September 23, 2008.

water right issues, very few water rights in the Nooksack Basin have been adjudicated. While Ecology administers the system of water right approvals, its administrative determinations are tentative, and not final determinations. Final determinations may only occur in a court adjudication. *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993).

This emphasis on cooperation over litigation with respect to water rights is not unique to Lynden water rights. The Watershed Management Plan completed by Whatcom County for WRIA 1, emphasized arriving at water right solutions cooperatively. For example, the WRIA 1 Plan authorized implementation of the Bertrand and Middle Fork Instream Flow Pilot Negotiations which have included without limitation Ecology, City of Bellingham, Lummi Tribe, Whatcom County P.U.D. No. 1, and a representative of farmers. *See Attachment E, Declaration of England, Exhibit I.2* The extent of water rights belonging to Bellingham, the Lummi Tribe and area farmers is highly uncertain.³ None of these entities, including Lynden, should be penalized for attempting to achieve cooperative solutions to water right questions in a basin where water rights have not been adjudicated.

The City of Lynden believes it has sufficient water rights to accommodate projected growth and that its position would be confirmed in an adjudication. The City's 2009 Water System Comprehensive Plan states that the City of Lynden has certificated water rights in the following quantities: Annual quantity ("Qa") is 6,620.7 acre feet per year; Instantaneous Quantity ("Qi") is 10,110 gpm or 14.56 mgd. An analysis of each of these rights may produce slightly different results, depending on the potential outcome of various legal arguments. *See Attachment A, "Abridged Legal Analysis of Lynden's Water Rights."* Under any likely scenario, however, these quantities for which water rights exist should exceed the estimated Qi of 4 mgd and Qa of 4480 acre feet estimated in the Water System Plan as needed for a potential population of 20,120 in 2027.⁴

As with Ecology, neither the County nor the Growth Management Hearings Board has the authority to adjudicate water rights. Absent court adjudication or determination, which to date all significant water right holders in Whatcom County have eschewed, a firm answer will not be forthcoming on the extent of any particular entities' water rights, including but not limited to Lynden.

Nonetheless, given that the question has been asked of the City of Lynden in particular, attached is a short summary of a portion of Lynden's position on its water rights entitled. *See Attachment A, "Abridged Legal Analysis of Lynden Water Rights."* This information has been prepared by my

² It should also be noted that the City of Lynden has not been represented in these private discussions and thus is not privy to or necessarily in agreement with all outcomes of said discussions.

³ For example, according to the Lummi Tribe, Bellingham has previously asserted it has perfected either 116 c.f.s or 109 c.f.s. *See Attachment F, Letter from Tribe to City, dated October 7, 2004.* The Lummi Tribe believed that Bellingham's right was only 90 c.f.s. Similarly, the amount of agricultural land in Whatcom County without water rights is likely significant, but largely unknown.

⁴ This exceeds the highest estimated Lynden population for 2031.

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office under the guidance and ongoing input from Tom McDonald. Mr. McDonald is a water rights attorney in Olympia, adjunct professor of water law at Seattle University, and a former water rights attorney with the Attorney General's Office for the State of Washington.

Yours truly,



Robert A. Carmichael

c: Seth Fleetwood, Chair, Whatcom County Council
Jean Melious, Chair, Whatcom County Planning Commission
Pete Kremen, County Executive
Jack Louws, City of Lynden Mayor
Bill Verwolf, City of Lynden Administrator
Amy Harksell, City of Lynden Planning Director
Duane Husky, City of Lynden Public Works Director

Attachment A

Abridged Legal Analysis of Lynden Water Rights

The City of Lynden holds several water rights that together provide a sufficient, if not excess, water supply for Lynden's projected growth. The water rights were issued over several years and as a result have some contradictory and ambiguous language. However, based on a fair and reasonable interpretation of the water rights, Lynden has sufficient water rights for its projected 20-year growth. The available water rights noted in Lynden's 2009 water system comprehensive plan is consistent with Lynden's intent in the applications and in its use and projected demand.

1. First certificated right (Certificate No. 6821).

A. Summary of Position.

The scope of the first certificated right for five (5.0) cubic feet per second ("c.f.s.") contains no limitation on annual quantity. Five (5.0) c.f.s. on an annualized basis provides the City with **3,620 acre feet per year**, which is by itself sufficient water for its present and near-term future needs. The Department of Ecology attempted to limit this right in its later issuance of certificated rights from 1963 - 1980, but subsequent court cases hold that Ecology does not have the authority make final determinations on the scope of a water right. The only means of obtaining final determination of the scope of this right is through court adjudication.

The City believes that its unlimited five (5.0) c.f.s. right in Certificate No. 6821 supports an annualized right of 3,620 acre feet per year. Support for the City's position is found in the RCW 90.03.260(5) proviso that population figures in water right documents shall not be considered a limitation on the scope of the right. Nothing in the recent King County Superior Court decision *Lummi Indian Nation, et al. v. State of Washington, et al.*, King County Superior Court No. 06-2-40103-4 SEA and *Burlingame et al v. State of Washington*, No. 06-2-28667-7 SEA (June 11, 2008), invalidating a portion of the municipal water law, or in Ecology's policy guidance GUID - 2030 (Exhibit 1 hereto) has changed this portion of the law.

B. Water Right Documents Related to Certificate No. 6821.

On December 3, 1956, the City filed its first known application (No. 14152) for a water right permit with one of Ecology's predecessors, the Department of Conservation and Development. The City requested 5 cubic feet per second ("c.f.s."). The application states that the supply was intended for "an estimated population of 5000 in 1965."

On March 7, 1957, Ecology's predecessor completed its Report of Examination ("ROE") in which it noted an annual quantity requirement of 1120 acre feet per year. This 1120 acre foot annual requirement was calculated entirely based upon estimated population by 1965: "The water requirement of this municipality of 5000 persons is calculated on each person using an

average of 200 gallons a day¹ and 0.224 acre-feet a year, or a total of 1120 acre-feet a year for 5000 persons, less any amount diverted under the vested right.”

On April 15, 1957, a permit was issued to the City for “the amount which can be beneficially applied and not to exceed 5.0 cubic feet per second.” Upon submission of a proof of appropriation following completion of construction, on May 29, 1957, a certificate was issued for 5.0 c.f.s. (Certificate No. 6821, Exhibit 2 hereto). The certificate was not limited on an annual basis. Certificate No. 6821 authorizes up to “5.0 cubic feet per second for municipal supply to supply the city of Lynden, Washington.”

C. Analysis of Certificated Right No. 6821

There is no annual quantity limitation associated with the 5.0 c.f.s. right in either the permit or the certificate. While it is true that the ROE states a water requirement of 1120 acre feet per year, by its own terms, this notation is based entirely on a projected population of 5000 persons requiring municipal supply. RCW 90.03.260(5) now makes clear that this reference to population is not a limitation on the City’s water right:

However, for a municipal water supplier that has an approved water system plan under chapter 43.20 RCW or an approval from the department of health to serve a specified number of service connections, the population figures in the application or any subsequent water right document are not an attribute limiting exercise of the water right as long as the population to be provided water under the right is consistent with the approved water system plan or specified number.²

RCW 90.03.260(5). The only reference to annual quantity appears in the ROE, which by its own terms, is based entirely upon a population estimate. Also, a certificated water right for municipal supply purposes issued based on a “pumps and pipes” policy is now recognized as a “right in good standing.” RCW 90.03.330(3).

Lynden’s permit and certificate are for 5.0 c.f.s. and contain no annual quantity limitation whatsoever. Because RCW 90.03.260(5) now makes clear that “population figures in the application or any subsequent water right document are not an attribute limiting exercise of the [municipal] water right” and because the reference to annual quantity in the ROE is tied strictly to population, there should be no additional annual quantity limit associated with the City’s right to 5.0 c.f.s. beyond its annualized quantity of 3,620 acre feet per year.

¹ The City's approved 1999 Water System Comprehensive Plan calculated a daily of 300 gpd/unit.

² The population to be provided with water under the water right is 5000. Because Lynden’s water system plan is approved to serve more than that, the right to serve 5000 is consistent with a water system plan.

D. Summary - Conclusion

The City's first permit and certificate for 5.0 c.f.s. contained no limitations on annual use. Under its first certificate for 5.0 c.f.s., the City has a sufficient right to meet its present and near-term quantity needs. Five (5.0) c.f.s. on an annualized basis would equal approximately **3,620 acre-foot annual quantity** under the first water right certificate alone. The legislature acknowledges in RCW 90.03.260(5) that population figures in water right documents are not limiting factors in those rights so long as a City is in compliance with the connections authorized in its comprehensive water system plan. Moreover, a certificated water right for municipal supply purposes issued based on a "pumps and pipes" policy is now recognized as a "right in good standing." RCW 90.03.330(3). RCW 90.03.260(5) and RCW 90.03.330(3) will support the City's position on the scope of water right Certificate No. 6821 in any adjudication thereof. This would resolve the City's purported water right shortfall. At 3620 acre feet per year, Certificate No. 6821 alone will satisfy the City's water demand.

2. West Farm Right

This right originates from a water right application filed on November 16, 1925 by the Whatcom County Dairymans Association (predecessor to Darigold or West Farm Foods) to authorize the diversion of water from Fishtrap Creek to supply its dairy facility in the City of Lynden. The state supervisor of hydraulics (predecessor to Ecology) issued a water right certificate for 1.55 c.f.s. The diversion from Fishtrap Creek was approved by the City of Lynden under Ordinance 186 (*See Attachment 4 of Exhibit 3 hereto*) in December 1920, which authorized the diversion and pumping plant to provide water to the milk products plant located in the City of Lynden, which remains to this day.

Over time, this water right was transferred to the City of Lynden, which began supplying water to the facility.³ The transfer was formally recognized in the transfer documents signed and recorded by the parties in 2005. An analysis of this certificated right by Mr. Tom McDonald, along with supporting documentation is attached hereto. (*Exhibit 3 hereto*). The 1.55 c.f.s. produces an annualized quantity of water of **1,122 acre feet per year**.

3. Combination of Certificate No. 6821 and West Farm Right.

Between the first certificated right (Certificate No. 6821) authorizing 3620 acre feet per year and the West Farm water right authorizing 1,122 acre feet per year, the City has water rights for up to 4,742 acre feet per year. In other words, these two rights can meet Lynden's projected annual demand of 4480 acre feet per year for a population of 20,120, as set forth in its 2009 Water System Comprehensive Plan. This does not take into account the City's interpretation of its

³ The logic of this transfer is inescapable. To argue otherwise requires an assumption that the parties intended to abandon a lawful water right for a major industrial consumer. This makes no sense and was not the intent of the parties, as the subsequent transfer documents attest.

second and third certificated water rights (Nos. 8986 and S1-21540, respectively) which afford even more water rights to Lynden.

4. Application No. 17613 (leading to second certificate – No. 8986).

In 1962, the City filed Application No. 17613 for a new water right permit for 15 c.f.s. The point of diversion proposed in the application is the site of the current point of diversion, which is described as 540 feet north of S.E. corner Sec. 20, Township 40 North, Range 3 East, W.M. The application states:

To supply the city or community of Lynden, Whatcom County, having a present population of 2575 and an estimated population of 5,000 in 2000. Estimated present requirement 5 c.f.s.

The ROE for Application No. 17613 was issued December 10, 1962. The ROE acknowledges the new intake structure being constructed on the south bank of the Nooksack River (City's current intake). In the "Special remarks and provisions" section, the ROE states as follows:

The City of Lynden is construction [sic] a new water intake structure on the Nooksack River. This structure is designed to ultimately supply 15 c.f.s. to the city but immediate construction will provide for 7.78 c.f.s. of this total. Of this amount 5.0 c.f.s. is covered under the existing certificate with 10 c.f.s. to be provided under this application. Thus, the immediate development under this application will divert only 2.78 c.f.s. with the balance diverted in the future through the addition of pumps.

(emphasis added). Based on an anticipated population of 5,000 by the year 2000, it was recommended that a permit be issued for an annual withdrawal amount of 1,680 acre feet. The ROE for Application No. 17613 concludes:

In accordance with section 90.03.290 RCW, I find that there is water available for appropriation from the source in question and that the diversion proposed in the application will not impair existing rights or be detrimental to the public welfare. Therefore, permit should issue as recommended above, subject to existing rights and indicated provisions.

A permit (Permit No. 13237), and following proof of appropriation a certificate (Certificate No. 8986, Exhibit 4 hereto), were issued under this application in the amount of 1680 acre feet of water per year.

The limitation in the permit and certificate were a direct result of the city's pumping capacity at the time of the application. The ROE notes that the structure is designed to supply 15 c.f.s. The only reason the permit was not issued in the full amount requested at the time was because the

necessary pumping capacity had not yet been constructed. However, the ROE expressly states that the City will receive additional permits under Application 17613, up to an additional 10 c.f.s., once the City is able to divert that additional water. This is clear from the portion of the ROE previously bolded: *“Of this amount 5.0 c.f.s. is covered under the existing certificate with 10 c.f.s. to be provided under this application. Thus, the immediate development under this application will divert only 2.78 c.f.s. with the balance diverted in the future through the addition of pumps.”* ROE, Application No. 17613, p. 1 (emphasis added).

In short, in the ROE for Application No. 17613, it states that additional permits will be granted under the application upon completion of the construction enabling diversion of up to a total of 15 c.f.s. (an additional 10 c.f.s.). The City has now completed that construction and added the aforementioned pumps. The City has actually diverted and used water from the completed facilities. Therefore, under Application No. 17613, the City should be issued a permit reflecting actual construction of the intake structure and pumps and a certificate reflecting perfected use.

The City is currently able to pump at least 11.4 c.f.s., which if annualized would allow 8,249 acre feet per year. A water right permit in the amount of 8,249 acre feet per year would recognize this pumping capacity year-round. According to the Public Works Department, the City has actually used up to approximately 2,800 acre feet per year with its present intake and pumps. Therefore, a water right certificate should be issued to the City (under Application No. 17613) for 2800 acre feet per year, pursuant to RCW 90.03.330(4).

5. Third Certificated Right (Certificate S1-21540C).

The third certificated water right was issued with an error pertaining to per capita consumption. The right to which the City is entitled under the third certificate is not an additional 112 acre feet as stated in the certificate, but an additional 1008 acre feet per year, based on Ecology's understanding that the first two water rights are limited to 1,680 afy (see footnote 4).

<u>Application</u>	Filed April 1974; requested 15 cfs for about 11,000 residences and "estimated population in 20 years" of 8,000 - "growing city requires more water."
<u>Report of Exam</u>	Issued October 1975; recommended 5 cfs and 112 additional acre feet. The 112 acre feet was based on a water duty of 200 gpd per capita for population of 8,000 people in 1980. Reported that diversion facilities were expected to increase.
<u>Certificate</u>	Issued for 1.77 cfs, 112 afy

(Exhibit 5 hereto) Although the certificate represents a water right in good standing, a water right holder may agree with the Department to revoke a certificate and place a water right back in permit. Additionally, the right may be corrected for ministerial errors. The water right represented by certificate S1-21540 was based on erroneous information and miscalculated the quantities granted to the City. The right is erroneously based on 200 gpdc. This conclusion is based on the following information.

- In granting right No. 8986 in 1963, the Department of Conservation found that the City's water right should be based on a demand of 300 gpdc. This water duty was determined by the current population of approximately 2,500. Although the City had an existing right that was analyzed based on 200 gpdc, this second right was analyzed for the total current and future population of 5,000 at 300 gpdc or 1,680 afy.⁴
- From 1963 to 1974, there is evidence that the per capita use did not change. The 300 gpdc was based on a large commercial demand. The commercial requirements have only increased over the years. In 1974, when the application was filed, the City had this information:
 - (a) In the 1960s, the largest commercial enterprises were Lynden Frosted Foods, Cascade Cold Storage, and Darigold (1969 Water Study).
 - (b) Commercial use expected to increase (1969 study). (In approximately 1980, a vegetable processing line was added and Darigold began use of water for its powdered milk operation (1982 Plan)).
 - (c) In the 1969 study and 1973 Comp. Plan Addendum, the water usage and populations show 300 gpdc as still accurate number.
1970 diverted and treated 327 mg = 320 gpdc based on 1970 population of 2,800.
Using same population of 2,800 (although likely less):
In 1968, the City diverted and treated 294 mg = 287 gpdc; and
In 1969, the City diverted and treated 312 mg = 305 gpdc.
(In 1995, the City diverted and treated 813 mg, with a population of approximately 7,400 = 300 gpdc.)
 - (d) The commercial growth was expected to increase at the same rate as residential growth (1969 study).

⁴ It is the City of Lynden's position that water right No. 6821 is for 5 cfs and not limited to an annual quantity. The City's agreement to reissue a permit on S1-21540 does not waive any arguments regarding the extent of water right No. 6821.

- (e) The City planned for system improvements consistent with the expected growth and water demand (1973 Addendum and 1/18/74 letter).
- (f) The estimated 1990 maximum day demand was 5.4 mgd (1969 Plan). This is equivalent to 2.7 mgd average, using a 2 to 1 factor for peak, or 3.6 mgd average, use a 1.5 to 1 peaking factor (1982 plan shows a 1.5 to 1 is likely and showed peaking of 7 to 8 mgd).

In 1974, the City applied for the third application. If in 1974 the City used the conservative 2 to 1 peaking factor, the City's estimate of 2.7 mgd average requirements for 1990 is equivalent to 3,025 afy (approximately 300 gpdc for a 9,000 population).

- (g) In 1976, the NPDES notice states the Water Treatment Plant processes 3 mgd or 3,360 acre feet.

The determination of population is difficult in the records because it appears that some records may reflect the population of the City of Lynden and not necessarily the population of the "Service Area." Lynden, in addition to serving the demand within the City, was serving approximately 200 in small water associations, and many commercial uses outside the City. This may account for the discrepancy in the application of the water right (11,000 residences; population 8,000).

The best information shows that in its 1973 application, Lynden had the information to reasonably estimate for a population of 8,000 within 20 years (by 1994) and 11,000 by 2000. The best figure we have is in the population projection for the service area from 1980-2000 provided in the 1982 water plan. The plan, Figure 3, shows that with a 4.0% growth, the 1994 population would be approximately 8,000. The population in 2000 would be approximately 10,500. The growth rate of 4.0% is very close to accurate because the 1999 plan that shows a 1995 actual population of 7,315 and a 2000 estimated population of 10,660.

These are consistent with the 1969 plan that estimated a 1990 population of 6,500 for the "City of Lynden." A 4.0% per annum increase would put the 1995 population at just over 7,900. (The 1982 Plan showed a 1990 population of 7,050 based on the 4.0% growth rate.)

The final conclusion is that the City of Lynden, in applying for the third water right, knew it needed significant increases in water supply, and at a minimum, estimated water needs for a 8,000 population. The water usage figures in 1974, at the time the application was filed, still showed approximately 300 gpdc. Mr. West for Ecology simply erred in multiplying 200 gpdc rather than the 300 gpdc that Ecology had already accepted. At 300 gpdc, the total City need was 2,690 afy.

Therefore, the third water right should have been issued for **1,008 afy** (not 112 afy) based on Ecology's understanding that the first two water rights are limited to 1,680 afy (see footnote 4).

6. Conclusion

The water rights table in the City's Water System Plan is simply additive and is accurate based on quantities listed in certificated water rights. The City's positions set forth herein may result in slightly different numbers (higher or lower), based on a deeper analysis of each particular water right. Under either approach, however, the City's water rights are sufficient to accommodate the highest forecast population growth during the planning period.