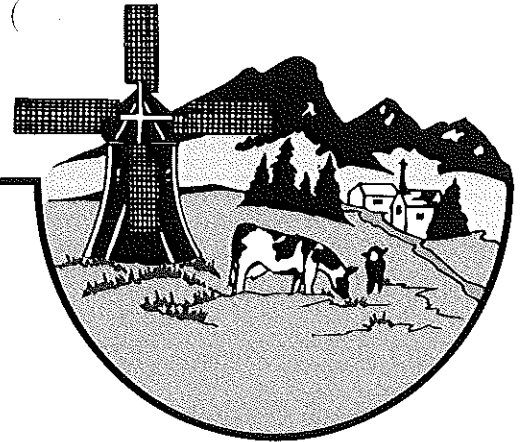


Mayor
Jack Louws

CITY OF LYNDEN



Council Members:
Doug Adelstein
Dave Burns
Gary Bode
Ron De Valois
Gerald Kuiken
Nick H. Laninga
Gary A. Vis

323 Front Street
Lynden, Washington 98264
(360) 354-4270
FAX (360) 354-5749

City Administrator
Bill Verwolf

January 21, 2004

Jim Bucknell
Department of Ecology
Bellingham Field Office
1204 Railroad Avenue, Suite 200
Bellingham, WA 98225

RE: City of Lynden Water Rights and
Water System Plan 2000 WSP Submittal #95-0511

Dear Mr. Bucknell:

Enclosed please find copies of the following signed items:

- Letter to Department of Health from Linda Hoffman, Interim Director of the Department of Ecology;
- Memorandum of Agreement between the Department of Ecology and the City of Lynden

Should you have any questions, please do not hesitate to call me at 360-354-1170.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bill Verwolf', written in a cursive style.

Bill Verwolf
City Administrator

Enclosures

RECEIVED
JAN 22 2004
DEPT. OF ECOLOGY
BELLINGHAM FIELD OFFICE



MEMORANDUM OF AGREEMENT

This Memorandum of Agreement ("MOA") is entered into by and between the Washington State Department of Ecology ("Ecology") and the City of Lynden ("Lynden") in consideration of the mutual promises and covenants contained herein.

ARTICLE 1. PURPOSE AND INTENT

Lynden and Ecology desire to work together to develop a water supply strategy for Lynden that provides water for current and future growth as projected in Lynden's historical and existing municipal Water Supply Plan and its Comprehensive Plan adopted under the Growth Management Act. 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 differing interpretations of Lynden's existing water rights. The purpose and objective of this water supply strategy will be to provide sufficient water supply for Lynden's next 20 years growth, and at a minimum to provide water sufficient to meet near-term growth. The Parties acknowledge that they may have differences in interpreting Lynden's existing water rights and that this MOA does not seek to resolve such differences. Instead, this MOA provides a plan designed to obtain a reliable water supply for Lynden which both Parties agree are sufficient to meet its current and future growth obligations, and to do so in a mutually cooperative environment.

ARTICLE 2. BACKGROUND

In entering into this agreement, the Parties acknowledge the following background:

- The City of Lynden requires approximately 7.13 cubic feet per second ("cfs") and 2400 acre-feet per year ("afy") of water to meet current demand. As projected in its current Water Supply Plan, Lynden will require approximately 16.30 cfs and 5490 afy for 20-year's growth.
- In 1999, Lynden developed its current Water Supply Plan for the State Department of Health. At this time, Ecology reviewed Lynden's water rights and concluded that Lynden was exceeding the annual quantity limitation of its rights.

- In 1999, to maintain the status quo while resolving the water supply issue, Lynden imposed a subdivision moratorium which has remained in effect until now. The Parties disagree as to the status of Lynden's current water rights.
- Lynden has taken substantial conservation efforts over the past several years to limit its water use. These efforts, in addition to imposing the moratorium, include: (1) block rate utility billing for water use; (2) two raises in water rates to encourage conservation; (3) a surcharge on water delivered outside Lynden's normal service area; (4) testing the City's entire water system for leaks and repairing those leaks; (5) a program of odd-even day lawn sprinkling during summer months; and (6) reducing the frequency of fire hydrant flushing. Lynden intends to continue to aggressively pursue conservation measures.
- The moratorium has led to economic hardship for the City of Lynden, including a skewed housing market with few remaining lots available for development.
- The Parties recognize that Lynden is a growing community and that it will continue to grow consistent with its urban growth plan and the Growth Management Act.
- The Parties recognize that conservation efforts alone will not address Lynden's long-term water needs and that, under any interpretation of Lynden's current water rights, additional water is still needed to meet the 20-year projected demand.
- Because of the Parties' interest in pursuing and achieving a Long-Term Solution to Lynden's water supply needs, the Parties agree that the benefits of pursuing a long-term solution as outlined in this MOA outweigh pursuing litigation to resolve differing interpretations of Lynden's water rights.
- Lynden is near completion in construction of a \$10,000,000 upgrade to its wastewater treatment facility to comply with state and federal requirements. The City has also embarked on a \$6,000,000 water tank and infrastructure upgrade. Both of these projects are necessary for Lynden to provide water and wastewater treatment to its citizens. Lynden's debt repayment schedule on these improvements and upgrades anticipate new development to pay for the share of these costs directly related to projected population increases as required by the Growth Management Act. The continuation of the subdivision moratorium would cause an undue burden on existing rate payers who would have to pay these growth-related expenses without the expanded rate base that growth would provide.

**IN CONSIDERATION OF THE ABOVE UNDERSTANDING OF THE
PARTIES, ECOLOGY AND LYNDEN AGREE AS FOLLOWS:**

ARTICLE 3. DEFINITIONS

- 3.1 "Growth Management Act." Chapter 36.70A. RCW.
- 3.2 "Long-Term Solution." A reliable water supply solution that provides Lynden with the ability to meet current and projected future growth demands for the next twenty (20) years as set forth in its approved comprehensive plan adopted pursuant to the Growth Management Act and its water system plan.
- 3.3 "Party" or "Parties." Ecology and/or Lynden individually or together.
- 3.4 "Subdivision(s)." Subdivisions, short subdivisions, or planned residential developments.
- 3.5 "Health MOU". The Memorandum of Understanding between Ecology and Health allowing for Ecology's review of water rights in connection with supply plans submitted to Health for approval.

ARTICLE 4. ACTIONS

There are several options to research and pursue for Lynden's Long-Term Solution. These include obtaining a new water right, purchasing and transferring an existing water right(s), and obtaining water from other municipal utilities. The goal of the Parties is to have the Long-Term Solution in time for it to be incorporated in the final approval of Lynden's 2006 water system plan.

The Parties recognize that a primary potential Long-Term Solution to Lynden's water rights issues is to obtain water from Bellingham ("Bellingham Option"). The Bellingham Option was considered in a white paper dated May 24, 2000. This white paper was prepared by Ecology for Lynden and discussed the water rights issues and water supply options. Lynden has had an ongoing series of discussions with Bellingham regarding its potential acquisition of water. Bellingham and Lynden commissioned a joint report by RH2 Engineering, Inc. entitled, "City of Lynden Water Source Options Feasibility Report," completed in April 2003. This report identifies acquisition of water from Bellingham as the primary Long-Term Solution to Lynden's water right issues. Ecology and Lynden understand that Bellingham's participation as a willing partner in pursuit of the Bellingham Option under this MOA is vital. Therefore, Ecology and Lynden are committed to working with Bellingham

to arrive at a mutually agreeable water supply plan for all entities, realizing that Bellingham has the right to approve or disapprove of any proposed action pertaining to its water rights. Lynden and Ecology's efforts in this regard are provided below in paragraph 4.1.2.

Lynden's other options for a Long-Term Solution include obtaining a new water right under pending water right applications, the transfer and change of other existing water rights, and the use of reclaimed water. Some of these options may be elements of the "Bellingham Option" described above. To the extent these options are not elements of the "Bellingham Option," Lynden and Ecology will pursue these options as described below in paragraph 4.1.3.

4.1 Action Items

4.1.1 The Parties will meet in January 2004 for the first of the quarterly meetings provided in Article 5, Management. In addition to the tasks identified below, an important purpose of the January 2004 meeting is to discuss planning and implementation of the following:

- a communication strategy;
- contacting and informing tribal governments;
- contacting and informing WRIA participants;
- evaluation of funding alternatives;
- meeting(s) with other parties;
- identification, evaluation, and pursuit of other options as needed or desired.

4.1.2 The Bellingham Option will be evaluated as the priority option for the first nine (9) months of this MOA. A detailed description of the Bellingham Option and a final document should be presented to Bellingham for its consideration and approval no later than one (1) year from the date of this MOA.

- Working with Bellingham, Ecology and Lynden will identify options and paths for achieving the Bellingham Option.
- In January 2004, Lynden and Ecology will meet to review the options identified and to identify tasks and establish timeframes.

- Ecology will schedule a meeting with Bellingham and Lynden within the first quarter of 2004.
- Ecology and Lynden will seek to have information gathered and cost and feasibility analysis completed on the Bellingham Option by July 2004.
- Lynden and Ecology will seek to have any further studies and analysis of the Bellingham Option completed in September to November 2004.

4.1.3 Alternative Long-Term Solutions shall be identified and pursued.

- In the January 2004 meeting, Lynden and Ecology will develop alternative options to the Long-Term Solution and will develop a schedule for collecting the information regarding each alternative.
- The alternative options include:
 - a. further consideration of Lynden's water rights;
 - b. reclamation as direct supply and/or for mitigation;
 - c. processing existing applications, including consideration of mitigation water from other sources and Lynden's discharge of water from its treatment plant;
 - d. identification and implementation of potential water right transfers as direct supply and/or for mitigation;
 - e. new groundwater rights for direct supply and/or for mitigation;
 - f. other mitigation options.

These options may be explored and implemented at any time, including concurrently with the Bellingham Option.

- At each of the quarterly meetings, as provided in Article 5, Management, Lynden and Ecology will assess the information collected regarding the alternative options.

- Should the Bellingham Option prove infeasible, Lynden and Ecology will pursue the alternative options in a priority that will be determined based on the assessment of the information collected regarding each alternative option.

4.1.4 Lynden will prepare a report summarizing its previous conservation measures and achievements and will continue to explore additional conservation measures.

4.1.5 Upon execution of this MOA, Ecology will submit a letter to the Washington Department of Health substantially in conformance with Exhibit A. Based upon communications with the Department of Health ("DOH"), the Parties fully expect that this letter will result in removal of the four specific water rights-related conditions placed on Lynden's water system plan approval. In the event that removal of said conditions is not immediately forthcoming, Ecology will work with DOH and Lynden in an attempt to resolve any remaining issues and accomplish this objective.

4.2 Guiding Principles

4.2.1 Ecology and Lynden will together pursue the most promising option(s) to achieve a Long-Term solution to Lynden's existing water rights issues. In determining which options are most promising, the Parties will consider the following nonexclusive list of factors: likelihood of success and feasibility; quantities and instantaneous flow made available; effect on in-stream flows; effect on other right holders; cost of delivery; and time required to achieve solution.

4.2.2 Ecology and Lynden will, as a priority, seek to work with Bellingham as a primary long-term source of water for Lynden.

4.2.3 In working with Bellingham, the Parties will consider options available for using Bellingham's water supply, including without limitation, a direct supply from Bellingham's system, conveyance of Bellingham water through the Nooksack River to Lynden's existing diversion point, and delivery of mitigation water for a new water right issued to Lynden.

4.2.4 The Parties will systematically evaluate and actively explore alternative means of delivering water, cost of delivery, mitigation uses, flow enhancement potential, and benefits to third parties.

- 4.2.5 Nothing herein limits the Parties from reassessing priorities or exploring any and all other options, including options not presently contemplated.
- 4.2.6 Upon agreeing on a Long-Term Solution and obtaining the necessary commitments from any other entities to implement the solution, the Parties shall implement the solution as necessary to obtain all necessary final decisions and commitments. These may include and require approval from the Lynden City Council and Ecology processing and approving any necessary water right applications subject to the laws and rules that apply to the processing of water right applications.
- 4.2.7 The Parties shared goal is to finalize and complete a Long-Term Solution in time for the final approval of Lynden's 2006 water system plan, and the Parties intend to make the effort required to achieve this goal. However, failure to achieve a Long-Term Solution within this time period will not result in automatic termination of this MOA. This MOA shall continue in effect until terminated in accordance with Article 6.

ARTICLE 5. MANAGEMENT

Lynden and Ecology shall commit their staff and legal counsel to developing the options toward reaching a Long-Term Solution to Lynden's existing water rights issues. It is intended that to the extent feasible, staff and legal counsel for the Parties shall work together effectively, efficiently, and in good faith to coordinate planning, strategy and execute mutual decisions. Lynden and Ecology will meet quarterly during the term of this MOA, or more frequently if necessary. At quarterly meetings, Lynden will provide updated reports of its water consumption and identify desired resource commitments needed from Ecology. In carrying out this MOA, Ecology will work with Lynden in applying for any available funds to pursue and/or implement a final Long-Term Solution. Otherwise, each Party shall bear its own staff, attorney, and consultant costs.

ARTICLE 6. DISPUTE RESOLUTION - TERMINATION

- 6.1 Any dispute arising out of the terms and conditions of this MOA shall first be subject to the following process. If a dispute shall arise, a meeting shall be held promptly between the Parties to attempt in good faith to negotiate a resolution to the dispute. For purposes of this Section 6.1, "promptly" shall mean within fourteen (14) calendar days of a Party requesting a meeting to resolve a dispute. If within sixty (60) days after such meeting the Parties have not succeeded in resolving the dispute, notice of termination may be issued by

either Party in accordance with Section 6.2. Following termination, any remaining disputes arising out of the terms and conditions of this MOA may be resolved in accordance with Section 7.7 herein.

- 6.2 This MOA shall remain in effect until the Parties mutually agree in writing that its purpose has been achieved or until it is terminated by either Party. This MOA may be terminated by either Party for unresolved disputes as provided in Section 6.1 or if it becomes apparent that securing the objectives of this MOA as expressed in Article 1, are not reasonably feasible. Notice of any termination shall be in writing and shall be effective thirty (30) days following receipt.

ARTICLE 7. GENERAL PROVISIONS

- 7.1 For so long as this MOA is in effect, Ecology will not exercise its discretion to take water right enforcement/legal action against Lynden nor shall it recommend denial or conditioning of any Lynden water system plan on grounds of insufficient water rights. Nothing herein shall prevent the Parties from jointly initiating litigation by mutual agreement to resolve discrete issues.
- 7.2 To the extent permitted by law, each Party shall indemnify, defend and hold the other Party, its officers, agents and employees harmless from all suits, claims or liabilities of any nature, including attorney fees, costs and expenses, for or on account of injuries or damages sustained by any person or property resulting from the negligent acts or omissions of and to the extent harm is caused by the first Party, its agents or employees in connection with the first Party's performance under this MOA.
- 7.3 All notices and other communications required or permitted to be given by this MOA must be in writing and must be given and will be deemed received if and when either hand delivered, faxed or mailed to:

CITY OF LYNDEN

City Administrator
City of Lynden
323 Front Street
Lynden, WA 98264

DEPARTMENT OF ECOLOGY

Manager – Bellingham Field Office
Washington Department of Ecology
1204 Railroad Avenue
Bellingham, WA 98225

or to such other address as the Parties hereto may from time-to-time designate in writing and deliver in a like manner. Facsimile transmission of any signed original document and retransmission of

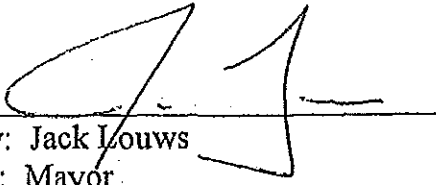
any signed facsimile transmission shall be the same as delivery of an original document.

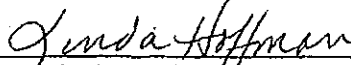
- 7.4 Failure of either Party at any time to require performance of any provision of this MOA shall not limit such Party's right to enforce such provision, nor shall any waiver of any breach of any provision of this MOA constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.
- 7.5 If any term or provision of this MOA or the application thereof to any person, entity or circumstance shall to any extent be invalid or unenforceable, the remainder of this MOA and the application of such term or provision to persons, entities or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term or provision of this MOA shall be valid and enforceable to the fullest extent permitted by law.
- 7.6 The laws of the State of Washington shall govern any disputes arising under this MOA.
- 7.7 Subject to section 6.1 herein, any disputes arising out of the terms and conditions of the terminated MOA may be adjudicated. Any legal cause of action shall be adjudicated in the Superior Court for Whatcom County, Washington, unless otherwise agreed.
- 7.8 This MOA constitutes the entire agreement between Ecology and Lynden as to the matters contained herein. This MOA may be modified in writing only, upon mutual agreement of the Parties.

Dated this 28th day of January, 2004.

CITY OF LYNDEN

DEPARTMENT OF ECOLOGY


By: Jack Louws
Its: Mayor


By: Linda Hoffman
Its: Interim Director

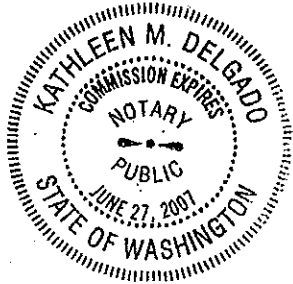
Approved as to form:

Robert A. Cell
City Attorney

STATE OF WASHINGTON)
) ss.
COUNTY OF WHATCOM)

I certify that I know or have satisfactory evidence that Jack Louws is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Mayor of the City of Lynden to be the free and voluntary act of such Party for the uses and purposes mentioned in the instrument.

Dated this 26th day of January, 2004.

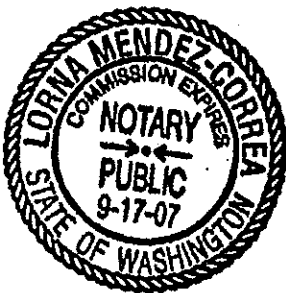


Kathleen M. Delgado
Print Name: KATHLEEN M. DELGADO
NOTARY PUBLIC in and for the
State of Washington.
My commission expires: 06-27-07

STATE OF WASHINGTON)
) ss.
COUNTY OF Thurston)

I certify that I know or have satisfactory evidence that Linda Hoffman is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the Interim Director of the Washington State Department of Ecology to be the free and voluntary act of such Party for the uses and purposes mentioned in the instrument.

Dated this 15th day of January, 2004.



Lorna Mendez-Correa
Print Name: Lorna Mendez-Correa
NOTARY PUBLIC in and for the
State of Washington.
My commission expires: 9-17-07

