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**To: Whatcom County Council**  
**From: Robert Carmichael and Bridget Bryck**  
**Date: May 23, 2025**  
**Subject: Proposed New Countywide Planning Policy #7**

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Discussion surrounding Proposed Countywide Planning Policy No. 7 has repeatedly and disproportionately focused on the City of Lynden (“City” or “Lynden”), with ongoing questions raised about the City’s ability to meet future water demand. Both this Council and the Whatcom Environmental Council (WEC) have requested that Lynden demonstrate the sufficiency of its water rights to support projected growth.

On April 7<sup>th</sup>, the City responded to these concerns in a memo accompanied by its Department of Health-approved 2019 Water System Plan (WSP), the 2004 Memorandum of Agreement (MOA) between the City and the Washington State Department of Ecology (Ecology), and several other supporting documents. These materials demonstrate not only the adequacy of Lynden’s existing water rights but also the City’s commitment to innovative water solutions. On April 14, the City submitted additional documentation, including a more detailed explanation of its water right self-assessment, reaffirming its capacity to support planned future growth. That same day, WEC submitted a follow-up comment, again questioning the City’s water rights and requesting that this Council make determinations regarding the validity of the City’s municipal rights.

This comment responds to WEC’s April 14<sup>th</sup> comment. Specifically, we disagree with WEC’s assertions that Lynden’s submitted documents fail to demonstrate water availability and that Ecology should confirm water rights before a city may plan for growth. We also clarify the City’s understanding of the 2004 Memorandum of Agreement (“MOA”) between Lynden and Ecology.

**1. Lynden’s water rights as described in its WSP are sufficient to accommodate future growth through the next 20-year planning cycle.**

WEC asserts that Lynden’s WSP and related documents provided to Council do not establish that Lynden has sufficient water available for build out under the updated comprehensive plan.<sup>1</sup> We disagree.

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<sup>1</sup> WEC’s April 14<sup>th</sup> comment implies a discrepancy between projections in Res. 2025-011 and the 2019 WSP. This is because the 2019 WSP was approved in 2020, and the 2025 Resolution projects population through 2045, while the WSP projects population through 2040. We in no way suggest that the 2019 WSP is based on population allocations approved by the County Council in 2025. We included reference to the 2014 multi-jurisdictional resolution (Resolution No. 2014-013) to demonstrate that a comparable increase in Lynden’s population is anticipated during this planning cycle as was anticipated in the previous planning cycle and to inform Councilmember’s interpretation of the provided tables. Lynden’s 2019 WSP was developed using a projected service population of 21,082 people (20,789 within city limits and 293 outside) by 2040.

As of Lynden’s 2023, population was 16,696 people.<sup>2</sup> Resolution No. 2025-011 is the non-binding multi-jurisdictional resolution regarding population, housing and employment allocations approved by the County Council to inform the 2025 Comprehensive Plan, which allocated a population increase of 6,665 people to Lynden. Lynden also serves 293 people outside of its City limits not accounted for in the population projection. This means that the total projected population to be served by Lynden’s water system in 2045 is 23,654 people.

	POPULATION (SERVED BY LYNDEN SYSTEM)	INSTANTANEOUS RIGHTS/ MAXIMUM DAILY DEMAND*	ANNUAL RIGHTS/ ANNUAL DEMAND*
<b>CITY’S WATER RIGHTS INTERPRETATION</b>		10,044 gpm	7,015 afy
<b>2018 DEMAND</b>	14,374	3,441 gpm	2,235 afy
<b>PROJECTED 2040 DEMAND (2019 WSP)</b>	21, 082	4,650 gpm	3,995 afy
<b>PROJECTED 2045 (RES. 2025-011)</b>	23,654	5,114 gpm	4,679 afy

\* Based on demand without conservation estimates found in Chapter 6 of Lynden’s 2019 WSP

\*\* These numbers were not calculated by an engineer. These estimates were calculated for this comment to reflect a proportionate increase in maximum daily demand and annual demand based on the forecasted population increase from the 2040 population (projected in the 2019 WSP) to the projected 2045 population (based on population allocations in Res. 2025-011).

From 2018 to 2040, the population was projected to increase by 6,708 people (from 14,374 to 21,082). The projected population increase from 2040 to 2045 is 2,572 people (from 21,082 to 23,654), which represents approximately 38% of the 2018–2040 increase. Therefore, the 2018–2040 increase in maximum daily demand (1,209 gpm) and annual demand (1,760 AFY) were multiplied by 0.38 to estimate the additional demand attributable to growth between 2040 and 2045, which was then added to the projected 2040 demand and is reflected in the 2045 estimated demand.

As shown in the table above, Lynden has sufficient water rights to meet estimated demand through 2025.

## 2. Ecology is not the final arbiter of legal water rights.

WEC insists it is not seeking an adjudication, yet its April 14 letter urges the County to make determinations about the validity of water rights, which is precisely the function of adjudication. WEC claims it merely seeks confirmation that rights are “available” to support growth, but Lynden has already provided planning documents demonstrating adequate water supply under its WSP. Neither Lynden’s DOH-approved WSP nor the draft Whatcom County Coordinated Water System Plan (CWSP) indicate that Lynden lacks sufficient water rights to accommodate projected growth.

Despite this, WEC contends the County must verify that Ecology agrees with Lynden’s self-assessment of its water rights.<sup>3</sup> This request misplaces adjudicatory authority to determine the validity of water rights

<sup>2</sup> Population and Employment: Growth Projections and Preliminary Allocations Technical Report, Leland Consulting Group (May 22, 2024).

<sup>3</sup> The April 14<sup>th</sup> letter from WEC appears to cast doubt on Lynden’s water right self-assessment. We would like to clarify that water rights self-assessments are neither optional nor informal, but rather a regulatory requirement. Under WAC 246-290-100(4)(f)(iv), purveyors are required to include a water right self-assessment as part of the water resource analysis in their WSP.

with Ecology, rather than with the superior courts. Washington courts have emphasized that Ecology is not the final arbiter of water rights. Instead, Ecology administers the water rights permitting system under RCW 90.03 and RCW 90.44.

“...broad enabling statutes are silent as to how Ecology is to determine water rights in a regulatory context. This silence is even more telling when compared to the elaborate general adjudication process for determining water rights entrusted to the superior courts by RCW 90.03. Nowhere in Ecology's enabling statutes was it vested with similar authority to conduct general adjudications or even regulatory adjudications of water [\*\*237] rights.” [\*Rettkowski v. Dep't of Ecology\*, 122 Wn.2d 219, 227, 858 P.2d 232, 236-37 \(1993\)](#) (See also *Pub. Util. Dist. No. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 794, 51 P.3d 744, 752 (2002), “It is true that neither Ecology nor the [Growth Management Hearings] Board has the authority to adjudicate water rights... in light of the fact that Ecology does not have the right to finally adjudicate water rights, its tentative determination as to whether a right has been abandoned or relinquished cannot be a final determination of the validity of the water right.”)

Further, Ecology is not responsible for ratifying local land use decisions. WEC urges the County to obtain confirmation from Ecology that it agrees with Lynden's asserted water rights before allocating additional population growth to the City. However, under Washington law, the County, not Ecology, is responsible for making land use decision that may affect ground water resources.<sup>4</sup> Moreover, the Growth Management Hearings Board (GMHB) has clarified that under the Water Resources Act of 1971 (chapter 90.54 RCW) and the GMA (chapter 36.70A RCW), the responsibility to assess water adequacy for land use planning lies with local governments, not Ecology:

“[I]t is the local government—and not Ecology—that is responsible to make the decision on water adequacy as part of its land use decision...” *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, Final Decision and Order at 23 (2014).

Finally, the fact that Ecology is itself the plaintiff in the WRIA 1 adjudication further underscores that it lacks the authority to unilaterally determine the validity or priority of a water right. If Ecology were authorized to conclusively determine the validity or priority of water rights, there would be no need for general adjudication. WEC's request would effectively bypass this process and assign Ecology a role that Washington law has expressly reserved for the courts.

### **3. The 2004 MOA has not been understood by the parties thereto as having a fixed termination date.**

WEC's insinuation that the 2004 MOA between Ecology and the City of Lynden automatically expired in 2024 is inconsistent with how both parties have operated under the agreement for the past two decades. The MOA includes no fixed expiration date. Section 6.2 expressly provides that:

“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

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<sup>4</sup> “Ecology is responsible for appropriation of groundwater by permit ... [while] the County is responsible for land use decisions that affect groundwater resources.” *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wn.2d 648, 681, 381 P.3d 1 (2016) (citing *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 180, 256 P.3d 1193 (2011)).

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.”

While the MOA contemplates a providing water for Lynden’s next 20 years of growth, this does not operate as a binding sunset clause. The City’s understanding is that the MOA remains in effect until the City and Ecology mutually agree that the City has secured sufficient water rights to meet then-current demand plus 20 years of projected future demand.

Until such agreement is reached or one party chooses to terminate the MOA pursuant to Section 6.1, the agreement remains in effect. Neither the City nor Ecology has taken any steps to terminate the MOA, and both have continued to operate in accordance with its terms.

#### **4. GMA goals and requirements disfavor urban growth moratoria.**

The MOA between Lynden and Ecology acknowledges that prohibiting growth in the City due to a perceived water supply issue has already been proven create severe economic hardship for the City of Lynden and its residents without achieving any meaningful water supply solutions. Imposing a growth moratorium based on unverified concerns about water availability contradicts the core objectives of the GMA. The Act directs local governments to plan for growth by concentrating it already urbanized areas.

As the Washington Supreme Court observed:

“The GMA concentrates future growth into urban growth areas. ... The Act seeks to minimize intrusion into resource lands and critical areas.”  
*Whatcom County*, 186 Wn.2d at 672.

Growth restrictions that displace development from cities will inevitably result in increased growth in rural areas, which would risk creating the kind of “uncoordinated and unplanned growth” the GMA was enacted to prevent. See *Hirst v. Whatcom County*, 186 Wn.2d 648, 681 (2016) (HN33; quoting RCW 36.70A.010).

#### **Conclusion**

Ecology plays a significant role in administering the state’s water resources, but it is not the sole authority on legal water rights or the validity of a city’s water supply claims. Courts and administrative bodies have repeatedly affirmed that local governments, not Ecology, are responsible for determining water adequacy in the context of growth planning under the GMA.