

WHATCOM COUNTY
Health Department
509 Girard Street
Bellingham, WA 98225



Regina A. Delahunt
Director

Environmental Health
Phone 676-6724

MEMORANDUM

TO: Mark Personius, Long Range Planning Manager

FROM: Kyle Dodd, Environmental Health Supervisor *KD*

RE: **Water Availability Review Process Supporting Documentation**

DATE: January 3, 2014

As stated in WCC 24.11.090(B)(3), and in other applicable sections, applications for water availability will only be approved in areas where the proposed well site does not fall within the boundaries of an area where DOE (Ecology) has determined by rule that water for development does not exist. The Growth Management Hearings Board, in its Final Decision and Order dated June 7, 2013, concluded that "Where the proposed groundwater withdrawal is located within a basin closed to new surface water appropriations, or where Ecology has set instream flows that are not consistently met, there is a presumption that no additional water is legally available."

As the local government agency tasked with approving water availability, the Whatcom County Health Department (WCHD) has been proactive in communicating with the Department of Ecology in an effort to ensure that we are making water availability decisions consistent with Ecology's interpretation of applicable water right rules and court interpretations. Since 2007, WCHD has routinely requested comments from Ecology related to water availability determinations and the legal use of exempt wells for development. Specifically, WCHD has requested Ecology feedback on proposed subdivisions that appeared to be one project in the context of the Campbell and Gwinn decision. In addition, Planning and Development Services has been requiring SEPA review for applicants of adjacent short plats. SEPA checklists are routed to Ecology for comments. Ecology has been helpful in providing water resource comments back, allowing WCHD to make water availability determinations based in part on Ecology guidance. The attached six exhibits (exhibits A-F) document water resource comments from Ecology in reference to the use of exempt wells for proposed projects in basins that are subject to the instream flows in WAC 173-501-030 and the surface water source limitations in WAC 173-501-040. The table below summarizes the projects referenced in the exhibits, the surface water drainage where they are located, and the status of that surface water source under WAC 173-501-040. There are no comments from Ecology in the attached exhibits indicating that water pursuant to the proposed permit-exempt withdrawal is not legally available due to the operation of Ecology's basin rule, or that WCHD should be requiring any additional information prior to approval of these sources.

Exhibit	Project	Surface water drainage	Status under WAC 173-501-040
A	Woodfern Cluster Long Plat	Anderson Creek	Partial year closure
B	Portal Way & Shen Industrial Plats	California Creek	Closed
C	Meridian Meadows Plat	Tenmile Creek	Closed
D	Seventh Heaven, West Hemmi Rd, and 3 rd Generation LLC's	Tenmile Creek	Closed
E	Jack & Trudy Lamoureaux	Tenmile Creek	Closed
F	Bertrand Creek Estates	Bertrand Creek	Closed

Attachments:

- Ex. A, Ecology letter dated November, 21, 2007 RE: Woodfern Cluster Long Plat
- Ex. B, Ecology letter dated February 19, 2009 RE: Portal Way and Shen Industrial Plats
- Ex. C, Ecology letter dated July 15, 2010 RE: Jeffery Grove (Meridian Meadows Plat)
- Ex. D, Ecology letter dated September 23, 2010 RE: Seventh Heaven LLC, West Hemmi Rd LLC, and 3rd Generation LLC
- Ex. E, Ecology letter dated December 14, 2001 RE: Jack and Trudy Lamoureaux
- Ex. F, Ecology letter dated March 8, 2011 RE: Bertrand Creek Estates

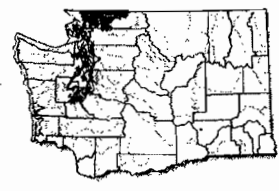
Ex. A



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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(360) 715/5200 • FAX (360) 715-5225

November 21, 2007



Your address is in the **Nooksack** watershed

Kyle Dodd
Whatcom Co. Department of Health
509 Girard St.
Bellingham, WA 98225

RE: **Project** Woodfern Cluster Long Plat
 Number LSS2006-00003

Dear Mr. Dodd:

Thank you for the opportunity to provide comments on the above referenced Long Plat.

Based on my review of the above referenced project and the information provided regarding the applicant's/owner's previous (2002) application materials for the original plat application for Sandy Ridge, we offer the following comments regarding water resources:

We consider the Woodfern Cluster Long Plat & the Sandy Ridge Long Plat to be a single project. As such, when calculating groundwater withdrawals, the proposed additional four homes (Woodfern Cluster) would be included with the existing six home (Sandy Ridge) project. RCW 90.44.050 allows for a total limit of 5,000 gallons per day for in-home use and no more than ½ acre of lawn or non-commercial garden per project. If the Sandy Ridge Long Plat has already utilized all water available under the groundwater exempted withdrawals (RCW 90.44.050), **no additional groundwater exempted withdrawals would be allowed.**

Any ground water development proposal that will withdraw water in excess of 5,000 gallons per day for single or **group domestic supply**, or for industrial purpose, or for the irrigation of **more than ½ acre of lawn or non commercial garden** (within the total project area) will require a permit from the Department of Ecology.

In Washington State, prospective water users must obtain authorization from the Department of Ecology before diverting surface water or withdrawing ground water, with several exceptions. Ground water withdrawals of up to 5,000 gallons per day used for single or group domestic supply, industrial purposes, stock watering or for the irrigation of up to one-half acre of lawn and garden are exempt from the permitting process. Water use under the RCW 90.44.050 exemption



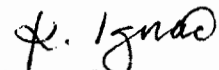
establishes a water right that is subject to the same privileges, restrictions, laws and regulations as a water right permit or certificate obtained directly from Ecology.

On March 28, 2002 the Washington State Supreme Court ruled that the RCW 90.44.050 permit exemption does not apply where a developer of a residential subdivision proposes multiple wells to serve each lot in the development if in combination, the withdrawal will exceed the exemption criteria.

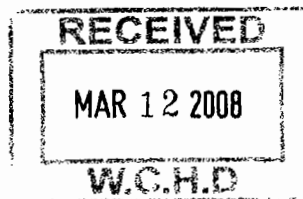
Use of water under the groundwater exemption has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. **The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn for domestic purposes exceeds 5,000 gallons per day or if a total of more than 0.5 acre of lawn and garden are irrigated.**

Thank you for considering these comments from the Department of Ecology. If you have questions please call me at (360) 715-5222.

Sincerely,


Kasey Ignac
Water Master

cc: BFO File





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February 19, 2009



Your address is in the **Nooksack** watershed

Kyle Dodd
Whatcom Co. Department of Health
509 Girard St.
Bellingham, WA 98225

RE: **Projects** Portal Way Industrial Park Short Plat and Shen Industrial Park Short Plat
 Numbers Short Plats 2008-00022 and 2008-00023

Dear Mr. Dodd:

Thank you for the opportunity to comment on the above referenced Short Plats, as they pertain to water resources. Based on Ecology's review of the proposed projects, we consider the Portal Way Industrial Park Short Plat and the Shen Industrial Park Short Plat **to be a single project.** As such, all eight of the proposed parcels should be considered collectively when calculating groundwater withdrawals.

RCW 90.44.050 (the Groundwater Exemption) allows for unlimited water for livestock (no acreage or gallon per day limit), up to 1/2 acre of non-commercial lawn or garden a maximum, up to 5,000 gallons per day for single or group domestic supply, and up to 5,000 gallons per day for industrial purposes. Use of water under the Groundwater Exemption (RCW 90.44.050) has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn exceeds the Exemption limits. Therefore, if the proposed short plats will collectively withdraw in excess of the amounts allowed under the Exemption, an approved water right from the Department of Ecology will be required.



Thank you for considering these comments from the Department of Ecology. If you have questions, please contact me at (360) 715-5222 or at kign461@ecy.wa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "K Ignac". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kasey Ignac
Water Master

cc: WR SEPA file

Ex. C



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Bellingham Field Office • 1440 10th Street, Suite 102 • Bellingham, Washington 98225
(360) 715-5200 • FAX (360) 715-5225

July 15, 2010

Tyler Schroeder
Whatcom County Planning & Development Services
5280 Northwest Dr.
Bellingham, WA 98226



Your address
is in the
Nooksack
watershed

RE: **LA File# SEPA 2008-00087**
 DOE file# 201003621
 Applicant Jeffery Grove

Dear Mr. Schroeder:

Thank you for the opportunity to provide comments on the above referenced Determination of Nonsignificance. Based on review of the State Environmental Policy Act (SEPA) Checklist associated with this project we offer the following comments regarding **water resources**:

If water is from permitted source such as city water, water association, or an irrigation or reclamation district, then the water purveyor is responsible for ensuring that the proposed use(s) are within the limitations of its water rights. If the proposal's actions are different than the existing water right (source, purpose, the place of use, or period of use), then it is subject to approval from the Department of Ecology pursuant to Sections 90.03.380 RCW and 90.44.100 RCW.

RCW 90.44.050 (the Groundwater Exemption) allows for unlimited water for livestock (no acreage or gallon per day limit), the irrigation of up to ½ acre of non-commercial lawn or garden, up to 5,000 gallons per day for single or group domestic supply, and up to 5,000 gallons per day for industrial purposes. Use of water under the Groundwater Exemption has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn exceeds the Exemption limits.

Therefore, if the project intends to withdraw groundwater under the Groundwater Exemption, the entire project will be limited to withdrawing no more than 5,000 gallons of groundwater per day for domestic supply and to irrigating no more than ½ acre of non-

commercial lawn or garden within the total project area. If the project will withdraw groundwater amounts in excess of the amounts allowed under the Exemption, or if it will divert any amount of surface water, an approved water right from the Department of Ecology will be required.

Thank you for considering these comments from the Department of Ecology. If you have questions you can contact me at (360) 715-5222 or at kasey.ignac@ecy.wa.gov.

Sincerely,

Kasey Ignac
Water Master

Sent via email

ecc: Kyle Dodd, Whatcom County Department of Health
BFO WR SEPA File

Ex. D



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September 23, 2010

Marvin Van Mersbergen, Arlene DeYoung, Sherwin Van Mersbergen, Darrel Timmer,
Kenneth Stremler, & Lewis Stremler
c/o Sherwin Van Mersbergen
Seventh Heaven LLC, West Hemmi Rd LLC, 3rd Generation LLC
2110 Greenview Ln
Lynden WA 98264

Dear Marvin Van Mersbergen, Arlene DeYoung, Sherwin Van Mersbergen, Darrel Timmer,
Kenneth Stremler, and Lewis Stremler:

The Department of Ecology's Bellingham Field Office recently received 7 Notices of Intent (NOIs) notifying Ecology of your intention to drill 7 wells at an unnumbered property at West Laurel Rd, Whatcom County Assessor's parcel no. 390223 459440. According to information submitted on the NOIs and according to other information provided to Whatcom County Planning and Development Services, you intend for these wells to serve multiple to-be-developed residences at or adjacent to Whatcom County Assessor's parcel nos. 390223 459440, 390223 527440, 390224 017463, and 390224 048463. A search of Ecology's water right records found no water rights appurtenant to these properties.

Without a water right, you are limited to using water under the State's Groundwater Exemption, as defined in Washington's Water Code at RCW 90.44.050. There are four types of groundwater uses that are exempt from the state water right permitting requirements:

- Providing water for livestock (no gallon per day limit);
- Watering a non-commercial lawn or garden ½ acre in size or less (no gallon per day limit);
- Providing water for a single home or groups of homes (limited to 5,000 gallons per day); and
- Providing water for industrial purposes, *including commercial irrigation* (limited to 5,000 gallons per day).

If the you intend to serve all of the planned future residences with ~~groundwater withdrawn~~ under the state's Groundwater Exemption (RCW 90.44.050), any groundwater development proposal



that will withdraw water in excess of 5,000 gallons per day for single or group domestic supply, or for industrial purposes, or for the irrigation of more than ½ acre of lawn or non-commercial garden (within the total project area) will require a permit from the Department of Ecology.

Use of water under the Groundwater Exemption has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn exceeds the Exemption limits.

Without a water right, the total groundwater withdrawals for the *entire project area* is limited to that allowed under RCW 90.44.050, despite the number wells intended to provide water to the project. As such, all of the planned future residences cannot collectively withdraw more than 5,000 gallons of groundwater for group domestic use and the entire site cannot irrigate more than a total maximum area of ½ acre of lawn or non-commercial garden.

To legally use any amount of surface water or groundwater beyond that allowed under the Groundwater Exemption, a state water right is required. If you are irrigating without a legal water right or in excess of an existing right, you are violating Washington Water Code RCW 90.03.400 and/or 90.44.050 and will be notified to curtail this diversion of water. According to provisions of RCW 90.03.600, failure to comply with that request could result in the issuance of an Administrative Order, with possible fines of up to \$5,000 per day of illegal use.

I am requesting that you please contact me at 360-715-5222 within ten (10) days of receipt of this letter to discuss your intended water use. Your assistance in resolving this matter is greatly appreciated.

Sincerely,



Kasey Ignac
Water Master

Sent via Certified Mail: 7009 3410 0001 8281 8718

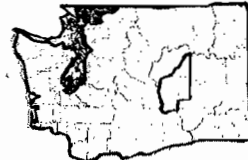
ecc: Noel Philip, NWRO WR, Ecology
Kyle Dodd, Whatcom County Dept. of Health



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December 14, 2011



Your address
is in the
Nooksack
watershed

Craig Ostrom
Whatcom County Planning & Development Services
5280 Northwest Dr.
Bellingham, WA 98226

RE: **LA File# SEPA 2011-00082**
 DOE file# 201105906
 Proponent Jack & Trudy Lamoureux (by Jaime White)

Dear Mr. Ostrom:

Thank you for the opportunity to provide comments on the above referenced State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS). Based on review of the SEPA checklist associated with this project we offer the following comments regarding **water resources**:

In the SEPA checklist, at Section B.3.b, the applicant also states that groundwater will be withdrawn from existing on-site wells.

If the applicant intends to serve the proposed developments (two 3-lot short plats) with groundwater withdrawn water under the state's Groundwater Permit Exemption (RCW 90.44.050), any groundwater development proposal that will withdraw water in excess of **5,000 gallons per day for single or group domestic supply**, or for industrial purposes, or for the irrigation of more than **½ acre of lawn or non-commercial garden within the total project area** will require a permit from the Department of Ecology.

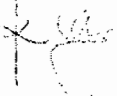
Use of water under the Groundwater Permit Exemption has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be

exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn exceeds the Permit Exemption limits.

Without a water right, the total groundwater withdrawals are limited to that allowed under RCW 90.44.050, despite the number of wells, short plats, or parcels. As such, all homes developed under both proposed short plats cannot collectively withdraw more than 5,000 gallons of groundwater for domestic supply, and no more than ½ acre of lawn or non-commercial garden may be irrigated within the total 32.03 acres project area.

Thank you for considering these comments from the Department of Ecology. If you have questions you can contact me at (360) 715-5222 or at kasey.ignac@ecy.wa.gov.

Sincerely,

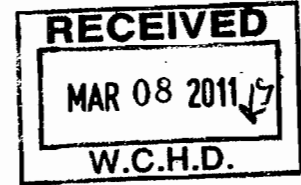


Kasey Ignac
Water Master

Sent via email



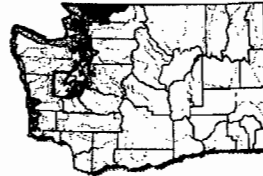
Ex: F



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March 8, 2011



Your address
is in the
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watershed

Kyle Dodd
Environmental Health Supervisor
Whatcom County Health Department
509 Girard Street
Bellingham WA 98225-4005

RE: **LA File# SEPA 2009-00034**
 DOE file# 201003155
 Applicant Bayes Brothers, LLC
 Project Bertrand Creek Estates Plat

Dear Mr. Dodd:

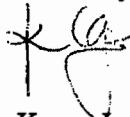
Thank you for the opportunity to provide additional information and clarification regarding **water resources** for the above-referenced project. The intent of this letter is to provide you with a written summary of the issues we have previously verbally discussed regarding the proposed Long Plat.

- As outlined in your 11/23/2010 letter to Nicole Terpstra (see enclosure), we have been informed that the Delta Water Association will supply water to one lot (one domestic connection) and the remaining nine lots will be withdrawing groundwater for domestic purposes under the Groundwater Exemption (RCW 90.44.050) from two wells. Under RCW 90.44.050, up to 5,000 gallons of groundwater may be withdrawn per day for single or group domestic supply¹.
- One Groundwater Exemption is allowed for any one 'project,' regardless of size. Based on the information provided to Ecology, including, but not limited to, development timelines, applicants, and property owners, it does **not** appear that Sunny Acres and Bertrand Creek Estates would be considered the same 'project.'
- Multiple wells may be used to withdraw Groundwater Exemption water, so long as the total withdrawal for the proposed project (Bertrand Creek Estates Plat) does not exceed the limits of 90.44.050.

- It appears that water right G1-22119C is appurtenant to the intended project site (see enclosure). G1-22119C is a groundwater right providing for the withdrawal of groundwater from a well at a maximum instantaneous rate (Q_i) of 72.0 gallons per minute (gpm) and an annual maximum limit (Q_A) of 16.6 acre-feet per year (afy) for irrigation purposes during the irrigation season. Use of water under G1-22119C must be consistent with the terms of the water right. Irrigation of lawn and garden is **not** considered **inconsistent** with a specified purpose of "irrigation."

Thank you for all of your efforts to coordinate on these water resources issues. If you have questions or need any additional information, please feel free to contact me at (360) 715-5222 or at kasey.ignac@ecy.wa.gov.

Sincerely,



Kasey Ignac
Water Master

Enclosure: Copy of water right G1-22119C
Copy of 11/23/2010 letter from Kyle Dodd to Nicole Terpstra

Hand Delivered 03/08/2011
KBI

ecc: Kyle Dodd
WR SEPA File (2011)

¹ The Groundwater Permit Exemption, RCW 90.44.050, allows the users of small quantities of groundwater to construct wells and develop their water supplies without first obtaining a water right permit from Ecology. The only exception to the permit requirement is for withdrawals of groundwater for:

- Providing water for livestock (no gallon per day limit).
- Watering a non-commercial lawn or garden one-half acre in size or less (no gallon per day limit, however limited to reasonable use).
- Providing water for a single home or groups of homes (limited to 5,000 gallons per day).
- Providing water for industrial purposes, including irrigation (limited to 5,000 gallons per day but no acre limit).