

July 23, 2009

VIA UPS and EMAIL

Mr. Grant Beck  
Community Development Director  
Community Development Department  
City of Yelm  
105 Yelm Avenue West  
Yelm, WA 98597



RE: Comment on Determination of Non-Significance  
File Number ENV-09-0125-YL  
Regarding City of Yelm Draft Water System Plan

Dear Mr. Beck:

This firm represents JZ Knight, a property owner and water right holder residing just outside the City of Yelm city limits. This letter is intended to provide formal comments regarding the City of Yelm's Determination of Non-Significance, File Number ENV-09-0125-YL ("DNS"). The City issued the DNS with respect to its proposed adoption of an updated water system plan for the City of Yelm, as reflected in the City of Yelm's *Draft Water System Plan* (Brown and Caldwell, June 2009) ("Draft Water System Plan"). We request that the City consider these comments and include these in the City's file and record regarding the City's action in issuing the DNS. JZ Knight provides these comments pursuant to chapter 43.21C RCW, WAC 197-11-340 and WAC 197-11-500, *et. seq.*<sup>1</sup>

As the City is aware, JZ Knight owns and operates a Group A water system, Zebras Aqueous Substance, DOH No. 61131N, and several ground water wells. The water system is authorized to withdraw ground water under water right certificate no. 5866, as amended. The right authorizes the withdrawal of water from six wells in the Thompson Creek/Nisqually River basin. JZ Knight also holds surface water right no. 7053 from Thompson Creek, which flows through the property. JZ Knight has not been able to exercise this right from the creek as historically was done because over the years the creek has become drier earlier in the irrigation season.

Upon review of the DNS and the *Draft Water System Plan*, we respectfully request that the City withdraw the DNS pursuant to WAC 197-11-340(3)(a).

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<sup>1</sup> JZ Knight will also be filing comments regarding the *Draft Water System Plan* that has been filed with Department of Health. In addition to the deficiencies specifically regarding the DNS stated in this letter, there are significant deficiencies in the *Draft Water System Plan* that will be outlined in that separate comment letter.

The environmental impacts of the proposals included in the *Draft Water System Plan* are already well documented. In analyzing the City's ability to meet demand and, if necessary, provide for capital improvements, the *Draft Water System Plan* incorporates and relies heavily upon both the City's new water right applications and the *Water Rights Mitigation Plan* (Golder Associates, Oct. 2008) ("Mitigation Plan"). The City issued a Mitigated Determination of Non-Significance ("MDNS") for its water right applications based on the *Mitigation Plan*. Yet despite the known impacts associated with the proposals in the *Draft Water System Plan* and in complete contradiction of the City's issuance of the MDNS on the draft mitigation plan, the City has issued a DNS.<sup>2</sup>

The City's threshold determination of a DNS should be withdrawn because (1) it is inconsistent with the City's own findings and conclusions that the necessary elements of the *Draft Water System Plan* will have probable significant impacts on the environment; (2) the *Draft Water System Plan* relies on water right applications, water right transfer applications, and a proposed mitigation plan, none of which have been accepted or approved by Ecology, and one of which has now been expressly denied; (3) in issuing the DNS, the City failed to consider several potential environmental impacts, including probable significant impacts on surface water, groundwater, and instream flows; and (4) the City has failed to include mitigation conditions necessary to address environmental impacts, including impacts the City has already acknowledged.

*The City Has Previously Acknowledged the Probable Impacts Related to the Draft Water System Plan.*

A DNS should only issue "[i]f the responsible official determines there will be no probable significant adverse environmental impacts from a proposal." WAC 197-11-340(1). Here, the City has already acknowledged that implementing the *Draft Water System Plan* will have known and significant adverse impacts. The *Draft Water System Plan* acknowledges that "[u]ntil additional water rights are secured, the City's ability to meet projected demands will be limited." WSP at ES-6. Coupling this concession with the fact that the City has been forced to withdraw quantities in excess of its rights, the City proposes adding significant water resources, through transfers and new water applications, which will significantly increase pumping and groundwater withdrawals. For example, the *Draft Water System Plan* encompasses projects including, but not limited to, proposed

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<sup>2</sup> Our comment letter submitted on behalf of JZ Knight related to the MDNS is attached hereto as Attachment C. To the extent several of the probable environmental impacts are interrelated, we ask that you please make that letter part of your file and record in the matter as well. By attaching that letter hereto, it is our intent to incorporate the comments and concerns raised in that letter as if fully set forth herein.

increased withdrawals from the City's southwest well field and the proposed golf course well, and transfer of the McMonigle water right<sup>3</sup>.

The following is a representative (but not exhaustive) list of known general impacts the City has noted with respect to the policies underlying the *Draft Water System Plan* that are not addressed in the DNS:

1. Impacts to the Deschutes Valley hydrologic area including changes in groundwater discharge to the entire Deschutes River above Tumwater Falls; and
2. Impacts to the McAllister Valley hydrologic area including changes in groundwater discharge to the Upper McAllister Valley hydrology; and
3. Impacts to the Woodland Creek Basin hydrologic area including changes in groundwater discharge to the entire Woodland Creek hydrology; and
4. Impacts to groundwater levels (including decreases in groundwater levels depending on the location and timing).

See MDNS File No. ENV-08-0397-YL at 2-4 (City of Yelm, May 1, 2009).<sup>4</sup>

The City has proposed a draft *Mitigation Plan* in an attempt to offset the known impacts. The *Draft Water System Plan* expressly incorporates the pending applications discussed in the City's MDNS and the *Mitigation Plan* as necessary and central components of the City's current and future plans and policies related to water service and water resources. It is demonstrably incongruous for the City to acknowledge some of the impacts associated with its *Draft Water System Plan* when discussing the water rights applications, but then to completely fail to acknowledge those same impacts in issuing a SEPA determination for the *Draft Water System Plan* itself.

A lead agency cannot insulate itself from the adverse impacts of its policies and plans by attributing those impacts solely to the plans' underlying proposed actions. In other words, a lead agency cannot achieve a threshold determination

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<sup>3</sup> On July 20, 2009, Ecology denied the application to change and transfer the McMonigle water right to the City. The City's failure to obtain this water right is significant in regard to the City's ability to meet its growth. The consequences are that, based on its own projections, the City will now exceed its water rights by 2010. Furthermore, the City must now rely even more on the approval of new water rights that the City recognizes will have significant environmental impacts. This new information alone mandates withdrawal of the DNS pursuant to WAC 197-11-340(3)(a).

<sup>4</sup> In their respective appeals, JZ Knight, Yelm Aquifer Preservation Society, and the Squaxin Island Tribe all pointed to further probable environmental impacts of the City's water right applications.

of nonsignificance by ignoring the real environmental impacts implicit in its non-project plan. Such a result would undoubtedly frustrate SEPA policies. To the extent the City is relying on the previously issued MDNS related to the water rights applications to support its DNS here, that reliance is not justified given the multiple deficiencies related to that MDNS and its pending appeal status.<sup>5</sup> See Attachment A. Just as the water rights applications and *Mitigation Plan* have probable adverse impacts on the environment, so too the City's *Draft Water System Plan* has impacts requiring mitigation or further analysis in an environmental impact statement.

*The DNS is Premature as the Draft Water System Plan Relies on Water Right Applications, Water Rights Transfer Applications, and a Proposed Mitigation Plan, None of Which Have Been Accepted or Approved by Ecology.*

The City of Yelm as the lead agency must make its threshold decision based upon information reasonably sufficient to evaluate the environmental impact. WAC 197-11-335. Accordingly, the threshold determination must be made when the information in the *Draft Water System Plan*, especially the central supporting documentation purportedly justifying the DNS, is final and complete. See WAC 197-11-310(3). Here, both the *Draft Water System Plan* and the corresponding environmental checklist rely heavily on a draft, unapproved *Mitigation Plan*. As JZ Knight has pointed out in prior comments to the City, that *Mitigation Plan* is not final or complete and is still under review by state agencies. In this regard, the Director of the Department of Ecology recently stated that the final mitigation for the City's water rights will likely be different than what the City proposed in its *Mitigation Plan* last year. See Attachment B.<sup>6</sup>

Furthermore, the environmental checklist expressly acknowledges that the City's evaluation of environmental impacts is not complete. For example, the checklist provides that "the City of Yelm is consulting with the Squaxin Island Indian Tribe to address fisheries habitat concerns in the Deschutes Watershed." Environmental Checklist at 11. The checklist does not define what these concerns may be. Rather, while the environmental checklist acknowledges the presence of Puget Sound Chinook salmon and bull trout, it summarily dismisses

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<sup>5</sup> Of note, JZ Knight filed her appeal of the MDNS on May 22, 2009. Over two months have now lapsed since that appeal was filed and the City has taken no action on the appeals, has not referred it for disposition, and has not responded to JZ Knight's inquiries regarding the status of those appeals.

<sup>6</sup> Furthermore, the City admits the *Draft Water System Plan* is not final or complete. The environmental checklist acknowledges that the *Draft Water System Plan* is not final and remains subject to a concurrency determination by Thurston County, comments from the Department of Ecology, approval and adoption of the plan by the Yelm City Council, and Department of Health approval. The City's issuance of a DNS is premature. See, e.g., WAC 197-11-310(3).

any potential impact on those species and related habitat. Given the known impacts on surface water and instream flows, a more complete analysis of the City's plan's impact on these species is necessary prior to the issuance of any threshold determination.<sup>7</sup> Of note, the Squaxin Island Tribe appealed the City's issuance of its MDNS related to the underlying water right applications, raising specific concerns regarding the impact of the City's policies on instream flows related to the Deschutes River and Woodland Creek watersheds, and noting a lack of concrete plans to address the Tribe's fisheries concerns. The incomplete nature of the City's consultations and corresponding mitigation plan confirms that the DNS is based on insufficient information.

Finally, the DNS is based on the assumption that Ecology would approve its transfer application related to the McMonigle right. Based, in part on the potential environmental impacts associated with the transfer, Ecology has denied that application. Therefore, the City's threshold decision is not based upon information reasonably sufficient to evaluate the environmental impact. WAC 197-11-335.

*The DNS Fails to Consider All Required Adverse Impacts and Provide Adequate Mitigation for These Impacts and Effects of the City's Draft Water System Plan.*

The law provides that the City of Yelm must consider and make specific determinations regarding *Draft Water System Plan* and its impacts, which impacts are defined as the effects or consequences of actions. See WAC 197-11-330(2) and -330(3); see also WAC 197-11-752. In assessing the significance of an impact, the City must consider all direct and indirect effects, and short and long-term effects. WAC 197-11-060(4)(b) and (c). The effects to consider also include those likely to result from implementation of the *Draft Water System Plan*, including cumulative impacts over time, and including "growth caused by a proposal" and the "precedent for future actions." WAC 197-11-060(4)(d) and (e).

The DNS, including the environmental checklist, fails to adequately address the impacts and effects on the groundwater resource, and the environmental impacts that will result from implementation of the *Draft Water System Plan*. It similarly

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<sup>7</sup> As a noted discrepancy, while the environmental checklist the City prepared related to the *Draft Water System Plan* acknowledges the presence of these listed threatened species, the City's prior environmental checklist related to the pending water right applications made no reference to threatened species, potential impacts, or related mitigation efforts. Washington courts have placed on local governments, acting under SEPA, the "affirmative duty to demonstrate its justification for a negative determination under SEPA." *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wn. App. 241, 245, 617 P.2d 743 (1980). There currently exists insufficient and seemingly incongruous information and evidence related to the potential impacts on listed species and their related habitat.

fails to address the cumulative impacts of the contemplated growth.<sup>8</sup> In turn, both the *Draft Water System Plan*, together with its supporting documentation, including the *Mitigation Plan*, do not address these impacts and effects as required by SEPA. See WAC 197-11-340, -350, and -768.

JZ Knight has been very concerned during the past two years about the City of Yelm's failure to comply with applicable legal requirements related to water planning and water availability determinations for proposed residential and commercial development. In this regard, she has recently provided comments to Ecology on the *Mitigation Plan* and on the City's MDNS. Those comment letters have been previously provided to the City as part of JZ Knight's comments related to the MDNS, and we ask that you please also make these part of your file and record in the matter. See Attachment C (including attachments thereto).

As you are aware, and as JZ Knight previously provided the City, Aspect Consulting completed a hydrogeologic assessment dated July 3, 2008 ("Aspect Report") addressing the impact of the City's proposed additional groundwater withdrawals from the City wells, including the transfer of 121.33 afy (sometimes referred to as the "McMonigle right"), upon which the *Draft Water System Plan* relies. A copy of the Aspect Report is attached hereto as Attachment D, and is incorporated herein by this reference. The Aspect Report raises significant concerns regarding the impact of increased pumping from the City's well field and wells located at the Tahoma Valley Golf Course on Thompson Creek, Yelm Creek, and the aquifer from which JZ Knight's rights draw. See Aspect Report at 5-6. Specifically, the Aspect Report concludes that the proposed transfer of the McMonigle right (and corresponding increased withdrawals from wells located at the Tahoma Valley Golf Course) would be expected to impact shallow aquifer levels, aquifer recharge, stream flows in the associated basin, and Thompson Creek stream flows in particular. Despite these proven adverse impacts, the *Draft Water System Plan* continues to plan for implementation of this increased pumping, plans for corresponding capital improvements, and relies, in large part, on the transfer of the McMonigle right as a necessary component of meeting demand. The Aspect Report addresses in detail the expected impact of this component of the *Draft Water System Plan* on Thompson Creek flows, concluding:

*In addition to increased pumping in the City wells, Thompson Creek is expected to be further adversely impacted on the JZ Knight*

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<sup>8</sup> With respect to nonproject actions, the City must actually consider the uses, development, and associated impacts that a nonproject action encourage. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993). The City failed to adequately consider these impacts.

*property by the establishment of an additional point of withdrawal on the Tahoma Valley Golf Course in the shallow Qva aquifer. This additional point of withdrawal would occur in connection with the proposed transfer of the McMonigle water right (up to 172.96 afy) to that location and would be in addition to the pumping of the existing Tahoma Valley Golf and Country Club water right (up to 77 afy) recently transferred to the City. The existing McMonigle well is located approximately 2 miles from the City wells upgradient in the Yelm Creek drainage, while the Golf Course well is about 2,000 feet from Thompson Creek and 1,300 feet from wetlands adjacent to Thompson Creek. Transfer of this additional pumping closer to Thompson Creek will have an increased adverse impact on Thompson Creek flows. Thompson Creek flows would be expected to diminish with transfer of the McMonigle water right (172.96 afy) and the corresponding increase in groundwater pumping from the Golf Course wells.*

Aspect Report at 5-6. Despite being previously made aware of this report and findings, the City, while recognizing Thompson Creek as being in the vicinity of the site, again fails to identify and consider the impacts to Thompson Creek in the environmental checklist and DNS. The City similarly fails to identify and consider the aquifer impacts. It follows then that the DNS reflects no effort to mitigate these impacts. In so doing, the issuance of the DNS violates SEPA, and should be withdrawn. See *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wn. App. 241, 245, 617 P.2d 743 (1980) (local governments, acting under SEPA, have the "affirmative duty to demonstrate its justification for a negative determination under SEPA").

Of significance, in denying the McMonigle transfer application, Ecology has concurred with JZ Knight's concerns and determined that impacts to surface water flows in the watershed, including, but not necessarily limited to impacts on stream flows in Thompson Creek and the Nisqually River have not been adequately analyzed or considered. A copy of Ecology's letter decision is attached hereto and incorporated herein by this reference. See Attachment E. Again, the City fails to consider these very same concerns in the present environmental checklist or DNS.

The *Draft Water System Plan* is based on water right applications and water right transfer applications that Ecology has not yet approved. Accordingly, the City's *Draft Water System Plan* is based on conjecture and assumptions, that if realized, could lead to significant issues and return the City to its past practice of withdrawing water in excess of its authorized quantities, which withdrawals, if

unmitigated, would certainly pose a probable significant adverse impact to the environment. Courts will reject threshold determinations when those determinations are "filled with many assertions, numerous unanswered questions and a paucity of information." *Sisley v. San Juan County*, 89 Wn.2d 78, 85, 569 P.2d 712 (1977).

The impacts include impacts on surface water flows, groundwater resources, and associated habitat and species. In short, the City cannot accurately determine the environmental impact of its planning policies until it knows what resources it is able to lawfully draw upon. As just one representative example, the City relies on its assumption that the McMonigle transfer will be approved. However, on July 20, 2009, Ecology denied the McMonigle application. Because of this denial, the City's *Draft Water System Plan* confirms that the City will again exceed its water demand and have insufficient water to serve its anticipated population by 2010--next year. The City needs to carefully consider the environmental impact this very likely overconsumption will have. The environmental checklist's reliance on conjecture and assumptions, and now on assumptions that have not proven true, leads to an unreliable threshold determination.

Finally, in addition to the concerns raised above, even a cursory review of the City's Supplemental Environmental Checklist for Nonproject Actions ("Supplemental Checklist") reveals the lack of identification and consideration of the known and probable environmental impacts. Despite the probable impacts discussed above, the Supplemental Checklist, among other things, summarily concludes, without any explanation or analysis, that the *Draft Water System Plan* "will not" have any affect on plants, animals or fish, "will not have a significant impact" on the depletion of natural resources, and "will not" affect wild or scenic rivers, threatened species habitat or natural resource areas. These conclusions are not supported by the known probable environmental impacts associated with the *Draft Water System Plan's* necessary implementing components. The City should withdraw its threshold determination until more information is available and the impacts can be carefully and properly considered pursuant to SEPA's requirements.

#### Conclusion

The DNS purports to be a determination that the proposed non-project action (approval of City's *Draft Water System Plan*) will not have a probable significant adverse impact on the environment. This determination is not in compliance with SEPA.

The City's proposed DNS fails to address significant environmental impacts and is based on the City's materially and demonstrably flawed water mitigation plans



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that continue to be subject to review by Ecology, and which Ecology has not yet approved. In light of these substantial deficiencies, and in accordance with the provisions of WAC 197-11-340(3)(a)(ii) and (iii), the City of Yelm should withdraw the proposed DNS issued on July 10, 2009.

In light of the significant environmental impacts to groundwater and surface waters that have been identified by the City and by my client but have not been addressed by the City in summarily issuing a DNS, mitigation measures must be provided for *Draft Water System Plan* or an EIS be initiated for the City's implementation of its water system plan before the City may adopt the plan or take any actions in reliance thereon pursuant to chapter 197-11 WAC.

Pursuant to WAC 197-11-680(5)(b)(i), or as otherwise provided for by law, JZ Knight requests notice, directed to the undersigned, of any decision the City makes or action the City takes relating to the proposed *Draft Water System Plan*.

Sincerely,



Thomas McDonald  
Direct Line: (360) 786-5039  
Email: [tmcdonald@cascadialaw.com](mailto:tmcdonald@cascadialaw.com)  
Office: Olympia

TM:en

Attachments:

- A - MDNS Appeals, City of Yelm File No. ENV-08-0397-YL
- B - Letter dated June 19, 2009 from Jay Manning to Keith Moxon
- C - SEPA Comment letter dated May 15, 2009
- D - Aspect Consulting Report dated July 3, 2008
- E - Ecology decision letter dated July 20, 2009 from Tom Loranger to City of Yelm

cc: *Via U.S. Mail, w/attachments:*

Jerrold Davis, Deputy Director, Field Operations, Department of Health  
Bonnie Waybright, P.E., Assistant Regional Manager, SW Regional Office  
of Drinking Water  
Regina Grimm, P.E., Regional Engineer, Department of Health  
Thomas Loranger, Manager, Water Resources, Southwest Regional Office  
Phil Crane, Water Resources, Ecology Southwest Regional Office