

PART I

April 11, 2013

Send communications to:  
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Anacortes, WA 98221  
(360) 293-7023



TO: Skagit County Board of Commissioners

**ANACORTES UGA EXPANSION PETITION PL12-0258 CREATES JURISDICTIONAL CONFLICTS AND DOES NOT MEET COUNTY DOCKETING CRITERIA**

These comments are provided on behalf of Ross O. Barnes, Gene Derig and Evergreen Islands.

The BCC should not docket Anacortes' UGA expansion petition PL12-0258 because the petition does not meet the docketing criteria specified by SCC 14.08.020.030(3) as stated in the Skagit County P&DS docketing recommendation of March 25, 2013.

2. Whether the proposed amendment, to be adopted, would require additional amendments to the Comprehensive Plan or development regulations that are not addressed in the petitioner's application, and is consistent with other goals, objectives and policies adopted by the BBC. **ANSWER: IT DOES NOT MEET THESE REQUIREMENTS**

3. Whether the proposed amendment raises policy, land-use, or scheduling issues that would more appropriately be addressed as part of an ongoing or planned work program, or as part of a regular review cycle. **ANSWER IT DOES RAISE SUCH ISSUES**

5. Whether the proposed amendment conforms to the submittal requirements of SCC 14.08, Legislative Actions, and other applicable provisions of Skagit County Code. **ANSWER: IT DOES NOT**

**Proof**

The UGA expansion as proposed creates shoreline and critical area jurisdictional conflicts between Skagit County and the City of Anacortes that require further changes to the UGA boundary to resolve, or serious land use policy issues that should be carefully examined and reviewed by the BCC.

Anacortes' revised petition of January 23, 2013, by E.D. Hovee (HOVEE) is incorrect at page 1, paragraph 2, page 3, item 1), page 4, item 3) and page 17 when it says the properties east and west of the proposed UGA expansion are in Anacortes' UGA and intended for industrial zoning. The 50' foot wide abandoned railroad ROW east of the proposed UGA boundary, and the adjacent Turners Bay estuary which is an estuarine salmon habitat recently restored by the Skagit

River System Cooperative (**Exhibit A**), will remain in Skagit County jurisdiction with a Rural Reserve (RRv) zoning designation and a Rural and Aquatic shoreline designation.

**Exhibit B** shows the proposed UGA expansion area and current UGA boundary in red. The restored Turners Bay estuary north of Similk Bay Road, and the adjacent abandoned railroad ROW, remain in County jurisdiction with RRv zoning as proposed by Anacortes.

**Exhibit C-1** shows the restored estuary north of Similk Bay Road at low tide. **C-2** shows the restored estuary at high tide north and south of what remains of Similk Bay road on the western shore. **C-3** shows the restored estuary at high tide north of what remains of Similk Bay Road on the eastern shore. With the estuarine circulation restored north of Similk Bay Road, there is no doubt that most if not all of this northern portion of Turners Bay has been restored to aquatic status with perhaps some associated fringe wetlands (cattail marsh) just south of Stevenson Road.

On **Exhibit D**, the abandoned railroad ROW forms the western shoreline of Turners Bay and associated estuarine wetlands, so the County shoreline designation of Rural (or Rural Conservancy in the new SMP draft), associated shoreline regulations, and zoning regulations for RRv will continue to apply to the circa 50' strip of shoreline. The County will have jurisdictional responsibility to protect the critical saltwater habitat of Turners Bay under its own shoreline and critical areas regulations but it will only control about 50' of the 200' shoreline setback area. Anacortes will control the remaining circa 150' of shoreline setback which will be in industrial zoning with land use specifications that are incompatible with the County's obligation to protect endangered species critical marine habitat.

For instance, under County Rural shoreline designation, non-water dependent commercial development is prohibited and otherwise requires a shoreline setback of 100'. Non-water dependent or oriented industrial development is prohibited and otherwise requires a 150' shoreline setback and buffer. Under the new draft Rural Conservancy designation, non-water oriented commercial/industrial development is entirely prohibited within the 200' shoreline setback.

In contrast to Skagit County's rural and conservancy oriented shoreline regulations, Anacortes, as stated by HOVEE on page 26, would see an Urban shoreline designation suitable for industrial zoning with a 25' shoreline setback for non-water dependent commercial/industrial uses, and policies and regulations that are incompatible with the County's continued mandate, policies and regulations to protect critical marine habitat in Turners Bay within rural shorelines and zoning designations.

Likewise, any shoreline associated critical areas--wetlands and habitats--will have different and conflicting buffer requirements under the County's and City's critical area ordinances, such that the County cannot implement their mandated and designated buffer protections that would extend onto Anacortes UGA areas west of the circa 50' shoreline strip that remains in County jurisdiction.

HOVEE, on page 27, even suggests restoring a rail line on the old abandoned railroad ROW which is immediately adjacent to the critical marine endangered species habitat of Turners Bay with no shoreline setback, and which will be located on County land that has incompatible RRv

zoning and an incompatible Rural shoreline designation. Such are Anacortes' stated intentions for this area.

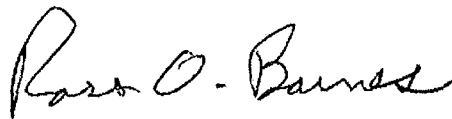
These jurisdictional conflicts over critical areas and shoreline jurisdiction also show that this UGA expansion fails to be supported by "critical areas" concerns as required by SCC 14.08.020(4)(b)(ii). Here the petition fails the docketing test of criteria #5.

Anacortes claims that the proposed UGA expansion will create a more logical land use pattern and UGA boundary configuration. This claim is refuted because the proposed expansion will actually increase the potential jurisdictional conflicts between County and City regulations.

The only way to resolve these jurisdictional conflicts is

- (1) to extend the UGA boundary south of Stevenson Road east to join the UGA at Reservation Road, thus eliminating jurisdictional conflicts from the area, or
- (2) to engage in protracted negotiations with Anacortes in an attempt to try to eliminate the policy and land use conflicts, and conflicting intentions created by the current UGA expansion petition.

Either or both of these alternatives fail to meet the docketing criteria stated at the beginning of this testimony.



Ross O. Barnes, Ph.D.  
Earth Science



Gene Defig  
Member, Evergreen Islands

Attachments:

**Exhibit A** - Turners Bay salmon habitat restoration grant

**Exhibit B** - Proposed UGA Expansion Area, annotated

**Exhibit C-1, C-2, C-3** - Turners Bay photos

**Exhibit D** - Turners Bay Lot Boundary Map showing jurisdictional conflicts

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EXHIBIT A

2009 SALMON RECOVERY PROJECTS FUNDED

GRANT APPLICANT

GRANT REQUEST

**Skagit River System Cooperative** **\$671,073**  
**Removing Turners Bay Road to Improve Salmon Habitat**

The Skagit River System Cooperative will use this grant to increase fish access to an isolated marsh and lagoon complex. Crews will remove part of Similk Bay Road, along with creosote-treated debris from a previous log storage operation and dredge spoils. They also will replace undersized culverts, control invasive Spartina and replant the area. Currently, upper portions of the salt marsh receive muted tidal flows and fish access is severely limited by part of Similk Bay Road and a non-functioning tide gate. Once the work is completed, Chinook salmon will have access to a nearly 60-acre lagoon and marsh complex. The work also will fix problems that prevented the lagoon from maintaining itself naturally. The Skagit River System Cooperative will contribute \$128,689 from a state grant. (09-1441)

# EXHIBIT B

RESERVATION RD

STEVENSON RD

11.15 Acres

COA  
UGA

COA  
UGA

Proposed County Zoning = AUD  
Future Proposed City Zoning LMI

Parcel #	Acreage	Owner
P19748	5.05ac	Homestead LLC
P19749	2.56ac	Homestead LLC
P19760	1.00ac	Homestead LLC
P19700	1.00ac	David Bass
P19747	0.84ac	Clinton Carnell
P19696	0.70ac	Robert Separovich

City Limits

Z-1M  
Z-LM1



Proposed UGA Expansion Area  
- Vicinity Map -

April 1990 - July 2011

July 2012

EXHIBIT C-1

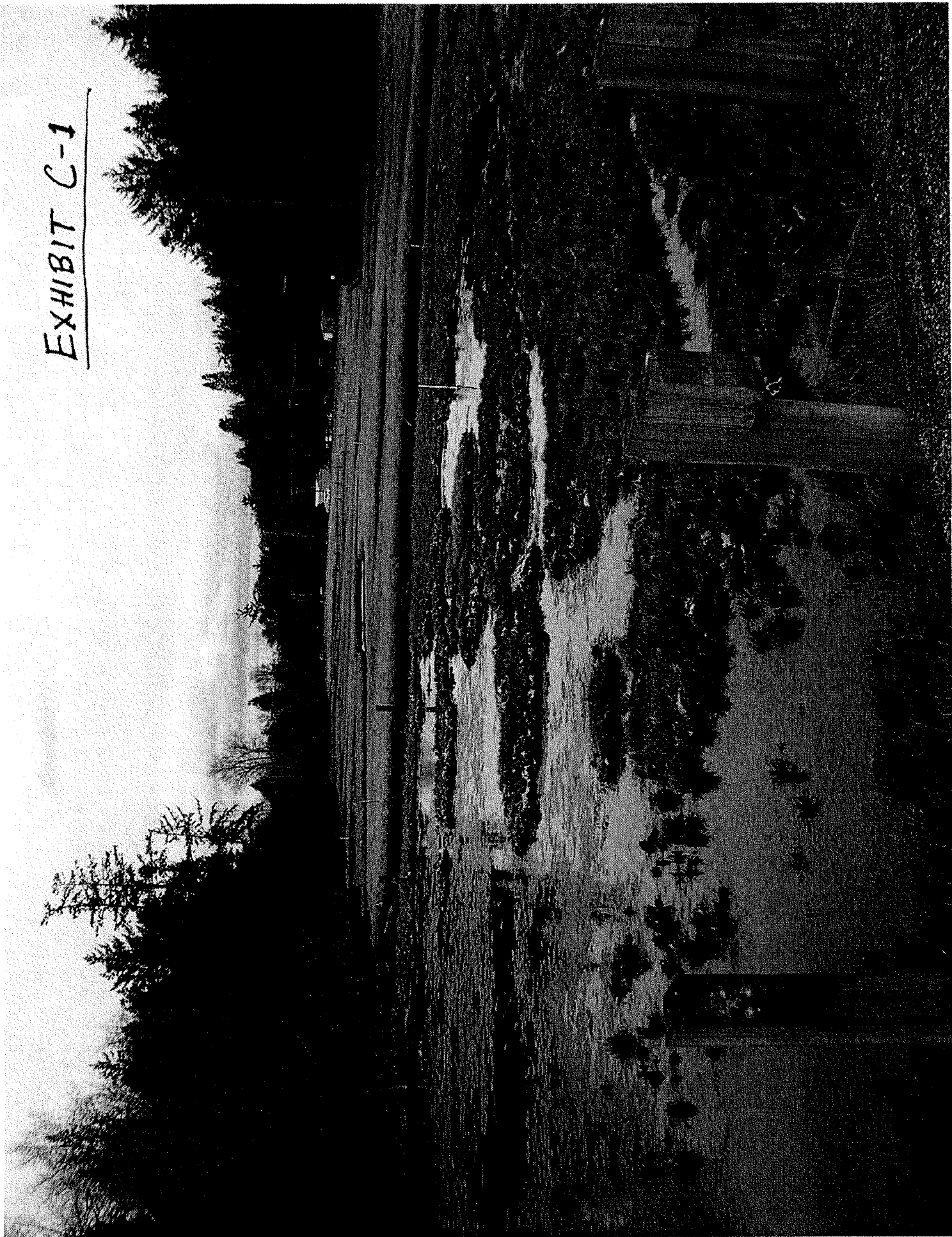


EXHIBIT C-2

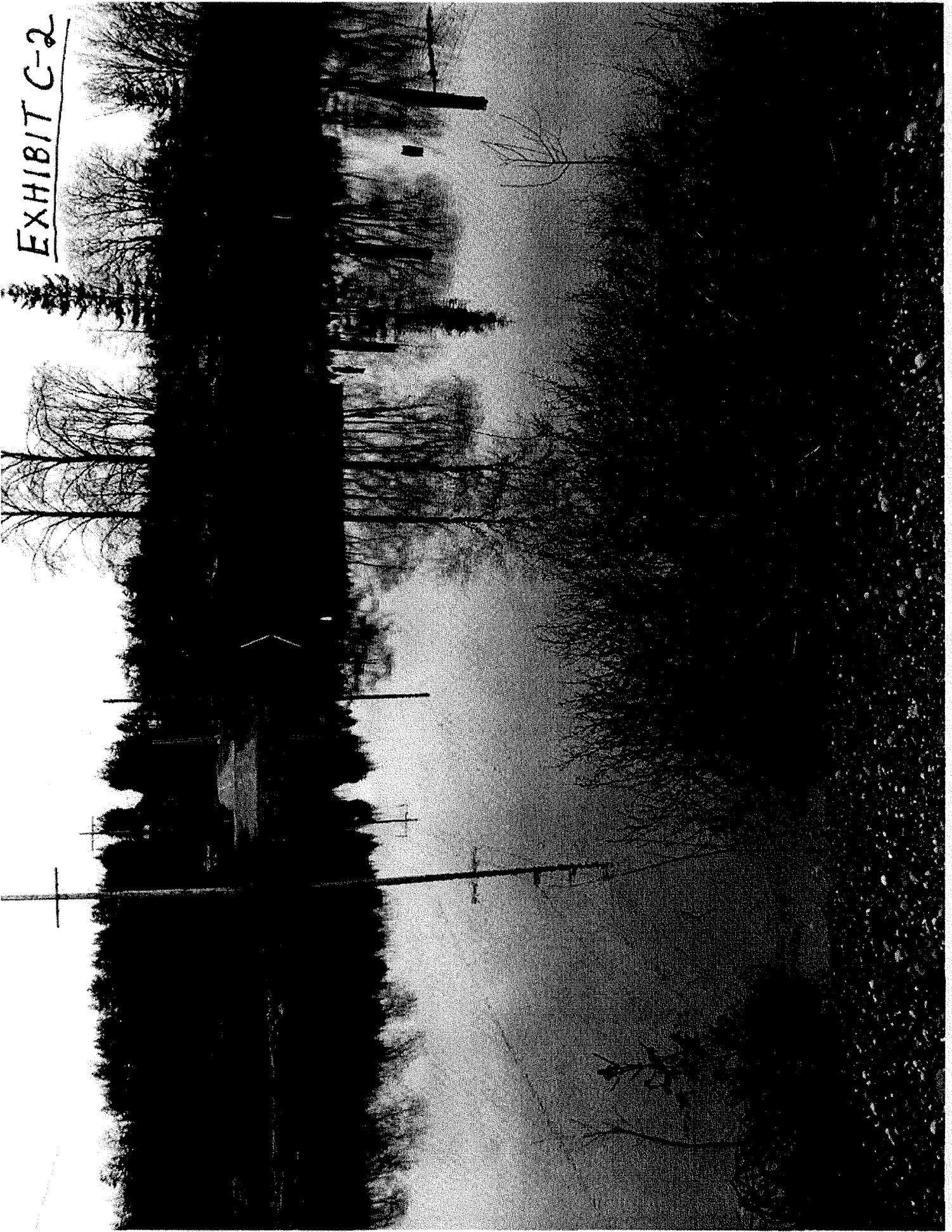


EXHIBIT C-3

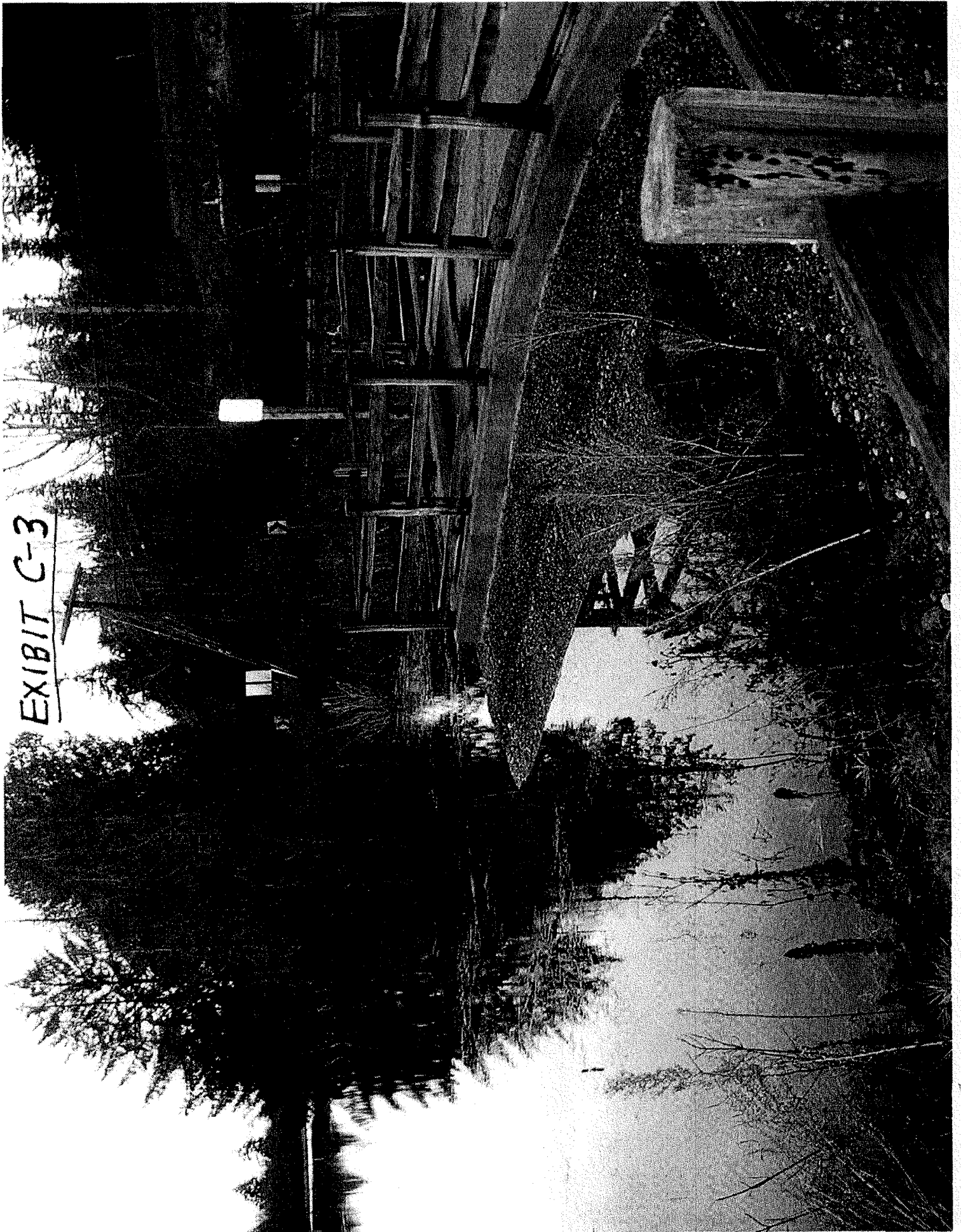






EXHIBIT D



PART II

April 11, 2013

Ross O. Barnes  
1004 7th. St., #202  
Anacortes, WA 98221  
(360) 293-7023

TO: Skagit County Board of Commissioners

ANACORTES' REVISED UGA EXPANSION PETITION PL12-0258 DOES NOT MEET COUNTY DOCKETING CRITERIA BECAUSE IT LACKS THE REQUIRED DETAILED DEVELOPMENT PROPOSAL, ETC.

These comments are provided on behalf of myself and Evergreen Islands.

The BCC should not docket Anacortes UGA expansion petition PL12-0258 because the petition does not meet the docketing criteria and process specified by SCC 14.08.030(3) as stated in the Skagit County P&DS docketing recommendation of March 25, 2013.

- 4. Whether the proposed amendment contains some legal or procedural flaw that would prevent its legal implementation. **ANSWER: IT DOES CONTAIN SUCH FLAWS**
- 5. Whether the proposed amendment conforms to the submittal requirements of SCC 14.08, Legislative Actions, and other applicable provisions of Skagit County Code. **ANSWER: IT DOES NOT**

**Proof**

I. To be docketed, a UGA expansion petition must meet the requirements of SCC 14.08.020(7) Rezones, including the following:

- (a) All rezones shall be processed together with a corresponding Comprehensive Plan amendment, except that rezones located wholly within an existing UGA and contemplating no UGA boundary modification shall be considered to stand alone and shall not require a corresponding Comprehensive Plan amendment. The procedures for a stand-alone rezone application, notice, schedule, etc., shall follow those for the Comprehensive Plan amendments/rezones in Subsections (2) through (6) of this Section.
- (b) Petitions for rezones, including those processed in conjunction with a Comprehensive Plan amendment, shall include at a minimum all of the requirements for policy and map amendments, plus the following additions:
  - (i) **A detailed development proposal that is consistent with the applicable designation criteria;**

There is no doubt that Anacortes' UGA expansion petition requests a rezone from RRv to A-UD to LM1 (see Gerald Steel letter of November 8, 2012, in Exhibit 1 of **Exhibit F**). The cover letter of Anacortes' revised petition of January 23, 2013, by E.D. Hovee (HOVEE), at paragraph

2, specifically removes the required "detailed development proposal" that was included in Anacortes' original July 31, 2012, application. That detailed development proposal is commonly referred to as the Tethys development proposal which occupied a large portion of the July 31 application. **Thus, the revised petition is non-responsive to the clear and specific requirements of SCC 14.08.020 (7)(b)(i).**

**Skagit County made a grave procedural error in instructing Anacortes to remove all references to and discussion of the required "detailed development proposal" from the revised petition, thus creating a fatally flawed revised petition.** Contrast this instruction with the statement in SCC 14.08.020(7)(b)(iii) "Commercial and industrial zoning is not intended for speculative purposes."

**Skagit County continues to make a grave procedural error in instructing all parties to ignore the clear requirements of SCC 14.08.020(7)(b)(i) & (iii), thus creating a flawed and illegal review procedure.**

**Skagit County will conduct a flawed SEPA review if it fails to consider and review the potential impacts of the required "detailed development proposal".**

**II.** To be docketed, a UGA expansion petition must meet the requirements of SCC 14.08.020(4)(b)(ii) and SCC 14.08.020(5)(b)(iii) & (iv) (see full text in **Exhibit E**).

Anacortes' revised petition (HOVEE) at page 5, item 6), page 29, paragraph 2, page 37, last paragraph, and page 39, under (D), specifically disavows the applicability of SCC 14.08.020(4)(b)(ii) and 14.08.020(5)(b)(iii) & (iv) as justification for this particular UGA modification petition. **So whether the HOVEE analysis is or is not fully responsive to these code specifications, by specific request of the applicant, that analysis is irrelevant to the petition.** Instead, HOVEE states on page 5, item 6), page 29, last paragraph and page 37, last paragraph, that all of this analysis will apply to future GMA comprehensive plan updates.

HOVEE states that the current petition is instead presented as some kind of land swap within the existing Anacortes UGA allocation of industrial/commercial land. **However, SCC 14.08 contains no such provision for justifying a UGA expansion, so this petition is not responsive to the requirements of SCC 14.08.020(4) & (5).**

**III.** Legal precedent in proof

By ignoring the clear code requirements for a rezone petition and by specifically disclaiming application of SCC 14.08.020(4)(b)(ii) and 14.08.020(5)(b)(iii) & (iv), Anacortes and Skagit County are creating a situation analogous to a prior attempt to expand the Mount Vernon UGA that was overturned by the Western Washington Growth Management Hearings Board in Case #05-2-0012. **The Board disallowed the type of ad hoc speculative UGA expansion proposed in Anacortes' revised petition, where no specific need or project is presented as justification for the expansion.** As a direct result of this decision, Skagit County made numerous changes and additions to SCC 14.08, including the requirement for "a detailed development proposal" for rezones.

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In their decision, the Board found

At page 21, line 10: "However, finding that the WJY proposal fits within the CPP 1.1 in Mount Vernon's allocation for industrial and commercial lands is not the same as performing the analysis required by SCC 14.18.020(5)(b)." [*equivalent to 14.08.020(4)(b)(ii) in the current SCC*]

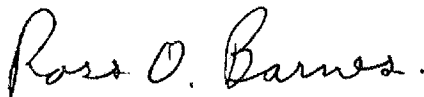
At page 21, line 20: "In fact CPP 1.1 only establishes allocations among urban growth areas for certain kinds of lands, including commercial lands. It does not set criteria for expanding urban growth boundaries if an urban growth area is developed in a manner not contemplated when the urban growth boundaries were established." [*applicable to Anacortes' proposed rezone of LM1 lands south of Fidalgo Bay as sole stated justification for this petition*]

At page 22, line 10: "In this case, it was clear that the UGA expansion was granted so that the WJY property could be included in the Mount Vernon UGA, rather than based on a need for an expanded UGA leading supported with an analysis of that need. We do not find that the County has met its own criteria for expanding the South Mount Vernon UGA to include the WJY property because the expansion was not 'supported and dependent' upon the required analysis." [*applicable to Anacortes' disclaimer of specific requirements of SCC 14.08.020(4)(b)(ii), 14.08.020(b)(iii) & (iv), and 14.08.020(7)(b)(i)*]

Wording in italics above is my added explanation.

In fact, HOVEE, at page 33, shows that Anacortes still has 272 acres of available industrial and commercial land, including 169 acres of LM1 zoning. By failing to provide the required "detailed development proposal" Anacortes has failed to show, indeed cannot show, that the existing industrial zoning is insufficient to accommodate some speculative unidentified future development in the 1 or 2 years before the UGA is revisited in the mandated 2014 comprehensive plan update.

IV. If the Tethys development proposal was restored as the required detailed development proposal, I have shown in the attached **Exhibit F (RE: PL12-0258 - CITY OF ANACORTES PETITION TO MODIFY UGA BOUNDARY** of January 29, 2013) that the Tethys development proposal violates the comprehensive plans of Anacortes and Skagit County. Thus, the UGA expansion proposal would remain fatally flawed and illegal.



Ross O. Barnes, Ph.D.,  
Earth Science

Attachments: **Exhibits E and F**

**Exhibit E**

SCC 14.08.020(4)(b).

A petition for a map amendment shall include, at a minimum, all of the requirements for a policy amendment, plus the following additions:

- (ii) Any proposed urban growth area boundary changes shall be supported by and dependent on population forecasts and allocated urban population distributions, existing urban densities and infill opportunities, phasing and availability of adequate services, proximity to designated natural

resource lands and the presence of critical areas.

SCC 14.08.020(5)(b).

All UGA modifications shall be subject to the following requirements:

(iii) A jurisdiction, as part of its comprehensive plan amendment that proposes an expansion of its UGA to accommodate additional population or employment capacity, shall conduct planning and analysis sufficient to update and confirm the development capacity analysis for buildable land within the existing UGA for residential, commercial, and/or industrial lands, which takes into account all development approved within the overall UGA since the last UGA expansion. Minimum requirements for UGA buildable lands development capacity analyses shall include the following steps:

- (A) Define vacant and underutilized (but likely to redevelop) parcels by zone.
- (B) Deduct from the gross land capacity by zone-identified in Subsection (5)(b)(iii)(A) of this Section-the following lands not available to accommodate future population or employment:
  - (1) Critical areas (and buffers as appropriate).
  - (2) Future roads/rights-of-way needs.
  - (3) Future public or quasi-public facilities needs.
  - (4) Remaining lands likely to be held off-the-market (e.g., market or other factors).
- (C) Apply the minimum (or average achieved) density or intensity of use in each zone to the remaining net developable acres identified in Subsection (5)(b)(iii)(B) of this Section.
- (D) Apply appropriate household size and/or employee land intensity standards to the output-identified in Subsection (5)(b)(iii)(C) of this Section-to determine total UGA population or employment capacity.

(iv) Document consistency of the proposed UGA expansion with Countywide Planning Policy 1.1 and the adopted 20-year population and employment allocation, including identification of any allocated but undesignated forecast population or employment.

January 29, 2013

Ross O. Barnes, Ph.D.  
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EXHIBIT F



To: Commissioner Ken Dahlstedt  
Commissioner Sharon Dillon  
Commissioner Ron Wesen  
Dale Pernula, Director, Planning & Development Services  
William Honea, Chief Civil Deputy Prosecuting Attorney  
cc: Gary Christensen, Manager, Planning & Development Services

**RE: PL12-0258 - CITY OF ANACORTES PETITION TO MODIFY UGA BOUNDARY**

I am submitting these comments on behalf of myself and Evergreen Islands as a partial response to the City of Anacortes petition #PL12-0258 to modify the Anacortes UGA boundary. Other comments will also be submitted separately on various aspects of the same petition. We ask that these comments be placed on the record of the Skagit County Board of Commissioners docketing hearing on PL12-0258. We also ask that these comments be forwarded to the GMA Steering Committee for their deliberations on a PL12-0258 docketing recommendation to the Skagit County Commissioners. We are also submitting these comments to Skagit County Planning & Development Services to assist the department in making their docketing recommendation to the Commissioners. A hard copy will be submitted for the formal record.

We request that the Skagit County Board of Commissioners reject PL12-0258 for docketing for the reasons stated here below.

SCC 14.08.020 (7) (b) (i) requires that a "detailed development proposal that is consistent with the applicable designation criteria" be submitted with any petition that includes a rezone proposal. PL12-0258 is such a petition. That which is required to be submitted as part of a petition is subject to review and comment during deliberations on that petition (**Exhibit 1** - November 8, 2012, letter from Gerald Steel to Skagit County Commissioners).

The detailed development proposal attached to PL12-0258 is commonly known as the Tethys development proposal as specified in the response to Section 3, question 1 of the petition.

The Tethys development proposal will implement a water service agreement (contract) between the City of Anacortes and Tethys Enterprises, Inc. (**Exhibit 2**). As discussed below, this water service agreement violates the comprehensive plans of the City of Anacortes and Skagit County. Any action amending a comprehensive plan to facilitate the Tethys development proposal and water service agreement is subject to appeal for said violation.

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# **TETHYS WATER SERVICE AGREEMENT EXCEEDS INDUSTRIAL WATER ALLOCATIONS IN CITY OF ANACORTES AND SKAGIT COUNTY COMPREHENSIVE PLANS IN THE CONTEXT OF PROJECTED WATER SUPPLY DEFICITS FOR SKAGIT COUNTY**

## **Executive Summary**

Neither the City of Anacortes nor Skagit County should take any action extending the term of performance of the Tethys water service agreement (hereafter the Tethys WSA) (**Exhibit 2**), or amending comprehensive plans or development regulations, or issuing land use permits that specifically facilitate the implementation of the Tethys WSA because the agreement violates the comprehensive plans of the City of Anacortes and Skagit County.

In the face of projected water supply deficits in Skagit County, Tethys' 5.5 MGD (million gallons per day) of contracted water exceeds Anacortes' industrial allocation in the Skagit County Coordinated Water System Plan 1999/2000 (CWSP) by over 2.4 MGD, also consumes PUD #1's 1 MGD new industrial allocation (CWSP Table 8-8), plus an additional 1.4 MGD of water that may be unavailable or taken from other users because of CWSP projected water supply deficits for Skagit County.

All agencies and governments in Skagit County must look to the limited allocations of new industrial water supply to maximize and support industrial job growth throughout the county. However, Anacortes specifies that all of the 5.5 MGD allocated to Tethys is to be processed only within the City of Anacortes.

## **Introduction - Tethys Contract**

The City of Anacortes contracted with Tethys Enterprises in October, 2010, to provide up to 5.5 MGD of municipal water for industrial and manufacturing purposes for a contract term potentially extending to December 31, 2050 (Tethys WSA Sections 4.1, 4.6.1 and 15)(**Exhibit 2**). This term is coincident with the projections of the Skagit County Coordinated Water System Plan 1999/2000 (CWSP), so the potential water demands of the Tethys WSA should be reviewed in the context of overall water supply and demand and water allocations projected to 2050 in the CWSP and shorter term projections and allocations in other County water planning documents such as the 2011 Anacortes Water System Plan (AWSP) and the Skagit County PUD #1 2007 Water System Plan (Draft) (PWSP).

I note that the CWSP is part of the Skagit County Comprehensive Plan. Skagit County Comprehensive Plan Policy 9A-8.4 requires that "water supply development and service shall be consistent with all related plans, including but not limited to, the Coordinated Water Systems Plan, the Anacortes-Fidalgo Island Water System Plan, this Comprehensive Plan, and related purveyor plans as they are developed." Policy 9A-8.4 is also incorporated into the AWSP at page 3-13. Similarly, the CWSP and the AWSP are part of the City of Anacortes Comprehensive Plan.

## Projected New Industrial Water Allocations in the CWSP and AWSP versus the Tethys Contract

[More detailed technical discussions are included in the footnotes (F1, F2, F3...)]

In the face of serious projected water rights/water supply deficits by 2050 in the combined Anacortes/PUD #1 water service areas (see discussion below), the CWSP projects and allocates a maximum of 21 MGD of industrial water demand for large industrial customers of Skagit County water systems, with that amount remaining constant from 2020 to 2050. Of this amount, 16 MGD is allocated to the Anacortes water system (CWSP Table 8-9) and 5 MGD is allocated to PUD #1 (CWSP Table 8-8). By 2007, existing Anacortes industrial customers Shell and Tesoro were already using as much as a yearly average of 13.23 MGD, and future projections to 2029 allocate a fixed quantity of 12.92 MGD to Shell and Tesoro (AWSP Table 4-10). AWSP projections for current industrial customers leave 3.08 MGD of the CWSP 16 MGD for new industrial uses and customers; however, the AWSP allocates 3.4 MGD for such future uses to 2029 (AWSP Table 4-10), exceeding the CWSP's 16 MGD by 0.32 MGD (F1).

The Tethys water supply contract for up to 5.5 MGD plus current user allocation of 12.92 MGD exceeds Anacortes' CWSP industrial water allocation of 16 MGD by 2.4 MGD (F2). Note that the AWSP was approved by the Anacortes City Council in March, 2012, 1-1/2 years after the City approved the Tethys contract, but the Tethys 5.5 MGD are only recognized in the AWSP to the extent of 3.4 MGD.

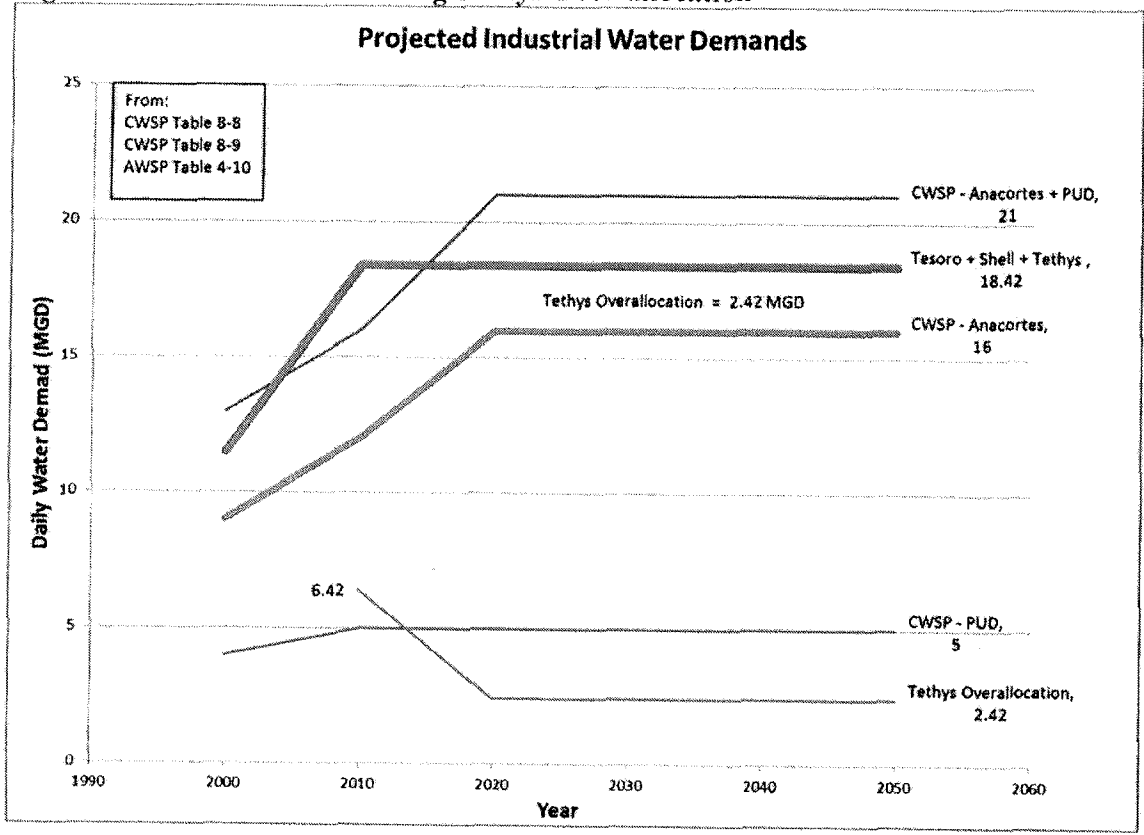
The PWSP makes future water allocation deficits even worse by postulating the PUD #1 (hereafter PUD) as using the whole 5 MGD of new industrial water use (PWSP Table 3.13) allocated for the whole of Skagit County for the period 2020 to 2050, even though the CWSP gives the PUD only 1 MGD of the 5 MGD total (CWSP Table 8-8).

The Tethys water contract and PUD's water musings exceed the total future industrial water allocations of the CWSP by up to 6.4 MGD. And this number assumes that Anacortes' existing industrial customers don't exceed their projected allocations by one drop. But Shell and Tesoro already exceeded those allocations in 2007.

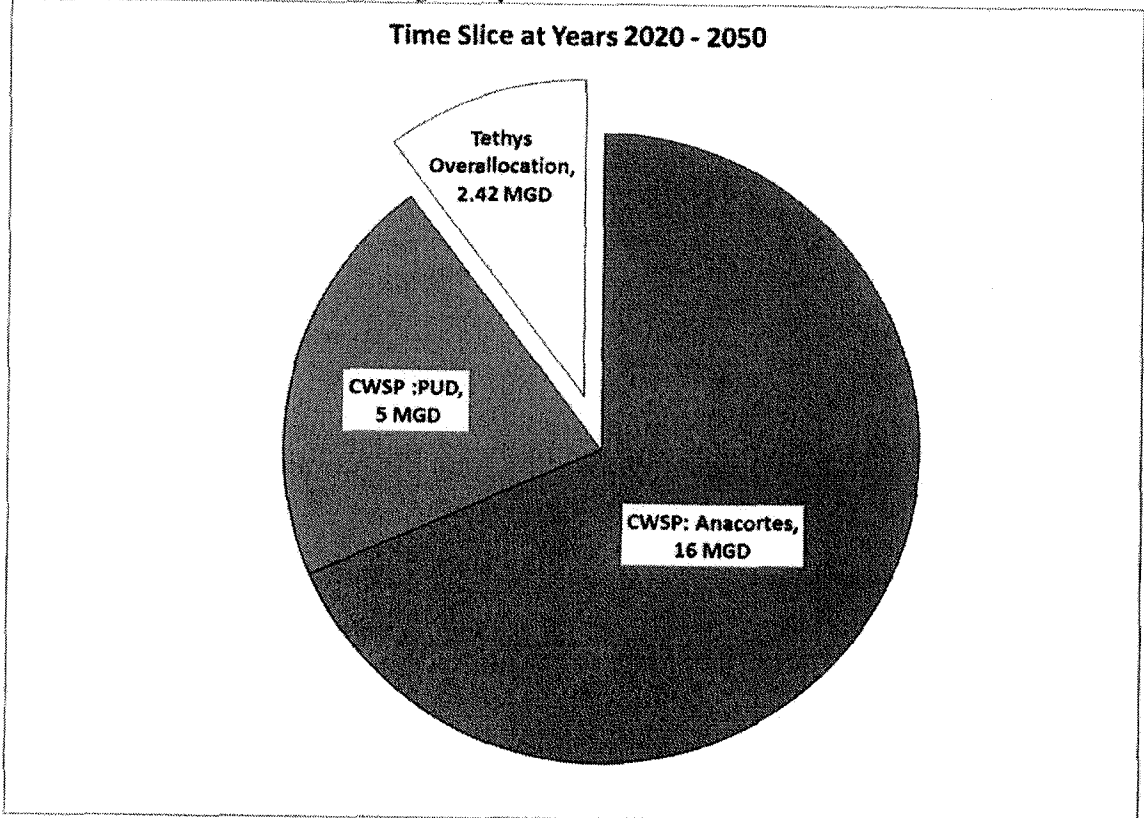
The allocations and uses of industrial water, including Tethys' over-allocation, are shown graphically in **Figure 1 - Time Series** and **Figure 2 - Time Slice 2020 – 2050**.



**Figure 1. Time Series Illustrating Tethys Over-allocation**



**Figure 2. Time Slice Illustrating Tethys Over-Allocation**



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## Projected Water Supply Deficits in 2050

Anacortes officials are fond of stating that Anacortes has more than enough water rights for future uses. However, that statement is refuted by the demand projections of the CWSP.

The CWSP uses high growth population forecasts for long range water demand projections to conservatively plan water source and supply for potential future growth (CWSP Section 7.2, page 7-1) (F3). To simplify, only the water service areas, Skagit Basin water rights and projected water demands for Anacortes and PUD Judy Reservoir system will be discussed (F4).

Anacortes has 54.94 MGD of continuous and 11.18 MGD of interruptible (subject to WAC 173-503 Skagit Basin In-stream Flow Rule) water rights on the Skagit River (AWSP Table 7-1), but essentially no functional raw water reservoir capacity compared to projected water demands.

NOTE: Anacortes has lost 9.7 MGD of the interruptible water rights assumed by the 1996 MOA and the CWSP (F5). Thus, the water rights assumed by the CWSP must be reduced by 9.7 MGD. That loss of 9.7 MGD extinguishes a potential water supply for the whole of the Skagit County rural population of 85,078 or less projected for the year 2050 (CWSP Table 8-1) (F6).

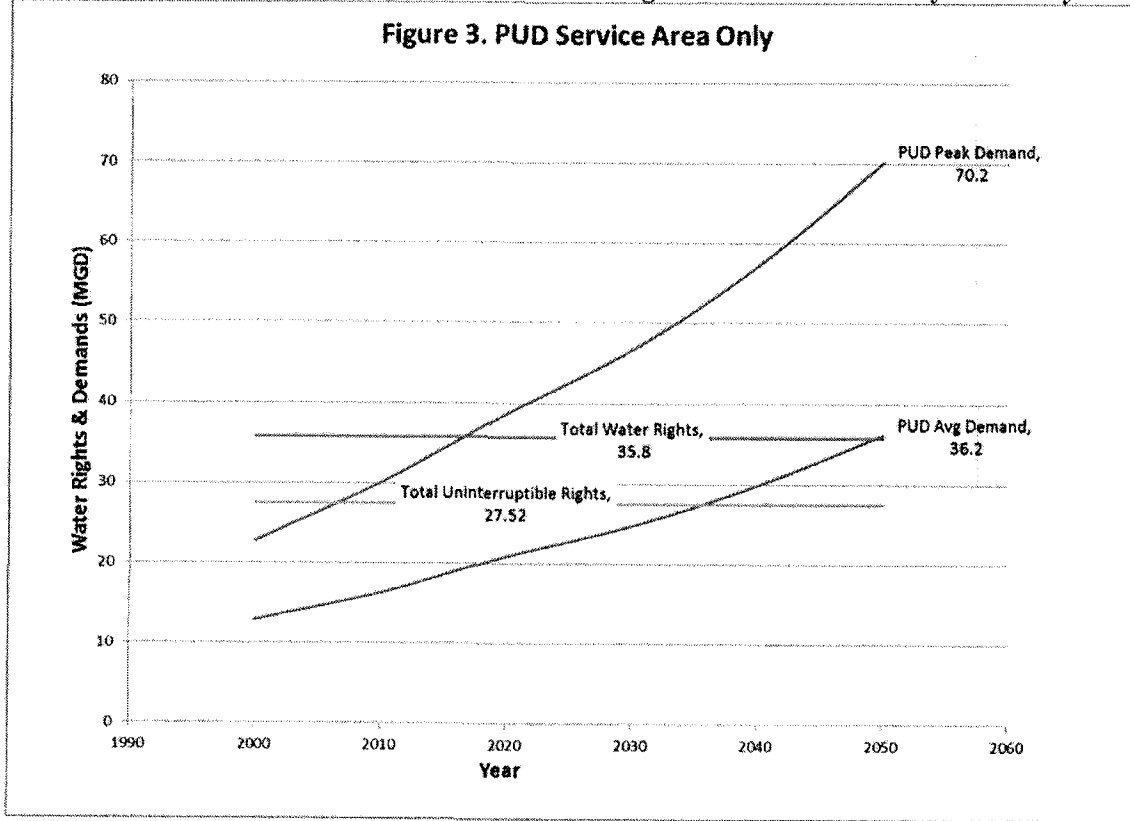
PUD has a maximum total water right of 35.8 MGD under the 1996 MOA with 27.52 MGD not subject to the lower Skagit River in-stream flows, and storage capacity of 1,450 MG in Judy Reservoir (CWSP page 9-13 and PWSP Section 2.4.1.2, page 2-12). The yearly average available water draw is less than 35.8 MGD (F7).

Typically the minimum allowable source water draws during low flow conditions for the PUD and Anacortes water systems occur during the time of maximum water demands during the late dry season.

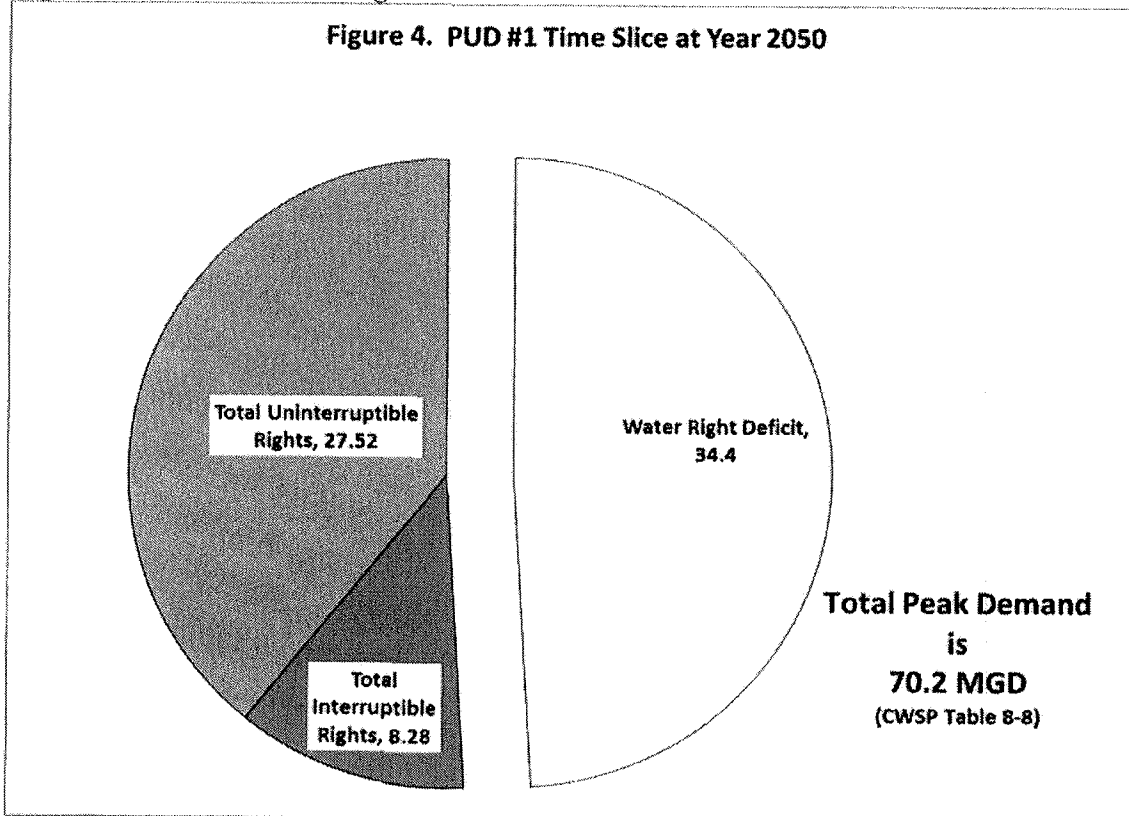
Projected 2050 peak day demand is 47.6 MGD for the Anacortes water service area (CWSP Table 8-9), and 70.2 MGD for the PUD service area (CWSP Table 8-8). These numbers overestimate Anacortes demand and correspondingly underestimate PUD demand, because the CWSP allocates population growth to Anacortes in excess of Anacortes stated intentions due to the limited expansion opportunities imposed by island topography, environmental limitations, and land area. In the year 2050, Anacortes water system is projected to have a 7.34 MGD potential continuous supply excess relative to peak day demand based on the 54.94 MGD continuous water right. However, the PUD water system is projected to have a potential supply deficit of more than 34.4 MGD relative to peak day demand (F8, F9). The combined deficit is more than 27 MGD (F10).

The projected water demand vs. water rights for the PUD #1 system alone are shown graphically in **Figure 3 - Time Series** and **Figure 4 - Time Slice at 2050**. The projected water demand vs. water rights for the combined Anacortes and PUD #1 systems is shown graphically in **Figure 5 - Time Series** and **Figure 6 - Time Slice at 2050**. In Figures 5 and 6, Anacortes interruptible water rights of 11.18 MGD are shown; however, there are no stated plans in the 50 year CWSP projections, or any other water system plan, to build water intake, processing and piping structures or reservoir capacity to effectively use this water (F10, F11, and F12).

**Figure 3. Projected Water Demand vs. Water Rights For the PUD #1 System Only**



**Figure 4. PUD #1 Water Right Deficit**



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Figure 5. Projected Water Demand vs. Water Rights for the Anacortes and PUD #1 Combined

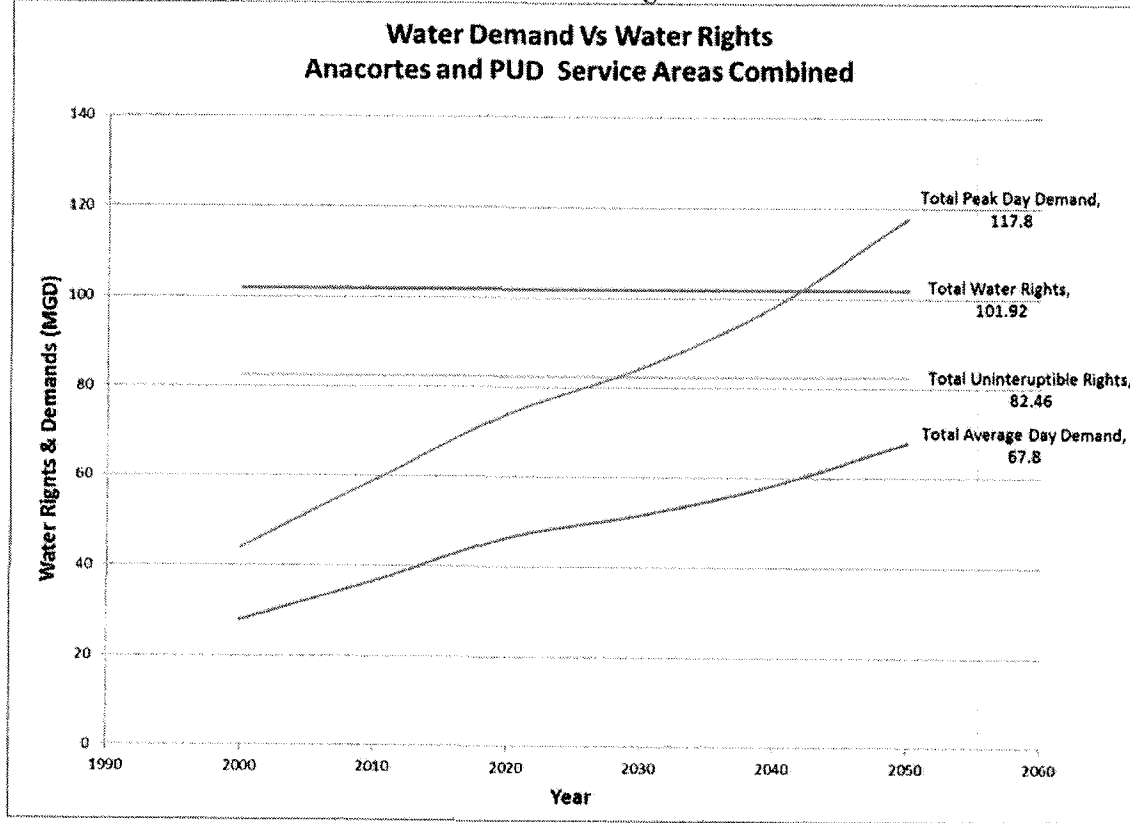
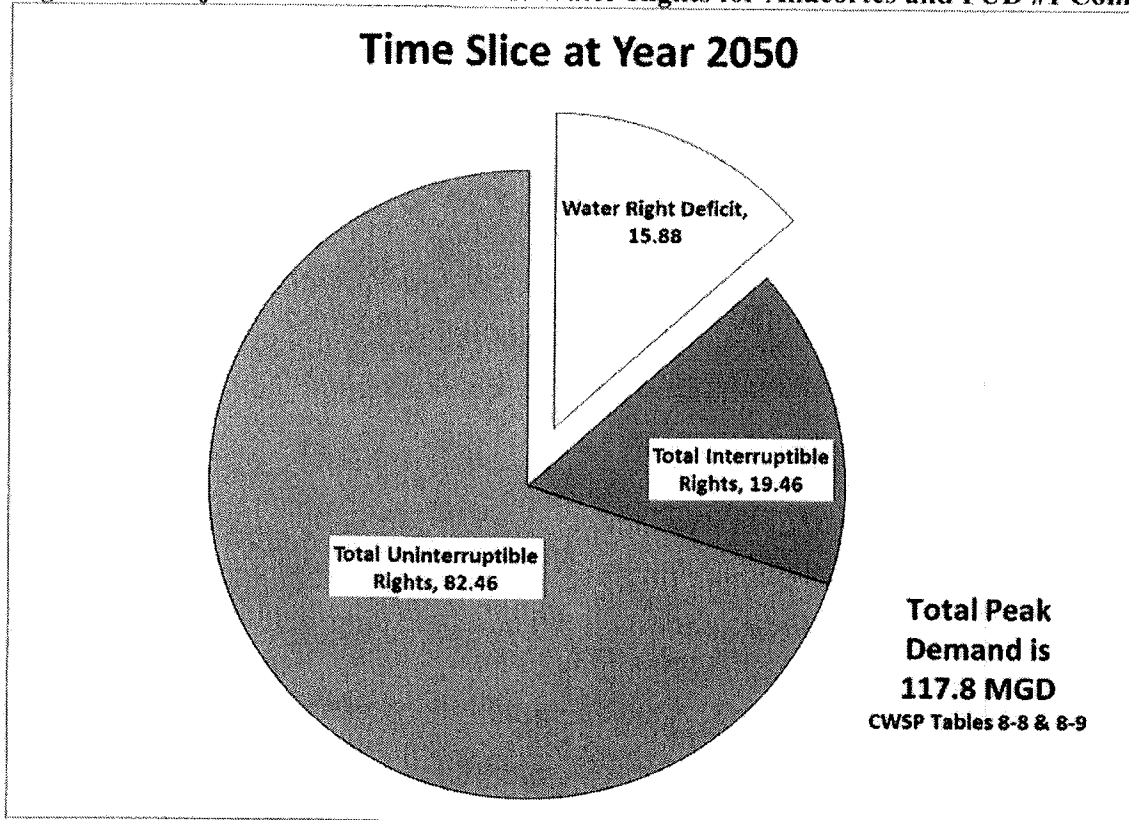


Figure 6. . Projected Water Demand vs. Water Rights for Anacortes and PUD #1 Combined



## Filling the Water Supply-Demand Gap

The Judy Reservoir storage capacity does not assist the situation of peak demand deficit because the 2050 projected average PUD demand of 36.2 MGD (CWSP Table 8-8) is still greater than the PUD peak draw of 35.8 MGD, so PUD could not build up a storage surplus to offset peak demand conditions, and would need to depend on water interties with the Anacortes water system just to meet average demand conditions and offset enough of PUD's own water supply to fill Judy Reservoir (F10).

The PUD failed to secure sufficient water rights under the 1996 MOA to meet 50 year projected demands, which became apparent as soon as the CWSP was revised in 1999/2000. The CWSP 1999/2000 predates the future water supply restrictions associated with the Skagit Basin In-stream Flow Rule (SBIFR) of WAC 173-503 and thus postulates future ground and surface water supplies that if available at all will be subject to minimum in-stream flows (F9). The CWSP is overdue for revision and extension of water balance projections well beyond 2050 which will increase the 50 year projected deficits of the CWSP.

The only water source currently available to offset the projected PUD deficit of more than 34.4 MGD is the projected excess of water right over immediate water demand of the Anacortes water system. Indeed, the CWSP (Section 10.1) and the Anacortes and Skagit PUD Joint Operating Agreement anticipate sharing of water and facilities between the two major water systems to meet combined Skagit County demands. However, Anacortes interruptible water rights are extinguished during low flow conditions that coincide with times of increased water demand. Additional storage reservoir volume multiple times the current size of Judy Reservoir will be needed to store water for use during times of high demand that exceed the instantaneous water rights of the combined water systems (F11, F12). Water demand is higher than average for about 4 months during late summer and fall (AWSP Table 4-4). Future interruptible water rights that might be obtained under WAC 173-503 will require even more storage capacity for efficient use.

Additional water storage capacity is not recognized in the 50 year projections of the CWSP. The next revision of the CWSP must seriously explore the options for significant additional reservoir storage capacity (F12).

## Conclusions

The 2050 peak demand water supply deficit projected by the CWSP for the combined Anacortes and PUD service areas is more than 27 MGD during low flow conditions in the water source areas. In the face of projected water supply deficits, all agencies in Skagit County must look to the limited allocations of new industrial water supply to maximize and support industrial job growth throughout the County. However, Anacortes has contracted a potential 5.5 MGD of new industrial demand to Tethys Enterprises which exceeds the new industrial allocation of 3.4 MGD in the AWSP and even the 5 MGD of new industrial demand projected by the CWSP for ALL of Skagit County from 2020 to 2050.

Tethys' 5.5 MGD exceeds Anacortes' industrial allocation in the CWSP by over 2.4 MGD, also consumes PUD's 1 MGD new industrial allocation (CWSP Table 8-8), plus an additional 1.4 MGD of water which may be unavailable because of CWSP projected water supply deficits and deficient water storage capacity. Further, Anacortes specifies that ALL of this 5.5 MGD be processed only within the City of Anacortes.

Any land use permit or Comprehensive Plan Amendment issued to facilitate the Tethys WSA is liable to appeal for violation of Comprehensive Plan Policies of Skagit County and the City of Anacortes as stated in the CWSP and AWSP and elsewhere. Any restrictions placed on Anacortes' water supply to Tethys as a result of these appeals could in turn result in a counter party suit from Tethys for breach of contract. Neither the City of Anacortes nor Skagit County should take any action extending the term of performance of the Tethys contract or changing comprehensive plans or development regulations that facilitate the implementation of the Tethys water supply contract.

The Uncontrollable Circumstances clause Section 9.5 of the Tethys water service contract would appear not to indemnify the City of Anacortes for failure to deliver water to Tethys because of foreseeable circumstances such as violations of comprehensive plans on the part of the City, etc. (see Contract - Exhibit A: Definitions. #14. Uncontrollable Circumstances). The statements of City of Anacortes officials that contracted water service to Tethys would not be a priority over water service to residential customers are not supported by the Tethys contract language or by the terms of AMC 8.29.050 A., B., C., or D covering low river flow and emergency water situations.

**Footnotes:**

**F1.** 16 MGD - 12.92 MGD = 3.08 MGD. Compare the 0.32 MGD excess allocation with the statement in the AWSP "the Anacortes Water System Plan is consistent with the policies, goals, and requirements set forth in the Coordinated Water System Plan" (AWSP Section 3.4.).

**F2.** 5.5 MGD + 12.92 MGD - 16 MGD = 2.42 MGD.

**F3.** Climate change predictions for northwest Washington such as Skagit River Basin Climate Science Report, Lee and Hamlet (2011) suggest that potential climate/weather changes will have less negative effects on human living and economic activities in this area than in many other areas where more extreme weather events and chronic droughts may become a new normal. Thus, the appeal of northwest Washington for residence and business will likely increase on a relative basis. Using high population growth trajectories for water system planning in the CWSP is both prudent and appropriate. High growth trajectories are about 0.5% greater per annum than medium population forecasts (CWSP Table 7-3). The one exception to "less negative effects" above is a significantly increased river flood risk which can be mitigated with appropriate land use planning. The referenced report is available at: <http://www.skagitcounty.net/EnvisionSkagit/Documents/ClimateChange/Complete.pdf>

**F4.** The AWSP has resurrected long neglected water rights on Lake Campbell, but their future utility for modern water supply is questionable since all infrastructure to utilize those rights has long been abandoned or destroyed and such use pumped Lake Campbell dry (photo and testimony on page 27 of At Home On Fidalgo, Ed. Evelyn Adams, 1999). Again Washington Department of Ecology (WDOE) raised the issue of this long neglected water right, but requested that it be included in the AWSP only if Anacortes was still using this water (AWSP Appendix 1-1: Comment and Response Log #19 and WDOE letter of 8/25/11). However, Anacortes added this 2.59 MGD to their list of primary water rights even though use stopped many decades ago.

**F5.** ASWP Table 7-1, compare to 1996 MOA numbers in ASWP Table 3-2 and CWSP. Apparently the draft of the AWSP sent to Washington Department of Ecology (WDOE) included the 9.7 MGD. WDOE noted that the water right had been relinquished in 2001 and requested that it be removed from the water rights listed in Table 7-1 (AWSP Appendix 1-1: Comment and Response Log #18, and WDOE letter of 8/25/11).

**F6.** The lost 9.7 MGD was subject to the Skagit River In-stream Flow Rule. USGS Skagit River gage data averaged over 71 years indicate that minimum flows are met or exceeded for an average of 314 days per year or 86% of the year. If the 9.7 MGD were collected 86% of the time and pumped to a raw water storage reservoir which lost 8% of the water to flushing, etc., the lost water rights would serve the entire rural population of Skagit County projected to be 85,078 or less in 2050 (CWSP Table 8-1) using 90 GPD per person for rural areas (CWSP Section 7.11).

**F7.** Because various portions of the 35.8 MGD are subject to flow conditions in the Cultus Mt. streams or the Skagit River, when the allowable maximum source draw drops below 35.8 MGD because of low flow conditions, that deficit cannot be "made up" later because 35.8 MGD is the maximum instantaneous draw. The PUD is developing a model that will allow estimates of the probable quantity of water available for beneficial use in their Judy Reservoir system (PWSP Section 3.6.1, page 3-41). For long range planning beyond the time line of the current PWSP, the PUD's model should include additional legally available water sources that can fill the projected supply deficits of the PUD system (for instance **F9**).

**F8.** 54.94 MGD - 47.6 MGD = 7.34 MGD  
35.80 MGD - 70.2 MGD = -34.4 MGD

**F9.** The discussion in the CWSP and other WSPs of potential new groundwater or surface water supplies for the Anacortes and PUD service areas is speculative in light of current water law and policy of the State of Washington and water rights litigation in Skagit County. Domestic, municipal, and commercial/industrial water supply reservations of 9.37 MGD in WAC 173-503-073 (1)(b) (Skagit Basin In-stream Flow Rule) are not available for existing municipal water systems such as Anacortes and PUD #1. The quantities are also subject to litigation and may be extinguished.

**F10.**  $70.2 \text{ MGD} - 7.34 \text{ MGD} - 35.8 \text{ MGD} = 27.08 \text{ MGD}$ , but PUD's full 35.8 MGD would typically not be available during times of high demand. PUD's continuous water right is only 27.52 MGD. Additional water from reservoir storage could be available if significant amounts of Anacortes water was distributed in the PUD system so Judy Reservoir was not depleted (see **Filling the Water Supply-Demand Gap** paragraph 1). There are no stated intentions in any water system plan to use Anacortes' 11.18 MGD interruptible water rights via reservoir storage for low flow high demand conditions<sup>11</sup> (see **F11**).

**F11.** Using the low flow conditions stated in **F6**,  $11.18 \text{ MGD} \times 314 \text{ days}$  at or above minimum river flow = 3510 MG seasonal storage for interruptible water right only. To store the excess of Anacortes 54.94 MGD continuous water right would require even more volume, although as mentioned in the text, a portion of this excess would be needed to fill Judy Reservoir<sup>10</sup> (**F10**). Compare the current Judy Reservoir at 1450 MG.

**F12.** The PWSP in Table 3-17, page 3-39, references certificated additional reservoir storage volume at Judy Reservoir of about 424 MG which is hardly relevant to additional storage needs<sup>11</sup> (**F11**). Table 3-17 also references a pending storage application for Day Lake of 11,200 acre-ft or 3650 MG, which would be very difficult to approve under the lake protection standards of WAC 173-503-071 or the stream protection standards for Day Creek in WAC 173-503-074.

---

Ross O. Barnes, Ph.D.  
Earth Science

**Attachments:**

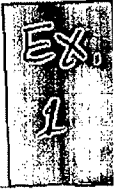
**Exhibit 1** – November 8, 2012, letter from Gerald Steel to Skagit County Commissioners on petition PL12-0258.

**Exhibit 2** – City of Anacortes, Washington, and Tethys Enterprises, Inc. Agreement Regarding Water Service, October 1, 2010.



EXHIBIT 1

GERALD STEEL, PE  
ATTORNEY-AT-LAW  
7303 YOUNG ROAD NW  
OLYMPIA, WA 98502  
Tel/fax (360) 867-1166



November 8, 2012

County Commissioners:  
Sharon Dillon, Ken Dahlstedt, Ron Wesen  
1800 Continental Place, Suite 100  
Mount Vernon, WA 98273

Re: Evergreen Islands opposes putting the Anacortes UGA Modification on the 2013 docket

Dear Commissioners,

I submit this letter on behalf of Evergreen Islands. We request that you do not include the Anacortes UGA Modification - PL 12-0258 ("UGA Modification") in the 2013 docket and instead defer this UGA Modification until the Comprehensive Plan Update scheduled for 2014. We discuss this issue below under the heading "Wait For The 2014 Update."

In his October 10, 2012 letter to the Anacortes Planning Director, your Planning Director states that this application will be reviewed as a non-project legislative action. I have researched this issue and have concluded that the County is required to meet SEPA requirements specific to both project and nonproject actions for this UGA Modification. We summarize this issue below under the heading "SEPA."

The application submitted by Anacortes is not complete and such an incomplete application should not be docketed. Missing from the application is a request to remove from the Anacortes UGA, the industrial-designated property purchased by the Samish Indian Nation in 2008. Without the removal of this property from the UGA, Anacortes will exceed its allocation of industrial lands in its UGA. This is further discussed below under the heading "Incomplete Application."

If you include the UGA Modification in the 2013 docket and review it, you will be precluded from considering a UGA change for the same property in the 2014 Update. SCC 14.08.020(3) ("In no case, even in separate 7-year periods, shall a proposal on the same property be reviewed in consecutive years.")

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## SEPA

The term "nonproject" appears in Skagit County Code only in regard to SEPA review. WAC 197-11-774 (as adopted by SCC 14.12.230) states "nonproject means actions which are different or broader than a single site specific project, such as plans, policies, and programs." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 629-30, 860 P.2d 390(1993) ("Nonproject" means actions such as plans, policies, or programs which are different or broader than a single site-specific project."). WAC 197-11-704(2)(b) (as also adopted by SCC 14.12.230) states:

**Nonproject actions.** Nonproject actions involve decisions on policies, plans, or programs.

(ii) The adoption or amendment of comprehensive land use plans or zoning ordinances;

Because there is an amendment of a comprehensive land use plan, the proposal appears to meet the definition of a non-project action. However, as in the instant case, when a nonproject action is taken in the context of a proposed development, the County combines a nonproject action with a project action and should meet the SEPA requirements specific to both project and nonproject actions. *Citizens Alliance To Protect Our Wetlands v. City of Auburn* ("Citizens"), 126 Wn.2d 356, 362, 894 P.2d 1300 (1995). In *Citizens*, NWRA wanted to build a racetrack on a piece of property in Auburn and initially applied for a rezone. *Id.* Midway through the rezone process, NWRA changed course and asked for a zoning text amendment to allow its use without a rezone. *Id.* The Court found the text amendment was a non-project action but the text amendment was being done in order to build the racetrack and the racetrack was a project action. *Id.* at 362-63. The Court found the EIS had to address both the requirements for a nonproject action and the requirements for a project action. *Id.* at 362-70. We note that the County is not given deference in its interpretation of state laws and regulations regarding SEPA. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn.App. 17, 38, 252 P.3d 382 (2011).

## INCOMPLETE APPLICATION

The City of Anacortes justifies its request to add 11.15 acres to its UGA for industrial development by its argument that 14.69 acres previously added to its UGA for industrial development may not be available for that use. But this argument is based on speculation. The City speculates that this 14.69 acres that was purchased in 2008 by the Samish Indian Nation may become Trust lands. In our view, when lands are put in a UGA for industrial use, the only way they should not be counted toward the City's industrial allocation is if other industrial lands are removed from the UGA. To remove the Samish Indian Nation lands from the UGA requires a UGA modification after either a de-annexation process or after the lands actually become Trust lands. Because the lands have neither become Trust lands nor de-annexed from the City, they continue to count in the City's industrial allocation. Because the Samish Indian Nation lands continue to count in the City's industrial allocation, the City cannot justify adding 11.15 more acres to its industrial allocation in the 2013 cycle.

In its application, the City proposes to rezone the Samish Indian Nation's property to a non-industrial use category. Section 3 Questionnaire at 2. Such a rezone would take a

comprehensive plan amendment. To have a complete application, the City needed to have already amended its comprehensive plan before it submitted its application. But we believe that there is a fundamental problem with the City's concept that it can redesignate existing industrial-designated lands to another use and then request the County to put more industrial lands in its UGA. The County does not have to agree to this process and it should not agree to this process. The City will likely exceed its allocations for urban lands for commercial or residential uses if it designates the subject Samish Indian Nation lands either commercial or residential. This is why we believe that in order to be on the 2013 Docket, the City UGA Modification Application needed to request that the Samish Indian Nation lands be removed from the UGA when it requested that the subject 11.15 acres be added to the UGA. And as stated above, to remove the Samish Indian Nation lands from the UGA requires either de-annexation or actual conversion to Trust lands which neither had occurred at the time of submittal of the City's incomplete Application.

The County should not agree to a process where a City can redesignate lands from industrial to commercial or residential and then request more industrial lands be added to its UGA. This process is likely to violate commercial or residential allocations. In situations where this is proposed, the County should only add lands to a City UGA in a 7-year Update when new allocations are made.

The City UGA Modification Application should not be put on the 2013 Docket because the application is incomplete for other reasons. These other reasons are apparent when the following subsections of SCC 14.08 are considered:

020(1): When the term "comprehensive plan amendment" is used without qualification it includes all comprehensive plan amendments: policy, map with no change to UGA boundary, and UGA modifications.

020(3): The County's current "7-year review period" began the year after the 2007 comprehensive plan was adopted. This "7-year review period" ends in 2014 and that is when the next full comprehensive plan update should be completed ("2014 Update"). This is the standard that currently governs County updates. The GMA has been amended so that the next GMA-mandated update is "on or before June 30, 2016, and every eight years thereafter." RCW 36.70A.130(5)(b). This new GMA amendment schedule should be incorporated in the 2014 Update.

020(4): The UGA Modification must include the relevant details required in subsections (a) and (b) or the Petition is not complete. The responses in the application should not be considered complete. For example, subsection (a)(ii) requires anticipated impacts of the change to be addressed. This must include anticipated impacts of the Tethys plant because the UGA Modification is being made to accommodate this plant. The Conceptual Plant Site Layout for the Tethys plant shows impacts on the RMI zoned land south of the proposed UGA land. These impacts on the RMI zoned land are not allowed by the comprehensive plan and zoning. There may also be inappropriate impacts on the RRv zoned land south and southeast of the proposed UGA land. Also the impacts of the trains on traffic on area roads must be discussed. Subsection (a)(v) requires demonstration that the adopted Capital Facilities Plans of the City support the needs of the proposed Tethys plant. Subsection (b)(i) and (ii) require the UGA Modification to be consistent with Urban allocations. Because the UGA

Modification does not remove the Samish Indian Nation lands from the UGA, the proposal is not consistent with Urban allocations and so the deficient proposal should not be included in the 2013 Docket. Subsection (b)(ii) requires a detailed study by the City on industrial infill opportunities in its UGA and such a study has not been provided with the application. The failure of the application to address all of the issues in subsections (a) and (b) makes the application incomplete and gives reason to defer the application to the 2014 Update Docket.

020(5)(a): The Anacortes UGA may only be modified once in each 7-year review period (which supports it occurring in the 2014 Update) unless one of the provisions in 020(5)(a)(i) to (vii) is satisfied. Subsections (vi) or (vii)(B) are the two possible justifications for an Anacortes UGA change in 2013. There are not adequate studies included in the application for the County to be able to assess compliance with these provisions. Even if one of these provisions in 020(5)(a) is met, the Board is not obligated to process the UGA change in 2013.

020(5)(b): The Anacortes UGA modification is subject to this subsection. Anacortes needed to include in its application the analysis described in subsections (iii) to (vi). Because it did not provide this analysis, the City should be given until July, 2013 to update its application to make it complete and the current incomplete application should be deferred to consideration as part of the 2014 Update.

020(7): Rezones. Rezones shall be processed with a comprehensive plan amendment. A rezone is defined in SCC 14.04.020 to be "a change in zone classification from one zoning district to another." With this UGA modification the zoning district would change from RRv to A-UD immediately and later to LM1 as a part of the same proposal, so there is a rezone. Subsection(7)(b)(i) requires "A detailed development proposal that is consistent with the applicable designation criteria." It is not clear what the phrase "applicable designation criteria" means but it is clear that a rezone requires a "detailed development proposal." I suggest that the "applicable designation criteria" would include the criteria for the Anacortes LM1 designation and zone. These criteria should also include criteria for RMI and RRv designations and zones because the project proposes impacts to these zones. SCC 14.16.220 allows a county development permit in the A-UD zone when the development proposal is consistent with the Anacortes zoning. Subsection (7)(b)(ii) requires a "1-inch equals 100 feet" map for the Petition to be complete. These requirements were not met in the UGA Modification Application and so the application should not be put on the 2013 Docket.

In summary, the UGA Modification Application is not complete and does not have sufficient information to allow it to be put on the 2013 Docket and be timely reviewed. It should not be put on the 2013 Docket because, to be adopted, the Tribe property may need to be removed from the UGA and that amendment was not in the UGA Modification Application and was not timely submitted (030(3)(b)); because criteria in 020(4)(a), 020(4)(b), 020(5)(a), 020(5)(b) and 020(7)(b) were not met by the Application; because the development proposal doesn't fit on the property and would require bottled water storage on tracks in the RMI (and possibly RRv) designation which is not allowed by zoning and the comprehensive plan (030(3)(d)); because the Application was incomplete (030(3)(e)); and considering the staff obligations in preparing for the 2014 update and the inadequate information in the Application, the staff doesn't have adequate resources to process the Anacortes UGA change in 2013 (030(3)(a)).

In his October 10, 2012 letter to the Anacortes Planning Director, your Planning Director identifies a number of deficiencies in the UGA Modification Application and requests additional information in order for the County to continue processing the application. But your Planning Director misses some of the deficiencies that we have identified in this letter. Because the UGA Modification is also a rezone the requirements of SCC 14.08.020(7) must be met which require a "detailed development proposal" that must be reviewed for environmental impacts and for consistency with City and County codes. SCC 14.08.040(1). A "detailed development proposal" must include a full disclosure of the property to be occupied by the proposed use. The proposed UGA Modification at page 2 of Section 3 Questionnaire 1, states that the development proposal may also occupy land north of Stevenson Road. The revised "Conceptual Plant Site Layout" attached to the UGA Modification shows a plant site that extends east and south of the proposed UGA, but shows nothing north of the Stevenson Road. A detailed site plan at 1-inch equals 100 feet (SCC 14.04.020(7)(b)(ii)) should be required showing the full scope of the proposed Tethys' development so that impacts both inside and outside of the proposed UGA Modification can be adequately addressed in the required site-specific review.

### WAIT FOR THE 2014 UPDATE

There is simply not enough time for the City and the Planning Staff to properly address the current deficient UGA Modification Application. If you do put this application on the 2013 Docket, you are likely to find that deficiencies prevent you from approving the application. In such a case, SCC 14.08.020(3) will prevent the County from considering any comprehensive plan amendment on the same property in the 2014 Update. Therefore, we strongly recommend that you consider the burden on staff resources of processing this incomplete application and defer consideration of this application to the 2014 Update.

Staff must begin preparing now for the 2014 Update. In the 2014 Update, there will be new allocations of industrial, residential and commercial lands to be divided among the UGAs. Anacortes will have time to do the necessary studies and submit a complete application for UGA modifications by the July 31, 2013 deadline for the 2014 Update. It is clear that Tethys requires substantially more than 30-acres to accommodate the development that it desires. Tethys should be convinced to adequately disclose its acreage and layout needs. Anacortes may find that there is a need to provide an industrial site with rail access for Tethys or another significant industrial center that is much larger than 30-acres. As part of the non-project environmental analysis, the County should consider alternative sites that could be in or become part of the Anacortes UGA or other UGAs including Bay View Ridge. Anacortes may be able to negotiate supplying its water allocation to a site in Bay View Ridge or in another UGA that is more suitable for such a new industrial center and share property tax revenues as a condition of supplying water.

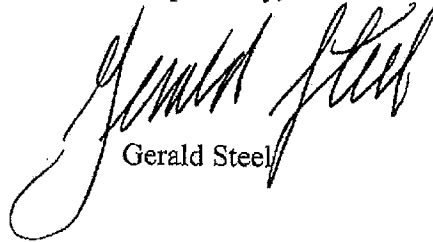
It will benefit Tethys, the County and Anacortes, and the residents of the County and Anacortes to process all UGA Modifications for Anacortes and the other UGAs in the 2014 Update, and to do the necessary studies now for the Cities to be able to submit complete UGA Modification applications by July 31, 2014.

Postpone Docketing the Anacortes UGA Modification  
November 8, 2012  
Page 6

We ask the County not to docket the Anacortes UGA Modification for 2013 and instead give the City of Anacortes time to prepare a complete application for the 2014 Update and consider all of the Cities' proposed UGA modifications at that time.

Thank you for consideration of our request.

Respectfully,



Gerald Steel

cc: Ryan C. Larsen

Dale Pernula

Attachment: 10/10/12 Letter from Pernula to Larsen



## PLANNING & DEVELOPMENT SERVICES

DALE PERNULA, AICP, DIRECTOR

JACK MOORE, CBCO, BUILDING OFFICIAL

October 10, 2012

Ryan C. Larsen, Director  
Planning, Community & Economic Development  
City of Anacortes  
PO Box 547  
Anacortes, WA 98221-0547

**RE: City of Anacortes UGA Boundary Modification Petition, CPA-PL12-0258**

Dear Mr. Larsen,

This correspondence is in response to the above referenced petition and your letter dated September 26, 2012, regarding the City of Anacortes proposal (CPA-PL12-0258) to expand its Urban Growth Area (UGA) to include approximately 11 acres of land (hereinafter, the "petition").

Skagit County's review of the petition will be conducted pursuant to Skagit County Code (SCC) 14.08 as a non-project, legislative action, following the requirements of the 2002 GMA Framework Agreement and the Urban Growth Area (UGA) modification criteria. The framework agreement and UGA modification criteria are the results of multi-year collaborative processes with the Growth Management Act Steering Committee (GMA SC), a committee comprised of elected officials from both the county and the major cities within Skagit County. The UGA modification criteria were adopted unanimously by the GMA SC by Resolution in 2007, and adopted into Skagit County Code in 2009.

While the petition materials reference the Tethys project, please understand that the merits and impacts of the Tethys proposal are not within the scope of the County's review.

Skagit County's review of the petition is limited to determining consistency with the Skagit County Comprehensive Plan (CP), Skagit County Code, and state law. Capital facility and functional plans will need to be addressed and a "buildable lands inventory and analysis" will need to be prepared.

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pds@co.skagit.wa.us • www.skagitcounty.net/planning

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The burden of demonstrating consistency rests with the municipality seeking to modify its UGA. Accordingly, the City's petition must provide information demonstrating that the relevant UGA modification criteria are met. In other words, a jurisdiction must "show its work" and "make its case" for a UGA boundary modification based on the Growth Management Act (RCW 36.70A), Growth Management Hearing Board decisions, and Washington State case law. Skagit County's Comprehensive Plan and Skagit County Code reaffirm these requirements.

Based on Skagit County's initial review of the petition, the following additional items are requested in order to continue processing the petition:

1. A statement of anticipated impacts to be caused by the change, including geographic area affected and issues presented. SCC 14.08.020(4)(a)(ii);
2. A statement of how adopted functional plans and Capital Facilities Plans support the change. SCC 14.08.020(4)(a)(v);
3. A statement of how the change affects implementing development regulations in SCC Title 14 and the necessary changes to bring the implementing development regulations into compliance with the plan. SCC 14.08.020(4)(a)(vi);
4. A summary of any public review of the recommended change. SCC 14.08.020(4)(a)(vi);
5. Any proposed urban growth area boundary changes shall be supported by and dependent on population forecasts and allocated urban population distributions, existing urban densities and infill opportunities, phasing and availability of adequate services, proximity to designated natural resource lands and the presence of critical areas. SCC 14.08.020(4)(b)(ii);
6. Information demonstrating compliance with SCC 14.08.020(5)(b)(i-vi); and
7. Executed resolution demonstrating municipal legislative request for UGA modification. SCC 14.08.020(2).

Each of the items set forth above is a requirement of Skagit County Code, which you can review in its entirety at <http://www.codepublishing.com/wa/skaagitcounty/>.

Attached are a number of relevant materials for your reference and review.

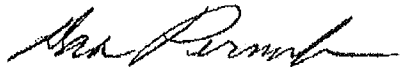
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Ryan Larson  
City of Anacortes UGA Boundary Modification Petition, CPA-PL12-0258  
October 10, 2012  
Page 3

In order to continue processing the petition, please furnish information responsive to this request within 120 days from the date of this letter. Should you have questions or need further assistance, please contact Gary Christensen, Skagit County Planning and Development Services, at (360)336-9410.

Sincerely,



Dale Pernula, Director

CC: Gary Christensen

Attachments

EXHIBIT 2

CITY OF ANACORTES, WASHINGTON

AND

TETHYS ENTERPRISES, INC.

AGREEMENT REGARDING WATER SERVICE

October 1, 2010



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CITY OF ANACORTES, WASHINGTON  
AGREEMENT REGARDING WATER SERVICE

1. **AGREEMENT**

This Agreement Regarding Water Service (“Agreement”) is between the City of Anacortes, (“City”) and Tethys Enterprises, Inc. (“Customer”). The City and Customer are each a “Party” to this Agreement, and collectively the “Parties.” The City and Customer agree as follows.

2. **RECITALS**

- 2.1 The Customer is entering into this Agreement to secure a supply of water for its industrial and/or other water supply requirements. The City owns and operates a Water Supply System.
- 2.2 The City may, but is not obligated to, supply water to the Customer. However, the City has water available to serve the Customer, and is willing to supply water according to the terms and conditions of this Agreement. This Agreement is in furtherance of the City’s proprietary authority.
- 2.3 Customer intends to acquire property within City limits for the purposes of developing an industrial park for water-intensive industries, with a primary focus on beverage bottling and food manufacturing. Customer may elect to build and operate its own facility within the industrial park and be its only or primary tenant.
- 2.4 It is the purpose of this Agreement to provide for the City’s supply of water to the Customer in accordance with the Agreement.

3. **SITE AND SITE DEVELOPMENT**

- 3.1 Site Selection. Within one (1) year of this Agreement’s Effective Date, Customer shall deliver to City a legal description and map of the property for Customer’s development (the “Property”). The Property shall be no less than 30-acres in size, and served by rail within the schedule for Property development set forth in this Section 3.
  - 3.1.1 In addition to the delivery of the Property description and map, Customer shall deliver a report of a title company and supporting title documents showing the Customer’s title, or right to acquire title, to the Property. For purposes of this Section 3.1, “right to acquire title” means a right controlled exclusively by Customer and not controlled by Property seller, vendor or any other person.

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3.1.2 The Property shall be located within the City; provided, however, upon acceptance by the City, acting in its sole discretion, the City may accept the site selection and the Property if the Property is to be annexed to the City within the period set forth in Section 3.2. City and Customer shall execute a Petition for Annexation, Annexation Agreement, and Declaration of Covenant, substantially in the form attached hereto as Exhibit E.

3.2 Development/Permit Process. Customer shall proceed as soon as practicable to prepare and file all necessary applications for the Property's development following Site Selection ("Permit Application"). Provided, however, such Permit Application shall occur no later than two (2) years following the Site Selection.

3.3 Property Occupancy and Use. Property shall be occupied (following issuance of certificate(s) of occupancy) and water purchase shall commence, within the later of

3.3.1 Twenty-four (24) months following the issuance of necessary development and building permits; or

3.3.2 Forty-two (42) months following Permit Application.

#### 4. **WATER SERVICE**

##### 4.1 Quantity

4.1.1 The City agrees to supply up to five (5) million GPD of water to the Property. Subject to Agreement Sections 4.6 and 5, the City's delivery of water shall be as set forth in the Committed Water Volume, set forth in Exhibit C, as may be modified from time to time consistent with this Agreement.

4.1.2 Upon Customer commitment to capital facility upgrades as set forth in Agreement Section 4.6.2, the City shall assure water availability to Property of up to five (5) million GPD.

##### 4.2 Delivery Points

4.2.1 Approved Delivery Points. The City shall deliver water to the Customer at the Property delivery points mutually agreed upon between Customer and City.

##### 4.2.2 Main Extensions and Service Connections.

(A) The Customer shall be responsible for paying all costs associated with installing water main extensions, other water system improvements and service connections required for the City's delivery of City Water to the delivery points. The connection shall

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include the necessary piping and valves, metering equipment of standard manufacture, and suitable isolating or backflow prevention devices as appropriate. If required by the City, the meter shall be of a type capable of transmitting continuous readings to the City's water treatment plant. The Customer shall prepare the design for the proposed service connection, submit it to, and receive the approval of the City prior to its installation. The City shall own the meter and be responsible for maintaining it in good repair.

- (B) All water system development and improvements to serve the Property shall conform to governing law and regulations for such improvements, including under Title 13 AMC for fire hydrants and other improvements, to be evaluated subject to vesting and consistent with regulations in effect at the time of City development and building permit review and approval. The City and Customer shall enter a Latecomers Agreement relating to such improvements, subject to Chapter 12.20 AMC, substantially in the form attached hereto as Exhibit D.

4.2.3 New Delivery Points. The Customer may request service at additional delivery points subject to the approval of the City. The City may approve new service connections consistent with the concept that the Water Supply System is not a distribution system but the Customer has responsibility for constructing and maintaining a distribution system within its Property adequate to serve facilities within the Property.

#### 4.3 Metering

The volume of water delivered to the Customer shall be measured by metering equipment installed in accordance with Agreement Section 4.2. The meter shall be maintained and read by the City. It shall be tested by the City periodically, but not less than once per year, to assure its continuing accuracy and conformance to the standards of measurement and service accepted in the water industry. The Customer has the right to be notified ahead of time and be present at any of the regularly scheduled tests. The cost of conducting such tests shall be borne by the City. These tests may also be conducted at other times at the request of the Customer and the Customer may elect to have a representative witness the meter test. If the meter is accurate, the Customer shall pay for the cost of the test; but if the test reveals an inaccuracy of more than two (2) percent, the City shall pay for the test. If an inaccuracy of more than two (2) percent is discovered, all billings for water furnished under this Agreement for one-half the time from the date of the preceding test shall be adjusted. The adjustment shall be for the full amount in excess of two (2) percent.



4.4 Quality of Water

4.4.1 Water Quality Standards. The City shall operate and maintain its Water Supply System in order to supply water for municipal and industrial purposes that meets the water quality standards of the Washington State Department of Health and the U.S. Environmental Protection Agency, including periodic revisions to these standards. The City shall employ the normal care and practices of water utilities with respect to meeting water quality standards.

4.4.2 City Responsibility. The City shall not be liable to the Customer for failure to meet the water quality standards because of Uncontrollable Circumstances. The Customer shall hold the City harmless from any water quality related claim for damages by third parties served by the Customer, to the extent that the claim arises out of Customer's negligence.

4.5 Continuity of Service

The City shall use reasonable diligence to provide a regular and uninterrupted supply to the Customer's approved delivery point(s), but shall not be liable to the Customer for damages, breach of contract, or otherwise for interruption of service or curtailment of supply because of Uncontrollable Circumstances, or under applicable City Municipal Code provisions, including Chapter 8.29 AMC. The Customer shall hold the City harmless from any claim for damages related to continuity of service by third parties served by the Customer, to the extent that the claim arises out of Customer's negligence.

4.6 Future Supply

4.6.1 Service Area. This Agreement between the City and the Customer is to supply City Water to the Customer's Property. In this regard, the Customer agrees not to increase operations on the Property, to add new customers, or to expand its service area in a manner that would increase its City Water requirements by more than 10 percent above the amount set forth in Section 4.1 without the prior written approval of the City. Customer shall use only City Water at the Property. Customer shall not use or distribute City Water at a location other than the Property. Customer shall not sell water (whether City Water or City Water that has been subject to treatment by Customer) for use off of the Property or to other City Water users, without the City's prior written approval, except that Customer may sell water for use off of the Property if:

- (A) The water is treated and packaged on the Property in units or containers of a size no greater than ten (10) gallons; or
- (B) The water is used on the Property in the manufacture or production of any food or beverage product.

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4.6.2 Water Supply Requirements. The City operates its Water Supply System for the purpose of delivering an adequate supply of good quality water to all of its Customers. The City agrees to maintain and to operate its system so as to meet the volumes contracted for by its Customers and to supply additional volumes as may be required by the Customer in the future, consistent with the needs of all its Customers.

4.6.3 Future Improvements. The City will plan and develop water supply facilities that may become necessary in the future to replace existing facilities or to expand the capacity of its Water Supply System to meet growing demands. The City may require appropriate commitments from Customer prior to proceeding with system improvements, as set forth in Section 5.4.

#### 4.7 Wastewater Management

4.7.1 Wastewater from the Property shall be disposed in or managed through the City's System of Sewerage. The Parties acknowledge that future improvements to the System of Sewerage may be required for the management of wastewater from the Property, and that Customer may be subject to capital facility costs for such improvements. Any necessary improvements to the System of Sewerage shall be identified in the Development/Permit Process. The City and Customer shall enter a Latecomers Agreement relating to such improvements, subject to Chapter 12.20 AMC, substantially in the form attached hereto as Exhibit D.

4.7.2 Nothing in this Agreement shall preclude Customer from recycling and/or reusing (including irrigation), but not disposing, of wastewater on the Property. The Parties will work in good faith to evaluate and implement systems and programs for use (including sale) of wastewater off of Property.

### 5. **RATES AND CHARGES**

The City has established the following rates and charges and billing procedures for customers of its Water Supply System, which apply to this Agreement.

5.1 Rate Structure. The City has defined the following costs associated with the facilities, operation and maintenance of its Water Supply System:

5.1.1 Capital Cost. Those costs incurred for the betterment and rehabilitation of the Water Supply System includes amounts paid from revenues, water system funds, and debt service on bonds issued for the betterment or rehabilitation of the System.

5.1.2 Fixed Operating Cost. The cost of labor, supervision, supplies, utilities, services, taxes, insurance, and all other expenses required to operate and

maintain the Water Supply System other than those items included under Variable Operating Cost.

5.1.3 Variable Operating Cost. The cost of chemicals and electric power required to deliver water from the Water Supply System.

5.2 Cost Allocation. The Customer shall pay its proportionate share of the Capital Cost, Fixed Operating Cost, and Variable Operating Cost. These costs shall be allocated as follows:

5.2.1 Capital Cost. Allocated to all Water Supply System customers based on the committed volume of water to each customer in proportion to the total water supply requirements.

5.2.2 Fixed Operating Cost. Allocated to all Water Supply System customers based on the metered water volume of each customer as a percentage of the total metered volume of all customers, with the following exceptions:

(A) Administrative support services and all employee benefits shall be allocated to customers in the same proportions that the total cost of all other personnel services is divided among them.

(B) The State and City Excise Tax shall be allocated based on actual (or projected) billings to each of the customers.

5.2.3 Variable Operating Cost. Allocated to all Water Supply System customers in accordance with the metered water volume of each customer as a percentage of the total metered volume of all customers.

5.3 Basis for Rates and Charges

5.3.1 The Capital Cost Allocation to customers is determined each time a water rate analysis is prepared by the City and is set for the ensuing rate period (usually 3 to 5 years). As part of the rate analysis, Customer and the City shall agree to a volume of water which the City shall deliver to the Customer, based upon current usage and estimated increased water requirements during the rate period ("Committed Volume"). The Committed Volume shall be used to calculate the Capital Cost for the rate period, which cost shall be agreed upon between the City and the Customer. The current capital cost will be shown in Exhibit C.

5.3.2 The Fixed and Variable Operating Costs shall be determined each year as part of the City's budgeting process. Rates under this Agreement will be shown on Exhibit C and are used as the basis for the Customer billings according to the volume of water used. The City will calculate the unit Fixed and Variable Operating Costs for the period based upon projected operating costs and projected water use and will notify the Customers of these rates. These revised costs will be used as the basis for billing

Customers over the billing period. Periodically, but not to exceed two (2) years, the City will calculate and report actual costs and retroactively adjust each Customer's charges (i.e., increase or decrease) to actual costs.

- 5.4 Future Capital Facility Upgrade. The City is in the process of designing and upgrading its water treatment plant to provide an average daily capacity of 32 MGD. The City can service the Property to a degree with the water plant's expanded capacity. However, should the Customer seek capacity up to and including 5 MGD per day, additional improvements to the water treatment plant would be required to increase that plant's capacity. As a result, prior to the City's obligation to provide up to 5 MGD, and as a condition precedent to that obligation set forth in Agreement Section 4.1.1, the Customer shall enter such agreement as is mutually acceptable to the City and Customer to provide necessary funding for the further expansion of the water treatment plant.

## 6. BILLING

The City shall read the Customer meter(s) each month, calculate, and issue a bill to the Customer. The bill shall identify the Capital Cost, the Fixed Operating Cost, the volume of metered water delivered to the Customer during the month, and the corresponding Variable Operating Cost. The Capital Cost is payable regardless of the volume of water consumed while the Fixed Operating Costs and Variable Operating Costs shall be paid according to the volume of metered water delivered to the Customer. Payment by the Customer is due within fifteen (15) days of the receipt of the bill.

- 6.1 Late Payment. If a bill remains unpaid after thirty (30) days, the City will assess interest on the delinquent amount at the rate of 12% per annum. If a bill still is not paid after ninety (90) days, the City may use other remedies legally available to it, including shutting off service to enforce payment.
- 6.2 Additional Charge. During the rate period, the Customer is entitled to the quantity of water fixed as the basis for the capital charge. Should the Customer use an annual volume greater than the Committed Volume shown on Exhibit B or as later amended by the parties, it shall pay the current Commercial rate (Outside of City water sales) for the quantity in excess of the Committed Volume.

## 7. GUARANTEES AND WARRANTIES

- 7.1 As to any facilities or equipment the Customer may dedicate to the City ("Dedicated Facilities"), the Customer shall provide to the City any and all warranties and guarantees required by any of the Agreement Documents.
- 7.2 To the extent permitted by such warranties or guarantees, all guarantees or warranties of equipment, services or materials furnished to Customer or subcontractors by any supplier shall be deemed to run to the benefit of the City. If any supplier of any equipment, services or material furnishes a guarantee or warranty for a period in excess of one year from the date of acceptance,

Customer's guarantee, as provided in Section 7.1 shall be deemed to extend for a like period as to such equipment, service or material.

- 7.3 The Customer shall fulfill the conditions of any warranties of manufacturers applicable to Dedicated Facilities.
- 7.4 Within a reasonable time after receipt of a written notice thereof, the Customer shall correct any defects in workmanship of Dedicated Facilities which exist prior to or during the period of any guarantee provided herein and any damage caused by such defects or the repairing of such defects, at its own expense and without cost to the City.
- 7.5 The guarantees and warranties applicable to Dedicated Facilities shall not be construed to modify, limit, or lessen in any way, any rights or remedies which the City may otherwise have against the Customer.

**8. ASSIGNMENT; CORPORATE CONTROL; SUCCESSORS**

- 8.1 Assignment. The Customer shall not assign any rights or obligations under or arising from this Agreement without the prior written consent of the City. The City's consent under this Section 8 shall be subject to a standard of reasonableness from and after January 1, 2013. The Customer shall not assign any amounts due or to become due to the City under this Agreement without prior written notice to the City.
- 8.2 Successors. This Agreement shall be binding on any and all successors or assignees of a Party in accordance with this Section.

**9. RIGHTS AND REMEDIES FOR DEFAULTS IN PERFORMANCE OF THE AGREEMENT**

- 9.1 Customer Default. There shall be three (3) categories of default by the Customer in its performance under this Agreement:
  - 9.1.1 A Category A default is the Customer's failure in any material respect, following the Effective Date, to meet any of the scheduled performance dates in Section 3.
  - 9.1.2 A Category B default is the Customer's:
    - (A) failure to maintain water system standards as may be required by law; or
    - (B) failure to pay any rate, charge or other financial obligation under this Agreement.
  - 9.1.3 A Category C default is any failure, other than a Category A or B default, by the Customer to perform its obligations under this Agreement.

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9.2 Consequences of Customer Defaults.

9.2.1 Category A default. In the event of a Category A default, the Customer shall be permitted to remedy the default within one hundred eighty (180) days from notice by the City. If the Category A default is not remedied within one hundred eighty (180) days, the City may, at its sole option:

- (A) be released from its obligations under this Agreement;
- (B) seek the judicial remedy of specific performance; or
- (C) pursue any combination of the foregoing or any other remedy provided by law.

9.2.2 Category B default. In the event of a Category B default, the Customer shall be permitted to remedy the default within the time periods set forth in Section 6.1, unless otherwise stated in the Agreement.

9.2.3 Category C default.

(A) In the event of a Category C default, the Customer shall be permitted to remedy the default within one hundred eighty (180) days from notice by the City. In the event Customer shall show cause why it should be entitled to reasonable additional time to cure the default, such additional time shall be granted. The determination of reasonableness shall be in the City's sole discretion. If the Category C default is not remedied within one hundred eighty (180) days, or within the additional time allowed to Customer, the City may, at its sole option,

- (1) seek the judicial remedy of specific performance; or
- (2) pursue the foregoing and/or any other remedy provided by law.

(B) The remedies provided in Section 9.2.3(A) shall not be available unless the Category C default is material.

(C) If a Category C default continues on a chronic and material basis, and City has given notice to Customer that such default is chronic and material, and Customer continues such incidents of default notwithstanding such notice, the City, upon thirty (30) days written notice, may at its sole option terminate the Agreement.

9.3 Default Procedure.

9.3.1 Notice. To initiate default and trigger remedy periods under this Section for Category A, B and C defaults, the City shall give thirty (30) days

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advance written notice to the Customer of the City's intention to declare the Customer in default. Unless the Customer promptly shows cause to the City's satisfaction why it should not be declared in default under the Agreement, the City may declare the Customer in default.

9.3.2 General. Any amount due the Customer under this Agreement at the time of default shall be reduced by the damages suffered and expenses incurred by the City due to the default. The amount of the damages shall be mutually agreed to by the Parties or established in arbitration as provided in Section 10 of this Agreement. In addition to the foregoing, City shall be entitled to any other remedy provided by law.

9.4 City Default. For each and every event of default by the City under this Agreement, within thirty (30) days of notice by the Customer, and after the City has failed to cure the default or give Customer reasonable assurances that the default or threatened default will be promptly cured, the Customer shall have the right to all of the following remedies to the extent provided by law:

9.4.1 Judicial Remedy of Specific Performance. For each and every default, the Customer shall be entitled to a judicial remedy of specific performance or mandamus requiring the City to specifically perform the City's basic responsibilities described in this Agreement, it being agreed that in the case of a default by the City, Customer's remedies at law will be inadequate.

9.4.2 Injunctive Relief. For each and every default, the Customer shall be entitled to the remedy of a permanent or temporary injunction, either in mandatory or prohibitory form, it being agreed that in the case of a default, the Customer's remedy at law is inadequate.

9.4.3 Termination or Suspension of Customer's Performance of the Contract. For each and every material default by the City, Customer shall be entitled to terminate or suspend Customer's performance of the Agreement if the City has not remedied the default within one hundred twenty (120) days of notice.

(A) Upon Customer termination of Agreement under this Section 9.4, City shall have no further obligation to supply water to the Property.

(B) Upon suspension of Customer's performance, Customer shall remain responsible for payments then due for rates and charges owed by Customer, but shall have no obligation to pay rates and charges for water or services not delivered.

9.4.4 General. In addition to the foregoing, Customer shall be entitled to any other remedy provided by law.

- 9.5 Uncontrollable Circumstances/Impossibility.
- 9.5.1 A delay or interruption in or failure of performance of all or any part of this Agreement resulting from Uncontrollable Circumstances shall be deemed not a default under this Agreement.
- 9.5.2 A delay or interruption in or failure of performance of all or any part of this Agreement resulting from any change in or new law, order, rule or regulation of any nature which renders operation of a facility on the Property in accordance with the terms of this Agreement legally impossible, and any other circumstances beyond the control of the Customer which render legally impossible performance by the Customer of its obligations under this Agreement shall be deemed not a default under this Agreement.
- 9.6 Customer's Bankruptcy/Receivership. If the Customer is insolvent, dissolved pursuant to court order, files for bankruptcy, is adjudged bankrupt, or makes a general assignment for the benefit of creditors, or if a receiver is appointed for the benefit of its creditors, or if a receiver is appointed on account of its insolvency, any such event could impair or frustrate the Customer's performance of this Agreement. Therefore, it is agreed that upon the occurrence of any such events, the City shall be entitled to request of the Customer or its successor-in-interest, adequate assurance of future performance in accordance with the terms and conditions of this Agreement. Failure of Customer to comply with that request within ten (10) calendar days of service on Customer of a written request from the City for that assurance shall entitle the City to terminate or suspend the City performance of the Agreement, including water service. The City shall not be bound to the Agreement by an insolvent Customer's trustee or receiver.
- 9.7 Non Waiver. Nothing in this Section and no actions taken pursuant to this Section shall constitute a waiver or surrender of any rights, remedies, claims or causes of action a Party may have against the other Party under any other provision of this Agreement or any provision of law.
- 9.8 Plan to Remediate. If an Uncontrollable Circumstance prevents for a period of sixty (60) days the satisfactory performance of any of the material provisions of this Agreement, (a) the excused Party shall deliver a written plan for the resumption of the performance of its obligations under this Agreement; (b) the other Party shall approve such written plan, which approval will not be unreasonably withheld; and (c) the excused Party shall diligently and continuously follow the approved written plan.
- 9.9 Police and Eminent Domain – Agreement Authority.
- 9.9.1 Nothing in this Agreement shall prevent or limit the City's exercise of its police power, power of eminent domain, or other governmental authority.



9.9.2 City's seizure and operation of a facility on the Property, or City's lease, sublease or license of a facility on the Property, shall be without prejudice to Customer's right to just compensation, and City's right to damages, in respect of such seizure, operation, lease, sublease or license.

10. **ARBITRATION, JUDICIAL VENUE AND GOVERNING LAW**

- 10.1 State Law. This Agreement shall be deemed to have been made in and shall be construed under the laws of the State of Washington.
- 10.2 Arbitration. Subject to the conditions and limitations of this Section, controversies or claims arising out of or relating to this Agreement shall be exclusively settled by arbitration. Arbitration shall be governed by the laws of the State of Washington, in accordance with the Commercial Arbitration Rules of the American Arbitration Association; provided, the American Arbitration Association shall not administer or otherwise have any involvement in arbitration matters between the Parties. All other controversies and claims shall be decided exclusively by a court of competent jurisdiction in Skagit County, Washington, under the laws of the State of Washington or in the U.S. District Court for the Western District of Washington, at Seattle.
- 10.3 Arbitrator. All arbitrated disputes shall be heard and decided in Skagit County by a panel of three (3) arbitrators selected by the Parties. If the Parties are unable to select the arbitrators, each Party shall select an arbitrator. Those arbitrators shall select a third arbitrator, who shall preside over the arbitration.
- 10.4 No Consolidation. There shall be no consolidation of any arbitration between the City and the Customer with any other arbitration involving, arising from, or relating to this Agreement or the Property, except as otherwise agreed in writing by the Parties.
- 10.5 Enforcement. Each Party hereto accepts jurisdiction of the courts of the State of Washington for the purposes of commencing, conducting and enforcing arbitration proceedings and agrees to accept notice in writing sent by certified mail addressed to the Party of intention to proceed with arbitration and of any other step in connection therewith or enforcement thereof, with the same effect as though personally served therewith in the State of Washington. The decision of the arbitrators shall be final and binding upon the Parties who hereby agree to comply therewith. The Parties agree that proper venue for any judicial proceeding to enforce any decision or award made by the arbitrators under this Section shall be exclusively in Skagit County, Washington.
- 10.6 Costs and Fees. In the event suit or action or arbitration is instituted to enforce any right granted herein, each Party shall be responsible for payment of its own attorney's fees and costs.

11. **TAXES AND FEES**

As between the City and Customer, the Customer shall be responsible and liable for payment of all federal, state, regional, county and local taxes and fees, and surcharges of every form, which apply to any and all Persons, entities, property, income, equipment, materials, supplies, structures, or activities which are involved in the performance of this Agreement, including but not limited to any and all income taxes, real property taxes, excise taxes, sales and use taxes, assessments and fees that arise in connection with the Agreement. The City shall be responsible for payment of taxes charged to the City.

12. **NOTICE**

12.1 Addresses. All notices and billing required under this Agreement shall be sent to the following addresses:

CITY OF ANACORTES

CUSTOMER

Attn: Public Works Director

Steve Winter, CEO

And to, City Clerk/Finance Director

Tethys Enterprises, Inc.  
2722 Colby Avenue, Suite 515  
Everett, WA 98201

Mailing: PO Box 547  
Anacortes, WA 98221

Physical: 904 6th Street  
Anacortes, WA 98221

12.2 Notice Process. All notices shall be personally delivered, telegraphed, telecopied, or sent by United States mail (return receipt requested) or by reputable private independent courier. Except for personal delivery and confirmed telecopy (which will be effective upon receipt), all notices will be effective on the date delivered to the telegraph company, United States Post Office depository, or reputable private independent courier, as the case may be. Either Party shall have the right to designate a new address for the receipt of notices by giving written notice as herein provided, but notwithstanding the foregoing, such notice of a new address shall not be effective until actually received by the other Parties.

13. **INDEMNIFICATION**

13.1 The Customer will at all times indemnify and hold harmless and defend the City, its elected officials, officers, employees, agents and representatives (collectively "City") from and against any and all losses, damages, costs, charges, expenses, judgments and liabilities, including reasonable attorneys' fees (including attorneys' fees in establishing indemnification of whatsoever nature), collectively referred to herein as "losses," directly or indirectly resulting from, arising out of, or related to one or more claims, as hereinafter defined.

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- 13.2 The Customer shall indemnify, hold harmless and defend the City from and against any and all claims, and all expenses arising from such claims, including but not limited to reasonable attorneys' fees and any and all costs, if such claims or expenses allegedly or actually arise or result, directly or indirectly, from, or are in any way connected with: (1) the performance or nonperformance of any provision or requirement of this Agreement by Customer, its officers, employees, Subcontractors, agents or servants; (2) any of the acts or omissions of Customer, its officers, employees, Subcontractors, agents or servants at the Property; (3) the failure of Customer, its officers, employees, Subcontractors, agents, or servants to comply in any respect with the provisions and requirements of all applicable permits, licenses, laws, statutes, regulations, ordinances, codes, orders and all other legal requirements of federal, state, regional, county and local government authorities and agencies having jurisdiction over the Facilities or relevant activities of the Customer; or (4) any release or emission, or threatened release or emission by any person, entity or entities at, onto, into, above, under, through or from any of the Property.
- 13.3 The term "claims" as used in this Section 13 shall mean all claims, lawsuits, causes of action, damages, penalties, charges, judgments, losses, liabilities of any character or kind and other legal actions and proceedings of whatsoever nature, including but not limited to claims, lawsuits, causes of action, damages, penalties, charges, judgments, losses, liabilities of any character or kind and other legal actions and proceedings involving bodily or personal injury or death of any person or damage to any property (including but not limited to persons employed by the City, the Customer or any other person and all property owned or claimed by the City, the Customer, any affiliate of the Customer or any other person). The term "claims" or "losses" as used in this Section 13 shall not include claims or losses (as defined above) (a) initiated by the City against its own officers, employees, subcontractors, agents or servants, or (b) arising from the City's breach of this Agreement, its sole negligence, intentionally wrongful acts or omissions, or the violation of applicable laws, statutes, regulations, ordinances, codes and orders.
- 13.4 The obligations of the Customer hereunder shall apply to all losses or claims, or both, that result from, arise out of, or are related to any event, occurrence, condition or relationship, whether such losses or claims, or both, are asserted. The City shall not be liable to the Customer for, and the Customer hereby releases the City from, all liability for any injuries, damages or destruction to all or any part or parts of any property owned or claimed by the Customer that directly or indirectly results from, arises out of or relates to the Property or any part thereof, except where that liability arises from the City's breach of this Agreement, its sole negligence, intentionally wrongful acts or omissions, or the violation of applicable laws, statutes, regulations, ordinances, codes and orders.
- 13.5 In case any action shall be brought against the City in respect of which indemnity may be sought against the Customer, the City shall promptly notify the Customer in writing and the Customer shall have the right to assume the investigation and

defense thereof, including the employment of counsel and the payment of all expenses. The City shall have the right to employ separate counsel in any such action and participate in the investigation and defense thereof, but the fees and expenses of such counsel shall be paid by the City unless the employment of such counsel has been authorized by the Customer and the Customer shall control the defense of claims against which it is providing indemnity hereunder.

- 13.6 Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Customer and the City, the Customer shall indemnify the City hereunder to the full extent of the Customer's negligence.
- 13.7 **It is further specifically and expressly understood that the indemnification provided herein constitutes the Customer's waiver of immunity under industrial insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the Parties.**
- 13.8 The Customer shall pay all royalties and license fees. The Customer shall defend all suits or claims for any and all infringements of any license or patents which may occur in the Customer's performance of this Agreement and shall save the City harmless from loss on account thereof.
- 13.9 The City shall have the sole and exclusive discretion to appear or not appear in defense of any claims arising out of the Agreement.
- 13.10 The Parties do not under this Section waive or surrender any indemnity available under any federal, regional, state or local law. This Section 13 shall survive termination or expiration of this Agreement.

#### 14. GENERAL PROVISIONS

- 14.1 State Environmental Policy Act. Consistent with the Washington State Environmental Policy Act ("SEPA"), including the application of categorical exemptions from SEPA under WAC 197-11-800 (14)(i) or WAC 197-11-800 (23)(b), this Agreement is preliminary to the performance of work necessary to develop an application for a proposal. See WAC 197-11-070. No action that would have an adverse environmental impact or limit the choice of reasonable alternatives shall be taken without SEPA compliance.
- 14.2 Customer Skill. The Customer and its officers, employees, agents and subcontractors shall perform each and every service to be performed under this Agreement in a skillful and competent manner. The Customer shall be responsible to the City for any and all errors or omissions in the performance of this Agreement by Customer and Subcontractors and for any and all failures to perform this Agreement.

14.3 Warranty of Personnel and Equipment. The Customer warrants that the facilities, materials, equipment and personnel used in the performance of this Agreement on the Property shall conform to the design, operating specifications and training requirements of applicable law.

14.4 Compliance With Law.

14.4.1 General. In performing each and every service to be performed under this Agreement, the Customer, its officers, employees, agents and subcontractors shall comply with all applicable laws, regulations, ordinances, building codes, orders and all other requirements of federal, state, regional, county and local government authorities and agencies having jurisdiction over the Project, and the Customer shall accordingly give all notices and shall be responsible for obtaining all licenses and permits so required by law. The latter requirements of law include, but are not limited to, all applicable statutes, regulations and orders concerning minimum wage rates, nondiscrimination in the employment of labor, protection of public and employee safety and health, environmental protection, the protection of natural resources, fire protection, burning and non-burning requirements, permits, fees and similar subjects. The City shall have the right to inspect copies of all correspondence or any other documents sent to or from the Customer, its officers, employees, agents or subcontractors to any government agency, federal, state, regional, county or local, relative to any and all of the requirements of law relating to this Agreement. To the extent such correspondence or other documents were submitted by the Customer or its officers, employees, agents or Subcontractors with a designation that such correspondence or documents, or materials incorporated therein, be treated as confidential, the City agrees that such correspondence and documents shall be subject to the provisions of Section 14.5 below. All agreements between the Customer and Subcontractors employed for this Agreement shall contain this section's requirements. The requirements of this section shall survive the expiration of the Agreement.

14.4.2 Permits and Regulation.

(A) The Customer shall have responsibility for obtaining, maintaining, and paying for all permits, licenses, certificates, inspection fees and surcharges and other approvals required by law, both temporary and permanent. The Customer shall obtain any business licenses required by law.

(B) The Customer shall be liable for all fines or civil penalties which may be imposed by any regulatory agency for Customer-caused violations of permits, laws or regulations; the City shall not be liable for and shall not reimburse Customer for payment of any such fines or civil penalties. The Customer reserves the right to

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contest any such fines in administrative proceedings or in court prior to any payment by the Customer.

14.5 Confidentiality.

14.5.1 Documents and records provided by the Customer to the City may be designated as Confidential Business Records. Such documents or records may be reviewed by the City, but shall remain the property of the Customer and returned to the Customer upon request.

14.5.2 "Confidential Business Records" include all trade secrets, proprietary plans, and financial data, and the ideas and information reflected therein, which Customer has made or may hereafter make available to the City.

14.5.3 Except as required otherwise by law, the City shall at no time shall use or knowingly permit any other Person or entity to examine, use or derive benefit from Customer's Confidential Business Records without the express written consent of Customer. The City shall not disclose any Confidential Business Records to anyone other than employees or outside consultants, attorneys or accountants who require access to such Confidential Business Records on the City's behalf; all such consultants, attorneys or accountants shall be instructed to comply with the provisions of this Section 14.5.3. Whenever the City believes that it is required by law to disclose Confidential Business Records, the City shall give prior reasonable notice to Customer before disclosing such Confidential Business Records.

14.5.4 All documents or materials, and copies thereof, shall at all times remain the exclusive property of Customer. The City shall not assert any proprietary rights in the Confidential Business Records.

14.5.5 Customer shall pay all costs, fines, judgments or other amounts, including but not limited to reasonable attorney fees, ordered, levied or imposed against the City, and any attorney fees and costs incurred by the City, as a result of the nondisclosure of Confidential Business Records.

14.5.6 This Section 14.5 shall survive termination or expiration of this Agreement.

14.6 No Public Official Liability. No provision or provisions of this Agreement nor any authority granted by this Agreement is intended to create or result in any personal liability for any public official or employee or agent of the City, nor shall any provision or provisions of this Agreement be construed to create any such liability.

14.7 Severability. If any term or provision of this Agreement, or the application thereof to any Person or circumstances, shall to any extent be invalid or unenforceable, the remainder of this Agreement or the application of such term or

provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law. Further, the Parties shall negotiate in good faith regarding amendments to this Agreement that would, to the maximum extent possible, effectuate the intent of any provision determined to be invalid or unenforceable.

- 14.8 Agreement Provisions Applied. The Customer shall comply with each and every provision of the Agreement binding on Customer, and City shall comply with each and every provision of the Agreement binding on City.
- 14.9 Non-Waiver. A waiver by either Party of any breach of any provision hereof shall not be taken or held to be a waiver of any succeeding breach of such provision or as waiver of any provision itself. No payment or acceptance of compensation for any period subsequent to any breach shall be deemed a waiver of any right or acceptance of the breach. Where the condition to be waived is a material part of the Agreement such that its waiver would affect the essential bargains of the Parties, the waiver must be supported by consideration and take the form of an Agreement modification.
- 14.10 Venue. The Parties agree that proper and exclusive venue for any and all actions under this Agreement shall be either in the Superior Court of the State of Washington in Skagit County or the U.S. District Court for the Western District of Washington, at Seattle.
- 14.11 Facility Ownership – Covenants.
- 14.11.1 The Customer warrants that it owns or will own the Property and that the use of the Property herein conforms to Washington state and local land use, environmental and other regulatory laws.
- 14.11.2 Owner covenants that any transfer of any interest in the Property and any liens or encumbrances placed against the Property shall render the claims and rights of transferee, the lien holders, and the Customer subordinate to the claims and rights of the City under this Agreement.
- 14.12 No Third Party Beneficiary. The rights and obligations created by this Agreement are for the sole benefit of the Parties, their successors or assigns and no Person not a Party shall be a beneficiary, intended or otherwise, of any such rights or be entitled to enforce any of the obligations created by this Agreement.
- 14.13 Headings. Any headings to Sections, sections or paragraphs appearing herein are not part of the terms of this Agreement and shall not be interpreted as such.
- 14.14 Construction. This Agreement has been freely and fairly negotiated by the Parties hereto and has been reviewed and discussed by legal counsel for each of the Parties, each of whom has had the full opportunity to modify the draftmanship hereof and, therefore, the terms of this Agreement shall be construed and

interpreted without any presumption or other rule requiring constructional interpretation against the Party causing the drafting of the Agreement.

14.15 Complete Agreement – Amendment.

14.15.1 This Agreement contains the complete statement of the understanding of the Parties with respect to the subject matter of this Agreement. There are no other representations, agreements, or understandings, oral or written, by the Parties relating to the subject matter of this Agreement that are not fully expressed in this Agreement. Each Party acknowledges and represents to the other Party that it is executing this Agreement solely in reliance upon its own judgment and knowledge and that it is not executing this Agreement based upon the representation or covenant of the other Party, or anyone acting on such Party's behalf, except as expressly stated herein.

14.15.2 Any modifications or amendments to this Agreement shall be approved in writing by both Parties. Either party can request amendment or modification of this Agreement not more frequently than on an annual basis.

15. **TERM – EFFECTIVE DATE**

15.1 Initial Term. This Agreement shall take effect on October 1, 2010 ("Effective Date"), and remain in full force and effect until December 31, 2035 ("Initial Term").

15.2 Renewal Terms

15.2.1 Extended Term Requirements. If by January 1 of any of years 2012 through 2016, Customer has commenced operations and purchased water in excess of an average of two (2) million gallons per month at the Property, this Agreement shall be extended to December 31 of the year twenty five (25) years after the commencement of operations and water purchase consistent with this Section 15.2.1 ("Extended Term"). For example, if Customer commences operation and purchases water at the Property beginning on March 1, 2014, and the water consumption averages in excess of two (2) million gallons per month from March 1, 2014 through December 31, 2014, this Agreement shall automatically be extended to December 31, 2039. Likewise, if Customer continues to purchase two (2) million gallons per month in each month of 2015, this Agreement shall automatically be extended to December 31, 2040. The Extended Term shall not extend beyond December 31, 2040.

15.2.2 Optional Renewal Terms. Additionally, Customer may at its sole discretion give City written notice by March 1, 2016 and City shall grant Customer two (2), five (5) year renewal options. In the event Customer has timely provided such written notice to the City, the Customer may



exercise the renewal options by sending written notice of exercise of each five (5) year renewal term. Notice of exercise shall be given by Customer not less than thirty (30) months before expiration of the Initial Term , Extended Term or renewal term then in effect.

16. SIGNATURE – EXECUTION

16.1 IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of this 8 day of OCTOBER, 2010.

16.2 Each signator to this Agreement warrants that he is duly authorized to and executes this Agreement for and on behalf of the indicated Party.

CITY OF ANACORTES

By: H. Dean Maxwell  
H. Dean Maxwell, Mayor

ATTEST:

Steve Hoglund  
Steve Hoglund, City Clerk/Treasurer

TETHYS ENTERPRISES, INC.

By: Steve Winter  
Steve Winter, CEO

ATTEST:

Philip Winter  
Corporate Secretary

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EXHIBIT A  
DEFINITIONS.

1. **AMC:** "AMC" means the Anacortes Municipal Code.
2. **CITY:** "City" means the City of Anacortes, a Washington municipal corporation.
3. **CITY WATER:** "City Water" means the water from the City Water Supply System delivered to Customer at Approved Delivery Points.
4. **CUSTOMER:** "Customer" means Tethys Enterprises, Inc. , a Washington corporation.
5. **DEDICATED FACILITIES:** "Dedicated Facilities" means the utility improvements and other systems constructed by Customer and dedicated or otherwise transferred to City.
6. **GPD:** "GPD" means gallons per day.
7. **METER:** "Meter" means the meter or meters at the Point of Delivery, owned by the City, from which water is distributed to the Property.
8. **MGD:** "MGD" means millions of gallons per day.
9. **POINT OF DELIVERY:** "Point of Delivery" means the location of the City Meter approved by the City in the course of the Property development and permit process.
10. **PROPERTY:** "Property" means the real property upon which the Customer shall develop its facilities for water-intensive industries.
11. **SITE SELECTION:** "Site Selection" means Customer's filing with the City of the legal description and map of the Property under Agreement Section 3.1.
12. **SYSTEM OF SEWERAGE:** "System of Sewerage" means the sanitary sewage collection, treatment and disposal system of the City.
13. **TREATMENT:** "Treatment" means that City Water has been subject to any treatment, distillation, deionization, reverse osmosis, purification, filtration or any other process by Customer on Property
14. **UNCONTROLLABLE CIRCUMSTANCES:** "Uncontrollable Circumstances" means circumstances such as acts of God, severe weather or any other natural cause beyond the reasonable control of a party, wars, civil disturbances, insurrections, acts of terrorism, riots, and/or damage to work in progress by reason of fire or other casualty.
15. **WASTEWATER:** "Wastewater" means sewage and wastewater as defined at RCW 90.46.010(16) and (20), or other applicable law and regulation.
16. **WATER:** "Water" means City Water and water for sale or distribution off of Property.

**17. WATER SUPPLY SYSTEM, OR SYSTEM:** "Water Supply System" is defined for purposes of this Agreement to include: 1) the water intake and treatment facilities near Avon on the Skagit River; 2) the City's water transmission pipelines from the water treatment facilities to the City; and 3) the water pipelines connecting the transmission pipelines to the Customer's Delivery Points.

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EXHIBIT B

Dated: January 1, 2010

Water Supply Agreement between the City of Anacortes and Tethys Enterprises, Inc..

Approved Metered Service Connections:

No.	Size	Brand	Type	Location	Reading System
TBD	TBD	TBD	TBD	TBD	TBD

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EXHIBIT C

Date: January 1, 2011

Water Supply Agreement between the City of Anacortes and Tethys Enterprises, Inc..

1. Water Charges: TBD
  - Capital Cost \$ TBD / Month
  - Fixed Operating Cost (2005 Estimate) \$ TBD / Month
  - Variable Operating Cost (2005 Estimate) \$ TBD / Million Gallons
2. Committed Water Volume:
  - Annual: TBD Million Gallons
3. Water Pressure: 90 psi

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EXHIBIT D TO  
CITY OF ANACORTES  
AND  
TETHYS ENTERPRISES, INC.  
AGREEMENT REGARDING WATER SERVICE

October 1, 2010

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LATECOMERS AGREEMENT FOR WATER AND SEWER SYSTEM IMPROVEMENTS

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**1. PARTIES**

1.1 This Latecomers Agreement For Water and Sewer Systems Improvements ("Agreement") is made and entered by the City of Anacortes ("City") and Tethys Enterprises, Inc., a Washington corporation ("Tethys"), together known as the "Parties." The Parties voluntarily agree as follows.

**2. RECITALS**

2.1 The City owns and operates a water system within and adjacent to the City limits. The City has no obligation to provide water or sewer services to any property located outside of the City's limits.

2.2 Tethys will construct or pay for the construction of storm, sanitary, or combination of sewers, pumping stations, water mains, hydrants, reservoirs, or appurtenances (collectively, "Water System Improvements") as set forth in Exhibit A, attached hereto and incorporated herein. All Water System Improvements are located within 10 miles of the City's boundaries.

2.3 Tethys has or will have constructed the Water System Improvements at a cost to Tethys as set forth in Exhibit B, attached hereto and incorporated herein by this reference.

2.4 The area capable of being served by the Water System Improvements ("Benefited Area") is described in Exhibit C, attached hereto and incorporated herein by this reference.

2.5 If not otherwise previously transferred, Tethys hereby agrees to convey by Bill of Sale the Water System Improvements to the City.

2.6 The Parties desire and intend by this Agreement to provide for collection of Water System Improvement costs as described in Exhibit B. Any person or business entity owning or leasing real estate and not contributing to the costs of the Water System Improvements shall pay a reimbursement fee to the City as calculated and set forth in Exhibit D, attached hereto and incorporated herein by this reference.

2.7 The Parties desire and intend for the City to collect the reimbursement fee and to distribute the reimbursement fee to Tethys.

2.8 This Agreement is made pursuant to the provisions of law, including the Municipal Water and Sewer Facilities Act, chapter 35.91 RCW.

**3. UTILITY BILL OF SALE**

3.1 Warranty. Tethys warrants that it is the owner of the Water System Improvements and that it has not authorized any person or other entity to tap into said system prior to the date of this Agreement.

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- 3.2 Transfer of Title. Tethys will transfer the title to the Water Systems Improvements by a Bill of Sale to be executed and delivered by Tethys to the City sixty (60) days after the inspection and testing by the City Engineer and his recommendation of acceptance, or sixty (60) days after the execution of this Agreement, whichever comes later. Tethys warrants that the Water System Improvements are free and clear of all encumbrances.
- 3.3 Transfer of Rights. Tethys assigns to the City all warranties and all other relevant rights applicable to the Water System Improvements.
- 3.4 Liens. In the event that any lien or other claim against the Water System Improvements are asserted after conveyance to the City, Tethys shall defend and hold harmless the City from loss on account thereof. In the event the City shall be put to any expense in defense of such claim or otherwise, then the City shall have a lien against any funds then or thereafter deposited with it pursuant to this Agreement.
- 3.5 Acceptance of Bill of Sale. In consideration of the conveyance of the Water System Improvements, the City agrees to accept said extension for ownership and maintenance as part of its system of utilities, after inspection and testing by the City Public Works Director and his recommendation of acceptance, and after the City receives and accepts Tethys' Bill of Sale.

#### 4. LATECOMERS AGREEMENT TERMS

- 4.1 Parties Responsible for Paying the Latecomers Fee. In consideration of the conveyance of the Water System Improvements, the City agrees to charge and collect a latecomers fee from the owner or owners of the parcels within the Benefited Area as shown in Exhibit C who have not heretofore contributed to the Water System Improvement costs, and who subsequently tap onto, connect to or use the same.
- 4.2 Eligible Costs to be Recovered. Eligible Water System Improvements project costs may include all reasonable costs incurred by Tethys, including, but not limited to: right of way and easement acquisition, design engineering, surveying, construction, construction inspection, and construction contract administration incurred and paid by Tethys.
- 4.3 Recovered Costs to be Pro Rata Share. The latecomers fee shall be a fair pro rata share of said total project costs set forth in Exhibit B. Said pro rata share of the total project costs to be assessed against each parcel in the Benefited Area shall be calculated according to a formula set forth in Exhibit D.
- 4.4 City is Responsible for Collecting Fees. It is the City's responsibility to collect the latecomers fee from any entity using the Water System Improvements. The City agrees to collect the latecomers fee prior to the issuance of a building permit for any construction located in the area shown in Exhibit C that will tap onto, connect to or use the Water System Improvements. The City reserves the right to