

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

In re:)	
)	Docket No. 00-11-C-1057DW
)	
SANDY POINT IMPROVEMENT CO.,)	FINDINGS OF FACT,
Whatcom County,)	CONCLUSIONS OF LAW
ID # 76105A,)	AND FINAL ORDER
)	
Respondent.)	
_____)	

APPEARANCES:

Respondent, Sandy Point Improvement Company, by
Perkins Coie, per
Greg Overstreet, Attorney at Law

Intervenor, Lummi Indian Business Counsel, by
Raas, Johnsen & Stuen, P.S., per
Harry L. Johnsen, Attorney at Law

Department of Health Division of Drinking Water Program, by
The Office of the Attorney General, per
Lilia Lopez, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Health Law Judge

The Presiding Officer, through authority delegated to him by the Secretary of Health, conducted a hearing on February 26, February 28 and March 5, 2003, in Kent, Washington. Division of Drinking Water Program decision reversed and remanded.

ISSUES

Was the Program's classification of full time versus part time residence, for purposes of determining the average daily demand used in the Respondent's application to expand its water system, reasonable in the present case?

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Can the Program make a water system plan decision regarding the Respondent's water system absent an express determination by the Department of Ecology regarding the underlying water rights issue between the Respondent and Intervenor?

SUMMARY OF DECISION

The burden of proof initially rests with the Respondent (applicant), and shifts to the Program following its issuance of the initiating document (conditional approval). The Program adopted the Respondent's definition of full-time versus part-time residence, for purposes of determining the required average daily demand calculation under the Respondent's water system plan. This definition failed to meet the evidentiary standard required under WAC 246-10-606, as using the permanent mailing address of the individual water consumers to determine full-time water use versus part-time water use does not reasonably express the amount of water consumed by a typical full-time residence for purposes of calculating average daily demand.

In light of the unique circumstances of this case, silence by the Department of Ecology precludes an accurate calculation of the average daily demand figure needed to determine the ultimate issue (does the Respondent's water system plan support an increase of water consumer connections). The Program's approval of the Respondent's water system plan decision, based on the silence of the Department of Ecology regarding the water rights of the Respondent and Intervenor in this case, is not reasonable under these circumstances. There is an ongoing dispute regarding water rights between the Respondent and Intervenor. Without a clear Department of Ecology decision specifying which water right should be used to service the Intervenor's 43 existing connections, the Program can not reasonably calculate the average daily demand for the proposed expansion of connections for the Respondent's water system.

PROCEDURAL HISTORY

In 1997 Sandy Point Improvement Company (the Respondent) submitted a water system plan (WSP) to the Division of Drinking Water Program (the Program) for review. The plan was an extension of the 1983 WSP previously approved by the Program in 1986. Richard Rodriguez of the Program forwarded the Respondent's initial WSP to the

Department of Ecology (DOE) in 1998, and DOE acknowledged receipt of that draft. DOE did not submit any written comments regarding the Respondent's WSP.

On January 24, 2000, Douglas N. Campbell, P.E., submitted the revised WSP and management and operations (M&O) manual to the Program. Exhibit P-23. Based on a 1993 Department of Ecology (DOE) determination, the water permit for the wells in question limited the Respondent's water withdrawal to 230 gallons per minute (gpm), and 143 acre feet per year (afy). Exhibit P-23, at 16-17. The 1997 WSP calculations, based on calculations submitted by Steve Goodrich, P.E., showed an ADD of 167 gallons per day (gpd). Using this calculation, the WSP anticipated accommodating servicing 740 residential connections plus 35 trust land (Lummi or tribal) connections¹ for a total of 775 connections, or equivalent residential units (ERU). Exhibit P-23 at 31. These connections represented an increase from the ERU connections permitted under the previous WSP.

Following receipt of the WSP, John P. Thielemann, P.E., a regional engineer for the Program, requested additional water use data from the Respondent to verify the average daily demand (ADD) criteria set forth in the 1997 WSP. Jennifer Clark, an employee of the Respondent, provided the requested water use data (water meter readings) information. The additional ADD criteria covered the years 1998 and 1999. The Thielemann analysis, dated September 25, 2000 (Exhibit P-4), was used to update

¹ The Respondent's WSP identifies 35 tribal connections, but the Program's determination letter identified 43 connections. For purposes of this decision, the Presiding Officer will use the number in the Program's determination.

and supercede portions of the WSP, including the criteria for the ADD. 10/20/00 Program letter at 1.

On October 20, 2000, the Program issued its written determination (10/20/00 letter) to the Respondent, with a copy to the Intervenor tribe. The Program conditionally approved the Respondent's WSP under WAC 246-290-100. The Program specified, in relevant part, that:

- A. No new connections to the existing water system be allowed because Ecology's recent analysis indicates that the source aquifer may be unable to sustain the intended water use in the future.
- B. New connections will be considered if [the Respondent] can provide credible scientific evidence to Ecology that the aquifer can sustain their intended future level of development.

10/20/00 Program letter at 1. The Respondent's updated analysis of the water system and approved WSP indicated that the existing water rights and remaining components of the water system could serve up to 739 ERU (711 full-time residential connections, 10 existing non-residential connections and 304 recreational connections). 10/20/00 letter at 2. The increased connections were in addition to 43 existing tribal connections located on trusts land. 10/20/00 letter at 2. Given the conditions of approval imposed by DOE (the DOE analysis that the source aquifer might be unable to sustain the intended water use in the future), the Respondent's water system was restricted to serving 621 ERU and 43 existing tribal connections. 10/20/00 letter at 1 and 2.

On November 8, 2000, the Respondent filed its application for a hearing on the Program's conditional WSP approval. The Respondent contended its revised WSP

should be approved for the full 739 ERU connections in addition to the 43 existing tribal connections.

The Program and Respondent stipulated to an order granting the Lummi Indian Business Counsel (the Intervenor) to intervene in this proceeding. Following the Intervenor's petition for superior court judicial review of the Program's conditional approval, the parties stipulated that the Intervenor tribe had a substantial interest in this matter. The stipulation was signed on March 2, 2001.

On April 2, 2001, the Respondent moved for a partial summary judgment, seeking an order that the Program lacked legal authority to allow DOE to impose conditions on the WSP. The Program contended the WSP approval was issued pursuant to its statutory and regulatory authority. The Program moved for its own summary judgment (at oral argument) requesting its October 20, 2000 decision be affirmed. Following briefs and oral argument by the parties, both summary judgment motions were denied. Prehearing Order No. 2.

On May 10, 2002, the Intervenor filed a prehearing memorandum and requested the following relief:

- A. Vacation of the Program's approval of the Respondent's WSP.
- B. A finding that the ADD for the Respondent's system is at least 206 gpd without inclusion of services to Indians on trust land, and higher if those services are included.
- C. A finding that the Respondent's WSP must accommodate the Respondent's existing service to all customers, including Indians on trust lands, within the Respondent's 143 afy ground water withdrawal permit issued by DOE.

Following briefing and oral argument by the parties, the Presiding Officer granted the Respondent's request to strike the tribal connection issue, and the Program's motion to dismiss water rights issue for lack of jurisdiction (request C above). Prehearing Order No. 7 at 13. The order provided further:

To the extent that the Intervenor's Issue No. 2 requests a showing by the Program of the (sp) which water rights its used in determining whether there were sufficient water rights to support the conditional approval issued by the Program, the Program's request to strike Intervenor's Issue No. 2 is DENIED.

Prehearing Order No. 7 at 13.

At the prehearing conference the Intervenor moved to admit excerpts of the deposition of Joye Emmens. Exhibit I-28. Neither the Respondent nor the Program objected, and the deposition excerpts were admitted. Prehearing Order No. 10, at 3. The Program, Respondent and Intervenor exhibits were likewise admitted without objection. Prehearing Order No. 10, at 4 – 9.

The hearing was convened on February 26, February 28 and March 5, 2003. At hearing the following Intervenor exhibits were admitted:

Exhibit I-36: Aerial photograph of Sandy Point Improvement System, dated June 14, 1999.

Exhibit I-37: Paul Gilligan hand illustration of bell curve analyzing ADD gpd per ERU calculations.

At the conclusion of the hearing the Program and Respondent submitted a joint stipulation and order of dismissal of the Respondent's additional connection appeal on March 5, 2003. The Intervenor stated it was challenging the ADD calculation. 3/05/03

RP at 180. In lieu of closing argument, the parties submitted briefs following receipt of the hearing transcript. Posthearing Order No. 1.

On July 28, 2003, the Respondent moved to supplement the hearing record by including a DOE letter dated December 3, 2002. The Program did not oppose this request, so long as the weight given to the document was appropriate to the time frame in which it was created or transmitted. The Intervenor opposed any supplementing of the hearing record, and contended that excluding the document was consistent with the Presiding Officer's previous ruling closing the application record effective October 23, 2000. (See 2/26/03 RP at 214 – 223). After reviewing the document the Presiding Officer denied the Respondent's request to supplement the record on relevance grounds. Posthearing Order No. 2.

HEARING

Any time the owner of a public water system (a "purveyor" – WAC 246-290-010) revises or changes its water system plan (WSP), the purveyor is required to submit the WSP revisions to the Program for review and approval. Chapter 246-290 WAC contains the regulations addressing public water supplies. The area of public drinking water is regulated on both the federal and state level. See WAC 246-290-001(4). To assist purveyors with the federal and state requirements, the Department of Health provides "guidance" documents on the relevant subjects. WAC 246-290-002.

One such "guidance" document is a detailed publication known as a "Water System Design Manual" (WSDM). Exhibit P-27. The WSDM involves:

- (1) Development of performance standards rather than prescriptive standards,

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- (2) Placement of mandatory requirements in WAC with corresponding reference made to support “shall” or “must” statements in the WSDM,
- (3) Provision of alternative design approaches to what is presented in the WSDM when a specific proposal meets consideration of “good engineering practice” and is supported by documented justification, and
- (4) Allowance for the customers of an individual water system to participate in the determination of their own level or standard of reliable water service under abnormal circumstances, provided that protection of public health is not compromised.

WSDM at i. The WSDM identifies the preferred criteria for design estimations of water demand requirements, as set forth in WAC 246-290-221. WSDM at 5-1. The first preference is reliable metered water use records, followed by comparable metered water use data, and criteria presented in the WSDM. Id. The WSDM provides:

NOTE: There is no substitute for reliable and accurate meter records of water usage for estimating future demand. Whenever reliable information can be secured relative to water demand in a given system, the design engineer is expected to use that information for the water system design. All public water systems are required to have totalizing source meters per WAC 246-290-130(4)(g).

WSDM at 5-2.

Chapter 6 of the WSDM presents methodologies used in determining the service capability of a water system. WSDM at 6-1. The basic unit of a system’s service capacity is the equivalent residential unit (ERU). Id. The quantity of water associated with an ERU is system-specific. WSDM at 6-3. The actual quantity of water represented by an ERU is related to a time period being considered, and the ERU levels for a single-family home can be expressed as average daily demand (ADD).

WSDM at 6-3. Expanding systems shall use water demand designed for ADD, and shall correlate to the maximum number of full-time or part-time ERUs in service at any time. WAC 246-290-221(1). Chapter 246-290 WAC does not specifically define what constitutes full-time or part-time residence. The WSDM provides that full-time residence refers to a permanent place of residence, and a part-time residence is a vacation home (occupied only seasonally, holidays, and/or weekends). WSDM section 6.4.3.

The Sandy Point water system encompasses several distinct areas (Sandy Point Shores, Sandy Point Heights, Neptune Heights and West Beach). Exhibit P-11. There are a number of different types of connections, including full-time residential, part-time residential, community connections (fire district, boat docks, golf course and clubhouse) and recreational. 2/26/03 RP at 31. A recreational connection has water service to it, but is limited in use (e.g., use by a travel trailer). 2/26/03 RP at 31.

John P. Thielemann is a regional engineer for the Northwest Drinking Water Operation Office of the Department of Health and he reviewed the final WSP submitted by the Respondent in January 2000. Mr. Thielemann testified on the first two days of the proceeding regarding the Program's conditional approval decision (10/20/00 letter).

In granting conditional approval to the WSP, the Program determined how many full-time connections there were in the Respondent's water system. An "equivalent residential unit" (ERU) is defined in WAC 246-290-010 as a system specific unit of measure to express the amount of water consumed by a typical full-time single-family residence. The 621 ERUs include 606 full-time connections, 10 non-residential connections and 120 recreational connections (connections that are not permitted to

have a home). 2/26/03 RP at 33. In addition, the Respondent's water system also has 43 tribal connections. 2/26/03 RP at 34.

A WSP covers a number of factors including: determining the service area of the system; describing the facilities; source, storage, treatment, and distribution facilities; and the current population of the water system. 2/26/03 RP at 36. The WSP also looks to the future population to determine the steps necessary to be able to adequately serve the future population. 2/26/03 RP at 36. Mr. Thielemann looked to the amount of water being used by the Respondent's water system. 2/26/03 RP at 37. The Program looks at the system's existing water use as measured by meter records. The purveyor's engineer examines the existing water use data and prepares the WSP based on the data. The Program's responsibility is to review the plan to see if the purveyor has meet the necessary requirements. 2/26/03 RP at 37 – 38.

Two key criteria used in analyzing water use are ADD and maximum day demand (MDD):

1. ADD is defined in WAC 246-290-010 as "the total quantity of water use from all sources of supply as measured or estimated over a calendar year divided by three hundred sixty-five. ADD is typically expressed as gallons per day per ERU (gpd/ERU).
2. MDD is defined in WAC 246-290-010 as "the highest actual or estimated quantity of water that is, or is expected to be, used over a twenty-four hour period, excluding unusual events or emergencies. MDD is typically expressed as gallons per day per ERU (gpd/ERU).

2/26/03 RP at 38. These calculations are complicated, and vary from system to system.

2/26/03 RP at 39. When reviewing a WSP for an existing system, regulations require, and the Program prefers, using an analysis of existing water data. 2/26/03 RP at 39.

Regulations addressing the expansion of an existing system do not set a minimum ADD amount. 2/26/03 RP at 40. When a WSP for a new system is being reviewed, however, a minimum ADD amount of 200 gallons per day is used.

Douglas Campbell, P.E., submitted the Respondent's proposed revision of the WSP in 1997. Exhibit P-31. Mr. Campbell submitted an ADD figure of 167 gpd, based on system analysis figures provided by the prior system engineer, Steven Goodrich. 2/26/03 RP at 47 – 48; Exhibit 31, item 14; Exhibit P-32 at 3. Mr. Goodrich used meter readings obtained during 1992 – 1994. 2/26/03 RP at 50. Mr. Thielemann requested the Respondent define which of the homes were used full-time and which were used part-time. 2/26/03 RP at 51. When analyzing the 1997 material Mr. Thielemann found the Respondent's ADD figure indicated the Respondent's system could support more connections than they could actually be approved for, because approval was limited by the amount of storage in the system. 2/26/03 RP at 51.

During this time period the Program and Intervenor discussed the Respondent's WSP. The Respondent's system served a number of homes on tribal "trust" land in addition to the customers on "fee" land. 2/26/03 RP at 52. Service to the trust land connections was based on prior agreements with the Indian Health Service and Lummi Nation as far back as the 1970s. 2/26/03 RP at 52. In order to develop the WSP it was necessary to define the current planned use population and the ultimate planned use population. The Intervenor's (Lummi tribe or Intervenor tribe) indicated their expectation the Respondent would work with them and get the tribe's input as to what the tribal needs might be from the Respondent's water system. 2/26/03 RP at 53.

In December 1999 the Intervenor tribe corresponded with Program employee Joye Emmens and expressed their concern regarding the Respondent's ADD calculations. Exhibit P-24. The Intervenor tribe believed the ADD data was not analyzed properly, and the 167 gpd ADD per full-time residence was too low. 2/26/03 RP at 56. Mr. Thielemann was also concerned about the calculations at this point, as the Program wants any ADD calculation to be "appropriate", meaning calculations that appropriately reflected the average water used by full-time residences in the water system. 2/26/03 RP at 56 – 57. Joye Emmens initially responded to the Intervenor's concerns on April 14, 2000, to confirm the Respondent's water system would be limited by its current water right to about 740 full-time connections on fee land following construction of a new storage tank. Exhibit P-22 at 2 (item 2).

The Intervenor remained concerned regarding the ADD calculation. Health, Ecology and the Lummi met to discuss this issue in May 2000. 2/26/03 RP at 65. Following the meeting Mr. Thielemann did an independent analysis of the ADD data. Exhibit P-16. The Respondent's data looked at all of the meter readings and eliminated all of the readings that were low, using a threshold value of one hundred gpd. 2/26/03 RP at 66 – 67. Mr. Thielemann concluded any analysis needed to separate out the water used by full-time for residential connections. 2/26/03 RP at 68. He removed the tribal home connections (which used more water than the typical home in the Respondent's system) to determine how many homes could be built on fee land lots. 2/26/03 RP at 72. Mr. Thielemann felt the Program's authority was limited to fee land

homes, and the calculation of physical capacity was based on the entire water right being available for use on fee land. 2/26/03 RP at 72 – 73.

The Intervenor tribe still took issue with the ADD and water records. The Program decided to review more recent data being collected by the Respondent. 2/26/03 RP at 78 – 79. The Respondent submitted additional water meter data to the Program in June 2000. Exhibit P-13. Mr. Thielemann, with Joye Emmens' approval, performed an independent analysis using the most recent water use data provided by the Respondent. 2/26/03 RP at 82 – 83. Normally the water system engineer would analyze the data – here Mr. Thielemann chose to independently analyze the data given the number of questions raised by the Intervenor tribe. 2/26/03 RP at 83.

In analyzing the 2000 data (covering the period 1998 – 2000), Mr. Thielemann worked with Jennifer Clark (a Respondent employee) to develop a series of codes that identified water meter readings for full-time, part-time or recreational connection. 2/26/03 RP at 85. After much discussion Ms. Clark and Mr. Thielemann determined a classification system for the water system. The system listed the water system areas affected, identified by individual route or meter number, and reflecting water usage for the period April 1998 – 1999 and April 1999 – 2000. Exhibit P-11². The route number is a unique number identifying a specific water meter. In classifying full-time ERUs, Ms. Clark and Mr. Thielemann chose to identify full-time residential connections by the customer's permanent mailing address. 2/26/03 RP at 88 – 89. Annual readings were

² Exhibit P-11, as submitted at hearing, contained an identical copy of the Sandy Point Heights water usage chart.

considered sufficient, given that ADD connections are to be compared to the Respondent's annual water right. 2/26/03 RP at 95.

Mr. Thielemann summarized his calculations for the water system, including his calculation of ADD, based upon the updated information from the Respondent. 2/26/03 RP at 97 – 98; Exhibit P-4. The average daily water use was initially determined by dividing the average water use over the 1998 – 1999 study period by the number of active connections for each category based upon the individual meter readings. Exhibit P-4 at 2. After adjusting for non-metered system losses, Mr. Thielemann determined the ADD was 172.5 gpd per equivalent full-time residential ERU during the 1998 – 1999 study period. Exhibit P-4 at 2.

In reaching this ADD figure Mr. Thielemann made corrections for some of the connections, categorizing some units as active and other inactive. 2/26/03 at 101.

More specifically:

That was an adjustment that I made myself when I looked at the detailed data. In some of these groups it looked like there were some of the connections that had zero water use and there were other connections that maybe had water use one year and not the other year; and there may have been a few that had what I would consider pretty low water use.

Now I knew that this was an issue for the tribe and so I decided to make some corrections, some nominal corrections for some of these. We had already sorted out and identified the homes that were in full-time use and sometimes there would be a home in that two year period, it might have just been vacant for one reason or another and for this particular calculation I did not include that home in this thing, so I said gee, that home would be inactive.

2/26/03 RP at 101 (lines 6 – 23). While he removed the connection itself, Mr.

Thielemann left the amount of water in the calculations to make the calculation more

conservative. After making all of his corrections Mr. Thielemann concluded that over the two-year period full-time connections averaged 154 gpd per active unit, which is water that was actually metered to an individual home. 2/26/03 RP at 104.

After examining the full-time connections, Mr. Thielemann then examined the part-time residential connections, recreational connections, non-residential connections and vacant lots. 2/26/03 RP at 106. Tribal connections were identified, but that water demand was separated out from the calculations. 2/26/03 RP at 106 – 107.

After all of the ADD calculations were considered, the 154 gpd figure was multiplied by 112.2 percent (reflecting water system losses or non-metered water use). The upward adjustment resulted in the final ADD per ERU of 172.5 gpd. 2/26/03 RP at 109; Exhibit P-4. Multiplying this figure by the annual water right of 143 afy allowed 740 ERU. 2/26/03 RP at 112. This figure was adjusted to 739 ERU. 2/26/03 RP at 112 – 113. This 172.5 ADD per ERU figure was considered “low”, but was not abnormally so. 2/26/03 RP at 115. The Respondent’s WSP provided several factors which accounted for the low ADD number, including: a number of very small lots; limited outdoor landscaping; the percentage of retired or older retired people living in the development; small families and single person homes; and a fair number of the residents travel for extended periods. 2/26/03 RP at 116.

In analyzing the WSP the Program was not required to compare the Respondent’s water system to other communities. Mr. Thielemann was aware of communities with similar low ADD calculations, and based on his experience the

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Respondent's ADD figure compared favorably to other like communities (that is, geographically remote communities with similar demographics). 2/26/03 RP at 117.

The Program receives determinations regarding the water right of an applicant system from DOE. The Program submits the WSP under consideration to DOE, which reviews the WSP to verify whether the system has a sufficient water right. 2/26/03 RP at 120 – 121. This Program – DOE cooperative effort is set forth in a Memorandum of Understanding, which is authorized by statute. Exhibit 26 at 1.

In its WSP, the Respondent indicated they were serving the Intervenor tribal connections with a water right separate from their own. 2/26/03 RP at 121. Richard Rodriguez, the Program's regional planner, transmitted the 1997 version of the WSP to DOE in July 1998 (Exhibit P-30), and DOE acknowledged receipt of the plan (Exhibit P-28). 2/26/03 RP at 122. Mr. Thielemann did not receive any comment from DOE regarding this version of the plan (including the Respondent's contention that the tribal connections would be served with a separate water right), but was aware the Intervenor tribe had concerns on this issue. 2/26/03 RP at 121.

Following the transmittal of the Respondent's 1997 WSP to DOE, there were ongoing state – federal tribal negotiations, and both the Program and DOE participated in those discussions. 2/26/03 RP at 123 – 124. DOE received the Program's updated (Thielemann) ADD calculations prior to the Program's final approval of the WSP. 2/26/03 RP at 124. On October 20, 2000, DOE manager Richard Grout wrote to the Program and recommended issuing a conditional approval of the WSP, but further recommended the approval specify that no new connections to the existing water

system be allowed because its hydrogeologist's analysis that the source aquifer might be unable to sustain the water use in the future (Exhibit P-2). The DOE letter did not comment on the Program's ADD analysis. 2/26/03 RP at 125. Mr. Thielemann believed the ADD concern had been resolved, and that the Program's analysis answered all of the Intervenor tribe's questions. 2/26/03 RP at 126.

The whole purpose of evaluating water system data, for purposes of calculating the ADD, is to average only the bona fide full-time residents. 2/26/03 RP at 155. Respondent employee Jennifer Clark initially assigned a code to each individual meter reading to sort out the full-time, part-time and recreational use³ connections. 2/26/03 RP at 155. Mr. Thielemann, after having discussed this issue with Ms. Clark, was confident that full-time use was identified. 2/26/03 RP at 156. This included looking at the actual meter readings for each class of customer. 2/26/03 at 156. Mr. Thielemann's criterion in examining the meter readings was to look for abnormal number, that is a low reading. 2/26/03 RP at 157. In looking at the meter readings, Mr. Thielemann categorized the connections as active, inactive or fractionally inactive. 2/26/03 RP at 159 – 160. Mr. Thielemann annotated the water usage charts as minus one (inactive) or one-half (fractionally inactive) (see Exhibit P-11). 2/26/03 RP at 161.

In characterizing Sandy Point Shores meter # 1472 as inactive, Mr. Thielemann stated at hearing that his method was not a "real scientific effort". 2/26/03 RP at 164. His goal was to keep in the water amount but divide it by a smaller number (of connections). 2/26/03 RP at 164. In examining his characterization of meter #1772 as

³ The meter codes can be found in Exhibit P-11, Sandy Point Shores page 7-7.

fractionally inactive at hearing, Mr. Thielemann could not identify what criteria he used to classify the connection as fractionally inactive. While he did not remember what criteria he used to make his decisions, Mr. Thielemann did attempt to be consistent in making his active-inactive determinations. 2/26/03 RP at 164 – 165. Following questioning on several of his active-inactive-fractionally inactive decisions, Mr. Thielemann stated he did not use a specific criteria in making his determinations. 2/26/03 RP at 178. He explained:

I did not have a specific criteria. What I was looking to see was that there was water use. I'm not trying to, I know that there is, I would say, a considerable number of these homes where people travel for extended periods, so I have no way of knowing whether they were there or not. So my goal was to, basic goal was to accept all of this data and just crank all of the volumes and all of the connections into the calculation. I chose to make some corrections, just in some cases.

2/26/03 RP at 179 (lines 1 – 9).

Looking at the data in question (Exhibit P-11), Mr. Thielemann could not tell whether the connection was full-time or part-time. 2/26/03 RP at 180. An effort was made to identify the homes that were occupied full-time, or, in other words, whether the homes were the individual's permanent residence. 2/26/03 RP at 180. It was expected that there would be periods where some of them would not be occupied. 2/26/03 RP at 183. It appears a number of connections with water usage lower than the ones actually adjusted were left in. Mr. Thielemann identified his goal was to pick out the obvious ones (connections with low water usage) and not to eliminate necessarily each connection with low water use. 2/26/03 RP at 187. He attempted to determine the ADD for this group/demographic. 2/26/03 RP at 189.

Mr. Thielemann acknowledged the Respondent's January 21, 2000 WSP (Exhibit P-23) was the version approved by the Program. 2/26/03 RP at 191. Item 3 of the executive summary stated the plan did not consider the trust land users connections (the Intervenor tribal connections) with respect with the WSP since the trust land was served by Indian reserved water rights. 2/26/03 RP at 191; Exhibit P-23 at 3. He understood that there had been discussions on this point between his section supervisor Joye Emmens and the tribe, and between DOE employee Jim Bucknell and the tribe. 2/26/03 RP at 197. The basis for this discussion appeared to be Mr. Thielemann's September 25, 2000 ADD analysis (see Exhibit P-4) and his (Bucknell's) belief that the data was all right.

Mr. Thielemann remembers several discussions and meetings with the Intervenor tribe on the issue of water rights. His memory was the Intervenor tribe did not have any problem providing their own water rights for their use. 2/26/03 RP at 204. Mr. Thielemann initially stated the Program did not receive a document from DOE which specifically approved the concept that state water rights would be used on fee land and some other water right would be used for trust land connections. 2/28/03 RP at 11. During the development of the current WSP the Respondent took that position and he suggested this approach was an appropriate way to handle the matter. 2/28/03 RP at 12. While he understood that DOE approved the Respondent's concept, the Program did not receive any letter indicating DOE's position on the matter. 2/28/03 RP at 13.

In reviewing the Respondent's WSP, Mr. Thielemann did not review any data not specifically included by the Respondent in its plan. 2/28/03 RP at 26.

The Intervenor tribe met with the Program to discuss an analysis of the Goodrich data. 2/28/03 RP at 33 – 34; Exhibit I-5. The Intervenor tribe’s primary concern was the ADD was too low, because it was based on the inclusion of part-time users. 2/28/03 RP at 36. Mr. Thielemann did not accept the tribal analysis and performed an independent analysis of his own (Exhibit P-16). 2/28/03 RP at 35. In examining the data, he calculated various ADD figures after using several different monthly averages. Exhibit P-16, page 2. Mr. Thielemann eventually concluded an ADD per ERU of 167 gpd “seemed okay”. Exhibit P-16, page 3. This figure did not account for system loss, based on Mr. Thielemann’s handwritten note. Id. If adjusted for water system loss (multiplied by 112%), the ADD per ERU would increase to 187.04 gpd.

While Mr. Thielemann performed an independent analysis of the Goodrich data, ultimately, the Program’s decision to issue its conditional approval was based on the water meter readings set forth in Exhibit P-11. 2/28/03 RP at 68. This decision included Mr. Thielemann’s active/inactive/fractionally inactive analysis.

Jennifer Clark is currently employed as general manager of Sandy Point Improvement Company, and has been employed in some capacity by the company for approximately thirty years. She oversees the daily operation of the homeowners association, and coordinates and works with the system employees. In that capacity she interacts with the Sandy Point property owners, often on a daily basis, to collect payment on the water bills.

Ms. Clark describes the Respondent’s community as unique, given its location. 2/28/03 RP at 124. Because of the size of the lots and the sandy terrain, the owners

tend to have little landscaping and very few lawns. 2/28/03 RP at 124. Owners are mostly retired, older individuals, with some families in the Sandy Point Heights development. 2/28/03 RP at 125.

Water meter readings are taken every two months. 2/28/03 RP at 126. This information is entered into the computer to generate water bills for mailing. 2/28/03 at 127. Ms. Clark maintains a list of all of the lots, all of the names and addresses of the owners and their billing addresses in the computer. 2/28/03 at 127. Based on this information, Ms. Clark initially provided Mr. Thielemann with billing information with four years of annual account meter readings (1993, 1996, 1998 and 1999) for the system. 2/28/03 RP at 127 – 128. The meter reading sheets used by Ms. Clark had a name and street address for each meter, which enabled her to total up the full-time and part-time residents. 2/28/03 RP at 128. Ms. Clark defined a full-time residents as one who had a local mailing address – individuals with a mailing address in Canada, Seattle or another state were not considered full-time residents. 2/28/03 RP at 128. This information was forwarded to the Program in June 2000. Exhibit P-13.

Ms. Clark and Mr. Thielemann communicated regarding the water use code classifications. 2/28/03 RP at 129 – 130. The classifications were established using Ms. Clark's personal knowledge of the residents of the Sandy Point system and the time they spent at the homes. 2/28/03 RP at 130. After further communications with the Program, Ms. Clark forwarded the final version of the water usage chart. Exhibit P-11. The main master reading sheet had an account number, name and street address for the property – this information was deleted from the final product. 2/28/03 RP at 131.

Ms. Clark remembered looking at Mr. Thielemann's adjustments (active/inactive/ fractionally inactive), and noted they were single family, full-time individuals. 2/28/03 RP at 133.

In classifying lots in the system as recreational, Ms. Clark was describing their present use. 2/28/03 RP at 153. There is nothing encumbering the use of a recreational lot which limits its use. In other words, a recreational lot may be used for a full-time residence. An individual attempting to change the use of a recreation lot would only need to file an application and obtain the necessary building permits to convert the lot to a full-time residence. 2/28/03 RP at 153, 172.

Ms. Clark's decision to classify homes as full-time was not affected by a resident being a "snowbird" (that is, a resident that would reside out of state during the winter months). In her mind there was no limit to the number of months a person would need to be at that person's residence to be full-time. 2/28/03 RP at 156. As previously stated, there was/is no property restriction by the Respondent requiring someone to use the residence as part-time, rather than full-time. 2/28/03 RP at 165.

Ethan Moseng began with the Program in 1983. He helped revise the WSDM, which was changed around the same time as changes to chapter 246-290 WAC. Mr. Moseng confirmed that when calculating ADD for existing systems using actual meter records, the WSDM sets no minimum ADD per EDU. 3/05/03 RP at 9. Obtaining monthly readings is not required using ADD calculations. 3/05/03 RP at 9 –10.

Mr. Moseng was section head for the Northwest Regional Office during the time the Respondent's water system plan was being reviewed by Mr. Thielemann. 3/05/03

RP at 11. In responding to the Intervenor tribe's concern over the low ADD water figure, Mr. Moseng indicated the low figure was the result of conservation measures enacted by the Respondent. 3/05/03 RP at 14; Exhibit I-24. Consulting engineer Steven Goodrich based the water usage figures on a considerable amount of analysis and documentation. 3/05/03 RP at 14. Mr. Moseng reviewed these figures with Mr. Thielemann.

Mr. Moseng also conducted a general review of calculations performed by Mr. Thielemann in 2000. 3/05/03 RP at 15. This review consisted of looking over some of Mr. Thielemann's work and discussing some of the assumptions that were made. 3/05/03 RP at 15. Mr. Moseng saw no reason to apply any threshold number to the full-time homes, nor did he believe a comparison to other water systems was necessary to justify the figures reached by the Respondent's system. 3/05/03 RP at 15, 17.

Mr. Moseng performed a general review of Mr. Thielemann's September 2000 calculations. 3/05/03 RP at 18; Exhibit P-4. A comparison of the ADD numbers for the four years of data examined (the Goodrich data and Thielemann data) appeared consistent. 3/05/03 RP at 18. A more conservative approach (that is, tossing out all of the numbers below a certain value) may increase the ADD gpd amount, but it wouldn't necessarily reflect what the actual system use is. 3/05/03 RP at 20.

Mr. Moseng discussed the independent calculations of the Goodrich data performed by Mr. Thielemann in May 2000. 3/05/03 RP at 31; Exhibit P-16. During his calculations Mr. Thielemann inserted an "average" calculation into particular months where there was no metered water use. 3/05/03 RP at 31. Mr. Moseng remembers

discussions regarding the Respondent's water use and why it was lower than the water use amounts the Program usually sees in similar systems (that is, usage in the 250 to 300 gpd range where there are no usage restrictions on customers). 3/05/03 RP at 37. One consideration was the size of the households in the Respondent's system – however, the household size information was anecdotal, rather than being based on actual data. 3/05/03 RP at 37 – 38.

In reviewing Mr. Thielemann's analysis in 2000, Mr. Moseng saw the information contained in Exhibit P-4, but not the information in Exhibit P-11. 3/05/03 RP at 40. When he reviewed the Thielemann data he asked questions of the assumptions being made and, in general, the types of adjustment being made. 3/05/05 RP at 41. He was not responsible for approving the methods used. Rather he provided Mr. Thielemann feedback from his experience with water systems. 3/05/03 RP at 42.

Jeremy Freimund is currently employed as a water resource manager for the Lummi Indian Business Council, and provides technical support to the Intervenor tribe related to water resource management (both quality and quantity, and shoreline management). This position requires the analysis of data using a scientific manner. Mr. Freimund identified the steps in using the scientific method as: (1) developing a hypothesis; (2) developing a methodology to test the hypothesis; (3) applying the methodology to the hypothesis; and (4) evaluating results and drawing conclusions from those results. 3/05/03 RP at 68. The conclusions are then generally presented to people with similar backgrounds for peer review. 3/05/03 RP at 68.

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Mr. Freimund reviewed both a copy of the Respondent's 1997 WSP draft from the Program, as well as the 1995 Goodrich data. 3/05/03 RP at 69 – 70. From the Goodrich report Mr. Freimund put together a spreadsheet regarding the Respondent's ADD calculation of 173 gpd⁴. 3/05/03 RP at 70; Exhibit I-5. Mr. Freimund developed a hypothesis that the 173 ADD gpd was due to the inclusion of small water numbers in the calculation rather than conservation measures. 3/05/03 RP at 73. In looking over this data, Mr. Freimund noted there was a large number of relatively small water use numbers. 3/05/03 RP at 73 – 74. Using the scientific method, and based on literature and research regarding residential water conservation, Mr. Freimund looked at 53 gpd per capita as an ADD baseline measurement. 3/05/03 RP at 74 – 75; Exhibits I-30, I-31 and I-32. The average population per household in Whatcom county of 2.3 people per house – multiplying the 53 gpd by 2 results in an ADD figure of 106 gpd, which was rounded down to 100 gpd. 3/05/03 RP at 76 – 77. This figure was used to define full-time occupation. 3/05/03 RP at 78. Using this baseline, Mr. Freimund calculated the ADD of 228 gpd. 3/05/03 RP at 79.

Mr. Freimund also analyzed the data used by the Program to issue its conditional approval of the Respondent's WSP. 3/05/03 RP at 85 – 86. In performing the analysis Mr. Freimund determined using just the ADD data could mask periods of little or no water use. 3/05/03 RP at 86. Without using monthly data, in addition to ADD data, it is not evident whether a home is occupied full-time. 3/05/03 RP at 89 – 90. This masking

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⁴ The 173 ADD figure is achieved after rounding up the 172.5 figure obtained by the Program.

effect has the effect of reducing the ADD. The 228 gpd ADD figure would be reduced to 211 gpd if monthly or bi-monthly data were excluded. 3/06/03 RP at 91.

When reviewing the 1998 – 1999 data used by the Program in issuing its conditional approval, and excluding the people using less than 100 gpd⁵, the ADD gpd was calculated at 185 pgd for 1998 and 184 gpd for 1999. 3/05/03 RP at 98. When adjusted by the 12 percent water system loss figure used by the Program, the ADD gpd figure increased to 206.6 gpd. 3/05/03 RP at 98.

Mr. Freimund attended the May 2000 meeting between the Program, DOE and the Intervenor tribe, and presented the above analysis to the Program. 3/05/03 RP at 92. Mr. Freimund did not remember any discussion of the WSP provision that excluded tribal water use from the 143 afy state water right. 3/05/03 RP at 95. However, discussion of that subject did take place as part of the federal – state negotiations. 3/05/03 RP at 96. During these discussions the parties determined there was not an adequate water supply on the reservation to meet all current and future demands – the parties had a signed agreement in principle that spoke to obtaining an off-reservation source of 2.5 million gallons per day to meet the increased need. 3/05/03 RP at 96.

Paul Gilligan is a licensed engineer in the state of Washington, and is employed by RH2 Engineering in Bothel, Washington. Mr. Gilligan analyzed the Respondent's WSP at the Intervenor's request. 3/05/03 RP at 118. His analysis of the Program data (Exhibit P-4) found the 167 ADD gpd figure to be too low – based on his calculations, the ADD gpd figure should be 220 gpd. 3/05/03 RP at 118 – 119. In addition to the

⁵ For purposes of this analysis, the 106 gpd figure was rounded down to 100 gpd.

Thielemann data, Mr. Gilligan reviewed all other relevant data and the WSDM. 3/05/03 RP at 119 – 120.

Mr. Gilligan defined a full-time resident as living in the home at least ten months a year. 3/05/06 RP at 129. While it would be sufficient for this definition that a person's main residence be at that location, identifying a person's main residence (in and of itself) would not. 3/05/03 RP at 129. Every consideration in chapters 5 and 6 of the WSDM goes to the issue of water use, demographics, part-time use, soil type and possible irrigation that can occur. 3/05/03 RP at 130. If a there is definition for use as a planning tool (here ERU), then it is necessary to stick to that definition – that is, full-time residence not part-time residence. 3/05/03 RP at 130.

Mr. Gilligan analyzed the Respondent's WSP meter data to see how a full-time residence would fit into the data. 3/05/03 RP at 148. In performing the analysis, he constructed a lower and upper boundary limit on full-time water use. 3/05/03 RP at 148; Exhibit P-11. The lower limit was 100 gpd per ERU. 3/05/03 RP at 148 – 151. Using a mathematical model, and plotting the Thielemann data on a graph (in groupings of 100 gpd), seventy-five percent of the connections fell between a range of 100 gpd (lower limit) to 500 gpd (upper limit). 3/05/03 RP 152 – 154; Exhibit I-37. Mr. Gilligan computed the ADD per ERU to be 196.2 gpd. 3/05/03 at 154. When accounting for the 12.2 percent leakage (water loss) the ADD figure increases to 220 gpd per ERU. 3/05/03 RP at 154. Under this approach it is necessary to exclude water consumption for residences that are not truly full-time to satisfy the WSDM criteria (section 6.4.3). 3/05/03 at 155 – 156.

In its closing brief, the Respondent argued it is unclear which standard of review and burden of proof applies, given that the applicable regulations do not contemplate challenges by interested third parties. It argues WAC 246-10-107 did not apply, and posited the most suitable burden of proof appeared in RCW 34.05.570. The Respondent contends the Intervenor should bear the burden of demonstrating the invalidity of the agency action. See *Sonnens v. Department of Labor and Industries*, 101 Wn.App. 350, 353 (2000). In that light, deference should be given to the agency's decision, as it was made within their area of expertise. See *Chelan County v. Nykreim*, 146 Wn.2d 904 (2002); *Sonnens v. Department of Labor and Industries*, 101 Wn.App. 350 (2000). Respondent's Post-Hearing Brief, at 8 – 11.

The Program contends the portion of the conditional approval being contested by the Intervenor is the part by which it notified the Respondent of the number of connections, including new connections, the Respondent's system would be capable of serving if and when it adequately addressed the question of aquifer sustainability. WAC 246-10-606 places the burden of proof on the Program to prove the alleged factual basis set forth in the "initiating" document. However, this provision is aimed at those cases in which the Program has taken some action against the licensee when an application for approval is not involved (that is, an enforcement action). Since its conditional approval action did not involve action against the Intervenor tribe, WAC 246-10-606 should not be interpreted as placing the burden of proof on the Program in this case. Such an interpretation would unnecessarily place the burden of proof on the Program for any action it takes that does not involve a license application

or enforcement action. In license applications, this would place the burden on the regulated party when it challenges the action, but not on a non-regulated party challenging the action. For that reason a third party's burden should more appropriately be analogized to the applicant who believes he or she has met all applicable criteria. Program's Initial Closing Brief, at 6.

The Intervenor identified several issues that it believes should be resolved in the final order. These issues include whether the Program is permitted to treat lots in the Respondent's water system as less than a full ERU when there are no legal, contractual or other restrictions on full-time occupancy, and whether the Program is permitted to use part-time water meter data to calculate water demand for lots that can be used full time. The Intervenor contends WAC 246-10-606 places the burden of proving all of the facts supporting its decision on the Program. Intervenor's Post Hearing Brief, at 3 – 5.

Based on a careful review of the record, the Presiding Officer enters the following:

I. FINDINGS OF FACT

1.1 The Respondent initially filed a WSP with the Program for review in 1997. Following communications with the Program, Respondent engineer Douglas N. Campbell submitted the Respondent's final WSP with the Program in January 2000. This WSP anticipated providing service to 740 fee land ERU, which represented an increase from the 621 ERU currently being served by the Respondent's water system. This increase was based on the Respondent's ADD calculation per each ERU of 167 gpd. This increased number of connections that remained within a previous DOE water

rights determination that restricted the Respondent's water system to withdrawals of 230 gpm and 143 afy. The Respondent's ADD calculations were based on work done by Respondent engineer Steven Goodrich and were based upon water meter readings from the period 1992 – 1994.

1.2 At the time the Respondent filed its January 2000 WSP with the Program, the Respondent's water system serviced 35 to 43 trust land (Lummi) tribal ERU connections (10/20/00 letter). Even with the increased ERU connections, the Respondent stated it would continue serving these trust land (Lummi) tribal ERU connections through their water delivery system. In doing so it would not reduce the amount of water available to the Respondent under the DOE determination, that is, available to fee lands.

1.3 John P. Thielemann initiated the Program's analysis pursuant to chapter 246-290 WAC and the WSDM. ADD calculations are complicated, and vary from water system to water system. In reviewing the Respondent's system, Mr. Thielemann did not consider a minimum ADD per ERU figure. Neither Chapter 246-290 WAC nor the WSDM require a minimum ADD figure when reviewing water use for an existing system. Mr. Thielemann determined, based on the ADD figures provided by the Respondent, that the water system could support more connections than they could actually be approved for, given water storage limitations in the system.

1.4 Service to the trust land connections was based on prior agreements between the Respondent, the Intervenor and Indian Health Services beginning around 1970. Beginning as early as 1994, Mr. Thielemann was in contact with the Intervenor

tribe regarding its obtaining water service from the Respondent system. At several points in these communications the Intervenor tribe made clear it disagreed with the Respondent's contention that service to the 35 to 43 trust land connections was based on the Intervenor providing water from a separate source. In addition, the Intervenor tribe disputed the 167 gpd ADD figure per full-time homes provided by the Respondent as being too low.

1.5 Mr. Thielemann also had some concerns regarding the ADD figure from the Goodrich data (based on water meter readings in 1992 – 1994) and did an independent analysis of the Goodrich data. Mr. Thielemann examined the ADD per ERU figure by characterizing full-time connections using a per day cutoff figure (50, 75 or 100 gpd). Exhibit P-16. After completing his analysis, he was comfortable that the ADD per ERU of 167 gpd submitted by the Respondent in its January 2000 WSP (based on calculations by Mr. Goodrich) “seemed okay”. This figure was not adjusted for water system loss.

1.6 Even though he was comfortable with this data, the Program ultimately decided it would not use the Goodrich ADD calculations in making its decision on the WSP. Mr. Thielemann requested more current data from the Respondent, and Ms. Clark, the Respondent's employee, provided water meter figures for the period 1998 – 1999. Exhibit P-11.

1.7 Ms. Clark characterized a connection as “full-time” based on two factors: (1) mailing address; and (2) personal knowledge of the residents of Sandy Point. Residents using a local mailing address were considered full-time, and residents with

out of area or out of state addresses were considered part-time. Her decision to classify a resident as full-time was not affected by the resident being a “snowbird”, individuals gone from the residence for up to four months during winter.

1.8 There is no restriction regarding the property in the Respondent’s water system that precludes a part-time residence from being used on a full-time basis.

1.9 In looking at the data in question (Exhibit P-11) Mr. Thielemann could not identify which connections were full-time, except for the classifications provided by Ms. Clark.

1.10 Mr. Thielemann received water usage data from the Respondent. Exhibit P-11. He made further adjustments to the water figures provided by the Respondent, and categorized some connections as active, fractionally active and inactive. These adjustments were noted by his handwritten figures (-1, -1/2) next to the columns of some of the water meter readings. Exhibit P-11. These connections were not included in the Program’s ADD computations, but the amount of water was included in the final calculations. In making these adjustments, Mr. Thielemann did not use a specific criteria – his goal was to accept all of the data provided by the Respondent and “crank” all of the volumes and all of the connections into the calculation.

1.11 Using the full-time/part-time information obtained from Ms. Clark, Mr. Thielemann calculated the ADD per ERU as 154 gpd. Exhibit P-4. Once adjusted for water system loss the ADD per ERU figure rose to 172.5 gpd. Mr. Thielemann replaced the Respondent’s ADD per ERU calculations in its WSP with his new calculations. Exhibit P-4, page 2 of 10. Using this ADD figure, Mr. Thielemann recommended that

the water system could be approved to serve 711 full-time residential connections (606 existing and 105 additional), 10 existing non-residential connections, and 305 vacant lots with metered water system service for recreational use on fee land. The water system was approved to service 43 existing tribal connections on trust land, with the understanding that the ground water withdrawal for tribal use is attributed to the tribal water right. Exhibit P-4, page 3 of 10.

1.12 When he performed these calculations (September 25, 2000), Mr. Thielemann had not received any written determination from the Department of Ecology regarding the water rights determination between the parties.

1.13 Richard Rodriguez of the Program forwarded the Respondent's initial WSP to DOE in 1998, and DOE acknowledged receipt of that draft. Under the terms of the MOU between DOE and the Department of Health, DOE has 60 days to review and comment in writing. In reaching its decision to conditionally approve the Respondent's WSP, Mr. Thielemann stated the Program did not receive any letter indicating DOE's position on the water rights matter. Exhibit P-26, page 5.

1.14 The Program did receive a letter from DOE field office manager Richard Grout on October 20, 2003. Exhibit P-2. This letter stated DOE recommended the Program issue a conditional approval of the 2000 WSP for the Respondent. The conditional approval should specify that no new connections to the existing water system shall be allowed, based on a recent analysis by a DOE hydrologist that indicated the source aquifer may be unable to sustain the intended water use in the future. Upon

production of new credible scientific evidence that the aquifer could sustain its intended use, new connections would be considered.

1.15 A review of the Respondent's 1998 – 1999 water meter readings (Exhibit P-11) reveals that the amount of water used in some of the two years measurement per connection, which are used by the Program in reaching its conditional approval, can differ dramatically for both full-time and part-time connections. For example Sandy Point Shore meter # 1436 (full-time) used 53,110 gallons in 1998, but 1,740 gallons in 1999. Sandy Point Shore meter # 1828 (full-time) used 44,440 gallons in 1998, but 160,280 gallons in 1999. West Beach meter # 6300 (part-time) used 54,510 gallons in 1998 and 78,490 gallons in 1999. West Beach meter # 6346 (part-time) used 99,800 gallons in 1998, and 123,510 gallons in 1999.

1.16 A comparison of the amount of water used by the Respondent's part-time connections reveals water amount usage similar to full-time connections. Compare Sandy Point Shores meter # 1436 (full-time) (53,110 gallons in 1998) to meter # 1346 (part-time) (55,170 gallons for 1998). Compare West Beach meter # 6114 (full-time) (136,830 for 1998/134,430 for 1999) to West Beach meter #6346 (part-time) (99,800 for 1998/123,510 for 1999).

1.17 A review of the water meter data reveals full-time connections with very little water used and no explanation how the inclusion of such small amount of water affects the ADD per ERU calculations. See Sandy Point Shores meter # 1436 (1,740 gallons in 1999); meter # 1472 (1,310 gallons in 1998 and 6,050 in 1999).

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II. CONCLUSIONS OF LAW

2.1 A person whose application is denied under WAC 246-290-100 may request an adjudicative proceeding. WAC 246-10-107(1). An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction. RCW 34.05.413(1). The Presiding Officer may grant a petition for intervention at any time where the petitioner qualifies as an intervenor under any provision of law, intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings. RCW 34.05.443(1); WAC 246-10-119.

2.2 The Respondent requested an adjudicative proceeding following the Program's conditional approval of its application to update its WSP. The Respondent appealed the Program's conditional approval of its WSP, and disputed that portion of the Program's approval which restricted the Respondent from making any additional ERU connections to the water system. In appealing the Program's conditional decision, the Respondent did not object to the ADD per ERU calculation used in the decision, but the calculation method used is disputed by the Intervenor.

2.3 The burden of proof is preponderance of the evidence. WAC 246-10-606. Evidence shall be based on the kind of evidence which a reasonably prudent person relies upon in the conduct of his/her affairs. WAC 246-10-606; RCW 34.05.452(1). An "initiating document" is defined as:

[A] written agency document which initiates action against a license holder or applicant for license or recipient of benefits and which shall create a right to an adjudicative proceeding. It may be entitled a statement of charges, notice of intent to deny, order or by any other designation indicating the action or proposed action to be taken.

WAC 246-10-102.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
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2.4 In examining the arguments of the parties, the Presiding Officer believes the parties have confused the burden of proof with the elements contained within the burden. Contained within the burden of proof are the burden of production and the burden of persuasion. *Carle v. McCord Credit Union*, 65 Wn.App. 93, 98 (1992) (citing *In Re C.B.*, 61 Wn.App. 280, 282 (1991)). The burden of production is applied by the judge, and the burden of persuasion is applied by the trier of fact. *Carle v. McCord Credit Union*, 65 Wn.App. at 98. The court stated further:

To question the sufficiency of evidence is to question whether the burden of production had been met. The burden of production is met when the plaintiff produces evidence sufficient to support a finding of each element of the cause of action. When it is met, it is said that the evidence is “sufficient” or “substantial”.

Usually, the burden of production must be met by the plaintiff in his or her case in chief.

Carle v. McCord Credit Union, at 98 (citations omitted). Satisfying the burden of production creates an issue of fact – an issue of fact is resolved by satisfying the burden of persuasion. *Carle v. McCord Credit Union*, at 102. The burden of persuasion remains with the plaintiff. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 363 – 364 (1988); *Jones v. Kitsap County Sanitary Landfill, Inc.*, 60 Wn.App. 369, *rev. denied* 116 Wn.2d 1022 (1991).

2.5 The Respondent, as applicant, bears the responsibility of proving (under WAC 246-10-606) that its application met the ADD per ERU requirements set forth in the applicable statute and regulation. WAC 246-10-606 then requires the Program prove the factual basis set forth in its initiating document (here, the conditional approval of the WSP). Because the only point of contention is the ADD per ERU, the Program

must prove the factual basis (that is, the burden of production) supporting its decision at hearing. This is important here, given the Program did not accept the Respondent's basis for calculating the ADD per ERU, and substituted a different factual basis for its conditional approval.⁶

2.6 The process at hearing is:

- A. The Program has to meet the burden of production (production of sufficient evidence to support its ADD per ERU calculation) to support its conditional approval decision on that element.
- B. If that burden is met, then the Intervenor must meet its own burden of production (production of sufficient evidence to overcome the Program's burden of production regarding the ADD per ERU calculation) in support of its conditional decision.
- C. If the Intervenor meets its burden of production (production of sufficient evidence to show that the Program's evidence does not prove the underlying contention) then the Program must meet its burden of persuasion (resolving the issue of fact by persuasion overcoming the Intervenor's burden of production).
- D. If the Program meets both the burden of production and persuasion, the Intervenor must meet its own burden of persuasion.

2.7 The Program's production burden was showing it calculated the ADD per ERU figure of 172.5 gpd (154 gpd multiplied by system water loss of 112%) using the requirements in chapter 246-290 WAC and the guidelines in the WSDM, that is:

- A. Utilized appropriate water system design criteria by using actual metered water use records pursuant to WAC 246-290-221(1) and chapter 5 of the WSDM.
- B. Measured the water use by determining the number of ERUs that "used a specific unit of measure used to express the amount of water consumed by a typical full-time single family residence".

⁶ A review of the record indicates the Respondent's board of directors eventually approved this calculation method subsequent to the submission of its WSP in January 2001.

WAC 246-290-010. The Program accepted the definition of “full-time” used by the Respondent – full-time being residents with a local mailing address to show the permanent place of residence. See WSDM section 6.4.3.

- C. Calculating the ADD, that is, measuring the “total quantity” of water use from all sources over a calendar year divided by three hundred sixty-five. Because it used the ADD measurement (dividing by 365), the Program contends it was not required to use any minimum amount in measuring the ADD figure or to look at full-time use by monthly figures.

By submitting this evidence, the Program met its burden of production or evidence sufficient to support an ADD per ERU figure of 172.5 gpd. The Respondent contends the Program’s interpretation should be given substantial weight because the subject area falls within the Program’s area of expertise. See *Sonner v. Department of Labor and Industries*, 101 Wn.App. 350, 355 (2000).

2.8 The Intervenor’s production burden was producing sufficient evidence to show the Program’s ADD per ERU calculations were not reasonable using the requirements in chapter 246-290 WAC and the guidelines in the WSDM, that is:

- A. Mr. Thielemann incorrectly adjusted the connection figures provided by the Respondent. At hearing Mr. Thielemann could not identify the basis for making his adjustments and, in fact, admitted he had no specific criteria.
- B. The Program’s definition of full-time residence (residents with a local mailing address) was not reasonable or accurate. A review of the water meter usage showed that some part-time homes used as much as, or more, water than homes identified as full-time. The Program’s standard did not take into account that residents identified as full-time could be gone as many as four months out of the year (the snowbirds). By not using a reasonable criteria to determine what is a full-time residence, the ADD per ERU calculation used by the Program reflected a lower ADD per ERU figure than is actually used by the Respondent’s water system.

After reviewing the evidence, the Presiding Officer concludes the Intervenor met its production burden, for the reasons set forth below.

2.9 At hearing Mr. Thielemann agreed that the whole purpose of evaluating the water system data, for purposes of calculating the ADD, is to average only the bona fide full-time residents. 2/26/03 at 155. Initially, the Presiding Officer notes the number of ERUs cannot be determined without defining what is “a typical full-time single family residence” per WAC 246-290-010. While the term “full-time” is used in the definition of ERU, that term is not defined in either chapter 246-290 WAC or the WSDM. According to the Mr. Thielemann, the Program defines full-time on a case-by-case basis (that is, defined for or relative to each water system). See WSDM section 6.4.1. In the Respondent’s water system (the standard adopted by the Program), “full-time” is defined as the permanent mailing address of the water system users, as identified by Ms. Clark.

2.10 The only guidance on what constitutes full-time use is set forth in WSDM section 6.4.3. That section states, in relevant part:

According to WAC 246-290-221(1), water demand design data shall correlate to the maximum number of full-time or part-time equivalent residential units in service at any time. Full-time refers to a permanent place of residence, whereas a part-time residence is a vacation home, not lived in year-round (occupied only seasonally, holidays, and/or weekends). The reason for the distinction is that systems designed only for part-time residences have been noted to gradually convert to full-time residences (because of retirement, changing housing markets, etc.). ...

Full-time residence is therefore more than just identifying the permanent place of residence (mailing address) – it speaks to the amount of time the residence is occupied.

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The question then becomes: When is a residence occupied year-round, as opposed to seasonally, holidays, or weekend use?

2.11 Having occupancy information is important in determining a full-time residence. This is clear from a review of Exhibit P-11. See Findings of Fact 1.15, 1.16 and 1.17. Knowing whether a resident has a local mailing address does not, by itself, consistently or reasonably measure the amount of water used by a resident. A review of Exhibit P-11 reveals part-time residents (as defined by the Respondent) that use as much water, or more, than residents designated full-time. Findings of Fact 1.15, 1.16 and 1.17.

2.12 The Program's adoption of the Respondent's full-time definition is based on the testimony of Ms. Clark. Initially, Ms. Clark testified that she considered residents as full-time even though the residents were "snowbirds" (that is, gone for up to four months a year). Additionally, she deleted from the final version of Exhibit P-11 the names and mailing addresses all residents. With due respect to Ms. Clark, her statements, without more (the names and street addresses having been deleted from the final version of Exhibit P-11), cannot be tested or examined for accuracy. Without this further proof her testimony consists of her assertions, and these assertions cannot be tested. Finally, even if Ms. Clark's testimony could be considered credible on identifying which residents lived full-time at the Respondent's water system, the Presiding Officer concludes her testimony is not conclusive on the issue of full-time occupancy, given the contradictory evidence regarding full-time and part-time water usage contained in Exhibit P-11.

2.13 The number of full-time connections (necessary to determine the ADD per ERU calculations) cannot reasonably be determined using the Respondent/Program definition of full-time residence, absent criteria addressing the occupancy factor. WSDM 6.4.3. The matter is therefore remanded to the Program for a determination of a definition of what constitutes “full-time” for the Respondent’s water system that addresses both permanent residency and occupancy, pursuant to its own WSDM. Because the matter is being remanded, the Presiding Officer declines to “recalculate Respondent’s water demand based on acceptable evidence in the record” as requested by the Intervenor. Lummi Nation’s Post-Hearing Brief at 3.

2.14 At hearing the Program’s representative testified that it had in its possession water usage data provided by the Respondent for the period 1992 – 1994 (the Goodrich data), and additional data from Ms. Clark (for years 1993, 1996, 1998 and 1999). WSDM section 5.3.1(2) states “[a]n analysis of historical water usage should be based upon meter readings covering a minimum of two, *but preferably more*, non-drought years.” (Italics added). The Presiding Officer believes no deference is due to the Program’s determination in the absence of a full examination of the water meter information available to it. On remand, the Program should consider this water usage data or explain why that data is unnecessary in determining the water usage by the Respondent.

2.15 The Program’s 10/20/00 conditional approval accepted the Respondent’s representation that the tribal connections were to be excluded from any determination of total connections. The Program concluded it could rely on the representation because

of the DOEs silence on the issue, as provided for in the MOU between the Department of Health and Department of Ecology. Exhibit P-26, Part One, paragraph 4. Under normal circumstances, the Program might reasonably rely on the silence of DOE as provided by the terms of the MOU.

2.16 Given the unique nature of this development, and the history between the Respondent, Program and Intervenor tribe, it is not reasonable for the Program to rely on DOEs silence in this case. First, there was the existence of the discontinued State-Federal-Lummi negotiations initiated in 1995. See 10/20/00 letter at 1. The Program can be required to show which water rights it used in determining whether there were sufficient water rights to support its decision. Prehearing Order No. 7, at 13. Silence on this issue does not answer that question (that is, would a reasonably prudent person be accustomed to rely on the Program's contention that it made a sufficient showing that sufficient water rights existed to support its decision). Second, using the reasonably prudent person test set forth in WAC 246-10-606, would a reasonably prudent person rely on DOEs silence, given the amount of correspondence between the Program and Intervenor on this issue. Exhibits P-4, P-14, P-16 through P-18, P-22, P-24, P-28, P-29 and P-31 through P-33; and Exhibit I-12 through I-27, I-29, I-33 through I-35. A review of this correspondence shows the Intervenor has consistently disputed the Respondent's position (see WSP Executive Summary at 3, and as adopted by the Program) that the Intervenor tribal connections are served by Indian Reserve Water Right. Finally, the Program failed to introduce the previous 1983 WSP (approved by the Program in 1986) to show its decision 2000 was consistent with its earlier 1986

decision. While silence by DOE, as contemplated in the MOU, would address most WSP approval issues, the unique circumstances of this case argue against such reliance here.

III. ORDER

Based on the foregoing Procedural History, Findings of Fact and Conclusions of Law, it is ORDERED:

3.1 The Program's conditional approval of the Respondent's WSP is REVERSED and REMANDED. The WSP is remanded to the Program for a determination of what constitutes "full-time single family residence" in the WAC 246-290-010 ERU definition, necessary to determine the ADD per ERU calculation.

3.2 Following its determination of what constitutes a "full-time single family residence", the Program should calculate the number of additional connections, if any, permitted under the Respondent's WSP, based on the 230 gpm and 143 afy granted under the DOE determination. In performing the calculations, the Program shall either use all of the water meter data provided by the Respondent in the application process, or provide clear findings why such water use data is not necessary in reaching its ADD per ERU calculations.

3.3 The Program's determination shall include a clear written finding regarding the water rights of the parties from the Department of Ecology, insofar as the water rights issue clarifies whether the 43 Lummi tribal connections affect the number of additional connections allowed under the WSP.

3.4 Given the above remand order, the Joint Stipulations and Order of Dismissal (Sandy Point's Additional Connections Appeal) is DENIED.

Dated this 28 day of October, 2003.

/s/
JOHN F. KUNTZ, Health Law Judge
Presiding Officer

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate/national reporting requirements. If adverse action is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either Party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this Order with:

The Adjudicative Clerk Office
PO Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Division of Drinking Water Program
PO Box 47822
Olympia, WA 98504-7822

The request must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Clerk Office has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A petition for judicial review must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

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The order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).