WR File NR S1-28733
WR Doc ID 5321458

DEPARTMENT OF ECOLOGY
State of Washington

State of Washington
Protested Report of Examination for Water Right S1-28733

PRIORITY DATE	WATER RIGHT NUMBER
July 11, 2012	S1-28733

MAILING ADDRESS	SITE ADDRESS (IF DIFFERENT)
Lummi Rock LLC PO Box 577 Sumas, WA 98295-0577	1103 Beach Avenue Lummi Island, WA 98262

Total Quantity Authorized for Withdrawal or Diversion

DIVERSION RATE	UNITS	ANNUAL QUANTITY (AF/YR)
0.022	CFS	3.4

Purpose

	DIVERSION RATE			ANNUAL QUANTITY (AF/YR)		
PURPOSE	ADDITIVE	NON-ADDITIVE	UNITS	ADDITIVE	NON-ADDITIVE	PERIOD OF USE (mm/dd)
Dust Suppression		0.022	CFS		3.4	1/01-12/31

REMARKS

Lummi Rock LLC (Lummi Rock) is seeking to draw surface water from the unnamed creek and Granger Pond to provide water for dust suppression. Lummi Rock is seeking a primary source of supply from Aiston Creek under water right S1-28703. The instantaneous rate and annual quantity of water under this water right is non-additive to S1-28703, meaning that no more than 0.022 cubic feet per second (cfs) and 3.4 acre-feet per year (af/yr) can be diverted from any combination of the sources.

IRRIGATED ACRES		PUBLIC WATER SYSTEM INFORMATION	
ADDITIVE	NON-ADDITIVE	WATER SYSTEM ID	CONNECTIONS
NA		NA	

Source Limitations

SOURCE FACILITY/DEVICE	A|S	DIVERSION RATE (CFS)	ANNUAL QUANTITY (AF/YR)	PERIOD OF USE (mm/dd)
Unnamed Creek	A	0.022	3.4	1/01-12/31
Granger Pond	A	0.022	3.4	1/01-12/31

A|S: A=Alternate; S=Standby/Reserve

Source Location

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
Whatcom	Unnamed Creek and Granger Pond	Hale Passage	01 - Nooksack

SOURCE FACILITY/DEVICE	PARCEL	WELL TAG	TWN	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
Unnamed Creek	370124065212000	NA	37N	1E	24	NW SW	48.6806	-122.6347
Granger Pond	370124064062000	NA	37N	1E	24	SW SW	48.6777	-122.6350

Datum: NAD83/WGS84

Place of Use (See Attached Map)

PARCELS

3701240652120000, 3701241751950000, and 3701241910840000

LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE

Government Lot 2 (NW¼ SW¼), Government Lot 3 (NE¼ SW¼ and NW¼ SE¼), and the SE¼ SW¼, all within Section 24, Township 37 North, Range 1 East, W.M.

Proposed Works

Two points of diversion are proposed: one from the unnamed creek and one from Granger Pond, which is located in the unnamed creek watershed. A 1-inch diameter hose from the unnamed creek will feed water to a pair of 12,000-gallon storage tanks via gravity which, in turn, supplies water to the production area for dust suppression via gravity. A small portable pump will be used to start a siphon to divert water from Granger Pond to the storage tanks when needed. Booster pumps located on the crushers provide additional pressure to feed water to the spray bars when crushing rock. The system is used as needed in summer and/or dry seasons to control dust. The diversions under this water right are alternate sources. The primary source of water is Aiston Creek under water right S1-28703.

Development Schedule

BEGIN PROJECT	COMPLETE PROJECT	PUT WATER TO FULL USE
Started	December 31, 2014	December 31, 2019

Additional Actions and Due Dates

ACTION	DATE DUE
Water meter shall be installed per WAC 173-173. Water Resources Program FORM 1 – Measuring Device Information shall be submitted to Ecology.	Within 30 days of permit issuance.

Measurement of Water Use

How often must water use be measured?	Bi-weekly (every other week)
How often must water use data be reported to Ecology?	Annually (by January 31st of the following year)
What volume should be reported?	Total Annual Volume
What rate should be reported?	Annual Peak Rate of Diversion (cfs)

Provisions

Relationship with S1-28703

The instantaneous rate and annual volume of water authorized under this filing will be considered non-additive to water right S1-28703, which authorizes the diversion of water from Aiston Creek for the same purpose of use by Lummi Rock. The maximum rate of water that Lummi Rock is authorized to divert from Aiston Creek, Granger Pond, or the unnamed creek under S1-28703 and S1-28733 is 0.022 cfs and 3.4 af/yr.

Limitation of Authorization

While the place of use of water under this water right includes parcels owned by Lummi Rock it is noted that the Whatcom County mineral resource land overlay covers only a portion of this area. As a condition of this permit, Lummi Rock must comply with the terms of the mineral resource land overlay and associated Whatcom County permits.

Measurements, Monitoring, Metering and Reporting

An approved measuring device must be installed and maintained for each of the sources identified by this water right in accordance with the rule "Requirements for Measuring and Reporting Water Use" WAC 173-173.

http://www.ecy.wa.gov/programs/wr/measuring/measuringhome.html

Recorded water use data shall be submitted via the Internet. For help setting up an Internet reporting account, contact the Bellingham Field Office. If you do not have Internet access, you can still submit hard copies by contacting the Bellingham Field Office for forms to submit your water use data.

WAC 173-173 describes the requirements for data accuracy, device installation and operation, and information reporting. It also allows a water user to petition the Washington State Department of Ecology (Ecology) for modifications to some of the requirements.

Department of Fish and Wildlife Requirement(s)

The intake(s) must be screened in accordance with the Washington State Department of Fish and Wildlife (WDFW) screening criteria (pursuant to RCW 77.57.010, RCW 77.57.070, and RCW 77.57.040). Contact the WDFW, 600 Capitol Way N, Olympia, WA 98501-1091. Attention: Habitat Program, Phone: (360) 902-2534, if there are questions about screening criteria.
http://www.wdfw.wa.gov/reg/regions.htm

Prior to construction of any instream structures, consult with the WDFW Area Habitat Biologist (Mr. Joel Ingram, 360-466-4345 ext. 271, joel.ingram@dfw.wa.gov) regarding the need for Hydraulic Project Approval under Chapter 77.55 RCW. No dam or weir may be constructed in connection with the diversions without the prior approval of the WDFW.

Easement and Right-of-Way
The water source and/or water transmission facilities are not wholly located on land owned by the applicant. Issuance of a water right authorization by Ecology does not convey a right of access to, or other right to use, land which the applicant does not legally possess. Obtaining such a right is a private matter between applicant and owner of that land.

The applicant owns the location of the diversion from the unnamed creek. The applicant does not own the land upon which Granger Pond is located. The applicant has provided a letter dated June 29, 2012, and signed by Mr. Dale Granger, the owner of the property on which Granger Pond is located. In that letter, Mr. Granger provides Lummi Rock with permission to withdraw water for dust suppression from Granger Pond.

Proof of Appropriation
The water right holder must file the notice of Proof of Appropriation of water (under which the certificate of water right is issued) when the permanent distribution system has been constructed and the quantity of water required by the project has been put to full beneficial use. The certificate will reflect the extent of the project perfected within the limitations of the permit. Elements of a proof inspection may include, as appropriate, the source(s), system instantaneous capacity, beneficial use(s), annual quantity, place of use, and satisfaction of provisions.

Schedule and Inspections
Department of Ecology personnel, upon presentation of proper credentials, will have access at reasonable times, to the project location, and to inspect at reasonable times, records of water use, wells, diversions, measuring devices and associated distribution systems for compliance with water law.

Findings of Facts
Upon reviewing the investigator's report, I find all facts, relevant and material to the subject application, have been thoroughly investigated. Furthermore, I concur with the investigator that water is available from the source in question; that there will be no impairment of existing rights; that the purpose(s) of use are beneficial; and that there will be no detriment to the public interest.

Therefore, I ORDER the requested appropriation under Application No. S1-28733 be approved, subject to existing rights and the provisions specified above.

Your Right To Appeal

You have a right to appeal this Order to the Pollution Control Hearing Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do the following within 30 days of the date of receipt of the Order.

File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.

- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.
- You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	**Department of Ecology** Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
Pollution Control Hearings Board 1111 Israel Road SW Suite 301 Tumwater, WA 98501	**Pollution Control Hearings Board** PO Box 40903 Olympia, WA 98504-0903

Signed at Bellevue, Washington, this 17 day of December 2013.

Jacqueline Klug, Section Manager
Water Resources Program
Northwest Regional Office

For additional information visit the Environmental Hearings Office Website: http://www.eho.wa.gov. To find laws and agency rules visit the Washington State Legislature Website: http://www1.leg.wa.gov/CodeReviser.

INVESTIGATOR'S REPORT

Application for Water Right – Lummi Rock, LLC
Water Right Control Number: S1-28733
Investigators: Jim Bucknell and Andrew Dunn, L.G., L.HG., RH2 Engineering, Inc.

BACKGROUND

This report serves as the written findings of fact concerning Water Right Application No. S1-28733. This application is being processed concurrently with Water Right Application No. S1-28703.

Cost Reimbursement

This application is being processed under a cost reimbursement agreement between the applicant and the Washington State Department of Ecology (Ecology). This report has been prepared by RH2 Engineering, Inc. (RH2).

Table 1 Summary of Requested Water Right

Applicant Name	Lummi Rock, LLC
Date of Application	July 11, 2012
Place of Use	Government Lot 2 (NW¼ SW¼), Government Lot 3 (NE¼ SW¼ and NW¼ SE¼), and the SE¼ SW¼, all within Section 24, Township 37 North, Range 1 East, W.M.

County	Waterbody	Tributary To	WRIA
Whatcom	Granger Pond and Unnamed Creek	Hale Passage	01- Nooksack

Purpose	Rate	Unit	Af/yr	Begin Season	End Season
Dust Suppression	0.022	cfs	3.4	01/01	12/31

Source Name	Parcel	Well Tag	Twp	Rng	Sec	QQ Q	Latitude	Longitude
Granger Pond	3701240640620000	NA	37N	1E	24	SW SW	48.6777	-122.6347
Unnamed Creek	3701240652120000	NA	37N	1E	24	NW SW	48.6806	-122.6347

cfs = cubic feet per second; af/yr = acre-feet per year; Sec. = Section; QQ Q = Quarter-quarter of a section; WRIA = Water Resource Inventory Area; E.W.M. = East of the Willamette Meridian; Datum: NAD83/WGS84

Legal Requirements for Approval of Appropriation of Water

Washington State law includes a four-part test for the issuance of a water right permit. The four tests are:

1. The appropriation will not impair existing rights;
2. Water is available for appropriation;
3. The proposed water use is a beneficial use of water; and
4. The appropriation will not be detrimental to the public welfare.

Each of these four tests is addressed in the **Investigation** section.

Public Notice

RCW 90.03.280 requires that notice of a water right application be published once a week, for two consecutive weeks, in a newspaper of general circulation in the county or counties where the water is to be stored, diverted, and used. Notice of this application was published in the *The Bellingham Herald* on April 2, 2013 and April 9, 2013.

No protests were received during the statutory 30-day protest period. However, protests received during the public notice period for S1-28703 were considered when drafting this report of examination.

Consultation with the Department of Fish and Wildlife (WDFW)

Ecology must give notice to WDFW of applications to divert, withdraw, or store water. On March 23, 2012, an email was sent to WDFW soliciting its opinion on companion application S1-28703 to withdraw water from Aiston Creek. A letter was received from Mr. Steve Boessow dated April 6, 2012. In this letter, he indicated that WDFW did not oppose the issuance of this application since there are no known fish species in the creek, as confirmed by the Area Habitat Biologist, Mr. Brendan Brokes.

Mr. Boessow did recommend that Lummi Rock contact the Area Habitat Biologist prior to construction of any instream structures for consultation regarding the need for Hydraulic Project Approval (HPA). He also cautioned that, "This letter does not exempt the applicant from compliance with state Hydraulic Code (Chapter 77.55 RCW) and fish screening statutes (RCW 77.57.010, RCW 77.57.040, and RCW 77.57.070), which may be required in order to divert water."

Another email was sent to Mr. Boessow on April 16, 2012, soliciting comments on Lummi Rock's decision to apply for use of the unnamed creek and Granger Pond as points of diversion (S1-28733). Mr. Boessow responded the same day and indicated that the additional two points of diversion being proposed did not change the WDFW opinion provided in the letter dated April 6, 2012.

State Environmental Policy Act (SEPA)

A water right application is subject to a SEPA threshold determination (i.e., an evaluation of whether there are likely to be significant adverse environmental impacts) if any one of the following conditions are met.

(a) It is a surface water right application for more than 1 cubic feet per second, unless that project is for agricultural irrigation, in which case the threshold is increased to 50 cubic feet per second, so long as that irrigation project will not receive public subsidies;

(b) It is a groundwater right application for more than 2,250 gallons per minute ;

(c) It is an application that, in combination with other water right applications for the same project, collectively exceed the amounts above;

(d) It is a part of a larger proposal that is subject to SEPA for other reasons (e.g., the need to obtain other permits that are not exempt from SEPA);

(e) It is part of a series of exempt actions that, together, trigger the need to do a threshold determination, as defined under WAC 197-11-305.

The proposed diversion of water under this application is categorically exempt from the SEPA because the quantity to be diverted is less than the 1 cfs threshold. Potential expansion of the quarry operation is subject to the SEPA and Whatcom County (County) is the lead agency for any determinations related to the expansion of the quarry project.

SEPA compliance has not been completed for the proposed expansion of the quarry. However, the diversion of water requested under S1-28703 and S1-28733 is necessary for the operation of the existing quarry regardless of whether their expansion plans come to fruition. According to Mr. Tyler Schroeder (Whatcom County Planning and Development Services, Current Planning/Permit Center Manager), the County previously issued a SEPA determination for the quarry as it exists (March 12, 2013, email correspondence with Andrew Dunn). Currently, the County's zoning code includes a mineral resource lands (MRL) overlay in which mining activities are allowed. This overlay includes part, but not all, of the lands identified as the place of use for these water rights. While water can be used anywhere within the approved place of use, this water right does not override restrictions on certain mining activities as regulated by the County. It is a condition of this water right that the water right holder complies with the County Comprehensive Plan and other pertinent County regulations and requirements.

INVESTIGATION

Proposed Use and Basis of Water Demand

Lummi Rock proposes to use water for dust suppression associated with the active quarry operation. Water is used to control dust when the aggregate crushers are running. Water is also reported to be used to maintain the moisture content of quarry roads to reduce dust from vehicles.

As mentioned previously, Lummi Rock has two water right applications that are being processed concurrently, S1-28703 and S1-28733 (this application). Under these two applications, three separate points of diversion are identified. The relationship of the points of diversion and water rights are listed in **Table 2**. Attachment 1 shows the points of diversion and place of use for the subject application.

Table 2 – Point of Diversion and Water Right Relationship

Water Right Number	Source Name	Order of Preferred Use	Qi (cfs)	Qa (af/yr)
S1-28733	Unnamed creek	First	0.022	3.4
S1-28703	Aiston Creek	Second		
S1-28733	Granger Pond	Third		
		Total	**0.022**	**3.4**

Diversion 1 – Unnamed Creek (S1-28733)

Lummi Rock's preferred point of diversion for this project is an intermittent, unnamed creek that flows down the hillside and passes very close to Lummi Rock's upper storage tank. The applicant said that this creek goes dry each summer and freezing conditions in the winter sometimes cause it to stop flowing as well. However, the proximity of the diversion point to the upper storage tank is easier to manage when flow is present than the Aiston Creek diversion, which is approximately ¼ mile away from the storage tank. Therefore, it is Lummi Rock's intent to use the unnamed stream as its first source of supply, when available. The watershed for this stream reaches from near the crest of Lummi Peak at an elevation of approximately 1,650 feet to Hale Passage at sea level. The total watershed (source of supply) is approximately 164 acres in size.

Diversion 2 – Aiston Creek (S1-28703)

Lummi Rock's secondary diversion point for this project is a stream locally referred to as Aiston Creek. The watershed for this creek reaches from near the crest of Lummi Peak, at an elevation of

approximately 1,600 feet to Hale Passage at sea level. Two reservoirs can be found near the 500-foot elevation level on the creek channel. These two reservoirs are operated by Lummi Island Scenic Estates (LISE) for municipal supply and recreation. LISE has water rights to serve the development, which are discussed in more detail later in this report. Flow in the lower reach of the stream appears to be controlled primarily by outflow from the LISE recreational reservoir. The stream drops approximately 500 feet in elevation over the last 2,000 feet of its length. Upon reaching the beach, the water goes subsurface and reemerges from the beach deposits just above the water level of Hale Passage. The total watershed (source of supply) is approximately 320 acres in size.

Diversion 3 – Granger Pond (S1-28733)

Granger Pond is estimated to be roughly a quarter acre in size. It occurs high up the hill at an elevation of approximately 420 feet in a depression next to a logging road. During RH2's site visit, the pond had no observed overland outflow or inflow. RH2 believes that this pond is formed by the capture of overland flow and interflow by the logging road prism and does not represent a naturally occurring pond. This source was identified by Lummi Rock as its backup source of supply for the quarry, should water become unavailable from the creeks. This pond lies within the same watershed as the unnamed creek.

Instantaneous Rate

On April 10, 2012, RH2 received an email from Lummi Rock clarifying that the desired maximum instantaneous rate under S1-28703 is 10 gpm, or 0.022 cfs. Lummi Rock has also applied for a second water right (this application) for the same purpose of use in the same place of use. This request is intended to provide a back-up supply for the water in the event of a shortage of water in Aiston Creek. This second application, S1-28733, requests the same quantity of water (i.e., 0.022 cfs and 3.4 af/yr) which, if approved, would be non-additive to any waters approved pursuant to S1-28703.

While it may be theoretically possible to divert up to 0.29 cfs (13 gpm) from these sources through a 1-inch diameter tube under gravity flow conditions, the water right can verify the diversion rate by timing how long it takes to fill a known volume. If the diversion rate is too high, the water right holder can place a valve on the diversion hose at the storage tank to control the diversion rate to make sure it does not exceed 0.22 cfs (10 gpm).

Annual Volume

In the email correspondence on April 10, 2012, Lummi Rock indicated it uses up to 3,000 gallons per day (gpd) during operation when dust suppression is needed. Since the need to provide dust suppression is based on the weather and product demand, it is difficult to determine how many days per year 3,000 gallons is used. If it is assumed that 3,000 gpd is used for 365 days per year (the worst-case scenario), then the maximum annual volume that could be diverted is 3.4 af/yr.

Given the uncertainty related to the actual use, the annual volume granted will be 3.4 af/yr. However, the final certificate will only issue for water that has been diverted and put to beneficial use.

Other Rights Appurtenant to the Place of Use

There is one water right appurtenant to the proposed place of use. This water right is SWC 9544, which was issued to Lloyd D. and Katherine H. Niedhamer. This water right is for community domestic supply for homes within Government Lot 3, which surrounds Smuggler's Cove. The quarry staff confirmed that there are one or two cabins that receive water from a stream that flows into Smuggler's Cove. This use is not related to the proposed quarry dust suppression use and the point of diversion is on a different unnamed creek in a different watershed. **Table 3** is an inventory of appurtenant water rights.

Table 3 - Inventory of Existing Appurtenant Water Rights

Water Right Number	Priority Date	Purpose	Qi (cfs)	Qa (afy)	Source
SWC 9544	9/8/1959	Community Domestic	0.03	NA	Unnamed Creek
	Total		**0.03**	**NA**	
[1] Not the same as the unnamed creek as identified on S1-28733 (this application).					

Site Visit

On March 22, 2012, Mr. Andrew Dunn from RH2 and Mr. Tom Buroker from Ecology performed a site visit for this water right application. Mr. David Grainger and Mr. Luke Olson from Lummi Rock discussed the quarry operation and the water system and provided a tour of relevant locations.

After meeting with the quarry representatives, Mr. Dunn and Mr. Buroker met with the following representatives from LISE: Mr. Mark Sexton, President; Ms. Meredith Moench; Mr. Lee McCollum; and Ms. Dempsey. They showed RH2 and Ecology where LISE diverts water from the LISE reservoir, helped trace the location of Aiston Creek as it flowed through the development, and provided access to view where Aiston Creek flows into Hale Passage.

During RH2's site visit, the flow in the creek was visually estimated to be 3 cfs. The site visit correlated with the time of year when one would expect to see the peak streamflow. Late summer and early fall represent the time when low flow would be expected. RH2 asked how low the flow gets in the late summer/early fall and the LISE representatives agreed that it ranges from a trickle to no flow at all along the length of the creek.

Impairment Considerations

Impairment is an adverse impact on the physical availability of water for a beneficial use that is entitled to protection. A water right application may not be approved if it would:

- Interrupt or interfere with the availability of water to an adequately constructed groundwater withdrawal facility of an existing right. An adequately constructed groundwater withdrawal facility is one that (a) is constructed in compliance with well construction requirements and (b) fully penetrates the saturated zone of an aquifer or withdraws water from a reasonable and feasible pumping lift.
- Interrupt or interfere with the availability of water at the authorized point of diversion of a surface water right. A surface water right conditioned with instream flows may be impaired if a proposed use or change would cause the flow of the stream to fall to or below the instream flow more frequently or for a longer duration than was previously the case.
- Interrupt or interfere with the flow of water allocated by rule, water rights, or court decree to instream flows.
- Degrade the water quality of the source to the point that the water is unsuitable for beneficial use by existing users (e.g., via sea water intrusion).

Within the unnamed creek watershed there is only one existing water right claim listed in Ecology's Water Rights Tracking System (WRTS). The claim is for surface water possibly from the unnamed creek. **Table 4** lists the water right claim in the unnamed creek watershed.

Table 4 – Water Rights in the Unnamed Creek Watershed

Water Right Number	Name	Identified Date of First Use	Location	Qi Claimed (gpm)	Volume Claimed (af/yr)
S1-157781CL	Frank Granger	1930	N½ NW¼, Sec. 25, T37N, R1E	4	9.6

Under the water code, impairment cannot occur to the holders of water rights including minimum instream flows set by WAC. Impairment will be examined in relation to both of these possible scenarios.

Other Water Rights

There is only one water right claim possibly falling within the same drainage as the unnamed creek and Granger Pond. The point of diversion under this claim is located upstream of the proposed Lummi Rock diversion on the unnamed creek. Therefore, the diversion of water from these sources will not impair any existing water rights. The LISE diversion points are all located on Aiston Creek, which is a different watershed than Granger Pond and the unnamed creek.

Minimum Instream Flows

The unnamed creek does not have any minimum instream flow regulations required under Chapter 173-501 WAC. In WAC 173-501-040, it specifically states, "streams which are not specifically listed in this regulation are affected by this regulation if they are tributary to streams or lakes herein; otherwise such streams are not affected."

The unnamed creek is not tributary to any water bodies identified in the regulation and is intermittent, while the pond is unnatural in its origin; thus, the unnamed creek and Granger Pond are exempt from the regulation.

Since there are no water rights diverting water from Granger Pond, no water rights for diversion from the unnamed creek, and no established minimum instream flows for the unnamed creek, there is no impairment of existing water rights associated with this proposed diversion of water.

Water Availability

For water to be available for appropriation, it must be both physically and legally available.

Physical Availability

Water is physically available whenever the natural runoff conditions provide sufficient water to the unnamed creek and Granger Pond.

Legal Availability

In reviewing Chapter 173-501 WAC, the Instream Resources Protection Program regulation for WRIA 1, no surface water bodies on Lummi Island are administratively closed to further consumptive appropriation, therefore water is legally available for this proposed use.

Beneficial Use

RCW 90.54.020(1) declares specified uses of water to be beneficial. The list includes mining and industrial. The dust suppression for which water is being requested by the Lummi Rock quarry is a water use typically associated with mining and industrial activities and is, therefore, a beneficial use of water under the water code.

Public Interest Considerations

No potential detriment to the public interest was identified during the investigation of the subject application.

Consideration of Protests and Comments

As stated previously, Ecology received a protest from the following parties in response to the public notice of this application. Note: the comments received were related to application S1-28703 but, since the second application was for water for the same use, those comments are being considered as applicable to this application, S1-28733, as well.

Protestors	Date of Protest
Lummi Indian Business Council	July 1, 2011
Mr. Kent Nielsen, Ms. Leslie Dempsey, and Mr. Paul Dempsey	August 1, 2011

Lummi Indian Business Council

On July 1, 2011, Ecology received a protest letter from the Lummi Indian Business Council dated May 20, 2011, expressing concerns over current and future potential impacts on instream flows (there are no instream flows established on Lummi Island) due to pending applications. In this letter, the Lummi Rock application for Aiston Creek (S1-28703) was identified in a table with other applications.

On March 23, 2012, an email was sent to Mr. Jeremy Freimund, Water Resources Manager of the Lummi Indian Business Council, soliciting any additional comments on the Aiston Creek application. Another email was sent to Mr. Freimund on April 16, 2012, soliciting comments on Lummi Rock's decision to apply for additional points of diversion at the second creek and pond (subject of S1-28733). No comments were received in response to either email.

Ecology did not receive any additional comments in response to the publication of the legal notice that occurred in April 2013.

Nielsen, Dempsey, and Dempsey Protest

On August 1, 2011, Ecology received a protest letter from Mr. Kent Nielsen, Ms. Leslie Dempsey, and Mr. Paul Dempsey, all of whom indicated affiliation with LISE. The letter was dated July 31, 2011, and in it they expressed concern about the Lummi Rock water right application S1-28703. In this protest the following points were identified:

1. The intermittent nature of the creek at the proposed point of diversion is unreliable for dust control.
2. The potential for impairment of the LISE water rights and supply.

This letter represents an official protest letter since it included the required $50 fee and was submitted within the protest period following the original public notice.

In addition to this protest letter, on March 9, 2012, Mr. Jim Bucknell and Mr. Andrew Dunn from RH2 participated in a conference call with Mr. Kent Nielsen regarding his concerns about the water right application. The conference call discussion included the location of the diversion point with respect to the section (property) line, the geology of the diversion site, and the location of the proposed diversion on Aiston Creek with respect to the LISE reservoirs. The discussion proved helpful during the site visit in accessing the diversion point, locating the nearby survey marker, and understanding the local geology.

LISE contended that the source of supply (Aiston Creek) is an unreliable source of supply for dust suppression due to its intermittent nature. RH2 concurs; however, a water right is not a guarantee of supply availability. Rather, a water right grants authority to divert water for a specific beneficial use when water is available. Phase 1 of RH2's analysis related to this water right identified the lack of a reliable supply because of the intermittent nature of Aiston Creek. Lummi Rock submitted a second application (the subject application S1-28733) adding two additional points of diversion (an unnamed creek and Granger Pond) as a means of improving the reliability of supply. This second application is being processed concurrently with their original application.

During the site visit, it was noted that the proposed point of diversion from the unnamed creek and Granger Pond are in a different watershed than the LISE diversion and will have no impact on the LISE water rights.

Conclusions

Washington State law includes a four-part test for the issuance of a water right permit. The four tests are:

1. The appropriation will not impair existing rights;
2. Water is available for appropriation;
3. The proposed water use is a beneficial use of water; and
4. The appropriation will not be detrimental to the public welfare.

The appropriation will not impair senior water rights in the area, including LISE, and no instream flows have been established by rule for the unnamed creek.

Although limited in supply due to the intermittent nature of the unnamed creek and minimal volume of Granger Pond, water is available for appropriation during portions of the year. Also, there are no legal limitations on the availability of water.

Consistent with RCW 90.54.020(1), water use associated with dust suppression is considered to be beneficial.

During the processing of this application, nothing was identified that would suggest this appropriation would be detrimental to the public welfare.

Therefore, the following recommendations apply.

RECOMMENDATIONS

Based on this investigation and conclusions, RH2 recommends that this request for a water right be approved in the amounts and within the limitations listed below and subject to the provisions listed in this report.

Limitations: Purpose of Use and Authorized Quantities

The amount of water recommended is a maximum limit and the water user may only use that amount of water within the specified limit that is reasonable and beneficial:

0.022 cfs (10 gpm) -- non-additive to S1-28703
3.4 af/yr -- non-additive to S1-28703
Purpose of Use -- Dust Suppression

Points of Diversion – alternate to S1-28703

Granger Pond – SW¼ SW¼, Section 24, Township 37 North, Range 01 East W.M.

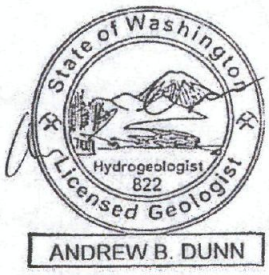
Unnamed Creek – NW¼ SW¼, Section 24, Township 37 North, Range 01 East W.M.

Place of Use
Government Lot 2 (NW¼ SW¼), Government Lot 3 (NE¼ SW¼ and NW¼ SE¼), and the SE¼ SW¼, all within Section 24, Township 37 North, Range 01 East, W.M.

Jim Bucknell

December 17, 2013

Jim Bucknell – RH2 Engineering, Inc. *Date*



December 17, 2013

Andrew B. Dunn L.G., L.HG. – RH2 Engineering, Inc. *Date*

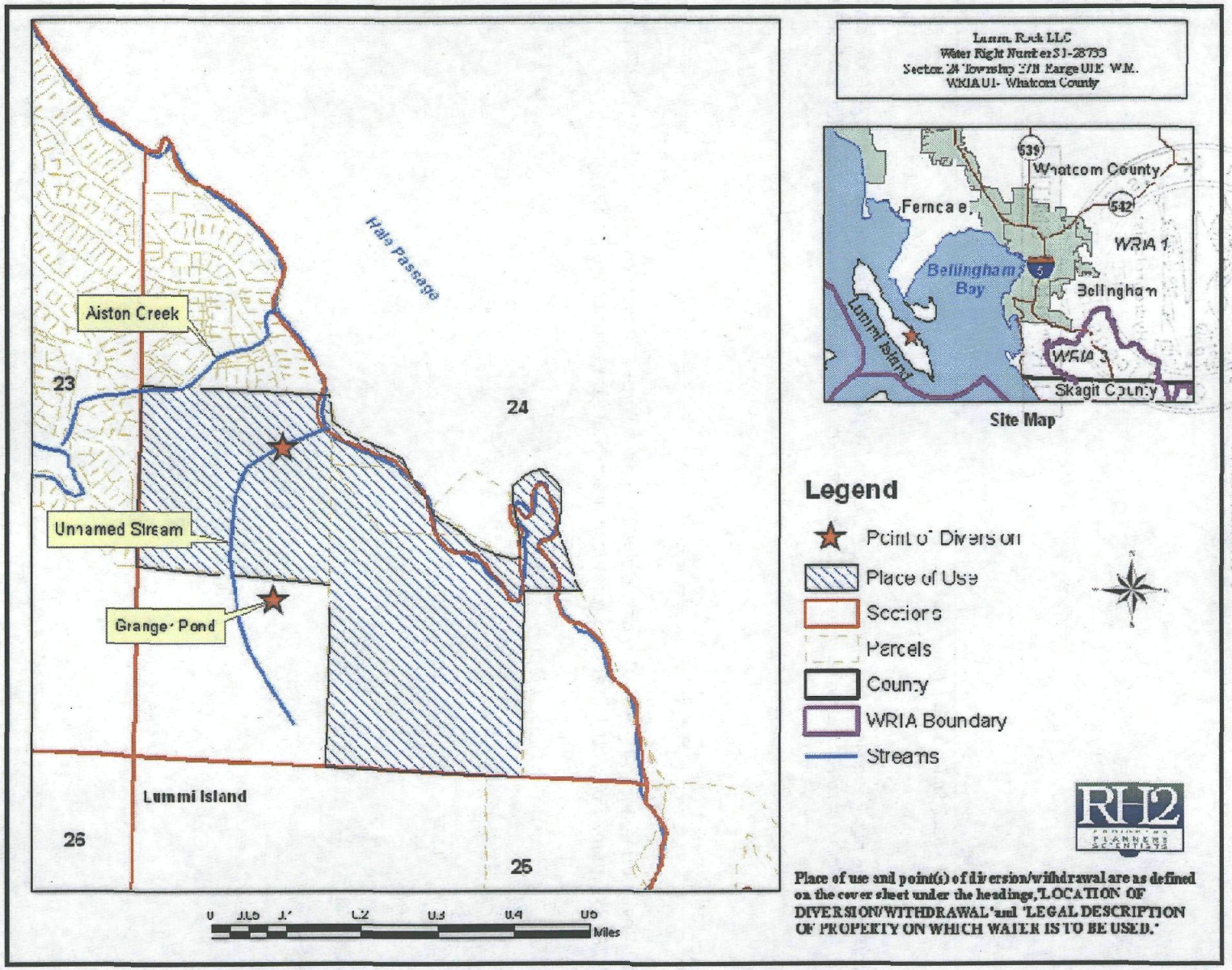
Buck Smith 12/17/2013

Reviewed By – Buck Smith, L.G., L.HG. – Ecology *Date*

If you need this publication in an alternate format, please call Water Resources Program at (360) 407-6600. Persons with hearing loss can call 711 for Washington Relay Service. Persons with a speech disability can call 877-833-6341.

Selected References

RH2 Engineering, Inc., August 2012, *Cost Reimbursement Phase 1 Report for Applications S1-28703 and S1-28733 (Lummi Rock, LLC)*, Prepared for: Washington State Department of Ecology.



Attachment 1