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NOTICE OF APPLICATION – WRITTEN COMMENT

Via Email

Jeremiah Cromie, Staff Planner
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Re: Ryegrass LPL Expansion (CU-21-00003)

Dear Mr. Cromie:

We represent Christine A. McCroskey, Jeffery McCroskey, Jarrod M. Chase, Sandra J. Ryan, Nels P. Sorenson, and Charlene A. Sorenson with regard to the remanded conditional use permit application filed by Kittitas County Solid Waste for expansion of the Ryegrass LPL landfill (CU-21-00003). We are in receipt of the *Notice of Application* which was issued on December 13, 2022. We take exception with a number of the conclusions and the process being utilized for consideration of the land use application following remand from the Yakima County Superior Court.

Application is not Complete for Processing.

Kittitas County Solid Waste's application for expansion of the Ryegrass LPS landfill is not complete for processing. Kittitas County has failed to comply with critical area review and report processes. KCC 17A.01.030(1) provides that Critical Area review "...shall apply to any alteration or development within the unincorporated portion of Kittitas County, and outside of shoreline jurisdiction, ..." It is further provided that "...[n]o development shall be constructed, located, extended, modified, converted, or altered, or land subdivided without full compliance with this Title." These requirements were imposed through *Ordinance No. 2021-016*, which was adopted December 7, 2021.

Kittitas County Solid Waste application for expansion of the Ryegrass LPL landfill (CU-21-00003) is not "vested" and is now subject to the requirements of Ordinance No. 2021-016.¹ The application for expansion of the landfill

¹ Conditional use permit applications are not "vested" applications and changes in the law are applicable to the processing of such land use applications. The courts have addressed vesting in the context of legislative enactments and stated in unequivocal terms that "...[w]hile it originated at common law, the vested rights doctrine is now statutory." *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014). A land use application vests only if there is a contemporaneous building permit (RCW 19.27.095(1)); a subdivision application (RCW 58.17.033(1)); or a development agreement (RCW 36.70B.180). Kittitas County has not submitted an application for a building permit or subdivision of the land use expansion property. As a consequence, the application is subject to changes in applicable development regulations including updates related to critical area review, reports and requirements

is neither exempt nor excepted from the requirements for Critical Area review. KCC 17A.01.050 and .060.

There should be no serious question that the site includes wildlife habitat conservation areas, native growth protection areas and impacts to wildlife and associated areas. The project area includes transitional shrubsteppe areas; two rare plant occurrences (*Pediocactus Nigrispinus* and *Lomatium Lithosolamanas*); is within the current range of an elk herd and current range of multiple Washington State Candidate shrubsteppe species such as Golden Eagle, sagebrush sparrow, sage thrasher, loggerhead shrike, burrowing owl, Townsend's ground squirrel, and black-tailed jackrabbit; supportive environment for state endangered species including sage-grouse and Ferruginous Hawk; and two streams. The site contains significant and fragile critical areas.

Prior to the county's consideration of any non-exempt alteration or development, "...the applicant *shall submit to the County complete information regarding the critical area on the application for the underlying development, on forms provided by county.*" KCC 17A.01.110(2)(a). Kittitas County has not submitted the necessary information. The applicant is also required to prepare and submit a critical areas report. KCC 17A.01.080(1). No critical area report has been submitted with the application. The minimum content requirements for the critical area report are set forth in KCC 17A.01.080(4).

As for the "completeness" determination, RCW 36.70B.070 provides in pertinent part:

- (2) A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently.

The current application does not meet the local government's submission requirements related to critical area application and reports. A Notice of Application may not be issued until there is a complete application available for review by agencies, departments and the public. KCC 15A.03.060.

Notice of Application and SEPA Checklist are Inconsistent With Superior Court Decision and Remand Instructions.

The *Notice of Application* incorrectly identifies the scope and requirements for remand as directed by the Yakima County Superior Court Order 21-2-02062-39. Kittitas County has erroneously interpreted Judge Elisabeth Tutsch's decision and remand to be limited to submission of "...a new SEPA checklist and environmental review for the conditional use permit..."² The remand was much broader in scope. The original conditional use permit approval was invalidated and all requirements applicable to the processing of that permit application remain in full force and effect in the scope of the remand.

Judge Tutsch's decision was much more than an instruction "...to develop a new SEPA Checklist." Judge Tutsch stated that "...[t]he question is whether the Lead Agency adequately evaluated whether the expanded landfill would have more than a reasonable probability of having more than a moderate effect on the quality of the environment." The court concluded that "...[t]he lead agency did not honor SEPA's value on having sufficient information to make an informed analysis of the landfill expansion's potential impact on the environment." The Court's conclusion

² SEPA Checklist includes a similar erroneous characterization of the LUPA decision stating "...[t]he appeal process resulted in direction ...to develop a new SEPA Checklist." *SEPA Checklist A.6* The decision was much more.

was as follows:

The court is left with the definite and firm conviction that a mistake was made. The lead agency did not have enough relevant and current information to conclude the environmental impact would be less than moderate. The hearing officer's decision is not supported by substantial evidence in light of the whole record, and the hearing officer erroneously applied the law to the facts. Accordingly, the hearing officer's conclusion is reversed.

Kittitas County was required to submit additional and sufficient information to address deficiencies cited by the court. A true and correct copy of the Court's decision is attached for your reference. **Attachments A and B.**

In the prior litigation, Kittitas County issued a Determination of Nonsignificance (DNS) based upon an incomplete and insufficient record of environmental impacts. The court also determined that Kittitas County failed to follow applicable procedures for adoption of the 2004 SEPA checklist.³ The court found that the record failed to provide sufficient information to evaluate the potential landfill's impact on groundwater; no document addressed the impact to animals; failed to include information about the prior environmental contamination and impact associated with the Balefill landfill; there was no evidence to evaluate long-term effects from the proposed expansion in the context of historic use of the site; there was no record that the lead agency considered likely impacts to groundwater within the expanded landfill area; there was no geologic information related to the expansion area and possible groundwater contamination; and a plethora of other deficiencies. Kittitas County ignored all of these deficiencies in the supplemental application and environmental documents.

The court also found that "...the 2004 hydrologic reports may not adequately evaluate the 2021 proposed expansion impact on groundwater." The monitoring well referenced (B-3 and B-7) "...suggests the hydrology could be different for the expansion site than for the site of the current LPL." Kittitas County did not implement required groundwater monitoring as required by the court.

In addition, the court addressed the deficiencies in the submitted documents and reports and concluded as follows:

While the HWA report generated for the 2004 ecology permit application thoroughly scrutinized the geology, hydrogeology, hydrogeologic properties and

³ The court offered the following response to the County's argument with respect to adoption of environmental documents:

Instead, the County argues an adoption form was unnecessary because the Addendum incorporated the 2004 Checklist by reference. The County is incorrect. "When an agency decides to use all or part of an existing SEPA document to constitute its checklist..., the agency 'adopts' all or part of the existing document. In such cases, the checklist ... would be composed of the adopted document and perhaps an addenda.... The only new environmental analysis conducted by the adopting agency would be in the addendum." *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 50, 52 P.3d 522, 529 (2002).

The resubmitted SEPA Checklist neither adopts nor references the 2004 SEPA Checklist. There is also no adoption of other outdated environmental information supplied in various 2004 reports. The current record includes no updates of those reports.

groundwater resource potential, *the report was limited to the area of the existing landfill*. The report itself warns that its data and conclusions should not be applied to a different location. “Experience has shown that subsurface soil and groundwater conditions can vary significantly over small distances.” *Record*, at 130. While the location for the monitoring well will be adequately addressed in the permitting process with Ecology, the lead agency may not have had sufficient geological information to evaluate whether groundwater impacts overall could be different at the expansion site than at the existing site.

The court directed that a site specific geological and hydrogeologic analysis be conducted on the proposed expansion site. Kittitas County failed to provide the required analysis for the expansion site.

The court found similar deficiencies and lack of accurate information “...about how the proposal would affect animals, birds and threatened and endangered species as required by WAC 197-11-960.” The court determined that Kittitas County failed to adequately review these environmental impacts:

The Department of Fish & Wildlife identified the presence of elk near the site, and that the site was located within their winter range. *Record*, at 494. Fish & Wildlife also noted the site is within the range of Golden Eagle, sagebrush sparrow, sage thrasher, burrowing owl, and other birds. Instead of addressing whether the expansion would have an impact on birds, elk and winter migration range, the Environmental Checklist concluded that they were not present. Without identifying the birds and mammals known to be on or near the site, the Lead Agency lacked sufficient information to evaluate the proposal’s impact on birds and animals.

The “new” SEPA checklist does little to improve information and is silent on mitigation measures. The SEPA Checklist does, however, include a recognition that the site is within mapped priority shrubsteppe habitat area.

- Environmental and Critical Area review require a report which includes a map drawn to scale depicting critical areas; documentation of field work performed on the site; field identification and characterization of all critical areas and buffers on and adjacent to the proposed development; a discussion of performance standards applicable to the critical area and proposed development; a mitigation plan; and any additional report information required for the critical area specified in KCC 17A.01.80 through KCC 17A.01.100. Details of critical area mitigation are set forth in KCC 17A.01.100. None of this information has been prepared for habitat or wildlife impacts.

The court also found that “...[a]n EIS is automatically required if the project would have significant adverse impacts on endangered or threatened species or their habitats. WAC 197-11-330(3)(e)(ii).” The court went on to address the impacts related to sage-grouse with the following determination:

The 2021 Addendum concluded that sage-grouse are not found in the area. *Record*, at 391. *This conclusion is not supported by the record*. The Department of Fish & Wildlife representative, Mr. Downes, conducted a site visit and determined the land had already been cleared, but the background habitat was

shrubsteppe/sagebrush. *Transcript*, at 66. Mr. Downes clarified the land was still habitat for endangered sage-grouse, but no sage-grouse could live on the proposed expansion area (because the land had already been cleared). *Record*, at 494. Mr. Downes wanted the record to reflect the potential for priority species, including the endangered sage grouse, to be found in the area. *Id.* The Environmental Checklist did not accurately describe what birds and animals could be found on or near the site. The Lead Agency did not have sufficient information to evaluate whether the proposed expansion would have more than a moderate impact on animals or on threatened or endangered species.

The court concluded that an EIS was automatically required where there would be a significant adverse impact on endangered or threatened species or their habitats. In an email dated December 15, 2022, Scott Downes advised that "...Ferruginous Hawk is now a State Endangered Species (it was under review at the time of the last SEPA comment). This adds to the scope of required environmental review and further substantiates the requirement for preparation of an Environmental Impact Statement (EIS).

All parties recognize that Kittitas County stripped the proposed expansion site of priority shrubsteppe habitat. The record contains no permit or analysis authorizing this activity but it is clear that it was a component of landfill operations and had direct and adverse impacts on habitat and species. SEPA Checklist 5d states as follows:

The landfill expansion area is within an existing, fenced, disturbed area of the site that experiences regular operations activity. The proposed location is not conducive to animals, and therefore further development of the area will have low impacts on animals.

Kittitas County destroyed the environment without permit or environmental review. This is not a "green light" to ignore the damage and impact in the current review process. There is no information to determine the nature, scope and impact of the illegal activity had on priority habitat and species. This analysis is required with the analysis including detailed mitigation measures, plans and options. WDFW offered the following conclusory observation:

Animals do use habitats in this area now, including shrubsteppe species listed in 5a. So, approval of this project would have impacts on shrubsteppe wildlife species, which is why if approved, WDFW requests that a habitat mitigation plan be submitted for WDFW review and approval.

SEPA requires that this information be prepared in advance of decision making. The record contains no information on this critical consideration.

Kittitas County May Not Ignore the Court's Decision and Ignore Environmental Review Responsibilities.

Kittitas County issued a Determination of Nonsignificance (DNS) with respect to the original land use application. On appeal, Judge Elisabeth Tutsch found that that environmental threshold determination was "clearly erroneous" and that Kittitas County had insufficient information to evaluate and mitigate significant adverse environmental impacts. There should be no question regarding the deficiencies identified by the court and the failures in the environmental review process. A court's decision means something and Kittitas County is bound by those determinations in the scope of this remand proceeding.

Despite the clarity of the court's decision, Kittitas County announces in its *Notice of Application* the following with respect to environmental review:

The County expects to issue a Determination of Non-Significance (DNS) for this proposal and will use the optional DNS process under WAC 197-11-355, meaning this may be the only opportunity for the public to comment on the environmental impacts of the proposal.

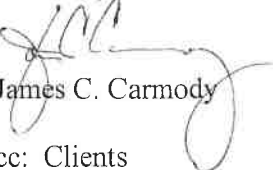
Kittitas County has not updated or supplemented the record with adequate information related to expansion areas specific geology, groundwater or well monitoring as required by the court. There is no substantive supplementation of environmental impacts to priority habitat or species. Ignored is the requirement for an environmental impact statement (EIS) when there are impacts to endangered or protected species.

Neither Kittitas County Community Development Services (CDS) nor the SEPA Responsible Official should be a "rubber stamp" for another county department. Kittitas County Solid Waste should be treated in the same manner as other project applicants. A Critical Area review and report is required for review, analysis and mitigation purposes. This court has spoken with respect to past failures. There is no basis for perpetuating the same deficiencies and inadequacies in the review process.

CONCLUSION

Kittitas County is obligated under the court order and decision to provide the required information, studies, reports and mitigation plans. As a matter of law, the reissuance of a DNS violates the court order as well as SEPA responsibilities. The significant environmental impacts have been identified and issuance of a Determination of Significance (DS) is mandated on the current record.

Very truly yours,
MEYER, FLUEGGE & TENNEY, P.S.


James C. Carmody
cc: Clients

Attachment A: Court's Decision dated July 1, 2022
Attachment B: Judgment Granting Land Use Petition, Vacating Conditional Use Permit,
And Awarding Costs, Expenses and Statutory Attorney Fees

ATTACHMENT A

Superior Court of the State of Washington
For the County of Yakima

SUPERIOR COURT JUDGES

Judge Kevin S. Naught
Judge Elisabeth M. Tutsch
Judge Jeffery B. Swan
Judge Blaine G. Gibson
Judge David A. Eloffson
Judge Ruth E. Reukauf
Judge Gayle M. Harthcock
Judge Richard H. Bartheld

Yakima County Courthouse
128 North Second St.
Yakima, Washington 98901

July 1, 2022

SUPERIOR COURT
COMMISSIONERS

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RE: McCroskey v Kittitas County, Cause No. 21-2-2062-39

Dear Counsel:

I took this matter under advisement following the hearing on June 9, 2022. The issue before the court is whether the environmental threshold determination was clearly erroneous by concluding that the proposed limited purpose landfill expansion would not have a significant adverse environmental impact. As explained below, I conclude it was and reverse the hearing officer's decision.

Background

Kittitas County Solid Waste Department proposes a 16.6 acres expansion to the Limited Purpose Landfill located in the Ryegrass area of Kittitas County, just south of the Wild Horse Renewable Energy

Center near the Vantage Highway. The County owns the land. It is located in the Forest and Range zone, with a Rural Working land use designation. *Record*, at 16.

The County has operated a landfill on the property for decades. Originally, it was a municipal solid waste facility. Due to environmental impacts, the County and the Department of Ecology entered a consent order that closed the municipal solid waste operation. In 1996, the County obtained a permit to open a construction and land clearing landfill nearby on the same piece of land. Subsequently, the regulations governing landfills were changed. In 2004 Kittitas County Solid Waste submitted an application to reclassify its permit to continue to operate a Limited Purpose Landfill under the new regulations. The 2004 application included an Environmental Checklist. The application was approved, and Kittitas County Solid Waste obtained a permit to operate a Limited Purpose Landfill under the new regulations in 2005.

Consistent with previous SEPA disclosure, the Limited Purpose Landfill now is nearing capacity. Kittitas County Solid Waste applied for a land use permit to expand the landfill to meet the community's ongoing needs. The application included a SEPA environmental checklist. The Environmental Checklist was composed of the original checklist prepared for the 2004 reclassification permit, and an addendum to provide information relevant to the 2021 expansion application. Kittitas County Community Development Services assumed the SEPA lead agency role, reviewed the application for the expansion landfill, and made a threshold determination that the expansion would have no significant impact on the environment. It issued its Determination of Non-Significance (DNS) in 2021. The Solid Waste Department applied for a conditional use permit. A public hearing was held on the SEPA DNS and the conditional use permit application. Following both hearings, a Hearings Examiner found in favor for the expansion. The neighbors appeal.

Standard of Review

Courts review a DNS decision under the “clearly erroneous” standard of review. This means the court reviews the record to determine whether the lead agency: (1) complied with SEPA procedural requirements, (2) had sufficient information available to evaluate the proposal’s environmental impact, and (3) adequately considered SEPA’s environmental values. *Wenatchee Sportsmen Ass’n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123, 126 (2000). The agency subject to SEPA bears the burden to show its threshold determination was made with due regard to environmental factors and SEPA’s procedural requirements. A decision is clearly erroneous when the court is left with the definite and firm conviction that a mistake has been committed. In applying the “clearly erroneous” standard, the court is expected to do more than merely determine whether there is substantial evidence to support an administrative or governmental decision. The entire record is opened to judicial scrutiny and the court is required to consider the public policy and environmental values of SEPA as well. *Sisley v. San Juan Cty.*, 89 Wn.2d 78, 84, 569 P.2d 712, 716 (1977).

Compliance with SEPA Procedural Requirements

The petitioners allege the permit application’s Environmental Checklist violated SEPA’s procedural requirements because the 2004 Environmental checklist was not applicable for the 2021 expansion proposal, and the Addendum was not implemented using the legally correct procedure. The record shows procedural errors occurred, but the errors were harmless.

SEPA encourages agencies to combine environmental documents in order to reduce duplication and paperwork. *Ellensburg Cement Prods., Inc. v. Kittitas Cty.*, 171 Wn. App. 691, 708, 287 P.3d 718, 725 (2012). If a previous checklist is used, the lead agency must use a specific adoption form that identifies the document and states why it is being adopted. WAC 197-11-630. The County concedes there is no adoption form that complies with the regulation.

Instead, the County argues an adoption form was unnecessary because the Addendum incorporated the 2004 Checklist by reference. The County is incorrect. “When an agency decides to use all or part of an existing SEPA document to constitute its checklist..., the agency “adopts” all or part of the existing document. In such cases, the checklist... would be composed of the adopted document and perhaps an addenda . . . The only new environmental analysis conducted by the adopting agency would be in the addendum.” *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 50, 52 P.3d 522, 529 (2002).

This is exactly how the environmental checklist was created in this case. The application used the 2004 Checklist with a 2021 Addendum. According to the 2021 Addendum:

“Per Washington Administrative Code (WAC) 197-11-600(2), this project meets the criteria that allows the use of the existing 2004 SEPA Checklist to evaluate the proposed expansion of the Ryegrass Limited Purpose Landfill (LPL) Expansion project... Per WAC 197-11-706, this addendum provides additional information to the existing 2004 SEPA Checklist.”

Record, at 389. Procedurally, the lead agency should have either written a new Environmental Checklist for the expansion project, or formally adopted the 2004 Environmental Checklist using the form prescribed in the regulation.¹ Failure to formally **adopt** an environmental document is reviewed for harmless error. The error is harmless if substantial evidence in the record suggests there was adequate public notice of the proposal and sufficient opportunity to be heard on the environmental issues. *Thornton Creek*, 113 Wn. App. at 56, 52 P.3d at 532. Here, the record shows notice was provided by e-mail to relevant agencies, postal mailing to adjoining property owners, and by public posting. Comments were

¹ “...[B]ecause the Director was using the existing documents *in place* of preparing a new checklist or EIS, rather than as *part of a checklist*... the Director should have adopted the documents rather than incorporated them by reference.” *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 52, 52 P.3d 522, 530 (2002).

invited and received. The comments indicate the agencies' and the public's substantive understanding of the proposal. Substantial evidence in the record shows the notice was adequate and there was sufficient opportunity to be heard.

The regulations require a signature on the checklist. WAC 197-11-960 (C). The 2004 Checklist is unsigned and no author is identified. The 2021 Addendum does indicate an author. The failure to include a signature on the 2004 Checklist is also harmless error.

Information in the Record About the Proposal's Environmental Impact

The decision to issue a DNS must be based on information sufficient to evaluate the proposal's environmental impact. WAC 197-11-335. *See, e.g. Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137, 142 (2002). If the proposal is to expand to a new area, the lead agency needs to consider the environmental impact imposed on the expansion area. *Lands Council v. Wash. State Parks Recreation Comm'n*, 176 Wn. App. 787, 309 P.3d 734 (2013). The record must be sufficient to demonstrate the agency gave actual consideration to the proposal's environmental impact. *Lassila v Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54, 60 (1978). In an unreported opinion, the Court of Appeals described how an agency gives actual consideration to potential environmental impact: An agency must take the requisite "hard look" at the environmental concern, and the initial assessment must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns. *Conserv. Nw. v. Okanogan Cty.*, 194 Wn. App. 1034 (2016) (Unreported opinions are non-binding authority, but may be cited under GR 14.1).

The Environmental Checklist must include the potential impact of the proposal on each element of the environment. WAC 197-11-960. The required format is set forth by regulation. Every question must be answered; it is impermissible to delete or skip questions. WAC 197-11-315 (6)(c). It is permissible to answer questions on the checklist by reference to a locally adopted ordinance, development regulation, or other legal authority. However, even if a question is adequately answered through other legal authority,

the lead agency must still consider whether the action has an impact on the particular element of the environment in question. WAC 197-11-315 (6).

As explained below, the 2004 Checklist and the 2021 Addendum do not contain sufficient information to adequately address the expanded landfill's environmental impact. Neither document identifies any environmental information prepared for the proposal, although such information exists and some was included in the application (Question A.8). While both documents addressed potential groundwater impacts, neither document provides sufficient information to evaluate the potential landfill's impact on groundwater. (Question B.3). *Record*, at 80-86, 388, 391. Neither document addresses the impact to animals. (Question B.5).

The missing environmental information related to Question A.8 falls into three categories: (1) Specific history of the known environmental hazards caused by the closed landfill on the same site; (2) Groundwater testing data to evaluate long term impact; (3) Geologic information relevant to likelihood of groundwater contamination.

The 2021 Addendum disclosed that the MSW Ryegrass Landfill was subject to a Department of Ecology cleanup order, Site #4061, and concluded all remedial actions were completed in 2012. *Record*, at 391. But there was no information provided about what damage had occurred to the environment and what remediation activities were undertaken. The record does not include any information about the prior environmental impact except the statement that one had occurred. The Lead Agency had had no evidence available to evaluate any long-term effects from the expansion in connection with the history of the use at the site.

Environmental review must consider environmental impacts, including long-term impacts that extend beyond the life of the project. WAC 197-11-060(4). The Lead Agency need not consider speculative impacts. Here, there is no record the lead agency considered the already available information about likely impacts on groundwater. Because the project proposal is to expand an existing landfill, there

is groundwater monitoring data available for the area. WAC 173-350-500. Reports from HWA GeoScience, Inc. show hydrogeologic information about groundwater flow and the water testing plan prepared for the 2005 LPL permit. *Record*, at 236. The Ryegrass Limited Purpose Landfill Permit Application asserts the existing LPL did not lead to groundwater contamination, and testing did not exceed normal limits except for elevated nitrate levels. *Record*, at 39. However, the record does not contain any data from tests conducted after the LPL permit was approved in 2005. Kittitas Solid Waste would have been required to report if testing showed increased levels of harmful substances. WAC 173-350-500 (5). There is no record the Lead Agency had data to evaluate whether any of the testing showed changes from the baseline measurements. Even though test results remained within normal limits, trends and changes may have been relevant for determining whether there would be a potential long-term impact to groundwater caused by expanding the landfill. The 2004 HWA report also revealed elevated nitrate levels and recommended ongoing testing. There is no information whether the Lead Agency had data or conducted any evaluation about potential nitrate contamination. After the DNS was issued, the Department of Solid Waste's expert testified at the public hearing that nitrates could not be attributed to the landfill. The record does not show what evidence the expert used to reach this conclusion.

The lead agency is responsible for evaluating the overall environmental impact, even while it take into account other applicable legal requirements and other regulations' mitigation measures. WAC 197-11-158 (1), *Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 160, 244 P.3d 1003, 1008 (2010) (holding that "SEPA overlays and supplements all other state laws"). Here, the Department of Ecology is responsible for approving a groundwater testing plan and evaluating testing results. WAC 173-350-500. It is appropriate for the lead agency to defer groundwater testing and monitoring to Ecology. But the lead agency is still responsible for evaluating the environmental impact. Testing data would have been useful information for evaluating the proposed expansion's impact on the environment.

Finally, the 2004 hydrogeologic reports may not adequately evaluate the 2021 proposed expansion's impact on groundwater. The permit application explains that groundwater monitoring for the expansion area will take place at Monitoring Wells B-3 and B-7. *Record*, at 240. The current LPL primary monitoring takes place solely at Monitoring Well B-7. *Record*, at 39. Looking at the provided map, Monitoring Well B-3's position suggests the hydrogeology could be different for the expansion site than for the site of the current LPL.

By analogy, an EIS is adequate if it discusses topography, site geology, hydrogeology, hydrogeologic properties and groundwater resource potential for each site. If the EIS covers the necessary information to make an informed decision, the evaluation of groundwater impact in the EIS is adequate even if it is not as detailed or thorough as it could have been. *Solid Waste Alt. Proponents v. Okanogan Cty.*, 66 Wn. App. 439, 447, 832 P.2d 503, 507-08 (1992). In applying this principle to a DNS decision, the court reviews the record to determine whether the lead agency had basic groundwater and geological information relevant to this proposal. If the record contains sufficient information to make an informed decision on the environmental impact, the DNS decision may be appropriate even if the information and analysis are not as detailed or thorough as they could have been. While the HWA report generated for the 2004 Ecology permit application thoroughly scrutinized the geology, hydrogeology, hydrogeologic properties and groundwater resource potential, the report was limited to the area of the existing landfill. The report itself warns that its data and conclusions should not be applied to a different location. "Experience has shown that subsurface soil and ground water conditions can vary significantly over small distances." *Record*, at 130. While the **location** for the monitoring well will be adequately addressed in the permitting process with Ecology, the lead agency may not have had sufficient geological information to evaluate whether groundwater impacts overall could be different at the expansion site than at the existing site.

Question 5.B was inadequately addressed because neither the 2004 Checklist or 2021 Addendum provided accurate information about how the proposal would affect animals, birds and threatened and endangered species as required by WAC 197-11-960. Neither document lists any birds or mammals known to be on or near the site. *Record*, at 86, 391. The Department of Fish and Wildlife identified the presence of elk near the site, and that the site was located within their winter range. *Record*, at 494. Fish and Wildlife also noted the site is within the range of Golden Eagle, Sagebrush Sparrow, Sage Thrasher, Burrowing Owl, and other birds. Instead of addressing whether the expansion would have an impact on birds, elk and the winter migration range, the Environmental Checklist concluded they were not present. Without identifying the birds and mammals known to be on or near the site, the Lead Agency lacked sufficient information to evaluate the proposal's impact on birds and animals.

An EIS is automatically required if the project would have significant adverse effects on endangered or threatened species or their habitats. WAC 197-11-330 (3)(e)(ii). The 2021 Addendum concluded that sage-grouse are not found in the area. *Record*, at 391. This conclusion is not supported by the record. The Department of Fish and Wildlife representative, Mr. Downes, conducted a site visit and determined the land had already been cleared, but the background habitat was shrubsteppe/sage brush. *Transcript*, at 66. Mr. Downes clarified the land was still habitat for endangered sage-grouse, but no sage-grouse could live on the proposed expansion area (because the land had already been cleared). *Record*, at 494. Mr. Downes wanted the record to reflect the potential for priority species, including the endangered sage grouse, to be found in the area. *Id.* The Environmental Checklist did not accurately describe what birds and animals could be found on or near the site. The Lead Agency did not have sufficient information to evaluate whether the proposed expansion would have more than a moderate impact on animals or on threatened or endangered species.

Consideration of the Environmental Values Expressed in SEPA

When a court applies the clearly erroneous standard of review to a SEPA threshold decision, the court is required to consider the public policy and environmental values of SEPA. *Sisley*, 89 Wn.2d at 84, 569 P.2d at 716. Environmental amenities and values must be given appropriate consideration in decision-making, along with economic and technical considerations. *Anderson v Pierce Cty.*, 86 Wn. App. 290, 936 P.2d 432 (1997). When applying this standard, courts are required to do more than merely determine whether substantial evidence supports the decision; courts must also consider the public policy and environmental values of SEPA. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137, 141 (2002). However, even at this stage, the court must accord substantial weight to an agency's DNS decision. *Id.*

SEPA does not require a specific result. SEPA is intended to provide information early in a project's decision-making process so the relevant agencies and the public can make informed choices that take into account the environment. In making those choices, the decision makers must keep in mind that each generation acts as a trustee of the environment for succeeding generations and each person has a fundamental and inalienable right to a healthful environment. RCW 43.21C.020. The lead agency did not honor SEPA's value on having sufficient information to make an informed analysis of the landfill expansion's potential impact on the environment.

Definite and Firm Conviction a Mistake was Made

The legal issues do not require this court to determine whether the Ryegrass landfill should be expanded. No one prefers to live near a landfill, but community displeasure cannot be the basis for site selection. *Solid Waste Alt. Proponents*, 66 Wn. App. at 446, 832 P.2d at 507 (1992) (Citing *Maranatha Mining, Inc. v. Pierce Cty.*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990)). The question is whether the Lead Agency adequately evaluated whether the expanded landfill would have more than a reasonable probability of having more than a moderate effect on the quality of the environment. *Norway Hill Pres. &*

Prot. Ass'n v. King Cty. Council, 87 Wn.2d 267, 278 552 P.2d. 674, 680 (1976); *Sisley*, 89 Wn.2d at 85, 569 P.2d at 717

The court is left with the definite and firm conviction that a mistake was made. The lead agency did not have enough relevant and current information to conclude the environmental impact would be less than moderate. The hearing officer's decision is not supported by substantial evidence in light of the whole record, and the hearing officer erroneously applied the law to the facts. Accordingly, the hearing officer's conclusion is reversed. As the prevailing party, the petitioners are requested to prepare final orders consistent with this opinion.

Sincerely,

A handwritten signature in cursive script that reads "Elisabeth Tutsch". The signature is written in dark ink and is positioned above the printed name and title.

Elisabeth Tutsch
Judge

ATTACHMENT B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

| | |
|---|---|
| <p>CHRISTINE A. McCROSKEY, JEFFERY McCROSKEY, JARROD M. CHASE, SANDRA J. RYAN, NELS P. SORENSON, CHARLENE A. SORENSON,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>KITTITAS COUNTY, a political subdivision of the State Washington, KITTITAS COUNTY SOLID WASTE PROGRAMS, a department within Kittitas County, and KITTITAS CO (SOLID WASTE),</p> <p style="text-align: center;">Respondents.</p> | <p>No. 21-2-02062-39</p> <p>JUDGMENT GRANTING LAND USE PETITION, VACATING CONDITIONAL USE PERMIT, AND AWARDED COSTS, EXPENSES AND STATUTORY ATTORNEY FEES</p> |
|---|---|

SUMMARY OF JUDGMENT

- | | |
|--|--|
| <p>1. Judgment Creditors:</p> <p>2. Judgment Debtor:</p> | <p>Christine A. McCroskey Jeffery McCroskey Jarrod M. Chase Sandra J. Ryan Nels P. Sorenson Charlene A. Sorenson</p> <p>Kittitas County Kittitas County Solid Waste Programs Kittitas Co (Solid Waste)</p> |
|--|--|

JUDGMENT GRANTING LAND USE PETITION,
VACATING CONDITIONAL USE PERMIT,
AWARDING COSTS, EXPENSES AND
STATUTORY ATTORNEY FEES - 1

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3 3. Costs:

4 Filing Fee \$ 240.00
5 Service Fee \$ 94.00
6 Appeal Fee \$1500.00
7 Cost of Administrative Record \$ 163.90
8 Cost of Court Transcripts \$ 437.25
9 Attorney's Fees & Costs \$ 200.00
10
11 **TOTAL JUDGMENT \$2,635.15**

12 THIS MATTER came before this Court on Christine A. McCroskey, Jeffery McCroskey,
13 Jarrod M. Chase, Sandra J. Ryan, Nels P. Sorenson, Charlene A. Sorenson, (collectively
14 "Petitioners") Land Use Petition filed on November 16, 2021. Petitioners' sought review of (a)
15 Hearing Examiner *Findings of Fact, Conclusions of Law and Decision*, dated October 21, 2021
16 ("*SEPA Decision*") affirming Kittitas County's Determination of Nonsignificance dated June 24,
17 2021, and dismissing SEPA appeal filed by Christine McCroskey; and (b) Hearing Examiner
18 *Findings of Fact, Conclusion of Law, Conditions of Approval and Decision*, dated October 21,
19 2021 ("*Conditional Use Decision*"). The court having reviewed and considered the pleadings,
20 briefing, administrative record and hearing transcripts, as well as the oral arguments of the
21 parties, and being fully advised and informed;

22 NOW, THEREFORE,

23 IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

- 24 1. Petitioners have carried their burden of establishing that the SEPA threshold decision
25 includes erroneous interpretations of law, is not supported by substantial evidence, and is
26 a clearly erroneous application of law under RCW 36.70C.130(1)(b), (c), and (d). This
27 order adopts the courts *Memorandum Decision* issued on July 1, 2022, a copy of which is
28 attached hereto as *Attachment A*. Accordingly, the Land Use Petition is granted and the
29 Hearing Examiner's decisions are REVERSED under RCW 36.70C.140;
30 2. A threshold determination is required for any proposal that is not a planned action or
categorically exempt. WAC 197-11-310. As such, one is required in the immediate case.

JUDGMENT GRANTING LAND USE PETITION,
VACATING CONDITIONAL USE PERMIT,
AWARDING COSTS, EXPENSES AND
STATUTORY ATTORNEY FEES - 2

1 The court finds that Kittitas County's Determination of Nonsignificance (DNS) in this
2 matter is clearly erroneous and void.

at
a new environmental checklist
and new threshold determination,
and

3 3. The court remands the matter back to Kittitas County for further environmental review
4 and processing consistent with the Court's *Memorandum Decision* and applicable local
5 and state laws.

6 4. Based on the court's determination that the DNS was void, the court further holds that the
7 Hearing Examiner's decision approving and granting conditional use permit for the LPL
8 landfill expansion is also void.

9 5. Petitioners are the prevailing party in this proceeding and based on the filed Cost Bill
10 (*Attachment B*) are awarded the following costs, expenses and statutory attorney's fees:

11 a) Petitioners are awarded costs for filing fees of \$240.00 and process of service fee
12 of \$94.00 pursuant to RCW 4.84.030 and RCW 4.84.010(1) and (2)(b);

13 b) Petitioners are awarded costs for process of appeal in the amount of \$1,500.00
14 pursuant to RCW 4.84.370, RCW 4.84.010(1) and (2)(b), and RCW 4.84.030;

15 c) Petitioners are awarded costs in preparing the administrative record in the sum of
16 \$163.90 in accordance with RCW 36.70C.110(4);

17 d) Petitioners are awarded costs in preparing verbatim transcripts of administrative
18 hearings in the amount of \$437.25 in accordance with RCW 36.70C.110(4);

19 e) Petitioners are awarded statutory attorneys fees in the sum of \$200.00 pursuant to
20 RCW 4.84.080(1);
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2 f) In total, Petitioners, as the prevailing party, are awarded a total judgment of
3 \$2,635.15 pursuant to RCW 4.84.010 and RCW 4.84.030 for costs and fees
4 expended in their appeal of the SEPA threshold decision.
5

6 DONE IN OPEN COURT THIS 7 day of ^{November} ~~July~~, 2022.
7
8

9 Elisabeth Tutsch

10 Elisabeth M. Tutsch, Judge

11 Signed in chambers following argument on 11/4/22

12 Appeared at the Presentation Hearing:

13 MEYER, FLUEGGE & TENNEY, P.S.
14 Attorneys for Petitioners

15
16 By:

17 James C. Carmody, WSBA #5205
18
19

20
21
22 KITTITAS COUNTY PROSECUTOR'S OFFICE
23 Attorneys for Respondent Kittitas County

24
25 By:

26 Neil Caulkins appeared for Kittitas County
27 Neil Caulkins, WSBA #31759
28 Chief Civil Deputy Prosecuting Attorney

29 Attachment A: Memorandum Decision
30 Attachment B: Cost Bill

JUDGMENT GRANTING LAND USE PETITION,
VACATING CONDITIONAL USE PERMIT,
AWARDING COSTS, EXPENSES AND
STATUTORY ATTORNEY FEES - 4

ATTACHMENT A

Superior Court of the State of Washington
For the County of Yakima

SUPERIOR COURT JUDGES

Judge Kevin S. Naught
Judge Elisabeth M. Tutsch
Judge Jeffery B. Swan
Judge Blaine G. Gibson
Judge David A. Illofson
Judge Ruth E. Reukauf
Judge Gayle M. Harthcock
Judge Richard H. Bartheld

Yakima County Courthouse
128 North Second St.
Yakima, Washington 98901

July 1, 2022

SUPERIOR COURT
COMMISSIONERS

Shane M. Silverthorn
Susan C. Arb
Sonia Rodriguez True

Phone:(509) 574-2710
Fax:(509) 574-2701

VIA E-mail

James C. Carmody
Meyer, Fluegge & Tenney, P.S.
Attorneys for Petitioners
P.O. Box 22680
Yakima, WA 98907

Neil A. Caulkins
Chief Civil Deputy Prosecuting Attorney
Kittitas County, Washington
Room 213, Kittitas County Courthouse
205 West Fifth Avenue
Ellensburg, WA 98926

RE: McCroskey v Kittitas County, Cause No. 21-2-2062-39

Dear Counsel:

I took this matter under advisement following the hearing on June 9, 2022. The issue before the court is whether the environmental threshold determination was clearly erroneous by concluding that the proposed limited purpose landfill expansion would not have a significant adverse environmental impact. As explained below, I conclude it was and reverse the hearing officer's decision.

Background

Kittitas County Solid Waste Department proposes a 16.6 acres expansion to the Limited Purpose Landfill located in the Ryegrass area of Kittitas County, just south of the Wild Horse Renewable Energy

Center near the Vantage Highway. The County owns the land. It is located in the Forest and Range zone, with a Rural Working land use designation. *Record*, at 16.

The County has operated a landfill on the property for decades. Originally, it was a municipal solid waste facility. Due to environmental impacts, the County and the Department of Ecology entered a consent order that closed the municipal solid waste operation. In 1996, the County obtained a permit to open a construction and land clearing landfill nearby on the same piece of land. Subsequently, the regulations governing landfills were changed. In 2004 Kittitas County Solid Waste submitted an application to reclassify its permit to continue to operate a Limited Purpose Landfill under the new regulations. The 2004 application included an Environmental Checklist. The application was approved, and Kittitas County Solid Waste obtained a permit to operate a Limited Purpose Landfill under the new regulations in 2005.

Consistent with previous SEPA disclosure, the Limited Purpose Landfill now is nearing capacity. Kittitas County Solid Waste applied for a land use permit to expand the landfill to meet the community's ongoing needs. The application included a SEPA environmental checklist. The Environmental Checklist was composed of the original checklist prepared for the 2004 reclassification permit, and an addendum to provide information relevant to the 2021 expansion application. Kittitas County Community Development Services assumed the SEPA lead agency role, reviewed the application for the expansion landfill, and made a threshold determination that the expansion would have no significant impact on the environment. It issued its Determination of Non-Significance (DNS) in 2021. The Solid Waste Department applied for a conditional use permit. A public hearing was held on the SEPA DNS and the conditional use permit application. Following both hearings, a Hearings Examiner found in favor for the expansion. The neighbors appeal.

Standard of Review

Courts review a DNS decision under the “clearly erroneous” standard of review. This means the court reviews the record to determine whether the lead agency: (1) complied with SEPA procedural requirements, (2) had sufficient information available to evaluate the proposal’s environmental impact, and (3) adequately considered SEPA’s environmental values. *Wenatchee Sportsmen Ass’n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123, 126 (2000). The agency subject to SEPA bears the burden to show its threshold determination was made with due regard to environmental factors and SEPA’s procedural requirements. A decision is clearly erroneous when the court is left with the definite and firm conviction that a mistake has been committed. In applying the “clearly erroneous” standard, the court is expected to do more than merely determine whether there is substantial evidence to support an administrative or governmental decision. The entire record is opened to judicial scrutiny and the court is required to consider the public policy and environmental values of SEPA as well. *Sisley v. San Juan Cty.*, 89 Wn.2d 78, 84, 569 P.2d 712, 716 (1977).

Compliance with SEPA Procedural Requirements

The petitioners allege the permit application’s Environmental Checklist violated SEPA’s procedural requirements because the 2004 Environmental checklist was not applicable for the 2021 expansion proposal, and the Addendum was not implemented using the legally correct procedure. The record shows procedural errors occurred, but the errors were harmless.

SEPA encourages agencies to combine environmental documents in order to reduce duplication and paperwork. *Ellensburg Cement Prods., Inc. v. Kittitas Cty.*, 171 Wn. App. 691,708, 287 P.3d 718, 725 (2012). If a previous checklist is used, the lead agency must use a specific adoption form that identifies the document and states why it is being adopted. WAC 197-11-630. The County concedes there is no adoption form that complies with the regulation.

Instead, the County argues an adoption form was unnecessary because the Addendum incorporated the 2004 Checklist by reference. The County is incorrect. “When an agency decides to use all or part of an existing SEPA document to constitute its checklist..., the agency “adopts” all or part of the existing document. In such cases, the checklist... would be composed of the adopted document and perhaps an addenda . . . The only new environmental analysis conducted by the adopting agency would be in the addendum.” *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 50, 52 P.3d 522, 529 (2002).

This is exactly how the environmental checklist was created in this case. The application used the 2004 Checklist with a 2021 Addendum. According to the 2021 Addendum:

“Per Washington Administrative Code (WAC) 197-11-600(2), this project meets the criteria that allows the use of the existing 2004 SEPA Checklist to evaluate the proposed expansion of the Ryegrass Limited Purpose Landfill (LPL) Expansion project...Per WAC 197-11-706, this addendum provides additional information to the existing 2004 SEPA Checklist.”

Record, at 389. Procedurally, the lead agency should have either written a new Environmental Checklist for the expansion project, or formally adopted the 2004 Environmental Checklist using the form prescribed in the regulation.¹ Failure to formally **adopt** an environmental document is reviewed for harmless error. The error is harmless if substantial evidence in the record suggests there was adequate public notice of the proposal and sufficient opportunity to be heard on the environmental issues. *Thornton Creek*, 113 Wn. App. at 56, 52 P.3d at 532. Here, the record shows notice was provided by e-mail to relevant agencies, postal mailing to adjoining property owners, and by public posting. Comments were

¹ “...[B]ecause the Director was using the existing documents *in place* of preparing a new checklist or EIS, rather than as *part of a checklist*... the Director should have adopted the documents rather than incorporated them by reference.” *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 52, 52 P.3d 522, 530 (2002).

invited and received. The comments indicate the agencies' and the public's substantive understanding of the proposal. Substantial evidence in the record shows the notice was adequate and there was sufficient opportunity to be heard.

The regulations require a signature on the checklist. WAC 197-11-960 (C). The 2004 Checklist is unsigned and no author is identified. The 2021 Addendum does indicate an author. The failure to include a signature on the 2004 Checklist is also harmless error.

Information in the Record About the Proposal's Environmental Impact

The decision to issue a DNS must be based on information sufficient to evaluate the proposal's environmental impact. WAC 197-11-335. *See, e.g. Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137, 142 (2002). If the proposal is to expand to a new area, the lead agency needs to consider the environmental impact imposed on the expansion area. *Lands Council v. Wash. State Parks Recreation Comm'n*, 176 Wn. App. 787, 309 P.3d 734 (2013). The record must be sufficient to demonstrate the agency gave actual consideration to the proposal's environmental impact. *Lassila v Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54, 60 (1978). In an unreported opinion, the Court of Appeals described how an agency gives actual consideration to potential environmental impact: An agency must take the requisite "hard look" at the environmental concern, and the initial assessment must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns. *Conserv. Nw. v. Okanogan Cty.*, 194 Wn. App. 1034 (2016) (Unreported opinions are non-binding authority, but may be cited under GR 14.1).

The Environmental Checklist must include the potential impact of the proposal on each element of the environment. WAC 197-11-960. The required format is set forth by regulation. Every question must be answered; it is impermissible to delete or skip questions. WAC 197-11-315 (6)(c). It is permissible to answer questions on the checklist by reference to a locally adopted ordinance, development regulation, or other legal authority. However, even if a question is adequately answered through other legal authority,

the lead agency must still consider whether the action has an impact on the particular element of the environment in question. WAC 197-11-315 (6).

As explained below, the 2004 Checklist and the 2021 Addendum do not contain sufficient information to adequately address the expanded landfill's environmental impact. Neither document identifies any environmental information prepared for the proposal, although such information exists and some was included in the application (Question A.8). While both documents addressed potential groundwater impacts, neither document provides sufficient information to evaluate the potential landfill's impact on groundwater. (Question B.3). *Record*, at 80-86, 388, 391. Neither document addresses the impact to animals. (Question B.5).

The missing environmental information related to Question A.8 falls into three categories: (1) Specific history of the known environmental hazards caused by the closed landfill on the same site; (2) Groundwater testing data to evaluate long term impact; (3) Geologic information relevant to likelihood of groundwater contamination.

The 2021 Addendum disclosed that the MSW Ryegrass Landfill was subject to a Department of Ecology cleanup order, Site #4061, and concluded all remedial actions were completed in 2012. *Record*, at 391. But there was no information provided about what damage had occurred to the environment and what remediation activities were undertaken. The record does not include any information about the prior environmental impact except the statement that one had occurred. The Lead Agency had had no evidence available to evaluate any long-term effects from the expansion in connection with the history of the use at the site.

Environmental review must consider environmental impacts, including long-term impacts that extend beyond the life of the project. WAC 197-11-060(4). The Lead Agency need not consider speculative impacts. Here, there is no record the lead agency considered the already available information about likely impacts on groundwater. Because the project proposal is to expand an existing landfill, there

is groundwater monitoring data available for the area. WAC 173-350-500. Reports from HWA GeoScience, Inc. show hydrogeologic information about groundwater flow and the water testing plan prepared for the 2005 LPL permit. *Record*, at 236. The Ryegrass Limited Purpose Landfill Permit Application asserts the existing LPL did not lead to groundwater contamination, and testing did not exceed normal limits except for elevated nitrate levels. *Record*, at 39. However, the record does not contain any data from tests conducted after the LPL permit was approved in 2005. Kittitas Solid Waste would have been required to report if testing showed increased levels of harmful substances. WAC 173-350-500 (5). There is no record the Lead Agency had data to evaluate whether any of the testing showed changes from the baseline measurements. Even though test results remained within normal limits, trends and changes may have been relevant for determining whether there would be a potential long-term impact to groundwater caused by expanding the landfill. The 2004 HWA report also revealed elevated nitrate levels and recommended ongoing testing. There is no information whether the Lead Agency had data or conducted any evaluation about potential nitrate contamination. After the DNS was issued, the Department of Solid Waste's expert testified at the public hearing that nitrates could not be attributed to the landfill. The record does not show what evidence the expert used to reach this conclusion.

The lead agency is responsible for evaluating the overall environmental impact, even while it take into account other applicable legal requirements and other regulations' mitigation measures. WAC 197-11-158 (1), *Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 160, 244 P.3d 1003, 1008 (2010) (holding that "SEPA overlays and supplements all other state laws"). Here, the Department of Ecology is responsible for approving a groundwater testing plan and evaluating testing results. WAC 173-350-500. It is appropriate for the lead agency to defer groundwater testing and monitoring to Ecology. But the lead agency is still responsible for evaluating the environmental impact. Testing data would have been useful information for evaluating the proposed expansion's impact on the environment.

Finally, the 2004 hydrogeologic reports may not adequately evaluate the 2021 proposed expansion's impact on groundwater. The permit application explains that groundwater monitoring for the expansion area will take place at Monitoring Wells B-3 and B-7. *Record*, at 240. The current LPL primary monitoring takes place solely at Monitoring Well B-7. *Record*, at 39. Looking at the provided map, Monitoring Well B-3's position suggests the hydrogeology could be different for the expansion site than for the site of the current LPL.

By analogy, an EIS is adequate if it discusses topography, site geology, hydrogeology, hydrogeologic properties and groundwater resource potential for each site. If the EIS covers the necessary information to make an informed decision, the evaluation of groundwater impact in the EIS is adequate even if it is not as detailed or thorough as it could have been. *Solid Waste Alt. Proponents v. Okanogan Cty.*, 66 Wn. App. 439, 447, 832 P.2d 503, 507-08 (1992). In applying this principle to a DNS decision, the court reviews the record to determine whether the lead agency had basic groundwater and geological information relevant to this proposal. If the record contains sufficient information to make an informed decision on the environmental impact, the DNS decision may be appropriate even if the information and analysis are not as detailed or thorough as they could have been. While the HWA report generated for the 2004 Ecology permit application thoroughly scrutinized the geology, hydrogeology, hydrogeologic properties and groundwater resource potential, the report was limited to the area of the existing landfill. The report itself warns that its data and conclusions should not be applied to a different location. "Experience has shown that subsurface soil and ground water conditions can vary significantly over small distances." *Record*, at 130. While the **location** for the monitoring well will be adequately addressed in the permitting process with Ecology, the lead agency may not have had sufficient geological information to evaluate whether groundwater impacts overall could be different at the expansion site than at the existing site.

Question 5.B was inadequately addressed because neither the 2004 Checklist or 2021 Addendum provided accurate information about how the proposal would affect animals, birds and threatened and endangered species as required by WAC 197-11-960. Neither document lists any birds or mammals known to be on or near the site. *Record*, at 86, 391. The Department of Fish and Wildlife identified the presence of elk near the site, and that the site was located within their winter range. *Record*, at 494. Fish and Wildlife also noted the site is within the range of Golden Eagle, Sagebrush Sparrow, Sage Thrasher, Burrowing Owl, and other birds. Instead of addressing whether the expansion would have an impact on birds, elk and the winter migration range, the Environmental Checklist concluded they were not present. Without identifying the birds and mammals known to be on or near the site, the Lead Agency lacked sufficient information to evaluate the proposal's impact on birds and animals.

An EIS is automatically required if the project would have significant adverse effects on endangered or threatened species or their habitats. WAC 197-11-330 (3)(e)(ii). The 2021 Addendum concluded that sage-grouse are not found in the area. *Record*, at 391. This conclusion is not supported by the record. The Department of Fish and Wildlife representative, Mr. Downes, conducted a site visit and determined the land had already been cleared, but the background habitat was shrubsteppe/sage brush. *Transcript*, at 66. Mr. Downes clarified the land was still habitat for endangered sage-grouse, but no sage-grouse could live on the proposed expansion area (because the land had already been cleared). *Record*, at 494. Mr. Downes wanted the record to reflect the potential for priority species, including the endangered sage grouse, to be found in the area. *Id.* The Environmental Checklist did not accurately describe what birds and animals could be found on or near the site. The Lead Agency did not have sufficient information to evaluate whether the proposed expansion would have more than a moderate impact on animals or on threatened or endangered species.

Consideration of the Environmental Values Expressed in SEPA

When a court applies the clearly erroneous standard of review to a SEPA threshold decision, the court is required to consider the public policy and environmental values of SEPA. *Sisley*, 89 Wn.2d at 84, 569 P.2d at 716. Environmental amenities and values must be given appropriate consideration in decision-making, along with economic and technical considerations. *Anderson v Pierce Cty.*, 86 Wn. App. 290, 936 P.2d 432 (1997). When applying this standard, courts are required to do more than merely determine whether substantial evidence supports the decision; courts must also consider the public policy and environmental values of SEPA. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137, 141 (2002). However, even at this stage, the court must accord substantial weight to an agency's DNS decision. *Id.*

SEPA does not require a specific result. SEPA is intended to provide information early in a project's decision-making process so the relevant agencies and the public can make informed choices that take into account the environment. In making those choices, the decision makers must keep in mind that each generation acts as a trustee of the environment for succeeding generations and each person has a fundamental and inalienable right to a healthful environment. RCW 43.21C.020. The lead agency did not honor SEPA's value on having sufficient information to make an informed analysis of the landfill expansion's potential impact on the environment.

Definite and Firm Conviction a Mistake was Made

The legal issues do not require this court to determine whether the Ryegrass landfill should be expanded. No one prefers to live near a landfill, but community displeasure cannot be the basis for site selection. *Solid Waste Alt. Proponents*, 66 Wn. App. at 446, 832 P.2d at 507 (1992) (Citing *Maranatha Mining, Inc. v. Pierce Cty.*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990)). The question is whether the Lead Agency adequately evaluated whether the expanded landfill would have more than a reasonable probability of having more than a moderate effect on the quality of the environment. *Norway Hill Pres. &*

Prot. Ass'n v. King Cty. Council, 87 Wn.2d 267, 278 552 P.2d. 674, 680 (1976); *Sisley*, 89 Wn.2d at 85, 569 P.2d at 717

The court is left with the definite and firm conviction that a mistake was made. The lead agency did not have enough relevant and current information to conclude the environmental impact would be less than moderate. The hearing officer's decision is not supported by substantial evidence in light of the whole record, and the hearing officer erroneously applied the law to the facts. Accordingly, the hearing officer's conclusion is reversed. As the prevailing party, the petitioners are requested to prepare final orders consistent with this opinion.

Sincerely,

A handwritten signature in cursive script that reads "Elisabeth Tutsch". The signature is written in dark ink and is positioned above the printed name and title.

Elisabeth Tutsch
Judge

ATTACHMENT B

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR YAKIMA COUNTY

10 CHRISTINE A. McCROSKEY, JEFFERY
11 McCROSKEY, JARROD M. CHASE,
12 SANDRA J. RYAN, NELS P. SORENSON,
13 CHARLENE A. SORENSON.

No. 21-2-02062-39

COST BILL.

14 Petitioners,

15 v.

16 KITTITAS COUNTY, a political subdivision
17 of the State Washington, KITTITAS
18 COUNTY SOLID WASTE PROGRAMS, a
19 department within Kittitas County, and
20 KITTITAS CO (SOLID WASTE).

21 Respondents.

22 Petitioners Christine A. McCroskey, Jeffery McCroskey, Jarrod M. Chase, Sandra J.
23 Ryan, Nels P. Sorenson, and Charlene A. Sorenson, submit the following cost bill pursuant to
24 RCW 4.84.010

| | | |
|----|------------------------------------|------------|
| 25 | Clerk's Fee | \$240.00 |
| 26 | Appeal Fee | \$1,500.00 |
| 27 | Service Fee | \$94.00 |
| 28 | Administrative Record | \$163.90 |
| 29 | Transcript Fees for Hearings | \$437.25 |

1 Attorney Fees (Statutory) \$200.00

2 Total: \$2,635.15

3
4 STATE OF WASHINGTON)
5) ss.
6 County of Yakima)

7 The undersigned, being first duly sworn, on oath, deposes and says:

8 That he is the attorney for the Petitioners in the above-entitled cause, and the
9 above and foregoing statement of costs and disbursements, exclusive of statutory attorney fees, is
10 true and correct, and said amounts have been actually disbursed in said action,
11
12

13
14 James C. Carmody, WSBA #5205

15
16 SIGNED AND SWORN TO (or affirmed) before me this 21st day of July, 2022
17 by James C. Carmody.

18
19 Deborah A. Girard
20 Printed Name: Deborah A. Girard
21 Notary Public in and for the State of Washington
22 Residing at Yakima, WA
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2 CERTIFICATE OF SERVICE

3 I hereby declare under penalty of perjury under the laws of the State of
4 Washington that on the date stated below I served a copy of this document in the manner
5 indicated:
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|--|---|
| 8 Neil A. Caulkins 9 Chief Civil Deputy Prosecuting Attorney 10 Kittitas County, Washington 11 Room 213, Kittitas County Courthouse 12 205 West Fifth 13 Ellensburg, WA 98926 | <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> E-Mail neil.caulkins@co.kittitas.wa.us <input type="checkbox"/> Hand Delivery <input type="checkbox"/> UPS Next Day Air |
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18 DATED at Yakima, Washington, this ___ day of July, 2022.

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21 Deborah Girard, Legal Assistant
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