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September 3, 2021

VIA EMAIL TO: andy@wenatcheelaw.com
Kittitas County Hearing Examiner
Andrew Kottkamp
435 Orondo Avenue
Wenatchee, WA 98801

VIA EMAIL TO:
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c/o Kittitas County Community Development Services
411 N. Ruby St., Suite 2
Ellensburg, WA 98926

Re: *Agency File #: SE-20-00003 (Brown & Jackson)*
Appeal of Issuance of Determination of Significance

Dear Mr. Kottkamp:

This firm has been retained by Brown & Jackson, Inc. (the "Appellant") regarding an appeal of the Responsible Official's Determination of Significance (the "DS") under the State Environmental Policy Act ("SEPA") for the above-referenced file number.

On or about July 15, 2021 the County's Responsible Official issued a DS in File # SE-20-00003, generally alleging, without the support of the record in the matter, deficiencies in the following areas:

1. Critical Areas Impacts
2. Flood Hazards
3. Ground Water and Irrigation Channel Impacts
4. Safety and Odor Impacts to Adjacent Property Owners
5. Wildlife Impacts

Accompanying the DS was a copy of a March 12, 2021 letter (the "Letter") from the Kittitas Community Development Services Department (the "Department") detailing concerns related to various issues described in the DS. The Appellant believes the issuance of the DS is clearly erroneous because each of the issues identified in the DS are either unsupported in the record, addressed by other agency regulations or not appropriately addressed under SEPA.

1. Appellant's Proposal Is Unlikely To Have A Significant Adverse Environmental Impact.

SEPA generally reflects the legislature's desire to carefully balance developmental and environmental concerns. *Colombia Riverkeeper v. Port of Vancouver, USA,* 188 Wn.2d 80, 95(2017). While SEPA recognizes that development will inevitably impact the environment, it does not dictate a particular substantive result. *Id.* citing *Save our Rural Env't,* 99 Wn.2d 363, 371 (1983). Instead, SEPA's EIS mandate simply ensures that environmental matters be given proper consideration during decision making. *Id.* As such, SEPA's threshold determination requirements compel government agencies to determine and document environmental impacts of their proposed actions so that adverse consequences may be avoided, mitigated, or, at the very least, consciously chosen. See *Save Our Rural Environment v. Snohomish County,* 99 Wn.2d 363, 371 (1983). ("SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision makers.")

Kittitas County Code 15.04.020 adopted WAC 197-11-060(4)(a), which states "SEPA's procedural provisions require the consideration of "environmental" impacts (see definition of "environment" in WAC 197-11-740 and of "impacts" in WAC 197-11-752), with attention to impacts that are likely, not merely speculative. (See definition of "probable" in WAC 197-11-782 and 197-11-080 on incomplete or unavailable information). In order to issue a Determination of Significance (a "DS"), the Responsible Official must find that "a proposal is likely to have a *significant adverse environmental impact*, and therefore an Environmental Impact Statement (an "EIS') is required. See WAC 197-11-310, WAC 197-11-360, WAC 197-11-736. For purposes of this matter, the following definitions are relevant:

"Environment" is defined in WAC 197-11-740 as those elements listed in WAC 197-11-444. This definition is important here because some of the alleged impacts are not appropriately addressed under SEPA.

"Impacts" are defined in WAC 197-11-752 as the effects or consequences of actions. Environmental impacts are effects upon the elements of the environment set forth in WAC 197-11-444.

"Probable" as defined by WAC 197-11-782 as "likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment' (see WAC 197-11-794)." The WAC further provides that "probable" is used to distinguish likely impacts from those that merely have a possibility of occurring but are remote or speculative." The WAC concludes "This is not meant as a strict statistical probability test." In a case where an activity is hypothetical or speculative, SEPA does not require it to be considered in an EIS. *Gebbers v. Okanogan County Public Utility Dist. No. 1,* 144 Wn.App. 371, 386 (2008).

WAC 197-11-794(1) defines "significant" as a reasonable likelihood of more than a moderate adverse impact on environmental quality. "Significance" involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact. The severity of an impact should be weighed along with the likelihood of its occurrence. The determination of whether an impact is "significant" includes examination of (1) the extent to which the proposed action will cause adverse environmental effects in excess of those created by existing uses in the area; and (2) the absolute quantitative effects of the action including the cumulative harm resulting from the action and the existing adverse conditions. WAC 197-11-330(3); *Chuckanut Conservancy v Washington State Dept. of Natural Resources,* 156 Wn.App. 274, 285 (2010).

At a bare minimum, the SEPA definitions require evidence or professional testimony that an actual impact is likely, or reasonably likely, to occur that would otherwise need to be mitigated. It is important to note that there are no comments from any Consulted Agency[1], internal department or outside consultant that support, or even remotely relate to, the concerns listed in the DS. Those concerns are all issues raised by neighbors surrounding the project site.

[1] A "Consulting Agency" is defined as "any agency with jurisdiction or expertise" that is requested by the lead agency to provide information during the SEPA process. WAC 197-11-724. Any "Agency with Environmental Expertise" is defined as an "agency with special expertise on the environmental impacts involved in a proposal or alternative significantly affecting the environment [which are] listed in WAC 197-11-920." WAC 197-11-714.

By comparison, the record does contain the following professional testimony, evidence and data submitted by the Appellant that does addresses the concerns raised by the Responsible Official:

- Site Specific Land Application Plan (6/2020)
- Operation and Closure Plan (2020)
- SEPA Checklist (6/2020)
- SEPA Checklist Addendum (6/30/2020)
- Engineering Report from Western Pacific Engineering (1/14/2021)
- Supplemental Engineering Report from Western Pacific Engineering (7/8/2021)
- App. for Coverage Under General Permit for Biosolid Management (12/2020)
    - Crop Management Plan
    - Soils Report
    - Sampling and Analysis Plan
    - General Land Application Plan
- Cultural Resource Report (12/2020)
- Avia Environmental Consulting: Wetland and Stream Delineation (10/2020)

2. The Record Does Not Support The Imposition Of A DS.

This Section 2 refers to arguments and statements made through the Department's Letter which was submitted to Appellants along with the DS.

2.1 The Is No Evidence In The Record Of Significant Adverse Impacts To Critical Areas.

The Letter contends that there are concerns regarding "potential" impacts from airborne contaminants and possible lagoon breaches. And, based on the general concerns from "certain agency and public comments", the Responsible Official requested "clarification" regarding the existence of a possible third stream on the property and its distance from the project area.

The record reflects that Avia Environmental Consulting previously prepared a report, which was provided to the Responsible Official, concluding that (1) the project is not expected to impact the function of the critical area or buffers; and (2) although the Washington Department of Fish and Wildlife database showed a third perennial stream, field observation did not reveal any such stream. *See July 8, 2021 Letter from Western Pacific Engineering & Survey, page 2; Avia Report, page 1,5.*

The Responsible Official's reference to airborne contaminants is not supported by any evidence in the record. Even if any evidence existed, the project would necessarily have to comply with State and regional air quality standards (see WAC 197-11-660(e)) and would be subject to other permitting standards as required by the Washington State Department of Ecology (see WAC 173-

308). The record simply does not establish that the Responsible Official's decision fit within the statutory definitions of "impact", "probable" or "significant."

2.2 The Is No Evidence In The Record Of Significant Adverse Impacts Related To Flood Hazards.

The record indicates that the subject property is not categorized as a floodplain. However, the Responsible Official previously insisted on a full Hydrologic Report with Floodplain Delineation based because (1) the determination that the subject property is not located in a floodplain was obtained through approximate methodologies and (2) several comment letters raised a concern that snow melt runoff from Park Hills Creek might create unintended consequences when interacting with the proposed lagoons.

The record reflects that the proposed project lies within Zone C of the FEMA mapping system. Zone C is defined by FEMA as areas with "minimal flooding". Zone C areas are located at an elevation higher than a 0.2 percent annual chance of a flood. FEMA Map 530095 0465 B, Effective May 5th 1981; *See July 8, 2021 Letter from Western Pacific Engineering & Survey, page 3.* As such, there is no basis in the record to require a full Hydrologic Report with Floodplain Delineation. Or, at the very most, this should only be a condition imbedded in a mitigated determination of non-significance.

The Responsible Official's position regarding potential runoff and unintended consequences does not appear to be based on any position expressed by FEMA or any other Consulting Agency in the record. Indeed, WAC 197-11-545(1) and (2) provide that lack of comment by a Consulting Agency or any other agency shall be construed as a lack of any objection to the environmental analysis. As such, it appears that this requirement has been imposed based on non-expert testimony, generalized opinions raised by members of the public, and speculative conclusions of the Responsible Official. This is improper for purposes of SEPA.

Generalized fears of neighboring property owners based on speculative predictions cannot form the basis for land use (or SEPA) decisions. *Sunderland Family Treatment Services v. City of Pasco,* 127 Wn.2d 782, 794 (1995). In *Sunderland,* the Court emphasized that "there is an important distinction between well founded fears and those based on inaccurate stereotypes and popular prejudices." *Id.* at 794. The Court emphasized that Washington Courts have long held that popular prejudices, by themselves, cannot justify zoning restrictions. *Id.* See also *Maranatha Min., Inc. v. Pierce County,* 59 Wn.App. 795, 804-805 (1990) (a decision based on community displeasure rather than reasons "backed by policies and standards as the law requires" is a "textbook example" of an arbitrary and capricious action.)

Here, the Responsible Official is not an expert that may independently analyze these issues. Rather, a Consulting Agency would fill this role and, as set forth in the record, no Consulting Agency has done do. Instead, the Responsible Official has effectively taken on the role of an expert to exercise

substantive SEPA authority, addressed what can only be defined as speculative outcomes, and alleges that the SEPA determination should have evaluated these unsubstantiated concerns. Washington law is clear that SEPA review does not need to address cumulative impacts when those impacts are speculative. *Boehm v. City of Vancouver,* 111 Wn.App. 711, 720 (2002). Where a party cannot clearly identify evidence of a cumulative impact, they will not be considered. *Id.* See also WAC 197-11-060(4)(a) (SEPA procedural provisions require consideration of environmental impacts which are likely, not merely speculative.); *Concerned Citizens of Hosp. Dist. No. 304 v. Board of Comm'rs of Pub. Hosp. Dist. No. 304,* 78 Wn.App. 333, 344 (1995) (remote impacts and impacts on property values need not be considered under SEPA); and *Cheney v. Mountlake Terrace,* 87 Wn.2d 388, 344 (1976) ("The mandate of SEPA does not require that every remote and speculative consequence of an action be included in the EIS. The adequacy of an EIs must be judged by application of the rule of reason.")

There is no basis for relating the Responsible Official's decision to the definitions of "impact", "probable" or "significant" under the relevant WACs. Even if these generalized comments constituted a significant impact, which the record simply does not support, there is absolutely no evidence of "probable" consequences to be considered under SEPA. *Gebbers v. Okanogan County Public Utility Dist. No. 1,* 144 Wn.App. at 386. The Responsible Official is not a subject matter expert which may independently analyze these issues (like a Consulted Agency would, but has not) and, as set forth above, cannot exercise authority under SEPA to do so.

2.3 The Is No Evidence In The Record Of Significant Adverse Impacts To Ground Water Or Irrigation Channels.

In the Letter, the Responsible Official acknowledges that the Appellant provided a spill recovery plan in its comment response documents. Despite inclusion of this plan, the Responsible Official nevertheless concluded that it did not address spills that "may" result as a result of a lagoon failure or if lagoons were "overtaken" by flood waters. The Responsible Official further stated that it had concerns of how "unintended leaks" may impact ground water and/or inadvertent irrigation channel infiltration. While acknowledging that the Western Pacific Engineering Report provided notes of test holes four to five feet in depth approximately 75 feet from Park Creek, the Responsible Official contended that it was "not convinced" of the depth of the ground water at the proposed location. Instead, the Responsible Official insisted that the Appellant (1) provide information to prevent any interaction with the ground water in the event of a leak or spill and specific information of the location; (2) and depth of the groundwater at the proposed site. Again, the Responsible Official's determination is without merit.

Conversely, Western Pacific Engineering has professionally opined on this issue as follows:

> The construction plans of the ponds along with the application for coverage under the General Solids Permit for Biosolids Management, spill prevention plan, and all associated documents have been reviewed and preliminarily approved by the

Washington State Department of Ecology (DOE) Biosolids Program as they fall under the DOE's jurisdiction.

Brown & Jackson has worked closely with the engineers at Western Pacific Engineering & Survey, Inc to ensure that the designed ponds and planned land application not only to meet DOE requirements, but also protect the local environment.

To protect local groundwater, the ponds will be lined with an approved 60 mil HDPE Drain liner, a secondary 60 mil WDPE smooth liner, and corresponding leak detection system. As part of the Operation Plan for this site, Brown & Jackson will check the ponds for any signs of leakage as part of our weekly inspection, as required by WAC 173-350-330 (6) (a) (v). Additionally when the ponds are emptied and cleaned each year, the liner will be inspected and DOE will be notified such that they have sufficient time and the opportunity to be present during the liner inspections, as required by WAC 173-350-330 (6) (a) (ix).

To give a frame of reference, the October 2015 Operating Plan for the Kittitas County Lagoons located at the Ryegrass Landfill, states that the two surface impoundments shall, at a minimum include a "30 mil reinforced artificial liner placed on top of a structurally stable foundation to support the liner and waste and to prevent settlement that would destroy the liner". Just like the ponds at Kittitas County Ryegrass facility, the Brown & Jackson ponds are designed to meet the requirements established by the Washington State Department of Ecology.

For this project, it is not expected that the local flood waters or stormwater runoff would rise to an elevation high enough to overtake or enter the ponds. The creeks are located significantly below grade in relationship to the ponds. The main concern during design, based on the location of the ponds, was the stormwater runoff coming from the hills located to the Northeast and East of the ponds. The potential for stormwater runoff from the surrounding area was taken into account in the design of the ponds and is discussed in detail within stormwater section of Engineering Report prepared by WPES, dated January 14, 2021. For your convenience, we have included some of the verbiage in this letter to further emphasize Brown & Jackson's plan to mitigate for the potential of stormwater runoff.

For this site, the Stormwater design considerations were for a 25-year 24-hour storm. The ponds are located adjacent to hillsides to the north and southeast that converge to an arroyo that is located just southeast of the ponds. The ponds are

designed and graded in such a manner that the runoff from the hillsides and arroyo will flow into the two foot (2 ft.) deep and two foot (2 ft.) wide channel. This channel diverts the flow of the runoff around the pond and to the native grade to the north and west of the ponds. Additionally, the edges of the ponds are raised above the adjacent grade, so that in the event of a severe storm the nearby surface runoff will be directed around the ponds.

Based on the surrounding topography the arroyo has the potential to collect Stormwater runoff from an approximately one square mile (1 sq. mi.) area of hillsides. Using an SCS Type 1A Regional Storm Hydrograph, it was determined that the maximum design flow of surface runoff from the hillsides would be approximately 4.9 cubic feet per second (4.9 ft3/s). Using Manning's equation, a roughness coefficient of 0.029 and a slope of two percent (2%), it was determined that the shallow trapezoidal channel, designed to divert the flow, has a capacity of handling a maximum flow that is larger than the design flow of surface runoff by safety factor greater than two.

Also, winter precipitation that occurs when the ponds are full, typically takes the form of snow and ice. Snow and Ice does not typically generate large amounts of runoff. Should rain occur, the warmer rains typically occur such that the ground can sufficiently absorb most of the expected runoff. However, with the edges of the ponds raised from the native ground and the channel to divert the flow of runoff, any Stormwater runoff that may occur will be re-directed away from the ponds.

See July 8, 2021 Letter from Western Pacific Engineering & Survey, page 3 - 5.

Moreover, it is important to note that potential impacts to ground water and other operational issues have already been addressed by the regulatory scheme which governs these types of operations. See WAC 173-308 et. seq. WAC 173-350 et seq. WAC 197-11-660(e) provides that agencies should first determine whether local, state, or federal requirements and enforcement would mitigate an identified significant impact. Here, the Responsible Official appears to have not first determined whether other requirements (e.g. Department of Ecology administrative regulations governing the permit) and enforcement provisions would mitigate that impact before imposing a mitigation requirement. The Consulting Agency with jurisdiction over issues related to ground water is the Department of Ecology. The record is devoid of any concerns expressed by the Department of Ecology for this project. Pursuant to WAC 197-11-545(1), the lack of any response by a Consulting Agency is an assumption "that the consulting agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise." In fact, attached hereto as **Exhibit A** is a letter dated September 2, 2021 from the Department of Ecology, which, in relevant part, states:

> Ecology recognizes that biosolids and septage facilities are not a popular topic. Ecology will not come in a be [sic] seen as rubber stamping a project without vetting and hearing from the community. However, land application in rural areas of the state, is the most cost effective beneficial use solution. Land application at a controlled and monitored rate is a common practice. Land application is a far superior practice than direct discharge of raw sewage to creeks or rivers, which used to happen 40+ years ago before environmental regulations were created. Cost effective alternative solutions to land application are simply few and far in between. And trucking wastewater out of the county is expensive, not environmentally friendly, and not really economically feasible. This is the reality of the situation. The fact of the matter is, land application has occurred for many years elsewhere in the county and people have gone on with their daily lives just fine, because it has been managed and regulated. There is no environmental disaster at those locations. We only need to look and travel 1.25 hours southeast of Kittitas County to the Hanford Nuclear Reservation, which houses the world's largest volume of radioactive waste (some of which is leaking into the ground), to see a true environmental problem.
>
> I've said it to a few people on both sides in one way or another. There may be more gained here for the benefit of the community, by collaboration and mitigation rather than opposition and litigation. I advocate for there to be broader discussions, avoid the unnecessary stress, and expenditure of time and financial resources with appeals and litigation.
>
> At the end of the day, this letter was sent to help give assurances that the facility will not be unregulated and will in time, if the project comes to fruition, be subject to the requirements of WAC 173-308.

Other than expressing its own generalized concerns (with no input or actual comment from the Department of Ecology), the Responsible Official's determination is not based on any actual evidence or expert opinion and there is no basis to support the imposition of mitigation on this issue. Rather, it appears to be based on generalized nothing more than speculation and generalized possibilities. This is improper. *Boehm v. City of Vancouver,* 111 Wn.App. at 720; *Sunderland Family Treatment Services v. City of Pasco,* 127 Wn.2d at 794-795; *Concerned Citizens of Hosp. Dist. No. 304 v. Board of Comm'rs of Pub. Hosp. Dist. No. 304,* 78 Wn.App. at 344; *Maranatha Min., Inc. v. Pierce County,* 59 Wn.App. at 805-805.; and *Cheney v. Mountlake Terrace,* 87 Wn.2d at 344.

There, there is no basis or clear evidence how the Responsible Official's decision fits within the definition of "impact", "probable" or "significant" as defined by the relevant provisions of the Washington Administrative Code.

2.4 The Is No Evidence In The Record Of Significant Adverse Impacts To Adjacent Properties.

The Responsible Official cites "many concerns" raised regarding possible smell impacts, potential impacts to property values, and unidentified concerns to "quality of life". While the Responsible Official concedes that the Western Pacific Engineering Report addressed this issue regarding the prevailing winds in the area, it required an independent assessment to potential impacts to property values related to "smell or visual impacts" that could result from the project. Presumably, the Responsible Official is requesting some form of a before and after appraisal to determine the project's effects on property values. While "odor" is listed as an element of the environment subject to SEPA review under WAC 197-11-444, any impact on home values is not appropriately considered under SEPA.

The Responsible Official's basis for its decision is, again at odds with the requirements of SEPA. *Concerned Citizens of Hosp. Dist. No. 304 v. Board of Comm'rs of Pub. Hosp. Dist. No. 304,* 78 Wn.App. at 344 (remote impacts and impacts on property values need not be considered under SEPA). Remember that "probable" is defined by WAC 197-11782 to distinguish likely impacts from those that merely have a possibility of occurring but are remote or speculative." As it relates to the issue of odor, the Western Pacific Engineering Report (78/2021) provides:

> To mitigate for the potential odor, WPES has worked with Brown & Jackson and have designed the storage ponds, day-to-day operations, and annual land application program to implement industry standard best management practices as recommended in Chapter 12 of the EPA's "Guide to Septage Treatment and Disposal". Any potential odor generated by the storage ponds will be mitigated by minimizing the turbulence and agitation of the ponds. Additionally, by extending receiving pipes below the water surface and by using quick disconnect fittings between the pumper truck and the receiving station, the "free fall" of septage is avoided and turbulence is further minimized.
>
> Potential odor related to land application activities will be mitigated by both limiting the frequency of land application to once per year and promptly incorporating the land-applied septage into the soil by disking it into the soil within six hours of application. Odor mitigation by incorporation is recognized by both the EPA and Ecology. Section 11.5 of Ecology's General Permit for Biosolids Management outlines the requirements of reducing Vector Attraction and thus the potential for nuisance odors. Incorporating the septage within 6 hours after application is a common practice for reducing vector attraction and has been accepted by Ecology.

> DOE has expertise and experience with odor prevention, management, and mitigation plans given their role as a permitting agency, which is key to all parties. DOE has already given preliminary approval for all the odor mitigation measures described. Based on this, KC CDS should issue a Mitigated Determination of Non-Significance for the proposed project.
>
> Both the Kittitas County Ryegrass Facility's ponds and the proposed Brown & Jackson Pond sites are located in the vicinity of scattered rural residences. Additionally, both sites are located upgrade from the residences and each site contains a creek or water way in the vicinity of the current and proposed land application areas. To help better understand each sites location, and distance from the surrounding rural housing, there are two exhibits attached.

Western Pacific Engineering also opined on the issue of odor in its Report dated January 14, 2021. This is the only professional opinion in the record on this issue. In a case where an activity is hypothetical or speculative, SEPA does not require it to be considered in an EIS. *Gebbers v. Okanogan County Public Utility Dist. No. 1,* 144 Wn.App. 371, 386 (2008).

Additionally, property values (or issues related to the potential trespass and safety of neighboring residents – see comments from the Washington State Department of Children, Youth and Families) are not defined as an "Element of Environment" under WAC 197-11-444. As a result, a requirement for an independent assessment regarding "potential impacts to property values" is not a mitigation that can be required by the Responsible Official under it substantive SEPA authority.

Finally, other examples of this exact type of facility already exist in eastern Washington, including one owned and operated by Kittitas County. In this matter, the record is devoid of any claims of nuisance related to odor from these facilities. The Responsible Official did not impose any similar requirements on its own facility while acting in its capacity under SEPA review for the same type of project. ." Again, SEPA does not require hypothetical or speculative matters to be considered in an EIS. *Gebbers v. Okanogan County Public Utility Dist. No. 1,* 144 Wn.App. at 386; and WAC 197-11-060(4)(a) (SEPA procedural provisions require consideration of likely environmental impacts, not speculative impacts.)

2.5 The Is No Evidence In The Record Of Significant Adverse Impacts To Wildlife Or General Safety.

The Responsible Official observed that while the project includes a fence along the parcel boundary, it would be adjacent to Washington State Department of Children, Youth and Families facility and raised concerns regarding youths that may inadvertently fall into one of the lagoons. The Responsible Official further expressed concern over wildlife that may traverse the property

and required a robust safety plan to account for these possibilities. This is inappropriate for two reasons.

First, generalized safety issues in general are not defined as an Element of the Environment under WAC 197-11-444 and imposition of a mitigation under SEPA by the Responsible Official under this statute is misplaced.

Second, the Washington State Department of Fish and Wildlife, a Consulted Agency, expressed no concerns regarding impact on wildlife. As set forth above, its lack of response indicates no objection to this project. WAC 197-11-545(1). As no comments have been provided by the Consulted Agency, there are no professional opinions and the Responsible Official's requirements are based on generalized and speculative opinions without basis in fact, which, as set forth above, is not proper under SEPA.

Notwithstanding the lack of any basis to impose such conditions on the project, Appellant is willing to install an additional six (6) foot fence around the perimeter of any pond to remove any potential risk to youth or wildlife. This should be addressed and imposed through a Mitigated Determination of Non-Significance.

2.6 The Is No Evidence In The Record Of Significant Adverse Impacts As A Result Of The General Operation Of The Site.

The Responsible Official generally contends that "facilities such as these" are usually managed by municipalities and contends that unidentified "serious issues" are not uncommon despite training, design standards, inspections and daily monitoring. Based on these unidentified and speculative concerns, the Responsible Official required more information to "understand how your design and maintenance plan will avoid the common issues that can arise in these types of facilities."

However, the record does not reflect exactly what "serious issues" are being cited here or how these undefined issues fit within the definitions of "impact", "probable" or "significant" as defined by SEPA. Similarly, the contended "issues" do not appear to be based on any public comment or Consulting Agency review and are limited to what appears to be the subjective interpretation of the Responsible Official alone.

Facilities such as the project proposed here are governed by the Washington State Department of Ecology which includes the County facility located at Ryegrass. In addition, the record reflect that the Department of Ecology *has already* reviewed and preliminarily approved construction of the ponds and application for coverage under the General Solids Permit for Biosolids Management. Appellant's ponds and land application process will meet the requirements of the Department of Ecology including, but not limited to, requirements for soil sampling and testing, pond liner inspections, annual reporting, onsite inspections, and other highly regulated conditions for permit coverage. See WAC 173-50 et. seq.

The Responsible Official once again appears to have imposed its subjective view when the Department of Ecology did not comment on this issue which, again, constitutes a lack of objection under WAC 197-11-545(1). Because other regulations address the operational concerns raised here, the Responsible Official is compelled to consider these regulations as sufficient to address those issues. WAC 197-11-660(e); see Exhibit A.

Finally, the concerns raised by the Responsible Official are not based on any actual evidence in the record but appear to be limited to nothing more than speculation and conjecture. As set forth in the case law above, such considerations are not allowed under SEPA.

3. Conclusion

The issuance of the DS in this matter is clearly erroneous because each of the issues identified therein are either unsupported in the record, addressed by other agency regulations or not appropriately addressed under SEPA. As such, Appellant respectfully requests that the Kittitas County Hearing Examiner find that the DS was issued in error and remand the instant SEPA determination back to the County for issuance of a determination consistent with the Hearing Examiner's decision.

Very Truly,

Taudd A. Hume
WITHERSPOON BRAJCICH MCPHEE, PLLC

Attachments

EXHIBIT A

(September 2, 2021 Department of Ecology Letter)

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
1250 W. Alder Street • Union Gap, WA 98903-0009 • (509) 575-2490

September 2, 2021

Dan Carlson, Director
Community Development Services
Kittitas County Planning Department
411 N Ruby Street, Suite 2
Ellensburg, WA 98926

RE: Brown & Jackson Septage Project

Dear Dan,

Brown & Jackson asked if the Department of Ecology (Ecology) could send a letter stating our role. In 1998, Ecology promulgated a rule (WAC 173-308) that governs biosolids and septage land application in our state. Under this rule, Ecology, is tasked with the permitting and oversight of biosolids and septage land application and related activities. Our state rule requires Ecology to follow established guidelines and ensure compliance with federal biosolid and septage rules developed by the United States Environmental Protection Agency. These rules have been developed after scientific studies, monitoring of land application, and best management practices. These rules serve to ensure protection of the environment and human health. As such, these rules require Ecology to ensure a facility complies with the rule, our site specific coverage approval, requests for inspection, post-harvest soil sampling, and any other additional requests of Ecology.

Each county has its own set of local ordinances, zoning criteria, and permitting requirements. As a former county official, I understand that and respect that. Currently the ball is in Kittitas County's court, if the county did give approval for the grade and fill permit or other local requirement; then this letter simply provides assurances to the county here, that Brown & Jackson still has to comply with Ecology's land application permitting and oversight requirements. If the county wanted to have more involvement in regard to regulating activities of the septage facility, Ecology is not opposed to that idea, our WAC 173-308 rule does allow for a county to request a delegation agreement from Ecology. The county however, wouldn't be in complete control, Ecology would still be involved (sort of a shared responsibility approach).

Ecology recognizes that biosolids and septage facilities are not a popular topic. Ecology will not come in a be seen as rubber stamping a project without vetting and hearing from the community. However, land application in rural areas of the state, is the most cost effective beneficial use solution. Land application at a controlled and monitored rate is a common practice. Land application is a far superior practice than

direct discharge of raw sewage to creeks or rivers, which used to happen 40+ years ago before environmental regulations were created. Cost effective alternative solutions to land application are simply few and far in between. And trucking wastewater out of the county is expensive, not environmentally friendly, and not really economically feasible. This is the reality of the situation. The fact of the matter is, land application has occurred for many years elsewhere in the county and people have gone on with their daily lives just fine, because it has been managed and regulated. There is no environmental disaster at those locations. We only need to look and travel 1.25 hours southeast of Kittitas County to the Hanford Nuclear Reservation, which houses the world's largest volume of radioactive waste (some of which is leaking into the ground), to see a true environmental problem.

I've said it to a few people on both sides in one way or another. There may be more gained here for the benefit of the community, by collaboration and mitigation rather than opposition and litigation. I advocate for there to be broader discussions, avoid the unnecessary stress, and expenditure of time and financial resources with appeals and litigation.

At the end of the day, this letter was sent to help give assurances that the facility will not be unregulated and will in time, if the project comes to fruition, be subject to the requirements of WAC 173-308.

Respectfully,

James Rivard (Signed digitally during telework mandate)

James Rivard
Regional Manager
Solid Waste Management Program
Central Regional Office

CC: Brown & Jackson