KITTITAS COUNTY HEARING EXAMINER

Brown & Jackson Appeal of Issuance of a Determination of Significance	NO. SE-20-00003
	COUNTY'S BRIEF

OVERVIEW

COMES NOW RESPONDENT KITTITAS COUNTY, by and through its attorney of record, Neil A. Caulkins, and files its brief in the above captioned appeal of a State Environmental Policy Act (SEPA) threshold determination. The purpose of SEPA is to prevent significant adverse environmental impacts. Kittitas County followed the SEPA process which actually requires issuing a Determination of Significance (DS) in this instance. The County's threshold determination was based upon information that Appellant "furnished" prior to making the determination. There is substantial evidence in the record to support the County's threshold determination. The SEPA threshold determination was thus proper and must be affirmed.

FACTS

Appellant filed an application for a grading permit related to a proposed project for septage lagoons that triggered SEPA review. Comments were received internally, from state agencies, and from neighboring property owners. (Administrative Record-AR 260-261) The comments raised issues including odor, flooding risk, and ground and irrigation water contamination. (AR 262-264) Appellant responded to comments. (AR 271-509) After receiving and reviewing the response, the County informed the Appellant (on March 13, 2021) that it was contemplating issuing a DS and

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asked for additional information about the issues raised in the comments, about which questions remained, such that such a threshold determination could be avoided. (AR 511-513) Over one hundred and twenty days elapsed with no response from Appellant. (Next response from Appellant was received on July 19, 2021-Declaration of Johnston.)

Eventually the County issued a DS on the project based on the available information. A few days after issuing the threshold determination, the County received a letter and attachment from the Appellant post marked the same day as the DS issuance (July 15, 2021). (Declaration of Johnston) This letter included the 7/8/21 material from Western Pacific Engineering & Survey. Material from that document is seemingly the primary support for Appellant's position in this appeal but was not received by the County until after the Threshold Determination was already made.

STANDARD OF REVIEW

Considerable deference is given to an interpretation by an agency charged with enforcing a statute. In addition, a court accords deference to an interpretation of law in matters involving the agency's special knowledge and expertise. *Cashmere Valley Bank v. Dep't of Revenue,* 181 Wn.2d 622, 635-6, 334 P.3d 1100 (2014). Kittitas County is charged with implementing SEPA in this case. Kittitas County Public Works administers the County's Flood Zone Control District as well as the County's water mitigation program, and so has expertise in flooding and water table issues.

LEGAL FRAMEWORK

WAC 197-11-080 provides that, if information is not available or unknown, the agency shall make known that such information is lacking or uncertain. WAC 197-11-335 provides that, if the County needs additional information, we can (1) ask the applicant for it, (2) do our own study, (3) consult with other agencies, or (4) determine the project or impact is not sufficiently defined and commit to subsequent or on-going review under WAC 197-11-055-070. WAC 197-11-330(4) states that "If after following WAC 197-11-080 and 197-11-335 the lead agency reasonably believes that a proposal ***may** have a significant adverse impact, **an EIS is required.***" (Emphasis added) WAC 197-11-330(1)(b) states that a threshold determination must be "based on the proposed action, the information submitted in the checklist, *and any additional information* ***furnished*** under WAC 197-11-335 and 197-11-350." (Emphasis added)

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ARGUMENT

This case appears to contain three issues: (1) In this circumstance, does issuance of a DS require that significant adverse environmental impacts be likely or probable, or merely that they may occur? (2) Was the threshold determination based upon information "furnished" to the County? (3) Is there substantial evidence to support the County's threshold determination? Because a DS, in this circumstance, is required under WAC 197-11-330(4) if such impacts "*may*" occur; because the information the Appellant "*furnished*" to the county prior (and after) making its threshold determination is either irrelevant or unresponsive and does not overcome remaining doubt as to impacts; and because substantial evidence exists in the record supporting the County's decision, the DS issued in this matter must be affirmed.

1. A DS is Required in This Circumstance.

Appellant argues that a DS is only appropriate if significant environmental impacts are likely or probable. It is well-established that the more specific statute governs the general. *Ohio Sec. Ins. Co. v. AXIS Ins. Co.,* 190 Wn.2d 438, 354, 413 P.3d 1028 (2018). It is true that the more general provision, WAC 197-11-330(1)(b), contemplates issuance of a DS if a proposal has "likely" and "probable" significant adverse environmental impacts. However, the circumstance found in this matter is that the lead agency has asked for additional information to answer questions raised during the comment period; such information was either not furnished or irrelevant, and the agency's questions remain. In that more specific circumstance, WAC 197-11-330(4) controls.

WAC 197-11-330(4) states that "If after following WAC 197-11-080 and 197-11-335 the lead agency reasonably believes that a proposal *may* have a significant adverse impact, *an EIS is required.* Notice that the words "likely" and "probable" are conspicuously absent. The Department of Ecology knows how to use such words, it has done so in other places in SEPA, and so when it does not use them here, it is because it means something else. Instead, this section clearly states that, after seeking additional information and having questions remain unanswered, an EIS is actually "*required*" if the lead agency merely believes adverse impacts "may" occur. In this circumstance (seeking additional information and not getting it), issuance of a DS is "required" if adverse impacts merely "may" occur.

Here, information that would answer questions raised in the comment period was lacking or unavailable. Pursuant to WAC 197-11-080, Kittitas County made that want of information known

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to the Appellant. Said another way, Kittitas County needed additional information to answer remaining questions and so, pursuant to WAC 197-11-335(1), it asked the Appellant for that information. Over one hundred and twenty days elapsed without receiving anything. This left Kittitas County in the situation provided for in WAC 197-11-330(4)-where it had sought additional information pursuant to WAC 197-11-080 and WAC 197-11-335, had received nothing and so was left with no basis to dispel the belief that the proposal "*may have a significant adverse impact.*" The County had asked for additional information to dispel that belief, yet none was forthcoming. In such a circumstance, WAC 197-11-330(4)'s provisions control where it states that, in this circumstance, "*an EIS is required.*" That is what the County did. That is what is "required" under SEPA. The County's decision must be affirmed.

2. The County's Threshold Determination Was Based Upon Information "Furnished" to the County.

WAC 197-11-330(1)(b) states that a threshold determination must be "based on the proposed action, the information submitted in the checklist, *and any additional information **furnished...***" The word "furnished" is in the past tense thereby signifying that the threshold determination must be based upon that which the agency had *prior* to that determination's issuance. The document dated July 8, 2021, was not, for purposes of WAC 197-11-330(1)(b), "furnished" to the County because it arrived several days after the threshold determination was issued.[1] (Declaration of Johnston) Kittitas County's Threshold Determination was based on that which it had before it at the time of issuance-it was based upon that which had been "furnished" to the

[1] The document arrived at the County after the issuance of the threshold determination, but before the certification of the appeal record. When certifying the record, the County simply batched together related documents received to that date. That is why it appears in the certified record as item #16-it had appeared before the record certification, but, in this case, after the issuance of the threshold determination.

Pursuant to KCC 15A.07.020(1), this appeal is an open record hearing, meaning that additional information can be introduced. The Appellant included as an attachment to its brief a letter from James Rivard at the Department of Ecology that is irrelevant and factually erroneous. Mr. Rivard states that "Land application is a far superior practice than direct discharge of raw sewage to creeks or rivers." Nobody is questioning the efficacy of land application or asserting that discharge into creeks or rivers is the only alternative to this project. The actual alternative to dumping septage in this proposed facility is to continue dumping it at the County's Ryegrass facility which does not involve the expense of out-of-county transport. Mr. Rivard continues by ridiculously comparing this proposed facility to the Hanford Nuclear Reservation, essentially saying that, so long as our issues are less than the Hanford Nuclear Reservation, they are not really environmental problems.

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County. It did not have the documents "furnished" after its determination. Those documents, as explained below, were not relevant or responsive to the two key issues anyway.

3. Flooding Concerns

The concern for flooding is driven by concerns (voiced by Public Works [AR 215], by WDFW as to Parke Creek [AR 243], and by KRD [AR 142-146] and its lawyers [AR 138-141]as to its irrigation ditch which forms the lower boundary of the subject property) of a flood flushing pond effluent down into either Parke Creek or the KRD irrigation canal. Either would be catastrophic in that sewage would be introduced into a stream or into an irrigation system used for the chief economic activity in Kittitas County-agriculture. The July 8, 2021 document from Western Pacific Surveying & Engineering is fundamentally flawed because it relies upon our flawed mapping.

Kittitas County, though its Public Works Department, operates both a Flood Zone Control District and the County's Water Mitigation Bank. Public Works has produced modeling that has resulted in FEMA changing our flood maps, the most recent of which were adopted on September 24, 2021. In short, Kittitas County Public Works has expertise in flooding and water table issues. In its Comment of August 31, 2020 (AR 215), Public Works states that the map that Appellant use should not be relied upon because it used "approximate methodologies and did not delineate a Parke Creek 100-year floodplain associated upstream of Vantage Highway..." Similarly, the Washington Department of Fish and Wildlife (WDFW) stated in its comment of September 1, 2020 (AR 243) that there needs to be 100-year flow modeling and it recommended a full hydraulic and hydrologic report prior to project approval. Neighbors also commented on the fact that the subject property is subject to occasional flooding. (AR 263-264)

In contrast to this, both documents produced by Western Pacific Engineering & Survey (both the January 14, 2021, and the July 8, 2021 document-AR 674-5) insist upon using the map that Public Works said should not be relied upon and continued to use a 25-year storm event rather than the 100-year event required by both Public Works and WDFW. Appellant's engineers state (at AR 675) that flood waters overtaking the ponds and washing contents downhill "is not expected." "Is not expected" is insufficient to address the disastrous consequences if this were to occur. Said another way, when told by both Public Works and WDFW that the flood modeling and mapping the Appellant relied upon were faulty, and when notified of the alarm the irrigation district had,

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Appellant's only response was, not to explain or defend its flood modeling or present analysis using modeling the agencies were insisting was necessary, but to parrot back the assumptions that had just been called into question.

Similarly, WDFW indicated there being three streams upon the subject property, yet the Appellant, after walking the property, only found water in two. This is potentially because what looks like a third stream could be a channel cut from seasonal flooding. The absence of water in this third stream does not alleviate flood concerns. If anything, it enhances them. Appellant's response to concerns about flooding are worse than inadequate.

4. Odor Concerns.

In response to the SEPA notice, there were sixty-five neighbors who submitted comments. (AR 260-261). Odor was a common theme in these comments. (AR 263-264). As a part of its response to these comments, Appellant produced an Operation and Closure Plan. (Begins at AR 361) On page 4 (AR 365), the Plan states that, given the remote nature of the facility, odor is not anticipated to become a nuisance. Something that generates 65 neighbor comments can hardly be characterized as remote. The plan continues by merely saying, essentially, that as problems arise, they will deal with it without giving any specifics, and concludes by promising to keep a log of complaints and actions taken in response. Similarly unresponsively, the July 8, 2021 document (at AR 676) merely states that odor will be minimized by minimizing how turbulent the ponds are allowed to be. Finally, the July 8, 2021 document tries to equate the County's Ryegrass facility with the Appellant's proposed facility and says, essentially, that it will have no more odor impacts than the County's facility. The County facility's nearest neighbor is a half mile away and there are very few others. (Declaration of Johnston) In contrast, this proposed facility drew comments from 65 neighbors. The proposed facility's potential odor impacts are not comparable to the County facility. Odor is listed as an element of the environment in WAC 197-11-444, and the notion that these two proposed lagoons would produce such odor is hardly speculative.

Appellant's statement in its brief in the first sentence of 2.4 is incorrect. Kittitas County does not concede that the odor issue was dealt with by merely saying the prevailing winds were away from the DCYF Facility. The issue of odor for the 65 neighbors who commented is still at issue. Appellant's response to concerns about odor is inadequate.

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Appellant seeks to argue that the interest of the Department of Children, Youth, and Families is somehow for public safety, which is not an element of the environment. However, WAC 197-11-444 states that government services are considered under SEPA, and the youth facility that the Department of Children, Youth, and Families runs is such-a government service. Therefor its comments and concerns are relevant to the SEPA discussion.

CONCLUSION

Kittitas County's issuance of a Determination of Significance in this matter must be affirmed. When a lead agency has sought additional information to resolve remaining questions and those questions remain (whether by an inadequate response or no response at all), WAC 197-11-330(4) *requires* issuance of a DS if the lead agency remains with the belief that significant adverse consequences *may* occur. In this instance, the words likely and probable are conspicuously absent. Appellant has refused to respond to the flood concerns of Public Works, WDFW, and the irrigation district as well as the neighbors by continuing to rely on faulty mapping and the incorrect flood estimate. The project has received significant complaints as to odor and its responses have been inadequate. The comments of Public Works, WDFW, KRD, and the neighbors constitute substantial evidence upon which the County relied, and upon which a decision to affirm the issuance of a Determination of Significance is required. Under WAC 197-11-330(4), when, as here, the County is left with the belief that significant adverse impacts *may* occur, issuing a DS is *required.* The County's decision must be affirmed.

DATED this 5th day of October 2021.

By _____
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