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July 21, 2021

Jeremy Johnson
Kittitas County
Community Development Services
411 N. Ruby Street, Suite 2
Ellensburg, WA 98926



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

Kittitas County CDS

Dear Jeremy:

This firm has been retained by Brown & Jackson, Inc. (herein, the “Appellant”), regarding its attempt to permit two storage ponds on Kittitas County Parcel No. 295134 (the “Project”). The Appellant, whose address is 107 N. Main Street, Ellensburg, WA 98926, is the owner of the property in question and the Appellant for a grading permit for which this DS was issued.

The purpose of this letter is to appeal the Responsible Official’s issuance of a Determination of Significance (the “DS”) issued on July 15, 2021 in File # SE-20-00003, which is attached hereto. The DS blanketly asserts the following areas for discussion in an EIS:

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 Impact

Accompanying the DS was a copy of a March 12, 2021 letter (the “Letter”) from Kittitas County (the “County”) objecting to various issues the County generally describes in the DS. In turn, all of these issues were addressed at length by the Appellant in a July 15, 2021 letter to the County.

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The Appellant believes the issuance of the DS is clearly erroneous because each of the items identified in the DS are either unsupported in the record in this matter, not appropriately addressed under SEPA, or otherwise addressed by the regulatory framework applicable to the underlying operation permit.

a. Critical Areas Impacts

The County's Letter suggests that there are concerns regarding "potential" impacts from airborne contaminants and possible lagoon breaches. However, the only actual request the Letter makes is for the Appellant to provide "clarification" regarding the nature of a possible third stream and its distance from the project area. Western Pacific Engineering previously addressed the technical aspects of this particular request, and it is worth noting that Avia Environmental Consulting (as "Avia") prepared a report that was previously provided to the County that concluded that (1) the Project is not expected to impact the function of the critical area or buffers, and that although there Washington Department of Fish and Wildlife databased do show a third perennial stream, that field observations did not reveal any such stream.

As it relates to the unsupported allegations regarding airborne contaminants, any such work will 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 under the authority of the Department of Ecology (e.g. WAC 173-250, WAC 173-308) which would otherwise form the basis of a condition under SEPA. Based upon the information in the Letter it is entirely unclear how this issue could fit the WAC definitions of "impact," "probable" or "significant."

b. Flood Hazards

The Letter requests a full Hydrologic Report with Floodplain Delineation based upon "several comment letters." The project lies within Zone C of the FEMA mapping system. Zone C is defined by FEMA as areas with "minimal flooding" and are located higher than the elevation of 0.2 percent annual chance flood (FEMA MAP 530095 0465 B, Effective May 5th, 1981). Consulting the FEMA maps is an appropriate and customary method for seeking floodplain information. The Letter does not indicate that FEMA itself (or any other Consulted Agency) has any issues with the Project location, but rather that "several comment letters" originated this concern. As such, we will assume that the record, and the requests for further study are informed primarily on the basis of this non-expert testimony since WAC 197-11-545 provides that a lack of comment from a Consulted Agency or any other agency may be construed as a lack of object to the environmental analysis.

The Appellant understands the concerns of the neighboring property owners, however, many of those concerns are in the form of generalized fears or speculative predictions that cannot form the basis for land use (or SEPA) decisions. *See Sunderland Family Treatment Services v. Pasco*, 127 Wn.2d 728 (1995) (holding that unsubstantiated fears of area residents about potential criminal behavior or nuisance activity are not a proper basis to deny a permit): *see also*

Maranatha Mining, -Inc. v. Pierce County, 59 Wn.App. 795 (1990) (holding that land use decisions must be based upon reasons backed by policies and standards, not “community displeasure.”). Without supplying any specific details, the County alleges that the SEPA determination should have evaluated a host of unsubstantiated concerns. This speculation is not supported by the record in this matter, the Responsible Official is not a subject matter expert to independently analyze these issues (like a Consulted Agency would be), and the County may not exercise its SEPA substantive authority to address speculative impacts. *Boehm v. City of Vancouver*, 111 Wn.App. 711(2002) (the Boehms argued that the threshold determination should be remanded because the City didn’t consider the site specific impacts of Fred Meyer’s proposed gas station. The court held that SEPA review need not address cumulative impacts when speculative; when a party can point to no specific impact, those impacts are speculative.); *Concerned Citizens of Hosp. Dist. No. 304 v. Board of Comm'rs of Pub. Hosp. Dist. No. 304*, 78 Wn. App 333 (1995) (remote impacts and impacts on property values need not be considered under SEPA); *Conservation Nw. v. Okanogan Cty.*, 194 Wash. App. 1034 (2016).

Based upon the information in the Letter it is entirely unclear how this issue could fit the WAC definitions of “impact,” “probable” or “significant.”

c. Ground Water and Irrigation Channel Impacts

As it relates to concerns regarding impacts to ground water, the Consulted Agency with jurisdiction over this issue is the Department of Ecology, who did not express any concerns about this issue in the record. Again, WAC 197-11-545 provides that a lack of comment from a Consulted Agency or any other agency may be construed as a lack of object to the environmental analysis.

Additionally, potential impacts to ground water and other operational issues are already addressed by the regulatory scheme that governs these types of operations. See WAC 173-350 et seq. Therefore, because WAC 197-11-660(e) provides that agencies should first determine whether other regulations will mitigate any presumed impacts before requesting such mitigation, this request/concern seems misplaced and cannot form the basis of a condition under SEPA.

The County should consider this issue to be adequately addressed under Appellant’s SEPA review because (a) DOE did not comment on this issue, and as a Consulted Agency its lack of comment should be understood as a lack of objection under WAC 197-11-545 (which is adopted via KCC 15.04.150); (b) due to this lack of comment there is no expert opinion in the record to support the imposition of mitigation on this issue (see *Boehm v. City of Vancouver*, 111 Wn.App. 711(2002); *Concerned Citizens of Hosp. Dist. No. 304 v. Board of Comm'rs of Pub. Hosp. Dist. No. 304*, 78 Wn. App 333 (1995); *Conservation Nw. v. Okanogan Cty.*, 194 Wash. App. 1034 (2016); *Sunderland Family Treatment Services v. Pasco*, 127 Wn.2d 728 (1995); see also *Maranatha Mining, -Inc. v. Pierce County*, 59 Wn.App. 795 (1990)); and (c) because other regulations address the operational concerns raised, the County is compelled to consider those regulations as sufficient to address those matters pursuant to WAC 197-11-660(e).

Based upon the information in the Letter it is entirely unclear how this issue could fit the WAC definitions of “impact,” “probable” or “significant.”

d. Impacts to Adjacent Properties

The Letter alleges various unsupported “impacts” to neighboring properties due to the smell from the operation and requests the Appellant to produce an “independent assessment regarding potential impacts to property values related to smell and/or visual impacts that could result from this project” (emphasis supplied). However, impacts from a project on the values of surrounding properties is not an issue to be considered under SEPA. *Concerned Citizens of Hosp. Dist. No. 304 v. Board of Comm'rs of Pub. Hosp. Dist. No. 304*, 78 Wn. App 333 (1995) (remote impacts and impacts on property values need not be considered under SEPA). Property values are not defined as “Elements of the Environment” under WAC 197-11-444. As such, a request for “an independent assessment regarding potential impacts to property values” is not mitigation that could be required by the County pursuant to its substantive authority under SEPA.

Additionally, it is worth noting that there are other examples of this exact facility already permitted in eastern Washington, including one owned and operated by the County, and the record herein is devoid of any claims of nuisance related to odor from these facilities. In fact, the Kittitas County Solid Waste Department submitted a SEPA Checklist for an expansion at its Ryegrass facility in November 2020 and granted itself an MDNS. In short, the County did not impose a similar requirement on itself when acting as the Responsible Official under a SEPA review of the same type of project.

e. Wildlife and General Safety

The Letter takes issue with a lack of fencing around the Project by alleging generalize concerns for trespassing youth from the neighboring Department of Children, Youth and Families operation and on behalf of unspecified wildlife. However, “safety” concerns (as those relate to humans) would also not be a SEPA-related issue under WAC 197-11-444. SEPA is concerned with mitigating demonstrable impacts to the environment.

It is also important to note that Washington Department of Fish and Wildlife, the Consulted Agency with regard to wildlife, did not express these concerns, and, through its lack of response, has indicated that it has no objections to the project. WAC 0197-11545. Without comment from a Consulted Agency on this issue there are no professional opinions beyond generalized speculation that could form the basis of a condition under SEPA. *Boehm v. City of Vancouver*, 111 Wn.App. 711(2002); *Concerned Citizens of Hosp. Dist. No. 304 v. Board of Comm'rs of Pub. Hosp. Dist. No. 304*, 78 Wn. App 333 (1995); *Conservation Nw. v. Okanogan Cty.*, 194 Wash. App. 1034 (2016); *Sunderland Family Treatment Services v. Pasco*, 127 Wn.2d 728 (1995); see also *Maranatha Mining, -Inc. v. Pierce County*, 59 Wn.App. 795 (1990).

However, in the interest of being a good neighbor, Appellant is willing to install a 6-foot fence around the perimeter of the ponds so that the potential risk to youth and wildlife is removed. This should be addressed in a Mitigated Determination of Non-Significance.

The Appellant requests a remand of the DS to the Department for an issuance of a Determination of Non-Significance or a Mitigated Determination of Non-Significance consistent with the Hearing Examiner's decision.

Please advise as soon as possible if you believe something else is needed to initiate this appeal. If we do not hear otherwise from you within 24 hours of the submittal of this appeal letter and fee we will presume you have accepted the appeal and that you will schedule a hearing with the Kittitas County Hearing Examiner accordingly. Enclosed herewith is a check in the amount of \$1,550.00 for the appeal fee.

Very Truly,



TAUDD
A.

HUME
WITHERSPOON BRAJCICH MCPHEE, PLLC

Enclosures
cc:



KITTITAS COUNTY COMMUNITY DEVELOPMENT SERVICES

411 N. Ruby St., Suite 2, Ellensburg, WA 98926

CDS@CO.KITTITAS.WA.US

Office (509) 962-7506

"Building Partnerships -- Building Communities"

STATE ENVIRONMENTAL POLICY ACT DETERMINATION OF SIGNIFICANCE AND REQUEST FOR COMMENTS ON SCOPE OF ENVIRONMENTAL IMPACT STATEMENT

Issued: July 15, 2021

Lead agency: Kittitas County Community Development Services

Agency Contact: Jeremy Johnston, jeremy.johnston@co.kittitas.wa.us, 509-962-7065

Agency File Number: SE-20-00003 Brown and Jackson

Description of proposal – Brown & Jackson, Inc. is proposing the construction of two storage ponds to hold septage that they pump from a variety of commercial and residential sources. The proposal also includes disking of solid waste materials on the subject property. The project is proposed on a site that is zoned Agricultural 20.

Location of proposal - Tax parcel 295134, located approximately 9.5 miles Northeast of the City of Ellensburg in the SE 1/4 of SW 1/4, Section 34, Township 18N, Range 20E, in Kittitas County, bearing Assessor's map number 18-20-34000-0011.

Applicant Contact: Brown and Jackson, Rikki Schmitt, 509-925-1564, rikkischmitt1@gmail.com

Kittitas County CDS has determined that this proposal is likely to have a significant adverse impact on the environment. An environmental impact statement (EIS) is required under RCW 43.21C.030 (2)(c) and will be prepared. An environmental checklist or other materials indicating likely environmental impacts is attached to this notice.

The lead agency has identified the following areas for discussion in the EIS:

- 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

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Kittitas County CDS

Scoping: Agencies, affected tribes, and members of the public are invited to comment on the scope of the EIS. You may comment on alternatives, mitigation measures, probable significant adverse impacts, and licenses or other approvals that may be required. The method and deadline for giving us your comments is:

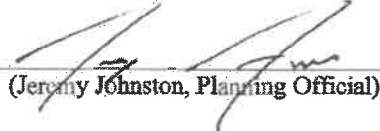
Please send all comments to jeremy.johnston@co.kittitas.wa.us or mail to:

Community Development Services
ATTN: Jeremy Johnston
411 N Ruby St, suite 2
Ellensburg, WA 98926

All comments must be received by 5pm on Thursday August 5, 2021

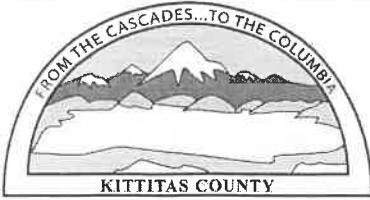
Jeremy Johnston, jeremy.johnston@co.kittitas.wa.us, 509-962-7065:

Signature


(Jeremy Johnston, Planning Official)

Date: July 13, 2021

Appeal process: Pursuant to Chapter 15A.07.010 KCC, this DS may be appealed by submitting specific factual objections in writing with a fee of \$1550.00 to the Kittitas County Community Development Services office at 411 North Ruby Street, Suite 2, Ellensburg, WA 98926. Timely appeals must be received no later than 5:00pm, July 29, 2021. Aggrieved parties are encouraged to contact Community Development Services at (509) 962-7065 for more information on appeal process.



KITTITAS COUNTY
COMMUNITY DEVELOPMENT SERVICES

Receipt Number: CD21-02556

411 N. Ruby St., Suite 2
Ellensburg, WA 98926
509-962-7506 / <https://www.co.kittitas.wa.us/cds/>

Payer/Payee: BROWN & JACKSON SEPTIC
107 N MAIN ST
ELLENSBURG WA 98926

Cashier: JESSICA CONTRATTO **Date:** 07/23/2021
Payment Type: CHECK (103499)

SE-20-00003 SEPA

<u>Fee Description</u>	<u>Fee Amount</u>	<u>Amount Paid</u>	<u>Fee Balance</u>
Appeal	\$1,550.00	\$1,550.00	\$0.00
SE-20-00003 TOTALS:	\$1,550.00	\$1,550.00	\$0.00
TOTAL PAID:		\$1,550.00	