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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 30770-1-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ABC HOLDINGS, INC., and
CHEM-SAFE ENVIRONMENTAL, INC.,

Appellants,

v.

KITTITAS COUNTY,

Respondent.

BRIEF OF RESPONDENT KITTITAS COUNTY

Kenneth W. Harper
WSBA #25578
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902
(509) 575-0313

Attorneys for Respondent

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Kittitas County Public Health Department ("KCPHD") lawfully issued a notice of violation to a business involved in handling moderate risk waste. The notice was based on the failure of the business, Chem-Safe Environmental, Inc., ("CSE") to possess a solid waste permit. The responsible official with KCPHD, James Rivard, first notified CSE of its obligation to obtain the necessary permit over a year before Mr. Rivard issued the Notice of Violation and Abatement ("NOVA").

CSE elected to appeal the NOVA to a hearing examiner, as allowed by local ordinances of Kittitas County. In proceedings before the hearing examiner CSE admitted that it lacked a solid waste permit. CSE also admitted that the absence of a solid waste permit was a violation of applicable regulations. CSE argued instead that the lack of a permit did not constitute a public nuisance and that, for this reason, the NOVA should have been overturned. The hearing examiner rejected this argument and affirmed the NOVA.

The Kittitas County Code ("KCC") provided for an appeal of the hearing examiner's decision, which CSE pursued. Under the KCC, the appeal proceeded under the Rules for Appeal of Decisions of Courts of Limited Jurisdiction ("RALJ").

The trial court reviewed the certified record from the hearing examiner proceedings. The trial court observed that the facts were not significantly disputed. The trial court did not find that the hearing examiner committed any error of law.

II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL

A. Is a facility that handles moderate risk waste required to obtain and possess a solid waste permit from the local jurisdictional health department?

B. Do admitted facts -- and substantial evidence -- support the hearing examiner's decision upholding the notice of violation and abatement?

C. Whether arguments not raised before the hearing examiner in prior administrative proceedings should be deemed waived?

D. Whether the trial court abused its discretion in denying a motion for clarification filed more than 17 months after an underlying order was issued and which sought to alter the rights determined in said order?

III. COUNTER-STATEMENT OF THE CASE

A. Circumstances of the notice of violation and abatement.

For relevant periods of time, including the period from July 10, 2008, and continuing through January 27, 2011, CSE stored and

managed moderate risk waste at its 400 South Main Street facility in Kittitas, Washington, as a part of a larger operation of collecting moderate risk waste materials and transporting them to disposal facilities. ABR[1] 68.[2] ABC Holdings, Inc., ("ABC") is the owner of the subject property. *Id.*[3] As of January 27, 2011, neither ABC nor CSE had obtained a permit to collect moderate risk waste or operate a moderate risk waste facility on the subject property despite the existence of moderate risk waste on the property. *Id.*[4]

In December 2009, Kittitas County Environmental Health Supervisor James Rivard recognized that CSE did not possess a solid waste permit for its facility even though it was then handling moderate risk waste at that facility. ABR 1, p. 3, ¶ 8; ABR 6. Mr. Rivard sent a letter to CSE dated December 21, 2009, pointing out the need for CSE to obtain a permit to avoid further penalties. ABR 9.

By early 2011, CSE still had not obtained a permit. On January 27, 2011, Mr. Rivard issued the NOVA to ABC and CSE. ABR 40. The NOVA cited specific regulatory violations, prescribed corrective action, ordered compliance, imposed a penalty, and gave notice of

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[1] Pursuant to RAP 9.1(e), the record of proceedings considered by the trial court on appeal from the hearing examiner has been certified. This brief follows the nomenclature of CSE in citing to this record as "ABR" for "appellate board record."
[2] Hearing examiner findings of fact nos. 1 and 4.
[3] Hearing examiner finding of fact no. 3.
[4] Hearing examiner findings of fact nos. 5 and 6.

appeal rights. *Id.* On February 10, 2011, Mr. Sky Allphin, president of CSE and treasurer of ABC, appealed the NOVA. ABR 48. In the notice of appeal Mr. Allphin stated that the NOVA was defective because: it was issued at a time when CSE was negotiating with the Washington State Department of Ecology ("DOE") regarding the issue of secondary containment of potential spills of waste; the NOVA's prescribed corrective actions did not relate to a violation cited in the NOVA; and the NOVA listed other deficiencies that Mr. Allphin believed to be improper. *Id.* Some of the contentions raised by Mr. Allphin related to labeling and shipping matters. *Id.* The NOVA did not address labeling and shipping violations, but found violations of applicable regulations due to the failure of CSE to possess the requisite permit from KCPHD. ABR 40.

Also on January 27, 2011, Mr. Rivard and the KCPHD Health Officer, Mark Larson, M.D., issued a health order to CSE pursuant to KCC 13.75.010. ABR 41. The health order was followed later the same day by an amended health order. ABR 43. As amended, the health order required that CSE suspend all operations until a solid waste permit was issued by KCPHD. *Id.* The amended health order also required testing for contamination and compliance with all other applicable regulations. *Id.*

Pursuant to KCC 13.75.070(1), the health order was appealable to the Kittitas County Board of Health. If not appealed, a health order is final and binding. KCC 13.75.040. CSE never appealed the health order.

B. The appeal to the hearing examiner.

Pursuant to KCC 18.02.030(6), CSE's appeal of the NOVA was assigned to the Kittitas County hearing examiner. In its opening brief to the hearing examiner, CSE identified the issues on appeal as: 1) whether the lack of a permit was a public nuisance; and 2) whether there was a public nuisance justifying the issuance of the NOVA. ABR 56, p. 7.

During the hearing, CSE's violation of the permit requirement was never in doubt, and CSE explicitly acknowledged its violation of this requirement several times. In its brief to the Hearing Examiner, CSE acknowledged that "[t]he Health Code contains as a requirement a Permit for the operation of a moderate risk waste handling facility." *Id.*, p. 8. CSE's brief also stated: "[s]ince violations admittedly include operating without a permit where one is required, Mr. Rivard had the authority to issue a notice to CSE that it was committing a violation and that it was required to correct the violation." *Id.*, pp. 11-12. CSE's

brief stated that its operations were legal "subject to permitting." *Id.*, p. 15.

The hearing examiner convened a hearing on CSE's appeal on April 28, 2011. ABR 68.[5] At the appeal hearing CSE's lawyer disputed the necessity to implement secondary containment measures to guard against leaks of waste. CP[6] 62-73. CSE argued that inspection reports prepared by Mr. Rivard preceding the NOVA did not "reveal a significant number of violations." CP 67. CSE did not dispute that CSE lacked a permit necessary to operate as a moderate risk waste facility. CP 73. CSE conceded that because its facility did not have a permit, the County or DOE "absolutely…has a right to shut it down." CP 73. CSE's lawyer acknowledged that "[a] permit ultimately is-is required for the activity." CP 77.

The lawyer for the County pointed out that a declaration of Mr. Rivard submitted to the hearing examiner made reference to a drum observed at the CSE facility that Mr. Rivard initially believed contained "P016."[7] Mr. Rivard identified P016[8] as typically a dry cleaning waste. ABR 1, p. 9, ¶ 45. The County's lawyer explained to the hearing examiner that Mr. Rivard's understanding of the label was mistaken

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[5] Hearing examiner finding of fact no. 12.
[6] "CP" identifies clerk's papers per designation filed May 11, 2012.
[7] CP 56-57.
[8] "P016" represents a hazardous waste number designated by 40 C.F.R. § 261.33 (1980).

and that it actually listed "D016." CP 56. The County's lawyer stated to the hearing examiner that D016 was also listed as a dangerous waste per WAC 173-303-090(8)(c) and at 40 C.F.R. § 261.21. *Id.*

The County argued that confusion over the "P016" versus "D016" issue was itself an indication that the subject label was not legible. CP 57. Because the subject label is poorly reproduced in the clerk's papers (CP 349) Mr. Rivard's photograph of the label is attached in color at Appendix A, p. 6.

In a supplemental declaration dated March 24, 2011, Mr. Rivard explained that D016 was also deemed a hazardous waste. ABR 59.

The identification error regarding the label was also the subject of a supplemental brief filed by CSE. ABR 60. In the brief, CSE acknowledged that "[a]lthough the issue is irrelevant to the issuance of the notice of violation" it was relevant "to show the lack of factual basis for both the notice of violation and stop work order beyond the obvious issue with the floor and the pending permit application." *Id.*, p. 2. CSE argued that Mr. Rivard's supplemental declaration was irrelevant and should be stricken even while admitting that it was "superficially correct as to the identification of the material…." *Id.*, p. 5.

After the close of the hearing and following submission of all supplemental briefing, the hearing examiner affirmed the NOVA. ABR 68. The hearing examiner listed 29 findings of fact (not counting sub-parts) and 14 conclusions of law. *Id.*

The hearing examiner found that CSE "did not dispute that it has been operating during the period of investigation by Mr. Rivard without the required license and/or permit." *Id.*[9] The hearing examiner found that "[t]he evidence is that the appellant collects waste, including moderate risk waste on-site, [and] stores such waste for varying amounts of time before transporting the waste to off-site collection facilities." *Id.*[10] The hearing examiner found that rather than disputing "that they operated without the required license/permit" CSE "instead focused on challenging the correctness of the alleged labeling and/or shipping incidents described in the Declarations of Mr. Rivard." *Id.*[11] Other findings of fact included the finding that the floor at the CSE facility "is cracked and shows other forms of deterioration that most likely was caused by unknown chemicals." *Id.*[12] "These unknown chemicals spilled on the flooring may pose a risk to the public's health, safety and welfare. Testing of this flooring is necessary to determine

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[9] Hearing examiner finding of fact no. 18.
[10] Hearing examiner finding of fact no. 24.
[11] Hearing examiner finding of fact no. 25.
[12] Hearing examiner finding of fact no. 23; *see also* record items cited at ABR 54, pp. 5-7.

whether or not the flooring contains hazardous waste from chemical releases." *Id.*

The hearing examiner concluded as a matter of law that the CSE facility required a permit from KCPHD. *Id.*[13] The hearing examiner also concluded that the County had established the existence of the violation cited in the NOVA due to the unpermitted moderate risk waste facility on the property. *Id.*[14] The hearing examiner concluded that the same constituted a public nuisance. *Id.*[15]

CSE moved for reconsideration. ABR 71. CSE argued that it was entitled to operate without a permit during the period that it was working toward compliance. *Id.*, pp. 2-7. CSE also argued other theories in support of reconsideration including: estoppel; the connection between the NOVA and a finding of public nuisance; and the existence of "questionable deficiencies" regarding shipping and labeling. *Id.*, pp. 7-17. CSE again argued to the hearing examiner that Mr. Rivard's interpretation of the particular waste label as P016 rather than D016 was in error. *Id.*, p. 17. The hearing examiner denied the motion for reconsideration by order dated May 31, 2011. ABR 69. The hearing examiner found that CSE's motion for reconsideration was a reargument of its position during the hearing. The hearing examiner

[13] Hearing examiner conclusion of law no. 3.
[14] Hearing examiner conclusion of law no. 5.
[15] Hearing examiner conclusion of law no. 13.

concluded that each of CSE's arguments for reconsideration was without merit. *Id.*, p. 2.

By the time of the appeal hearing before the hearing examiner, CSE had ceased operations on the subject property. ABR 68.[16]

C. The appeal to superior court.

By operation of KCC 18.02.030(6) the decision of the hearing examiner was appealable to Kittitas County Superior Court. CSE filed a notice of appeal to the trial court on June 10, 2011. CP 1-3. The notice of appeal did not identify any of the hearing examiner's enumerated findings of fact for purposes of assigning error. *Id.*

CSE acknowledged in its opening brief to the trial court that it operated "by collecting 'moderate risk waste' products from other companies, storing those products short-term within its warehouse facility in Kittitas and then transporting those products and other waste to appropriate disposal facilities." CP 14. It accepted a similar finding of fact of the hearing examiner. CP 15 (citing finding of fact no. 4). CSE stated that it was continuing "to work with KCPHD on permitting issues." CP 20.

The main argument on appeal was CSE's claim that the lack of a permit did not constitute a public nuisance. CP 21-25. In making this

[16] Finding of fact no. 28.

argument, CSE identified conclusions of law 4-11 and conclusion of law 13. CP 21. The only argument of CSE regarding any particular finding of fact was in a footnote, in which CSE disputed the hearing examiner's finding regarding the condition of the facility floor. CP 25 n. 4. On this point CSE did not argue that there was an absence of substantial evidence that the floor was indeed cracked, but only disputed when the floor became cracked and whether there had been any particular chemical spills on the floor. *Id.* CSE contended that the hearing examiner committed an error of law in his determination that a public nuisance existed sufficient to support the NOVA. CP 28-29.

In its reply brief, CSE acknowledged that the appeal proceedings were based on "a closed record" and admitted that "the facts are not significantly disputed." CP 95. CSE did not cite any particular finding of fact of the hearing examiner as lacking substantial evidence. CSE again criticized the hearing examiner's conclusions of law nos. 4-11 and 13. CP 100. CSE stated that "this case turns largely on errors of law" and that the hearing examiner's decision "was erroneous as a matter of law." CP 100.

The trial court issued a memorandum decision dated March 7, 2012. CP 120-127. The court noted CSE's acknowledgement that "the facts are not significantly disputed" and reviewed the record for the

presence of substantial evidence to support the hearing examiner's findings of fact. CP 121-123. The court found that the record contained substantial evidence to support the hearing examiner's findings: that CSE had collected moderate risk waste material on the property before transporting the moderate risk waste to disposal facilities for periods encompassing July 10, 2008, to January 27, 2011; that CSE lacked the necessary permit; that the County was not estopped from enforcing its permit requirement; that the floor of the facility was cracked and deteriorated most likely as a result of unknown chemicals that may pose a risk to the public's health, safety, and welfare; and that testing of the flooring and ground was necessary. CP 121-122.

In an order adopting the memorandum decision, the court further specifically found that each of the hearing examiner's factual determinations "are supported by substantial evidence in the record." CP 135. The court affirmed the hearing examiner's conclusions of law regarding the existence of a public nuisance due to CSE's violation of applicable solid waste permit regulations. CP 123-124; CP 135-136. The court upheld the NOVA. CP 127; CP 136. The court commented on the "broad based overall flagrant permit violation which regulates all aspects of solid waste…." CP 126.

D. Trial court proceedings following affirmance of the NOVA.

1. The stay motion and the contempt order.

CSE filed a notice of appeal to this Court on April 11, 2012. CP 132. With the appeal pending, CSE moved for a stay of enforcement of the trial court's order affirming the NOVA. CP 146-153. CSE requested the stay in an effort to obtain relief from the NOVA's requirement for testing of the facility's floor and ground. CP 147. This requirement was specifically upheld by the trial court. CP 135. In its motion, CSE stated: "[w]hile CSE does not deny that a MRW[17] permit may be required, it avers the DOH has the authority to approve such MRW permits and the procedure under which approval was granted." CP 150. Similarly, CSE stated as follows: "CSE do not contest the right of the DOH and Kittitas County to order the close down of the facility pending perfection of an MRW permit." CP 153.

The trial court initially determined that it lacked jurisdiction to decide the stay motion pursuant to RAP 8.1. CP 284-285. On further consideration of RAP 7.2(h), the court accepted that it was authorized to make a decision on the stay. CP 487. The court found that the issues raised by CSE were not debatable with respect to whether CSE's "violations of permit regulations constitute a public nuisance." CP 482.

[17] "MRW" = "moderate risk waste."

Likewise, the court did not find a debatable issue regarding whether the abatement order should require testing of the concrete floor. *Id.*

Subsequent proceedings in the trial court included a motion for order to show cause why CSE should not be held in contempt of court for its failure to comply with the requirements of the orders of May 14, 2012, and November 5, 2012. CP 493-495. This motion resulted in an order of contempt issued against ABC and CSE for failure to comply with the court's order of May 14, 2012. CP 878-879. The contempt order required CSE to submit a sampling plan and perform testing consistent with the terms of the NOVA. CP 879. Following the contempt order CSE filed its second notice of appeal, dated May 31, 2013. CP 880-881.

2. CSE's motion for clarification.

With the contempt order pending, CSE filed a motion for clarification on November 4, 2013. CP1 6-23.[18] The motion asked the trial court to "clarify" its decision of November 5, 2012, by vacating the affirmance of the hearing examiner. CP1 6. CSE filed this motion 16 months after the court's denial of CSE's motion to stay enforcement of the court's final order to affirm the hearing examiner (dated June 18, 2012 – CP 284-285) and more than 17 months after the underlying final

[18] Again following the nomenclature of CSE, "CP1" identifies clerk's papers per designation filed March 26, 2014.

order itself (dated May 14, 2012 – CP 134-136). This motion included two declarations from Mr. Allphin which, with exhibits, totaled more than 700 pages. CP1 25-631; CP1 840-984.

On February 5, 2014, the trial court issued a memorandum decision on CSE's motion for clarification. CP1 997-1001. In its ruling, the trial court observed that CSE's requested clarification was based upon extensive additional evidence filed after the court's order of May 14, 2012. CP1 997. The court observed that the exhibits to Mr. Allphin's declaration included many documents that had already been reviewed by the court. CP1 1001. The court acknowledged that the court's November 5, 2012, order failed to address an alternative motion of CSE under CR 60 to vacate the court's order of May 14, 2012. CP1 997. The court agreed that its November 5, 2012, (CP 485-488) addressed only CSE's motion for reconsideration pursuant to CR 59 but not CSE's associated motion seeking relief pursuant to CR 60 (CP 289-297). CP1 998.

The trial court disagreed that any of CSE's evidence submitted at the time of its motion under CR 59/CR 60 justified vacating the May 14, 2012, order. CP1 998. The court reached the same conclusion with respect to the voluminous new materials submitted as part of the "clarification" motion. CP1 999.

The court noted that the nature of the relief sought by CSE converted CSE's motion from one seeking clarification to one asking for either reconsideration or to vacate the earlier order(s). CP1 999. The court ruled that the true nature of relief requested by CSE was untimely pursuant to CR 59 and CR 60 with respect to the final order of May 14, 2012 (the actual order which CSE sought to vacate in CSE's motion of June 28, 2012) and insufficient to justify the relief sought by CSE relative to the order of November 5, 2012. CP1 1000-1001.

The court's memorandum opinion also contained formal language indicating an intent to constitute a final disposition of the case. CP1 1001. CSE filed its third notice of appeal to this Court dated February 28, 2014.[19]

E. Soil testing.

Soil sampling, consisting of three soil borings, was conducted at CSE's facility on June 18, 2013. CP1 642. Analytical tests were performed on the soil and the results were summarized in a report dated July 30, 2013. CP1 639-646. Although the report concluded that there had been no chemical release to subsurface soil, the report stated that certain chemicals (oil-range petroleum hydrocarbons, gasoline-range petroleum hydrocarbons, and semi-volatile organic compounds) were

[19] This notice of appeal has been designated as pp. 1017-1024 in a third designation of clerk's papers filed July 25, 2014.

found in the soil above laboratory reporting limits at two of the sampling locations. CP1 643-644.

F. Current status of CSE facility.

Although not currently in operation, the record is devoid of any indication that the CSE facility has been formally closed pursuant to applicable regulations. WAC 173-350-360(8) (notice and verification of closure actions).

G. Unsupported factual statements of CSE.

There is no evidence in the record for the following factual allegations found in CSE's opening brief:

- that any official from KCPHD ever advised CSE that it was not subject to local moderate risk waste permitting requirements. Br. 6.
- that Mr. Rivard ever granted permission for CSE to operate without necessary approvals. *Id.*
- that Mr. Rivard acted in conjunction with representatives of DOE to impose a fine on CSE as "a prelude to closing CSE's operations." Br. 9.
- that DOE employee Richard Granberg stated to Kittitas County Deputy Prosecuting Attorney Suzanne Becker that CSE was authorized to handle moderate risk waste without complying with KCPHD's moderate risk waste regulations. Br. 11.
- that the County or DOE served the NOVA with knowledge of the falsity of the NOVA or with any improper motive. Br. 14.
- That Richard "Granberg handwrote a memo on the 'discovery' [of the drum label that appeared to state P016] and emailed it from Rivard's office to himself." Br. 12.

IV. ARGUMENT

A. Standard of review.

In an appeal from a judicial review of an administrative decision, the appellate court bases its review on the administrative record. *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998), *review denied*, 137 Wn.2d 1004 (1999). Factual findings are reviewed under the substantial evidence standard and conclusions of law are reviewed de novo. *Biermann*, 90 Wn. App. at 821. Questions of mixed law and fact are reviewed under the "clearly erroneous" standard. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 42, 252 P.3d 382 (2011).

CSE has failed to specifically list any assignments of error for any of the findings of fact of the hearing examiner as required by RAP 10.3(g). Those findings are now verities on appeal. *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999) (failure to assign error to findings of fact of trial court resulted in verities); *West Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 214, 48 P.3d 997 (2002) (failure to assign error to factual findings of the hearing examiner resulted in verities between the parties).

Incidentally, it is not entirely clear that CSE is entitled to appeal to this Court as a matter of right. Under RALJ 9.1(h), review of a decision of the superior court on appeal is subject to discretionary review pursuant to RAP 2.3(d). The County will provide supplemental briefing on this issue if requested, but is currently prepared to proceed as if appeal may be taken as a matter of right. RAP 2.1(a)(1).

B. The NOVA was properly issued because CSE lacked the necessary permit.

1. CSE's legal challenge to the permit requirement raises new arguments on appeal and ignores findings of fact made below.

By virtue of previous admissions of CSE, combined with the failure to assign error, there cannot be a dispute that CSE was required to possess a solid waste permit from KCPHD. The need for a permit was never challenged in proceedings before the hearing examiner. Although CSE now argues that KCPHD's permitting jurisdiction did not include CSE, these arguments were also not timely raised before the trial court.

Because the trial court's review invoked appellate (not general or original) superior court jurisdiction, it is particularly important that this Court apply the rule of waiver for arguments on appeal of administrative decisions that were not first raised before the administrative tribunal. *See Citizens for Mt. Vernon v. City of Mt.*

Vernon, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997) ("our cases require issues to be first raised at the administrative level...."); *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) (to be properly raised at the administrative level, there must be more than simply a hint or a slight reference to the issue in the record); *Spokane County v. Utilities & Transp. Comm'n*, 47 Wn. App. 827, 829, 737 P.2d 1022 (1987) (administrative appeal invokes superior court's limited appellate jurisdiction). Requiring resolution of an issue at the administrative level is more than "simply a technical rule of appellate procedure; instead it serves an important policy purpose in protecting the integrity of administrative decision-making." *Pacific Land Partners, LLC, v. Department of Ecology*, 150 Wn. App. 740, 754, 208 P.3d 586 (2009), *review denied*, 167 Wn.2d 1007 (internal quotations omitted).

CSE lacked a permit where one was required. CSE admitted this repeatedly and, consistent with these admissions, did not assign error to the finding that it lacked a required permit. The NOVA was correct in citing a violation due to CSE's lack of a permit. ABR 40. For admissions of CSE on this point, see above at pp. 5-8.

2. CSE was required to have a solid waste permit issued by KCPHD.

Even aside from the failure of CSE to properly assign error and raise issues below, the law requires that this Court reject CSE's arguments.

a. Background of Washington's dangerous waste and solid waste regulatory framework.

CSE's business activities at the facility included the handling of moderate risk waste. Br. 5. "Moderate risk waste" is defined as a solid waste (identified by reference to WAC 173-303-016) that is household waste or conditionally exempt small quantity generator waste. RCW 70.105.010(13). Put differently, moderate risk waste exhibits properties of hazardous waste but is conditionally exempt under the state's dangerous waste regulations at WAC 173-303-070(8) (for small quantity generators) and at WAC 173-303-071(3)(c) (as to household waste). Moderate risk waste is regulated as a solid waste, even though it can be chemically identical to materials that are regulated as dangerous wastes if generated in large quantities by non-household sources. Moderate risk waste falls under the purview of solid waste handling authority. Ch. 70.95 RCW.

A key purpose of Chapter 70.95 RCW, Solid Waste Management--Reduction and Recycling, is the establishment of a scheme in which local health departments are given authority to permit solid waste facilities. *See* 23 Tim Butler & Matthew King, *Washington Practice: Environmental Law and Practice* § 13.1 (2014).

Consequently, Chapter 70.95 RCW emphasizes the role of local governments in the administration of solid waste management. *See, e.g.*, RCW 70.95.010(6)(c) (legislative finding that "county and city governments [are] to assume primary responsibility for solid waste management"); RCW 70.95.020(1) (stating purpose of chapter "[t]o assign primary responsibility for adequate solid waste handling to local government.").

Perhaps most importantly, RCW 70.95.160 directs jurisdictional boards of health to adopt regulations governing solid waste handling "including but not limited to the issuance of permits and the establishment of minimum levels and types of service for any aspect of solid waste handling." This statute also allows local implementing regulations or ordinances to "be more stringent than the minimum functional standards adopted by the department [of Ecology]." *Id.*

State law prohibits any solid waste handling facility from operating in the absence of a permit issued by the relevant jurisdictional

health department. RCW 70.95.170; *see also* RCW 70.95.180(4) ("when the jurisdictional health department finds that the permit should be issued, it shall issue such permit."); RCW 70.95.190 (jurisdictional health department renewal of solid waste permit contingent upon review as deemed necessary to assure that any facility "continues to meet minimum functional standards of the department, applicable local regulations, and are not in conflict with the approved solid waste management plan.").

b. Local regulations governing solid waste, including moderate risk waste.

The County -- through its board of health -- has adopted regulations governing the handling of solid waste pursuant to Chapter 173-350 WAC. The applicable regulations were adopted as ordinance number 1999-01, dated July 15, 1999 (hereafter the "local regulations"). ABR 5.

The local regulations state that their purpose is to "govern the handling, storage, collection, transportation, treatment, utilization, processing and final disposal of all solid waste within Kittitas County, including the issuance of permits and enforcement." ABR 5, p. 1, § I. The regulations are implemented by a general permit process: "...all solid waste handling, storage, collection, transportation, treatment, utilization, processing, recycling, recovery, and final disposal facilities

subject to these regulations are required to obtain permits." *Id.*, p. 22, § VI(A)(1)(a). This section further specifies that "no solid waste disposal site or facility, solid waste handling facility, shall be operated, established, substantially altered, expanded or improved until the county, city or other person operating or owning such site has obtained a Solid Waste Handling Permit from the Health Department pursuant to the provisions of this section." *Id.*, p. 23, § VI(A)(2). The applicable permit is to be issued by the jurisdictional health officer. *Id.*, p. 24, § VI(A)(2)(a)(8).

The local regulations require that all moderate risk waste facilities comply with minimum standards regarding closure as set forth in WAC 173-304-407(1) – (5). *Id.*, p. 38, § VI(I)(3)(b). These regulations require a formal closure plan that meets designated performance standards and that implements post-closure monitoring. WAC 173-304-407.

In the event of any conflict within the local regulations, or between the local regulations and state regulations (including Chapter 173-350 WAC), "the more stringent shall apply." *Id.*, p. 40, § VII(A)(2).

c. Coverage of moderate risk waste handling and permit regulations.

In its opening brief CSE repeatedly makes reference to the fact that it possessed an "EPA/state ID #." Br. 1, 5, 9, 10 n. 10, 19, 30 and 46. This is a form of identification for purposes of registering and tracking waste during transportation. WAC 173-303-060(1). An EPA/state ID # is required for persons who generate, transport, offer for transport, or transfer dangerous waste, or who own or operate a dangerous waste treatment, storage, or disposal facility. WAC 173-303-060(1).

But, contrary to CSE's arguments, nothing in the dangerous waste regulations (Chapter 173-303 WAC) exempts any person from otherwise-applicable requirements solely by possession of an EPA/state ID #. Nothing in the text of CSE's actual registration documents states any such thing. CP 858-859. More importantly for the present case, the solid waste handling regulations (Chapter 173-350 WAC) make no reference whatsoever to a person's or facility's status relative to possession of an EPA/state ID #. Likewise, the local regulations of KCPHD make no reference to this concept, and particularly do not establish an exemption from solid waste permit requirements on this basis. ABR 5. It should be noted that an EPA/state ID # is also not a dangerous waste permit, as may be issued by DOE. *See* WAC 173-

303-800. While CSE has never claimed that it possessed at any relevant time a dangerous waste facility permit, it has obscurely contended that its possession of an EPA/state ID # somehow obviates the need for a solid waste permit. There is no basis for this contention.

First, an EPA/state ID # is in no way a permit for anything. It is a number for purposes of tracking -- nothing more. Second, its relevance as a tracking number is for the management and transport of dangerous waste. It has no relevance to the regulation of solid waste handling. It has no relevance for the permitting requirements for solid waste facilities. Although the regulatory framework for dangerous waste has certain points tangentially in common with that of solid waste, solid waste regulations function on a fundamentally different basis pursuant to separate statutory authority. There is no regulatory basis for CSE's contention that an EPA/state ID # constitutes some form of exemption from the applicability of state and local solid waste regulations.

CSE argues in error that state and local solid waste regulations do not apply to a moderate risk waste facility whose operator also uses the same facility to support its dangerous waste transfer/transporter operations. Br. 17-18. The essential point of CSE's argument is found in its erroneous analysis of WAC 173-350-360(1)(a) and (b).

CSE's reliance upon its interpretation of WAC 173-350-360 pervades its briefing. CSE cites this regulation to justify its view that it was exempt from state and local solid waste regulations 17 times in its brief. Br. *passim*. CSE cites no other provision of state law or regulation for this premise.

The problem with CSE's core argument is that WAC 173-350-360 does not operate as a basis for exempting moderate risk waste facilities from moderate risk waste permit requirements prescribed elsewhere in Chapter 173-350 WAC. Further, WAC 173-350-360 has no effect at all on the applicability of a local regulation such as KCPHD Ordinance 1999-01, which is independently applicable pursuant to state authorization at RCW 70.95.160.

CSE misreads the text of 173-350-360(1)(a) and (b). This regulation defines when certain moderate risk waste handling obligations apply. In addition to the moderate risk waste handling obligations, any moderate risk waste facility must obtain a permit from the local jurisdictional health department. WAC 173-350-700(1)(a); *see also* local regulations at § VII(a)(1)(a).

The text of WAC 173-350-360 does not support CSE's argument for other reasons aside from its relationship to the overall dangerous waste and solid waste regulatory framework. First, the text

of WAC 173-350-360(1)(a)(i) makes the regulation applicable to any *facility* that accepts solid waste categorized as moderate risk waste. Unchallenged findings of fact, together with admissions of CSE in lower proceedings and in CSE's opening brief here, establish that CSE operated a facility that accepted moderate risk waste.[20] Delving into the regulation further, the provision at subsection (1)(a)(ii) makes the regulation's handling requirements obligatory for persons storing moderate risk waste for more than ten days at a single location. CSE stored moderate risk waste for more than ten days at its facility in Kittitas. ABR 57, p. 2, ¶ 5; *see also* photographs of labels showing accumulation dates at ABR 7, ABR 24, and ABR 39, all of which are also reproduced as color images at Appendix A.

Conversely, the waste handling requirements are inapplicable pursuant to (1)(b)(i) under three circumstances. In reverse order, the handling regulations are inapplicable to conditionally exempt small quantity generators managing their own wastes. WAC 173-350-360(1)(b)(iii). It is an unchallenged finding of fact that CSE was not a small quantity generator managing its own waste. ABR 68.[21] The waste handling requirements are also inapplicable to universal waste (a defined term that mainly describes batteries, fluorescent light tubes, and

[20] See above at pp. 5-8.
[21] Hearing examiner finding of fact no. 24.

certain forms of lamps). *See* WAC 173-303-045. CSE has never claimed that it dealt only in universal waste. Lastly, the waste handling requirements are inapplicable to *persons transporting* moderate risk waste in a manner compliant with the regulations governing shipments of manifested dangerous waste. WAC 173-350-360(1)(b)(i).

However, CSE's position that its transfer/transporter status exempts it from also being a "facility" is patently incorrect. CSE was not merely a "person transporting" moderate risk waste. CSE has also maintained a "facility" that accepted and stored moderate risk waste for extended periods of time. The definition of "MRW facility" encompasses any "solid waste handling unit" that is engaged in, among other things, the "transfer [of] moderate risk waste." WAC 173-350-100. And any MRW facility must be permitted. WAC 173-350-360(10). This topic was made the subject of findings of fact by the hearing examiner and is also acknowledged in CSE's opening brief here. ABR 68.[22]

In short, the text of WAC 173-350-360 does not support CSE's arguments. Although the solid waste regulations are complicated, careful study of their terms will show that there is no implicit or explicit exemption for CSE. Functionally, the very purpose of WAC 173-350-

[22] Hearing examiner finding of fact 4. *See also* Br. 1, 5.

360 is to regulate moderate risk waste handling at all facilities. The suggestion that a business may not be required to implement the regulation's detailed requirements for facility design standards, operating standards, and personnel training, makes perfect sense if the business is engaged *only* in transporting moderate risk waste as required of dangerous waste. WAC 173-350-360(1)(b)(i). CSE was not such a business. It is implausible that the central purpose of this regulation, i.e., the management of *facilities*, may be rendered inapplicable by a business' parallel transporter activity. CSE's conclusion would mean that there are no facility standards at all for its business.

There are other problems for CSE's interpretation, including CSE's disregard of the general applicability of a local health department permit obligation established at WAC 173-350-700. The local regulations are applicable to all facilities engaged in any manner of solid waste handling. *See* WAC 173-350-360(10) and local regulations at § VII(a)(1)(a). KCPHD was authorized to adopt its regulations without merely mirroring Chapter 173-350 WAC because RCW 70.95.160 granted authority for the local regulations to "be more stringent than the minimum functional standards adopted by the

department [of Ecology]." *See also* WAC 173-350-700(2). This enabling legislation extends to "the issuance of permits." *Id.*

d. There is no authority to support CSE's claim of an implied exemption for moderate risk waste facilities.

CSE is incorrect in arguing that KCPHD's authority to issue a solid waste permit stems from WAC 173-350-360. Br. 17. CSE claims that "it is clear that any transfer/transporter compliant with [the manifest] documentation requirement and shipping mixed loads of DWs and MRWs will be categorically exempt from MRW facility permitting…requirements." Br. 19. Although this contention may be "clear" to CSE, it is indisputable that CSE cites no authority for this sentence. CSE appears to contend that there is an implicit exemption lurking somewhere in the relationship between Chapter 70.105 RCW and Chapter 70.95 RCW or, perhaps, between Chapter 173-303 WAC and Chapter 173-350 WAC. Given the heavily regulated nature of dangerous waste and solid waste in Washington, the idea of an implicit exemption must fail.

A similar contention was examined and rejected in a 1993 Attorney General opinion. Although not controlling, Attorney General opinions are given "considerable weight." *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.,* 109 Wn.2d 819, 828, 748 P.2d 1112 (1998).

The Attorney General was asked, in part, whether local health board jurisdiction regarding the management of moderate risk waste was preempted by Washington's hazardous waste management statutes at Chapter 70.105 RCW. 1993 Op. Att'y Gen. No. 1. Although the Legislature "expressly preempted" local authority regarding hazardous waste, the Attorney General found no similar preemption regarding moderate risk waste. *Id.* at 6 (citing RCW 70.105.005(8)).

In its opinion, the Attorney General pointed out that local health boards are governed by Chapter 70.05 RCW and derive police power from article 11, section 11 of the Washington Constitution, which provides: "Any county, city, town, or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." 1993 Op. Att'y Gen. No. 1, at 1. The Attorney General further pointed out that "the Legislature also envisioned a significant role for local government. An express purpose of chapter 70.105 RCW is to promote cooperation between state and local governments by assigning planning responsibilities for hazardous waste to the state and similar responsibility for moderate-risk waste to local governments." *Id.* at 2.

CSE's core argument regarding a lack of jurisdictional authority of KCPHD to issue the NOVA must be rejected.

C. The NOVA was properly issued because Mr. Rivard knew that CSE lacked the necessary permit.

CSE's opening brief devotes slightly more than one page to the argument that Mr. Rivard lacked a reasonable belief that CSE's operation without a solid waste permit constituted a public nuisance. Br. 25-27. This argument is difficult for CSE mainly because, as noted above, there can be no dispute that CSE lacked the requisite permit.

CSE argues that because Mr. Rivard allegedly was wrong in believing that a public nuisance existed, the NOVA is invalid. Br. 26. But the local ordinance cited by CSE does not make Mr. Rivard's state of mind relevant to sustaining the NOVA. KCC 18.02.030. Nor does the ordinance require showing that Mr. Rivard's state of mind comported with the actual legal definition of "public nuisance."

The state of knowledge of Mr. Rivard, if relevant at all, was a matter of his "reasonable belief" which is a question of fact. KCC 18.02.030(1); *see also Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 567, 27 P.3d 1208 (2001) (fact issue regarding state of knowledge). Although any requisite knowledge of Mr. Rivard was met because CSE indeed had no permit, the absence of any specific finding of fact on this point to the contrary makes it impossible for CSE to now argue otherwise. *See Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 526, 844 P.2d 389 (1993) (finding of fact inferred against

party with burden of proof); *see also* KCC 18.02.030(5)(c)(i) ("...in all cases where a license or permit is required but has not been issued, the burden shall be on the applicant to establish that the application meets all applicable criteria or that a license or permit is not required.").

D. CSE's argument regarding the law of public nuisance is irrelevant and incorrect.

CSE's criticism of the state of knowledge of Mr. Rivard is developed further in CSE's related argument that Mr. Rivard could not have had a reasonable belief that CSE's operation constituted a public nuisance because, as a matter of law, the operation of CSE's facility in the absence of the required permit was not a public nuisance. Br. 27-30. CSE particularly argues that the hearing examiner failed to make a finding or reach a conclusion regarding the presence of "a statutory or common law public nuisance." Br. 29.

For reasons set forth above, the County disagrees that CSE can overturn the decisions below by attacking Mr. Rivard's state of mind. To reiterate, Mr. Rivard's state of knowledge regarding the specific legal nature of public nuisance was not an element of upholding the NOVA. *See* KCC 18.02.030(1). To the extent this was a requirement, a finding of fact adverse to CSE may be inferred. *Xieng*, 120 Wn.2d at 526. Nor was such a finding even necessary given the admitted violation by CSE.

As a purely legal matter, pursuant to KCC 18.01.010(1)(k) any violation of the Kittitas County health ordinances and codes, "including but not limited to, Solid Waste Ordinance(s)" constitutes a public nuisance. The hearing examiner reached this conclusion. ABR 68.[23] So did the trial court. CP 482 (issue "not debatable"); CP1 999 ("Chem-Safe maintained a public nuisance.").

CSE argues that the examiner's conclusion of law no. 13 is flawed because of its reliance on Mr. Rivard's "observation of the presence of dangerous and/or hazardous waste as well as labeling and storage violations...." Br. 26. CSE opaquely argues that Mr. Rivard's observations cannot be considered a basis for issuance of the NOVA because the violations were not set forth in the NOVA. CSE cites no authority for this proposition. Br. 26-27. Contrary to CSE's argument, it was an entirely sufficient basis for the hearing examiner to uphold the NOVA due to the absence of a permit. ABR 40. This Court may affirm the trial court's affirmance of the hearing examiner on any correct ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

CSE also argues that its permit violation could not be a public nuisance because of the confounding claim that CSE did not need a

[23] Conclusions of law nos. 4, 5, 11, and 13.

solid waste permit at all. Br. 28. This argument was disposed of above, for reasons that will not be repeated here.

CSE's argument is wrong as a matter of nuisance law. In a footnote, CSE attempts to support its argument with a discussion of *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 720 P.2d 181 (1986). Br. 29 n. 39. The trial court addressed the *Kev* decision and disagreed with CSE's interpretation of that opinion in its memorandum decision of March 7, 2012. CP 124.

In *Kev*, an ordinance of Kitsap County deemed any violation of the county's regulations of erotic dance studios to also be a public nuisance. *Kev*, 106 Wn.2d at 138. Because of the court's reluctance to interfere with the legislative prerogative of the county commissioners, the court accepted the determination that a violation of the pertinent ordinance itself was an injury to the community. *Id.* at 139.

The *Kev* court discussed whether the violation of the ordinance at issue had a tendency to interfere with the comfort, repose, health, or safety of others, but specifically noted that this analysis was "[e]ntirely aside from [the legislative determination] and the ordinance violations…." *Id.*

Here, language of the Kittitas County Code virtually mirrors the county regulations accepted as sufficient in *Kev*. *See* KCC

18.01.010(1)(a) – (k) (listing solid waste ordinances, among others, as ordinances and codes "the violation of which either injures or endangers the comfort, repose, health, or safety or others [and] are hereby declared a public nuisance.").

In the same footnote containing its entire discussion of *Kev*, CSE apparently intends to distinguish *Kev* by pointing out that *Kev* dealt with injunctive relief as opposed to the "penal remedy" of the NOVA. Br. 29 n. 39. CSE cites no authority for this argument, which was not an argument raised before the hearing examiner. ABR 56, ABR 60, ABR 63, ABR 71.

Ample alternative justification for a finding of public nuisance is supported by substantial evidence in this case. A finding that CSE's operation constituted a nuisance is supported by CSE's lack of secondary containment at its facility. Mr. Rivard's declaration cited an absence of secondary containment for moderate risk waste at the CSE facility. ABR 1, p. 4, ¶ 8. The local regulations require secondary containment to capture and contain releases and spills of wastes. ABR 5, p. 38, § VI(I)(3)(a)(6). In conjunction with the hearing examiner's finding that the facility had a cracked and deteriorated floor, this lack of secondary containment justifies a conclusion that CSE's facility was a

public nuisance because of the resulting potential risk to the public's health safety and welfare. ABR 68.[24]

As noted by the trial court in responding to CSE's motion for clarification, CSE's poor labeling practice, as evidence by the confusion over the correctness of the P016 or D016 label, supported labeling and storage violations justifying a public nuisance. CP1 999.

E. CSE was not deprived of due process and the County was not estopped from issuing the NOVA.

As its final point challenging the NOVA, CSE makes an argument based on estoppel. Br. 32-35. The gist of CSE's argument is that Mr. Rivard consented to CSE's operation in the absence of the requisite permit. Br. 34. To support this argument, CSE claims "specific Constitutional protections against retroactive penalties" and vaguely asserts that "due process requirements have not been met." Br. 34.

1. CSE was not deprived of a protected property interest without notice and an opportunity to be heard.

CSE's due process allegations appear to relate to the procedural due process guarantees of the United States Constitution and the Washington State Constitution. Br. 34. Although similar arguments were raised before the hearing examiner (ABR 63, pp. 13-15), these

[24] Finding of fact no. 23.

arguments were scarcely presented, if at all, to the trial court. CP 13-29; CP 94-109. Entirely aside from CSE's waiver problem, the constitutional arguments are meritless.

The fundamental requirements of procedural due process are notice and opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Due process must be afforded prior to deprivation of a protected property interest. U.S. Const. amend XIV; Washington Const. art. I, § 3. Procedural due process is not a fixed standard, but a relative concept changing in form, providing that process of law which is due in each circumstance. *Reilly v. State of Washington*, 18 Wn. App. 245, 250, 566 P.2d 1283 (1977).

There are key flaws in CSE's due process argument. First, CSE was of course provided notice and an opportunity to be heard regarding the NOVA. That was precisely the function served by the appeal to the hearing examiner. Second, CSE's argument fails because the NOVA did not deprive CSE of any constitutionally protected property interest. *See Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (protected property interest based on entitlement under state law). Because CSE was required to obtain a permit, the NOVA did not cause a deprivation of a permitted activity of CSE.

If CSE intended to argue that the NOVA itself impaired a protected property interest, then this argument fails, too. A notice of violation, even if final, "is not the type of encumbrance that constitutes a significant property interest giving rise to procedural due process." *Cranwell v. Mesec*, 77 Wn. App. 90, 111, 890 P.2d 491 (1995), *review denied*, 127 Wn.2d 1004. The holding of *Cranwell* refutes CSE's position that the NOVA itself implicated a property interest giving rise to due process requirements.

CSE's due process arguments cite two cases: *Int'l Bhd. of Elec. Workers Local Union No. 46 v. Mitchell*, 98 Wn. App. 700, 703-05, 990 P.2d 998 (2000), and *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 10-12, 959 P.2d 1024 (1998). Neither case has anything to say about the relationship between due process and protected property interests in a context similar to this case.

It should also be noted that the NOVA did not deprive CSE of anything. It only required CSE to take action in accordance with its terms "**or** pay the required appeal fee and request an appeal hearing." ABR 40, p. 3 (emphasis in original).

There was no deprivation of any constitutionally protected property interest of CSE unaccompanied by due process safeguards. This Court should reject CSE's due process argument.

2. CSE's estoppel claim is without merit.

In a related portion of its brief, CSE argues that Mr. Rivard provided assurances upon which CSE relied. Br. 35. This argument of CSE is foreclosed, however, by specific findings of fact made by the hearing examiner, and accepted by the trial court, to the effect that any concession by Mr. Rivard allowing CSE to operate during the permit application process did not constitute an estoppel or a waiver of otherwise-applicable regulations. ABR 68.[25]

As a point of law, CSE's estoppel argument fails because estoppel can only be invoked against the government upon a showing of clear and convincing evidence of specified elements, including proof that estoppel will not impair governmental functions. *Kramarevcky v. Dep't of Soc. & Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). CSE made no such showing below. Because the gravamen of Washington solid waste regulations is the delegation of authority to local jurisdictions to impose permit requirements, CSE's version of estoppel would directly conflict with the exercise of an important governmental function and must be rejected.

[25] Findings of fact nos. 20, 21, and 22.

F. The abatement terms of the NOVA are not a taking.

CSE suggests that the County's NOVA may constitute a taking. Br. 37. CSE provides no substantive argument on this point.

CSE's claims in this section of its brief are not developed in any meaningful sense (nor were they below) and do not demonstrate that they relate to manifest error affecting any constitutional right. CSE's citations to United States Supreme Court takings precedents, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013), are inapposite. The *Koontz* holding applies only in the context of the land use permit process where a governmental approval is conditioned upon coercively compelling a landowner to give up property. *Koontz*, 133 S.Ct. at 2603. The present case is not like *Koontz* or any other development exaction case because the present matter is one of regulatory permit enforcement. There has been no *quid pro quo* of a government benefit in exchange for conferral of private property to the government.

G. The trial court committed no abuse of discretion in denying CSE's motions under CR 59 and CR 60.

1. The trial court was fully apprised of the facts.

The trial court's ruling on CSE's motion for clarification, which also effectively denied CSE's motions for reconsideration and to vacate the prior orders of May 12, 2012, and November 5, 2012, must be

reviewed for abuse of discretion. *See Ma'ele v. Arrington*, 111 Wn. App. 557, 559, 45 P.3d 557 (2002) (CR 59 motion for a new trial reviewed for abuse of discretion); *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978) (decision on motion to vacate should be overturned on appeal only upon abuse of discretion).

CSE bases its theory of abuse of discretion on what it refers to as "Rivard's recant." Br. 39. CSE implicitly acknowledges that the absence of a permit was an issue before both the hearing examiner and the trial court that was independent of Mr. Rivard's testimony on labeling. As discussed above, the absence of a permit was an entirely sufficient basis to uphold the NOVA.

CSE's argument is also misguided because CSE's brief has literally nothing to say about the trial court's discussion of the effect of Mr. Rivard's first declaration. The trial court discussed the effect of Mr. Rivard's first declaration extensively in its ruling of February 5, 2014. CP1 997-1001. Perplexingly, CSE claims that the trial court should have considered the effect of any error in Mr. Rivard's first declaration "as to its substantive relevance to the issues or as an equitable bar to Respondent's position in the matter." Br. 41. However, the trial court's ruling of February 5, 2014, demonstrates that

the trial court did exactly what CSE now raises as a criticism. CP1 997-1001.

The trial court made clear that it did not rely to its detriment upon any purportedly false statement of Mr. Rivard. CP1 999. For this reason CSE's theory of judicial estoppel must also fail. *See Falkner v. Foshaug*, 108 Wn. App. 113, 125, 29 P.3d 771 (2001) (for judicial estoppel to apply, inconsistent position first asserted must have successfully convinced the court to accept its position).

Although the trial court pointed to issues of untimeliness in CSE's motion for clarification, the court explicitly mentioned the issue of a mistake in Mr. Rivard's first declaration. The trial court found that the error was revealed at the administrative hearing level and concluded that the "substantive relevance" of the issue "would not change this court's decision to affirm the hearing examiner's determination that labeling of storage violations occurred and that Chem-Safe maintained a public nuisance." CP1 999. This analysis by the trial court demonstrates that it did not abuse its discretion in denying CSE's CR 59 and CR 60 motions.

2. The motions were untimely.

CSE apparently has no argument regarding the untimeliness of the motions raised in its request for clarification. Any motion brought

under CR 59 "shall be filed not later than 10 days after entry of the judgment." CR 59(h). The trial court correctly found that CSE's CR 59 motion was untimely. CP1 1000.

Any request for relief pursuant to CR 60(b)(1) - (3) is timely only if it is filed within a reasonable time and not more than one year from the decision at issue. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 310, 989 P.2d 1144 (1999), *review denied*, 140 Wn.2d 1026. The one-year provision fixes the outer-most limit in time for the making of the motion.

The trial court concluded that CSE's motion under CR 60 related to the court's ruling of May 14, 2012, upholding the hearing examiner. CP1 999-1000. Because the CR 60 motion was filed more than one year from the challenged decision, it was untimely and properly denied. CP1 100.

The court also analyzed the timeliness of CSE's motion under CR 60 relative to the decision of November 5, 2012, in which the trial court denied CSE's motion for reconsideration of the court's decision to deny CSE's motion to stay. CP1 999. Although noting that the CR 60 motion was technically filed within one year of the November 5, 2012, order, the court found no basis to support setting aside the challenged order. CP1 1000-1001. The court found CSE's

"generalized statements regarding...new 'records'" to lack "specificity as to how any of the information changes what has been presented...." CP1 1000-1001. To the extent that CSE's CR 60 motion claimed the presence of new evidence, the court found that none of the new materials supported setting aside the judgment. CP1 1001.

CSE's motion for clarification was near-frivolous. In truth, CSE did not seek "clarification" but rather a substantive alteration of the rights of the parties as previously settled more than a year earlier. Although a trial court may entertain a motion to clarify at any time, this is only true so long as the motion seeks to explain or refine rights already given, not grant new rights or extend old ones. *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). On appeal, CSE has no persuasive argument as to how the trial court abused its discretion on timing or in the substance of its analysis of CSE's request for reconsideration and/or to vacate. CSE's arguments must be rejected.

H. The order of contempt is not properly before this Court but rests on a sound basis.

In the last section of its brief, CSE presents arguments against the trial court's order of contempt dated May 6, 2013. CP 878-879. CSE cites no material in the record to support this section of its brief. CSE's argument consists of a two-word assertion in a footnote, which raises no coherent theory. Br. 45 n. 61.

CSE's argument appears to claim that the contempt order failed to contain a provision allowing CSE to purge the contempt finding. Br. 44-45. Contrary to CSE's argument, however, the contempt order contained a specific clause stating that the contempt could be purged upon formulation and execution of a "satisfactory sampling/testing plan by June 5, 2013, at 5:00 p.m." CP 879.

In the event, a sampling and analysis plan was prepared by a consulting firm dated May 29, 2013. CP1 762-767. A report based on the work plan was completed on July 30, 2013. CP1 639-646.

A motion of the County dated December 11, 2013, sought monetary sanctions beginning June 5, 2013, until the sampling plan and testing had been performed. CP1 635-638. The matter was heard by the trial court on December 23, 2013, and the court orally ruled that CSE had purged the contempt. CP1 827. The court further orally denied the County's request for any penalties against CSE. *Id.*

Because the trial court found the contempt purged and denied penalties against CSE, it is unclear how CSE remains aggrieved. *See Orwick v. City of Seattle*, 105 Wn.2d 249, 253, 692 P.2d 793 (1984) (issue is formally moot when appellate court can no longer provide effective relief). To the extent CSE seeks review of the contempt ruling as a nominal matter based on the underlying substantive merits of

CSE's appeal, the County points to the extensive arguments set forth above.

CSE also challenges the contempt order because, it argues, the trial court failed to allow CSE to introduce yet more new evidence. Br. 45-46. CSE claims that the new evidence arose from requests made by CSE under the Public Records Act, Ch. 42.56 RCW, that "cast light" on the county's "bad motive" and "knowledge of falsity of facts and law that it asserted by declaration...." Br. 45.

CSE's argument on this point is entirely devoid of citation to the record. The trial court's ruling of February 4, 2014, indicates a rather patient effort to evaluate the many hundreds of pages of material submitted with the declaration of Mr. Allphin dated November 4, 2013. CP1 1000-1001. On appeal, CSE provides no guidance to this Court on how the trial court failed to grant proper consideration to CSE's materials. CSE's argument that it could yet demonstrate, through new evidence, some form of impropriety below does not engage any substantive issue on which the lower decisions relied. Br. 44-46. This Court should find CSE's argument to be unsupported and meritless.

V. CONCLUSION

For the foregoing reasons the decisions of the hearing examiner and the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of July, 2014.

Menke Jackson Beyer, LLP

By: 

Kenneth W. Harper, WSBA #25578

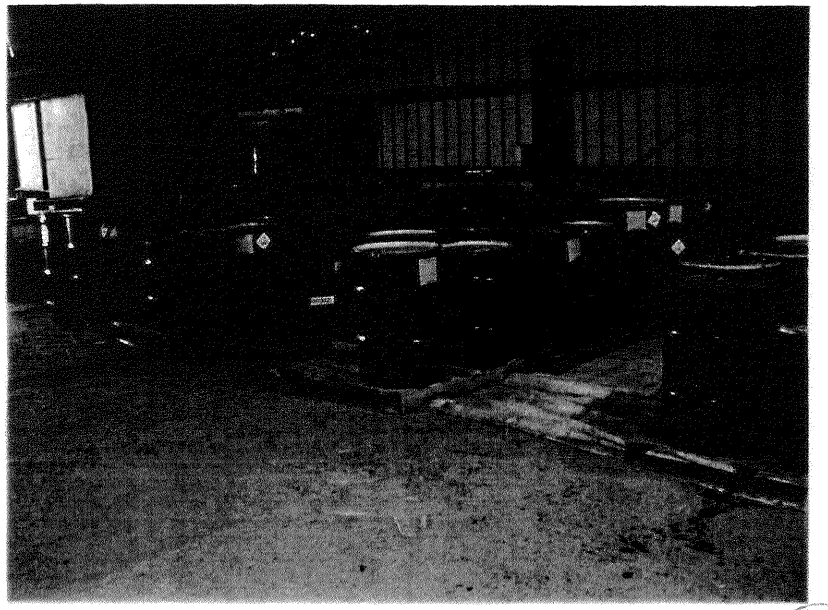
Attorneys for Respondent
Kittitas County

Appendix A

(Color images from ABR 7, ABR 24, and ABR 39)

ABR 7

(Excerpt)



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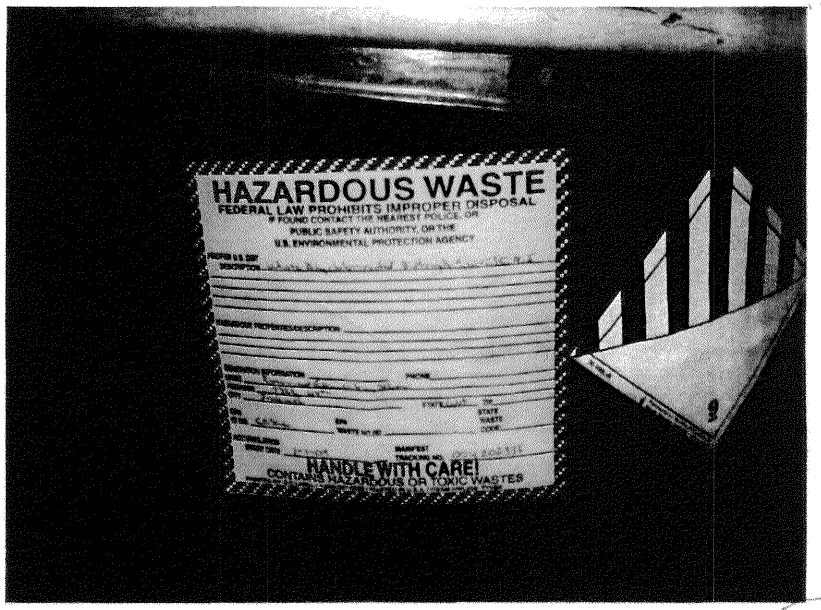

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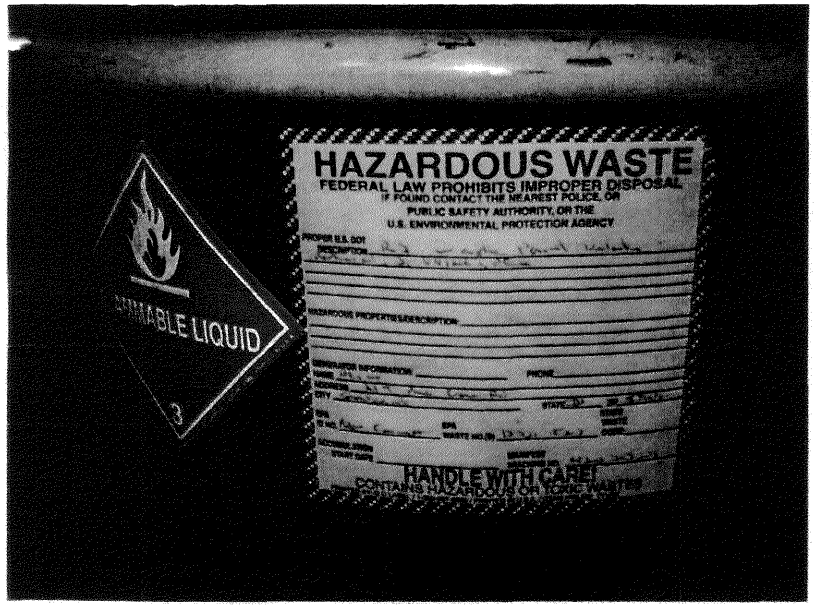

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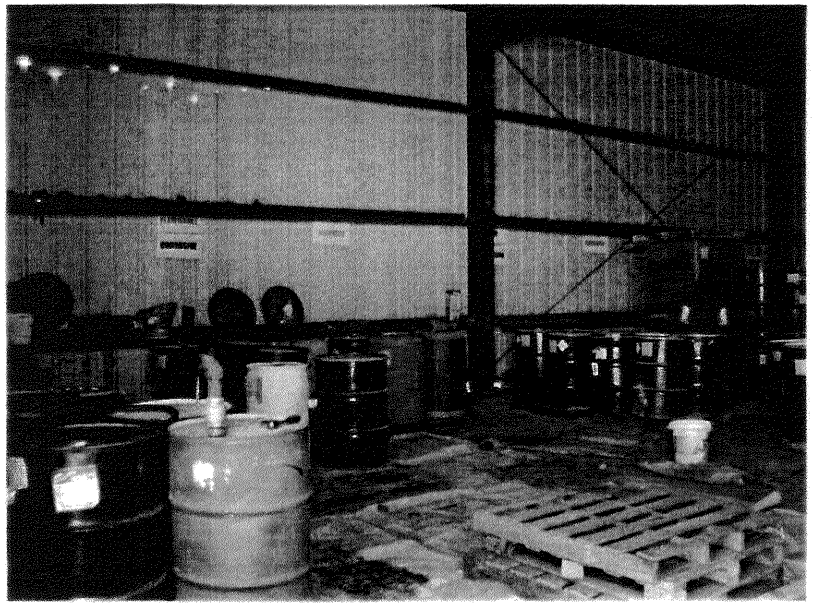
Inspector: James Rivard and WA DOE

ABR 24

(Excerpt)



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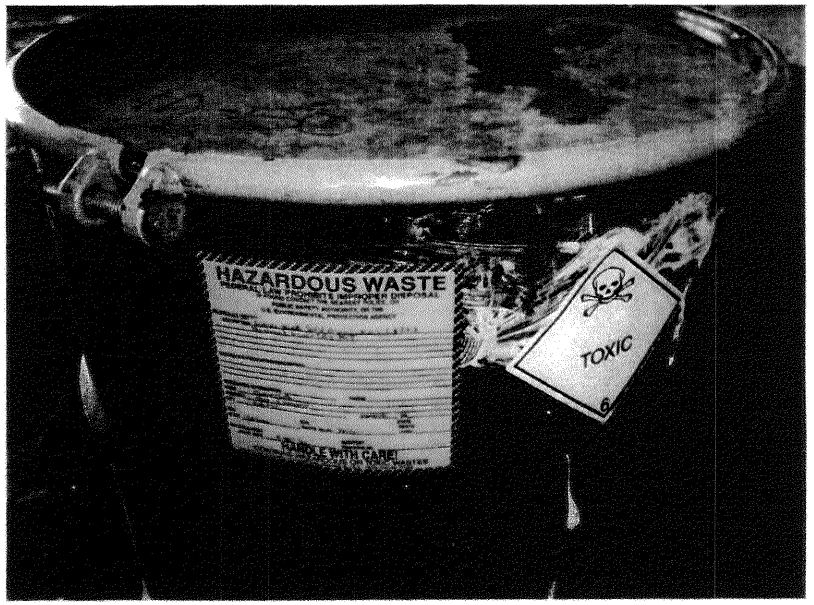

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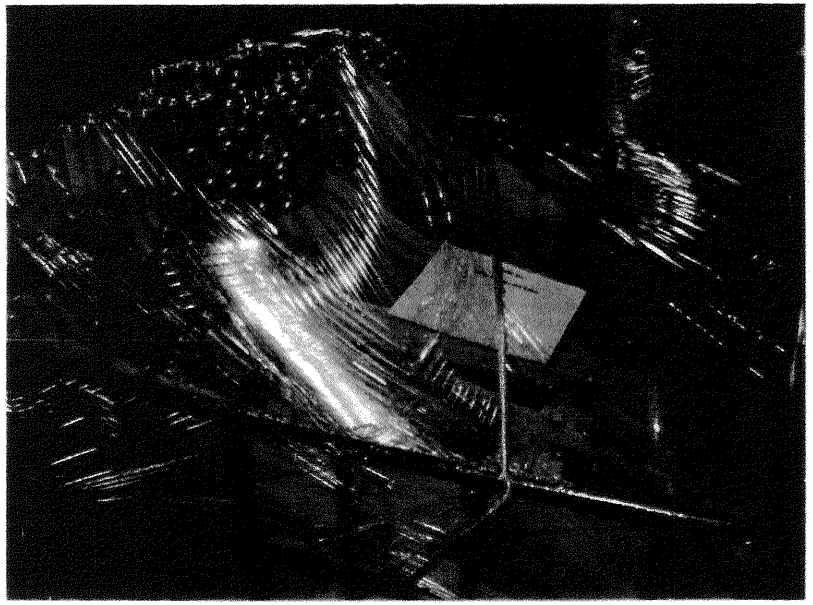


7/6/2010 10:20:27 AM

Inspector: James Rivard, (Wendy Neet, Gary Bleeker - DOE)

ABR 39

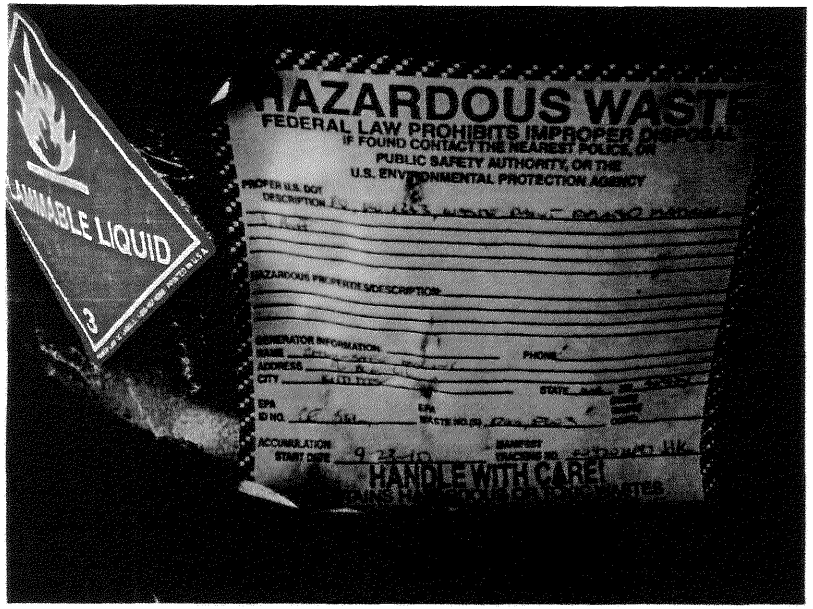
(Excerpt)

173-350-360; rather, Appellant directs attention to the language thereof making WAC 173-350-360 inapplicable to Appellant and its operations.

Respondent urges that regulation of DWs and 'solid waste' overlap and that local government has oversight over both, at least as it applies to 'transfer facilities'. Respondent identifies no dual permitted transfer and MRW facilities. Further, an examination of Chapter 70.95 RCW governing solid waste management, 70.105 RCW governing dangerous waste management, Chapter 173-303 WAC, the Dangerous Waste Regulation, Chapter 173-350-360, the Solid Waste Regulation, and the Solid Waste Ordinance foreclose that conclusion.

RCW 70.105.007(1) and (3) grants the DOE exclusive regulatory authority over such wastes[10] and further expresses its intent that the DOE regulate hazardous waste and local government solid waste. The distinction between such hazardous waste and solid waste for regulatory purposes is further confirmed by RCW 70.105.035. On the other hand, RCW 70.95.020(1) assigns exclusive regulatory authority over solid waste management to local government. The grant to local government, then, only includes solid waste not treated as hazardous waste under Chapter

[10] Hazardous waste under Chapter 70.105 is identical to dangerous waste under the Dangerous Waste Regulation which implements it.



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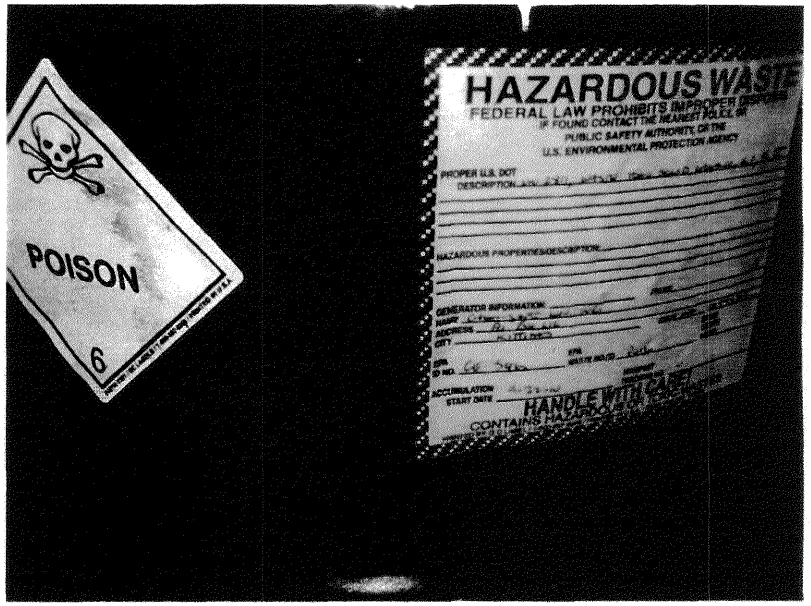

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government, are not allowed to accept DWs except as excluded from the Dangerous Waste Regulation.[11]

Kittitas County's Solid Waste Ordinance is consistent with this division of authority. An examination of Solid Waste Ordinance Section IV(B)(2)(d)(1) and VI(A) generally covering permitting subject to the Solid Waste Ordinance at VI(A)(2)(b) adopts Chapter 173-304 WAC as minimum standards for permitted facilities. Chapter 173-304 WAC by its terms does not cover DWs. Further, at VI(A)(2)(c), it contains an extensive protocol prohibiting any covered facility from accepting DWs, inspection of waste to insure compliance, and documentation. The Solid Waste Ordinance excludes from local regulation of solid waste, permitting, facility design, operation and the like, DWs including solid waste containing DWs. The intent to exclude DWs from local government solid waste regulation is further confirmed in Kittitas County's Solid Waste Management Plan adopted in August, 2011. It recites at Section 7.2 thereof that a moderate risk waste facility cannot accept hazardous waste

[11] Washington Department of Ecology, *Moderate Risk Waste Fixed Facility Guidelines,* (1995).

with DW content above the state regulated threshold.[12] Finally, as noted above, the DOE's own guidelines make clear that MRW facilities are not allowed to accept DWs.

Respondent's position that it could require Appellant to obtain an MRW facility permit and be regulated by Respondent as an MRW facility is flawed as confirmed by the exclusivity of the transporter/transfer regulation and MRW/solid waste regulation. A person with an MRW facility permit issued under WAC 173-350-360 and, here, the Solid Waste Ordinance, cannot legally accept, store, ship, or otherwise handle DWs.

WAC 173-350-360(10) provides that an MRW facility must have a plan to refuse acceptance of DWs and direct them to a qualifying DW facility. A qualifying DW facility is either a transporter with or without a transfer facility or a TSD. The distinction lies in the holding period of the DWs. Transporters with a transfer facility may hold DWs no more than ten (10) days. If DWs are held longer, the facility must qualify and be permitted as a TSD. See WAC 173-303-240(6), last sentence and (8). Chapter 173-303 WAC governs 'permitting' of both transporters and TSDs. Subject to the applicability of the ten (10) day rule, either

[12] *Kittitas County 2010 Solid Waste and Moderate Risk Waste Plan Update*, August, 2011, at Sec. 7.2.