

NO. 44700-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

Appellant,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State

Respondent.

**AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT
DEPARTMENT OF ECOLOGY OF AMICI NATURAL
SELECTION FARMS, INC. AND BOULDER PARK, INC.**

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I. INTRODUCTION

Amici Natural Selection Farms, Inc. and Boulder Park, Inc. (collectively, “Farm Amici”) respectfully submit this *amicus curiae* brief in support of appellant Washington State Department of Ecology (“Ecology”). Farm Amici are third- and fourth-generation farm families who have worked for decades with Washington’s cities and towns to recycle biosolids to the soil, growing crops and improving soil quality in eastern Washington. For the Farm Amici – some of whom are descendants of original homesteaders – their soils are their heritage and their foundation for the future. They rely on biosolids to build their soils with organic matter, to replenish nutrients, to nourish the soil’s biological communities of microorganisms, and to increase crop yields.

Farm Amici know first-hand the efficiency and benefits of the Ecology’s biosolids management program. Washington’s success in recycling biosolids will be jeopardized if every county and locality can countermand the state program through bans or other conflicting restrictions. Farm Amici submit this brief to explain (1) the value of biosolids for rural farming communities in Washington and (2) the need for a consistent, science-based, state biosolids program that is not blocked by bans or other incompatible local ordinances.

II. INTERESTS OF AMICI

A. Natural Selection Farms, Inc.

Farm Amicus Natural Selection Farms, Inc. (“NSF”) is a family owned agri-business owned by Ted Durfey and Pamela Durfey, in Sunnyside, Washington (Yakima County).

<http://www.naturalselectionfarms.com/>. The Durfeys’ concern for soil fertility and conservation led the family to try soil conditioning with biosolids more than 20 years ago, and over time they have regularly used biosolids on over 1,500 acres of land they own or manage. NSF distributes and land applies biosolids for farms in Yakima, Benton, Klickitat, and Kittitas counties. Approximately 20 farms of various sizes work with NSF in using biosolids on a wide variety of crops and pastureland; approximately 4,000 to 6,000 acres are fertilized with biosolids annually. The source of these biosolids is over 25 wastewater treatment agencies in eastern and western Washington that service approximately 600,000 people.

NSF’s project grew as their neighbors began to observe changes in the soils that have been treated with biosolids. NSF has experienced increased soil organic matter, higher retention of moisture, improvements in soil structure, decreased soil erosion, better soil fertility, and the return of earthworms to the fields. Some of these benefits have been quantified in

a cooperative Washington State University – University of Washington study. See S. Brown et al., *Quantifying Benefits Associated With Land Application of Residuals in Washington State*, 45 Environ. Sci. Technol. 7451-58 (2011). NSF continues to receive requests for biosolids; however, demand continues to exceed the supply.

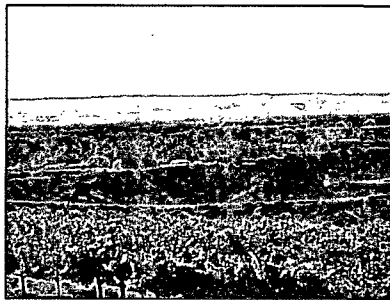


Fig. 1. NSF farmland, grapes in foreground, hops in background.

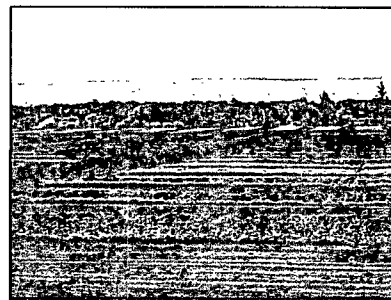


Fig. 2. Research plots at NSF for evaluation of various rates of biosolids and varieties of canola.

B. Boulder Park, Inc.

Farm Amicus Boulder Park, Inc. (“BPI”) is a farmer-owned and managed agri-business that provides hauling and Class B biosolids application for amending soils and fertilizing crops. The BPI partners – Leroy Thomsen, Gary Poole, and Larry Glessner – are lifelong residents of Douglas County, well-known local farmers who are active in their communities of Waterville and Mansfield, on the plateau east of Lake Chelan.

The BPI partners first used Class B biosolids on their own fields in 1991. For over 20 years, more than 5,000 acres of their own land has been

applied with biosolids, with some fields receiving multiple applications. As demand for biosolids grew among other farmers in Douglas County, the BPI partners sought other sources of biosolids. In 1997, BPI began contracting with a number of wastewater agencies to bring their biosolids to Douglas County. Many of these were smaller eastern Washington agencies who saved significantly in hauling and permitting costs by having their biosolids marketed to local farmers as part of a larger project. The crops grown on soil amended with biosolids are small grains consisting mainly of winter wheat, spring wheat, winter canola, and small quantities of oats.

Currently 48 farms of various sizes are participating in the project. Biosolids are applied to 6,000 to 8,000 acres annually. These biosolids are sourced from more than 25 wastewater treatment agencies, representing a combined population of 1.8 million. *See King Co. Government Env'tl. Svcs., Biosolids Projects, available at <http://www.kingcounty.gov/environment/wastewater/Biosolids/BiosolidsRecyclingProjects/BoulderPark.aspx>.*

Documented increases in crop productivity and soil tilth and fertility from biosolids have benefited farmers throughout Douglas County. C. Cogger et al., *Long-Term Crop and Soil Response to Biosolids Applications in Dryland Wheat*, 42 J. Env'tl. Quality 1872 (2013). As

knowledge about these results has spread among eastern Washington agricultural communities, BPI has received requests for biosolids from farmers in Grant and Adams counties. The state biosolids program and its primacy over local ordinances provide a consistent regulatory climate for BPI. A return to county-by-county regulations would affect BPI's ability to provide biosolids and application services to farmers who need biosolids to improve their soils.

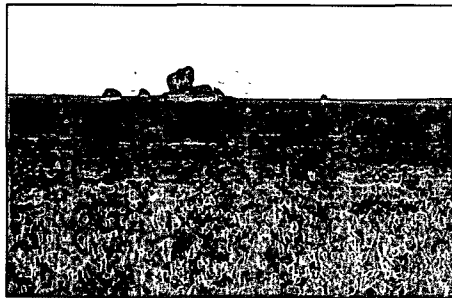


Fig 3. Biosolids-grown wheat on dryland fields of Boulder Park.

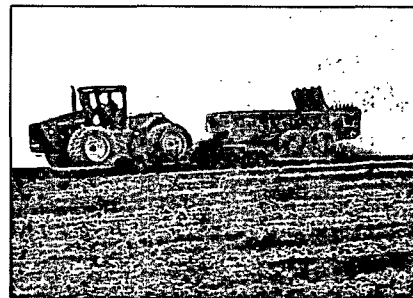


Fig. 4. Applying an agronomic rate the of biosolids on a fallow wheat field at Boulder Park.

III. THE DEPARTMENT OF ECOLOGY RIGOROUSLY OVERSEES THE AMICI'S USE OF BIOSOLIDS

Adding fields to BPI or NSF's state permit is a thorough, multi-step process prescribed by Ecology in its General Permit for Biosolids Management. Washington State Department of Ecology, *Statewide General Permit for Biosolids Management (2010)*, available at <https://fortress.wa.gov/ecy/publications/publications/wsr9808050.pdf>.

When a farmer expresses an interest in amending his/her soils with

biosolids, BPI or NSF review the fields and compile information needed for the state-required Site-Specific Land Application Plan (“SSLAP”). *See* Wash. Admin. Code 173.308.90003 (2007). This information includes site boundaries, proposed staging areas, location of all water bodies and wells, and buffer zones to protect sensitive areas.

Ecology’s regional biosolids coordinator (one for each of the state’s four regions) reviews applications for permit coverage and guides applicants through the process. Proposed sites are posted with a public notice for 30 days following the submission of the SSLAP. The regional biosolids coordinator responds to any public comments. If there is sufficient interest, Ecology may hold a public meeting. However, as a courtesy and good management practice, managers from BPI or NSF personally contact neighbors. The Farm Amici also hold annual open houses and farm tours – attended by Ecology’s regional biosolids coordinator since the advent of the state’s biosolids program – which have been successful in making the projects accessible to the community and satisfying concerns about the use of biosolids.



Fig. 5. Natural Selection Farms owner Ted Durfey, overlooking fields of hops, leads a tour of biosolids use on his land.

Fig. 6. Boulder Park manager Dave Ruud leads a tour through biosolids research plots on land owned by BPI partner Gary Poole.

Ecology's regulators oversee initial farm evaluations, permitting, development of an application rate, field application of biosolids, and environmental monitoring. They inspect sites, provide assistance to the permittee, and answer public questions throughout the life of the project. Ecology's procedure is well established and grounded in biosolids and agricultural science. The general permit that establishes statewide standards for land application has a term of five years and Ecology updates the permit to reflect continuous improvement in their oversight and advances in agricultural use of biosolids.

Ecology's permitting process is well established but time-consuming. Additionally, the preparation for application and agronomic rate development requires farmers to develop nutrient plans well in advance of the fertilizing season to ensure that they identify high priority fields for biosolids use. The threat of county restrictions or bans or an arbitrary local permitting process would further complicate farm planning and investment.

IV. WASHINGTON STATE FARMERS HAVE PROVEN THE VALUE OF BIOSOLIDS TO THEIR CROPS AND SOIL

A. Biosolids Provide Numerous Micronutrients Essential for Plant Growth

Micronutrients like boron, manganese, zinc, chloride and copper are essential for plant growth and are provided by biosolids. Although farms in Washington that have been cropped for multiple generations may be depleted in some of the micro nutrients, these are rarely added as they can be expensive. Biosolids contain a full suite of nutrients, both macro and micro.

The cost of biosolids is far less than the cost of purchasing these elements in chemical formulation. BPI collects a soil amendment fee annually from some farmers who receive biosolids and returns this fee to the biosolids producer. In 2011, BPI collected and returned \$6.77 per dry ton of biosolids to producers, which was only fourteen percent of that year's market price of the macro nutrients (nitrogen, phosphorus, potassium, and sulfur) in chemical form. The farmer's cost for biosolids – if any – will be only a small fraction of the market price of the macro nutrients.

These are not insignificant savings for farmers. If a crop needs 50 pounds per acre of nitrogen, farmers using biosolids would save \$19 per acre on nitrogen alone. The value derived from a standard three dry tons of biosolids per acre is $\$51.31/\text{dry ton} \times 3 \text{ dry tons/acre} = \$153.93/\text{acre}$ for the macro nutrients only. See D. Sullivan, *Fertilizing With Biosolids*,

Pacific Northwest Extension, Publication PNW:508-E (revised 2014).

Additional value would be derived from the full suite of micronutrients.

B. The Richness of Biosolids Provides Higher Crop Yields

Another economic benefit for the farmer who uses biosolids is the increase in crop yields. Agronomic rates of biosolids can produce equal to or better grain yields than applications of chemical nitrogen. *See D. Sullivan et al., Predicting Biosolids Application Rates For Dryland Wheat Across a Range of Northwest Climate Zones, 40 Cmty. Soil Sci. Plant Anal. 1770-89 (2009); R. Koenig et al., Dryland Winter Wheat Yield, Grain Protein and Soil Nitrogen Responses to Fertilizer and Biosolids Applications, 2011 Appl. Env'tl. Soil Sci. 925462.* A 20-year study of crop and soil responses was conducted by Washington State University soil scientists in commercial wheat production fields of BPI. These dryland (non-irrigated) wheat fields are managed in a two-year fallow rotation – a year of cropping followed by a fallow year – as a method of capturing soil moisture during the fallow year. Various rates of biosolids amendment were compared with the traditional anhydrous ammonia and a no-fertilizer control. Operational rates of biosolids increased grain yields over the chemical fertilizer across eight successive harvests. All rates reliably produced equivalent or greater grain yields than the standard chemical nitrogen fertilizer. *See Cogger, C. et al., Long-Term Crop and Soil*

Response. Biosolids also increased yields from the second harvest, more than three years after the initial biosolids application.

C. The Organic Bulk of Biosolids Improves Soil Quality

Soil conservation and moisture retention are crucial practices in dryland farming. The organic matter in biosolids provides benefits in these areas that chemical fertilizer cannot. From the first applications of biosolids in the early 1990s, Boulder Park farmers noticed changes to their soils as well as increased crop yields. Even one application of biosolids made a difference in added tilth and body of the soil; fields not amended with biosolids felt hard underfoot and the thin, powdery soil was easily blown by wind. After biosolids were tilled into a field wind erosion was significantly reduced due to organic matter aggregating and holding the soil particles.

University research in Washington has confirmed and quantified the increase in soil carbon from biosolids applications. In a 20-year study of the effects of Class B biosolids on dryland wheat yield and soil quality, biosolids had a large positive effect on total soil carbon, *id.*, nearly doubling the concentration compared with control and chemical fertilizer treatments. There was also an associated decrease in density of the soil, important for soil tilth and water infiltration. The researchers concluded that “agronomic biosolids applications are an effective and low-cost tool

to increase soil carbon and improve soil quality in soils depleted of organic matter after years of grain-fallow rotation.” *Id.*

Similar increases in soil carbon were found in Yakima, Chelan, Douglas, and Pierce counties – including croplands managed by both amici Natural Selection Farms and Boulder Park. *See* S. Brown et al., *Quantifying Benefits*, at 7451-58. Researchers found that biosolids and compost increased total soil carbon in control soils across all sites, with different soils, tillage practices, crops, and time since application. These results were consistent with previous studies in other states. *See* G. Tian et al., *Soil Carbon Sequestration Resulting From Long-term Application of Biosolids For Land Reclamation*, 38(1) *J. Env'tl. Quality* 61-74 (2009).

The Pacific Northwest Extension (extension programs at Washington State University, Oregon State University and the University of Idaho) publication *Fertilizing With Biosolids* summarizes the results of decades of use and research on the benefits of biosolids for soils in this region in the table below.

Benefits to Soil Quality from Biosolids Applications

Biological	Increases soil microbial community
Chemical	Adds macro- and micro-nutrients Increases cation exchange capacity Provides slow release nitrogen and other nutrients Buffers soil pH Increases soil carbon storage
Physical	Increases water holding capacity Improves soil tilth Loosens compacted clay soils Prevents soil erosion Increases water infiltration Aerates soil Provides organic matter

D. Sullivan, *Fertilizing With Biosolids*.

V. LOCAL BIOSOLIDS BANS WILL UNDERMINE THE STATE PROGRAM

A. Biosolids are Currently Regulated Under a Comprehensive and Equitable State Program That Would Be Jeopardized by Local Ordinances

Farmers rely on state primacy in regulating biosolids because in the modern era farmers often have little political say in local regulation of farm practices, even in rural communities. Unfounded fears or prejudices against biosolids can lead to restrictive ordinances or bans that eliminate biosolids as an option for farmers. In a technical field like using biosolids for fertilizer, it is critical – and the legislature so recognized when it established the state program in 1992 – that science-based, uniform state standards govern a statewide activity such as recycling biosolids from

treatment plants to farm fields. This Court should join the many federal and state courts around the country that have upheld state primacy in regulating land application and struck down restrictive local ordinances and bans.¹

Statewide primacy and uniformity in biosolids regulations and permitting is important for many large farming operations that span county lines and have operations in more than one county. One set of state rules for biosolids quality and land application procedures has increased public and private investment in biosolids recycling and furthered the state law's stated purpose that "the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity. . . ." RCW 70.95J.005(2). Farm Amici have relied for many years on the legislature's endorsement and support for biosolids recycling. The trial court's ruling upholding a biosolids ban threatens that reliance.

¹ See, e.g., *Los Angeles v. Kern County*, 214 Cal. App. 4th 394 (2013), review granted on other grounds, 302 P.3d 572 (Ca. 2013); *Liverpool Twp. v. Stephens*, 900 A.2d 1030 (Pa. Commw. Ct. 2006); *Granville Farms, Inc. v. Cnty. of Granville*, 612 S.E.2d 156 (N.C. Ct. App. 2005); *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003); *O'Brien v. Appomattox Cnty.*, 293 F. Supp. 2d 660 (W.D. Va. 2003); *Blanton v. Amelia Cnty.*, 540 S.E.2d 869 (Va. 2001); *Soaring Vista Props., Inc. v. Bd. of Cnty. Comm'rs*, 741 A.2d 1110 (Md. 1999); *Franklin Cnty. v. Fieldale Farms, Corp.* 507 S.E.2d 460 (Ga. 1998).

B. Prohibition on Long-Term Landfilling of Biosolids Confirms the Legislature’s Support for Beneficial Use of Class B Biosolids

The Washington legislature’s support for biosolids use as a soil conditioner is expressed throughout the state biosolids law. For example, the legislature’s findings include that “[p]roperly managed municipal sewage sludge is a valuable commodity and can be beneficially used in agriculture, silviculture, and in landscapes as a soil conditioner.” *See* RCW 70.95J.005(1)(d). The legislature provides an overarching command to Ecology to establish a program “to manage municipal sewage sludge and that the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity and is managed in a manner that minimizes risk to public health and the environment.” *See* RCW 70.95J.005(2).

In a corollary to its beneficial use directive, the legislature gave Ecology the authority to prohibit final disposal of sewage sludge in landfills except under certain economic circumstances. *See* RCW 70.95.255. Ecology incorporated this direction in its biosolids state program and regulations.

Landfilling of biosolids in Washington is not considered a beneficial use, unless the biosolids are used for the purpose of reclamation in a closure plan, *e.g.*, establishing vegetation on cover materials. Wash.

Admin. Code 173.308.300 at (5) and (6). Landfilling of biosolids for disposal is only allowed on an emergency or temporary basis until the generator can establish a beneficial program. For *emergency* landfilling, the local health jurisdiction must agree that no healthful beneficial use options are presently available. For *temporary* landfilling, the generator must submit a plan to Ecology, stating (1) the conditions that dictate disposal (rather than beneficial use); (2) the steps that will be taken to correct these conditions and eliminate the need for disposal as a long-term management option; (3) a schedule for correcting the conditions that make disposal necessary; and (4) written approval for disposal from the local health jurisdiction. *Id.*

The formality of these steps and the significance of the course correction required for the generator who has no valid beneficial use program are another indication of the state's intention to maximize the use of biosolids as a beneficial soil conditioner. Regardless of whether biosolids are Class A or Class B, the rule is written to convey that landfilling is not an option that will be readily approved by the state, except on an emergency or temporary basis while the generator is developing appropriate markets for its biosolids product. For the Farm Amici and their customers who rely on the limited supply of biosolids for their crops, the state's discouragement of disposal is an important position.

Because the state makes it difficult to dispose of Class B biosolids and directs agencies to find beneficial uses, more biosolids in Washington have become available for agricultural use.

C. The State Biosolids Program Allows for County Participation in Permitting, Monitoring, and Enforcement

Preemption of local biosolids bans by the state program does not deprive localities of a significant role in the oversight of land application. Ecology delegates authority to implement and assist in the administration of appropriate portions of the state program to local health departments, with final permit review by Ecology. *See* RCW 70.95J.080 and -.090. Natural Selection Farms has direct experience working with a jurisdiction that has received delegation of authority from Ecology. Yakima County, the home county of amicus National Selection Farms, secured delegation from Ecology and participates in review of farms proposed for land application. Yakima County's participation in biosolids use in the county has contributed to the widespread acceptance of biosolids recycling in the county. Delegation enables the state program to incorporate local knowledge, conditions, and concerns. For the eastern Washington Farm Amici, delegation maintains the consistency of the primary state program and synchronizes relations with local government.

By contrast, unilateral bans or regulations like Wahkiakum’s are divorced from and contrary to the state program. Agricultural use of biosolids will be inefficient and expensive, if not impossible, if local governments independently prescribe site management practices and duplicative permit requirements. Farmers could lose the ability to use Class B biosolids completely if they resided in a county, such as Wahkiakum, that ignored the delegation opportunity offered by Ecology and chose to ban biosolids instead. The preemption analysis requires that the Court assess the consequences if other counties, not just Wahkiakum, began to assert local primacy on biosolids regulation. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (“[T]he practical effect of the statute must be evaluated not only by considering the consequences of the [ordinance] itself, but also . . . what effect would arise if not one, but many or every, State adopted similar legislation.”).

D. The Conflict Between a Ban and the State Program is Stark and Requires Preemption

Farm Amici have successfully applied biosolids many hundreds of times pursuant to state permits and regulations and know that a ban on Class B land application is irreconcilable with the state program. Farm Amici only work with Class B biosolids, which are available in the large volumes needed for eastern Washington farms. Class A biosolids, which

are considerably more expensive for treatment plants to generate, are typically generated in smaller volumes and are used for smaller, non-farm applications where Class B site access restrictions would be impossible to implement. Class A biosolids often are a dryer product with less organic matter and at times less nitrogen content. The experience of the Farm Amici is that Class B biosolids are greatly superior in farmer acceptance due to their increased organic matter.

Wahkiakum's notion that banning Class B biosolids does not conflict with the state program because municipalities and farmers can simply switch to generating and using Class A biosolids has no basis in reality. For the Farm Amici, there simply is no adequate supply of Class A biosolids to meet the growing needs of eastern Washington farmers. Even if Class A biosolids became available in volume, operations would have to be overhauled and tested to adjust to a new and quite different biosolids product. For the Farm Amici's municipal suppliers, conversion to Class A would be time-consuming and expensive and would disrupt their beneficial use programs as they attempt to find non-farm markets for Class A biosolids.

The practical conflict between a Class B ban and a state program focused largely on Class B biosolids is sufficient for the Court to find conflict preemption as a matter of law under Washington Const. art. XI,

section 11. Whether analyzed under the test of does the Wahkiakum ban “thwart” the legislative purpose, *Diamond Parking v. City of Seattle*, 78 Wn.2d 778, 781; 479 P.2d 47 (1971), or the test of does the ordinance “prohibit[] what state law permits,” *Entm’t Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep’t*, 153 Wn.2d 657, 663; 105 P.3d 985 (2005), the Class B biosolids ban fails for the reasons outlined above.

Many provisions of the state biosolids law and regulations reinforce a finding of preemption: (i) the legislature’s declaration to reuse biosolids “to the maximum extent possible,” RCW 70.95J.005(2); (ii) the prohibition of landfill disposal of biosolids except under exigent circumstances, RCW 70.95.255; (iii) the definition that biosolids are not a solid waste, and therefore not subject to local control under solid waste law, RCW 70.95J.005(1)(d); RCW 70.95J.010(1); and (iv) the lack of a savings clause in the biosolids law empowering local regulation of biosolids (beyond the right to seek delegation of state authority under the program on specified terms). While the plain meaning of the biosolids law and regulations are controlling, the legislative history reinforces preemption. *See, e.g.*, S.B. Rep. on E.S.H.B. 2640, at 3, 52nd Leg., (Wash. 1992) (final Senate bill report states that “Technical amendments are made to clarify: the intent to maintain state primacy for the sludge management program”).

VI. CONCLUSION

The Farm Amici and their municipal and farm partners have benefited tremendously from a state biosolids program that encourages and advances land application statewide. Ecology's biosolids program provides certainty, stability, and science-based oversight to improve soil health, boost crop yields, and assist Washington's wastewater community in a vital recycling activity. For equal access – regardless of county of residence – to biosolids and its benefits to soils, crops and farm families, good public policy and the application of preemption principles require that land application of biosolids be governed by state law, not local ordinances. The Farm Amici ask that the trial court ruling be reversed.

DATED this ~~29th~~ day of May, 2014.

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NO. 44700-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

COURT OF APPEALS
DIVISION II
2014 MAY 30 AM 10:03
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STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

v.

WAHKIAKUM COUNTY, a political
subdivision of Washington State,

Respondent.

**CERTIFICATE OF
SERVICE**

Pursuant to RCW 9A.72.085, I certify that on the 29th day of May
2014, I filed the Amicus Curiae Brief of Natural Selection Farms, Inc. and
Boulder Park, Inc., with the Court of Appeals, Division II, and served the
parties herein as indicated below:

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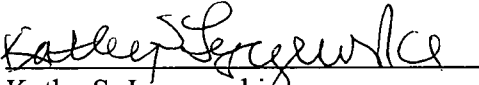
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The foregoing being the last known addresses.

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 20th day of May 2014, at Yakima, Washington.


Kathy S. Lyczewski