THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

No. 30770-1-III Consolidated with 317129 & 323013

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

Appellants,

v.

KITTITAS COUNTY, Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION. Chem-Safe Environmental, Inc. and ABC Holdings, Inc., Appellants, collectively ("CSE") owns or operates a transfer/transporter under an EPA/DOE ID No. issued by the United States Environmental Protection Agency (the "EPA") and the Washington State Department of Ecology ("DOE"). CSE is authorized thereunder to receive, store, and ship ("Handle") dangerous waste ("DW") and moderate risk waste ("MRW") thereunder, shipped under uniform hazardous waste manifest ("Manifest")[1] without additional authorization. Respondent acting through Mr. Rivard, ("Rivard") the Kittitas County Public Health District ("KCPHD") health officer ("Health Officer") sought to require CSE additionally to obtain an MRW facility permit issued by and under KCPHD authority as delegated by the DOE. CSE dissented by attempting to comply. Prior to receipt of the notice of violation ("NOVA") issued by Respondent and KCPHD health order ("Health Order") on January 27, 2011, Respondent authorized CSE in writing to continue to Handle MRWs. The NOVA, alleged that CSE committed a public nuisance by

[1] Hazardous substance is an allinclusive reference to "any.. substance… or waste regardless of quantity that exhibits any of the characteristics or criteria of hazardous waste.." The term includes dangerous waste, throughout ("HW"). See RCW 70.105.010(10) and (11). Thus, 'special waste' and under it MRWs are 'hazardous waste'. Respondent's witness, Peck, so admits. Peck Decl., August 13, 2012, Para. 12 CP 407, lines 16-21.

operating an MRW facility on two dates covered by KCPHD's authorization, without a permit. The NOVA fined CSE, ordered it to suspend operation at the site until an MRW permit issued, and conduct unspecified invasive testing for releases at the site. CSE bonded the fine, complied with the NOVA except for its invasive testing requirement and administratively appealed. The Hearing Examiner("HE") affirmed the NOVA based on its factual claims and on further claims by Respondent based on Rivard's declaration that CSE had, P016, a DW on site without a requisite permit. The Superior Court affirmed. CSE appealed. In supplemental proceeding, Rivard recanted the claim that CSE had P016 at the Facility without requisite permit. CSE moved for reconsideration and to set the judgment aside. Both motions were denied. Respondent moved for civil contempt while simultaneously interfering with CSE's legal right to use information obtained from the DOE in a Public Records Act ("PRA") request. The Superior Court ordered civil contempt. CSE appealed but purged the civil contempt.

II. ASSIGNMENT OF ERRORS. The HE and the Kittitas County Superior Court ("Superior Court") on appeal from the decision of the HE erred as follows:

A. The Superior Court erred in affirming the HE's affirmance of the NOVA, because the NOVA was an invalid, ultra vires act, was factually unsupported by necessary predicates of actual incidents of public nuisance, and procedurally defective.

B. The Superior Court erred in affirming the abatement order in the NOVA invasively to test CSE's concrete floor because the order did not respond to the allegation of operation of an MRW facility without a permit and because it was too vague to permit performance without the cooperation of third parties not before the Superior Court.

C. The Superior Court erred by failing to grant reconsideration and set aside the judgment against CSE based on Rivard's subsequent declaration recanting a material declaration statement he made to the HE upon which the HE relied in affirming the NOVA or under principles of judicial estoppel based thereon.

D. The Superior Court erred in issuing a civil contempt citation based upon impossibility to perform the NOVA's vague abatement order compelling invasive testing and upon Respondent's interference in CSE's ability to present exculpating evidence in its defense.

II. STATEMENT OF CASE.

A. Procedural History. On January 27, 2011, Respondent served a NOVA on CSE. CSE timely filed an administrative appeal of the NOVA to the HE. The HE issued its initial decision affirming the NOVA on May 12, 2011 and denied reconsideration on May 31, 2011. CSE timely filed an appeal to Superior Court on June 10, 2011. The Superior Court issued its memorandum decision affirming the HE on March 12, 2012 and its final order on same on May 14, 2012. CSE timely appealed to this Court on April 11, 2012. The Court denied CSE's motion for stay on June 18, 2012. CSE filed a motion for reconsideration under CR 59, a motion to set aside the judgment under CR 60 on June 28, 2012, based upon Rivard's declaration recant of a material declaration statement he made to the HE and upon which the HE and Superior Court relied. The Superior Court denied CSE's CR 59 motion on November 5, 2012 and its CR 60 motion on February 5, 2014. Respondent moved for civil contempt to compel CSE to obey the abatement order invasively to test its floor on April 8, 2013. The Superior Court issued a civil contempt order against CSE on May 6, 2013. CSE appealed but purged the civil contempt.

B. Factual Statement of Case. CSE operates as a transfer/transporter for DWs and MRWs at 400 S. Main St., Kittitas, WA under an EPA/DOE ID. No. WAH 000008169 (the "DOE Number") issued by DOE to transfer/ transporters handling DWs and MRWs and MRWs as an incident thereto shipped under Manifest.[2] The facility (the "Facility") consists of an unheated metal skin building constructed on a concrete pad, one of two similar buildings on the campus. The Facility is more than fifty years old. Its floor is stained from prior use as a fertilizer storage facility. There are cracks in the concrete floor, none of which compromise its integrity. Other than condensation on drums, there is no evidence the Facility's integrity was compromised when the NOVA issued.[3] DWs and MRWs are collected and stored at the Facility prior to

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[2] WAC 173-350-360(1)(b)(i); 173-303-240; 173-303-060; 173-303-180; **(Appellate Board Record PH-11-0001 hereinafter referenced as "ABR")** Rivard Decl., March 8, 2011, Ex. CC [ABR 30], referencing CSE's compliance with the storage limitations for DWs under WAC 173-303-240, uniquely applcable to transfer/transporters; Ex. PP thereto [ABR 43], the Rivard's cover letter to the amended health order ("Amended Health Order") dated January 27, 2011, part of Rivard's declaration submitted by Becker, confirming her knowledge that CSE was an authorized transfer/transporter; Ex. K [ABR 12] Granberg admitted that CSE was a permitted transfer/transporter by WAC 173-303-240 and not in violation under WAC 173-303-950 which would give rise to penalties under RCW 70.105.080 or 090. His reference in email correspondence to a lapsed permit was to a DOE issued waste generator permit that CSE allowed to lapse because CSE had ceased generator activities. See footnote 12.

[3] **(Clerk's Papers for Court of Appeals 30770-1-III hereinafter referenced as "CP").** Bradley Decl., June 18, 2012, paras 10-14 [CP 276, 279-281], describing the Facility. The contemporaneous inspection reports prepared by Rivard on his inspections

shipment to authorized waste disposal sites. The Facility is owned by ABC Holdings, Inc., CSE's sister corporation.

Prior to December, 2009, CSE operated under the advice from Mr. Wholpers, the then Health Order that CSE was not subject to local MRW permitting and regulatory requirements because it was a transfer/transporter. In December, 2009, it was informed by Rivard, the new Health Order, that a MRW permit would also be required to Handle MRWs. CSE disagreed but cooperated toward obtaining an MRW permit. It filed a completed permit application in November 17, 2010. It continued to handle as a transfer/transporter pending approval under authority granted by Rivard in two letters dated August 4, 2010 and November 4, 2010 (the "Permission Letters"). The NOVA and the

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of October 12, 2010, January 10, 2011 and January 27, 2011 make no reference to leaks in the roof. Water droplets showing on the pictures of some of the drums are water condensation. The January 10, 2011 inspection report makes reference to a corrected deficiency in a side panel. Neither Neet in her letter of July 14, 2010, concerning secondary containment, comments of KCPHD and the Solid Waste to the November 17, 2010 MRW permit application, the NOVA, nor the Health Order refer to roof leaks. There is no contemporaneous evidence supporting that there were leaks in the roof or that it was a matter of concern to KCPHD or Solid Waste. See Inspection Reports, October 12, 2010 [ABR 30], January 10, 2011 [ABR 36], January 27, 2011 [ABR 39]; Neet letter,; and Appellant's Sur Rebuttal Brief, August 17, 2012, p. 9, 10, footnotes 9-11 [CP 429-430]; Rivard Decl., March 8, 2011, Exs Y, CC, DD, II, LL, MM, NN, OO, and PP [ABR 1, 26, 30, 31, 36, 39, 40, 41, 42, 43, respectively]. DWs and MRWs were stored on pallets set on an impervious canvas membrane as required by WAC 173-303-630(7) and particularly 7(a)(i) and 7(c)(ii) therein. Transfer/transporters unlike MRW facilities, are not subject to any secondary containment requirement.

associated Health Order revoked CSE's authority to continue to Handle MRWs putatively based on CSE's lack of diligence in perfecting its permit.[4]

Rivard conducted at least three inspections of the Facility and produced contemporaneous reports dated October 12, 2010, January 10, 2011, and January 27, 2011. Other than a small oil spill identified on a concrete pad outside the Facility, none of the inspection reports identify any releases. Physical conditions of the Facility are referenced as corrected. None of the inspection reports state that any drums are mislabeled.[5] The January 10, 2011 inspection report confirmed CSE was

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[4] CSE timely submitted its application on November 17, 2010 in accordance with Rivard's Permission Letter of November 4, 2010. Rivard circulated the application to the solid waste division of the DOE ("Solid Waste"). Both Rivard and Neet and Bleeker, personnel of Solid Waste, hand wrote comments on the application. It was returned to CSE for further corrective action on January 27, 2011, the same time the NOVA and the KCPHD health order (the "Health Order") was served. There is no way that CSE could have responded more promptly given the review time taken by Rivard, Neet and Bleeker. See Rivard Decl., March 8, 2011, para. 40, Exs Z, DD, GG, NN, OO, PP, and QQ [ABR 1, 27, 31, 34, 41, 42, 43, 44, respectively].

[5] Rather, the January 27, 2011 inspection report, refers to labeling as incomplete because manifest information was not attached. There is no requirement of either MRW facilities or transfer/transporters that there be any labeling beyond the diamond showing a hazardous waste. See WAC 173-303-190(3)(a); 173-350-360(6)(a)(v) requiring only identification of 'waste type' of MRW facilities. Manifests are required of MRWs only at point of shipment, not as a function of storage. WAC 173-303-180; WAC 173-303-360(6)(viii). Rivard complains not of 'waste type' or 'diamond marking' but the absence of 'manifest'. See Rivard Decl., March 8, 2011, para. 45 [ABR 1/CP 206, 214-215]. References to WAC 173-350-360 do not concede its applicability but rather show that the putative requirements referenced by Rivard and the HE at Conclusiono of Law 13 would have been met had CSE been an MRW facility.

in compliance with its storage requirements under its DOE Number. Neither the October 12, 2010 report nor the January 10, 2011 report identified any labeling issue. The drum later misidentified by Rivard as P016 was inspected on both January 10, 2011 and January 27, 2011, and was shipped to and disposed by a disposal site as D016, the actual label on the drum.[6]

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[6] The January 27, 2011 report states that a slip is not filled out completely; it does not state that it is misidentified. On March 8, 2011, however, Rivard testified that CSE failed properly to label hazardous waste, referring to pictures 13 and 14. HE concluded that a drum of DW, Dichloromethyl ether ("P016"), picture 14, was stored at the Facility in violation of CSE's authorization. Rivard Decl., March 8, 2011, para. 45 [ABR 1/CP 206, 214-215]. Rivard's testimony is flawed in several ways. First, it is not consistent with the January 27, 2011 inspection report which does not identify any issue relating to P016 or the legibility of the labels. Second, there are three variants of the picture. In only one, the one identified in connection with Rivard's statement at para. 45, is the picture not in focus. The other two show plainly that the putative 'P' is a 'D' by comparison of other exemplars of 'P' and 'D' appearing elsewhere on the photographs. Third, the drum in question was shipped on February 23, 2011 to a disposal site and accepted as 2,4-D ("D016") as labeled continuously since January 10, 2011. It was so labeled in the manifest covering the drum as it is in the inventory delivered to Rivard on February 9, 2011. Rivard and Granberg visited CSE's Facilityon February 15, 2011 and Rivard on February 25, 2011, to inspect labeling and manifests provided by CSE on February 9, 2011. Rivard was provided copies of the manifests and list of drum shipments on February 25, 2011. Neither Rivard nor Granberg identified any drum containing DWs in either visit or in response to the inventory, an identification that would have been required had there been DWs on site on January 27, 2011, more than ten days before the inventory. Neither the inventories, the shipment information, nor the manifests identified any DWs. The drum at issue was properly identified as D016, a state regulated MRW. Notwithstanding the purpose of the visits, neither Rivard nor Granberg questioned whether the drum at issue contained D016, at the time of their visit. Rivard Decl., March 8, 2011, Para. 59 and Ex. SS, Ex. TT, Ex. VV, Ex. YY [ABR 1, 46, 47, 49, 52, respectively]. When he executed his March 8, 2011 declaration, he was on notice that the material in question was not P016 as he testified at Paragraph 45, but D016, a waste that is classified as a 'special waste' under WAC 173-303-040, state regulated waste, which may be handled and stored as an MRW. See RCW 70.105.130 which contains the

On January 24, 2011, Messrs Granberg ("Granberg") and Bleeker ("Bleeker") and Ms. Neet ("Neet"), all DOE personnel and Rivard were parties to an email discussing a plan for KCPHD to issue an MRW permit to CSE and immediately thereafter fine CSE for having DWs at the Facility as CSE was entitled under its DOE Number.[7] The fine was a prelude to closing CSE's operations. A transfer/transporter operating with a secondary MRW permit is barred under the MRW permit from Handling DWs,[8] CSE's primary business.

On January 27, 2011, officials of Respondent, KCPHD, and DOE's Solid Waste Division came to the Facility. They served the

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EPA's authorization to the DOE, not Respondent, to permit and regulate DWs. Finally, after Rivard's Declarations of March 8, 2011 and March 24, 2011 were filed and formed a basis for the HE's decision adverse to CSE and the Superior Court to affirm same, and after CSE's appeal thereof, in response to CSE's supplemental motion for stay pending appeal, Rivard filed the June 14, 2012 declaration, in which he recanted his earlier declaration testimony that CSE had stored P016 at the Facility. Rivard Decl., June 14, 2012, Para. 24 [CP 196, 201-202]. The HE relied exclusively on Rivard's March 8, 2011 Declaration and his March 24, 2011, Supplemental Declaration and not on any other records, testimony, or argument. See HE Decision, May 12, 2011, Conclusion of Law 13 [CP 243, 248]. Rivard testified falsely before the HE and before the Superior Court as to the presence of DW at the Facility in violation of CSE's authorization, was on notice of the falsity of the statement when it was made, and only corrected the issue after the HE relied upon thereon as a basis for his decision and the Superior Court affirmed based thereon. See HE Decision, May 12, 2011, Conclusion of Law 13 [CP1 243, 248]; Superior Court Judgment, May 14, 2012, [CP 252-254].

[7] **(Clerk's Papers for Court of Appeals 32301-3-III which was consolidated into Court of Appeals 30770-1-III on April 25, 2014 hereinafter referenced as "CP1")** Allphin Decl., November 4, 2013, Ex. S [CP1 25, 28; 252, 253] which is an email of January 24, 2011 among listed parties.

[8] See WAC 173-350-360(6)(e)(ii)(F); KCSWO Sections IV(C)(3), VI(I)(2)(c)(2).

NOVA and Health Order. The NOVA recited that CSE had committed a public nuisance by operating an MRW facility on site without a permit on November 4, 2010 and January 27, 2010, both covered by the Permission Letters. In abatement, it ordered CSE to pay a fine of $500, to obtain an MRW permit from Respondent, to cease operations at the Facility until an MRW permit issued, and to conduct unspecified invasive testing of the concrete floor in the Facility. The materials served on CSE recited to deficiencies not been identified in the inspection reports. Mislabeling, Handling DWs without a permit, and releases on site were not identified therein.[9]

The word processed NOVA, obviously prepared in advance, alleges that CSE Handled DWs without authorization, an allegation repeated by Respondent throughout the proceedings. CSE was authorized to handle both DWs and MRWs under its DOE Number. See WAC 173-303-240 and 173-303-060. Rivard knew at the time CSE was so authorized.[10] On January 27, 2011, Rivard delivered marked drafts of

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[9] Rivard Decl., March 8, 2011, Ex. II [ABR 1, 36].

[10] See cover letter, Rivard Decl., March 8, 2011, Ex. PP, [ABR 43]. Moreover, Rivard Decl., March 8, 2011, Ex. KK at p. 4 [ABR 38], contains a copy of the uniform hazardous waste manifest used by CSE containing its EPA/DOE Id. No. at line 6. That manifest was in Rivard's possession before January 27, 2011. The January 10, 2011

CSE's MRW application containing handwritten comments from Neet, Bleeker and himself. Upon receipt of the NOVA and Health Order, CSE appealed but ceased acceptance and storage of MRW other than in storage on its vehicles, shipped the remaining waste to disposal cites, and provided Rivard with inventories and copies of manifests and lists of wastes shipped.[11]

Between February 4th and February 7th, 2011, Ms. Becker ("Becker"), the Kittitas County Civil Deputy in charge of the NOVA exchanged emails with Granberg.[12] She inquired of CSE's permits and was informed that CSE operated under a valid DOE Number authorizing it to Handle DWs. The relevant authority cited by Granberg confirmed CSE's authority to Handle MRW without special MRW compliance.

On February 25, 2011, Rivard visited CSE's site and was provided a list and manifest of shipped drums. The inventory and manifests

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inspection report references compliance with the storage requirements applicable to transfer/transporters for DWs. There is simply no question but that Respondent misrepresented the status of CSE's authorizations as to DWs throughout the proceedings in an effort to create a public nuisance other than had been alleged in the NOVA.

[11] Rivard Decl., March 8, 2011, Para. 45-59; Ex. MM, NN, PP, and SS [ABR 1, 40, 41, 43, 46, respectively].

[12] Allphin Decl., November 4, 2013, para. 12, Ex. K [CP1 25, 27, 127, 130-4].

confirmed the drum Rivard erroneously identified as P016 to be D016, a household chemical commonly known as 2,4-D.[13]

On March 7, 2011, Granberg met with Rivard in Rivard's office. Based on photographs to be attached to Rivard's declaration, Granberg identified a drum label that he could read as P016, a DW, to which he referred as the 'smoking gun'. The drum was shipped, accepted and disposed of under the label as D016 before Rivard's visit to the site on February 25, 2011. Granberg handwrote a memo on the 'discovery' and emailed it from Rivard's office to himself.[14] Thereafter, the alleged presence of P016 in alleged violation of CSE's MRW status became a focal point of Rivard's declaration, Becker's briefs, Becker's argument before the HE and of the HE's and later the Superior Court's decisions. Rivard only formally recanted the declaration testimony on June 14, 2012[15] in a supplemental hearing, after the Superior Court's opinion issued and this appeal commenced.

On April 25, 2011, Rivard filed a notice with the DOE's Model Toxic Waste Act ("MTCA") Division claiming CSE released or may have

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[13] Allphin Decl., November 4, 2013, para. 11, Ex. J [CP1 25, 26, 120, 121-6]; Rivard Decl., March 8, 2011, at Ex. TT[ABR 1, 47].

[14]Allphin Decl., November 4, 2013, Para. 28, Ex. Z [CP1 25, 29, 363, 366].

[15] Rivard Decl., June 14, 2012, Para. 24 [CP 196, 201-2].

released dangerous waste on its site.[16] Mr. Peck ("Peck"), for the MTCA Division became involved in late May, 2011. On June 16, he circulated a draft notice to which he referred as the 'straw dogs notice' to Rivard, Bleeker, Granberg and Neet admitting that he had no evidence of a release and had to pursue CSE under the 'threat of release' language in MTCA[17]. On a number of occasions between August 31, 2012 and May 6, 2013, the date the civil contempt citation issued, Mr. Allphin ("Allphin") called or corresponded with Ms. Bound ("Bound") of MTCA and Rivard asking them to identify the release by location and substance. Neither provided information to the request.[18] The information was necessary to develop a testing protocol to fulfill the NOVA.[19]

In October, 2012, Allphin and CSE filed PRA requests on Respondent and the DOE for all information relating to the CSE matter.

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[16] Allphin Decl., November 4, 2013, para. 30, Ex. AB [CP1 25, 29-30, 604, 606-7]

[17] Allphin Decl., November 4, 2013, para. 4, Ex. C [CP1 25, 26, 54, 55, 56-8].

[18] WAC 173-340-320(7) requires the DOE to provide the site owner with its findings. These identify the location and content of the releases or other events. Notwithstanding the requirement, neither Bound nor Peck provided such information to CSE. See also WAC 173-340-800(9) identifying specifics to the requirement. Neither the August 2, 2011 Bound letter nor any correspondence from the DOE in response to CSE'ss request for information met these requirements.

[19] Allphin Decl., November 4, 2013, Para. 13, Ex. L [CP1 25, 27, 135, 136-151]. None of the 'guidance' from the DOE or KCPHD met the requirements of WAC 173-340-320(7) that notice of the event and its contents be provided to the landowner.

The DOE responded in November 2012 with information including the January 24, 2011 email, the February 4-7th Becker correspondence, the March 7, 2011 handwritten memo, and an email between Granberg and the DEQ of Montana confirming that CSE was authorized to Handle DWs.[20] The information showed conclusively that the NOVA was served as part of an attempt by Respondent or the DOE to close or fine CSE, that Rivard and Becker had knowledge of the falsity of their position that CSE was handling DWs or hazardous waste without the requisite authorization, or that there had been any release of P016 or even D016, and that Granberg, who initiated the MRW demand through Rivard, knew that CSE did not need and could not legally operate under an MRW permit to Handle MRWs with its DW operation under its continuing authority under its DOE Number, as to Rivard, before the NOVA issued, as to Becker, before Rivard's declaration of March 8, 2011 was filed with the HE, and Granberg, before the Superior Court entered the order affirming the HE.[21]

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[20] Allphin Decl., November 4, 2013, Para. 17, Ex. P at 15(k) therein [CP1 25, 27-8, 228-237]. Granberg's email confirms that MRWs that are combined with DWs are regulated as DWs. Accordingly, since CSE is authorized to handle DWs, its shipment of DWs and MRWs under a universal manifest is admittedly allowed.

[21] Allphin Decl., November 4, 2013, para 17, Ex. P [CP1 25, 27-8, 170, 241-5].

On February 22, 2013, Ms. Lowe ("Lowe"), Becker's successor, filed an action against the DOE and CSE to prevent CSE from using records transmitted by the DOE to CSE in response to its PRA request which contained the information referenced in footnotes citing Allphin's November 4 and December 19, 2013 and Powers May 1, 2013, Declarations hereof confirming the intent of Respondent and the DOE and their knowledge as to their allegation that there had been a release and storage of a DW without a relevant permit, as to MTCA's involvement and the 'release' story.[22] The TRO motion was granted on April 4, 2013, ex parte. Lowe scheduled the formal hearing thereon and it took place on May 6, 2013, the same date as the hearing on motion for civil contempt. As a result, CSE could not use the records cited herein in its defense to show Respondent's knowledge and the improper motive of Respondent and the DOE in the matter.[23]

The order of civil contempt issued May 6, 2013. It made reference to cooperation of the parties and the DOE in developing and then

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[22] Allphin Decl., November 4, 2013, para. 33, Ex. AE [CP1 25, 30, 623, 624-31].

[23] Powers Decl., May 1, 2013, para 3-6 and 8, 9 [CP1 684-686].

executing the sampling plan.[24] While CSE and KCPHD reached agreement on the plan. The DOE while copied thereon, failed to cooperate or even appear at scheduled meetings to deal with it. In conflict with Peck's declaration statement of August 13, 2012 that the DOE and KCPHD would approve a common plan and consistent with CSE's concern that it would be faced with potentially conflicting or overlapping invasive testing requirements, Peck, did exactly as CSE feared he would. DOE did not cooperate and has not approved the plan approved by KCPHD under the NOVA.[25] The plan approved by KCPHD was executed and the engineer's report thereon confirmed CSE's position that there had been no releases and the site was not contaminated with P016, D016, perc, or any other hazardous material.[26]

III. ARGUMENT.

A. The NOVA is Legally and Factually Defective.

1. Basis of NOVA. A NOVA issues under KCC 18.02.030(1). Issuance is subject to a to specific conditions. It may be

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[24] [CP1 878-9].

[25] Peck Decl., August 13, 2012, para 9. [CP 406]; Allphin Decl December 19, 2013, para. 3, 4, 6, 7, and 9 and associated exhibits.

[26] Allphin Decl., November 4, 2013, Para. 24[CP1 25, 28]; Respondent's brief, December 11, 2013, Ex. A [CP1 635, 639-73], conclusion of environmental engineers at [CP1 643-4].

issued only by an authorized officer of Kittitas County. That person must have a reasonable belief. The belief must be that there was a public nuisance and that the public nuisance is in violation of the KCC. A NOVA must have specified content designed to give notice of the act or omission giving rise to the public nuisance. See KCC 18.02.030(1)(b). It must set forth the acts or omissions required to abate the putative public nuisance. See KCC 18.02.030(1)(e). It must be served, personally or by certified mail, For reasons that follow, other than the identity of the 'authorized officer' and personal service, none of the conditions for issuance of a NOVA or its content requirements were met.

2. Violation Requirement. CSE could not and did not operate an MRW facility without an MRW facility permit. An MRW facility permit issues from KCPHD under authority and requirements of the DOE set forth in WAC 173-350-360. It is codified as part of the regulations dealing with solid waste. It authorizes the DOE to grant KCPHD and other local districts the authority to permit, approve design, regulate operation, and regulate closure of MRW facilities that Handle only MRWs, i.e. 'state regulated waste'. Actual direction on design, operation and closure are controlled by the DOE and implemented by the

various health districts, including KCPHD.[27] Only 'state regulated waste', not DWs may be Handled, including accepted, at MRW facilities.[28] Thus, it was not legally allowed for the Facility which handled DWs to be an MRW facility.

One facility cannot be both an MRW facility and a transfer/transporter. WAC 173-350-360(1)(b)(i) specifically excludes from all regulatory requirements of WAC 173-350-360 governing MRWs, including permitting, design, operation or closure, transfer/transporters who are regulated under WAC 173-303-240 who shipped mix loads of DWs and MRWs under a Manifest. Since the use of a Manifest rather

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[27] The Washington Dep't of Ecology, *Moderate Risk Waste Fixed Facilities Guidelines* (1995) covers the requirements to be incorporated by county health districts into MRW facilities, their permitting, operations and closures is published by the DOE. WAC 173-350-360 contains detailed requirements thereof. Finally, KCSWO Ordinance as amended in 2004 adopts Chapter 173-350, WAC as controlling. The DOE operates a solid waste division of which Neet and Bleeker were personnel, to work with local health districts throughout the entire process. Here, all of the permit applications by CSE as well as inspections of the Facility were accompanied by DOE personnel. Rivard Decl., March 8, 2011, para. 19, 45, 49, Exs V, OO [ABR 1, 23, 42], which include the responsive MRW permit application of November 17, 2010, containing DOE's as well as Rivard's comments at Ex. OO.

[28] WAC 173-350-360(6)(e)(ii)(F); KCSWO, Section VI(I)(2) precluding MRW facilities from accepting DWs and the definitions of MRWs and MRW facilities contained in KCSWO Section III. MRWs are DWs that are exempted by regulation issued under Chapter 70.105D, RCW, from handling under DW classification and limitations. See WAC 173-303-040, definition of 'Special Waste' identifying such wastes as 'state regulated', and restricting the definition to non EPA regulated waste, 173-303-073(2) identifying special wastes as 'excluded from the requirements of Chapter 173-303, and WAC 173-303-100(5) identifying 'D' wastes as within such classification. Special wastes are the same as state regulated wastes and MRWs which may be subject to local health districts' oversight.

than a bill of lading is mandatory for shipping DWs,[29] it is clear that any transfer/transporter complying with its documentation requirement and shipping mixed loads of DWs and MRWs will be categorically exempt from MRW facility permitting, operations, and closure regulation and requirements.

CSE ships mixed loads of MRWs and DWs under such Manifest. As such, it was and is uniquely regulated by the DOE or EPA under its DOE Number. Local health districts, including KCPHD have no authority to permit or regulate the design, operation, or closure of transfer/transporters. Local health districts are allowed under DOE delegation to permit and regulate MRWs only. WAC 173-350-360(1)(b) specifically provides that transfer/transporters, as CSE, that Handle MRWs with DWs and ship them under a Manifest are exempt from all requirements and oversight applicable to MRW facilities. The limitation follows the general restriction limiting the regulation of DWs to the DOE and the EPA and delegating to local health districts only responsibility over state regulated waste, i.e. MRWs.

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[29] WAC 173-303-180; 173-303-240(3).

The companion allegation that CSE possessed P016 at the Facility is legally irrelevant. CSE was a transfer/transporter under a DOE Number, shipped DWs and MRWs under Manifest and thus was authorized to Handle both DWs such as P016 and MRWs at its Facility. Moreover, the allegation is factually in error. Rivard represented both the presence of P016 and the associated violation of permitting at paragraph 45 in his March 8, 2011 declaration submitted to the HE. The HE believed Rivard's declaration testimony and so stated in his decision at Conclusion of Law no. 13. On June 14, 2012, after the HE's decision affirming the NOVA based materially on Conclusion of Law no. 13, and the Superior Court's affirmance of the HE decision, in supplemental proceedings, Rivard submitted a second declaration admitting at para. 24 that his initial conclusion that P016 was present at CSE was in error and based on a misreading of the label on a drum. Therein, Rivard concluded and representated that the reference and drum content were D016, a special waste that an MRW facility was authorized to Handle. In short, the 'evidence' that the HE and Superior Court relied upon that CSE even had DWs at its Facility is now admitted by the declarant of same to be

false. Without that evidence, Respondent has provided no record evidence that DWs were even present at CSE's facility.

Respondent clearly knew that CSE operated as a transfer/transporter under a DOE Number while it sought to compel CSE to obtain an MRW permit. Rivard, the Health Order, made specific reference to the ten day storage protocol uniquely applicable to storage of DWs by a transfer/transporter and CSE's compliant storage of DWs thereunder in his January 10, 2011 inspection report.[30] He further confirmed that knowledge by modifying the Health Order of January 27, 2011 that accompanied the NOVA to exclude CSE's transfer/transporter operations which he admitted in the cover letter thereto were not subject to KCPHD regulation.[31] Becker also knew that CSE was required to and did operate under a transfer/transporter DOE Number. She confirmed this in a

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[30] [CP1 169].

[31] To the extent Respondent is seen to urge that it viewed CSE's operations as two facilities, the inspection reports and Rivard cover letter of January 27, 2011, confirm that there is only one site and one facility at issue. Applicable law forbid that operation. To the extent this is Respondent's position, it is logically absurd. CSE has the right to Handle in all phases both DWs and MRWs under its transfer/transporter DOE Number. Why would it undertake an MRW permit that not only doesn't increase the scope of its rights beyond those it now enjoys, conflicts with those rights because the bar on handling DWs in an MRW facility, and increases its operating burdens by requiring it to be open to the public with employees present, obligations not applicable under a transfer/transporter DOE number? See for WAC 173-350-360(5)(a)(vi); emails French and Rodriguez, both with DOE/DW to Granberg, March 4 and 17, 2011, rejecting or expressing doubt on 'double permitting transfer/transporters handling MRWs'. [CP1 360-2].

series of emails with Granberg between February 4, 2011 and February 7, 2011.[32]

The residual violations, again found by the HE on the basis of the Rivard March 8, 2011 Declaration at para. 45, of labeling violations and issues of cleanliness are not supportive of the finding of public nuisance. Since Respondent had no authority to regulate CSE, its findings would have significance only if a corrective order issued from the DOE under the Dangerous Waste Regulation. The record recites to no such order. Rivard's and the HE's references to the KCSWO provide no assistance. They do not pertain to transfer/transporters handling DWs and MRWs under a Manifest. Design requirements, requirements as to the maintenance of drums, and labeling requirements under the KCSWO or WAC 173-350-360 do not apply to transfer/transporters such as CSE. Moreover, the claimed violations do not state violations of the Dangerous Waste Regulation. There is no requirement thereunder that the information that ultimately is contained in a Manifest be maintained prior to shipment. Manifesting under WAC 173-303-180 and 173-303-240 is a function of shipment, not storage. As a practical matter, the mobilization

[32] Allphin Decl., November 4, 2013, Ex. K [CP1 25, 132-4].

of loads of drums in shipment and the identification of drums thereat to Manifests by virtue of their serial numbering require that such records be produced at the time of shipment and not as an incident to storage. Other than terminal shipping date, date of shipment is not determined by reference to date of receipt of waste. Rivard and based thereon the HE erroneously conflate storage and shipping requirements.[33] Drums are not required to be maintained in any particular 'sanitary' condition as long as their contents are not incorrectly mixed and the drums are tight.[34] The contents of the drums are dry residues of chemicals, not liquids. There is no evidence in the record of leaking drums or incorrect mixing of wastes.

Respondent also knew that P016 was not at the site. CSE produced an inventory of drums to be shipped as required by the NOVA and delivered it to Rivard on February 9, 2011. On February 15, 2011, Rivard and Granberg inspected the Facility. Rivard had a copy of the inventory which he annotated. His annotation recites that the inspection would examine labels and drum content. The inventory recited that the

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[33] WAC 173-303-630(3) requires only that labels identify the waste as to danger, not as to the information required in the Manifest under WAC 173-303-180. The universal extremely hazardous waste diamond symbol is adequate.

[34] WAC 173-303-630(2) and (6) dealing with inspections, contain no requirement beyond leak free and tight. The only limitation is a general prohibition of mixing certain DWs. See WAC 173-303-630(4).

drum in question contained D016. It was shipped and received and accepted as such by the disposal site. Rivard was on notice of the shipment and acceptance as D016 before February 25, 2011, when he again, without Granberg, inspected the Facility.[35] Moreover, there is no reference of P016 in any of Rivard's inspection reports or indeed anywhere prior to March 7, 2011. On that date, Granberg, apparently reviewing a draft of Rivard's March 8, 2011 declaration, inspected photographs of the site and 'discovered' that a label disclosed in one of those photographs could be read as P016.[36] Only thereafter was the issue of P016 as a DW at CSE's site raised in these proceedings.

Because CSE was at all relevant times a transfer/transporter operating under a DOE Number and shipping DWs and MRWs under a Manifest, it was not an MRW facility and did not need to be one to Handle DWs and MRWs as it did. It Handled DWs and MRWs as cited by the HE at Conclusions of Law nos. 4 and 13. However, it did not require and could not have an MRW facility permit to Handle MRWs with its DWs.

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[35] Allphin Decl., November 4, 2013, Ex. J [CP1 25, 120-6, at 121].

[36] Allphin Decl., November 4, 2013, Ex. N [CP1 25, 164-167], the email covering the transmittal as disclosed by Respondent without the handwritten memo in response to Alllphin's PRA request; [CP1 366], the handwritten memo as disclosed by the DOE in response to CS's PRA request, and CS's brief on Motion for Clarification, November 4, 2013 [CP1 6, 21-2], explaining the memo and emails covering same.

Respondent misrepresented the legal requirement that CSE obtain an MRW permit or was operating without one or was accepting DWs as an MRW facility and the HE mistakenly believed the misrepresentation and expressed it in Conclusions of Law nos. 4 and 13. The HE also believed Rivard's declaration statement that P016 was present, at the Facility, later recanted by Rivard, the declarant, and incorporated it as material in and to Conclusion of Law no. 13. Vague references by the HE to the need to clean the drums and to their appearance adds nothing. Whatever their application, they do not apply to transfer/transporters such as CSE. His decision, affirmed by the Superior Court, based on a finding that CSE was required to obtain and operate its MRW Handling under an MRW facility permit, that in had DW in the form of P016 present at the Facility, and the incidental references to the appearance of the drums in violation of its permitting and committed a public nuisance by not doing so must be reversed. They err in law and fact.

3. The Notice Requirement. To the extent the HE's decision at Conclusion of Law 13 is based on a finding of public nuisance not identified in the NOVA, it must be set aside. KCC 18.02.030(1) requires that a NOVA cannot issue without a basis in 'public nuisance'

and without notice thereof. The official issuing the NOVA must have reasonable belief; Rivard's January 10, 2011 inspection report and cover letter to the January 27, 2011 Amended Health Order conclusively show the absence of such reasonable belief.[37] KCC 18.02.030(2)(b), (c), (d), and (e) requires such notice must include a description of the violation constituting the public nuisance, the time of its occurrence, the authority violated, the amount of the fine, and a description of the action required to abate the nuisance. Here, the NOVA identified two violations on November 4, 2010 and January 27, 2011 that consisted of operating a MRW facility without requisite county and state permits. While the HE's Conclusion of Law 4 is limited to the public nuisance disclosed in the NOVA, the putative violations recited in Conclusion of Law 13, viz. presence of P016 a dangerous/hazardous waste, labeling deficiencies, and drum maintenance, do not. The HE states that they are taken from Rivard's March 8, 2011 Declaration and its exhibits, not the NOVA. As

[37] It is difficult to see this requirement could be met given the Permission Letters issued by Rivard and copied to Neet and Bleeker, Rivard's admission in the January 10, 2011 inspection report that CSE was properly Handling DWs at the Facility, and the cover letter to the Amended Health Order which confirms CSE's right to operate as a transfer/transporter not subject to KCPHD with authority to Handle DWs and MRWs provided by WAC 173-303-240 and 173-350-360(1)(b)(i) upon which the cover letter's conclusions must be based. Rivard clearly knew that CSE was authorized to conduct its business without an MRW facility permit when he assisted in serving the NOVA. He cannot be seen to have a reasonable belief to the contrary.

such, they cannot be considered a basis for issuance of the NOVA. The NOVA must stand or fall on the operation without a requisite permit allegation. As limited to such allegation, given the erroneous legal proposition asserted therein, the NOVA does not meet the notice requirement of identifying one or more public nuisances.

4. Public Nuisance Requirement. A NOVA cannot be issued without reasonable belief that acts or omissions giving rise to a public nuisance have occurred. Public nuisance is not any public nuisance at statutory or common law. Rather, it is limited to a 'public nuisance' that is 'in violation of this Title', viz. Title 18, KCC, Enforcement. Title 18 specifically identifies those acts or omissions which constitute public nuisances. KCC 18.01.020(1)(k) provides that County Health Codes including Solid Waste Ordinances are covered. KCC 18.01.020(2)(a) covers public nuisances as defined by Washington State Statute or case law. The HE upheld the NOVA based upon its finding that CSE's Handling of MRWs without an MRW facility permit constituted a public nuisance and that the presence of DW/hazardous waste and labeling/storage violations identified in Rivard's two declarations constituted a public nuisance under the KCC. See Final Order at

Conclusions of Law 4 and 13, at CP 09. The conclusions of law, actually, findings of fact, are flawed.

As seen in Subsection 2, above, the factual basis for Conclusions of Law 4 as it refers to permitting requirement is erroneous. CSE had the permit, the DOE number, it required to Handle DWs and MRWs in the manner it did under a Manifest. It needed no other permit and could not have even operated under an MRW facility permit because of the restriction on handling DWs, CSE's primary business. Moreover, the allegations based on the putative presence of P016, a DW, which CSE could have Handled in any case have been admitted to be false by the declarant, Rivard. Finally, the putative violations based on the condition of drums and labeling, if they have any basis at all, clearly do not apply to transfer/transporters such as CSE. Whatever their relationship to MRW facilities, and no citation to either WAC 173-350-360 or the KCSWO is made in support thereof, they are inapplicable to CSE and are not authority the breach of which, could give rise to a public nuisance finding under KCC 18.01.020(1)(k) or (2). That provision requires that the relevant violation be a violation of the County Health Codes, including KCSWO. No nexus is identified.

The HE references a violation of Kittitas County Codes, not a statutory or common law public nuisance. He makes no finding and reaches no conclusion that there was a statutory or common law public nuisance. Indeed, absent a direct legislative recitation that an ordinance's violation is impressed with actual impact on and harm to the public, a violation of an ordinance can never reach the requirements of a statutory public nuisance.[38] That same standard pervades common law public nuisances. Absent a direct legislative declaration, both require a public impact.[39] Here, the recited public nuisance in the NOVA is operation

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[38] RCW 7.48.120 defines a nuisance in relevant part as "unlawfully doing an act or omitting to perform a duty which...either annoys, injures or endangers the comfort, repose, health or safety or others...; or in any way renders other persons insecure in life, or in the use of property." RCW 7.48.130 defines public nuisance as a "nuisance which affects equally the rights of an entire community or neighborhood..". The HE recites to putative violations of KCSWO or State environmental law, particularly permitting, or operational requirements thereunder. There is no showing of any of the elements of a statutory or common law nuisance.

[39] *Greenwood v. The Olympic, Inc.*, 51 Wn.2d 18, 21, 315 P.2d 295 (1957); *Kitsap County v. Kev, Inc.* 106 Wn.2d 135, 138-40, 720 P.2d 181 (1986). While *Kev* found a public harm and impact, it did so in connection with a patently illegal prostitution and drug operation operating through a nude dancing bar. The closure order in question was not parallel to a NOVA. See also, 23 *Wash Prac., Environmental Law & Practice*, Sec. 4.2 (2d Ed.); 16 *Wash. Prac. Tort Law & Practice,* Sec. 2.26 (3d Ed.). It is also significant that the relief sought and granted in Kev was a permanent injunction preventing persons with criminal backgrounds from operating a nude dancing studio while the remedy sought here was a NOVA that itself carries fines and provides a basis for criminal prosecution. The applicable standard for issuance of injunctive relief, a civil remedy is not the same as a NOVA, a penal remedy. The difference is recognized in connection with citations for criminal contempt verses civil contempt. A higher due process standard applies to the former than the latter.

without a requisite permit. As has been shown, there was no such operation or Handling of DWs or MRWs without a requisite permit. The DOE Number was the requisite and only permit. The drum condition and labeling recitations are similarly not sufficient in themselves to show a public harm and impact. In addition to the absence of any record evidence that the drums did not meet the condition, labeling, and handling requirement of WAC 173-303-630 which is here applicable, no other standard, including one imposed by KCSWO applies. KCC 18.01.020(1) does not incorporate Chapter 173-303 or for that matter 173-350 as 'codes' or 'ordinances' the violation of which could be a public nuisance thereunder. No actual public harm or impact has been shown. No other legislative finding has been cited. The record does not support the HE's conclusion that there was a public nuisance.

5. The NOVA Issued on an Unlawful Predicate. The NOVA issues on the legal basis that Respondent has the legal authority to regulate CSE or its Handling of DWs or MRWs. It clearly does not. As noted above, CSE operates as a transfer/transporter under a requisite DOE Number. As such it is permitted and regulated exclusively by the EPA and DOE. Its Handling of DWs and MRWs and shipping same under

Manifest as required of transfer/transporters with respect to DWs deprives Respondent of regulatory authority over permitting, design, operations or closure of CSE in its capacity as transfer/transporter.[40] It is in this capacity that CSE Handled MRWs with its DWs. As noted, CSE neither could possess nor did it need an MRW facility permit to operate as it did.

Underlying the NOVA is Respondent's claim that it had jurisdiction over CSE's MRWs and their permitting and handling. Respondent cites no legal authority that WAC 173-350-360(1)(a)(i) does not apply to confirm that Respondent does not have jurisdiction or authority. As government agencies, Respondent and KCPHD must operate within their respective authorities. Specific powers not included in those authorities cannot be implied.[41] An ultra vires act is one without legal authority and is void even if it is procedurally proper.[42] Here, Respondent and KCPHD thereunder had no authority to regulate permitting, design, operation, Handling or closure of transfer/transporters handling MRWs under Manifest. Neither had they the authority to issue

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[40] WAC 173-303-360(1)(b)(i) expressly excludes any regulation of MRWs Handled by transfer/transporters under Manifest from its ambit and authority and its delegation thereunder to local health districts such as KCPHD. Without limitation, the duty to permit as an MRW facility is precluded as to transfer/transporters and MRWs they Handle with DWs under Manifest. This clearly means that KCSWO Sec. VI does not apply to transfer/transporters such as CSE acting in that capacity.

[41] See *Ortblad v. State,* 85 Wn.2d 109, 117-8, 530 P.2d 635 (1975); *Barendregt v. Walla Walla School Dist. No. 140*, 26 Wn.APP. 246, 249-50, 611 P.2d 1385 (1980).

[42] *S. Tacoma Way, LLC v. State* 169 Wn.2d 118, 122, 233 P.3d 871 (2010); cited in *Lane v. Port of Seattle*, 178 Wn.App. 110, 123-4, 316 P.3d 1070 (2013) as the controlling definition.

the NOVA in putative violation thereof. Neither Respondent nor KCPHD nor the HE acting on a NOVA issued by Respondent have authority to extend or alter these limitations. Here, authority over CSE was reserved to the DOE, not Respondent or KCPHD or their HE.[43] Because Respondent and KCPHD thereunder did not have authority to regulate permitting or Handling of DWs or MRWs by transfer/transporters operating under a DOE Number and employing a Manifest as did CSE, it did not have authority to issue a NOVA based upon such putative authority. Accordingly, the NOVA was an ultra vires act, illegal when issued, and void.[44]

6. Respondent's Consent to CSE's Operation Without Permit. Assuming, arguendo, CSE were required to obtain an MRW facility permit, there still would be no basis to issue the NOVA. The NOVA recites that CSE committed a public nuisance by operating and Handling waste without a requisite permit on two specific dates, November 4, 2010 and January 27, 2011. Both incidences of operation refer to times when CSE operated under specific written authority granted

[43] A HE as legislatively adopted by Respondent may hear appeals of administrative decisions and determinations in accordance with an ordinance adopted by Respondent. Respondent has so authorized HEs. See RCW 36.70.970; KCC 1.10.010. However, the HE's authority must be based on a decision that issued under authority of Respondent. Neither Chapter 70.105 RCW nor Chapter 173-303 or 350 or WAC 173-350-360 thereunder grant Respondent or KCPHD authority over DWs. See, particularly, WAC 173-350-360(10). Hence, the DOE, not Respondent or KCPHD have authority over CSE and its Handling of DWs and MRWs and permitting associated therewith.

[44] *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 798-9, 666 P.2d 329 (1983); *Finch v. Matthews,* 74 Wn.2d 161, 172, 443 P.2d 833 (1968).

by Rivard, the Health Order, on November 4, 2010 by letter. The authority was continuing as long as CSE filed a completed MRW facility permit application by November 19, 2010. It filed the application which was facially complete on November 17, 2010.[45] Rivard further confirmed that he told Chem Safe that the authorization would only be revoked on two week notice after comments on the application issued from himself and from Neet and Bleeker.[46] Those comments only issued and were delivered on January 27, 2011, with the service of the NOVA. Rivard's reference to a period of response after comments were delivered clearly shows that he contemplated that there would be comments and that those comments would not render the application incomplete. An examination of the annotated application shows that the comments were not directed toward completeness. At no time prior to the issuance of the NOVA was CSE given the opportunity to respond to the comments.

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[45] Indeed, it was substantially complete when submitted in April, 2010 according to Neet's review and the deficiencies noted by Rivard on January 27, 2011 as to the November 17, 2010 submission were marked as not applicable, complete or, in the case of financial assurances awaiting Respondent's response. See Rivard Decl., March 8, 2011, Ex. V consisting of a checklist [ABR 23]; Ex. OO, cover letter to comments on November 17, 2010 submission [ABR 42].

[46] Email Rivard to Bleeker, December 8, 2010, confirming statement to CS; Allphin Decl., November 4, 2013, Ex. W [CP1 25, 349-352].

The effect of the NOVA was retroactively to revoke a consent given by Rivard to CSE to continue to operate as it had without a permit pending the perfection of a permit. It violated and express additional assurance that revocation, if any, would only be prospective and that after opportunity to respond. While the right granted under Rivard's letter may not be a vested right, it is a right cognizable under Art. I, Sec. 3 and 23 of the Washington State Constitution, Art. I., Sec. 9, Clause 3 of the United States Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Here, by structure a criminal allegation, committing two or more acts of public nuisance within twelve months, is made.[47] Such an allegation invokes specific Constitutional protections against retroactive penalties. Moreover, due process requirements have not been met. There was no hearing or its equivalent before a nonvested but active right was terminated. Indeed, termination was retroactive. Temporary rights such as the Permission Letters are covered by due process considerations.[48] None were here met, nor could they have been

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[47] KCC 18.01.050(1).

[48] *International Brotherhood of Electrical Workers Local Union No. 46 v. Mitchell*, 98 Wn.App. 700, 703-5, 990 P.2d 998 (2000); *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 10-12, 959 P.2d 1024 (1998).

when a right was retroactively revoked to invoke a possible criminal violation.

Not only did the retroactive revocation violate CSE's Constitutionally protected rights, but they also breached an assurance that Respondent had given to CSE in response to specific inquiry, an assurance upon which CSE reasonably relied. CSE had been advised that it was required to obtain an MRW facility permit and was attempting to comply. It operated a regulated business, that of a transfer/transporter, that was subject to material adverse effect from public nuisance citations. It sought, was granted and relied on official relief in a written statement. Respondent should be estopped retroactively to withdraw such statement. Since the facts would support a civil remedy against Respondent subject to its waiver of sovereign immunity[49], it cannot be seen as enforceable against CSE by Respondent.[50]

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[49] RCW 4.96.010.

[50] "A duty of care may arise where a public official charged with the responsibility to provide accurate information fails to correctly answer a specific inquiry from a plaintiff intended to benefit from the dissemination of the information." *Taylor v. Stevens County*, 111 Wn.2d 159, 171, 759 P.2d 447 (1988); *Meaney v. Dodd*, 111 Wash.2d 174, 180, 759 P.2d 455 (1988). See *J & B Dev. Co. v. King Cy.*, 29 Wash.App. 942, 953–54, 631 P.2d 1002 (1981), aff'd on other grounds, 100 Wash.2d 299, 669 P.2d 468, 41 A.L.R.4th 86 (1983); *Rogers v. Toppenish*, 23 Wash.App. 554, 560–61, 596 P.2d 1096 (1979).

B. The Abatement Order is Defective. The abatement order contained in the NOVA is defective because it fails to address the specific 'public nuisance' identified in the NOVA. The term abatement is incorporated into the NOVA as the action which corrects the violation prospectively. While one can see how closure of the MRW facility, removal of the waste stored thereat, and discontinuation of receipt of more MRWs for storage pending issuance of an MRW permit have a nexus to the putative violation, operation without an MRW permit, there is no such nexus between the putative violation and the order invasively to test the concrete floor. The NOVA revoked the written consents to operate an MRW facility without an MRW permit; it does not end the permitting process. Indeed Rivard testified that he expected the permitting process to continue and criticized CSE for not seeking the permit diligently.[51]

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[51] Rivard Decl., August 13, 2012, paras. 28, 31 [CP 333, 345, 346]. Therein, Rivard highlights the problems with the NOVA. He recites to two putative transporting manifest identification issues, neither not subject to oversight by KCPHD, that did not occur in Washington, and were corrected by correcting the manifest's identification by phone and, critically were not identified in the NOVA as a violation upon which the finding of public nuisance was based. He also confirms that the proposal by CS to move its MRW handling operations to another building on campus would not be accepted even though the 'threat of release' posed by storing drums in the original facility had been remediated by removal of the drums. Rivard does not recite that the new facility is not structurally acceptable but rather that as a condition to the consideration of the new facility, the old facility, the site under the application must be closed. Here, however, he fails to identify any order for such closure contained either in the health order or the

Abatement orders are not without limits. They are by nature injunctive type of relief. Their reach can extend no further than the correction of the identified deficiency. Here the identified deficiency is operation without an MRW permit. Assuming, arguendo that such a permit was required which CSE denies, there is no correlation between invasive testing of a concrete pad underlying the Facility, testing which will destroy or materially damage the pad, and operating without a permit. Orders extending to prohibition or destruction independently give rise to issues under the Washington State Constitution and the United States Constitution. They may constitute takings and require specific actions by Kittitas County not here undertaken.[52] Abatement must be remedial; it cannot constitute a taking. It is not an excuse to issue orders unrelated to

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NOVA or that conforms to the requirements for closure of an MRW facility, and certainly not one that applies to transfer/transporters that would be subject to WAC 173-303-610. Finally, Rivard admits acting in consort with personnel of the DOE on a matter over which Respondent has unlawfully claimed jurisdiction in its NOVA. Rivard Decl., August 13, 2012, paras. 15, 16, 28-31 [CP 333, 338-340, 345-346]; Rivard Decl., March 8, 2011, Ex. NN [ABR 41]. The Rivard Decl., August 13, 2012 [CP 333], and Respondent's brief based thereon clearly show that Respondent erroneously believes that the notice requirement of KCC 18.02.030 need not be followed and notions of due process need not be considered to uphold an obviously flawed NOVA.

[52] 1 *Wa. St. Envir. L.* Sec. 3.21 (2012) at footnotes 9-11 and associated text; Wash. St. Const. Art. I, Sections 3, 16; United States Constitution, Fifth and Fourteen Amendments.

the identified harm or to issue orders that are disproportionate to such harm.[53]

Operating without a permit, if required, is curable by obtaining the permit on the same facility or another facility or by ceasing such operation. Here, the operation was suspended pending further permit action. Orders that relate to that result abate the putative public nuisance. An order invasively to test the concrete pad underlying the Facility does not respond to the putative public nuisance at all. Rivard so admits by discussing it within the context of a closure of the Facility, an activity beyond the scope of the NOVA.[54] The closure protocols applicable to MRWs and transfer/transporters do not require invasive testing of the floor. The protocols invoke engineering reports.

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[53] The demand for invasive testing of the pad raises the 'unconstitutional conditions doctrine set forth in *Koontz v. St. John's River Management Dist.*, 133 S.Ct. 2586, 2591, et. seq., (2013), *Nollan v. California Coastal Com'n.*, 483, U.S. 825, 837, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S.Ct. 2309 (1994). Although these cases dealt with illegal conditions to issuing land use permits, there is little to distinguish them from this case in which a permit on a different facility was 'conditioned' upon illegal invasive testing of a different facility. The doctrine has been recognized by the Washington court in a different context of constitutional rights protected in a criminal setting. See *Butler v. Kato*, 137 Wn.App. 515, 530, 154 P.3d. 259 (2007). Here a protected property right is involved.

[54] Rivard Decl., August 13, 2012, para. 28 [CP 333, 345].

C. CR 59/60 Motion. The Court below erred in declining to rule in favor of Appellant's motion under CR 59 and under CR 60.[55] The motion for reconsideration also asked the Court to grant the stay based on Rivard's recant.[56] Rivard's declaration testimony provided a basis for the HE's determination that CSE had DW or hazardous waste at the Facility without a requisite permit and that such finding supported the NOVA's

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[55] While the motion contained two alternative motions, one under CR 59 to reconsider the denial of CSE's motion for stay, and one under CR 60 to set aside the judgment. Both motions were based in part on Rivard's recant of his original declaration testimony that P016, a DW, was on CSE's site without authorization. CSE maintains that the Superior Court committed an abuse of discretion by denying its motion for reconsideration of the Superior Court's denial of its motion for stay on the basis that it would affect the relief that CSE sought on appeal and as a result of Rivard's admission that P016 was not present on the site, 'the County's house of cards crumbles...the basis for the order requiring invasive testing was the alleged existence of a dangerous or hazardous waste at the facility-a waste that we now know and the County finally admits was not present.' Brief in Support of Motion for Reconsideration, July 5, 2012, Sec. D(2), sic., at p. 6.

[56] Rivard Decl., June 14, 2012, para. 24 [CP 333, 342]. The testimony was false not only as to the presence of P016 on site but as to the underlying proposition that its presence was not 'authorized'. Rivard clearly knew and admitted in the cover to the Amended Health Order that CSE was a transfer/transporter. He admitted his knowledge of the ten day rule of WAC 173-303-240 applicable to storage of DWs by transfer/transporters by reference to thereto in his January 10, 2011 inspection report. The proposition that P016 was on site was false. So was the proposition that CSE committed a violation by handling or storing same. The issue is compounded by Peck's testimony that conflates hazardous waste, covering both DWs and MRWs, with DW only, leading the Superior Court to conclude that the dichotomy between DWs and MRWs made no difference. Special waste to which reference is made in WAC 173-303-040 by definition making reference to 'state only waste' and in WAC 173-303-100 by identification is treated as an MRW, is exempt from most DW handling requirements, and is expressly subject to local governmental oversight. It is treated as an MRW even though listed in the DW regulations.

abatement provisions and for the Superior Court's order affirming same.[57] Without that determination, the 'public nuisance' was limited to operation without an MRW permit, a deficiency that is not 'corrected' by invasive testing of the concrete floor of the Facility. The public nuisance basis for the NOVA also fails if CSE were authorized to Handle DWs. Rivard's declaration testimony is thus critical to the decisions below upholding the NOVA as well as the Superior Court's failure to grant stay.

A stay should have been ordered to address the effect of the recanting of prior testimony. If as he states, Rivard he twice informed, apparently Becker,[58] that the initial declaration contained a false statement and she did not correct the matter, it calls to question whether the decision in favor of Respondent should have been reversed under principles of

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[57] The HE so recites in HE Decision, May 12, 2011, Conclusion of Law 13 [CP 243, 248] that he relied solely on Rivard's March 8, 2011 and March 24, 2011 Declarations. The Superior Court affirmed on the HE's 'finding' in that conclusion. Court Order, May 14, 2012, [CP 252-254].

[58] While Becker admitted in oral argument at the hearing before the HE that the substance in question was D016, she continued to misrepresent the presence of DWs and did not cause Rivard to testify to correct the record. HE Transcript, Transcript p. 7, lines 9-14, 24-p. 8, line 15 [CP 46, 54, 55]; Respondent's brief of March 10, 2011 to Hearing Examiner, pp. 6, 7 [ABR 54]. At Conclusion of Law 13, the HE confirmed that he only considered Rivard's Decl., March 8, 2011 and March 24, 2011, and nothing else. Argument was not enough. Ms. Lowe, Becker's successor obviously so concluded. She caused Rivard to file his June 14, 2012 Decl [CP 196] recanting his testimony.

equitable or judicial estoppel.[59] The Superior Court should have reopened the proceeding for additional evidence on the false statement and considered it both as to its substantive relevance to the issues or as an equitable bar to Respondent's position in the matter.

While CSE's motion was couched in terms of the effect of the false testimony upon the HE's and Superior Court's order affirming the NOVA and the basis it provided for reopening the proceeding under CR 59, based on (2) and (4) thereof, it also states a basis to reverse the decision based on equitable or judicial estoppel. The prongs of judicial estoppel are here present. One party made a false statement, the Superior Court relied on the false statement to reach its decision, the party reversed its position on the subject matter of the false statement, and injustice results from allowing the original decision to issue based on a statement now admitted as false.[60] Clearly, Rivard's declaration that there was P016 illegally

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[59] See discussion of standard at *Anfison v. Fed. Express Ground Package Sys. Inc.* 174 Wn.2d 851, 861-2, 281 P.3d 289 (2012). Given the conflicting declarations, the Court could have set Respondent's judgment aside on grounds of judicial estoppel, a matter raised in Appellants' brief. The positions conflict, one is false, and the counterparty was put to disadvantage by Respondent's tardiness of the disclosure of falsity.

[60] *Miller v. Campbell*, 164 Wn.2d 529, 539, 540, 192 P.3d 352 (2008); *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007); *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

stored on the premises made in his declaration of March 8, 2011 was false, it was the basis for the HE's decision and the Superior Court's affirmance thereof, Rivard now admits the statement was false and that he so informed counsel who did nothing to correct the matter, and CSE has suffered material unjustified damage by being deprived of the right to operate from its Facility and being compelled invasively to inspect its concrete floor which will materially damage same. The Superior Court abused its discretion by not reopening the proceeding, either in response to the CR 59/CR 60 motion or to its attendant motion for relief under judicial estoppel when it was faced with a material false statement upon which it and the HE had relied.

The basis for granting the CR 59/60 motion or sua sponte issuing a judgment based on judicial estoppel is further enhanced by the evidence that Respondent was fully aware of the falsity of its statement at the time it was initially made and at all relevant times thereafter and consciously chose to permit first the HE and then the Superior Court to be misled in consort with the DOE with a view to fining and closing CSE's operations

or rendering them unprofitable. The January 24, 2011 email exchange among the parties clearly implicates the wrongful goal of fining or closing CSE for acts that both knew to be authorized. Rivard's January 10, 2011 inspection report and his reissuance of the Amended Health Order show that he had requisite knowledge that CSE was authorized to handle both DWs and MRWs as it did. The email exchange between Granberg and Becker, the civil deputy who prepared the NOVA and defended in the administrative appeal of February 4-7, 2011 show that she clearly knew long before she responded to CSE's administrative appeal, at the time she filed Rivard's March 8, 2011 declaration, and at the time of the hearing before the hearing examiner and before the Superior Court that CSE was duly authorized to handle DWs and MRWs in the way it did without an additional MRW permit. Both knew, that even if true, the allegation that CSE improperly handled P016, a DW, on its site was false. Yet both continued to urge this position before the HE and the Superior Court. While the basis for the malice is unclear, its presence cannot be doubted as a motive for concocting the scheme to fine or close CSE or render its business noneconomic by advocating in the NOVA, before the HE, and

before the Superior Court a position that Respondent and its representatives knew to be false or without legal basis.

D. The Civil Contempt Citation. The civil contempt citation of May 6, 2013, improperly issued. First, it ordered an action, development of a testing plan acceptable to Respondent and executing same which was not within the power of CSE to perform. While the Court admonished the parties to cooperate, actual approval of the testing plan under the NOVA was left to the unfettered discretion of Respondent. The Court did not change the requirement to provide an alternate means of approval or to require good faith or any standard of approval on Respondent. Moreover, the NOVA neither lists what toxins are to be tested, the basis for the selection of such toxins, and the location at which testing for such toxins must be made. It compelled CSE to reach an agreement with Respondent.

CSE, after the Superior Court's order and before the motion for civil contempt, made repeated attempts to obtain guidance from both the DOE and Respondent thereon. No assistance was provided. Indeed, as CSE believed, notwithstanding Peck's declaration testimony to the contrary, the DOE and Respondent did not have a coordinated testing

protocol in mind. It is axiomatic that a defense to a civil contempt citation is impossibility as long as it is not caused by the putative contemnor. Here, neither the order of civil contempt, the NOVA, nor Respondent, before the date that the civil contempt order could be purged, actually provided guidance for an invasive testing protocol consistent with the NOVA but capable of performance.[61]

Second, Respondent's wrongful interference in CSE's presentation to the Superior Court of a defense and exculpatory evidence should have been considered by the Superior Court. The Superior Court was aware that Respondent had sought and obtained an ex parte TRO barring CSE from using and thus introducing records made available to it through PRA requests that cast light on Respondent's wrongful issuance of the NOVA, bad motive, and knowledge of falsity of facts and law that it asserted by declaration, brief and oral argument before the HE and the Superior Court to obtain the relief it sought to enforce. It was aware that a hearing on the scope of the TRO was scheduled simultaneous with the hearing on the motion for civil contempt. Yet the Superior Court did not

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[61] Defense recognized. *In re Marriage of Didier*, 134 Wn.App. 490, 501, 140 P.3d 607 (2006); *In re Interest of Rebecca K.*, 101 Wn.App. 309, 314; 2 P.3d 501 (2000); *In re M.B.*, 101 Wn.App. 425, 439, 3 P.3d 780 (2000) *State ex. Rel. Shafer v. Bloomer*, 94 Wn.App. 246, 253, 973 P.2d 1062 (1999).

reset the hearing to determine the scope of new evidence that CSE could present and, instead, allowed that evidence to remain under the cloud of the original TRO. Failure to permit CSE to provide a defense, breached CSE's due process rights and forms a basis for setting aside the civil contempt order, even if performed.[62]

VI. CONCLUSIONS. The Superior Court's decision to affirm the HE's ruling affirming the issuance of the NOVA against CSE must be reversed. The issuance of the NOVA was clearly ultra vires. CSE as a transfer/transporter was regulagted exclusively by the DOE or EPA, not Respondent or KCPHD. CSE neither had a duty to obtain an MRW permit nor could it have operated under one. Kittitas County has neither authority nor can it penalize CSE for not obtaining an MRW permit. The HE 'finding' of a predicate public nuisance in Conclusion of Law 13, as affirmed by the Superior Court, as to presence of P016, a DW/hazardous waste without authorization is flawed; P016 was not present, and if it had been CSE was legally authorized to Handle it.

Neither do the remaining 'findings' address the absence of

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[62] Due process requirements recognized in actions for civil contempt. See *M.B.*, p. 438. The right to defend by producing evidence is implicit in the standard for asserting the defense.

jurisdiction. Because jurisdiction over DWs vests exclusively with the DOE and is not delegated or delegable to the counties or their health districts, the NOVA issued to CSE constitutes an invalid ultra vires, and hence void order because it is based on Respondent's attempt to extend Respondent's and KCPHD's putative authority over MRW facilities to transfer/transporters such as CSE. That authority as noted is limited to state regulated wastes only, MRWs, and facilities Handling same and does not extend to transfer/transporters Handling and shipping MRWs with DWs on Manifests. The NOVA recites no legal basis for its existence or for the fine and abatement order contained therein. The NOVA and its effect must be reversed.

The recitation of the HE Decision as affirmed by the Superior Court cannot stand. Each violate the requirement of the ordinance authorizing NOVAs that the NOVA set forth the basis for the determination of public nuisance. Putative violations referenced at paragraph 13 of the HE's conclusions of law are not listed in the NOVA as the public nuisance on which it issued. Hence, the NOVA is rendered unenforceable as issued to all charges other than the putative charge of

operating without an MRW facility permit, which on closer examination is not legally required of transfer/transporters such as CSE.

Reliance on 'public nuisance' events not identified in the NOVA both violate KCC 18.02.030 and applicable Washington State and Federal notice and due process requirements. Moreover, the requirements for finding a public nuisance thereunder are clearly here absent. Authorization required and regulation of transfer/transporters such as CSE issue from the DOE, not Respondent or KCPHD. Putative DW regulatory violations are not listed under the codes or ordinances, the violation of which Respondent claims to be a public nuisance. Neither do they meet the public impact requirement of statutory law or common law, a violation of which was in any case not found by the HE or affirmed by the Superior Court. There is simply no public nuisance upon which the NOVA must be grounded.

Assuming, arguendo, Respondent had some regulatory authority over CSE's transfer/transporter operation which CSE denies, it still cannot be doubted that Rivard acting with authority under the KCSWO specifically gave CSE the right to operate without an MRW facility permit. The right was wrongfully revoked retroactively in violation of

CSE's Constitutional and due process rights and of the agreement Respondent made with CSE. Wrongful retroactive for the Respondent gave CSE cannot legally form a basis for a NOVA, its fines and abatement order.

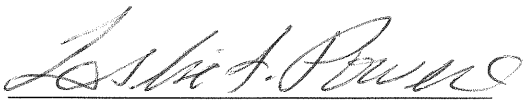
The abatement order in the NOVA is independently defective. It does not respond to the putative public nuisance, operation without an MRW facility permit.

The Superior Court erred in failing to consider the obvious grounds for judicial estoppel pled in CSE's CR 59/60 motion. Rivard obviously misrepresented in declaration the presence of P016 as well as CSE's authority to handle it. He recanted that representation only after the HE and Superior Court affirmed the NOVA on that basis. It is now clear that Rivard was not 'mistaken' and rather that he and Becker knew that the statement was untrue, factually and legally when it was made. The first prong is fulfilled. The HE at Conclusion of Law 13 admitted reliance on Rivard's testimony in affirming the NOVA against CSE. The second prong is fulfilled. It was error for the Superior Court to fail to grant the CR 59/60 motion or to find for CSE on the basis of judicial estoppel.

Based on the foregoing, CSE is entitled to have the judgment reversed or reversed and remanded for additional review of the evidence based on the misrepresentations of Rivard advanced by Becker and in each case made with knowledge of their inaccuracy.

DATED this 30th day of June, 2014.

Attorney for Appellants



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