FILED
JUL 06 2015
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

SUPREME COURT CASE NO. 91878-3

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs/Petitioners,

-vs-

KITTITAS COUNTY

Defendants/Respondents.

FILED
JUL 21 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

Petitioner's Attorney:
LESLIE A. POWERS
Powers & Therrien, P.S.
WSBA #06103

3502 Tieton Drive
Yakima, WA 98902
Phone: (509) 453-8906
Fax: (509) 453-0745

APPENDIX

A. **Identity of Parties**

B. **Decision Appealed**

C. **Issues/Basis for Review**

D. **Statement of Case**

E. **Basis for Review**

F. **Argument Why Review Should Be Accepted**

G. **Conclusion**

TABLE OF AUTHORITIES

CASES

Hart v. Dep't. of Soc. and Health Services, 111 Wn.2d 445, 447, 449, 759 P.2d 1206 (1988). . . . 8

In re Cross, 99 Wn.2d 373, 377, 662 P.2d 828 (1983). 8

Marriage of Hoover, 151 Wn.2d 884, 892, 893, 93 P.3d 124 (2004) 8

Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). 8

State v. Barr 123 Wn.App.,373, 381, 98 P.3d 518 (2004). 13

State v. Lynn 67 Wn.App. 339, 345, 835 P.2d 251 (1992). 13

State v. McFarland 127 Wn. 2d 322, 333, 899 P.2d 1251 (1995). 13

State v. WWJ Corp., 138 Wn. 2d 595, 601, 602, 980 P.2d 1257 (1999). 13

STATUTES AND RULES

Amendment 5, U.S. Const. 3

Amendment 14, U.S. Const. 3

Art. I, Sec. 2, Wash, St. Const. 3

Art. I, Sec. 3, Wash, St. Const. 3

Art. XI, Sec. 11, Wash, St. Const. 2

40 CFR 261 4

RAP 2.5 7

RAP 2.5(a)(3) 7

RAP 13.4. 13

RAP 13.4(d)(4). 8

RCW 70.95 19

RCW 70.95.060 5

RCW 70.95.160 11

RCW 70.95.185 11

RCW 70.105. 19

RCW 70.105.005(8) 9

RCW 70.105.005(10). 9

RCW 70.105.007. 11

RCW 70.105.007(1) 5

RCW 70.105.007(3) 5

RCW 70.105.010(1) 4

RCW 70.105.010(7) 4

RCW 70.105.010(11) 4

RCW 70.105.010(13) 4

RCW 70.105.035 5

WAC 173-250-360 5

WAC 173-303 19

WAC 173-303-040 4

WAC 173-303-060 3

WAC 173-303-180 6

WAC 173-303-200 4

WAC 173-303-201 4

WAC 173-303-240 6

WAC 173-303-240(1). 4

WAC 173-303-240(4). 4

WAC 173-303-240(6). 3

WAC 173-303-240(9). 4

WAC 173-350 19

WAC 173-350-310 11

WAC 173-350-360 6

WAC 173-350-360(1)(a)(ii) 6

WAC 173-350-360(1)(b)(i) 6

WAC 173-350-360(4)-(11) 6

WAC 173-350-360(6). 7

WAC 173-350-360(6)(a)(viii) 10

WAC 173-350-700(2) 4

OTHER AUTHORITY

Kittitas County Solid Waste Plan, 2011. . . . 5

Kittitas County Solid Waste Ordinance. 4

Kittitas County Solid Waste Ordinance,
VI(I)(1) 16

Kittitas County Solid Waste Ordinance,
VI(I)(1)(a) 14

A. IDENTITY OF PARTIES

ABC Holdings, Inc. and Chem-Safe Environmental, Inc. (collectively, CSE) ask this Court to accept review of the Court of Appeals' Decision Terminating Review designated in Part B of this Petition. Respondent is Kittitas County ("County").

B. DECISION

CSE requests that the Supreme Court review the published decision of the Court of Appeals, Division III, filed April 23, 2015 in case No. 307701-III and its order denying the Petitioners' motion for reconsideration dated June 4, 2015. A copy of the decision is in the Appendix at pages A-1 through A-18. A copy of the order denying Petitioners' motion for reconsideration is in the Appendix at page A-19.

C. ISSUES / BASIS FOR REVIEW

1. Did the Court of Appeals error in refusing to consider Constitutional issues that the Petitioners were jurisdictionally barred from raising at the hearing before the hearing examiner?

2. Can a county determine that a solid waste transferor and transporter that transports and transfers dangerous waste under a valid license issued by the Department of Ecology is in violation of county

regulations pertaining to moderate risk waste facilities and, as a result, order the dangerous waste transferor/transporter to cease operations?

3. Can a county require a dangerous waste transferor and transporter to obtain a permit to operate as a moderate risk waste facility when, under Washington law, a solid waste facility that stores any amount of dangerous waste is determined to be a dangerous waste facility and, therefore, not a moderate risk waste facility?

4. Can a county regulation applicable to moderate risk waste facilities preempt Department of Ecology regulations concerning the transfer and transport of dangerous waste?

5. Is a solid waste transfer facility operating under a valid license issued by the Department of Ecology required to obtain a permit to operate a moderate risk waste facility when dangerous waste is not permitted in a moderate risk waste facility?

6. Does a county violate article XI, section 11 of the Washington State Constitution when it retroactively and without notice, requires closure of a dangerous waste transfer and transport facility for failure to comply with a local ordinance applicable to moderate risk waste facilities that conflicts with state laws governing dangerous waste facilities?

7. Did the county violate CSE's right to due process under article I, section 2 and article I, section 3 of the Washington State Constitution, and the Fifth and Fourteenth Amendments to the Federal Constitution when it issued a Notice of Violation and Abatement (NOVA) without notice and a hearing and with retroactive effect?

D. STATEMENT OF CASE

CSE transports regulated dangerous waste ("DW") and moderate risk waste ("MRW") from its address in Kittitas County to remote federal or state permitted disposal sites. CSE and its transporter and transfer facility operation is exclusively permitted and regulated by the Washington State Department of Ecology as further authorized by the United States Environmental Protection Agency ("EPA") in its receipt, temporary storage and shipment of DWs and locally generated MRWs therewith. CSE has at all relevant times possessed the requisite EPA/DOE number issued under WAC 173-303-060 and as to its transfer facility under notification of the DOE under WAC 173-303-240(6). In short, CSE has all governmental permits to operate its transporter/transfer facility. Kittitas County through its public health district ("KCPHD") has a limited authority under delegation from and strict oversight of the DOE to permit and regulate solid waste handling, including MRW facilities, that involve

and are limited to waste that is either state regulated only, i.e. not exclusively regulated by the EPA and the DOE under delegation thereof, or exempt in small quantities from such regulation.[1] Such local regulation is executed under the local solid waste ordinance ("KCSWO") as approved by Kittitas County but registered with the DOE and all other counties and local health districts.[2] The DOE's oversight and the division of authority and direct oversight between the DOE and local government

[1] Moderate risk waste ("MRW") is waste not regulated federally under 40 CFR Part 261 because it is below threshold quantity or is otherwise exempt. Regulated waste is hazardous waste which is either dangerous waste, mixed waste, or extremely hazardous waste. Dangerous waste ("DW") is hazardous waste other than extremely hazardous waste. Local government jurisdiction is limited to solid waste which does not have a regulated waste component. The DOE regulates regulated waste including dangerous waste. Solid waste with a dangerous waste or extremely hazardous waste component is regulated exclusively by the DOE as dangerous or extremely hazardous waste. As so limited, 'DWs' are 'hazardous waste' and are 'regulated waste'. MRWs are solid waste that does not include 'regulated waste' components, i.e. 'DWs'. Transporters are DOE regulated services transporting DWs and MRWs from collection sites to licensed disposal sites transfer facilities are the fixed base facility from which transporters collect, temporarily store and, load DWs and MRWs for transportation regulated under a transporter's 'permit'. See RCW 70.105.010(1), (7), (11) and (13), definitions, and 70.105.007(10); WAC 173-303-040 definitions. See also, *Guidelines*, p. 1 defining MRWs, *Guidelines*, at IV(B), p. 19 prohibiting MRW facilities receipt of DWs and *Guidelines*, at IX(A) and (D), p. 49-51, distinguishing transporters and TSDs from MRW facilities. TSDs and transporters are treated as the recipients of waste from MRW facilities and not as MRW facilities. The *Guidelines* pp. 11-13, 19, do not link guidance on permitting MRW facilities with EPA/DOE Numbers applicable to TSDs (treatment, storage, or disposal facilities) and transporters other than to point out that MRW facilities must become TSDs if they accept any DWs. A transfer facility as an identified part of a transporter and operates under the transporter number after notification of the DOE. See WAC 173-303-240(1), (6), and 173-303-060. Temporary storage does not include storage in transit. See WAC 173-303-040, definition, 173-303-240(6), (9) setting out the ten day storage limitation for transfer facilities, and 173-303-200-201 that otherwise permit small waste generators longer storage of MRWs, made applicable to transporters by WAC 173-303-240(4).

[2] WAC 173-350-700(2).

are based on a clear statutory mandate.[3] Local government is thus barred federally and by Washington statutes from regulating anything other than state only regulated waste.

CSE plays an important role in the overall scheme of waste management and disposal. It is licensed to and accepts, temporarily retains and ships to licensed disposal sites DWs and MRWs from local generators for disposition. It is specifically identified in and its role specifically recognized as a unique State permitted transporter/transfer facility for disposition of DWs and MRWs in the Kittitas County Solid Waste Plan as reviewed and approved by the DOE. Thus, it performs a valuable and recognized function to Kittitas County in the process of disposing of hazardous wastes that must be sent to licensed disposal sites which locally permitted waste handling facilities under the KCSWO are not authorized to do.[4]

Based on a misconstruction of the KCSWO and WAC 173-250-360 which provides for MRW handling and facilities and delegates to local health districts permitting and administration thereof, KCPHD issued an order on December 21, 2009 to CSE to obtain an MRW facility permit

---

[3] RCW 70.105.005(8) and (10), 70.105.007(1) and (3), 70.105. 035 and 70.95.060.

[4] *Kittitas County Solid Waste Plan*, (2011), p. 7-4 – 7-7 and Tables 27 and 29 recognize CSE and its role in transporting DWs, there designated as regulated or hazardous waste for disposition and that Kittitas County has no disposal sites for such waste.

for CSE's transfer facility.[5] To avoid conflict therewith, CSE attempted to do so.[6] On November 4, 2010, KCPHD by letter authorized CSE to continue to operate its transfer facility if it proceeded with its MRW facility permit application and assured CSE that its right to operate would not be terminated until two weeks after KCPHD commented on CSE's MRW facility permit application.[7] On January 27, 2011, Kittitas County issued a NOVA closing the transfer facility as an unpermitted MRW, fined CSE for operating same, and ordered invasive testing of the facility floor.

---

[5] WAC 173-350-360 generally authorizes local government to permit, administer, and close MRW facilities under strict detailed guidelines covering, location, design, operations, closure and permitting that are contained in WAC 173-350-360(4)-(11). See further, Washington Dep't. of Ecol., *Moderate Risk Waste Fixed Facility Guidelines* (1993, 1995) issued in further guidance of local government ("*Guidelines*"). WAC 173-350-360(1)(a)(ii) and (1)(b)(i) categorically exempt therefrom, including from permitting by local government under WAC 173-350-360, transporter/transfer facilities permitted and regulated pursuant to WAC 173-303-240 if, as does CSE, they have an EPA/DOE issued number under WAC 173-303-060 as a DW facility and they ship both DWs and MRWs under a uniform manifest authorized by WAC 173-303-180. The categorical exemption from MRW permitting and compliance covers both DWs and MRWs and coverings both transporters and their transfer facilities, the latter perfected under transporter permit by notification of the DOE, here, as to CSE, not an issue. See WAC 173-303-240(6). It at all relevant times had a relevant number and notified the DOE of its transfer facility in its annual DOE reporting compliance in 2003. See Rivard Decl, 3/8/11, ex. K. (Appellate Board Record PH-11-0001 hereinafter referenced as "ABR") [ABR 12] and ex. PP [ABR 43]; Allphin Decl, 11/4/13, ex. K (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") [CP1 129-134].

[6] Rivard, the KCPHD health officer, admitted that a DOE permitted transporter/transfer facility did not need an MRW facility permit Rivard Decl., 11/16/12 to Court of Appeals, para.15 disingenuously claiming CSE elected to have an MRW facility permit rather than 'apply' for the DOE transfer facility 'permit'. This is false. Rivard as KCPHD health officer ordered CSE to obtain such an MRW facility permit on 12/21/09 [ABR 9] as noted above even though he later testified such MRW facility permit was not required. CSE's application for an MRW facility permit was not elective. See note 2 above.

[7] Rivard Decl 3/8/11, Ex. DD [ABR 31] ; Allphin Decl 11/4/13, Ex. AD [CP1 154],

CSE administratively appealed.[8] The hearing examiner refused to hear any challenges to the NOVA's construction of KCSWO and approved the NOVA based on the presence of DWs at CSE's transfer facility as an MRW facility and on its lack of an MRW facility permit.[9]

On appeal, the Superior Court based review strictly on the hearing examiner record, which did not contain the legal or Constitutional challenges to Kittitas County's actions, and affirmed the hearing examiner.[10] On appeal, the Court of Appeals ignored RAP 2.5(a)(3)'s mandate to hear Constitutional Issues not brought below and cited RAP 2.5 as justification not to hear issues not brought before the hearing examiner.[11]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals' decision that a county regulation pertaining to a moderate risk waste facility can preempt a state regulation governing dangerous waste transferors and transporters presents an issue of substantial public interest that this Court should determine.

[8] Rivard Decl 3/8/11, Ex. MM [ABR 40]. Per WAC 173-350-360(6), MRW facilities cannot accept DWs (regulated waste). See similarly, *Guidelines*, p. 19. Hence, a transfer facility cannot legally be permitted as an MRW facility because it by definition and purpose accepts regulated waste (DWs) and as an addition MRWs.

[9] Hearing Examiner Decision filed 5/12/11 [ABR 64], see para. 13, conclusions of law; As to refusal to hear constitutional issues, transcript, hearing examiner hearing of 4/25/11, p. 5., HE hearing transcript, filed with the Court of Appeals 9/20/12.

[10] Memorandum Decision 3/12/12 [CP 120]; Final Order 5/14/12 [CP 134].

[11] Decision of Court of Appeals filed 4/23/15.

A matter is reviewable by this Court if it affects a substantial public interest. See RAP 13.4(d)(4). A substantial public interest is affected if the matter involves a matter of a public as opposed to private nature, if it is desirable to provide an authoritative determination for future guidance to public officers, and if the matter is likely to recur. *Hart v. Dep't. of Soc. And Health Services*, 111 Wn.2d 445, 447, 449, 759 P.2d 1206 (1988); *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972); *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983). In *Hart*, the court examined whether due process was denied to Hart when her paramedic certificate was modified on recommendation of her director in a manner binding DSHS without the opportunity for review through appeal. In *Sorenson,* the Court examined whether qualification for local public office could be conditioned by ordinance on local property ownership. The *Hart* Court recognized that substantial public interest is implicated where issues of constitutional interpretation or the validity of statutes and regulations are involved because they tend to be public in nature and involve risks of recurrence. See *Hart*, p. 449. In *Marriage of Hoover*, 151 Wn.2d 884, 892, 893, 93 P.3d 124 (2004), this Court recognized that a lower court's failure to follow construction guidelines on a matter of interpreting a marital statute was sufficiently important to meet the public

interest test since there was risk of recurrence and the matter involved one affecting a waste of judicial resources. It referred to the lack of guidance in the statute and conflicting judicial decisions in reference to its waste of judicial resources claim.

The matter for which CSE urges review by this Court is similarly supported by its substantial public interest. The NOVA and the decisions of the hearing examiner, trial court, and Court of Appeals misconstrue and conflict with WAC 173-350-360, disregard WAC 173-350-360(1)(a)(ii) and WAC 173-350-360(1)(b)(i), and RCW 70.105.005(8), (10), RCW 70.105.007(1) and (3) and RCW 70.105.035 which authorized the legislative regulation, restricts local government to nonregulated waste, and grants the DOE exclusive authority over regulated DWs and facilities handling, storing, or transporting same.

As shown by reference to CSE's facility and its necessary use in receiving and transporting waste from Kittitas County to out of county disposal sites in compliance with federal and state law, there is a clear public interest in the resolution of the question whether a dangerous waste transporter and transferor can be subject to a local permitting process which makes it impossible to receive and temporarily store in transit MRWs and dispose of them with DWs, an activity sanctioned and required

by WAC 173-350-360 governing such dispositions. Unless transporters are allowed to use transfer facilities subject to their DOE permit to accept and temporarily hold MRWs as well as DWs, Kittitas County will be left without a means of disposing of such wastes out of county where such disposition is required by the waste classification under rules of the DOE and EPA.[12] All other public health districts in Washington are similarly left in limbo as to the effective transportation of MRWs and DWs if the resolution approved by the hearing examiner and the courts below stand. They all have similar solid waste ordinances. Parenthetically, in no other county in Washington has a transporter with a transfer facility been required to obtain a local MRW facility permit for such transfer facility or is there a private locally permitted MRW facility that is either permitted as a transfer facility or accepts DWs. Moreover, all MRW generators that deliver MRWs to transporters at their transfer facilities will be rendered noncompliant because as shown by WAC 173-350-360(6)(a)(viii), MRWs become subject to DW regulation and uniform manifest compliance requirements if a transporter loses its right to accept and re-manifest MRWs at its transfer facility. What the decisions below require, that is

---

[12] The function of receiving in transit MRWs is identified in WAC 173-350-360(6)(a)(viii) in connection with the re-manifesting thereof from bills of lading applicable to MRWs to uniform manifests applicable to the shipment of MRWs by transporters under the uniform manifest regime.

that a transfer facility be permitted locally as an MRW facility simply is not legally permissible under the applicable DOE regulations and RCW 70.105.007(3) which authorizes the restriction of local government therefrom.

The Washington legislature recognized the importance of limiting local government's jurisdiction over waste management state wide to solid waste without regulated components subject to state regulatory oversight through the DOE and giving jurisdiction over all other waste, particularly that with regulated components to the DOE. It further recognized the state wide implications of that division of authority.[13] Local authority is identified as jurisdictional health departments consisting of counties and groups of counties covering the state. Local ordinances implement their authority, all filed with the DOE.[14] Permits subject to their purview are similarly reviewed for legality by the DOE.[15] The system and its division of authority over waste is thus, state wide, discrete as to jurisdiction, and overseen by the DOE. Clearly, local construction of local ordinances conflicting such carefully reticulated statutory grant have substantial

[13] See language in RCW 70.105.005(8) and (10) and 70.105.007, introductory paragraph, 70.105.007(1) and (3).

[14] RCW 70.95.160, applicable only to 'solid waste' without a regulated component.

[15] RCW 70.95.185. The DOE passes on legality and consistency with minimum legal requirements of all local government permits. Similarly, see WAC 173-350-360 and 173-350-310 which dictate design and permitting requirements for MRW facilities and intermediate waste handling facilities subject to local government oversight.

public interest, particularly when so declared by the Legislature. There are 9 listed TSD or transporters that provide services to Kittitas County, of which only Chem-Safe is local.

The Court of Appeals' decision to disregard RAP 2.5(a)(3)'s mandate to consider constitutional issues not raised before the hearing examiner on an administrative appeal implicates a substantial public interest. The matter has come before appellate courts and this Court in other contexts. The Court of Appeals' decision o is particularly problematic in situations where constitutional issues cannot be brought before the trier of fact because of jurisdictional limitations placed on a hearing examiner. The Court of Appeals' decision raises an issue of significant public interest because the decision requires any Washington litigant either to elect to file judicially for declaratory relief at the risk of failure to exhaust administrative remedies or to file judicially for declaratory relief and at the same time maintain the administrative action with the further risk of inconsistent results and added expense and use of judicial resources.

2. The Court of Appeals' construction and upholding of a local ordinance that conflicts with the governing state regulation and its refusal to consider constitutional issues outside of the hearing examiner's jurisdiction present significant questions of law under the State and Federal constitutions.

The test for determining whether review is warranted as a manifest error of a principle of constitutional law affecting a material right under RAP 13.4 is four pronged: (1) was there an error that was constitutionally based; (2) was the error manifest; (3) is the argument that there was such an error meritorious; (4) was the error harmless. *State v. Barr* 123 Wn.App.,373, 381, 98 P.3d 518 (2004). In *State v. WWJ Corp.,* 138 Wn. 2d 595, 601, 602, 980 P.2d 1257 (1999) this Court confirmed that the test applies both to criminal and civil proceedings. It reasoned that the term manifest requires that the error result in a concrete detriment to the claimant based on constitutional principles, there the 8th Amendment and a claimed excessive fine. See *WWJ*, pp. 602, 603; *State v. McFarland* 127 Wn. 2d 322, 333, 899 P.2d 1251 (1995), and *State v. Lynn* 67 Wn.App. 339, 345, 835 P.2d 251 (1992), cited therein.[16] The error must rest on a plausible argument. See *WWJ*, p. 603 wherein this Court measured the application of the constitutional principle that was abridged with the facts supporting abridgement. Finally, the record must be adequate to show the abridgement, detriment, constitutional issue and the plausibility of

---

[16]The 'could have been brought below' issue concerning the courts is absent here. CSE was foreclosed by jurisdiction from bringing the constitutional issues to the hearing examiner as the hearing examiner confirmed.

claimant's position. See *WWJ,* p. 603, denying relief on the inadequacy of the record. This petition meets the *WWJ* standards for review.

Art. XI, Sec. 11, Wash. St. Const. renders unenforceable a local ordinance conflicting directly with a law of general application. Here, the County's and hearing examiner's construction of the KCSWO VI(I)(1)(a) require CSE to obtain an MRW facility permit as a condition of operating CSE's DOE-permitted transfer facility despite the language of WAC 173-350-360, which categorically exempts CSE as a transporter/transfer facility from MRW permitting and compliance and local government jurisdiction[17] Kittitas County's construction, specifically the hearing examiner's decision, holds CSE in violation of the bar therein as an MRW facility to receipt of DWs, the core purpose of CSE's DOE permit as a

---

[17]See authorization to regulate in RCW 70.105.005(8) and (10), 70.105.007(1) and (3), 70.105.035, and as to DOE oversight and rule making as applicable to solid waste, 70.95.060. Collectively, the DOE is granted exclusive overall authority to promulgate regulations designating wastes by classification, regulating hazardous and extremely hazardous waste, its handling and facilities and their administration, and the authority to issue regulations governing minimum standards for solid waste facilities administered by local government. Local government may not be delegated jurisdiction over any waste that is regulated by the EPA. Solid wastes with regulated components cannot be regulated by local government. Thus, as to jurisdiction over hazardous waste facilities, including transporters of hazardous waste with or without transfer facilities, local government is statutorily barred from exercising jurisdiction. Under its authority to issue regulations governing solid waste that is subject to local government oversight, the DOE recognizing the need to transport such waste issued a regulation, WAC 173-350-360 categorically excepting from local government oversight and permitting handling of MRWs that are shipped with DWs under a uniform manifest pursuant to WAC 173-303-180 and facilities handling same and assigning same to transporters/transfer facilities already permitted under WAC 173-303-240 to receive, temporarily retain and ship to disposal sites such MRWs.

transporter/transfer facility for receiving, temporarily storing and shipping DWs and MRWs therewith to remote licensed disposal sites.

Art. XI, Sec. 11, Wash. St. Const. specifically preempts and voids any local ordinance that directly conflicts with a statewide law of general application. The Washington legislature has adopted laws of general application that give the DOE 'broad regulatory authority' and oversight over hazardous waste facilities such as transporter/transfer facilities that handle federally regulated waste and minimum standards for locally administered solid waste facilities including MRWs. Thereunder, the DOE issued WAC 173-350-360 retaining exclusive authority over transporter/transfer facilities and their receipt, temporary storage, and shipment of DWs and MRWs, therewith and treating the MRWs as DWs categorically excluding them and such activities from local oversight and permitting of MRWs handling and facilities. The DOE's regulation has state wide application. It is a legislative regulation of general application implementing statutory language referring to the DOE's preemptive authority. Art. XI, Sec. 11, Wash. St. Const. requires in such situations, that local ordinances be void where in conflict with statewide laws of general application. Kittitas County's construction of KCSWO(6)(I) directly conflicts WAC 173-350-360(1)(a)(ii) and (1)(b)(i), RCW

70.105.005(8) and (10), 70.105.007(1) and (3) and as implemented by the DOE or EPA, RCW 70.105.035, and 70.95.060 by asserting jurisdiction over, requiring permitting of, closing CSE's DOE permitted transfer facility as an MRW facility and fining CSE for operation thereof and receiving DWs therein. Such construction clearly conflicts governing law of statewide application, is unconstitutional, and must be struck down as void under Art. XI, Sec. 11, Wash. St. Const.

CSE's due process rights under Art. I, Sec. 3, Wash. St. Const. and the Fifth and Fourteenth Amendments, U.S. Const. were violated by Kittitas County. The NOVA fined and ordered closure of CSE's transfer facility without notice and a hearing. It illegally exercised jurisdiction over and ordered CSE to obtain an MRW facility permit and fined CSE for operating without same even though it had no jurisdiction over CSE's transporter/transfer facility or its operation. By illegally issuing the NOVA, it prohibited CSE from acting under the language and purpose of its DOE permitted transporter/transfer facility and punished CSE for acting thereunder, specifically receiving DWs. Without regard to the legality of its order, Kittitas County retroactively revoked a temporary license it issued to CSEs to operate without an MRW facility permit during the application for and perfection thereof, a valuable right issued to

CSEs within the authority granted to KCPHD under KCSWO(1), without prior notice and a hearings. Such actions by Kittitas County violated CSE's substantive and procedural due process rights by enforcing an illegal obligation, obtaining an MRW facility permit, retroactively terminating a license to operate granted in writing by it without notice and a hearing, by fining and ordering invasive testing of CSE's transfer facility and acceptance of DWs thereat, the very purpose of CSE's DOE permit.

The Court of Appeals erred in not considering the constitutional implications of Kittitas County's actions by treating same as discretionary under RAP 2.5 and dismissing because such constitutional issues were not raised to the hearing examiner in disregard of RAP 2.5(a)(3)'s mandate that such constitutional issues may be raised initially on appeal. Here, the hearing examiner identified the issue. He expressly stated that he was legally prohibited from hearing constitutional issues and stated that they should be heard on appeal.[18] CSE was foreclosed from raising constitutional issues relating to the legality of Kittitas County's construction of KCSWO to exercise jurisdiction over and require permitting of CSE and due process affected by that legality and by the retroactive revocation of CSE's license to operate. The hearing examiner

[18] Statement made, p. 5, HE hearing transcript, filed in Court of Appeals 9/20/12.

assumed the legality of Kittitas County's action and applied them to the facts, albeit incorrectly.

The problem lies in the appellate process. The Superior Court received the appeal below on the record from the hearing examiner. She did not consider other evidence or issues that could not be raised. Nor did she consider the legality of the NOVA or hearing examiner order although the issues were timely raised to her directly or in motion for construction and reconsideration and to set aside the judgment under CR 59 and 60.

The Court of Appeals compounded the problem by ruling that CSE was foreclosed to bring the constitutional issues before it because they were not raised to the hearing examiner. Since they could not be raised to the hearing examiner and were disregarded by the Superior Court, under the Court of Appeals decision CSE has been prevented from being heard on these issues. Such a construction would render RAP 2.5(a)(3) void and violate CSE's constitutional right to be heard on the issue of legality and constitutionality of the NOVA and hearing examiner's decision.

CSE has suffered harm from the illegal demand by Kittitas County that it obtain an MRW facility permit, by the retroactive termination of its license to operate its transfer facility without an MRW facility permit under conditions granted by local government which had no legal

authority to require same, by suffering a fine and the illegal closure of its transfer facility by local government without any authority to make such order, and by the further order contained therein invasively to test its transfer facility floor for contaminants issued in connection with the illegal order to cease operations thereat. It has been fined, paid thousands of dollars in testing cost, and been deprived of the use of its transfer facility, all illegally, by Kittitas County. The Court of Appeals erroneous application of RAP 2.5 without regard to RAP 2.5(a)(3) and allowance of constitutional matters initially raised on appeal and the nondiscretionary nature of that allowance which had the effect of approving the illegal NOVA and hearing examiner order under which CSE was damaged.

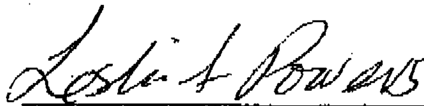
CSE's references to the record establish a sufficient basis in the record for this Court to accept and decide this petition without additional record facts. The record cites have been made in the introduction hereof CSE raised the constitutional issues in detail in its motion for reconsideration which was denied without comment.[19] The remaining issues are legal involving the KCSWO, and Chapters 70.95 and 70.105, RCW and 173-350 and 173-303, WAC.

F. CONCLUSION

[19] Motion for reconsideration to Court of Appeals with summary denial filed 6/4/15.

Based on the above, CSE respectfully requests that the Court grant the Petition for Review of the decision of the Court of Appeals. CSE also respectfully requests this Court to reverse the Court of Appeals' decision.

Respectfully submitted this 6th day of July, 2015.



LESLIE A. POWERS
WSBA #6103
Attorney for Plaintiffs/Petitioners
3502 Tieton Drive
Yakima, WA 98902
Phone: 509-453-8906
Fax: 509-453-0745
Email: powers_therrien@yvn.com

APPENDIX

FILED
APRIL 23, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

ABC HOLDINGS, INC., and CHEM-SAFE ENVIRONMENTAL, INC.,	)	No. 30770-1-III Consolidated with No. 31712-9-III and No. 32301-3-III
Appellants,	)	
v.	)	PUBLISHED OPINION
KITTITAS COUNTY,	)	
Respondent.	)	

BROWN, A.C.J. – Today, we decide three consolidated appeals. First, Chem-Safe Environmental, Inc. and its parent company, ABC Holdings, Inc. (collectively CSE) appeal the superior court's public nuisance order, affirming the Kittitas County hearing examiner's decision upholding the county's notice of violation and abatement (NOVA) for handling moderate risk waste (MRW) without proper county permits. Second, CSE appeals the court's contempt order based on its failure to adhere to the NOVA. Third, CSE appeals the court's denial of its motion to vacate the NOVA. CSE contends (1) the NOVA was factually unsupported, beyond the county's authority, and procedurally defective, (2) the court erred in finding contempt, and (3) the court erred in denying its reconsideration request in light of newly discovered evidence. We conclude the

contempt appeal is moot because CSE has since purged the contempt without sanctions and we reject CSE's remaining contentions. Accordingly, we affirm.

FACTS

The facts are drawn primarily from the hearing examiner's unchallenged findings of fact. From July 10, 2008 through January 27, 2011, CSE collected MRW materials on its property before transporting the waste to disposal facilities. CSE claimed it was in the process of obtaining a permit. On January 27, 2011, a county's health department inspector, James Rivard, visited CSE's property. He had inspected the site in the past and had warned CSE it needed a permit. Mr. Rivard found MRW material on the property, which Mr. Rivard believed was dry cleaning solvent (dichloromilthyl ether), labeled P016—a hazardous waste number designated by 40 C.F.R. § 261.33. CSE did not have a permit from the county's health department to collect MRW or operate a MRW facility on the property, violating Kittitas County Code Ordinance 1999-01 and chapter 173-350 WAC.

The county issued a NOVA to CSE including a description of the alleged violation, notice of a $500 fine payable within 30 days from the end of the appeal period, a description of abatement action necessary, a statement that CSE could request an administrative hearing, and notice the county may assess costs of abatement against CSE. The NOVA ordered CSE to "test the concrete floor and ground at the facility site for contamination. All test methods and sample locations must be pre-approved by [the County] in consultation with [the Department of Ecology] prior to any testing. Testing

cannot be performed by [CSE], but must be done by a neutral 3rd party who is approved by [the County] in consultation with DOE." Clerk's Papers (CP) at 536. Lastly, the county concluded CSE's actions amounted to a public nuisance.

CSE requested an administrative hearing but did not dispute it had been operating during Mr. Rivard's investigation without a required permit. CSE, however, argued it was in the process of applying for the proper permit and asserted the county had approved its operation during the application period. The county pointed out Mr. Rivard's declaration submitted to the hearing examiner made reference to a drum observed at the CSE facility that Mr. Rivard initially believed contained "P016." The county explained to the hearing examiner Mr. Rivard's understanding of the label was mistaken and that it actually listed "D016." The county informed the hearing examiner that D016 was listed as a dangerous waste per WAC 173-303-090(8)(c) and at 40 C.F.R. § 261.21.

The hearing examiner found the county had allowed CSE to operate their waste facility during the application process, but were not estopped to revoke that consent to protect the public health, safety and welfare. The examiner found the county lacked authority to waive the permitting requirements. And, that CSE "does not dispute that they operated without the required license/permit." CP at 8. The examiner affirmed the NOVA and denied reconsideration. By this time, CSE had ceased operating at its property.

In March 2012, CSE appealed to the superior court; the superior court affirmed, filing a memorandum decision.

In April 2012, CSE appealed here and requested the superior court stay NOVA enforcement until this appeal was decided. CSE mainly wanted to stay the required testing of the facilities' floor and ground below. In June 2012 the superior court denied CSE's stay request, finding it did not have jurisdiction because a notice of appeal had been filed. This court directed the parties to RAP 7.2 and RAP 8.1 regarding post judgment motions and the right to stay enforcement of trial court decisions.

Based on this court's directive, CSE moved for reconsideration of the June 2012 order denying its stay request, based on CR 59(a)(8) (error of law), or alternatively, under CR 60(b)(3) (newly discovered evidence based on Mr. Rivard's later declaration regarding the drums' labeling). In October 2012, the superior court denied CSE's stay request, but did not address its CR 60 motion. In November 2012, CSE unsuccessfully requested reconsideration of the court's denial of its stay motion.

In April 2013, the county requested a show cause hearing on why CSE should not be found in contempt for failing to adhere to the NOVA. In May 2013, the court found CSE in contempt, stating, "The contempt may be purged if appellants both formulate and execute a satisfactory sampling/testing plan." CP at 885. CSE appealed the court's contempt order to this court. In December 2013, the court ruled CSE had purged the contempt and denied the county's request for sanctions.

In February 2014, CSE requested clarification of the court's November 2012 denial of its request for reconsideration. Filing another memorandum decision, the superior court clarified its denial of CSE's motion to vacate based on newly discovered evidence, finding Mr. Rivard's subsequent declaration regarding the drums' labeling was before the hearing examiner and not newly discovered evidence. CSE separately appealed that ruling as well. This court consolidated the three matters.

ANALYSIS

A. Permit Requirement

The issue is whether the hearing examiner erred in affirming the county's NOVA for CSE's operation without a permit. CSE contends it was not required to have a permit, the NOVA was issued without due process, and the required abatement amounts to an impermissible taking.

The superior court reviews the administrative record before the body or officer in the local jurisdiction authorized to make the final determination. *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001). We stand in the same position as the superior court and review the record before the hearing examiner. *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 47, 52 P.3d 522 (2002). We review challenged findings of fact under the substantial evidence standard and conclusions of law de novo. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Since CSE does not

challenge the findings of fact, we consider them verities here. *Anderson v. Pierce County*, 86 Wn. App. 290, 307 n.9, 936 P.2d 432 (1997).

Initially, the county argues this appeal is not a matter of right because the superior court heard the matter like an appeal or review of an order by a court of limited jurisdiction. But, a court of limited jurisdiction is any court organized under Titles 3, 35, or 35A RCW. RCW 3.02.010. The hearing examiner is not a court organized under any of those titles, and is therefore not a court of limited jurisdiction. Thus, the superior court's orders were final orders appealable as a matter of right under RAP 2.2(a)(1).

CSE no longer argues it was a generator of solid waste, and instead argues it was not required to obtain a county permit because it was a transferor/transporter of MRW regulated by state and federal agencies. The county responds this issue was not before the hearing examiner and, therefore, is not properly before us. "Our cases require issues to be first raised at the administrative level." *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997). Furthermore, "[i]n order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993).

The hearing examiner found CSE operated by "collecting moderate risk waste materials on the Property before transporting . . . to disposal facilities" but CSE had not "obtained a permit to collect . . . waste . . . from [the] County." CP at 5. The examiner found, "a violation of the KCC Ordinance 1999-01 and WAC 173-350 occurred due to

the existence of an unpermitted . . . moderate risk waste facility." CP at 5. CSE did not contest and even conceded the permit requirement at the administrative hearing. Indeed, CSE initially defended, by arguing, it was in the process of obtaining a permit when the county issued the NOVA. The hearing examiner's unchallenged findings of fact clearly show CSE failed to obtain a permit, a violation of local and state administrative codes. Thus, the issue of whether a permit was required was not raised below.

Requiring resolution of an issue at the administrative level is more than "'simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decision-making.'" *Pacific Land Partners, LLC, v. Dep't of Ecology*, 150 Wn. App. 740, 754, 208 P.3d 586 (2009) (citation omitted). The issue of whether CSE was required to obtain a permit from the county should have been raised at the administrative level and is not properly before us. Even so, we note CSE's argument it was solely a transferor/transporter of MRW waste excluded from the county's permit requirements lacks merit.

RCW 70.95.160 directs jurisdictional health boards to adopt regulations governing solid waste handling "including but not limited to the issuance of permits and the establishment of minimum levels and types of service for any aspect of solid waste handling." MRW is defined as a solid waste. RCW 70.105.010(13).

Pursuant to chapter 173-350 WAC, the county adopted solid waste ordinance 1999-01 to "govern the handling, storage, collection, transportation, treatment,

utilization, processing and final disposal of all solid waste within Kittitas County, including the issuance of permits and enforcement." Board Record (BR) at 27. The regulations are implemented by a general permit process: "all solid waste handling, storage, collection, transportation, treatment, utilization, processing, recycling, recovery, and final disposal facilities subject to these regulations are required to obtain permits." BR at 48. This section specifies "[n]o solid waste disposal site or facility, solid waste handling facility, shall be operated, established, substantially altered, expanded or improved until the county, city or other person operating or owning such site has obtained a Solid Waste Handling Permit from the Health Department pursuant to the provisions of this section." BR at 49. "We interpret local ordinances the same as statutes." *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). An unambiguous ordinance will be given its plain meaning. *Id.* While we acknowledge the parties struggle to reconcile seemingly overlapping regulatory schemes as the focal point of their problem, we need not attempt to voice our view on this problem because our dispute resolution does not allow us to express advisory opinions. Our record is clear.

The unchallenged findings show CSE was in the business of "collecting moderate risk waste materials on the Property before transporting." CP at 5. This handling, collecting, and storing is covered by ordinance 1999-01 and requires a permit. CSE claims, however, it was exempt from the MRW facility permit requirement because it possessed approval by the Department of Ecology (DOE) and the Environmental

Protection Agency (EPA). While CSE possessed an EPA/State Identification Number for tracking waste during transportation, nothing in the solid waste handling regulations (chapter 173-350 WAC) relieves CSE of local permit requirements for storage facilities. Given the heavily regulated nature of dangerous waste and solid waste in Washington, we reject any implicit exemption in the Ordinance 1999-01 permit requirements.

CSE argues alternatively it was in the process of obtaining a permit and had been assured by Mr. Rivard it could operate during the application period without a permit, thereby estopping the county from arguing CSE violated Ordinance 1999-01. But estoppel can solely be invoked against the government on a showing of clear and convincing evidence of specified elements, including proof that estoppel will not impair governmental functions. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). CSE made no such showing below. We reject CSE's estoppel arguments because the gravamen of Washington's solid waste regulations is the delegation of authority to local jurisdictions to impose permit requirements; accepting CSE's argument would conflict with this important governmental function.

CSE next argues the county improperly issued the NOVA without showing a public nuisance. Generally, abatement is a remedy against a public nuisance. RCW 7.48.200. Kittitas County Code (KCC) 18.01.010(1) declares a public nuisance exists for violations of Kittitas county ordinances and codes related to, among other things, environmental health and safety. Specifically, pursuant to KCC 18.01.010(1)(k) any

violation of the Kittitas County health ordinances and codes, "including but not limited to, Solid Waste Ordinance(s)" constitutes a public nuisance.

As analyzed above, CSE did not comply with local permitting ordinances. This noncompliance is considered a public nuisance under the plain terms of KCC 18.01.010(1)(k) and is sufficient to justify the NOVA.[1] Accordingly, we conclude the hearing examiner did not err in concluding likewise.

CSE next argues it was denied due process, claiming "specific Constitutional protections against retroactive penalties" and "due process requirements have not been met." Appellant's Br. at 34. The fundamental requirements of procedural due process are notice and opportunity to be heard. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991). Based on our record, CSE was provided notice and an opportunity to be heard regarding the NOVA as evidenced by the appeal to the hearing examiner. Moreover, the NOVA did not deprive CSE of any constitutionally protected property interest. The NOVA did not cause a deprivation of any CSE permitted activity. A violation notice, even if final, "is not the type of encumbrance that constitutes a significant property interest giving rise to procedural due process." *Cranwell v. Mesec*, 77 Wn. App. 90, 111, 890 P.2d 491 (1995). Accordingly, the NOVA alone does not implicate a property interest giving rise to due process requirements; rather, it required

[1] CSE challenges the hearing examiner's conclusion that the presence of dangerous and/or hazardous wastes and labeling and storage violations constituted a public nuisance. Because the lack of the permit satisfies the public nuisance finding, we need not further discuss this NOVA challenge.

CSE to take action in accordance with its terms. In sum, we conclude CSE was not unconstitutionally deprived of any protected property interest.

CSE lastly argues the county's NOVA constitutes a "taking." Appellant's Br. at 37. CSE cites to *Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) in footnote 53 of its brief to support its argument. But, the *Koontz* holding applies solely in the context of the land use permit process where a government approval was conditioned on coercively compelling a landowner to give up property. *Id.* at 2603. Our case is distinguished from *Koontz* because it concerns regulatory permit enforcement and does not compel a landowner to give up property.

Given all, we hold CSE fails to show the hearing examiner erred in concluding the county properly issued the NOVA because it lacked the required county permit.

B. Post Judgment Motions

The issue is whether the trial court erred by abusing its discretion in denying CSE's postjudgment CR 59 and CR 60 motions. CSE contends the court should have stayed enforcement of the NOVA's testing requirements because it was invalid and should have set aside the judgment based on Mr. Rivard's alleged recantation.

We review rulings under CR 59 and 60 for abuse of discretion. *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 170-71, 15 P.3d 664 (2001); *Shaw v. City of Des Moines*, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Initially, the county argues CSE's clarification motion was untimely. In June 2012 the superior court denied CSE's stay request. Since the matter was on appeal before this court, a commissioner of this court directed the trial court to RAP 7.2 and RAP 8.1. Based on this court's directive, CSE filed a motion for reconsideration. In October 2012, the superior court reconsidered and denied CSE's stay request, but did not address its CR 60 motion based on newly discovered evidence. In November 2012, CSE unsuccessfully requested reconsideration of the court's denial of its stay motion. In February 2014, CSE requested clarification of the court's November 2012 denial of its request for reconsideration, arguing the court overlooked its CR 60 motion in 2012.

We reject this contention because under CR 60(a), "mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time." The court overlooked an issue raised by CSE in 2012. Two years later, and while litigation continued, CSE brought the omission to the court's attention. This is reasonable under CR 60(a).

Turning to the merits, the trial court made clear it did not rely to its detriment on a false statement of Mr. Rivard's to justify relief. The superior court clarified its denial of CSE's motion to vacate based on newly discovered evidence, finding Mr. Rivard's later declaration regarding the drums' labeling was before the hearing examiner and not newly discovered. These findings are tenable grounds to justify the court's denial of CSE's postjudgment relief request.

CSE's judicial estoppel theory lacks merit. For judicial estoppel to apply, an inconsistent position first asserted must have persuaded the court to accept its position. *Falkner v. Foshaug*, 108 Wn. App. 113, 125, 29 P.3d 771 (2001). The court mentioned the mistake issue in Mr. Rivard's first declaration and found the error was revealed at the administrative hearing level; thus, it concluded the "substantive relevance" of the issue "would not change this court's decision to affirm the hearing examiner's determination that labeling and storage violations occurred and that Chem-Safe maintained a public nuisance." CP at 1022. The court's analysis shows no inconsistent position originally asserted. Without such, CSE's judicial estoppel claim fails.

C. Contempt

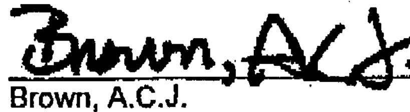
CSE contends the trial court erred in finding it in contempt of the trial court's May 2012 final order because NOVA improperly compelled it to have a third party test its facility, did not provide a way to purge the contempt, and denied due process by precluding it from a hearing to show the NOVA requirements were improper.

Contempt of court includes the intentional disobedience of any lawful judgment. RCW 7.21.010(1)(b). If the court finds "that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court." RCW 7.21.030(2). We review contempt findings for an abuse of discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40-41, 891 P.2d 725 (1995).

"A case is moot if a court can no longer provide effective relief." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). Generally moot issues are

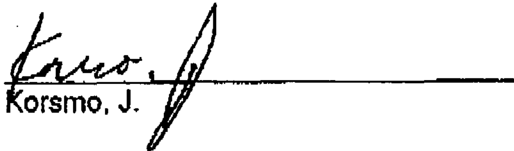
dismissed on appeal. *City of Seattle v. Johnson*, 58 Wn. App. 64, 66-67, 791 P.2d 266 (1990). Here, the county requested a show cause hearing on why CSE should not be found in contempt for failing to adhere to the NOVA. CSE failed to meet its burden. Thus, the court found CSE in contempt, and ordered, "The contempt may be purged if appellants both formulate and execute a satisfactory sampling/testing plan." CP at 885. CSE satisfied the required testing. The court purged the contempt finding and denied the county's sanctions request. Therefore, we can provide no further effective relief. Accordingly, we conclude the contempt issues are moot.

Affirmed.



Brown, A.C.J.

I CONCUR:



Korsmo, J.

No. 30770-1-III; 31712-9-III; 32301-3-III

Fearing, J. (concurring) — I concur with the majority's decision in each of the three consolidated appeals. I write separately because I do not join in one of the majority's ruling in the first appeal that challenges the validity of the notice of violation and abatement (NOVA). The majority holds that Chem-Safe Environmental, Inc. (CSE), was not exempt from the moderate risk waste (MRW) facility permit required by Kittitas County despite holding a permit from the Washington State Department of Ecology and Environmental Protection Agency to handle dangerous waste (DW), a level of waste more risky than MRW. I find the law ambiguous on whether one holding a permit to handle DW must also obtain a permit to handle MRW. Therefore, I would avoid the issue and resolve the first of the three appeals on the sole basis of invited error.

Kittitas County contends that CSE failed to raise the issue of an exemption before the hearing examiner and thus waived the issue on appeal. As mentioned in passing by the majority, this court will not review an issue that was not raised before an administrative body unless the appellant (1) did not know and had no duty to discover facts giving rise to the issue, (2) did not have an opportunity to raise the issue before the agency, or (3) the issue arose from a change in controlling law or a change in agency

action and the interests of justice require its resolution. RCW 34.05.554(1)(d); *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt Hearings Bd.*, 160 Wn. App. 250, 271-72, 255 P.3d 696 (2011). None of these exceptions apply.

CSE contends it forwarded its exemption argument before the hearing examiner, and it cites to Clerk's Papers at 468 for this contention. During the administrative hearing on that page of the transcript, CSE represented to the hearing examiner that the Department of Ecology originally told CSE that it needed the county permit, but the county disagreed. Later, according to the representation, Kittitas County changed its mind and told CSE that it needed a permit. CSE argued to the hearing examiner that the county should be estopped from demanding a county permit to handle MRW. Nevertheless, CSE did not argue that it was exempt because it also handled DW.

In oral argument before this court, CSE also contended that its various briefs submitted to the hearing examiner forwarded the exemption argument. CSE has failed to cite to any portion of the briefs that presented this argument, however. In its opening brief, filed March 23, 2011, CSE maintained that the lack of a permit was not a public nuisance; any public nuisance did not justify the issuance of a NOVA; it timely submitted a completed application for a county permit; the county agent, James Rivard, consented to CSE operating without a permit; and CSE will eventually procure a permit. Board Record (BR) at Index #56. In its supplemental brief, filed April 14, 2011, CSE argued

that Kittitas County erred in identifying the substance in a drum. BR at Index #60. CSE did not assert an exemption in either brief.

CSE's response brief, filed April 21, 2011, repeated earlier arguments and added that some of its problems arise from handing DW, not MRW. CSE did not assert that, since it had a permit to handle DW, it did not need a permit to handle MRW. More importantly, CSE wrote, "The issue is not whether County Health can require an MRW permit but whether it can retroactively revoke the right it has granted to [p]etitioner to operate without one and to fine petitioner based thereon." BR at Index #63, page 9 of 19.

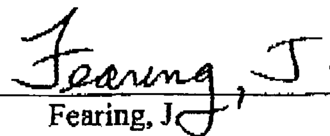
In its brief in support of a motion for reconsideration, filed May 26, 2011, CSE argued estoppel; it was a small generator; and invasive testing was not needed at the site. CSE further wrote, "Appellant does not urge that it is not required to obtain an MWF permit. It applied for such a permit and there is a modified MWF permit application pending." BR at Index #71, page 4 of 20. Thus, in two briefs, CSE told the hearing examiner it needed a county MRW permit. CSE asserted no exemption from the permit requirement.

CSE contends it may raise the exemption for the first time on appeal under RAP 2.5(a)(3). This rule's subsection permits the raising of a new issue on appeal if the issue involves a manifest constitutional error. I question whether any error is constitutional in nature or manifest in character. I need not address this question, however. CSE

affirmatively told the hearing examiner that it needed a permit and was engaged in the process of procuring the permit.

If the hearing examiner committed any error, CSE encouraged the error. Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law during a hearing and then complain of it on appeal. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995).

I CONCUR:



Fearing, J.

FILED
June 4, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

ABC HOLDINGS, INC., and CHEM-SAFE ENVIRONMENTAL, INC., Appellants.	)	No. 30770-1-III
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION
KITTITAS COUNTY, Respondent.	)	

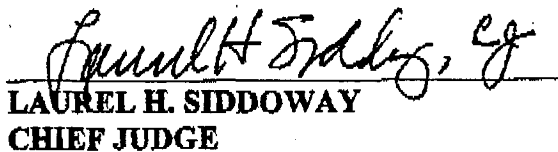
THE COURT has considered appellants' motion for reconsideration of this court's decision of April 23, 2015, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration is hereby denied.

DATED: June 4, 2015

PANEL: Jj. Brown, Korsmo, Fearing

FOR THE COURT:

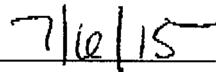


LAUREL H. SIDDOWAY
CHIEF JUDGE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this day I served a true copy of this document on the following, properly addressed as follows:

NEIL CAULKINS Deputy Prosecuting Attorney Kittitas County 205 West Fifth, Room 213 Ellensburg, WA 98926	by: X US First-Class Mail, postage prepaid ___ Overnight Delivery ___ Facsimile Transmission ___ Electronic Mail
KENNETH W. HARPER *Attorneys for Respondent* Menke Jackson Beyer, LLP 807 North 39th Avenue Yakima, WA 98902	by: X US First-Class Mail, postage prepaid ___ Overnight Delivery ___ Facsimile Transmission ___ Electronic Mail
CLERK OF THE COURT Court of Appeals, Division III 500 North Cedar Street Spokane, WA 99201-1905 Fx: 509-456-4288	by: ___ US First-Class Mail, postage prepaid ___ Overnight Delivery X Facsimile Transmission
Supreme Court PO Box 40929 Olympia, WA 98504-0929 Email: supreme@courts.wa.gov	by: X US First-Class Mail, postage prepaid ___ Overnight Delivery ___ Facsimile Transmission X Electronic Mail



Signed Date

Powers & Therrien, P.S.
Attorneys at Law
3502 Tieton Drive
Yakima, WA 98902
509-453-8906
Fax 509-453-0745

FILED
JUL 06 2015
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

ATTN: Barb

To:	CLERK OF THE COURT OF APPEALS	Fax:	# 509-456-4288
From:	LES POWERS	Date:	July 6, 2015
Re:	ABC Holdings et al, v Kittitas Co. 30770-1-III	Pages:	47 (Includes Cover Page)

☐ For Your Information ☐ For Review ☐ Please Comment ☐ Hard Copy to Follow

Notes:

PLEASE FILE THE ATTACHED **PETITION FOR REVIEW** IN YOUR USUAL MANNER. PER MY PHONE CALL WITH YOU, I HAVE PUT THE FILING FEE IN THE MAIL. THANKS.

Should you experience any problems with this transmission please call Diane Sires at phone number 509-453-8906.

This message is intended for the use of the individual or entity to which it is transmitted and may contain information that is privileged, confidential and exempt from disclosure under applicable laws. If the reader of this communication is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by phone & return the original communication to us at the address above via U.S. Postage Service. We will reimburse you for the mailing costs. Thank you.