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Court of Appeals Case No. 63526-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PACIFIC TOPSOILS, INC., Owner of Maltby Composting Operation,
Respondent,

v.

SNOHOMISH HEALTH DISTRICT, a Washington Municipal
Corporation, Appellant.

BRIEF OF RESPONDENT

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NOTE: The hearing transcripts in this case number seven volumes; the volumes are, most unfortunately, situated in the Clerk's Papers in reverse order. The Index to Clerk's Papers does not list the hearing transcript volumes in order, so that it becomes confusing to follow or sometimes find particular testimony. Below is a table for the Court's convenience:

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1	2555-2633 (spans CP volumes XIII & XIV)
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6	2194-2226 (spans CP volumes XI and XII)

I. INTRODUCTION.

Pacific Topsoils, Inc. is a pioneer in the solid waste recycling business. For more than 27 years, Pacific Topsoils has turned yard debris into high-quality garden compost, which is sold primarily to landscapers and nurseries. On an annual basis, Pacific Topsoils' composting operation diverts more than 53,000 tons of waste that would otherwise have gone to Snohomish County's landfills.¹ CP 2594. In its early days, the composting operation attracted observers from all over the U.S. and the world to study

¹ This is precisely the purpose of the Solid Waste Management-Reduction in Recycling Act, under which SHD derives its authority to regulate in this case: to reduce the amount of recyclable material that is disposed of in our state's landfills. RCW 70.95.020.

it, and in 1989, Snohomish County awarded Pacific Topsoils the Recycler of the Year Award. Pacific Topsoils' product is of such high quality that landscapers' demand exceeds supply.

The regulation at issue in this case requires that a commercial composting operation “**be designed** to promote an aerobic composting method” – and then expressly states that this means that designers of composting operations must take certain scientific parameters into account. The Snohomish Health District (hereinafter “SHD”) failed to demonstrate that its permit condition requiring Pacific Topsoils to completely revamp its operation from the ground up was justified under this regulation. Instead, the permit condition applies a different, unwritten, more stringent standard than that set forth in the regulation, in violation of due process of law.

The Hearing Examiner, who is neither a lawyer nor a scientist, ignored extensive, unrefuted expert testimony from two prominent composting experts simply because he found that their testimony did not constitute a “rigorous study” and was not peer-reviewed, and therefore did not demonstrate to a “scientific certainty” that Pacific Topsoils' composting method is an aerobic method. He had never conducted a hearing on composting. CP 2395. In so acting, the Hearing Examiner made two reversible legal errors: first, he failed to apply the correct,

preponderance standard of proof rather than his own elevated standard of proof; and second, he incorrectly applied the regulation to the facts.

CP591. Additionally, these legal errors caused the Hearing Examiner to simply ignore the evidence in the record, thereby reaching factual findings that were not supported by substantial evidence. This Court should reject the Health District's appeal; the Superior Court was correct to reverse and vacate the Hearing Examiner's decision.

II. STATEMENT OF THE CASE.

For the most part, the statement of procedural facts in the Brief of Appellant is correct, and for the sake of brevity Pacific Topsoils will not repeat those procedural facts here.

Pacific Topsoils' 25-year-old composting operation is authorized by a Solid Waste Handling Permit from the Snohomish Health District *and* a separate required composting permit from the Puget Sound Clean Air Authority (hereinafter "PSCAA permit"). *See* Appendix 1 for PSCAA permit. CP 127. The Health District permit incorporates the PSCAA permit by reference and requires Pacific Topsoils to remain in compliance with it. Among other requirements, the PSCAA permit forbids Pacific Topsoils from disturbing its piles for a period of six months after

formation, and requires that any anaerobic sections be removed from the pile and replaced with carbon-rich materials. App. 1; CP 127.

For the convenience of the Court, the relevant evidence adduced before the Hearing Examiner is set forth in Section III(D)(2), *infra*, so that it is placed in the context of the relevant legal standard and need not be repeated.

III. ARGUMENT

A. Standards of Review.

This case comes before the Court on direct appeal of a final judgment. Rules on Appeal (RAP) 2.2. The judgment below was a statutory Writ of Review under RCW 7.16.010 *et seq.* On appeal of a Superior Court decision granting a writ of review and reversing an administrative agency, the Court of Appeals stands in the shoes of the Superior Court and reviews the case based on the administrative record. *Chaussee v. Snohomish County Council*, 38 Wn.App. 630, 689 P.2d 1084 (1984).² Thus, this Court applies the same legal standards as the Superior

² Since the *Chaussee* case, the Legislature has amended the Writ of Review statute to provide that the reviewing court determines whether the agency's factual findings were supported by substantial evidence. RCW 7.16.120; Laws 1989, c.7, §1.

Court – here, the standards set forth in the Writ of Review statute.³ That statute directs the reviewing court to determine, *inter alia*:

(3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

(5) Whether the factual determinations were supported by substantial evidence.

RCW 7.16.120. “Substantial evidence” means evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *Dillon v. Seattle Police Pension Bd.*, 82 Wn.App. 168, 916 P.2d 956 (1996).⁴

³ Although SHD correctly states that this Court reviews the whole case standing in the place of the Superior Court, it also argues extensively about errors it alleges the Superior Court made in exercising appellate jurisdiction under the Writ of Review statute. The Superior Court made no error in its review. The Court based its decision on the record made before the Hearing Examiner. The Court did determine, in accord with the standard of review set forth in the Writ of Review statute, that the Hearing Examiner’s factual determinations were not supported by substantial evidence in the record, and made findings demonstrating why this was the case. The court also determined that there was no competent proof of the facts necessary to authorize the Hearing Examiner to approve the illegal permit condition – also directly in accord with the Writ of Review statute. The Superior Court rightly decided questions of law and mixed questions of law and fact *de novo*.

⁴ The Snohomish Health District attempts to argue that the Writ of Review procedure is so exceedingly narrow in its scope that the trial court was wrong to reverse the decision of the Hearing Examiner absent misconduct. To the contrary, the standard of review in this case is no narrower than that in any other judicial review of an administrative proceeding. In review of an administrative decision, “[a]ppellate courts only determine

“Under subsection (3) of RCW 7.16.120, a complaining party who can establish that the administrative body or officer made a prejudicial ‘error of law’ is entitled to relief.” *Washington Public Employees Ass’n v. Washington Personnel Resources Bd.*, 91 Wn.App. 640, 652, 959 P.2d 143 (1998). In order to review the Hearing Examiner’s affirmance of the permit condition, this Court necessarily must determine what the relevant regulation requires; this is a question of law reviewed *de novo*. *Tapper v. Employment Security Dep’t*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993). Whether Pacific Topsoils’ method as revealed in the administrative record complies with the regulatory language by “promoting” aerobic composting is a mixed question of law and fact, which this Court determines *de novo*, with no deference to the Hearing Examiner’s opinion on that matter. *Id.* SHD’s brief omits to discuss the correct standard of review for a mixed question of law and fact, instead arguing that the Hearing Examiner’s determination as to whether Pacific Topsoils’ composting method “promotes” aerobic composting is a factual finding entitled to great deference. This is incorrect. A finding of fact “is the assertion that a phenomenon has happened or is or will be happening

whether factual findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law and judgment.” *Nguyen v. Washington State Dep’t of Health Medical Quality Assurance Comm’n*, 144 Wn.2d 516, 29 P.3d 689 (2001).

independent of or anterior to any assertion as to its legal effect.” *Leschi Improvement Council v. Washington State Highway Comm’n*, 84 Wn.2d 271, 283, 525 P.2d 774 (1974). In determining a mixed question of law and fact, the Hearing Examiner’s *purely* factual findings are “entitled to the same level of deference which would be accorded under any other circumstance.” *Tapper*, 122 Wn.2d at 403.

B. The relevant regulation requires that composting facilities “promote” aerobic composting by taking specified parameters into account when designing their facilities and processes.

The state solid waste statute requires the Department of Ecology (hereinafter “Ecology”) to “adopt rules establishing minimum functional standards for solid waste handling”. RCW 70.95.060(1). The implementing regulation provides:

Composting facilities shall be designed with process parameters and management procedures that promote an aerobic composting process. This requirement is not meant to mandate forced aeration or any other specific composting technology. *This requirement is meant to ensure that compost facility designers take into account* porosity, nutrient balance, pile oxygen, pile moisture, pile temperature and retention time of composting *when designing a facility*.

Washington Administrative Code 173-350-220(3)(d) (emphasis added).

What it means to “promote” aerobic composting is thus defined by the language of the regulation itself. The Hearing Examiner wrongly

concluded that the regulation does not define what it means by requiring that facilities “promote an aerobic composting process.” CP 178. Where the regulation states “[t]his requirement is meant to ensure...”, it is clearly referring back to its own requirement – that is, the just-stated requirement that that compost facilities be designed to promote aerobic composting.

In other words, to “promote an aerobic composting process” means to take into account porosity, nutrient balance, etc. in designing the composting process, so as to bring about, as possible, aerobic composting. Thus, the statute and the regulation are not, as the Hearing Examiner claimed, based on results. In order to comply with the regulation, the compost process must be designed to address those named factors. Both the regulatory language and the common definition of “promote” require only that the method encourage and foster aerobic composting – not that it eliminates all anaerobic decomposition.

When a regulation is not ambiguous, no resort to interpretation is required or even proper.

In order to ascertain the meaning of [a statute] we look first to its language. If the language is not ambiguous, we give effect to its plain meaning. If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.... A statute is ambiguous if it is susceptible to two or more reasonable interpretations, but ‘a statute is not ambiguous merely because different interpretations are conceivable. This court does not subject an unambiguous statute to statutory construction and has declined to add

language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it. Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute. Thus, when a statute is not ambiguous, only a plain language analysis of a statute is appropriate.

Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006)(internal quotes and citations omitted). Thus, this Court should decline to reach SHD's arguments discussing the meaning of the word "promote". The regulation says what it means by "promote," and it is not ambiguous.

However, even if the regulation were ambiguous, SHD's argument as to what it means is incorrect. The verb "to promote" means "[t]o further the growth, development, progress, or establishment of (a thing); to advance or actively support (a process, cause, result, etc.); to encourage... to catalyse or initiate." Oxford English Dictionary Online, www.dictionary.oed.com (subscription required). According to Webster's Dictionary, "promote" means "to contribute to the growth or prosperity of, FURTHER; to help bring (as an enterprise) into being." Merriam Webster Online, <http://www.m-w.com/dictionary/promote>.

Thus, the usual and common meaning of "promote aerobic composting" is that a composting process must further those factors that help develop aerobic decomposition. Because Ecology recognized in writing the regulation that it is impossible to have a composting process

that is entirely aerobic in nature, “promote” cannot be given any stronger meaning.⁵ The expert testimony discussed *infra* about the science of composting shows that the regulatory factors (porosity, nutrients, oxygen, etc.) are the very factors that contribute to making a composting process aerobic. Thus, the usual and common meaning is exactly the same as the regulatory definition discussed *supra*.

Based both on the regulatory definition and the dictionary definition, the regulation’s word “promote” does not necessarily require ongoing changes to a compost pile. SHD’s interpretation that a process must include constant manipulation in order to be “controlled”, *see* App. Br. at 25, violates the regulation’s express statement that it is not meant to require forced aeration or *any other* particular technology. SHD’s argument also ignores the scientific basis of composting technology. “Control” does not necessarily mean “manipulated”; control can be built in at the beginning of the process, as the expert witnesses testified to at length. For example, Dr. Brown testified that “by controlling your feedstocks and monitoring the moisture content and the C to N [carbon to

⁵ It is this point of law that makes the Hearing Examiner’s heavy reliance on the statement that “anaerobic odors probably exist” so nonsensical. CP 184 Finding No.8. The mere fact that some anaerobic decomposition may be present does not mean that the method does not “promote” aerobic composting. As everyone in this case has acknowledged, including the Hearing Examiner himself, a completely aerobic method of composting is not attainable, and this was recognized in drafting the regulations.

nitrogen] ratio, you can maintain a highly aerobic system even within a static pile system.” CP 2491-92; *see* Appendix 2. *See* Section III(D), *infra*, for detailed discussion of the control methods used at this site. Apparently losing sight of the fact that composting is a naturally occurring process that humans have learned to optimize, SHD tries to make the word “control” carry more meaning than it can lift without a more definite regulatory statement to help prop it up.

C. The Hearing Examiner and SHD have applied unwritten, *ad hoc* rules to Pacific Topsoils that were not stated in the regulations, violating due process.

As the Superior Court found, the Hearing Examiner and SHD actually applied additional unwritten, *ad hoc* standards to Pacific Topsoils, in violation of constitutional due process.⁶ The SHD has not argued against the Superior Court’s findings on due process in its brief, and seems to have abandoned its argument that they were incorrect. Arguments not made in an appellant’s brief are abandoned. *Zabka v. Bank of America*

⁶ Contrary to the SHD’s assertion on p. 36 of its brief, the Superior Court did not lack authority to reach these issues. RCW 7.16.120(3) specifically provides reviewing courts with the authority to reverse the lower tribunal when “in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator”. In order to determine whether constitutional rights have been violated, the Superior Court necessarily had to make findings about the process that was followed below and the rules that were applied below.

Corp., 131 Wn.App. 167, 174, 127 P.3d 722 (2005). On this issue alone SHD's appeal to this Court must fail.

Washington courts have held repeatedly that government agencies cannot rely on unadopted, unpublished standards. *Simpson Tacoma Kraft v. Department of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992). Under *Norco v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982), due process forbids the government from enforcing unadopted, unpublished regulations. *See also Tabbs Lake Ltd. v. United States Army Corps of Engineers*, 750 F. Supp. 720 (1980)(Army Corps of Engineers improperly established jurisdiction over isolated wetlands based on an unofficial policy that had not been adopted through proper rulemaking); *Salt Pond Associates v. United States Army Corps of Engineers*, 815 F. Supp. 766 (E.D.Del. 1993)(same).

Anderson v. Issaquah, 70 Wn.App. 64, 75, 851 P.2d 744 (1993) held that it violated the developer's due process rights when the City demanded compliance with discretionary, *ad hoc* unpublished design standards ("the commissioners enforced not a building design code but their own arbitrary concept of the provisions of an unwritten statement to be made on Gillman Blvd.") Similarly, in *Burien Bark and Supply v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986), Justice Utter found that "a citizen should be able to determine the law by reading the published code. A citizen should

not be subject to *ad hoc* interpretations of the law by county officials.”

The Court further observed that “the County must provide ascertainable standards to guide local officials who enforce the zoning ordinances to satisfy due process.” *Burien Bark*, 106 Wn.2d at 872. *Anderson v. Issaquah* and *Burien Bark* together teach that if the Health District wants to impose more stringent requirements on Type 1 composting than that currently provided in the regulations, requiring that the operator continually make minute adjustments to any parameter throughout the composting process – a requirement it admits is not actually stated in the current regulations – then it must amend its Sanitary Code and publish that standard. Unless and until it does so, its use of such unpublished standards is a violation of due process.

In imposing the permit condition, SHD applied at least two rules that were not provided in the regulations. CP2008-10. The approval process by which the Health District determines on an *ad hoc* basis whether a particular method promotes aerobic decomposition, without any recourse to the framework set out in WAC 173-350-220 (3)(d), is totally devoid of due process protections. This was borne out by the testimony of Holly Westcott and Peter Christiansen of the Department of Ecology, who testified that in order to determine compliance with the composting regulations, workers at the Health District do rely on their

own unpublished standards. CP 2440; 2441; 2458-59; 2405-2410; 2426; 2435; 2437-2441; 2458-2459. The Westcott and Christiansen testimony clearly showed the existence of a due process violation – they testified that they relied on unadopted, unpublished standards to evaluate Pacific Topsoils’ compost operation. CP2404- 2408; CP2410; 2416; 2426.

First, the Health District is applying its own, unwritten, bright-line rule that static piles are, *per se*, not legal under the regulation. SHD official Geoffrey Crofoot’s stated in a memorandum that “[the regulation] does state that composting facilities shall be designed and operated in a manner promoting aerobic composting process. ***By definition*** static large piles do not meet the definition.” CP 1053. Second, the Health District is applying an unwritten rule that piles cannot be considered aerobic unless they are aerated, manipulated, or turned. Mr. Christiansen testified: “[i]f they are – I mean, if an operation is meeting, you know, the (3)(d) with the nutrient balance, porosity, ***moving the pile***, that sort of thing, then we assume for the most part they’re going to have an aerobic process.” CP 2407 (emphasis added); *see* App. 4. Such conclusions were neither based on any adopted regulation nor actual study of the Pacific Topsoils’

compost pile. CP 2398; 2416. SHD simply devised and relied on subjective discretionary standards.⁷

The PSCAA permit, which is incorporated by reference into the SHD permit and which also requires the promotion of aerobic decomposition,⁸ *requires* Pacific Topsoils to compost in a large static pile and *prohibits* manipulation or turning of the pile for a six month period. CP 2100; *See* Appendix 1. The Clean Air Authority's paramount concern is a composting method which avoids the emissions of foul smells and greenhouse gases – both of which are the product of anaerobic composting. Thus, to satisfy the Clean Air Authority, a composting method must be aerobic – and the Clean Air Authority prohibits Pacific Topsoils to turn its pile for a period of six months. This demonstrates that SHD's position is based on its own *ad hoc* requirements and not on the statute or the science of promoting aerobic composting. In addition, as discussed at greater length below, the expert witnesses and scholarly

⁷ The Examiner, incredibly, characterized this behavior as using the flexibility of the statute. *See* D&O at 16 ¶2. CP 127. Any “flexibility” built into the statute and regulations are meant to benefit the composting industry and allow it to flourish. If a regulator takes advantage of a statute's “flexibility” to impose additional, more stringent, unwritten standards, that is a due process violation.

⁸ The Clean Air Authority demands that carbon to nitrogen ratios be kept at a 30 to 1 and that materials with a low carbon to nitrogen ratio and potentially high decomposition rates be mixed with bulking agents which have a high carbon to nitrogen ratio. Controlling the carbon to nitrogen ratio of materials encourages aerobic decomposition. *See* Appendix 1.

literature reject the idea that piles must be turned in order to be aerobic.

See Appendix 10.

Similarly, the Examiner's conclusions are unrelated to whether Pacific Topsoils' composting method complies with WAC 173-350-220(3)(d). Although the Hearing Examiner *stated* that he recognized that the regulations neither mandate a particular method of composting nor a totally aerobic method of composting, he nevertheless concluded that Pacific Topsoils' method does not promote aerobic composting, based on his own subjective standards. The Examiner concluded that "A process that only oxidizes anaerobic odors without seeking to minimize anaerobic conditions does not 'promote' aerobic decomposition. CP 807.

(Conclusion No. 1.) Additionally, the Hearing Examiner determined that

... the fact that PTI plan of operation had not materially changed for years even though the WAC rules had changed, the Health District was perfectly justified in concluding that PTI large stable pile method at Maltby did not "promote aerobic decomposition..."

Id. The Examiner, opining that the WAC provides very little guidance and does not define the phrase "promote aerobic composting," went on to conclude that the WAC provided a performance-based rule. and that "each composting operator is free to propose whatever system he/she thinks will achieve the desired objective". CP 807, ¶1.

The Examiner's conclusions of law may have partially recited the correct rule, *but he did not actually apply that rule in practice*. The Examiner's new, self-created rule required Pacific Topsoils to prove by some unspecified quantum of evidence what portion of the pile is aerobic, even though he also acknowledged – in word if not in deed – that no large-scale composting method can be completely aerobic. Thus, ignoring the language of the WAC, the Hearing Examiner found that Pacific Topsoils had not proved that its pile was aerobic. But that is not the question the WAC required him to answer. It required him to determine whether the method the facility uses was *designed to promote* aerobic composting as set forth in the WAC. Thus, the Examiner illegally relied on unadopted, unpublished standards to determine that Pacific Topsoils' composting method does not "promote aerobic composting".

The following statement the Examiner made at the hearing is very telling: "Now frankly, based on the evidence that I've heard today, I don't think it's scientifically possible to say with certainty that the current process does or does not permit aerobic decomposition." CP 2466.⁹ In

⁹ He reinforced this point in his decision when he dwelled almost exclusively on the perceived limited nature of Dr. Henry's testing results and concluded that "the results of the tests performed by PTI [Pacific Topsoils, Inc.] do indicate that aerobic conditions existed at times in the pile. What they do not indicate is whether Pacific Topsoils' method promotes aerobic decomposition." CP 2106.

the real substance of his findings, the Examiner was clearly substituting the question “is the method aerobic?” for the correct question, which is “does the method promote aerobic composting?”

D. The Hearing Examiner erred by affirming the permit condition, when the record before him showed that, based on the preponderance of the evidence, the condition was not needed to ensure compliance with the regulations.

The Hearing Examiner was wrong to affirm the permit condition requiring the entire overhaul of Pacific Topsoils’ composting method when he himself could not find that the present method fails to comply with the regulations.

As a preliminary matter, The Court should decline to reach SHD’s new arguments on appeal regarding monitoring, as no record was made before the Hearing Examiner on these questions. New arguments generally will not be heard on appeal. *Zabka*, 131 Wn.App at 174. Even though SHD never presented any testimony or argument to the Hearing Examiner regarding what monitoring requirements might be imposed and how Pacific Topsoils’ method would meet or fail to meet such requirements, it now asks this Court to find, *a priori*, and upon no record whatsoever, that Pacific Topsoils cannot comply with those requirements using its current method. *See, e.g.*, App. Br. at 14; 20; 25-26. On reconsideration, the Superior Court rightly refused to hear the newly-

minted argument about monitoring. Now SHD attempts to bring this issue in through the back door by including it in its argument about what it means to “promote” aerobic decomposition. The Court should reject this attempt. There is no factual record from which this Court could conclude that it is not possible for Pacific Topsoils to comply with those monitoring requirements, even assuming they were part of “promoting” aerobic composting.¹⁰ As SHD never raised these questions before the Hearing Examiner, where Pacific Topsoils could have presented testimony as to how it does comply with the monitoring requirements while keeping its present method, it would be utterly unjust and improper to hear such arguments at this late stage. Further, the SHD argument fails to consider that the Puget Sound Air Pollution Control Authority permit incorporates stringent monitoring requirements. *See* Appendix 1.

The Health District and Ecology claim that Pacific Topsoils’ method of composting was merely “natural decay of organic solid waste under uncontrolled conditions” and therefore did not constitute “composting” under state law. This characterization does not stand up to even the most cursory examination of Pacific Topsoils’ operation. It rests on

¹⁰ As demonstrated above, however, the regulation itself defines “promoting” aerobic composting as taking into account the specified process variables when **designing** the facility and does not mention monitoring at all with respect to whether a process “promotes” aerobic composting.

unsupported, speculative generalizations, factual errors, and ignorance of Pacific Topsoils' composting method, not on accepted composting science or study of the Plan of Operations or the Puget Sound Air Pollution Control Authority permit. As noted in Section III(A) supra, the determination whether Pacific Topsoils' method complies with the regulatory standard is a mixed question of fact and law reviewed *de novo*.

1. *The Health District's evidence on whether Pacific Topsoils' method promotes aerobic decomposition.*

SHD claims, relying on the opinions of Ecology personnel, that the large static pile composting method is categorically illegal, and that “*by definition* static large piles do not meet” the definition of composting. CP 1053. At the hearing, SHD presented the testimony of Peter Christiansen, head of Ecology's solid waste division, and Holly Westcott, his employee and SHD employee Mr. Crofoot.

Mr. Christiansen confirmed that Ecology had not done studies of Pacific Topsoils' static piles, nor had it obtained any actual data about the composting method. CP 2398. Although Mr. Christiansen thus claimed that Pacific Topsoils had to “move its pile” – *i.e.*, manipulate, turn, or otherwise manually aerate the pile – he also admitted that the WAC states clearly that it “is not intended to mandate forced aeration or another

specific composting technology.” WAC 173.350.220(3)(d); CP 2404-2405.

Holly Westcott, an Ecology employee who addresses biological issues in the solid waste division, testified that in her opinion large static pile composting was not considered an aerobic method, but she admitted that she had not studied Pacific Topsoils’ method or conducted any investigation at that facility. CP 2398. Ms. Westcott could not identify any scientific studies supporting her conclusion that static pile composting was not an aerobic composting method. CP 8. She had not reviewed any scientific literature regarding composting without forced aeration (*i.e.*, without turning piles) and could not testify as to the existence or non-existence of any science that shows that, done correctly, static pile composting is a valid form of aerobic composting. CP 925.

Mr. Christansen, Ms. Westcott and Health District employee Geoffrey Crofoot all conceded that they were unaware of any test data or studies demonstrating that Pacific Topsoils uses an anaerobic method of composting. CP 2527; Appendix 7. In addition, Ms. Westcott and Mr. Christiansen both admitted that in order to determine compliance with the composting regulations, workers at the Health District rely on their own unpublished standards. CP2405-2410; 2426; 2435; 2437-41; 2440-41; 2458-59. Mr. Christiansen’s January 24, 2006 letter shows that his

opinion was based only on generalized opinions about static pile composting, and not on the true conditions at Pacific Topsoils' facility:

Depending on the operation, large static piles are often built by driving on them. This is a standard operational procedure that is used at the Pacific Topsoils Maltby composting facility. This action results in compaction, which removes free air space and destroys porosity in the pile.

CP 1060. In fact, as detailed below, "construction [of the pile] is carefully controlled to minimize compaction." CP 1135 (Pacific Topsoils Plan of Operation). Heavy equipment is not driven on the piles until they reach twenty feet in height, and when equipment must be driven on the piles, it is operated along established traffic routes so as to minimize compaction and retain porosity. Aerobic decomposition has actually already occurred at that point in the process, according to Dr. Henry. CP 932. *Id.* Mr. Christansen, Ms. Westcott, and Mr. Crofoot all testified that they were unaware of any test data or studies substantiating their claim that Pacific Topsoils uses an anaerobic method of composting. CP 2398; CP 1006; CP 1008; CP 1005.

SHD relied heavily upon an alleged statement of Janusz Bajsarowicz, a Pacific Topsoils employee, during a meeting, in which he allegedly stated that the core of the pile is anaerobic; the Hearing Examiner also relied heavily on this statement. CP 178; see also CP

2330; App. Br. at 8. Mr. Bajsarowicz was asked during his hearing testimony about that statement. He answered that

the only thing that would concern me about that statement is I have no idea what the center of our pile is. That's the whole purpose of doing the study... so if I made that statement... I'm not relying on any data of any kind to prove that that's correct.

CP 2244. Mr. Bajsarowicz had previously testified that he deals with environmental permitting issues over all of Pacific Topsoils' sites and has no expertise in composting. CP 2245.

2. Pacific Topsoils' evidence on how its system promotes aerobic composting.

Pacific Topsoils presented extensive evidence as to its adopted procedures, how those procedures are followed in practice, why those procedures are in place, and how following those procedures promotes aerobic composting. Between the Operating Procedures, the testimony of employees who actually apply those procedures daily onsite, the technical experts who testified that the method promotes aerobic composting, and the terms of the Clean Air Authority permit requiring strict parameters to ensure aerobic composting, it was shown that the Health District's and Ecology's portrayal of the composting operation as a monolithic pile of material dumped and allowed to rot for nine months has no basis in fact.

Two prominent composting experts, Dr. Sally Brown and Dr. Charles Henry, both professors at the University of Washington, testified that they had reviewed and analyzed Pacific Topsoils' composting method and concluded that its composting method promotes aerobic composting and complies with the standards set forth in the statute and regulations. Dr. Henry testified about his testing of the piles and explained in detail how Pacific Topsoils' method takes into account each of the parameters required by the regulations. CP 2626-2631; CP 2625. Dr. Henry testified that Pacific Topsoils' method complied with the WAC by taking into account porosity, nutrient balance, pile oxygen, pile moisture, pile temperature and retention time. CP 2473-2474. Dr. Henry also testified extensively as to the data he had collected on Pacific Topsoils' composting site and discussed the scientific conclusions that could be drawn from that data, showing that the composting process was aerobic.

Dr. Brown testified that, contrary to the claim of the Health District, scientific research has determined that static pile composting can be aerobic, and that based upon her review of the procedures used and the system design, Pacific Topsoils' method promotes aerobic composting. Dr. Brown testified that the scientific literature of composting did not support the Health District's claim that static piles are by definition anaerobic piles. CP 2488-2491. Indeed, she testified that manually aerated

(turned) piles can easily turn anaerobic. CP 2490. She testified that she had reviewed Pacific Topsoils' plan of operation with a view to whether it complied with the principles set forth in the science of composting without forced aeration. She testified that Pacific Topsoils' method takes into account all of the factors required by WAC 173-350-220(3)(d). CP 2492-2493. Dr. Brown testified, based on her expertise and review of the scientific literature on composting:

[I]n all compost systems you will have anaerobic sites. The extent and impact of the anaerobic sites – the easiest way to control these and reduce the importance of these anaerobic sites or the occurrence of these anaerobic sites is **by mixing high carbon materials, bulky materials, with a low moisture content into the feedstock**. This is also in a basic textbook on composting... that specifies use of high carbonaceous larger materials as a way to maintain aerobic conditions whatever type of composting system you use.

CP 2491 (emphasis added). Dr. Brown continued: “by controlling your feedstocks and monitoring the moisture content and the C to N [carbon to nitrogen] ratio, you can maintain a highly aerobic system even within a static pile system.” CP 2491-92; *see* Appendix 2. SHD has suggested that Dr. Brown’s familiarity with Pacific Topsoils was “previously shown to be nonexistent”, *see* App. Br. at 13. Actually, looking at the record, Dr. Brown had been shown to not have previously had name familiarity with Pacific Topsoils as a company. But she testified that had studied their method based on their operating manual and had familiarity with the

operation itself. CP 2492.¹¹ Moreover, she was present for Dr. Henry's testimony, and thus heard his extensive explication of how the operation worked. *See* Appendix 2.

Pacific Topsoils production manager Dave Malins, who is in charge of building the compost piles, testified that there is a "strict recipe" for mixing highly carbonaceous material, or "hog fuel", in with the yard waste brought by customers. CP 2505. Mr. Malins testified that Dr. Henry's statements as to how the piles are carefully and deliberately constructed was correct, and added that when the workers start a windrow, they add 50% hog fuel to that material as "bony material". CP 2501. Mr. Malins testified that "hog fuel" is ground up brush, which has high-carbon content. *Id.* He also testified that Pacific Topsoils deliberately chooses not to grind up the higher-nitrogen yard waste to go into the piles, because "we like to keep it bulky so it [doesn't] cut the oxygen from going off inside the pile." *Id.* He testified that they keep adding hog fuels as the

¹¹ For example, in *Sustainability of Modern Composting*, Dr. William Brinton teaches that turning piles has little sustained influence on oxygen levels and that, in fact, an aerated pile can be successfully constructed by carefully selecting combinations of materials to form the pile. CP 1068. Similarly, Joseph Jenkins observes in *The Humanure Handbook* that "the perceived need to turn compost is one of the myths of composting." CP 1075. He observes that one way to aerate a pile is "to build the pile so that tiny interstitial air spaces are trapped in the compost. This is done by using coarse materials in the compost, such as hay, straw, weeds, and the like. When a compost pile is properly constructed, no additional aeration will be needed." CP 1077.

“benches” (or, in the terminology of the Hearing Examiner, “lifts”) are constructed because “we want to keep the bony material going in it... get the carbon back in the pile.” CP 2504. It was clear from both Mr. Malins’s testimony and Dr. Henry’s testimony that although to the untrained eye the pile may appear monolithic, it is in fact comprised of smaller portions that are each built in such a way as to maximize oxygen content, and are harvested at different times. Moreover, the “bony material” to which Mr. Malins repeatedly referred serves as structure to the piles, to maintain air pockets throughout and maintain high oxygen levels. CP 2522. Mr. Malins also testified that when it becomes necessary to operate the track hoe on the previously built structure, it does not drive all over the pile, but instead follows an established, uniform traffic pattern. CP 2523. All of these points are borne out by the terms of the Operating Manual, as set forth below.

Dr. Henry testified that the decision to leave materials in a static pile for a specified amount of time is a control mechanism which preserves moisture and prevents odor. He testified that Pacific Topsoils exercises various controls over its pile and that such controls yield an aerobic compost product. His testing of the pile indicated “moisture content at one location in the pile to be 58%, within the accepted range for aerobic decomposition”. CP 2102. Dr. Henry and Dr. Brown both testified that

the temperature and odor of the compost – both while in process and after completion – showed that, in fact, the controls built into the system were working. They were promoting aerobic decomposition. Both experts testified that such results could not have been achieved otherwise.

Pacific Topsoils ensures **porosity** and **pile oxygen** by conscious decisions as to the size of particles added to the pile, and by adding elements with larger pieces to elements with smaller pieces, so as to ensure greater porosity in the pile in general. CP 2255-2270. Additionally, the operating procedures are specifically aimed to minimize compaction and enhance porosity; for example:

[p]ile height is up to 40 feet, but construction is carefully controlled to minimize compaction. ... equipment does not travel on the compost pile till its depth exceeds 15-20 feet, and even then follows a controlled traffic pattern. Compaction of the composting pile is minimal, maintaining good porosity.”

CP 1135. Also, “[f]resh yard waste is placed in the composting pile without grinding, thus maintaining high porosity...” *Id.* Very bulky, woody material from landscapers is used to ensure porosity of the pile because it resists compaction; additionally, it enhances aeration and pile oxygen because it creates air pockets within the pile. CP 2257. This is in contrast to Pacific Topsoils’ competitors, who grind woody material into much smaller pieces before use, thereby removing many of these

beneficial qualities. Pile oxygen is ensured by maintaining porosity and by enhancing the aeration of the pile by keeping larger pieces in the pile. These larger pieces help to create air pockets that help ensure that decomposition occurs in the presence of air – that is, in an aerobic manner. Mixing brown and green materials to ensure the correct nutrient balance, as described below, also enhances both porosity and pile oxygen. CP 2492; CP 2257-2260; CP 2270.

Dr. Henry's testimony (*see* Appendix 3) confirmed that porosity and pile oxygen are controlled by systematically placing very large woody elements into the pile to create air pockets. CP 2474. In addition, Pacific Topsoils closely controls the size of particles used in constructing its pile, to ensure that air pockets are created. CP 2474. Dr. Henry testified that during the first two to three week interval, when the pile is being created, "you essentially have aerobic composting" and then "more piles are added to reach whatever height is desirable." CP 2473; *see* Appendix 3. Dr. Henry further testified that oxygen control "also occurs after screening, because windrows are made after screening. They are there for quite a while." CP 2474.

The proper **nutrient balance**, or ratio of carbon to nitrogen, is ensured by the careful mixing of green with brown materials *before* materials are added to the pile. The Plan of Operations specifies that

“materials with low C/N [carbon-to-nitrogen] ratio, porosity, and potentially high decomposition rates are mixed with bulking agents, which have a high C/N ratio. This produces a mix less likely to generate odors because C/N is not below 30:1 and porosity is very high.” CP 1133. Dr. Henry also testified that nutrient balancing occurs when the pile is structured. CP 2473-2474. Dr. Brown testified that the science shows that by mixing materials so as to retain a high proportion of carbon in relation to nitrogen, a static pile method maintains oxygen within the pile and, as a result, continues to compost aerobically, even though the materials inside the pile are not exposed to outside air. CP 2490.

To control **pile moisture**, Mr. Malins testified that pile constituents are moistened during pile formation as well as from time to time during warm months; Dr. Henry confirmed that this was a useful pile moisture control. Dr. Henry also testified that

In terms of a controlled operation, you know we’ve talked about a variety of things that are controlled, but yet when you look at it, not turning a pile is a way of controlling things that are happening in the pile. Not turning the pile retains a lot more moisture. When you turn a pile you lose a lot of moisture.

CP 2358. Operators monitor the moisture content of the piles and add moisture when necessary. “Compost can suffer from water loss so adding

back some leachate¹² and water aids in the process. Because the pile is porous, the leachate and water percolates down into the compost and does not generate fugitive odors.” CP 1136.

As to **pile temperature and retention time**, Dr. Henry testified that “[t]he temperature is consistently in a long time above 55 degrees centigrade and it certainly has the time requirement [of the WAC].” Dr. Henry summarized: “So if you are to look at Pacific Topsoils, I’m not sure which of these process variables that it doesn’t do.” CP 2474. In the system design, temperature is ensured by the fact of an aerobic process and has been proven by testing. CP 2474. Pacific Topsoils tests its compost pile ten feet in for temperature to ensure complete composting. CP 1141. Pacific Topsoils retains its material in a static pile for a six month period, as required by its Clean Air Authority composting permit. CP 127. Additionally, “[t]he finished material will remain piled for up to 2 weeks prior to distribution, and will be rotated after one week using a loader to insure uniform heating of the material.” CP 1136.

Pacific Topsoils also presented strong evidence that the process is, in fact, aerobic. Evidence that when Pacific Topsoils’ method is followed the resulting process is aerobic is also, logically, evidence that the method

¹² Pacific Topsoils currently uses water to moisten the piles, rather than the leachate specified in the Operating Plan. CP 1136.

“promotes” aerobic composting. Dr. Henry testified as to sampling he took of the pile. He testified that he found sufficient oxygen within the pile. CP 2470. He testified that the temperature of the pile was more than 55°C (approximately 131°F), just six inches into the pile, and that the temperature rose as his testing went farther into the pile, to be 70°C six feet in and then even hotter at 20 feet in. CP 2629. He testified that the temperature is “consistently a long time above 55 degrees centigrade.” CP 2629. Most importantly, Dr. Henry testified from a scientific standpoint that *only aerobic decomposition causes such a temperature rise*. CP 2357; CP2629. He rejected as unsupported by any science he knows of the Health District’s idea that the temperature might be elevated in some other way, without aerobic decomposition. CP 2356-2357. See Appendix 3.

Dr. Henry testified that Pacific Topsoils’ final product has an “earthy” smell, caused by microorganisms called actinomycetes, *which can only live in an aerobic environment*. CP 2625. Thus, according to Dr. Henry, that “earthy” smell is a clear sign that the compost has been decomposed aerobically – indeed, he testified “I know of no other way to get that earthy smell.” CP 2232. Dr. Brown testified that if Pacific Topsoils were using an anaerobic composting method its compost pile

would emit a foul, sulfuric, rotten-egg smell and its final product would have the same smell. CP 2495.

Dr. Henry testified that the Health District's ideas about Pacific Topsoils' composting method ignore the science of composting and, indeed, fly in the face of the laws of physics. After hearing the Health District's witnesses, Dr. Henry testified in rebuttal testimony:

There's a number of things that have been said by the Health Department and Ecology that, that don't make a lot of sense from a technical basis. We're talking about increase in temperature in the pile and that, in my mind, is a suggestion that we have aerobic conditions. Mr. Crofoot said that while he believed that [the aerobic portion] was only potentially six inches deep, yet the laws of thermodynamics say that heat does not go from a cold source to a hot source, but rather from a hot source to a cold source. The small amount of preliminary monitoring we have done suggests that *the pile gets hotter as it goes in at least to six feet and when we monitored even into 20 feet the temperature was far greater than it was on the surface.* So that suggests that there is aerobic conditions happening if I know the science of composting. There has been some suggestions by Ecology that there are other ways to heat a pile besides having aerobic decomposition. I don't know of those. So it's a science that I am not aware of.... So I'm getting a lot of feeling that the arguments that Ecology and the Health Department are making are not technical. *I haven't heard any good science presented by them that say anything about how temperatures can increase without being aerobic.* Now, we have an aerobic product. Now, if something decomposes anaerobically, you do not end up with an aerobic process [sic]¹³.

¹³ From the context, it is clear that Dr. Henry said or meant to say "if something decomposes anaerobically, you do not end up with an aerobic *product*." It is unknown

CP 2356-2358 (emphasis added). Dr. Henry was clearly troubled by the Health District's actions as not being based on science:

We have an aerobic product. We have parts of the pile, and all of the pile at times, that are aerobic. And so on a scientific basis it seems strange that this successful operation is being targeted for closure or for some major modifications. So if with the problem about not explaining how heat is produced and not explaining how you get an aerobic product at the end, I have a real problem with accepting the arguments from both Ecology and the Health Department.

CP 2359. The Hearing Examiner's record also included the PSCAA permit. The Health District presented no evidence refuting Dr. Henry and Dr. Brown's testimony and other evidence demonstrating that Pacific Topsoils' composting method takes into account the factors specified in the WAC, much less expert testimony rebutting such evidence. Indeed the SHD seems not to understand the science of a static pile; it fails to understand that adding carbon-rich materials is a more effective method for keeping a pile aerobic than turning it or aerating it. *See* studies by Dr. Brinton and Mr. Jenkins at Appendix 10; CP 2491.

whether he misspoke or whether the error rests with the reporter or transcriptionist.

3. *The Hearing Examiner ignored unrefuted expert testimony based on his incorrect application of the standard of proof.*

Pacific Topsoils assigned error to the HE's finding that the question of compliance could not be answered in either the affirmative or the negative, *see* App. Br. at 22, because there is a burden of persuasion – preponderance of the evidence – and Pacific Topsoils met it, while SHD failed to meet it. Thus, no matter which party bears the onus of proof, the HE should have found for Pacific Topsoils on that issue.

The standard of proof in this case was the preponderance of the evidence. The “preponderance of evidence” means “more likely than not.” *Alpha Kappa Lambda Fraternity v. Washington State University*, ___ Wn.App. ___, 216 P.3d 451 (September 17, 2009). The preponderance test is to be applied to all the evidence in the record: considering all the evidence adduced by both sides, is the proposition sought to be established by the party bearing the burden of proof more likely than not?

The Hearing Examiner's conclusions as to the weight and sufficiency of the evidence are not entitled to any deference because he was applying a higher burden than the mere preponderance of the evidence. This is shown both in his statements during the hearing and in the reasoning he employed in his decision. He stated at the hearing: “Now frankly, based on the evidence that I've heard today, I don't think it's

scientifically possible to say with certainty that the current process does or does not permit aerobic decomposition.” CP 2466. But the standard he was required to apply was not proof to a scientific certainty, but proof sufficient to persuade a reasonable mind that it was more likely than not that the method promotes aerobic decomposition.¹⁴ As the Superior Court found, the Hearing Examiner stated the correct application of law, but then he went on to fashion his own idea of what constituted sufficient proof to justify the Maltby composting method, rather than applying the preponderance of the evidence standard to the record that was actually before him. Most importantly, he ignored the unrefuted scientific testimony in the record because, in his opinion, the data presented did not constitute a “scientifically valid study” and because the data was not a “properly vetted study”. CP 2107-08.

In this proceeding, the parties are not searching for abstract truth or seeking scientific proof beyond a reasonable doubt. The question was whether, based on the evidence adduced before the Hearing Examiner, it was more likely than not that Pacific Topsoils’ method “promotes” aerobic decomposition. Rather, posing the question “Does the static pile

¹⁴ Pacific Topsoils has continuously argued, and still contends, that the burden of proof in this proceeding must be placed on SHD. *See* argument *infra*. For clarity’s sake, in this discussion of whether the Hearing Examiner applied the correct standard of proof, we assume, *arguendo*, that he was correct to place the burden on Pacific Topsoils.

composting method employed by Pacific Topsoils promote aerobic decomposition?”, the Examiner found that

Given the evidence in the record of this hearing, this question cannot be answered in either the affirmative or the negative. The core of the pile is anaerobic according to Pacific Topsoils’ consultant. The extent of the anaerobic conditions, both areally [sic] throughout the pile and temporally over the decomposition period, is unknown. The handful of tests performed by Pacific Topsoils this Spring do not constitute a rigorous study of pile conditions. The tests performed by Pacific Topsoils this Spring did not even reach the most inner core of the pile. The tests performed by Pacific Topsoils this Spring did not extend over a long enough period to allow any conclusions to be reached regarding conditions over time. The results of the tests performed by Pacific Topsoils this Spring do indicate that aerobic conditions existed at the time in portions of the pile. What they do not indicate is whether Pacific Topsoils’ large static pile method “promotes” aerobic decomposition.

CP 2106. The Hearing Examiner largely ignored the extensive testimony and documentary evidence showing that Pacific Topsoils’ composting process is designed and operated with close attention to the variables that promote aerobic composting as required by the regulation, as well as Dr. Henry’s expert scientific testimony debunking the theories SHD had floated as to how Pacific Topsoils’ method could have the characteristics and product of aerobic decomposition without being aerobic. Rather, again stating that the proportion of aerobic areas to anaerobic spots in the pile was unknown, he concluded:

Whether leaving the pile undisturbed for six to nine months promotes aerobic decomposition in a controlled fashion simply cannot be discerned from the sparse technical evidence in the record. IT may be that the controls Pacific Topsoils employs during the initial mixing and pile formation is sufficient to promote aerobic decomposition in a controlled environment; or it may not. It may be that wetting down dry feedstock materials during initial pile construction is sufficient to promote aerobic decomposition in a controlled environment; or it may not. A properly vetted study over a sufficient time period is necessary before any defensible conclusion can be reached on this issue.

CP 2107. The Hearing Examiner did not apply the preponderance of the evidence standard to the record before him. Rather, he applied a higher standard of his own making. Because he was not applying the correct standard, his conclusions as to the sufficiency and weight of the evidence are not entitled to any deference whatsoever.

The Hearing Examiner's failure of logic is stunning. Having proposed a "performance-based" rule, having decided that he wanted to see evidence of aerobic decomposition, he then went on to ignore or explain away a large body of evidence before him that, in fact, such results were being obtained. For example, he ignored the evidence that the inner temperature of the pile reaches and sustains a temperature of 55 degrees centigrade, something that only occurs in an aerobic process. CP 2357. Having heard expert testimony that the final product's earthy smell is evidence of an aerobic process rather than an anaerobic one, the Examiner

inexplicably dismissed that concrete evidence of an aerobic process, stating: “If a composting process does not ‘promote’ aerobic decomposition, then its product, no matter how it smells... is not composted material under Chapter 173-350 WAC.” CP 807. Having heard evidence that the Pacific Topsoils facility does not emit the sulfuric odors emitted by anaerobic composting methods, the Examiner ignores the clear implication that, then, the decomposition is aerobic, instead seizing on one comment by the expert:

Henry cannot explain how the end product would have an aerobic decomposition smell when some portion of the pile core is likely anaerobic. Henry believes that any odors generated from anaerobic decomposition in the pile’s core is largely oxidized by passing through the aerobic “outer shell” of the pile.

CP 806. The Examiner, ignoring the clear fact that the lack of odor shows the presence of aerobic decomposition, instead concluded: “A process which only oxidizes anaerobic odors without seeking to minimize the anaerobic conditions does not “promote” aerobic decomposition.” CP 807.

The Hearing Examiner’s conclusions are particularly insupportable since he also concluded that “[n]o one representing the Health District... stated that composting must be totally aerobic to comply with the statute and rule”, CP 808, and that the WAC was written the way it was because

“DOE realized that a totally aerobic composting process is likely not achievable.” CP 807. Yet his rejection of Dr. Henry’s sampling and analysis, and his rejection of both Dr. Henry and Dr. Brown’s expert evaluation that the design of the composting method properly took into account porosity, nutrient balance, pile oxygen, pile moisture, pile temperature, and retention time of composting, appeared to be based merely on the fact that Dr. Henry testified that an unspecified portion of the core of the pile is likely anaerobic, and that a Pacific Topsoils employee was reported to have told Ecology that there was probably an anaerobic core to the pile. CP 2106.

The Examiner’s novel composting theories are not supported in the record by either expert or non-expert testimony. He wrote:

To meet the WAC standard, the composting procedure must “promote aerobic decomposition and not just merely have aerobic processes occurring naturally alongside anaerobic processes. A process which only oxidizes anaerobic odors without seeking to minimize the anaerobic conditions does not promote aerobic decomposition. If a composting process does not promote aerobic decomposition then its product, no matter how it smells or how highly sought after it may be, it is not a compost of material under Chapter 173-350 WAC.

CP 2105. No testimony in the record, let alone the expert testimony, supports that conclusion of the Hearing Examiner. The Hearing Examiner admitted that this was the first hearing he had ever conducted on composting, and that he himself has absolutely no composting expertise

nor even scientific credentials.¹⁵ The Hearing Examiner is not a trained attorney and has never conducted a hearing about composting. He studied geography in college. Yet he substituted his judgment for that of two experts, Dr. Henry and Dr. Brown. He rejected the results of Dr. Henry's sampling and analysis of the piles at the facility, inexplicably concluding that the scientist's analysis was "not scientifically valid".¹⁶ The Hearing Examiner put forth no cogent reason for that conclusion, nor did the Hearing Examiner state what, in his opinion, would have constituted a "scientifically valid" analysis.

Well-established law prevents decision-makers without expertise from rejecting expert testimony and relying on their own subjective theories. *Hoffman Homes v. The United States Environmental Protection Agency*, 999 F2d 256 (1993)(declining to hold that an area was a wetland because that conclusion "was merely speculation based on the assumption that Area A was a wetland similar to Area B"). In *Levine v Jefferson*

¹⁵ The Hearing Examiner studied geography at college and called himself a social scientist; he does not have a background in the physical sciences. Nor is the Hearing Examiner a lawyer. He has never before presided over any hearing regarding composting. CP 1084-1086.

¹⁶ The Hearing Examiner determined that Dr. Henry's sampling analyses "do not constitute a scientifically valid study in the Examiner's opinion. We have no information on study protocols... The results are interesting, but not scientifically valid nor necessarily representative of average conditions throughout the pile or over the life of the composting process." D&O at 12, note 15.

County, 116 Wn.2d 575, 807 P.2d 363 (1991), our Supreme Court declined to uphold the State Environmental Policy Act mitigation measures because only speculative theories supported the mitigation measures and “there is no evidence that the perceived ill effects that concerns the neighbors would actually materialize” and “the record fails to address specific proven environmental impacts”. *Id.* at 581. In *Turner Conservation Comm. v. City of Norwalk*, 344 A.2d 258 15 Conn. App. 336 (1988), the court held that a lay commission without expertise acts in absence of substantial evidence “when it relies on its own knowledge and experience concerning technically complex issues.” *Feinson v. Conservation Commission*, 180 Conn. 421, 429 A.2d 910 (1980) held that when an administrative agency chooses to rely on its own judgment, it has an obligation to reveal publicly its own knowledge and expertise regarding technically complex issues. In *Norwalk*, the trial court had set aside the wetland commission’s decision because it had disregarded the opinion of two experts and relied instead on its own judgment when it lacked technical expertise. The hearing examiner’s decision was arbitrary: he did not advance any proper justification for rejecting Pacific Topsoils’ appeal and upholding the permit condition.

SHD argues that the Hearing Examiner was right to ignore Dr. Brown’s and Dr. Henry’s testimony, and that he did so because he found

the testimony incredible. As a result, SHD claims that the reviewing court is not entitled to consider the experts' testimony when determining whether the Hearing Examiner's findings were supported by substantial evidence. The Hearing Examiner did not find Pacific Topsoils' expert testimony not credible; he simply ignored the testimony because, in his opinion, it did not constitute a "rigorous study". Nowhere in his decision does the Hearing Examiner state that Dr. Henry and Dr. Brown were not credible witnesses. Rather, as discussed extensively above, he did not consider their testimony valuable because it was not conclusive to a scientific certainty, essentially because they had not personally conducted what he considered scientifically valid, rigorous, peer-reviewed studies of Pacific Topsoils' method.

4. The testimony of Dr. Henry and Dr. Brown was not "speculative", but the testimony of Ms. Westcott was speculative.

SHD argues that the opinions of Dr. Brown and Dr. Henry were merely speculative and that the Hearing Examiner was thus justified in ignoring their testimony. This misapprehends the nature of speculative expert testimony. In *Owen v. Burlington Northern*, 114 Wn.App. 227, 56 P.3d 1006 (2002), this Court held that where an expert in the field renders an opinion about whether the facts as established in the record meet a certain legal standard, that testimony is not speculative even though the

expert is testifying about probabilities and has not conducted rigorous study. *Id.* at 236-37. The *Owen* court distinguished cases where an expert attempted to establish otherwise unknown facts from general principles without an independent basis in the factual record and their testimony was thus speculative. *Id.*, *distinguishing Miller v. Likins*, 109 Wn.App. 140, 147-150, 34 P.3d 835 (2001)(where the ultimate question was how the accident happened, and no eyewitness testimony was available on that issue, an accident reconstructionist could not use testify, based on the positions of the pedestrian and motorist after the accident, what their positions were before the accident.)

Although the low burden of persuasion (preponderance of the evidence, “more likely than not”) did not justify such a requirement, the Hearing Examiner wanted Dr. Henry and Dr. Brown to have personally conducted “rigorous” studies open to peer review before he would pay attention to their testimony. But an expert in the field may testify based on studies and scientific inquiry conducted by others. Expert scientific testimony based on others’ research and the facts in the record is not “speculative”. The difference is demonstrated by *Safeco v. McGrath*, 63 Wn.App. 170, 817 P.2d 861 (1991). The Court of Appeals rejected an alcohol expert’s testimony about whether McGrath’s ability to form the intent to injure was destroyed by drinks he had consumed in a particular

period of time. The Court pointed out that a technical expert may testify as to the effects of alcohol on the ability to drive safely because that

has been the subject of extensive scientific research. Based upon such research, an expert may testify that after X drinks within Y hours an individual's ability to operate his automobile is affected, regardless of age, sex, weight or other physical qualities. **Indeed, this scientific basis is what permits imposing criminal liability in drivers on the basis of the blood alcohol on their breath.**

Id. at 178 (emphasis added). However, the Court found that the testimony in question in that case was speculative because there was no scientific basis “regarding the effects of intoxication on the mental capacity to form an intent”. *Id.* As pointed out in *McGrath*, courts admit testimony of unlawful intoxicated driving from expert witnesses based on research that has been done in the past by other scientists and on the blood-alcohol level in the record of the particular case. Similarly, in this case, Dr. Henry and Dr. Brown are composting experts who are well versed in the science of composting and who were therefore highly qualified to apply their extensive knowledge of composting technology and the science behind how composting works to the data that was in the record. That data included not only the testing conducted by Dr. Henry to ascertain the operating temperatures, oxygen levels, and other parameters at Pacific Topsoils’ operation, but also the mandatory operating procedures that

Pacific Topsoils' employees follow to build the composting piles so as to promote aerobic decomposition.

By contrast, Ecology employee Holly Westcott was not testifying from the facts in the record, and her testimony was speculative as defined in the caselaw. Mr. Christiansen testified that Ecology had conducted no studies or reviewed no studies in formulating conclusions about Pacific Topsoils method. Ms. Westcott's testimony showed that she did not understand the facts of how Pacific Topsoils actually conducts their composting operation, but was only testifying about a generic, theoretical static pile. She admitted that she had not reviewed any of the science or literature regarding so-called "static pile composting". CP 2440; 2432, 2438. She did not identify any studies, in fact, that would bear on the issue of whether Pacific Topsoils' composting method complied with the statute. CP 2440. She did not testify she had studied Pacific Topsoils' method or conducted any studies at that facility. Ms. Westcott could not identify any scientific studies supporting her conclusion that static pile composting was an anaerobic composting method. Thus, her testimony lacked a scientific basis, and was truly speculative under Washington caselaw. CP 2398. She came to her testimony with the firm conclusion that static pile composting does not "promote" aerobic decomposition, but she had not based that opinion on any science. Thus, her testimony was,

in fact, speculative. Further, SHD expert Mr. Crofoot similarly testified that SHD had done no studies to support its conclusion that PTI had an illegal composting method. CP 2527.

SHD and Ecology officials failed to explain why it was a viable plan for Pacific Topsoils to manipulate its pile when the Puget Sound Clean Air Authority permit, which the SHD permit incorporates by reference requires static pile composting. *See* Appendix 1.

E. The burden of proof should have been placed on the Health District to justify the condition by showing that Pacific Topsoils' method did not comply with the statute.

The burden of proof must be placed on the Health District because the Washington State and Federal Constitutions so require. Pacific Topsoils' license to do business is a protected property interest. *Devine v. Department of Licensing*, 126 Wn. App. 941, 951, 110 P.3d 237 (2005) ("A driver's license represents an important property interest and cannot be revoked without due process of law."); *Jimmy's Germantown Place, Inc. v. City of Philadelphia*, 862 A.2d 708 (Pa. Commw. Ct. 2004) ("It is axiomatic . . . that government licenses to engage in a business create an entitlement to partake of a profitable activity, and hence, such a license constitutes a property right.

Pacific Topsoils has a constitutionally protected right in its permit and in the permitting process. A government agency seeking to take away a property interest has the burden of proof. *Van Sant v. Everett*, 69 Wn.App 641, 647-49, 848 P.2d, 1276 (1993) (Government had burden of proof in proceeding to take away a nonconforming right which is a property right); *Springer v. Dept. of Licensing*, 24 Wn.App. 847, 604 P.2d 994 (1979) (“this is a civil proceeding calling for a sanction...the burden of proof is on the state”). Further, the general rule in administrative law is that the proponent of an order has the burden of proof. Bernard Schwartz, *Administrative Law* §7.8 (2d ed.1984). In general “an agency is the proponent of its orders”, A Stein, et.al., *Administrative Law* §24.02 at 24-21 (1987). Thus, for both these reasons, in this case, the government had the burden of proof.

Pacific Topsoils had a license to compost for over ten years, and the Health District’s threat to remove that license without complying with due process violated that property right. Pacific Topsoils has held its permit for 10 years and renews it each year. Government agencies are obliged to issue permits if an individual complies with the permit standards specified in the ordinance. *Valley View Indus Ctr v. City of Redmond*, 107 Wn.2d 621 637, 733 P.2d 182 (1987). (“A permit or license must issue as a matter of right upon compliance with the

ordinance.”) *Id.* at 636. Withholding a permit from an individual entitled to it constitutes a due process violation. *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1999).

Instead of making the Health District prove that Pacific Topsoils’ current method is unlawful, the Examiner erred by making Pacific Topsoils prove that its method was lawful. This burden-shifting was an unconstitutional deprivation of due process because there had been no proceeding at which the Health District presented evidence supporting its license revocation decision or claim that Pacific Topsoils had to change its composting method.

This error of law prejudiced Pacific Topsoils. The Examiner found (wrongly) that the evidence did not establish the facts one way or another whether the composting method promoted aerobic decomposition. Thus, the appeal was denied because Pacific Topsoils was held to have failed to meet its burden of proof. Had the burden of proof been placed on the Health District, as was proper, the appeal would have been granted.

Additionally, Pacific Topsoils’ ability to present its case was greatly impaired by the fact that it had not been allowed to depose any witness from the Department of Ecology or the Health District and to inquire in a detail fashion about why such agencies had concluded that its composting method was an illegal anaerobic method. Then, because it had been

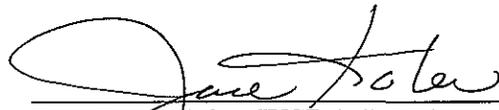
allocated the burden of proof, it was forced to present its case before hearing any testimony on these issues from SHD witnesses. This violated due process. *Mansour v. King County*, 131 Wn.App. 255, 128 P.3d 1241 (2006). Under *Mansour*, an alleged violator must be given notice of the government agency's burden of proof at the hearing – both the government's regulatory authority and every factual element that must be proved. *Mansour* emphasizes that a notice of civil violation must give the alleged violator notice of what factual elements must be proved in order for the agency to prevail at hearing.

IV. CONCLUSION.

Based on the foregoing, Pacific Topsoils respectfully requests that the Court affirm the judgment of the Superior Court.

DATED this 20th day of October, 2009 at Gig Harbor, Washington.

Respectfully submitted,



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LIST OF APPENDICES

1. Permit documents
 - Solid Waste Handling Permit
2. Excerpts from Dr. Brown's testimony and resume.
3. Excerpts from Dr. Henry's testimony.
4. Excerpts from Ecology employee Peter Christensen's testimony.
5. Excerpts from Ecology employee Holly Wescott's testimony.
6. Excerpts from Pacific Topsoils' employee Janusz Bajsarowicz's testimony.
7. Excerpts from testimony of Snohomish Health District employee Mr. Crofoot.
8. Letters and e-mails from Ecology and the Health District about the need for Pacific Topsoils to change its composting method.
9. Transcript from hearing with objection to making Pacific Topsoils have burden of proof.
10. Excerpts from composting treatises addressing how carbon rich materials promote aerobic conditions.