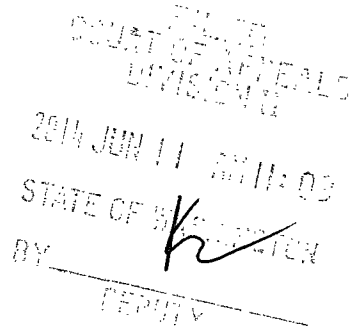


**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,<br><br>Appellant,<br><br>v.<br><br>WAHKIAKUM COUNTY, a political subbdivision of Washington State,<br><br>Respondent. | NO. 44700-2-II<br><br>RESPONSE TO *AMICUS CURIAE* BRIEF OF NATURAL SELECTION FARMS, INC., et. al. |

## I. BACKGROUND

This response is perhaps presumptuous in that it assumes the success of the County's motion to strike the various factual assertions made by *amici* Natural Selection, et. al. (hereafter, *amici* or Natural Selection). In the event the court sees fit to deny the motion, the County first maintains its objection and second requests that, for the reasons given in its motion to strike, the court refuse to take cognizance of any of any of the factual assertions of *amici* that are not made with citation to the clerk's papers. The County, in this response, will confine itself to answering *amici*'s legal arguments with the exception of this paragraph.

## II. RESPONSE

### A. Legislative purpose redux

The County's vow to reply only to legal argument cuts down significantly on the length of this response, since of the 20 pages of Natural Selection's brief, about seven of them contain legal argument. Of those seven pages, most are repetitions or elaborations on the arguments made and countered over the years of litigation between the County and the Department. For instance, page 14 rehashes the Department's arguments regarding legislative intent in its brief at 20 et. seq. And it shares the Department's lack of perspective, calling the by now familiar passage from the legislative findings at RCW 70.95J.005(1)(d) and (2) regarding "beneficial use" an "overarching command" rather than a finding. Id. Like the Department, it purports to have discovered, in that finding, the legislative purpose it should have found in RCW 70.95J.007, which the legislature says in so many words establishes "the purpose of this chapter." This despite the fact that the courts are directed to "accept as a verity any legislative declaration of the statute's public purpose." Johnson v. Johnson, 96 Wn.2d 255, 258, 634 P.2d 877, 879 (1981).

*Amici* also elide the more uncomfortable findings in the same statute they otherwise enshrine, failing to mention RCW 70.95J.005(1)(a) (sludge is an "unavoidable byproduct of the wastewater treatment process" – "unavoidable" is a term rarely used for good things), (c) (sludge

management is a "financial burden"), and (e) (sludge "can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health."

The County's response to Natural Selection is the same as it was to the Department: if you're trying to determine legislative purpose, look at the part of the law that begins, "The purpose of this chapter is..." RCW 70.95.007, Johnson, supra. But even if RCW 70.95J.007 did not exist, Natural Selection's reliance on RCW 70.95J.005 fails on its own terms.

RCW 70.95J.005(e)(2) states that Ecology "shall, to the maximum extent possible, ensure that municipal sewage sludge is (1) reused as a beneficial commodity and (2) is managed in a manner that minimizes risk to public health and the environment." The county ordinance is consistent with clause (1) in that it permits literally any amount of sludge treated to Class A biosolids standards to be "reused as a beneficial commodity" by application to land in the County. The Ordinance is consistent with clause (2) as well: it ensures that public health and the environment are not endangered by exposure to the microorganisms in biosolids that the Legislature expressly found "may pose a risk to public health." RCW 70.95J.005(1)(e).

On the other hand, *amici* read clause (2) out of the statute. While their interpretation of the statute surely maximizes the reuse of less-treated biosolids, it neither acknowledges nor gives effect to the equally-weighted

legislative direction to Ecology to "ensure that municipal sewage sludge...is managed in a manner that minimizes risk to public health and the environment." RCW 70.95J.005(2). The Court must interpret a statute to give meaning to all of the statute's provisions. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 149 Wn.2d 660, 685, 72 P.3d 151, 164 (2003), citing Cox v. Helenius, 103 Wash.2d 383, 387, 693 P.2d 683 (1985). *Amici*'s interpretation renders clause (2) of RCW 70.95J.005 superfluous, so their reading must be rejected.

The Washington Legislature found, just as Wahkiakum County and the trial court in this case found, that "(m)unicipal sewage sludge can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health." RCW 70.95J.005(1)(d). For this reason, the Legislature directed Ecology to establish a program that, on the one hand, promotes reuse of municipal sewage sludge, and on the other hand, requires the Department to manage the program "in a manner that minimizes risk to public health and the environment." RCW 70.95J.0005(2). The County's focus on clause (2) of the statutory provision "minimize(s) the risk to public health and the environment" and redresses the imbalance created by Ecology's exclusive focus on clause (1). Restricting the application to county lands of partially-treated municipal sewage sludge that the legislature expressly found "may pose a risk to public health" is consistent with the statute and therefore

constitutes a proper exercise of the police power vested in the county by Article XI, section 11 of the Washington Constitution.

B. Additional Arguments

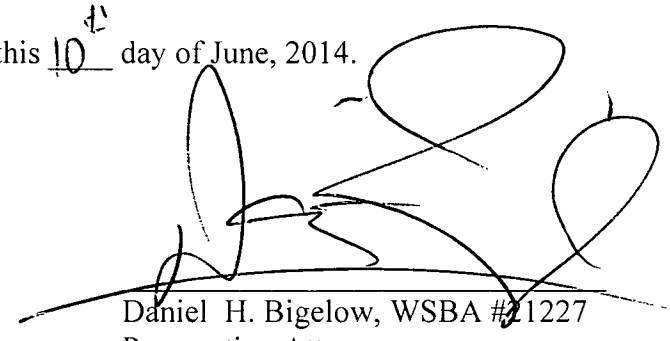
*Amici* spend two pages arguing that the legislature's regulations on landfill disposition of biosolids somehow means Wahkiakum County's ordinance is unconstitutional. The County submits this is rhetorical sleight of hand. Its true purpose is to create through repetition the impression in the reader that landfill disposal of sewage sludge is the sole alternative to spraying class B biosolids on croplands. As the court has seen in the County's prior briefing (e.g., Respondent's Brief at 28-29, 35, 41), besides applying sewage sludge on land in Wahkiakum County as Class B biosolids, those posed with the question of disposal might indeed landfill it within or outside the county – or they may incinerate it within or outside the county; or they may apply it as Class B biosolids to land outside the county that would be, if the Department's description of its desirability is true, happy to get it; or they may apply it as Class A biosolids anywhere within or outside the county – an alternative that *amici* do not counter with any legal argument or cognizable fact. This court should not be persuaded that legal provisions for landfill disposition of biosolids forecloses, or has any other bearing on, other methods of biosolids disposal.

*Amici* then spend a single phrase arguing, or rather, declaring, that "the definition that biosolids are not a solid waste" somehow forecloses any county regulation of biosolids. See its brief at 19. This is an unusual position in a case that has, until now, held as uncontested the notion that the State has not preempted the field; and without further elaboration the County is unsure of how to respond. If *amici* are arguing field preemption here, then the County submits it has submitted the issue without sufficient argument pursuant to RAP 10.3(a)(6) and is therefore being unhelpful to the court pursuant to RAP 9.1.

## III. CONCLUSION

Based on the record herein and the additional arguments set forth *supra*, the County requests this court uphold the duly passed Cathlamet biosolids ordinance in question.

Respectfully submitted this 10 day of June, 2014.



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| STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,<br><br>Appellant,<br><br>v.<br><br>WAHKIAKUM COUNTY, a political Subdivision of Washington State,<br><br>Respondent. | NO. 44700-2-II<br><br>CERTIFICATE OF SERVICE |

Pursuant to RCW 9A.72.085, I certify that on the 10th day of June, 2014, I caused to be served a true and correct copy of the Motion to Strike Impermissible Additions to the Record in *Amicus Curiae* Brief of Natural Selection Farms, Inc., *et. al*, and the Response to *Amicus Curiae* Brief of Natural Selection Farms, Inc., *et. al.*, in the above captioned matter upon the parties herein as indicated below, by U.S. Express Mail:

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

DATED this 10th day of June, 2014, at Cathlamet, Washington.

Geri L. Rooklidge

GERI L. ROOKLIDGE, Administrative Assistant