

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Mar 11, 2015, 12:56 pm  
BY RONALD R. CARPENTER  
CLERK

E. CRF  
RECEIVED BY E-MAIL

NO. 91156-8

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

WAHKIAKUM COUNTY,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

---

RESPONDENT'S ANSWER TO LEWIS COUNTY'S AMICUS  
CURIAE MEMORANDUM

---

ROBERT W. FERGUSON  
*Attorney General*

LEE OVERTON, WSBA #38055  
*Assistant Attorney General*

Office ID No. 91024  
P.O. Box 40117  
Olympia, WA 98504-0117  
(360) 586-2668  
Lee.Overton@atg.wa.gov  
*Attorneys for Respondent*

 ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ARGUMENT .....1

    A. Lewis County Fails to Identify Any Issue of Substantial  
        Public Interest .....1

    B. The Court of Appeals’ Rejection of Wahkiakum  
        County’s Claim of Statutory Authority for Its Biosolids  
        Ban Does Not Conflict With Any Decision of This Court .....4

    C. There Is No Conflict With This Court’s Holding in  
        *Biggers* .....5

III. CONCLUSION .....7

**TABLE OF AUTHORITIES**

**Cases**

*Biggers v. City of Bainbridge Island*,  
162 Wn.2d 683, 169 P.3d 14 (2007)..... 1, 5, 6

*Diamond Parking, Inc. v. City of Seattle*,  
78 Wn.2d 778, 479 P.2d 47 (1971)..... 6

*W.R. Grace & Co.-Conn. v. Dep't of Revenue*,  
137 Wn.2d 580, 973 P.2d 1011 (1999)..... 6

**Constitutional Provisions**

Const. art. XI, § 11..... 6

**Statutes**

RCW 70.95J..... 1, 4

RCW 70.95J.005(1)..... 2

RCW 70.95J.005(2)..... 2

RCW 70.95J.007..... 2

RCW 70.95J.010(1)..... 3

RCW 70.95J.010(4)..... 3

RCW 70.95J.020(1)..... 2, 3

**Regulations**

WAC 173-308..... 3

WAC 173-308-060(3)..... 2

40 C.F.R. § 503..... 3

**Rules**

RAP 13.4(b) ..... 1

## I. INTRODUCTION

Amicus Lewis County urges this Court to review this case, but offers no valid grounds. Its attempt to show that the decision below raises an issue of substantial public interest, and its assertion that the decision conflicts with a decision of this Court, are both without substance. The biosolids statute fully protects human health, and the Court of Appeals decision does not undermine that protection. Moreover, the Court of Appeals' citation to *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007), was appropriate, but ultimately unnecessary. Thus, Lewis County fails to raise any convincing argument for review in this case. Wahkiakum County's petition for review should be denied, as it meets none of the criteria in RAP 13.4(b).

## II. ARGUMENT

### A. Lewis County Fails to Identify Any Issue of Substantial Public Interest

Like most of the laws implemented and administered by the Department of Ecology (Ecology), the biosolids statute at RCW 70.95J has at its core the protection of human health and the environment. The regulatory system established under the statute imposes rigorous treatment and management standards, and an in-depth permit system for the beneficial reuse of sewage sludge. Sewage sludge that fails to meet the

standards for classification as biosolids may not be applied to the land. WAC 173-308-060(3). Despite this, Lewis County asserts that “Ecology and the Court of Appeals . . . read the protection of public health and the environment out of the statute,” claiming this creates an issue of substantial public interest. Lewis County’s Amicus Curiae Memorandum (Amicus Mem.) at 3.

The statute’s legislative findings reveal the challenge that gave rise to the law: the production of municipal sewage sludge is unavoidable; it will increase with population growth; it is a financial burden to municipalities and ratepayers; and it can contain contaminants that may pose a risk to public health; but, properly managed, it is a valuable commodity that can be beneficially used in farming, forestry, and landscaping. RCW 70.95J.005(1). The Legislature clearly declared its policy choice: “a program shall be established to manage municipal sewage sludge and that the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity and is managed in a manner that minimizes risk to public health and the environment.” RCW 70.95J.005(2).

The law ensures that sludge meets certain standards for the protection of human health and the environment before it is used on the land. RCW 70.95J.020(1); RCW 70.95J.007. By meeting these standards,

sewage sludge becomes biosolids—a valuable commodity that can safely be applied to the land to improve soil. The biosolids management regulations at WAC 173-308 contain 74 pages of rules, incorporating the protective standards and means for achieving them that were developed and promulgated by the Environmental Protection Agency. See 40 C.F.R. § 503; RCW 70.95J.020(1). Sludge that meets these protective standards may be applied to the land under a permit system; sludge that does not must be disposed as solid waste. See RCW 70.95J.010(1), (4). The purpose of the statute is thus to ensure, “to the maximum extent possible,” that sewage sludge is brought to these protective standards and put to beneficial use on the land, rather than being disposed of as solid waste.

In its search for an issue of public interest that would merit this Court’s attention, Lewis County turns this regulatory scheme on its head. Despite the statute’s clear and forceful promotion of biosolids reuse, Lewis County asserts that the statute’s purpose is to *prevent* the use of biosolids: “the Legislature determined” that biosolids “threaten public health and the environment”; “[t]he Legislature also found that biosolids are toxic”; and “ecology uses the statute . . . to facilitate the contamination of the very waters the statute was intended to protect.” Amicus Mem. at 2–3, 10. These assertions have no basis in the language of the statute or its regulations. The Legislature found that *untreated* sewage sludge—i.e.,

material that does not meet the requirements of RCW 70.95J—could contain contaminants that may pose a risk. The very purpose of the regulatory scheme is to promote, to the maximum extent possible, the treatment of municipal sewage sludge to biosolids standards so that it can be beneficially used on the land.

**B. The Court of Appeals’ Rejection of Wahkiakum County’s Claim of Statutory Authority for Its Biosolids Ban Does Not Conflict With Any Decision of This Court**

In its briefing before the Court of Appeals, Wahkiakum County took the position that the Legislature, by its passage of the biosolids statute, RCW 70.95J, had authorized local governments to ban land application of Class B biosolids. *See* Wahkiakum County’s Petition for Review (Petition), App. G at 26. The County supported this position with three arguments. Petition, App. G at 17–27. The Court of Appeals addressed and rejected each in turn. *See* Petition, App. A at 12–16. Far from authorizing local governments to ban biosolids management activities, the court concluded that the Legislature, by its passage of the biosolids statute, expressly had displaced previously-existing local authority under the solid waste statute relating to biosolids management. Petition, App. A at 16. Because the County had contended in those three arguments that its alleged authority flowed from the Legislature by way of the biosolids statute, the court held that the County’s ordinance “exercises

power the legislature did not confer on local governments under the statutory scheme for management or disposal of biosolids.” Petition, App. A at 12.

Lewis County asserts, with no supporting argument, that this holding of the Court of Appeals, “is flatly wrong” and in conflict with a decision of this Court. Amicus Mem. at 7–8. But a flat rejection of the Court of Appeals’ holding, with no argument, does not show a conflict.

**C. There Is No Conflict With This Court’s Holding in *Biggers***

The Court of Appeals found that, pursuant to legislative directive, Ecology adopted a robust regulatory scheme which, through an in-depth process, specifically grants permits for land application of Class B biosolids, creating a right to land application of Class B biosolids when a permit is acquired. Petition, App. A at 8–9. The court held that due to the statutory directive to maximize the beneficial use of biosolids, the implementing regulatory scheme, and the complexity, scope, and intensity of Ecology’s permitting process, Wahkiakum County lacks authority to entirely prohibit the land application of Class B biosolids. *Id.* at 7–8.

This rationale for the Court of Appeals’ holding stands on its own. But the court also cited two decisions of this Court. From *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007), it drew on the holding of the plurality decision, together with what is arguably dicta from

the four-justice lead opinion.<sup>1</sup> From *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 479 P.2d 47 (1971), it drew on a precedential holding and rationale.

Lewis County argues that, because the Court of Appeals cited to a rationale accepted by only four of the justices contributing to the plurality decision in *Biggers*, the Court of Appeals decision conflicts with the decision in *Biggers*. Amicus Mem. at 8–9. The argument fails. First, citing to the rationale by which four justices supported the plurality decision, where that rationale is arguably dicta, does not constitute a conflict with that decision. Second, the court’s citation to *Biggers* is completely unnecessary to its decision—not only does the court’s rationale for its holding stand on its own, but the court also finds precedent in *Diamond Parking*, 78 Wn.2d at 782 (holding that “while the local governments can impose reasonable regulations which do not conflict with state laws, they cannot validly enact measures which interfere with the

---

<sup>1</sup> Ecology briefed the Court of Appeals on the *Biggers* case. See Respondent’s Answer to Petition for Review, App. B at 21–22. *Biggers* addressed the legality of a rolling moratorium on dock construction imposed by the City of Bainbridge Island. In a 4-1-4 split decision, a plurality concluded that the challenged local rolling moratorium violated article XI, section 11 of the state constitution. *Biggers*, 162 Wn.2d at 697–99, 702–06. The concurring justice disagreed with the reasoning of the lead opinion, so the holding is simply that the moratorium violated article XI, section 11; the rest, including all rationale, is mere dicta. See *W.R. Grace & Co.-Conn. v. Dep’t of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) (“[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds”).

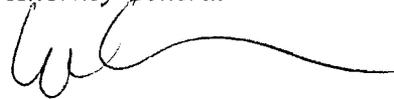
uniform operation of laws enacted by the legislature.”). Lewis County thus identifies no conflict with a decision of this Court.

### III. CONCLUSION

Lewis County’s assertions regarding issues of public interest and conflict with this Court’s decisions are without substance. Ecology respectfully requests that the Supreme Court deny Wahkiakum County’s Petition for Review.

RESPECTFULLY SUBMITTED this 11th day of March 2015.

ROBERT W. FERGUSON  
*Attorney General*



LEE OVERTON, WSBA #38055  
*Assistant Attorney General*

Office ID No. 91024  
P.O. Box 40117  
Olympia, WA 98504-0117  
(360) 586-2668  
Lee.Overton@atg.wa.gov

NO. 91156-8

**SUPREME COURT OF THE STATE OF WASHINGTON**

WAHKIAKUM COUNTY, a political  
subdivision of Washington State,

Petitioner,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

CERTIFICATE OF  
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 11th day of March 2015, I caused to be served a true and correct copy of Respondent's Answer to Lewis County's Amicus Curiae Memorandum in the above-captioned matter upon the parties herein as indicated below:

DANIEL H. BIGELOW  
WAHKIAKUM COUNTY PROSECUTING  
ATTORNEY  
64 MAIN STREET, P.O. BOX 397  
CATHLAMET, WA 98612

U.S. Mail  
 By Fax  
 By Email:  
[dbigelow@waprosecutors.org](mailto:dbigelow@waprosecutors.org)

GLENN J. CARTER  
LEWIS COUNTY CHIEF CIVIL DEPUTY  
PROSECUTING ATTORNEY  
345 W. MAIN STREET, 2ND FLOOR  
CHEHALIS, WA 98532

U.S. Mail  
 By Fax  
 By Email:  
[Glenn.Carter@lewiscountywa.gov](mailto:Glenn.Carter@lewiscountywa.gov)

KENNETH W. HARPER  
MENKE JACKSON BEYER LLP  
807 NORTH 39TH AVENUE  
YAKIMA, WA 98902

U.S. Mail  
 By Fax  
 By Email:  
[kharper@mjbe.com](mailto:kharper@mjbe.com)

JAMES B. SLAUGHTER  
BEVERIDGE & DIAMOND PC  
1350 I STREET NW, SUITE 700  
WASHINGTON, DC 20005

U.S. Mail  
 By Fax  
 By Email:  
[jslaughter@bdlaw.com](mailto:jslaughter@bdlaw.com)

KONRAD J. LIEGEL  
KONRAD J. LIEGEL ATTORNEY  
AT LAW PLLC  
1463 E REPUBLICAN STREET, SUITE 190  
SEATTLE, WA 98112

U.S. Mail  
 By Fax  
 By Email:  
[Konrad@konradliegel.com](mailto:Konrad@konradliegel.com)

the foregoing being the last known addresses.

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

DATED this 11th day of March 2015, at Olympia, Washington.

  
TERESA L. TRIPPEL  
*Legal Assistant*

## OFFICE RECEPTIONIST, CLERK

---

**To:** Trippel, Teresa (ATG)  
**Cc:** Overton, Lee (ATG)  
**Subject:** RE: E-filing for Case No. 91156-8

Received 3-11-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Trippel, Teresa (ATG) [mailto:TeresaT@ATG.WA.GOV]  
**Sent:** Wednesday, March 11, 2015 12:53 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Overton, Lee (ATG)  
**Subject:** E-filing for Case No. 91156-8

Please find attached for filing in *Wahkiakum County v. State of Washington, Department of Ecology*, Case No. 91156-8, Respondent's Answer to Lewis County's Amicus Curiae Memorandum. This Answer is filed by Lee Overton, Assistant Attorney General, WSBA No. 38055, phone number (360) 586-2668, email address [Lee.Overton@atg.wa.gov](mailto:Lee.Overton@atg.wa.gov).

Thank you,

**Teresa Trippel** | Legal Assistant to Lee Overton, AAG | WA Attorney General's Office | Ecology Division  
P.O. Box 40117, Olympia, WA 98504-0117 | 360.586.4618 | [Teresa.Trippel@atg.wa.gov](mailto:Teresa.Trippel@atg.wa.gov)

**E-Mail Address for E-Service:** [ecyolyef@atg.wa.gov](mailto:ecyolyef@atg.wa.gov)

**Note:** This communication is intended only for the addressee(s) shown above. It may contain information that is privileged, confidential, or otherwise protected from disclosure. Any review, dissemination, or use of this communication or its contents by persons other than the addressee(s) is strictly prohibited. If you have received this communication in error, please notify the sender immediately by email or by phone and delete this message and all copies and backups thereof. Thank you.