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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

No. 30770-1-III

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

Appellants,

v.

KITTITAS COUNTY, Respondent.

APPELLANTS' REPLY BRIEF

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I. Response to Counterstatement of Facts. Appellant reaffirms its statement of facts as to statements of Respondent in conflict therewith or addition thereto. Appellant draws attention to Respondent's misstatement as to the environmental engineering report's conclusions respecting petroleum releases. The report confirms no petroleum was released and that there were no releases on the pad. Mr. Rivard's January 27, 2011 inspection report to a release characterizes it as minor and locates it outside the transfer facility.¹

Mr. Granberg's handwritten memo, alleging the presence of P016, the 'smoking gun', was produced and transmitted as stated in Appellant's opening brief. Mr. Rivard's declaration in a companion case confirmed that the memo was prepared by Mr. Granberg in a meeting with Mr. Rivard on March 7, 2011 at which they reviewed Mr. Rivard's January 27, 2011 photographs.²

¹(Clerk's Papers for Court of Appeals 32301-3-III which was consolidated into Court of Appeals 30770-1-III on April 25, 2014 hereinafter referenced as "CP1") CP1 639, 643, Landau Associates, Report Soil Sampling Event Chem-Safe Environmental, Inc., July 30, 2013, p. 3; (Appellate Board Record PH-11-0001 hereinafter referenced as "ABR") ABR 39, at Sec. 3.6.

²A copy of the declaration is attached as an exhibit to Appellant's motion to expand the record under RAP 9.11 to be filed with this Court on August 18, 2011. See paragraph 30 thereof.

II. NOVA Invalidly Enforces Illegal Act. Appellant draws attention to Respondent's claim that the Notice of Violation and Abatement of January 27, 2011 (the "NOVA") properly issued because Appellant operated without a requisite MWR facility permit. The NOVA recited that Appellant had hazardous waste without either a county or state permit on two specific days. It fails because Respondent, in a special relationship with Appellant, granted a consent to Appellant to operate without a county permit and to revoke same only after two weeks notice and because Mr. Rivard modified the health order and hence the NOVA on which it was based to confirm the county's lack of jurisdiction over Appellant's state regulated transporter business.³

This case is controlled by one material legal issue: did Respondent have the legal authority to require Appellant to obtain and be subject to a moderate risk waste ("MRW") facilities permit issued by Respondent's Kittitas County Public Health District ("KCPHD") under authority of the

³ ABR 43. On January 27, 2011, Mr. Rivard states "...it was recognized how the previous health order could be interpreted as meaning no transporting could be done. That was not our intent...Again to clarify, Kittitas County Public Health does not have jurisdiction over the transporter license that Chem Safe has through the Department of Ecology."

Kittitas County Solid Waste Ordinance⁴ (“Solid Waste Ordinance”), is Appellant, a transporter with a transfer facility operating under Chapter 70.105 RCW and WAC 173-303-240 exempt from the requirements of WAC 173-350-360 and provisions of the Solid Waste Ordinance implementing same? The core issue before this Court is a matter of construction, accordingly legal, and subject to the de novo review by this Court without deference to the trier of fact below. If Appellant could not be required to obtain or legally operate under an MRW facility permit, the NOVA upon which it was based, was void.

Notwithstanding Respondent’s position that Appellant misreads WAC 173-350-360, a careful review of its language reveals that Appellant’s position that it is not subject to the permitting requirements thereunder or under the Solid Waste Ordinance is the only possible reading of WAC 173-350-360(1). In relevant part, WAC 173-350-360(1) provides:

- (a) *This section is applicable to: ...*
 - (ii) *Persons transporting MRW using only a bill of lading (MRW that is not shipped using a uniform hazardous waste*

⁴Kittitas County Board of Health Ordinance No. 1, as amended.
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manifest) who store MRW for more than ten days at a single location...

(b) This section is not applicable to:

(i) Persons transporting MRW managed in accordance with the requirements for shipments of manifested dangerous waste under WAC 173-303-240...

Appellant is a transporter with a transfer facility and as such operates subject to the requirements of WAC 173-303-240. Appellant transports MRWs under a uniform manifest, not a bill of lading. Appellant operates under a number issued to Appellant jointly by the United States Environmental Protection Agency (“EPA”) to transporters of dangerous wastes (“DWs”) under WAC 173-303-060. Appellant does not store DWs more than ten days⁵ and transports and manages both DWs and MRWs in accordance with the requirements of shipments of manifested dangerous waste under WAC 173-303-240. It is clear that WAC 173-350-360(1)(a) does not include transporters with or without transfer facilities, such as Appellant, that are subject to WAC 173-303-240 as covered solid waste handling entities. Appellant’s business operates under an exclusion from solid waste management provided by WAC 173-350-360(1)(b).

⁵ABR 36, Rivard inspection report, 1/10/11, last handwritten line.
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Appellant's business is principally the receipt from customers of DWs and the transportation thereof to authorized treatment, storage or disposal facility ("TSD")⁶. Incident thereto, Appellant has a base of operations where it receives, consolidates, stores, and ships DWs and parks its transportation vehicles. Such a base is a transfer facility. Appellant incidentally accepts, consolidates, stores, and ships MRWs with its DWs. As such Appellant is subject to WAC 173-303-240. Appellant operates under a number issued jointly by the DOE and EPA to transporters of DWs, with or without transfer facilities under WAC 173-303-060. Appellant has registered its base site as a transfer facility with the DOE as required by WAC 173-303-240(6)(a).⁷ Appellant ships all DWs and also ships its MRWs under a uniform manifest as required by WAC 173-303-180. In short, Appellant transports DWs and MRWs under

⁶ WAC 173-303-030; see also definition of TSD facility in WAC 173-303-040.

⁷ Rivard Decl., March 8, 2011, para. 14, ABR 1, p. 5, para. 14; ABR 12, p. 1, 2. Page 2 confirms Appellant's E-filing on transfer facility with DOE for each year after 2002. Appellant as a transporter and under WAC 173-303-240 governing transporters is required under WAC 173-303-240(6) to 'register' its transfer facility with the DOE which it did. Since the registration requirement applies to transporters under DOE regulation, only the DOE has the authority to act on reporting deficiencies. There has been no action by the DOE thereon; neither does Rivard or Respondent make that factual allegation. Hence, it is clear that Appellant has a 'permit' for its transfer facility. This statement raises the question how Mr. Rivard's statement that Appellant voluntarily sought an MRW facility permit in lieu of a transfer facility registration it already had. See Rivard Decl., November 15, 2012, para. 15, filed with this Court.

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a uniform manifest subject to the requirements of WAC 173-303-240 as provided in WAC 173-350-360(1)(b)(i) and does not transport MRWs under a bill of lading as provided in WAC 173-350-360(1)(a)(ii).

There can be no doubt that Respondent was fully aware that Appellant's operations as a transporter with a transfer facility were fully compliant with WAC 173-303-240 and the permitting, design, and operating requirements applicable thereto. In August, 2011, Respondent published the Kittitas County Solid Waste Management Plan Update ("Solid Waste Plan"). There, at Table 27, Regulated Waste Generators, 2009, Appellant is identified as follows:

Generator ID, WAH000017335, Company Name – Chem Safe Environmental Inc; Location – Kittitas”; Generator ID, WAH000008169, Company Name – Chem Safe Environmental Inc Transporter, Location – Kittitas.

The Solid Waste Plan confirms that as of 2009 and current through August 2011, Appellant held two DW handling 'permits',⁸ in the form of DOE/EPA numbers, one for generation and the other for transporting under specific numbers issued by the DOE. Respondent cannot be heard

⁸ Permits are defined to include any consent or authorization to operate. As to DWs, see WAC 173-303-040, definition of permit; as to 'solid waste' see WAC 173-350-100. The distinction is only the authority that issues the 'authorization', DOE for DWs, local government for 'solid waste'. For this purpose, 'solid waste' and MRWs have the same meaning. See WAC 173-350-100, definition of 'MRW'.

to deny its own published Solid Waste Plan adopted under the requirements of Chapter 173-350 WAC, or that Appellant did not operate as a transporter for purposes of WAC 173-350-360(1)(a) and (b) and 173-303-240 as to its transporter and transfer facility operation.⁹

The application of WAC 173-350-360(1)(b) to Appellant is clear. Appellant meets the requirements of and operates as a transporter with a transfer facility under WAC 173-303-240, shipping DWs and MRWs together under a uniform manifest. It receives, consolidates, stores, handles and ships DWs and MRWs under the requirements of WAC 173-303-240. As such Appellant is a 'person' to which the entire 'section' of WAC 173-350-360 is 'not applicable'. Not applicable means that Respondent is not authorized to require permitting of Appellant or Appellant's submission to design and oversight requirements under the MRW facility provisions of its Solid Waste Ordinance, itself issued under authority of WAC 173-350-360. Appellant does not misconstrue WAC

⁹Appellant's 'permitting' and operation as a transporter and transfer facility handling DWs and MRWs is further confirmed in Mr. Rivard's, KCPHD's health officer's inspection report of January 10, 2011 which makes specific reference to Appellant's compliance with the ten day storage rule, a requirement only applicable to transfer facilities operated by transporter's under WAC 173-303-240 by Mr. Granberg's, a DOE Dangerous Waste Division official's, email of February 7, 2011, to Ms. Becker, the Kittitas County civil deputy, confirming that Appellant received, stored, and transported DWs and MRWs under a EPA/DOE number properly issued to Appellant by the DOE.

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173-350-360; rather, Appellant directs attention to the language thereof making WAC 173-350-360 inapplicable to Appellant and its operations.

Respondent urges that regulation of DWs and 'solid waste' overlap and that local government has oversight over both, at least as it applies to 'transfer facilities'. Respondent identifies no dual permitted transfer and MRW facilities. Further, an examination of Chapter 70.95 RCW governing solid waste management, 70.105 RCW governing dangerous waste management, Chapter 173-303 WAC, the Dangerous Waste Regulation, Chapter 173-350-360, the Solid Waste Regulation, and the Solid Waste Ordinance foreclose that conclusion.

RCW 70.105.007(1) and (3) grants the DOE exclusive regulatory authority over such wastes¹⁰ and further expresses its intent that the DOE regulate hazardous waste and local government solid waste. The distinction between such hazardous waste and solid waste for regulatory purposes is further confirmed by RCW 70.105.035. On the other hand, RCW 70.95.020(1) assigns exclusive regulatory authority over solid waste management to local government. The grant to local government, then, only includes solid waste not treated as hazardous waste under Chapter

¹⁰ Hazardous waste under Chapter 70.105 is identical to dangerous waste under the Dangerous Waste Regulation which implements it.
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70.105 RCW and accordingly dangerous waste under Chapter 173-303 WAC, its implementing regulation.

That these Chapters are exclusive as to their subject matter is confirmed by WAC 173-350-020. It recites that Chapter 173-350, the Solid Waste Regulation, applies to solid waste management *excluding* “(15) [D]angerous wastes fully regulated under Chapter 70.105 RCW, Hazardous waste management, and Chapter 173-303 WAC, Dangerous waste regulations”. The exclusion of solid waste containing DWs over a given threshold from regulation as solid waste is further confirmed in Chapter 173-304 WAC, governing minimum standards for solid waste facilities. WAC 173-303-015(3) provides that Chapter 173-304 WAC does not apply to dangerous waste subject to Chapter 70.105 RCW and Chapter 173-303 WAC, the Dangerous Waste Regulation.

WAC 173-350-100 provides that DW means any waste designated as dangerous waste under Chapter 173-303, WAC. WAC 173-303-040 provides that DWs are solid waste designated by WAC 173-303-070 through 100 as dangerous, extremely hazardous, or mixed waste and refer to all wastes regulated under Chapter 173-303 WAC. Certain wastes which are otherwise solid wastes are excepted from the Dangerous Waste

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Regulation, either categorically, or conditionally. These include wastes listed in WAC 173-303-071 which include household wastes, and state regulated wastes with concentrations below set standards including D classification, 'special wastes' which are excluded under WAC 173-303-100(5) and as to small waste generators, WAC 173-303-100(4). While 2,4-D may be a DW, it is excluded from DW requirements as a special waste under 'D' classification. Unless such exclusions apply, solid waste is dangerous waste. It is not solid waste for purposes of the Solid Waste Regulation and its permitting and oversight is not delegated to local government.

Transporters and their transfer facilities that store, ship, or handle DWs, including any solid waste not subject to an exclusion from the Solid Waste Regulation are subject to Chapter 70.105 RCW and Chapter 173-303 WAC, WAC 173-303-020 specifically lists both such transporters and transfer facilities as subject thereto. Regulation, including 'permitting' thereof is assigned to the DOE. Consistent therewith, the DOE's Guidelines at pp. 18-20, provide that MRW facilities, regulated by local

government, are not allowed to accept DWs except as excluded from the Dangerous Waste Regulation.¹¹

Kittitas County's Solid Waste Ordinance is consistent with this division of authority. An examination of Solid Waste Ordinance Section IV(B)(2)(d)(1) and VI(A) generally covering permitting subject to the Solid Waste Ordinance at VI(A)(2)(b) adopts Chapter 173-304 WAC as minimum standards for permitted facilities. Chapter 173-304 WAC by its terms does not cover DWs. Further, at VI(A)(2)(c), it contains an extensive protocol prohibiting any covered facility from accepting DWs, inspection of waste to insure compliance, and documentation. The Solid Waste Ordinance excludes from local regulation of solid waste, permitting, facility design, operation and the like, DWs including solid waste containing DWs. The intent to exclude DWs from local government solid waste regulation is further confirmed in Kittitas County's Solid Waste Management Plan adopted in August, 2011. It recites at Section 7.2 thereof that a moderate risk waste facility cannot accept hazardous waste

¹¹ Washington Department of Ecology, *Moderate Risk Waste Fixed Facility Guidelines*, (1995).

with DW content above the state regulated threshold.¹² Finally, as noted above, the DOE's own guidelines make clear that MRW facilities are not allowed to accept DWs.

Respondent's position that it could require Appellant to obtain an MRW facility permit and be regulated by Respondent as an MRW facility is flawed as confirmed by the exclusivity of the transporter/transfer regulation and MRW/solid waste regulation. A person with an MRW facility permit issued under WAC 173-350-360 and, here, the Solid Waste Ordinance, cannot legally accept, store, ship, or otherwise handle DWs.

WAC 173-350-360(10) provides that an MRW facility must have a plan to refuse acceptance of DWs and direct them to a qualifying DW facility. A qualifying DW facility is either a transporter with or without a transfer facility or a TSD. The distinction lies in the holding period of the DWs. Transporters with a transfer facility may hold DWs no more than ten (10) days. If DWs are held longer, the facility must qualify and be permitted as a TSD. See WAC 173-303-240(6), last sentence and (8). Chapter 173-303 WAC governs 'permitting' of both transporters and TSDs. Subject to the applicability of the ten (10) day rule, either

¹² *Kittitas County 2010 Solid Waste and Moderate Risk Waste Plan Update*, August, 2011, at Sec. 7.2.

transporters or TSDs are authorized to receive DWs. WAC 173-350-360(6)(e)(ii)(F) clearly contemplates that MRW facilities subject thereto and to local oversight are not authorized to handle DWs.

Thus, in conflict with the Respondent's demands that Appellant obtain an MRW facility permit and operate thereunder, it is now clear that if Appellant had obtained such a permit it would have immediately been in violation of either the MRW facility regulation or the Dangerous Waste Regulation. It could not legally operate its transporter business and at the same time operate a separately permitted MRW from the same facility.

Without conceding that Respondent had jurisdiction over Appellant's performance as a transporter with a transfer facility under WAC 173-303-240,¹³ Respondent's allegation that Appellant violated the ten (10) day limitation on holding waste applicable to it under WAC 173-303-240(6), last sentence and (8) as to certain waste identified in photographs that are exhibits to Mr. Rivard's declaration of March 8, 2011

¹³ Respondent has not alleged that and, in fact, Appellant has not been cited by the Dangerous Waste Division of the DOE, of which Mr. Granberg was an official, for any of the putative deficiencies cited by Respondent in the NOVA, Health Order, or Reply Brief. Clearly, the DOE's Dangerous Waste Division had jurisdiction and through Mr. Granberg was on notice of the facts. Had Appellant violated the DOE's DW rules, it would have acted under its authority and in the manner provided by WAC 173-303-830 and 173-303-840 or RCW 70.105.095(1).

errs. Mr. Rivard confirmed Appellant's compliance with the ten (10) day rule as it applied to DWs in his January 10, 2011 inspection report. He recited: "Overall Facility is keeping records better and appears to meeting [sic] 10 day deadline for commercial waste disposal."¹⁴ Even if Appellant held MRWs more than ten (10) days, no violation occurred. MRWs shipped by Appellant as a transporter under a uniform manifest are not subject to the ten (10) day rule. WAC 173-303-240(6) and (8) apply the limitation only to DWs, not to other waste that may be handled by a transporter. Because Appellant ships MRWs under a uniform manifest, it cannot be considered an MRW facility subject to WAC 173-350-360 because it would be exempt therefrom as well as any ten (10) day limitation by shipping MRWs under a uniform manifest as provided in WAC 173-350-360(1)(a)(ii). Since WAC 173-303-240 establishes no temporal limitations for holding MRWs if shipped under a uniform manifest, it is clear the ten (10) day rule does not apply and does not make Appellant into an MRW facility. Even if the ten (10) day rule applied by treating MRWs as DWs under WAC 173-303-240, it would not give rise to enforcement jurisdiction to Respondent. Compliance with WAC 173-

¹⁴ ABR 36, Rivard Inspection Report of January 10, 2011.
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303-240 is regulated by the DOE, not local government, including Respondent.

III. RAP 2.5 Does Not Bar Appeal. Respondent argues that Appellant's failure to raise the issue of the illegality of Respondent's order to obtain an MRW facility permit somehow affects Appellant's right to raise the issue on appeal under RAP 2.5 or on the basis of waiver or failure to raise the issue at trial. The argument fails both because it is subject to the exemption set forth in RAP 2.5(a)(3) since Respondent's ultravires action affected Appellant's property interest in the transfer facility and its operation and because a fair examination of the record shows that the issue was either raised or was sufficiently raised under the applicable 'arguably related to' standard.

There can be no question but that a constitutional issue has been raised. Appellant has been deprived of the use of and fined for the operation of its transfer facility by Respondent under color of authority which, as shown above, did not exist. Appellant meets the first prong of RAP 2.5(a)(3) because Appellant's rights under the Federal Fifth and Fourteenth Amendments to and Article I, Section 9, para. 3 of the Federal

Constitution and Art. I, Sec. 3 and 16, and 23 of the Washington State Constitution are implicated. Appellant meets the second prong thereof because the invasion of Appellant's rights has obvious, practicable and identifiable consequences, including closure of its transfer facility, an order compelling invasive testing thereof, and a fine with criminal implications. *State v. Lynn*, 67, Wn.App. 339, 345, 835 P.2d 251 (1992); *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001); *State v. WWJ*, 138 Wn.2d 595, 600-608, 980 P.2d 1257 (1999). Civil as well as criminal Constitutional rights are subject to the exception. Both the Court below and the hearing examiner affirmed the NOVA issued on this erroneous basis. *Haueter v. Cowles Publ'g Co.* 61 Wn.App. 572, 577, 811 P.2d 231 (1991); *Richmond v. Thompson*, 130 Wn2d 368, 385, 922 P.2d 1343 (1996). Appellant clearly meets the test applicable to RAP 2.5(a)(3).

At the hearing before the hearing examiner, Appellant averred to the hearing examiner that it was properly 'permitted' as a transporter to handle DWs and accordingly MRWs.¹⁵ Moreover, the issue that Appellant was properly permitted under its EPA/DOE Number to handle P016, a DW, and D016, an MRW are raised in Mr. Bradley's Declaration

¹⁵ (Clerk's Papers for Court of Appeals 30770-1-III hereinafter referenced as "CP") CP 468.

of June 17, 2012 with the motion for reconsideration and to set aside the judgment filed with the Superior Court, June 26, 2012 at paragraph 17.¹⁶ The issue is also specifically raised in the motion for clarification filed with the Superior Court on November 4, 2013.¹⁷

The scope of the exception to MRW facility compliance contained in WAC 173-350-360 like the effect of the arguments made by Appellant both go to the validity of the NOVA enforcing the Solid Waste Ordinance issued in connection therewith and clearly meet the ‘arguably related to’ exception to the requirement that the specific issue on appeal first be raised to the trial court. *Mavis v. King Co., Public Hospital No. 2*, 139 Wn.App. 639, 651, 248 P.3d 558 (2011); *Lunstad v. Saberhagen Holdings, Inc.*, 139 Wn.App.334, 338, 339, 160 P.3d 1089 (2007), *affd.*, 166 Wn2d 264, 208 P.3d 1092 (2009); *State Farm Mut’l Auto Ins., Co. v. Amirpanahi*, 50 Wn.App. 869,872, 751 P.2d 329 (1988). The issue, if not the legal theory, was raised by reference to Appellant’s statement before the hearing examiner that it had the requisite permits and that it did not require a county solid waste permit for the periods identified in the

¹⁶ CP 313.

¹⁷ CP1 6, 8, 9, 17, Motion to Clarify, November 4, 2013, p. 3, line 22 through p. 4, line 13 and note 3, and p. 12, lines 5-12.

NOVA. Lack of legal authority would have been yet another reason why the alleged violation in the NOVA, operating without a county solid waste permit, was in error. At the very least, the additional legal basis was arguably related to the argument that was in fact advanced.

IV. Other Bases for Invalidity of NOVA. Appellant validly argued that Respondent was barred from its argument based on a county solid waste permit and the NOVA was hopelessly defective and invalid. To the extent the hearing examiner engrafted other ‘public nuisances’ than operation of a hazardous transit and storage business without a requisite state or county permit on November 4, 2010 and January 27, 2011, the NOVA failed to identify the public nuisance that served as a basis for the NOVA.¹⁸ Lack of permitting is not the same as illegal presence of DWs. Appellant’s transporter operations were excluded from the NOVA; they covered handling DWs and by extension MRWs.¹⁹

Exercising authority specifically granted to the health officer under the Solid Waste Ordinance, Mr. Rivard in that capacity expressly granted Appellant the right to operate without an MRW facility permit on the two

¹⁸ ABR No. 40, p. 1.

¹⁹ ABR No. 43.

occasions cited in the NOVA. He further confirmed that he had given Appellant two weeks to respond to any deficiencies to Appellant's MRW application identified by the DOE or Respondent. Those comments were returned to Appellant on January 27, 2011 with the health order. Respondent's submission of the plan to the DOE confirmed its completeness; in violation of the Solid Waste Plan, Sec. 8.2.3, Mr. Rivard apparently submitted the application without review by the solid waste advisory committee.²⁰ Respondent identifies no dual permitted transfer and MRW facilities. Appellant was entitled to two weeks to respond and was denied same. Mr. Rivard had the authority as the KCPHD health officer to allow Appellant to operate without an MRW facility permit.²¹ Appellant has properly averred to the due process considerations raised by

²⁰ ABR No. 42

²¹ CP1 25, 54, Ex. B to Sky Allphin Decl. 11/4/13, Rivard Letter November 4, 2010 authorizing Appellant to continue operation while perfecting its MRW facility permit application. CP1 351, Ex. W to Sky Allphin Decl. 11/4/13, Rivard email of December, 2010 confirming that he gave Appellant the right to notice and cure of any deficiencies in the MRW facility application. Solid Waste Ordinance I, second paragraph gives KCPHD discretion to enforce the Solid Waste Ordinance and not a mandate to do so. See also, Solid Waste Ordinance VII(E)(3)(a)(2) which authorizes the health officer to work with persons requiring a permit to cure deficiencies and grants permissive authority for health orders to enforce same. See also KCC 18.02.030(1), initial paragraph, which permits but does not mandate that a NOVA be issued by the responsible officer. Enforcement of the duty to obtain a permit, if any, was clearly permissive to the health officer and not mandatory.

revoking KCPHD's consent retroactively, obviously without notice in violation of the consent KCPHD granted to Appellant.

Ignoring any requirement for notice and the right to be heard before a revocation of authority could obtain, revoking the authority to operate on January 27, 2011, contemporaneous with the service of NOVA, and construing Appellant's operation consistent with that authorization for periods prior to the revocation thereof, raises due process, ex post facto, and estoppel issues. This is not a case parallel to *Radach v. Gunderson*, 39 Wn.App. 392, 397, 398, 695 P.2d 128 (1985) or *City of Mercer Island v. Steinmann*, 9 Wn.App. 479, 481-3, 513 P.2d 80 (1973) or the line of cases that follow them. In *Radach*, the agency erroneously issued a permit in violation of a statute and 'balancing the equities, the court enjoined Gunderson from constructing improvements in reliance on the agency's erroneous grant; the court further held that damages should be paid by the agency to Gunderson for losses resulting from the injunction; here, there was no error in granting consent to operate without an MRW facility permit and the agency's erroneous act is the issuance of the NOVA to fine Appellant and compel it to close and conduct testing on its

transfer facility notwithstanding the consent by the agency rendered issuance of the NOVA in conflict therewith void.

Respondent misstates the due process issue by confounding it with its police authority. The due process issue arose when Respondent lawfully excused Appellant from compliance with a permit if it sought the permit and then, after Appellant performed, Respondent cancelled, here retroactively, the right to operate it had granted. As a result of the specific consent during the permitting process, Respondent had a special relationship with and owed a special enforceable duty to Appellant. It breached that duty by issuing the NOVA. *Radach*, p. 397. Further, as a result of that special duty and Appellant's enforcement rights thereunder, Respondent could not retroactively or unilaterally abrogate Appellant's rights thereunder in conflict with its agreement. It owed Appellant notice and a right to respond either as a function of its duty or under general principles of due process. *Rhod-a-zalea & 35th St. Inc. v. Snohomish County*, 136 Wn.2d 1, 9, 959 P.2d 1024 (1988) clearly recognizes the right, albeit unvested, as a protected right which requires notice and a hearing before, not after, revocation.

While the vested rights doctrine addressed in *Rhod-a-zalea, id.*, is generally applied to vested rights in land use or under land use permit applications, its analog applies more broadly because it “implicates constitutional protections and prevents a retroactive application even when the legislative intent is clear”. *Real Progress, Inc. v. City of Seattle*, 91 Wn.App. 833, 840, 841, 894, 895, 963 P.2d 890 (1998), *Moran v. City of Seattle*, 179 Wash. 555, 560, 38 P.2d 391 (1934), *Gillis v. King County*, 42 Wn.2d 373, 378, 255 P.2d 546 (1953). Here, there is not even a statute, but an act by the Kittitas County health officer exercising ‘police powers’ that gives rise to a retroactive termination of a permission granted by him and upon which Appellant had a right to rely.

It is the case that a subsequent police power regulation may modify the use; however, the regulation cannot do so retroactively or even immediately and must ‘amortize’ their effects to the right holder. While ‘nonconforming’ use rights were the gravamen of *Rhod-a-zalea, id.*, as in this case, the claim that police power, wrongfully applied, trumped the right on an immediate basis is common to this case and was rejected therein.

V. CR 60/Judicial Estoppel. Respondent mistakenly argues that Appellant's motion for clarification was either mischaracterized or untimely. Neither is the case. The motion asked the Superior Court to rule on an issue, the pending CR 60 motion, that it had not ruled upon in its decision to the companion CR 59 motion.²² The CR 60 motion subject to the motion for clarification was timely and based on newly discovered evidence. The motion for clarification additionally supported the subject CR 60 motion with additional newly discovered evidence relating to the knowledge and motive of Mr. Rivard, the declarant that reversed his declaration testimony on a key issue before the hearing examiner, the presence of P016, a DW. The new evidence was relevant to the additional request for relief under the CR 60 motion for an order of judicial estoppel. The motion for clarification was filed within one year after the Superior Court's decision on the companion CR 59 motion and within three (3) months after the additional newly discovered evidence was freed of Respondent's temporary restraining order, long after the time for a CR 59

²² The motion was brought at the instance of an order by the Commissioner of this Court issued June 13, 2013, filed in this court.
APPELLANTS' REPLY BRIEF - 23

motion had passed.²³ Thus, the motion is within one (1) year of the decision on the CR 59 motion, timely for motions based on newly discovered evidence, and because misconduct by Respondent is implicated, not subject to the one year limit at all.²⁴

Under the abuse of discretion standard, the Superior Court's decision stands unless it adopts a manifestly unreasonable view, rests on facts unsupported in the record, or applies an erroneous legal standard.²⁵ Here, under the facts, Appellant had no legal duty to obtain the MRW facility permit it was ordered by KCPHD and then the NOVA to obtain and for which it was held subject to the punitive provisions of the NOVA. The Superior Court failed to reverse for newly discovered facts were brought to its attention that P016, the DW upon which the hearing examiner based its decision was not in fact present at Appellant's facility. Appellant's new evidence showed that Respondent was aware that the alleged P016 was in fact D016 a moderate risk waste and that P016 was not present. Together, these called into to question the hearing examiner's

²³ A motion for clarification is timely without regard to limitations imposed on motions to set aside judgments under CR 60. *Kemmer v. Keiski*, 116 Wn.App. 924, 933, 68 P.3d 1138 (2003).

²⁴ See CR 60(b)(3) and (4) and second unnumbered paragraph thereof.

²⁵ *State v. Phiengchai Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012)

decision based on the presence of P016. The Superior Court ignored the facts and applied the wrong legal standard in failing to set aside the judgment and remand.

VI. Conclusion. Respondent raises no meaningful issues to its lack of jurisdiction over Appellant's operation and Appellant's argument based thereon. The issue, if not the legal argument, was raised to the hearing argument and both were raised to the Court below. Respondent's lack of candor as to its knowledge and intent respecting the demand for an MRW facility permit masked the jurisdiction issue. Principles of judicial estoppel should bar Respondent's argument based thereon. Respondent fails to address the proposition that it was not entitled to terminate a right granted by it to a person under a special relationship with it, either by contract or due process, without notice and a hearing. Respondent has further failed to show how the public nuisance cited in the NOVA supports the abatement order therein. Respondent did so in violation of Appellant's rights. Appellant was not tardy in filing for relief under CR 60. Respondent's continued misrepresentations invoke principles of judicial estoppel requiring reversal or remand.

DATED this 15th day of August, 2014.

Attorney for Appellants

A handwritten signature in cursive script that reads "Leslie A. Powers". The signature is written in black ink and is positioned above a horizontal line.

Leslie A. Powers, WSBA #06103

Powers & Therrien, P.S.

3502 Tieton Drive

Yakima, WA 98902

Email: powers_therrien@yvn.com

Phone: (509) 453-8906

CERTIFICATE OF SERVICE

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

NEIL CAULKINS
Deputy Prosecuting Attorney
Kittitas County
205 West Fifth, Room 213
Ellensburg, WA 98926
Ph: 509-962-7664
Fx: 509-962-7060
Em: neil.caulkins@co.kittitas.wa.us
Em: angela.bugni@co.kittitas.wa.us

by:
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 Overnight Delivery
 Facsimile Transmission
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KENNETH W. HARPER
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CLERK OF THE COURT
Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201-1905
Ph: 509-456-3082
Fx: 509-456-4288

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Signed

8/15/14

Date

Appendix A

ABR 12

CP1 129-134

CP1 253

Kittitas County Board of Health Ordinance Number 1999-01

Washington DOE Moderate Risk Waste Fixed Facility Guidelines

Kittitas County 2010 Solid Waste and Moderate Risk Waste Management Plan Update

ABR 12

James Rivard

From: Granberg, Richard L. (ECY) [DGRA461@ECY.WA.GOV]
Sent: Thursday, January 21, 2010 9:11 AM
To: Neet, Wendy (ECY)
Cc: Bleeker, Gary (ECY); James Rivard
Subject: FW: Chem Safe
Attachments: image001.png@01CA9432.80BA9E70; image002.png@01CA9432.80BA9E70

Wendy,

Here is documentation of the improper, or failure to adequately report annually as a transfer facility since the initial notification in 2002 that we spoke about earlier today.

Richard Granberg
Hazardous Waste and Toxics Reduction Program
(509) 457-7147
FAX (509) 575-2809
dgra461@ecy.wa.gov

From: Wolfe, Tonya (ECY)
Sent: Wednesday, January 13, 2010 9:27 AM
To: Granberg, Richard L. (ECY)
Subject: Chem Safe

When they originally applied for the RCRA ID # in 2002 they marked Transfer Facility but since then each year of Annual report they have not marked Transfer Facility.

Role: Annual Report Staff Environment: Production

RCRA Site ID: WAH000017335 Chem Safe Environmental Inc
400 S MAIN
KITTTITAS, WA 98934
Facility/Site ID: 58926155

Site ID History							
Type	Status	Legal Owner	Submitted	Effective	E-Filer		
Revised: RY2008	XQG	Chem Safe Environmental Inc	3/23/2009	12/31/2008	Yes	View	Print
Revised: RY2007	XQG	Chem Safe Environmental Inc	2/12/2008	12/31/2007	Yes	View	Print
Revised	SQG	Chem Safe Environmental Inc	8/6/2007	8/6/2007	No	Amend	Delete
						View	Print
Revised: RY2006	SQG	Chem Safe Environmental Inc	2/7/2007	12/31/2006	Yes	View	Print
Revised: RY2006	XQG	Chem Safe Environmental Inc	2/7/2007	12/31/2006	Yes	View	Print
Revised: RY2005	SQG	Chem Safe Environmental Inc	3/7/2006	12/31/2005	Yes	View	Print
Revised: RY2004	SQG	Chem Safe Environmental Inc	3/29/2005	12/31/2004	Yes	View	Print
AR: RY2003	XQG	Chem Safe Environmental Inc	4/29/2004	12/31/2003	Yes	View	Print
AR: RY2002	MQG	Chem Safe Environmental Inc	3/3/2003	12/31/2002	No	View	Print
	MQG	Chem Safe Environmental Inc	2/19/2002	2/19/2002	No	Amend	Delete
						View	Print

Here is their Transporter ID # and they do file their yearly reports correctly:

Role: Annual Report Staff Environment: Production

RCRA Site ID: WAH000008169 Chem Safe Environmental Inc Transporter
400 S MAIN TRANSPORTER
KITTTITAS, WA 98934
Facility/Site ID: 15673162

Site ID History							
Type	Status	Legal Owner	Submitted	Effective	E-Filer		
Revised: RY2008	XQG	Chem Safe Environmental Inc	3/23/2009	12/31/2008	Yes	View	Print
Revised: RY2007	XQG	Chem Safe Environmental Inc	2/12/2008	12/31/2007	Yes	View	Print
Revised: RY2006	XQG	Chem Safe Environmental Inc	4/16/2007	12/31/2006	No	View	Print
Revised: RY2005	XQG	Chem Safe Environmental Inc	3/7/2006	12/31/2005	Yes	View	Print
AR: RY2004	XQG	Chem Safe Environmental Inc	3/29/2005	12/31/2004	Yes	View	Print
AR: RY2003	XQG	Chem Safe Environmental Inc	3/31/2004	12/31/2003	Yes	View	Print
AR: RY2002	XQG	Chem Safe Environmental Inc	3/3/2003	12/31/2002	No	View	Print
Revised	XQG	Chem Safe Environmental Inc	2/19/2002	2/19/2002	No	Amend	Delete
						View	Print
AR: RY2001	SQG	Chem Safe Environmental Inc	2/27/2002	12/31/2001	No	View	Print
AR: RY2000	SQG	Chem Safe Environmental Inc	2/14/2001	12/31/2000	No	View	Print
AR: RY1999	SQG	Chem Safe Environmental Inc	2/14/2000	12/31/1999	No	View	Print
New	MQG	Chem Safe Environmental Inc	4/8/1999	4/8/1999	No	Amend	View
						View	Print

Let me know if you would like additional information. Thanks Tonya

Tonya Wolfe

Hazardous Waste & Toxics Reduction Program
(360) 407-6023
tw01461@ecy.wa.gov

CP1 129-134

From: James Rivard
To: Granberg, Richard L. (ECY); Suzanne Becker
Cc: Bleeker, Gary (ECY); Neet, Wendy (ECY)
Subject: RE: ChemSafe Operations Plan - Questions regarding type of permit
Date: Wednesday, February 09, 2011 8:50:56 AM

Sounds like Dick and Suzanne are available Monday-Wednesday next week. I'm available then too.

Gary and Wendy?

James Rivard
Environmental Health Supervisor
Interim Co-Administrator Kittitas County Public Health Department
507 N. Nanum St., Suite 102
Ellensburg, WA 98926
(509) 962-7005

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From: Granberg, Richard L. (ECY) [mailto:DGRA461@ECY.WA.GOV]
Sent: Tuesday, February 08, 2011 10:55 AM
To: Suzanne Becker
Cc: James Rivard; Bleeker, Gary (ECY); Neet, Wendy (ECY)
Subject: RE: ChemSafe Operations Plan - Questions regarding type of permit

I am available Monday through Wednesday of next week, but am tied up Thursday and Friday. Will wait to hear availability from James, Gary and Wendy.

Richard Granberg
Hazardous Waste and Toxics Reduction Program
(509) 457-7147
FAX (509) 575-2809
dgra461@ecy.wa.gov

From: Suzanne Becker [mailto:suzanne.becker@co.kittitas.wa.us]
Sent: Tuesday, February 08, 2011 10:49 AM
To: Granberg, Richard L. (ECY)
Cc: Rivard, James (DOHI); Bleeker, Gary (ECY); Neet, Wendy (ECY)
Subject: RE: ChemSafe Operations Plan - Questions regarding type of permit

A meeting would be great - I would really appreciate it. I am available Thursday and Friday this week, and Monday through Wednesday next week.

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And again, thank you for your responses. I'll take a look at the WACs and CSI's operating plan to see if I have more questions regarding how we might want to work our permit and any restrictions.

Suzanne Becker
Civil Deputy Prosecuting Attorney
Kittitas County
205 W. 5th Ave, Rm. 213
Ellensburg, WA 98926
(509) 962-7520 (Main)
(509) 962-7060 (Fax)

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From: Granberg, Richard L. (ECY) [mailto:DGRA461@ECY.WA.GOV]
Sent: Tuesday, February 08, 2011 9:26 AM
To: Suzanne Becker
Cc: James Rivard; Bleeker, Gary (ECY); Neet, Wendy (ECY)
Subject: RE: ChemSafe Operations Plan - Questions regarding type of permit

Suzanne, please see inserted text below in an attempt to answer/clarify your questions.

Richard Granberg
Hazardous Waste and Toxics Reduction Program
(509) 457-7147
FAX (509) 575-2809
dgra461@ecy.wa.gov

From: Suzanne Becker [mailto:suzanne.becker@co.kittitas.wa.us]
Sent: Monday, February 07, 2011 1:58 PM
To: Granberg, Richard L. (ECY)
Cc: Rivard, James (DOHi); Bleeker, Gary (ECY); Neet, Wendy (ECY)
Subject: RE: ChemSafe Operations Plan - Questions regarding type of permit

Hi Richard,

Thank you for your help with this! So, if I understand you properly, you would consider this to be both a moderate risk waste facility needing a permit from KCPHD, and a transfer facility that would need to register with DOE if the facility is going to keep operating in the same manner that it has in the past.

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Yes, continued MRW activities require CSI to have a permit issued by the KCPHD, and they must also have a current/valid notification to Ecology that they are also operating as a 10-day transfer facility. In addition, CSI must be in compliance with the MRW permit and with the transfer facility requirements as stated in WAC 173-303-240(6).

If that is the case, then I would appreciate it if you could comment on my understanding of what operations can occur in a moderate risk waste facility. A moderate risk waste facility is limited to 1) accepting MRW from SQG and household users (i.e. the SQG and household users transport their waste to the facility), and any waste that can be transported on a bill of lading only (no hazardous waste manifest).

- What types of waste can be transported on a bill of lading?
- If Chemsafe picks up dangerous waste from a SQG, then the waste must be manifested at the time of pick-up, and can only be kept at the transfer facility for 10 days, correct?

Depending upon the language in the permit, a MRW facility is indeed only permitted to accept waste from households and small quantity generators. I am not aware of any requirement for MRW generators to transport their own waste to a MRW facility, but I suppose a permit could restrict self transport of MRW waste. Although there is no requirement for MRW waste to be transported on a uniform hazardous waste manifest, a manifest could be used for tracking purposes as often been done by CSI. I am also not aware of any bill of lading requirements while conditional MRW waste is in transport.

It is my understanding that any waste that is not subject to hazardous waste manifesting can be transported via a bill of lading. Department of transportation requirements might be different than my assumption, but I am not familiar with those requirements.

And finally, if CSI picks up DW from a SQG, that waste is not required to be manifested at the time of pick-up. That waste would not be subject to the 10-day transfer facility requirements as long as it retained its conditional exemption, but would be subject to any permit requirements as required by the KCPHD. You can see here why a solid waste transfer permit becomes so important for helping to regulate safe management of MRW. If however during transport or storage prior to disposal, that waste was managed in a way that would cause it to lose its exemption such as being mixed with regulated waste or spilled and subsequently cleaned up, then it would be subject to all of the requirements of a regulated DW.

Hope this clarifies things a bit. I spoke with Wendy and Gary this morning and we thought it may be helpful if we all, including James, schedule a meeting to

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discuss these permitting, transportation, storage and disposal issues that CSI needs to be compliant with. Let us know your thoughts on that idea. Thanks

Thanks again,

Suzanne

Suzanne Becker
Civil Deputy Prosecuting Attorney
Kittitas County
205 W. 5th Ave, Rm. 213
Ellensburg, WA 98926
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From: Granberg, Richard L. (ECY) [mailto:DGRA461@ECY.WA.GOV]
Sent: Monday, February 07, 2011 10:36 AM
To: Suzanne Becker
Cc: James Rivard; Bleeker, Gary (ECY); Neet, Wendy (ECY)
Subject: RE: ChemSafe Operations Plan - Questions regarding type of permit

Hello Suzanne,

I received your mail last Friday while working at home and wanted to wait until I had my regulations in hand so I could make the proper WAC reference to your question. You are correct in your assumption that Chem-Safe (CSI) is/has been transporting manifested dangerous waste (DW) into their facility and storing that waste before transporting it out for disposal. They have previously notified as a 10-day transfer facility as required by WAC-173-303-240(6) with reference to WAC 173-303-060. They have also previously notified as a transporter of DW as required by -060 as well. The second part of your question concerning whether or not their facility should be a transfer facility subject to the 10 day storage requirement can be answered as yes.

Here is the situation as I see it concerning who regulates what activities at CSI and what type of permit is required. Since inception of the Chem-Safe business at a previous location in Kittitas County and a move to the current

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location, activities have always been intermingled between collection, storage, re-packaging and shipping of moderate risk waste (MRW) as well as to transporting and receiving manifested DW and storage of that waste prior to shipping off-site for disposal. The MRW activities are regulated by WAC 173-350 and the DW activities are regulated by WAC 173-303. These distinctly different activities are sometimes hard to verify during inspection unless proper records are kept. CSI has been negligent in keeping these proper records in the past.

One condition for small quantity generators (CSI clients) to maintain their waste as conditionally exempt from all of the requirements of WAC 173-303, they must send their waste to a facility "permitted to manage MRW under chapter 173-350 which is operated in accordance with state and local regulations, and consistent with the applicable local hazardous waste plan that has been approved by the department" which is stated in WAC 173-303-070(8). This means that CSI is putting all of their MRW customers out of compliance with the conditional exemption as stated by not having a solid waste transfer facility permit. Ecology has been working with CSI since the early 1990's to get them to comply with the solid waste transfer facility permit requirement. CSI has been resistant to obtain that permit which has led the Kittitas County Health Department, with concurrence and assistance from Ecology, to the present situation of denying CSI to operate until the solid waste transfer facility permit is in place.

Once CSI is compliant with that permit, Ecology will be able to better monitor compliance with WAC 173-303 for transporters and IO transfer facility requirements. Please feel free to contact me if you have further questions about what permit and notifications CSI is required to have. Thanks

Dick, Hazardous Waste Specialist/Inspector

Richard Granberg
Hazardous Waste and Toxics Reduction Program
(509) 457-7147
FAX (509) 575-2809
dgra461@ecy.wa.gov

From: Suzanne Becker [mailto:suzanne.becker@co.kittitas.wa.us]
Sent: Friday, February 04, 2011 10:07 AM
To: Bleeker, Gary (ECY); Neet, Wendy (ECY); Rivard, James (DOHI); Granberg, Richard L. (ECY)
Subject: ChemSafe Operations Plan - Questions regarding type of permit

Hello,

000133

Thank you so much for working with us regarding ChemSafe. As I have become more familiar with Washington's regulations regarding transport and disposal of hazardous waste, I have some questions regarding permitting this facility as a moderate risk waste facility vs. a transfer facility.

WAC 173-350-360 states:

(1) *Moderate risk waste handling - Applicability.*

(a) This section is applicable to:

(i) Any facility that accepts segregated solid waste categorized as moderate risk waste (MRW), as defined in WAC 173-350-100;

(ii) Persons transporting MRW using only a bill of lading (MRW that is not shipped using a uniform hazardous waste manifest) who store MRW for more than ten days at a single location; and

(iii) Mobile systems and collection events.

(b) This section is not applicable to:

(i) Persons transporting MRW managed in accordance with the requirements for shipments of manifested dangerous waste under WAC 173-303-240;

Isn't ChemSafe transporting manifested dangerous waste into the facility? Shouldn't this be a transfer facility per 173-303-240, subject to the 10 day storage requirements?

Thank you again for all your help in this situation. I would appreciate any thoughts that you have regarding the type of permit that this facility should be obtaining.

Suzanne

Suzanne Becker
Civil Deputy Prosecuting Attorney
Kittitas County
205 W. 5th Ave, Rm. 213
Ellensburg, WA 98926
(509) 962-7520 (Main)
(509) 962-7060 (Fax)

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message id: 30eb45918b2dcbdac24bb8719d064a14

000134

CP1 253

James Rivard

From: Bleeker, Gary (ECY) <gble461@ECY.WA.GOV>
Sent: Monday, January 24, 2011 1:56 PM
To: James Rivard
Cc: Granberg, Richard L. (ECY); Neet, Wendy (ECY)
Subject: RCWs

RCW 70.95.180 requires a permit to operate a solid waste handling facility.
It allows up to 90 days for the issuance of a permit once an application is submitted.
It states that the JHD may charge a reasonable fee for such a permit.

RCW 70.95.200 allows for the suspension of the permit above, if the owner/operator does not comply with the conditions of said permit.

In theory, you could issue the permit one day, and if you find something grossly out of compliance, suspend the permit the next day.

Penalties are up to you. RCW 70.95.305 and 315 deal with penalties for not complying with an exemption.

Just sharing, in case someone were to question whether they were required to obtain a permit, by law.

Gary

Kittitas County Board of Health
Ordinance Number 1999-01

- c. All waste tire carriers, and businesses transporting more than five (5) waste tires generated by their

**KITTITAS COUNTY BOARD OF HEALTH
ORDINANCE NUMBER 1999-01**

SOLID WASTE REGULATIONS

July 15, 1999

.....
.....

SECTION VI. SOLID WASTE HANDLING FACILITY STANDARDS

A. General Facility Requirements

1. Applicability.

- a. All facilities which are subject to the standards of Chapters 173-303, 173-304 or 173-351 WAC or the amendments thereto, and all solid waste handling, storage, collection, transportation, treatment,

- c. All waste tire carriers, and businesses transporting more than five (5) waste tires generated by their utilization, processing, recycling, recovery, and final disposal facilities subject to these regulations are required to obtain permits. Single-family residences and single-family farms who generate waste on site are exempt from these permit requirements provided that the applicable standards of Section IV are fully complied with.
- b. Permits are not required for corrective actions at solid waste handling facilities performed by the state and/or in conjunction with the United States Environmental Protection Agency to implement the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), or corrective actions taken by others to comply with a state and/or federal cleanup order provided that:

.....
(3) The facility standards of Chapters 173-304 and 173-351 WAC and Sections IV.B. and VI.A.3. are met; and

c. Effective Dates.

- (1) Existing facilities will operate under the terms and conditions of their existing permits valid on the effective date of this regulation. After the expiration date of existing permits, these existing facilities shall meet the requirements of this section.

effective date of this regulation.

2. Solid Waste Handling Permit.

No solid waste disposal site or facility, solid waste handling facility, shall be operated, established, substantially altered, expanded or improved until the county, city or other person operating or owning such site has obtained a Solid Waste Handling Permit from the Health Department pursuant to the provisions of this section.

a. Procedures for Permits.

.....

(3) Once the Health Officer determines that an application for a permit is factually complete, he/she shall refer one (1) copy to the Central Regional Office of Ecology and one (1) copy to Solid Waste Programs for review and comment.

.....
3. Facility Standards.

a. The following Ecology facility standards are hereby adopted by reference:

(1) WAC 173-304-467: Financial Assurance for Public Facilities, except for municipal solid waste landfills regulated under Chapter 173-351 WAC.

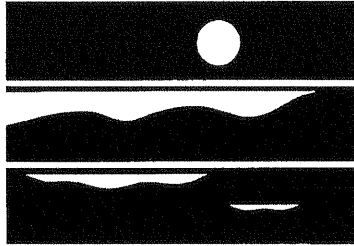
(2) WAC 173-304-400: Solid Waste Handling Facility Standards.

(3) WAC 173-304-405: General Facility Requirements.

b. Out-of-County Generated Solid Waste. No out-of-county waste shall be accepted unless the Health Officer has reviewed and presented all pertinent information to the Board of Health for their review for either acceptance or denial. The Board of Health shall then forward their recommendation to the County Commissioners. The County Commissioners shall either accept or deny the Board of Health recommendation.

c. Disposal Site Inspection and Screening. If during inspections of solid waste handling facilities the Health Officer observes waste suspected of being regulated dangerous waste, the Health Officer shall have the authority to require the site operator to segregate and hold any such waste. If the Health Officer determines that testing is required to identify the waste, the generator shall be responsible for such analysis. If the generator is not known, the site owner or operator shall be responsible for such analysis. The disposal site owner, operator, and/or attendants shall have similar authority not to accept suspect wastes. All generators of dangerous wastes shall be subject to the conditions of the Dangerous Waste Regulations, Chapter 173-303 WAC. The site owner or operator will assume responsibility for disposal of the waste if the generator is unknown. The site owner or operator shall maintain records of loads refused as suspected dangerous wastes. These records shall include name and address of generator or transporter, license plate number of the transporting vehicle, description of waste and reason for refusal. The site operator shall refer this information to the Health Officer as soon as possible.

Washington DOE Moderate Risk Waste Fixed Facility Guidelines



WASHINGTON STATE
DEPARTMENT OF
E C O L O G Y

Moderate Risk Waste Fixed Facility Guidelines

Publication No. 92-13
March 1992
(Revised May 1993 and December 1995)



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IV. REGULATIONS, CODES, AND STANDARDS

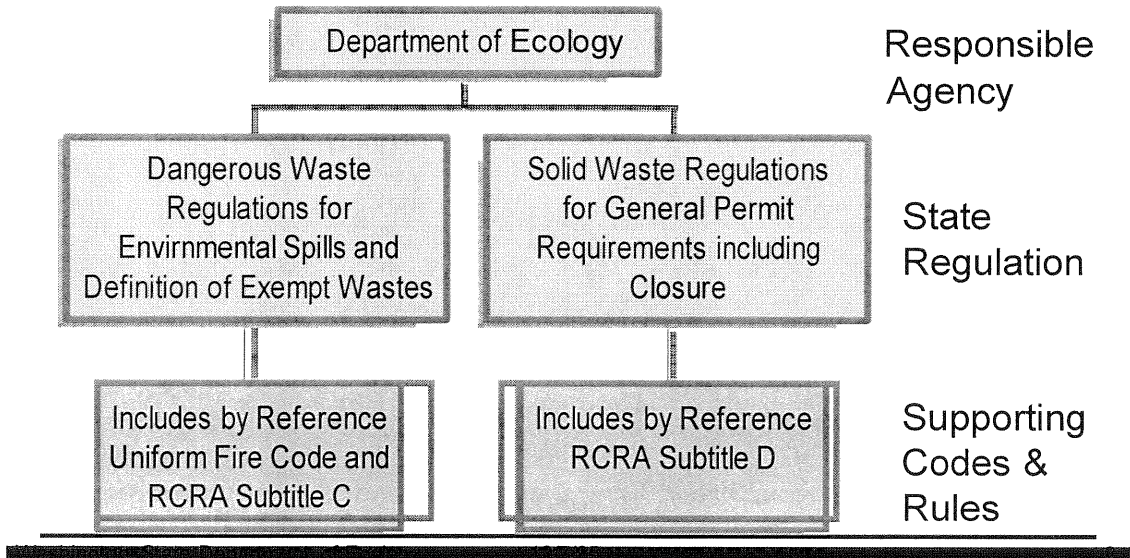
APPLICABILITY: This section applies to both MRW Fixed Facilities and Limited MRW Fixed Facilities. Also, see Subsection A. on page 19.

There are existing codes and regulations that will be applied, as appropriate, to the operation and design of MRW Fixed Facilities. The current codes and regulations must be interpreted as they apply to the specific local facility(ies). These local interpretations will shape both the operations and the final design.

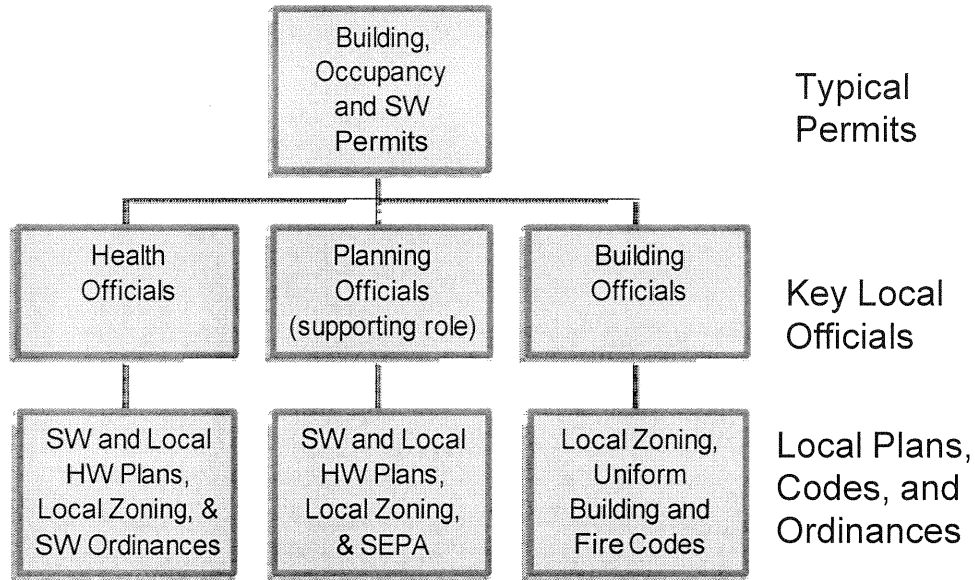
There are many sets of regulations, codes, and standards that could conceivably be brought to bear on the eventual design and implementation of an MRW Fixed Facility. The following text highlights those which appear to be most useful in developing the final operating and design parameters and are likely to be used for permitting and approval criteria. Although these various requirements may initially appear unconnected, they are typically developed with consideration for, and often with reference to associated codes and standards. As such, they typically act as a uniform and comprehensive body of requirements.

The interrelationship between the primary regulations, codes, and standards at the local and state level are shown on Figure 2. This figure shows state and local regulatory relationships separately; however, in practice, these regulatory domains also interrelate. For example, the MFS are used at both the state and local level and Ecology often provides technical assistance to local health authorities on solid waste permitting issues. Similarly, the various uniform, national standards and codes are relied upon by both state and local agencies/officials.

Primary Environ. Regulatory Relationships at the State Level



Local Regulatory Relationships



A. Applicability of Requirements to Different Facilities

In general, the more varied the types of wastes accepted, the larger the quantities, and the more sophisticated the handling techniques employed at an MRW Fixed Facility, the more sophisticated and detailed the operations plan and final design should be. The existing requirements, referenced below, differentiate between the various levels of hazards, potential threats to human health and the environment, and the type of activity involved. For example, a facility that accepts only known substances, lab packs all MRW in drums, and expects to receive and ship MRW to fill only ten drums per year will have a relatively low potential human and environmental threat. This would be in comparison to a facility that receives unknown substances of potentially high hazard and MRW in large volumes that is then bulked before shipment, or treated onsite. Applying the same set of regulations, codes, and standards to different individual facilities, will result in different requirements for final design and operation.

B. Regulatory Framework

MRW Fixed Facilities are regulated as a type of interim solid waste handling facility. This regulatory status applies so long as only HHW and conditionally exempt SQG wastes are accepted. A waste acceptance protocol needs to be established to assure maintenance of this regulatory status. If waste is accepted from a fully regulated hazardous waste generator, then the MRW facility will be regulated as a hazardous waste Treatment, Storage, and Disposal (TSD) facility until all waste is removed. Because MRW facilities do not usually hold permits to operate as a TSD, such an MRW Fixed Facility would immediately be in violation of the Dangerous Waste Regulations.

As a solid waste handling facility, an MRW Fixed Facility can be permitted by the local health authority. This process is much easier and quicker than the permit process for a hazardous waste facility under the Dangerous Waste Regulations. However, the nature of the materials received at an

MRW Fixed Facility are significantly more problematic to handle in a safe and environmentally sound way than other solid wastes. MRW Fixed Facilities perform some functions and activities typically found in fully regulated hazardous waste TSD facilities.

In order to account for the dichotomy between some of the TSD-like operating features of MRW Fixed Facilities and their solid waste regulatory status, the following regulatory approach has been chosen. For general environmental protection, the existing solid waste Minimum Functional Standards should be used, as described below. For additional operation and design requirements, existing health, safety, building, and other existing appropriate regulations, codes, and standards should be used.

The existing (non-Ecology) requirements are typically based on national and uniform codes and standards. These codes and standards differ from Ecology's regulations by relying on categories of equipment safety, empirical design data, human health and safety hazards, or materials classifications to trigger their application, rather than waste classifications. This regulatory approach allows for environmental and human health protection at MRW Fixed Facilities handling hazardous substances. A brief compilation of the Washington regulations that need to be reviewed and applied to MRW Fixed Facilities, as appropriate, are shown in Table 4.

TABLE 4

SELECTED WASHINGTON REGULATIONS AND REFERENCES		
Washington Regulation	Subject(s)	Technical Assistance and Interpretation
Chapter 173-304 WAC, <i>Minimum Functional Standards for Solid Waste Handling</i>	Applied to MRW Fixed Facilities (see below)	Local Health Authority Ecology Regional Office
Chapter 173-303 WAC, <i>Dangerous Waste Regulations</i>	Generator Status EPA/State ID# and reporting requirements	Ecology Regional Office
Chapter 296-24 WAC, <i>General Safety and Health Standards</i>	Part A-1 Education, Medical and First-Aid Requirements Part A-2 Personal Protective Equipment (PPE) Part E Hazardous Materials, Flammable and Combustible Liquids; storage, design, ventilation, container requirements, wiring Part G-2 Fire Protection Part G-3 Fire Suppression Equipment Part L Electrical	Department of Labor and Industries Division of Industrial Health and Safety, Voluntary Services
Chapter 296-62 WAC, <i>General Occupational Health Standards, Volumes I and II</i>	Parts A,B,C General, Records, Hazard Communication Part E Respiratory Protection (classification, selection, use, etc.) Parts H,I Air Contaminants (Permissible Exposure Limits, (PELs), etc.) Part K Hearing Conservation Part L Ventilation and Emergency Washing Part P Hazardous Waste Operations and Emergency Response Part Q Hazardous Chemicals in Laboratories	Department of Labor and Industries Division of Industrial Health and Safety, Voluntary Services

C. Minimum Functional Standards for Solid Waste Handling

MRW Fixed Facilities are considered interim handling solid waste facilities of a unique type. As such, the following guidance for the design, construction, permitting, and operation is provided and may be used in the future update the Minimum Functional Standards (MFS).

Unless exempted from the solid waste facility permitting process as a Limited MRW Fixed Facility, all MRW Fixed Facilities should be designed, constructed, and operated so as to:

1. Obtain a solid waste handling permit before construction through submission of an application addressing each issue listed below as part of the preliminary engineering report/plans and specifications for the facility, in accordance with WAC 173-304-600(3)(a), Permit requirements for solid waste facilities, except as noted below;
2. Comply with WAC 173-304-405, General facility requirements, except (2)(e), (2)(g), (4)(d), and (6);
3. Comply with WAC 173-304-407(1) through (5), General closure and post-closure requirements, assuming there will be no remaining waste or onsite contamination at the end of the closure activities;
4. Be surrounded by a fence or natural features that restrict access to the site;
5. Provide a lockable gate to control public access;
6. Be sturdy and constructed of easily cleanable materials and provide secondary containment for all MRW;
7. Be accessible by all-weather roads
8. Restrict public access while on site to unloading areas;
9. Be designed and serviced as often as necessary to ensure safe handling, appropriate MRW removal, and adequate collection and storage capacity at all times;
10. Be designed to exclude underfloor spaces and underground storage tanks, except for secondary containment spaces, pipes and/or sumps;
11. Have an adequate buffer zone around the operating area to minimize noise and dust nuisances, and have a buffer zone of fifty feet from the active area to the nearest property line in areas zoned residential;
12. Comply with local zoning, fire, and building codes including approved local variances and waivers;
13. Divert run-on water;
14. Provide pollution control measures to protect surface and ground waters, including run-off collection and discharge² from active areas² designed and operated to handle a twenty-four hour, twenty-five year storm, with impervious surfacing in all active MRW handling and storage areas;

²NOTE: If collected run-off water is contaminated, it must be treated before being discharged or disposed of as a regulated waste water or hazardous waste depending on analysis of the contaminated water.

² An “active area” is

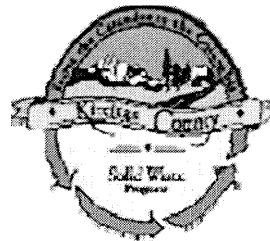
15. Provide pollution control measures to protect air quality including any applicable requirements of the Clean Air Washington Act of 1991;
16. Prohibit scavenging (this does not preclude materials exchanges);
17. Provide attendant(s) on-site during hours of operation;
18. Comply with Department of Labor and Industries Standards for health and safety, including Chapter 296-62 and 296-24 WAC (these requirements cannot be foregone by a solid waste handling permit exemption);
19. Have a sign readable from a distance of at least 25 feet that identifies the facility and shows at least the name of the site, hours during which the site is open for public use, and, if applicable, what constitutes materials not to be accepted, and other necessary information posted at the site entrance;
20. Have communication capabilities to immediately summon fire, police, or emergency service personnel in the event of an emergency; and
21. Remove all wastes at closure, as defined in WAC 173-304-100, from the facility to a permitted facility.

Kittitas County 2010 Solid Waste
and Moderate Risk Waste
Management Plan Update

Final Draft

**Kittitas County
2010 Solid Waste and Moderate Risk
Waste Management Plan Update**

Kittitas County
Solid Waste Department
925 Industrial Way Ellensburg,
Washington 98926 (509) 962-
7542



7.2 ANALYSIS OF CURRENT CONDITIONS

7.2.1 MODERATE RISK WASTE

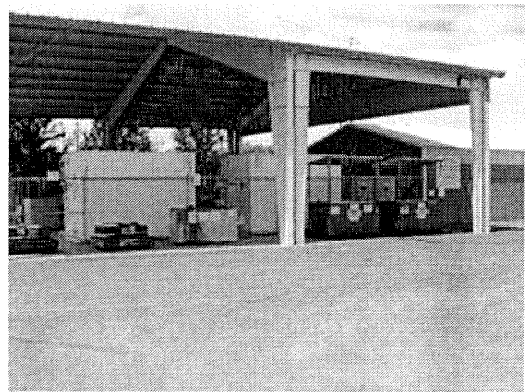
Moderate risk wastes are hazardous wastes produced by households, and by businesses and institutions in small quantities. Commercial and institutional generators of hazardous waste are conditionally exempt from full regulation under the HWMA, provided that they do not produce or accumulate hazardous waste above specified quantities defined by Ecology (quantity exclusion limits). These “small quantity generators” produce hazardous wastes in quantities that do not exceed the following State regulatory limits:

- 220 pounds (100 kg) of dangerous waste per month or per batch.
- 2.2 pounds (1 kg) of acute or extremely hazardous waste per month or per batch.

In addition, to maintain its status as a small quantity generator, a business or institution may not accumulate more than 2,200 pounds of dangerous waste or more than 2.2 pounds of acute or extremely hazardous waste at one time.

Drop boxes located at the Upper County Transfer Station in Cle Elum and at the Moderate Risk Waste Facility in Ellensburg are used to collect used motor oil, antifreeze, lead-acid vehicle batteries, and household batteries for recycling on an appointment basis only. Residents are instructed to collect all of the waste in a box, and to categorize the waste as much as possible (i.e., solvents, thinners, mineral spirits together in one box, paints in another box, garden products in another, etc.). Residents are further instructed not to mix products, and to keep the products in their original containers or to label products that are not in their original containers. When residents arrive at the facility, a waste specialist directs them into the HHW facility, and unloads the waste from the resident’s vehicle.

The Kittitas County Moderate Risk Waste Facility (MRWF) offers an opportunity for local businesses to dispose of their hazardous wastes for a fee to cover disposal cost. This opportunity is offered to pre-registered businesses that are classified under the Small Quantity Generator status. Hazardous wastes generated from Regulated Businesses (businesses that exceed the above definition) cannot be accepted. Business owners classified as Small Quantity Generators must contact Solid Waste to schedule an appointment for the waste specialist to inventory the waste, estimate the disposal cost, and complete the requisite paperwork. Following the inventory, the business brings the waste to the MRWF facility, where it is unloaded by a solid waste specialist.



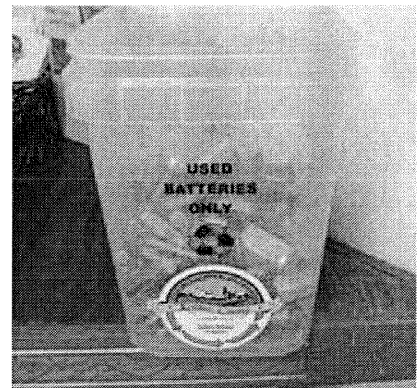
Usage information for the Moderate Risk Waste Facilities is provided in Table 26.

Table 26. Moderate Risk Waste Facilities Usage

	Material Collected				Household Hazardous Waste (pounds)
2004	368	126	4,890	735	36,792
2005	421	3	17,382	935	17,382
2006	512	45	12,249	1,109	55,480
2007	470	31	14,935	1,058	62,265
2008	515	21	11,950	555	74,285

In addition to the MRW facilities, there is an extensive in-County network of locations that accept batteries for proper handling:

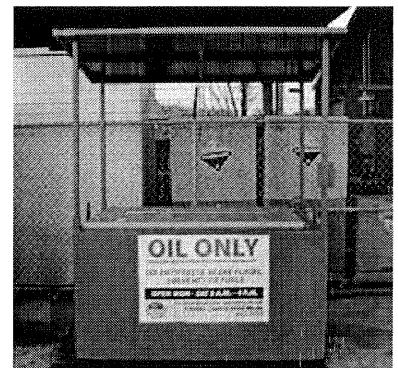
- Cle Elum
 - Carpenter Library, 302 Pennsylvania Ave.
 - Cavallini's Pharmacy, 106 E. First St.
 - Cle Elum Safeway Grocery, 804 W First St.
- Easton
 - C.B. General Store and Lodging
- Ellensburg
 - Bi-Mart, 608 E Mountain View Ave.
 - Downtown Pharmacy, 414 N Pearl St. Ave.
 - Ellensburg High School, 1300 E 3rd Ave.
 - Fred Meyer, 201 S Water St.
 - Jerrol's Book and Supply, 111 E. University Way
 - Kittitas County Solid Waste, 925 Industrial Way
 - Rite Aid Pharmacy, 700 S. Main
 - Valley View Elementary School, 1508 E. Third Ave.
 - Woods Ace Hardware, 310 N Pearl
- Kittitas
 - Country Hardware, 117 N Main St.
- Roslyn
 - Harper Lumber Company, 18 Pennsylvania



The Solid Waste Department is responsible for collecting the batteries from fifteen point-of-sale collection sites, storing, and labeling them for shipment to a treatment storage and disposal firm contracted by the County.

Waste oil can be recycled at three self-serve recycling tanks:

- **Solid Waste Department**
925 Industrial Way
Ellensburg, WA



Monday - Saturday, 8:00 am - 4:00 pm

- **Cle Elum Transfer Station**

50 - #5 Mine Road

Cle Elum, WA

Tuesday - Saturday, 8:00 am - 1:00 pm and 1:30 pm - 4:00 pm

- **Cle Elum Hardware & Rental**

811 W. Davis Street (S.W. of Safeway Grocery)

Cle Elum, WA

Monday - Saturday, 7:00 am - 6:00 pm; Sunday, 8:00 am - 5:00 pm

7.2.2 HAZARDOUS WASTE

Businesses or institutions producing or accumulating hazardous waste above the quantity exclusion limits are required to meet a stringent set of regulations when storing, handling, and disposing of their hazardous wastes. In addition, these fully regulated hazardous waste generators must comply with extensive waste tracking and reporting requirements. Small-quantity generators must meet certain requirements for identifying and managing their hazardous wastes, but are exempt from portions of the waste tracking and reporting requirements.

Within the County's jurisdictions, certain zones are eligible for the management of hazardous waste. Eligible zones and uses are as follows:

- Cle Elum
 - Conditional Use in Industrial District (listed as chemical storage and treatment, not hazardous)
- Ellensburg
 - Conditional Use in Tourist Commercial Zone (onsite storage and treatment)
 - Conditional Use in Commercial Highway Zone (onsite storage and treatment)
 - Conditional Use in Central Commercial (CBD) Zone (onsite storage and treatment)
 - Conditional Use in Central Commercial 2 Zone (onsite storage and treatment)
 - Conditional Use in Light Industrial Zone (onsite and offsite storage and treatment)
 - Conditional Use in Heavy Industrial Zone (onsite and offsite storage and treatment)
- Kittitas
 - Accessory Use in Industrial Zone (onsite storage, treatment, sales, and distribution)
- Roslyn
 - None
- South Cle Elum
 - None
- Unincorporated County
 - Conditional Use in Light Industrial Zone
 - Conditional Use in General Industrial Zone

7.2.3 DANGEROUS WASTE GENERATORS

Businesses in the County that have an EPA/State identification number issued under Chapter 173-303-WAC, are included in Table 27.

Table 27. Regulated Waste Generators, 2009

Generator ID	Company Name	Location
WAH000032789	Arco AM PM Thorp	Thorp
WAD980835631	Central Washington University	Ellensburg
WAH000017335	Chem Safe Environmental Inc	Kittitas
WAH000008169	Chem Safe Environmental Inc Transporter	Kittitas
WA0000712489	Chevron #95012	Ellensburg
WAD988489738	CHEVRON #95179	Ellensburg
WAH000000778	Circle K Stores #2701136	Ellensburg
WAD988510285	D & M Motors & Towing	Ellensburg
WAH000035491	Kittitas County Hospital District 2	Cle Elum
WAH000036214	Kittitas Valley Community Hospital	Ellensburg
WAR000006486	PSE Kittitas Service Center	Thorp
WAH000014415	Rental Service Corporation #559	Ellensburg
WA0001013267	Rite Aid #5299	Ellensburg
WA0000712968	Sportland Yamaha	Cle Elum
WAD988503561	Texaco Station #120695	Ellensburg
WAD019201771	University Auto Center	Ellensburg
WA0000380246	UPS Ellensburg	Ellensburg
WA0000189589	US DOE BPA Schultz Maintenance HQ	Ellensburg
WAH000008342	WA AGR Kittitas 2	Ellensburg
WAH000017954	WA AGR Kittitas 3	Ellensburg
WAR000002352	WA Parks Lake Easton State Park	Easton
WAD004865382	Ward Rugh Inc	Ellensburg
WAD980738256	Waste Management of Ellensburg	Ellensburg

7.3 LEGAL AUTHORITY FOR PROGRAM

7.3.1 STATE AUTHORITY

Ecology derives its regulatory authority from the Hazardous Waste Management Act (HWMA) Chapter 70-105.020 through 145 RCW, the Dangerous Waste Regulations (Chapter 173-303, Washington Administrative code [WAC]) and the Solid Waste handling Standards (Chapter 173-350 WAC). The Beyond Waste Plan, published in 2004, establishes five initiatives as starting points for reducing wastes and toxic substances in Washington. Initiative #2 is Reducing Small-Volume hazardous materials and wastes. The goal of this initiative

“...is to accelerate progress toward eliminating the risks associated with products containing hazardous substances.”

Specifically, the initiative encompasses products and substances commonly used in households and in relative small quantities by businesses.

In 2009, Ecology updated the MRW Planning Guidelines, and in 2010, Ecology updated the Guidelines for the Preparation of Solid Waste Management Plans. Included in the new guidelines are new requirements for a combined Solid Waste and MRW Plan. This section has been prepared to meet the requirements for a combined Solid Waste and MRW Plan.

7.3.2 LOCAL AUTHORITY

Local governments are required by the HWMA to address moderate risk waste management in their jurisdictions. In 1991, Chapter 70.951.020 RCW was added requiring local governments to amend their local hazardous waste plans to include the Used Oil Recycling Act, for the management of used oil as part of MRW management. Local governments have specific authority to adopt ordinances and regulations under RCW 70.95.160 to manage MRW and implement the plan. In addition, jurisdictional health districts may choose to use Chapters 70.05.060 and .070 RCW when appropriate.

The Kittitas County Public Health Department works with the public, cities, County, and state agencies to develop and implement plans for the safe storage, collection, transportation, and final disposal of solid waste. The Public Health Department works to assure compliance with Chapters 70.95 and 70.105 RCW, and WAC Chapters 173-303, 173-304, 173-340, and the Kittitas County Board of Health Ordinance Number 1999-01, Solid Waste Regulations. The Public Health Department also permits solid waste handling facilities, including the landfill, transfer station, moderate risk waste facility and materials recovery facilities. The department also issues orders of abatement to facilities or individuals dumping waste illegally, and licenses private contractors to pump and haul septic tank wastes.

Waste Acceptance Control Program

The Kittitas County Health Ordinance includes a waste screening requirement. In accordance with the ordinance, all solid waste must be designated as required by WAC 173-303-070 to prevent the disposal of dangerous waste at a facility not permitted to accept dangerous waste. All solid waste which is designated as dangerous waste must be managed in a manner consistent with these regulations and Chapter 173-303 WAC.

The screening process may involve analytical testing, a disclosure of the waste constituents and waste generation process, and other additional information necessary to determine if the waste is dangerous. The Health Officer may establish a schedule for compliance as part of the screening process. Based on the results of the required screening, the Health Officer may require the generator or transporter to direct the waste to a facility permitted to handle such waste.

Mandatory Disposal

The County Health Ordinance stipulates the following:

The owner, operator or occupant of any premise, business establishment or industry shall be responsible for the satisfactory and legal handling and/or disposal of all solid waste generated by them or accumulated on the property. Single-family residences and single-family farms are prohibited from dumping or depositing solid waste onto or under the surface of land owned or leased by them.

In addition as listed below to the quantity exclusion limits (QELs) contained in WAC 173-303-070(8), MRW, used oil, and hazardous substances shall not be accumulated in quantities that, in the opinion of the Health Officer, present a demonstrable threat to public health or the environment. Small Quantity Generators (SQG) shall not accumulate wastes in excess of the Quantity Exclusion Limit for the wastes generated by their business per WAC 173-303-070, 100, and 170(1). Large Quantity (Regulated) Generators shall not accumulate wastes on site in excess of their monthly accumulation limit for waste in accordance with WAC 173-303-200(1)(c), (1)(d). Used oil shall not be accumulated in quantities in excess of 300 gallons at any one site, home or business. The Health Officer at his discretion may restrict the amount of used oil accumulated if potential public health and safety are at risk.

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8.3.2 OPTIONS

The following options were presented to the SWAC for evaluation.

ADM.ORD.6. Permit Review

Solid Waste Advisory Committee should continue to be included in the review of all new solid waste facility permit requests within the County, although final approval shall continue to reside with the jurisdictional Health Department. Such requests, after review by the SWAC, will be forwarded to the Health Department with SWAC's comments. This review will assure adherence to the Solid Waste Management Plan, Chapter 70.95 (165) and (180) RCW.