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No. 63526-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

v.

SNOHOMISH HEALTH DISTRICT, a Washington Municipal
Corporation, Appellant.

BRIEF OF APPELLANT SNOHOMISH HEALTH DISTRICT

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I. INTRODUCTION

The Snohomish Health District (hereinafter, “SHD”) appeals from a decision of the Snohomish County Superior Court, issued pursuant to a Writ of Review, reversing a Health District Hearing Examiner’s Decision and Order. That Decision denied the appeal of Pacific Topsoils, Inc. (hereinafter, “PTI) seeking to strike from an otherwise regularly issued and valid SHD Solid Waste Facility Permit, a statement that its composting processes do not meet statutory and regulatory standards and must be remedied by process or legislative changes before the permit expiration date of June 30, 2009, the conclusion of a three (3) year compliance period.

The standard of review is specified in RCW 7.16.120. Issues of law are reviewed to determine whether the decision below was contrary to law. RCW 7.16.120(3). This is a *de novo* standard. Issues of fact are reviewed to determine whether they are supported by competent and substantial evidence. RCW 7.16.120(4)-(5). This review is deferential and requires the court to view the evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. Sunderland Family Treatment Servs. v. City of Pasco, 127 Wash.2d 782, 903 P.2d 986, citing Freeburg v. City of Seattle, 71 Wash. App. 367, 371, 859 P.2d 610 (1993),

and State ex rel. Lige & Wm. B. Dickson Co. v. Cy. of Peirce, 65 Wash. App. 614, 618, 829 P.2d 217, *review denied*, 120 Wash.2d 1008, 841 P.2d 47 (1992).

II. ASSIGNMENT OF ERROR

Assignment of Error

The Superior Court erred in entering the February 26, 2009 Order on Writ of Review and Compliance with Solid Waste Operating Permit, which reversed the May 23, 2007 Decision and Order of the Snohomish Health District Environmental Health Hearing Examiner.

Issues Pertaining to the Assignment of Error

1. Did the Hearing Examiner properly conclude that PTI's large static pile process might fail to comply with standards which require a composting facility to "promote" aerobic decomposition under "controlled conditions," justifying SHD's conditional issuance of PTI's operating permit?
2. Did the Hearing Examiner properly decline to accept PTI's admittedly preliminary and speculative scientific evidence as determinative of its obligation to carry the burden of proof?
3. Did substantial evidence support the Hearing Examiner's findings of fact so that, pursuant to RCW 7.16.120, the Superior Court was

prohibited from redetermining or reinterpreting those facts, and compelled to accept and rely upon them in reviewing issues of law?

III. STATEMENT OF THE CASE

PTI operates a solid waste composting facility at its “Maltby site” in Snohomish County, which is required to obtain an annual permit from SHD. SHDSC 3.1 XVI(F). CP 1536. The Maltby facility collects huge piles of organic debris, primarily yard waste and wood waste, which measure up to 150 feet in width, by 375 feet length, and 40 feet in height. CP 2513. These piles remain static and primarily untouched for periods of six (6) to nine (9) months before being harvested as “compost”. CP 2511. See also photos. CP 1264, CP 1318-1319.

Solid waste handling facilities, which include composting operations, are required to obtain operating permits from the local jurisdictional health department. RCW 70.95.170 *et seq* and WAC 173-350-700.

As the local health district, SHD is delegated the responsibility to enforce the laws established by the legislature of the State of Washington and the regulations promulgated by the Department of Ecology. RCW 70.95.160 and WAC 173-350-700. SHD has codified its own local regulations under Snohomish Health District Sanitary Code (hereinafter, “SHDSC”) Chapter 3.1 (CP 1523-1551), which governs solid waste

handling, and in SHDSC Chapter 3.2 (CP 1552-1671) which incorporates Chapter 173-350 WAC. The obligation to comply with the rules and regulations is with the facility operator. SHDSC Chapter 3.1 I(B). CP 1525.

In 1998, the Washington Legislature amended the state's solid waste handling laws (Chapter 70.95 RCW). The amended legislation mandated that the Department of Ecology (hereinafter "DOE") "adopt rules establishing minimum functional standards for solid waste handling" and provide technical assistance to local health agencies. RCW 70.95.060(1), 70.95.260, and 70.95.263(2). The Legislature amended the definition of "composted material"¹ to mean:

organic solid waste that has been subjected to controlled aerobic degradation at a solid waste facility in compliance with the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material. RCW 70.95.030(4).

DOE thereafter conducted a three year ruling-making process which culminated in the adoption of Chapter 173-350 WAC, Solid Waste Handling Standards. CP 2419. PTI was a participant in this process, and in fact submitted a letter to DOE acknowledging the impact the proposed

¹ Previously, Chapter 173-304 of the Washington Administrative Code ("WAC") contained no express provisions addressing composting operations; it defined "composting" as, "the controlled degradation of organic solid waste yielding a product for use as a soil conditioner." Former Chapter 173-304 WAC and 173-304-100(14) WAC. CP 1677.

regulations would have on its composting operation in that it
“...anticipates a great deal of additional expense to continue composting
according to proposed standards in WAC 173-350...” The letter did not
otherwise protest regulatory changes, and went on to address PTI’s
concerns on a different subject. CP 0510-0512.

While the effective date for Chapter 173-350 WAC was February
10, 2003, solid waste facilities already holding permits had until February
10, 2006 to comply with the new regulations. WAC 173-350-030 2(a)(ii).
Those regulations defined both “composted material” and “composting” to
require a process where biological degradation and transformation of
organic solid waste occurs under controlled conditions designed to
promote aerobic decomposition; and both definitions expressly
incorporate the RCW 70.95.030(4) pronouncement that natural decay
under uncontrolled conditions is not composting. WAC 173-350-100.

PTI received its initial permit in 2002, prior to the new regulations.
PTI’s 2002 Plan of Operation proposed the use of “static pile” where solid
waste is deposited and left for six (6) to nine (9) months on concrete pads
of two acres or more in size. CP 1399-1416. The Plan stated that,
“although anaerobic odors probably exist within the core of the compost
pile they are being trapped and decomposed before they can escape.” CP
1401. PTI filed subsequent operating renewal applications and was issued

annual permits for conducting composting at the Maltby site. Despite receiving annual operating permits starting in 2002, PTI did not actually begin composting at the Maltby site until 2004. CP 1346.

The regulatory compliance deadline meant that the new regulations applied to PTI's 2006-2007 permit renewal application. PTI's annual permit expired on June 30 each year. By correspondence dated January 4, 2006, DOE advised SHD that the use of "large static piles as a composting process does not promote aerobic decomposition, and this does not meet the definition of composting." It also stated that, "facilities should be operated and maintained with technologies that allow for adjustments to the conditions that support microbial growth. This means the operator must have the ability to adjust the process parameters that lead to aerobic conditions in the piles. Large static piles do not allow for adjustments in the composting process." CP 1265-1267.

On February 7, 2006, PTI submitted a Revised Plan of Operation for the Maltby site, proposing to use the same basic static pile process again acknowledging anaerobic odors as it had in prior plans back to 2002. CP 1240-1262; CP 1399-1416; CP 1355-1382; CP 1280-1302; CP 2464. On March 10, 2006, SHD forwarded DOE's January 4, 2006 correspondence to PTI, advising it that, based upon the advice of DOE, SHD did not consider their large static pile process viable under the new

regulations. CP 1235. PTI was on notice that if it disagreed with DOE's position it was "incumbent" upon it to prove otherwise by a means "founded in science" and "able to stand up to peer review." CP 1267. SHD advised PTI that the parties would need to negotiate a schedule to bring the Maltby site into compliance with the new statutory and regulatory provisions. CP 1235.

Despite these developments, PTI applied to SHD for a 2006-2007 operating permit without proposing any changes in its operation. CP 1229-1234; CP 2463-2464. Further, PTI did not produce or direct SHD to any record or documents demonstrating from PTI's perspective that its large static process is aerobic. CP 2609. Applicants are not guaranteed an operating permit. Even where the applicant has an active permit for the proceeding year, issuance is subject to proper application and compliance. PTI's 2006-2007 application went through SHD's formal evaluation which, pursuant to regulations, includes a 45 day review. WAC 173-350-710. DOE has complete authority to review and/or appeal any permit issued by the local jurisdiction. RCW 70.95.185 and 70.95.190.

On July 17, 2006, representatives of DOE, SHD, and PTI met to discuss composting operations at the Maltby site. At the meeting, PTI presented a specific written agenda which included a proposed study of its composting methods, and its intent to pursue legislative change which

would incorporate its process. CP 1226. At the meeting, PTI representatives acknowledged that the large static pile was not an aerobic process, and that it contained a definite anaerobic core. CP 2330.

In spite of PTI's own representatives' acknowledgment of a non-aerobic process, SHD pursued DOE, as its technical advisor, to further consider the viability of large static pile process. By email correspondence dated August 14, 2006, DOE advised SHD that it had reassessed the issue with its key personnel, and was reaffirming its position that the large static pile process at Maltby was not compliant with regulations mandating controlled aerobic processing. DOE suggested a three year compliance schedule be developed which would allow PTI "time to either come into compliance with the regulations or seek legislative remedy." CP 1215. This lenient position was consistent with PTI's July 17, 2006 representation that it would seek legislative change.

On August 24, 2006, taking into account PTI's own admissions as to the anaerobic character of its process as reflected in the July 17, 2006 meeting agenda and discussions, SHD sent PTI its issued 2006-2007 Operating permit. CP 1206-1213. The permit allowed PTI to utilize its large static pile process throughout the permit period without restriction, while also providing a "Compliance Schedule for Operating" in Section

VI². CP 1212-1213. Section VI set forth the statutory definition of “composted material” and advised that composting processes at the Maltby site were viewed as noncompliant with the related regulations in WAC 173-350, requiring either change to the process or the regulations by June 30, 2009, the 2009-2010 permit expiration date. CP 1212-1213. The permit as written was consistent with the analysis by DOE, the requests and admissions of PTI, and SHD’s observation of PTI’s overall inability to exert actual control and/or influence over its huge piles over the six to nine month process. CP 2526-2527.

On September 14, 2006, pursuant to SHD administrative appeal procedures, PTI filed notice for an informal Step One Appeal with the Director of Environmental Health. CP 1200-1205. The submission offered no changes to PTI’s Plan of Operation or process, no new factual information, and no testing materials or expert analysis, but consisted of generalized legal arguments which provided no specific information relative to the site or process. PTI did not exercise the opportunity for a pre-appeal conference with involved SHD personnel as afforded in SHDSC Chapter 1.9.1.4 (CP 1516), and waived its right to meet with the reviewer (CP 1200), as provided for in SHDSC 1.9.1.6(C). CP 1517. The

² As noted in the Hearing Examiner’s Decision, the permit contained two Section VI’s. All references hereinafter to Section VI should be understood to address the first of these two sections.

Director reviewed the file and written appeal materials, consulted staff, and considered the applicable regulations. On October 11, 2006 the Director affirmed SHD's issuance of PTI's Solid Waste Handling Permit, inclusive of the conditional statement in Section VI, the single component of the permit challenged by PTI. CP 1191.

Following SHD's administrative appeal procedures, PTI filed a request for a Step Two Appeal, which afforded it a formal public hearing before SHD's Hearing Examiner. The appeal challenged the Director's Step One Appeal decision. CP 1185. No additional facts, test results, or expert analysis were submitted in the request to appeal statement, which contained the same generalized legal arguments submitted with the Step One Appeal request. CP 1185-1190. Hearing was set for January 10, 2007. CP 1184. On January 9, 2007, PTI filed a Request for Stay of Appeal and Assignment of Hearing Date Which Will Allow for Testing. The Motion declared that such stay would, "allow a decision in this case to be based on actual data rather than speculative premises." CP 1470. In support of the Motion, PTI submitted the declaration of its consultant, Dr. Charles Henry, who stated that PTI's method had not been the subject of studies, a circumstance which meant:

... there is insufficient data available to make a well-reasoned decision about the issue of whether Pacific Topsoils' method of composting complies with the

Department of Ecology standards; making a fair, well-reasoned decision in this case requires that Pacific Topsoils conduct studies [sic] its method of composting. In the absence of such studies, any decision rendered about Pacific Topsoils' method of composting would necessarily be based on speculative theories rather than actual data. CP 1474-1475.

SHD objected to PTI's requested delay of six (6) months to one (1) year, which would likely have placed the hearing date and decision beyond the expiration date of the very permit in question. The Hearing Examiner noted that, at least dating back to March 2006, PTI had been aware of the positions of SHD and the DOE regarding its process, and could have initiated a testing program. On February 2, 2007, by an Interlocutory Order, the Hearing Examiner denied PTI's Motion for Stay of Appeal. CP 1487-1490.

PTI thereafter filed a Motion to Revise Hearing Examiner's Order and Request to Authorize Discovery. The discovery request sought to allow PTI to conduct depositions under Rule 30(b)(6) of the Superior Court Civil Rules. CP 1447-1449. SHD filed an objection to the same. CP 1451-1454. The Hearing Examiner denied the request by Interlocutory Order of March 5, 2007. The Order notes that PTI had failed to avail itself of codified opportunities for a pre-appeal conference with SHD personnel who made the decision, and for a meeting with the reviewer in the Step One Appeal. It further observed that SHDSC provides only a limited

discovery process, not including depositions or interrogatories, and found that PTI failed to demonstrate a rational basis for an extraordinary discovery process. CP 1464-1465.

On May 4, 2007 and May 18, 2007, two days of hearings occurred before the Hearing Examiner. PTI presented no proposed changes to its operation. As the Hearing Examiner's Decision and Order would appropriately note "[t]he application makes no mention of the LSPC ("large static pile composting") compliance issue... [and] did not propose operational changes...." CP 0495.

In the hearing, PTI was assigned the burden of proof as to material factual issues, as the party appealing the permit decision. SHDSC 1.10.6(A). In its attempt to carry that burden, PTI provided testimony from consultants Dr. Sally Brown and Dr. Charles Henry, which the Hearing Examiner ultimately found "interesting" but entirely deficient to sustain PTI's burden of proof. CP 2102-2103; CP 2106.

Dr. Brown testified to a lack of familiarity with PTI:

Q And as a result of your familiarity with composting, are you aware of Pacific Topsoils?

A I've heard their name. I've never been to the site.

Q And have you been -- do you have any impressions of Pacific Topsoils?

A It's my understanding, and this is primarily through a graduate student that had been a landscaper, that they make a quality product.

CP 2487.

Through her testimony, Dr. Brown provided no specific testing information, studies or actual analysis of the PTI site. CP 2485-2496. Dr. Brown testified that, based upon her familiarity with PTI's operation (previously shown to be nearly nonexistent), it seemed to be in compliance with WAC 173-350-220(3)(d). CP 2492-2493. Following SHD's objection to the relevancy of Dr. Brown's testimony, the Hearing Examiner noted:

Given that this witness has started by saying she has never been to the site, I am understanding her testimony to be, if you will, more scientific – well, more generic. Scientifically precise, but generic in terms of composting and to a -- for while here I'll -- I'm willing to listen to it and see what I can learn. CP 2489.

Dr. Henry testified with the assistance of a Power Point slide presentation. CP 2623. Dr. Henry readily acknowledged that big pile composting is an unknown. – “so how does that work with big pile composting? Where does it fit in? We don't know. We have not studied them.” CP 2471. At the same time, Dr. Henry admitted “I believe firmly that it has an anaerobic core. How much that core is, I don't know. We haven't studied that yet.” CP 2358. Not only did he acknowledge an anaerobic core, but Dr. Henry also acknowledged the presence of

anaerobic odors, which he believed were being suppressed by the big pile's outer shell (CP 2360) as displayed in his slide presentation (CP 2038).

Dr. Henry testified as to the PTI operation, "We have done some just like preliminary studies starting about two weeks ago." CP 2621. He stated that a few samples were taken "and those were taken at depths of six inches, three feet and six feet. These were just grab samples that we did at various parts around the pile just to get an idea." Dr. Henry testified that "...we've done nine samples," and completely agreed that this amounted to a very minute testing area in relation to the entire pile. CP 2483. Henry's monitoring information was limited to those nine (9) grab samples. No PTI witness produced any historical monitoring data for such conditions as moisture, temperature, and porosity, all of which are required to be monitored throughout the active life of the composting process. WAC 173-350-220(4)(e)(ii)(G). One of the Dr. Henry's slides was entitled, "The Composting At Pacific Topsoils Fits My Definition" (CP 2481), which he further testified was, "controlled biological degradation of organic matters to produce a stable amendment in an environmentally friendly way," while admitting this was not the regulatory definition. CP 2482. Dr. Henry also admitted that he had not examined

either PTI's permit application or its associated Plan of Operation either for 2006-2007, or years past. CP 2481.

Dr. Henry's testimony was unrefuted unrelated. In fact, PTI elicited the testimony of Holly Wescott, DOE's Compost Specialist since 1994. CP 2430. Ms. Wescott holds a Bachelor's Degree in Plant and Soil Science, as well as a Master's Degree in Environmental and Resource Engineering. CP 2456. In the course of her testimony, she disagreed with Dr. Henry's assessment, including his speculation on porosity and airflow within the big pile. CP 2437. Ms. Wescott also discussed the significant dynamics or changes which passively would occur over a six (6) to nine (9) month period relative to the oxygen in pore spaces (CP 2442), and the lack of control over the pile oxygen, moisture and temperature. CP 2450-2454. PTI employee, Malin, confirmed the lack of any activity throughout the six (6) to nine (9) months during which the collected organic solid waste simply sits in a pile without monitoring or evaluation. CP 2509-2513. Malin acknowledged that what occurred was basically a natural decay process. CP 2511.

Additional testimony addressed the July 17, 2006 meeting, involving personnel from PTI, DOE and SHD. Marietta Sharp, of the Department of Ecology, testified at that meeting "...Mr. Henry stated quite clearly that – excuse me, he recognized that it was not an aerobic

process.” CP 2330, CP 2333. Peter Christiansen, of the Department of Ecology, testified that PTI representatives at the hearing expressed that perhaps only the first ten (10) feet were aerobic in nature. CP 2411.

On May 23, 2007, by a written Decision and Order, the Hearing Examiner declined to remove the challenged language of Section VI from the 2006-2007 operating permit. CP 2091-2109. However, the Examiner did not directly find PTI in violation of, or noncompliant with, the statutory and regulatory scheme for “composting.” Rather, he found himself unable to determine, from evidence in the record, either of the following issues:

Does the static pile method employed by PTI promote aerobic decomposition? CP 2106, issue (3).

Does PTI’s Maltby composting operation meet applicable standards? CP 2107, issue (8).

Subsequently, PTI appealed the Examiner’s Decision to the SHD’s Board of Health. PTI’s counsel was provided notice of SHDSC Chapter 1.9.1.7(F) and the discretion of the Board. CP 2124. After due consideration, the Board exercised its option to decline to hear further appeal and affirmed the Hearing Examiner’s decision. CP 2171.

On July 27, 2007, PTI filed with the Snohomish County Superior Court its Petition for Writ of Review of the Hearing Examiner’s May 23,

2007 Decision. On September 20, 2007, the Court issued an Order Directing Issuance of the Writ of Review. CP 3192.

With the Writ of Review pending, SHD received an application for and issued an operating permit for PTI's Maltby site for a one year period automatically terminating June 30, 2008. CR 0477-0483. The permit allowed PTI to utilize its large static pile process throughout the permit period without restriction but contained the following as a footnote:

The 2006/2007 operating permit noted that the subject site composting process did not promote aerobic decomposition consistent with the applicable laws/regulations and identified an expectation of compliance by July 1, 2009, either by changes in the law/regulations, changes in the composting process and/or otherwise demonstration of compliance. Although not a condition of issuance with this operating permit, that continues to be an issue and expectation.

PTI objected to the footnote but did not comply with SHD administrative procedures when it requested Step One and Two Appeals in a single notice. CP 1166. The requested appeal(s) were denied by letter of September 12, 2007, on both procedural and substantive bases. CP 1174. PTI then filed a Petition for Writ of Review regarding the 2007-2008 permit under Snohomish County Superior Cause No. 07-2-05026-2. That case was consolidated with the present proceeding for the limited purpose of determining "the effect of the footnote contained in the 2007-2008 operating permit". CP 3190.

The consolidated writ proceedings were heard by the Snohomish County Superior Court, which issued a Ruling on Writ of Review in letter form on December 18, 2008. This Ruling related facts found and analysis made by the Superior Court, but did not provide final orders. CP 0368-0372. This led to further hearings. At a hearing on February 3, 2009, the Superior Court invited additional submissions on issues raised by an independent, civil damage lawsuit PTI had commenced against SHD under 42 U.S.C.A. § 1983. The Court specifically directed briefing on the issue of collateral estoppel, expressing its intention to craft an order in this writ proceeding to influence the outcome in that related but independent case. RP Hearing February 3, 2009, p. 37 lines 21-24, p. 39 lines 16-18 and p. 41 lines 19-24. Only thereafter did the Court enter its Order on Writ of Review, dated February 26, 2009, containing extensive findings and conclusions and five (5) substantive orders, including a directive to both SHD and nonparty DOE to “cease and desist” enforcement action against PTI. CP 0288-0297. SHD filed a Motion for Reconsideration (CP 0241-0271) which was denied by the Superior Court “without further analysis” by an Order of Denial on Motion for Reconsideration dated April 24, 2009. CP 0031-0044.

IV. ARGUMENT

1. Did the Hearing Examiner properly conclude that PTI's large static pile process might fail to comply with standards which require a composting facility to "promote" aerobic decomposition under "controlled conditions," justifying SHD's conditional issuance of PTI's operating permit?

The Hearing Examiner properly noted that the outcome of this appeal hinges substantially upon interpretation of four (4) provisions of Washington law addressing composting as performed at solid waste handling facilities. The first of these is the legislative definition of "composted material" in Chapter 70.95 RCW, Solid Waste Management, which reads:

"Composted material" means organic solid waste that has been subjected to controlled aerobic degradation at a solid waste facility in compliance with the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material. RCW 70.95.030(4)

Chapter 173-350 WAC (Solid Waste Handling Standards), the outcome of legislative directive to the Washington State Department of Ecology to "adopt rules establishing minimum functional standards for solid waste handling" (RCW 70.95.060(1)), adds definitions for the following terms:

"**Composted material**" means organic solid waste that has undergone biological degradation and transformation under

controlled conditions designed to promote aerobic decomposition at a solid waste facility in compliance with the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material.

“Composting” means the biological degradation and transformation of organic solid waste under controlled conditions designed to promote aerobic decomposition. Natural decay of organic solid waste under uncontrolled conditions is not composting. WAC 173-350-100.

In the statement of purpose at WAC 173-350-010, it is provided that all solid waste handling facilities should be “located, designed, constructed, operated and closed in accordance with this chapter.” 173-350-010(5).

Accordingly, subsection WAC 173-350-220(3)(d) addresses design standards for composting facilities as follows:

Composting facilities shall be designed with process parameters and management procedures that promote an aerobic composting process. This requirement is not intended to mandate forced aeration or any other specific composting technology. This requirement is meant to insure that compost facility designers take into account porosity, nutrient balance, pile oxygen, pile moisture, pile temperature, and retention time of composting when designing a facility. CP 2097.

It is to be noted that a separate section of WAC 173-350-220 prescribes operating standards for composting facilities, including specifically 173-350-220(4)(e)(ii), providing for ongoing process monitoring of such conditions as temperature, moisture, and porosity.

In his Decision and Order, the Hearing Examiner appropriately noted that, “when terms are defined in a statute, they must be used as defined when applying that statute.”³ See Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 828 P.2d 549 (1992) (“if a term is defined in a statute, that definition is used”). He then carefully applied the legislative definition of “composted material” in RCW 70.95.030, as qualified by the WAC definitions, to reach the legal conclusion that:

To meet the WAC standard, the composting process must “promote” aerobic decomposition, not merely just have aerobic process occurring naturally alongside anaerobic process. A process which only oxidizes anaerobic odors without seeking to minimize the anaerobic conditions does not “promote” aerobic decomposition. If a composting process does not “promote” aerobic decomposition, then its product, no matter how it smells or how highly sought after it may be, is not composted material under Chapter 173-350 WAC. Hearing Examiner’s Decision and Order; CP 2105.

The Examiner further concluded that the regulatory qualifier, “promote,” indicated, and a preponderance of evidence produced at the hearing confirmed, that “anaerobic conditions may be encountered in any composting process to some extent and at certain times in the decomposition process.” CP 2105.

³ In doing so, the Hearing Examiner implicitly rejected alternate definitions of “composting” advanced by PTI’s expert witness, Dr. Charles Henry, including the simplistic Power Point page declaring “The composting at Pacific Topsoils fits my definition. They produce stable product – free of unpleasant odor.” CP 2029.

It is critical to this appeal to understand that, while the Hearing Examiner found these standards applicable to PTI's Maltby operation, the compliance issue was not determined adversely to PTI. Rather, the Examiner concluded that it could not, based on evidence in the record, answer the issue framed ("Does the static pile composting method employed by PTI promote aerobic decomposition?") in either the affirmative or the negative. CP 2106. In its submittal to the Superior Court, PTI nevertheless assigned error to that portion of the Hearing Examiner's Decision quoted above. CP 0750.

PTI's position raises for consideration basic rules of statutory construction, in particular, treatment of words undefined by statute. Those rules also apply to agency regulations, which are interpreted as if they are statutes. Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus., 122 Wash. App. 402, 409, 97 P.3d 17 (2004), *aff'd*, 157 Wash.2d 90, 135 P.3d 913 (2006); Children's Hosp. v. Dep't of Health, 95 Wash. App. 858, 864, 975 P.2d 567 (1999). Appellate review of this issue of law is *de novo*, but substantial weight is to be given to an agency's interpretation of statutes and regulations within its area of expertise. Roller v. Dep't of Labor & Indus., 128 Wash. App. 922, 926-27, 117 P.3d 385 (2005). Accordingly, a court acting in an appellate capacity will uphold an agency's interpretation of a regulation if it reflects a plausible construction of the language of the

statute and is not contrary to the legislative intent. Seatoma Convalescent Ctr. V. Dep't of Soc. & Health Serv., 82 Wash. App. 495, 518, 919 P.2d 602 (1996). Ultimate responsibility for interpreting a statute or regulation resides with the reviewing court, under the *de novo* standard. Children's Hosp., 95 Wash. App. at 64, 975 P.2d 567 (1999), *review denied*, 139 Wash.2d 1021 (2000).

The statutory and regulatory scheme at issue here twice defines “composted material,” at RCW 70.95.030(4) and WAC 173-350-100. “Composting” is also defined specifically at WAC 173-350-100. Each of the three (3) provisions contains an identical phrase which defines unequivocally that which is not composting: “natural decay of organic solid waste under uncontrolled conditions.” The operative words of RCW 70.95.030(4) require composted materials to be “subjected to controlled aerobic degradation.” The corollary WAC definitions require the material to have undergone “degradation and transformation” under “controlled conditions designed to promote aerobic decomposition.” These descriptions of an active process are further bolstered by subsection WAC 173-350-220(3)(d), which directs that a composting facility, “shall be designed with process parameters and management procedures that promote an aerobic composting process.”

Under applicable principles of statutory interpretation, a court will not look beyond the plain meaning of the words to construe an unambiguous statute or regulation. Mader v. Health Care Ath., 149 Wash.2d 458, 473, 70 P.3d 931 (2003). In determining that plain meaning, a reviewing court may look to the entire statutory scheme (Mader, 149 Wash.2d at 473), and should, if possible, give meaning to every clause, sentence or word. Groves v. Meyers, 35 Wash.2d 403, 407, 213 P.2d 483 (1950). Where a term is defined, the reviewing court will use that definition. U.S. v. Hoffman, 154 Wash.2d 730, 741, 116 P.3d 999 (2005), citing Cowiche Canyon, 118 Wash.2d at 813, 828 P.2d 549 (1992). Where nontechnical terms are not defined either by statute authorizing a regulation or by the regulation itself, the court may look to the dictionary for guidance in interpreting the term. State v. Pacheco, 125 Wash.2d 150, 154, 882 P.2d 183 (1994); American Cont'l Ins. Co. v. Steen, 151 Wash.2d 512, 518, 91 P.3d 864 (2004).

In this case, the Hearing Examiner found no ambiguity, nor any illegal, unauthorized rule making. CP 2107. Rather it found, in the WAC regulations, “a slight, but important qualifier” in DOE’s repetition of the word, “promote” in conjunction with the required aerobic decomposition process. CP 2105. Although the Examiner did not provide a dictionary definition of “promote,” this court may do so to confirm the correctness of

the Hearing Examiner's regulatory interpretation. The word "promote" is defined as, "to help or encourage to exist or flourish." Webster's Encyclopedic Unabridged Dictionary of the English Language 1548 (2001). Synonyms identified include "advance", "assist", "help", and "support", as well as "elevate, raise, exalt." Id. The word accordingly implies action rather than inaction, and denotes a predominately positive, rather than neutral or negative quality. These definitional concepts are entirely consistent with the Hearing Examiner's conclusion, which was that to "**promote**" aerobic decomposition, a process could "not merely just have aerobic processes occurring naturally alongside anaerobic processes." CP 2105. In furtherance of that conclusion, and its applicability to PTI, the Examiner specifically targets PTI's use of a shell of ground woodwaste to contain anaerobic odors (CP 1259), stating, "a process which only oxidizes anaerobic odors without seeking to minimize the anaerobic conditions does not 'promote' aerobic decomposition." CP 0192.

The Examiner might also have supported his conclusion by additional focus on the word "control" which appears in each of the four (4) composting provisions at issue. "Control" is defined as: "to exercise restraint or direction over; dominate; command", or alternately "the act or power of controlling; regulation; domination or command." Words

identified as synonymous with “control” are: “manage, govern, rule.” Webster’s Encyclopedic Unabridged Dictionary of the English Language 442 (2001). Repeated references in the composting provisions to “controlled conditions” (regulatory definitions) and “controlled aerobic degradation” (Statute) also imply some form of ongoing, active management (consistent with operating standards in fact found in WAC 173-350-220). Taken together, the definitions of “promote” and “control” confirm and support the Examiner’s legal conclusion that the mere existence of some aerobic processes in PTI’s huge static pile was not sufficient evidence of its compliance with the statutory and regulatory standards for “composting.”

Having so determined, the Hearing Examiner established a basis for conclusion that the Permit condition challenged by PTI was justified:

Given the prior statements of PTI personnel and the paucity of available evidence, the Health District is perfectly justified in telling PTI that it must prove that its LSPC method meets the WAC objectives. PTI is the one seeking approval of a technique which on its surface appears to have little control after the pile is initially built and which has an anaerobic core (perhaps throughout the entire composting process). PTI’s counsel suggested in an argument that a proper parallel would be traffic or code enforcement, where the agency must first present at least a *prima facie* case of code violation. That analogy is inappropriate. A more appropriate analogy would be provisions in building codes which require the proponent to prove that some alternative technology will work as well as the system called for by the code. CP 2098.

2. **Did the Hearing Examiner properly decline to accept PTI's admittedly preliminary and speculative scientific evidence as determinative of its obligation to carry the burden of proof?**

The Hearing Examiner presided over a Step Two Appeal pursuant to Chapter 1.10 of the Snohomish Health District Sanitary Code (hereinafter, "SHDSC"), which prescribes the conduct of such hearings. SHDSC Section 1.10.6A assigns the burden of proof:

Burden of Proof: The Appellant shall have the burden of proof as to material factual issues unless applicable Health District rules and regulations or state law or regulations provide otherwise.

Accordingly, PTI had the burden of proof on the issue ultimately left undetermined, as its appeal sought to eliminate the compliance condition imposed on its 2006 Operating Permit (First Section VI thereof). PTI's appeal, if successful, would have resulted in a determination that its composting processes do meet the standards imposed by the legislature, and by the Department of Ecology through the related WAC provisions, so that no "compliance" would need to be demonstrated within the defined period. That determination, in turn, would rest upon the underlying material fact: whether PTI's process promotes aerobic decomposition, thereby constituting "composting" under state law. When the Hearing Examiner concluded that evidence in the record precluded an affirmative

finding in PTI's favor, it effectively declared PTI's evidence, particularly the testimony of its scientific "experts", inadequate to persuade by the preponderance necessary to meet its burden in the case.

In this appeal, taken from a Superior Court reversal of the Hearing Examiner's Decision, this court conducts its review on the record made before the Hearing Examiner (the highest forum exercising fact finding authority), and not on the record of proceedings in the Superior Court. It is the trier of fact who determines if the burden of persuasion has been met. Welch Foods Inc. v. Benton Cy., 136 Wash. App. 314, 322, 148 P.3d 1092 (2006), citing Renz v. Spokane Eye Clinic, P.S., 114 Wash. App. 611, 623, 60 P.3d 106 (2002). The burden of persuasion defines the degree of certainty with which the fact finder must decide the issues. NW Pipeline Corp. v. Adams Cy., 132 Wash. App. 470, 475, 131 P.3d 958 (2006), citing In re Det. of Skinner, 122 Wash. App. 620, 629, 94 P.3d 981 (2004), *review denied*, 153 Wash.2d 1026 (2005). In this case, as identified by the Hearing Examiner, Appellant PTI's burden was to persuade the trier of fact by a preponderance of the evidence.

2 McCormick on Evidence § 339 (6th Ed.).

PTI argued, and the Superior Court concurred (without apparent regard for the quantum of evidence produced), that the testimony of its experts, Dr. Charles Henry and Dr. Sally Brown, caused a shifting of the

burden of proof to SHD to produce its own scientific evidence. However, this misapprehends the full meaning of the “burden of proof.” In Gillingham v. Phelps, 11 Wash.2d 492, 501, 119 P.2d 914 (1941), the appellant was assisted by a statutory presumption making a prima facie case, but the Court explained that even in the context:

A statutory presumption making a prima facie case does not shift the burden of proof or require the adversary to prove the negative by the preponderance of the evidence; it merely requires the submission of the issue to the jury to determine the preponderance of the evidence, required throughout of the party asserting the affirmative of the issue. State v. Rouw, 156 Wash. 198, 286 P. 81.

The term ‘burden of proof’ has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets his obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end. 11 Wash.2d at 501.

PTI attempted to meet its burden of persuasion through the testimony of its consultants, Dr. Charles Henry and Dr. Sally Brown. See Statement of the Case, pages 12 thru 15, relating the significant deficiencies of that testimony, which ultimately led the Hearing Examiner

to declare the evidence inconclusive, both as to the conditions in the pile, and PTI's compliance with composting standards. CP 2106-2107; CP 2102, footnote 15.

The Superior Court should have (and this court now should) defer to the Hearing Examiner's assessment both of the credibility of witnesses and the weight to be given to competing evidence offered at the hearing. The credibility and weight to be attached to the testimony of witnesses are for the trier of fact and not an appellate court. State v. Johnson, 2 Wash. App. 743, 743, 472 P.2d 411 (1970) citing State v. Hoffman, 64 Wash.2d 445, 392 P.2d 237 (1964) and State v. Bunch, 2 Wash. App. 189, 467 P.2d 212 (1970). See extended discussion in In re Martinson's Estate, 29 Wash.2d 912, 920, 190 P.2d 96 (1948). An appellate tribunal is not empowered to weigh either the evidence or the credibility of witnesses even though it may disagree with the trial court in either regard. In re Sego, 82 Wash.2d 736, 739-740, 513 P.2d 831 (1973). The trier of fact may give to the testimony of any witness such weight and credence as it believes the evidence warrants. Segall v. Ben's Truck Parts, Inc., 5 Wash. App. 482, 483, 488 P.2d 790 (1971).

At the Superior Court, PTI argued and the Court concurred that the Hearing Examiner was compelled to accept as determinative scientific testimony offered by PTI, essentially without regard to the adequacy and

quantum of proof produced or the weight afforded it by the Hearing Examiner. That position significantly misstates the law, which does not afford conclusive effect to inadequate or faulty scientific testimony, even if uncontradicted and unimpeached. Opinion evidence is not generally conclusive, but is accorded such weight as reasonably attaches to it. In re Estate of Hastings, 4 Wash. App. 649, 651, 484 P.2d 442 (1971), citing Richey & Gilbert Co. v. NW Natural Gas Corp., 16 Wash.2d 631, 134 P.2d 444 (1943). The trier of fact may determine the credibility of an expert's opinion even though the opinion is uncontradicted. Swenson v. Low, 5 Wash. App. 186, 191, 486 P.2d 1120 (1971). The trial court may refuse to accept even uncontradicted expert testimony as long as it does not act in an arbitrary or capricious manner. State ex rel. Flieger v. Hendrickson, 46 Wash. App. 184, 189, 730 P.2d 88 (1986), citing Brewer v. Copeland, 86 Wash.2d 58, 542 P.2d 445 (1975).

Expert testimony is to be considered and weighed by the same tests as other testimony. In re Marriage of Pilant, 42 Wash. App. 173, 709 P.2d 1241 (1985); State v. Toomey, 38 Wash. App. 831, 690 P.2d 1175 (1984); In re Watson's Welfare, 25 Wash. App. 508, 610 P.2d 367 (1979). A trial court has the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence, as long as it does not act in an arbitrary and capricious manner in doing so.

Brewer, 86 Wash.2d at 74; In re Welfare of Watson, 25 Wash. App. 508, 610 P.2d 367 (1979). The trial court has wide latitude in determining what weight to give an expert's opinion. In re Marriage of Sedlock, 69 Wash. App. 484, 491, 849 P.2d 1243, *review denied*, 122 Wash.2d 1014 (1993).

Finally, when expert opinions are based on theoretical speculation, they may not only be given little weight, but are subject to total exclusion. Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded. Queen City Farms, Inc. v. Central National Ins. Co. of Omaha, 126 Wash.2d 50, 102-103, 882 P.2d 703 (1994), *dissent amended at* 891 P.2d 718 (1995). The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert's conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact. Griswold v. Kilpatrick, 107 Wash. App. 757, 761-762, 27 P.3d 246 (2001), citing Sanchez v. Haddix, 95 Wash.2d 593, 627 P.2d 1312 (1981).

Here, the Hearing Examiner gave detailed acknowledgement to the general technical information delivered by Dr. Henry and Dr. Brown (CP 2102-2103), but correctly found their specific knowledge of the Maltby

operation scientifically inadequate (Dr. Henry's samples "...do not constitute a scientifically valid study..." (CP 2102); "...do not constitute a rigorous study of the pile..." (CP 2106)). The Examiner had the right and authority to so assess PTI's factual proof; the Superior Court erred when it ignored that assessment, elevated the testimony found inadequate by the Examiner to be determinative, and declared the Hearing Examiner's decision arbitrary and capricious for failing to make those same determinations. Order on Writ of Review, CP 0296.

3. **Did substantial evidence support the Hearing Examiner's findings of fact so that, pursuant to RCW 7.16.120, the Superior Court was prohibited from redetermining or reinterpreting those facts, and compelled to accept and rely upon them in reviewing issues of law?**

Review of the Hearing Examiner's decision is by Writ of Review in accordance with RCW 7.16.120, which identifies the "questions involving the merits to be determined by the court" to consist of the following:

- (1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.
- (2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or make the determination.

- (3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.
- (4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.
- (5) Whether the factual determinations were supported by substantial evidence.

The appellate court stands in the same position as the superior court in reviewing administrative decisions, and applies the appropriate standard of review directly to the administrative record. Wilson v. Emp. Sec. Dep't, 87 Wash. App. 197, 940 P.2d 269 (1997), citing Snohomish Cy. v. State, 69 Wash. App. 655, 664, 850 P.2d 546 (1993) *review denied* 13 Wash.2d 1003 (1994).

Under the writ statute, RCW 7.16.120, this court reviews issues of law *de novo* to determine whether the decision below was contrary to law. Davidson v. Kitsap City, 86 Wash. App. 673, 680, 937 P.2d 1309 (1997), citing Sunderland v. City of Pasco, 127 Wash.2d 782, 788, 903 P.2d 986 (1995) and Freeburg v. City of Seattle, 71 Wash. App. 367, 370, 859 P.2d 610 (1993). Factual findings are reviewed to determine whether they are supported by competent and substantial evidence. Sunderland, 127 Wash.2d at 788, citing Freeburg, 71 Wash. App. at 371 and RCW 7.16.120(4)-(5). The Court's factual review is deferential and requires the court to view the evidence and reasonable inferences therefrom in the light

most favorable to the party who prevailed in the highest form that exercised fact-finding, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. State ex rel. Lige, 65 Wash. App. at 618, *review denied*, 120 Wash.2d 1008 (1992); Davidson, 86 Wash. App. at 680, citing Freeburg, 71 Wash. App. at 371-372.

As noted in State ex rel. Lige, to give proper deference on factual issues, it is necessary to determine whether each tribunal below had original or appellate jurisdiction. 65 Wash. App. at 219-220. A tribunal with original jurisdiction has the authority to make findings of fact, while a tribunal with only appellate jurisdiction is not permitted or required to make its own findings. State ex rel. Lige, 65 Wash. App. at 220, citing Berger Eng'r Co. v. Hopkins, 54 Wash.2d 300, 308, 340 P.2d 777 (1959) and Maranatha Mining, Inc. v. Pierce Cy., 59 Wash. App. 795, 802, 801 P.2d 985 (1990). In this case, the Snohomish County Superior Court had appellate rather than original jurisdiction, as its sole authority to review the Hearing Examiner's Decision derived from the writ statute, RCW 7.16.120. On factual issues, the Superior Court's limited function was identical to that now to be exercised by this court, which is to determine whether the Hearing Examiner's findings of fact were supported by substantial evidence. Andrew v. King Cy., 21 Wash. App. 566, 575, 586

P.2d 509 (1978). In doing so, it normally reviews only the administrative record below, takes no new evidence, and therefore need enter no findings of fact or conclusions of law. Grader v. City of Lynnwood, 45 Wash. App. 876, 879, 728 P.2d 1057 (1986), citing King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd., 87 Wash.2d 536, 544, 554 P.2d 1060 (1976). Here, the Superior Court substantially exceeded those limits on its authority, entering extensive findings of fact and conclusions of law, even issuing its own cease and desist order directed to both the Health District and the Department of Ecology, which also expressing its intent to exercise conclusive authority in PTI's independent damage action against SHD. Although it lacked authority for these actions, they alone do not constitute grounds for reversal, but are instead to be treated as mere surplusage. Grader, 45 Wash. App. at 879, citing Spokane Cy. Fire Protec. Dist. 8 v. Spokane Cy. Boundary Review Bd., 27 Wash. App. 491, 493, 618 P.2d 1326 (1980). This court reviews the administrative record in rendering its decision, and does not rely upon the trial court's findings and conclusions. Spokane Cy. Fire Protec. Dist. 8, 27 Wash. App. at 493, 618 P.2d 1326 (1980); Van Sant v. City of Everett, 69 Wash. App. 641, 647, 849 P.2d 1276 (1993). The Superior Court, exercising appellate authority under the writ statute, could conclude the Hearing Examiner committed legal error in its failure to determine key material facts, but it

may not go further and determine from the testimony and evidence what the facts were, nor can this court on appeal. Andrew v. King Cy., 21 Wash. App. at 574, 586 P.2d 509 (1978).

The Snohomish County Superior Court, in its Order on Writ of Review and Compliance with Solid Waste Operating Permit (CP 288-297), did not by specific reference identify Hearing Examiner fact determinations it found not supported by substantial evidence. Rather, the Court issued a blanket pronouncement that, “when the Hearing Examiner’s factual findings...are inconsistent with this court’s ruling, this court finds that those facts were not supported by substantial evidence in the record.” CP 289. While this statement forecasts the Superior Court’s intention to engage in independent fact finding in support of its own conclusions of law, those facts are to be treated as mere surplusage. Grader, 45 Wash. App. at 879, 728 P.2d 1057 (1986).

This court’s standard of review, applied to the facts found by the Hearing Examiner, is whether “the factual determinations were supported by substantial evidence.” RCW 7.16.120(5). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair minded, rational person of the truth of the finding.” Hilltop Terrace Homeowners Ass’n. v. Island Cy., 126 Wash.2d 22, 34, citing State v. Maxfield, 125 Wash.2d 378, 385, 886 P.2d 123 (1994). Evidence is

“substantial” if it would convince an unprejudiced, thinking mind of the truth of the declared premise. Cowsert v. Crowley Maritime Corp., 101 Wash.2d 402, 405, 680 P.2d 46 (1984). Under this standard, an appellate court is not to substitute its own judgment for that of the fact finder, as the standard necessarily entails acceptance of the fact finder’s views regarding credibility of witnesses and the weight to be given reasonable but competing inferences. Hilltop, 126 Wash.2d at 34, citing State ex rel. Lige, 65 Wash. App. 614, 618, 829 P.2d 217, *review denied* 120 Wash.2d 1008 (1992). On factual questions, the reviewing court cannot substitute its interpretation of the facts for the fact finder’s interpretation or reweigh the evidence. Van Sant, 69 Wash. App. at 650, citing Franklin Cy. Sheriff’s Office v. Sellers, 97 Wash.2d 317, 325, 646 P.2d 113 (1982), cert. denied, 459 US 1106 (1983) and Balser Invs., Inc. v. Snohomish Cy., 59 Wash. App. 29, 36-37, 795 P.2d 753 (1990).

The extreme extent of the Superior Court’s independent fact finding, and its use of reinterpreted facts to support its conclusions of law, is most evident in the Court’s bizarre ruling that PTI’s huge static pile is not “uniform” but “actually constructed in a series of cells and then deconstructed by removing parts of the pile cell by cell.” Order on Writ of Review, CP 0293. While the Hearing Examiner explained in his findings of fact that the “piles are formed in three lifts,” the creation of which he

relates in great detail, he makes no finding that the pile is constructed in discrete cells capable of being identified and separately deconstructed, nor does the evidence produced at the hearing support the Superior Court's novel theory. These are no borders, edges, or demarcations within the pile, and there is no cell by cell deconstruct based on a pattern of oldest material harvested first (PTI harvests from the top, not bottom to top, CP 2516). PTI's 2006 Plan of Operation makes no reference to cells (or even "lifts"). CP 1240-1262. Photographs of the pile demonstrate unequivocally that "cells" are nonexistent. CP 1214; CP 1318-1319. But even had the evidence allowed for such a finding, the Superior Court had no authority to reject the Hearing Examiner's found facts, reinterpret the evidence, and advance its own creative theory as to the pile construction process. Furthermore, the Court improperly used its own factual analysis to support conclusions of law which are otherwise unsupportable. It declares the "cell by cell" construction to be "one reason why the "anaerobic core" argument fails, and in footnote explains:

Also the HE's analysis with regard to the need for further scientific study of the pile fails for the same reason. This conclusion assumes some part of the monolithic pile – when the testimony is that it is constructed and deconstructed in cells that are ready at different times. In this scenario the "spot testing" that Dr. Henry performed is highly relevant because that is precisely how you would test any given cell. Each cell has its own core and its own function. The HE concluded that Dr. Henry's temperature

tests were insufficient for a larger mass but his conclusion is based on an erroneous assumption for which there is no scientific evidence existing in the record. Order on Writ of Review, CP 0294, footnote 3.

The Court thus accords Dr. Henry's testing scientific validity completely beyond that which Henry's own testimony supports: Henry made no claim to have "spot tested" any particular cell, nor even suggested "cells" existed within the structure of the pile. When SHD protested the Court's "cell" theory in its Motion for Reconsideration, the Court responded that it relied not upon Henry, but on the testimony of Dave Malin, PTI employee involved in the construction of the pile, and attached to its Order the relied-upon transcript pages, complete with the Court's own highlights. CP 2508-2521. As can be seen there, it is in the context of a verbal exchange between the Hearing Examiner and Mr. Malin that first appears the word "cells," clearly not in a context having any formal or scientific significance.⁴ Nevertheless, the Court thereafter attempts to buttress its cellular theory with another fact in the record which the Hearing Examiner acknowledged, but did not find determinative of the issues before it for resolution: the fact that PTI held an additional permit with the Puget

⁴ The exchange was as follows: Questions (from Hearing Examiner) "We are doing this really in cells, marching across, back, and forth?", to which Malin replies "There you go. Yeah. You can say it like that, yeah." CP 2515. The Hearing Examiner later explains his reason for conceptualizing the pile in that manner: "-- I guess it goes back to my landfill hearing days, of garbage being put in cells and covered on a daily basis with an inert material." CP 2518.

Sound Clean Air Agency (hereinafter “PSCAA”). While the Hearing Examiner had addressed the permit in its findings of fact (CP 2100), the Superior Court elevated that fact to virtually determinative of PTI’s regulatory compliance, declaring in footnote:

It is this court’s decision that the Hearing Examiner (HE) completely ignored the terms of this permit which implements strict process controls on the site in order to maintain aerobic decomposition and orders the elimination of any anaerobic material. The HE’s Findings of Fact are defective and incomplete by not including this material. The evidence in the record shows that PTI has not been in violation of this permit, which means to this court, given the terms of the permit, that they have maintained an aerobic decomposition process. Order on Writ of Review, CP 0290, footnote 1.

In so declaring, the Superior Court again oversteps its authority, invading the province of the trier of fact to determine the weight to be afforded the evidence produced.

The Superior Court in this case also designated certain of the Hearing Examiner’s determinations to be “arbitrary and capricious.” While “arbitrary and capricious” was previously the writ standard of review, statutory amendment in 1989 replaced it with the substantial evidence standard.⁵ In the context of agency decision making as, action

⁵ Whether that amendment worked a substantive change in the statute appears to be somewhat unsettled. Freeburg, 71 Wash. App. at 371, n.7, 859 P.2d 610 (1999) declares “[t]here is a plain and important distinction between the statutory ‘substantial evidence’ standard and the ‘arbitrary and capricious’ standard applied under the prior statutory language.” But see State ex rel. Lige, 65 Wash. App. 614, 617-18, 829 P.2d 217, *review*

will be designated as arbitrary and capricious only when it is willful and unreasoning or taken without consideration and in disregard of the facts.” Hayes v. City of Seattle, 131 Wash.2d 706, 726, 934 P.2d 1178 (1997) citing State v. Wittenbarger, 124 Wash.2d 467, 486, 880 P.2d 517 (1994). Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached. Cougar Mountain Assoc. v. King Cy., 111 Wash.2d 742, 750, 765 P.2d 264 (1988). An unwise decision or error in judgment does not constitute “arbitrary and capricious” action. Concerned Land Owners of Union Hill v. King Cy., 64 Wash. App. 768, 772, 827 P.2d 1017, *review denied*, 119 Wash.2d 1008, 833 P.2d 387 (1992). Action taken after giving parties the opportunity to be heard, exercised honestly and upon due consideration, is not arbitrary and capricious even though it may be believed an erroneous decision has been reached. Heinmiller v. The Dep’t of Health, 127 Wash.2d 595, 903 P.2d 433 (1996).

denied, 120 Wash.2d 1008 (1992), declaring “on issues of fact, we determine the competency and sufficiency of the evidence, which is the same as determining whether the decision below was arbitrary and capricious.” And see: State ex rel. Lige v. Cy. of Pierce, 65 Wash. App. 614, 618, fn 4, 829 P.2d 217 (1992) which notes that “RCW 7.16.120(5) was amended in 1989, but the amendment did not work a substantive change. Both before and after, the relevant inquiry was whether there was sufficient or substantial evidence. Compare Andrew, at 21 Wash. App. 575, 586 P.2d 509, with RCW 7.16.120(5) as amended in 1989.”

This court comes then to a review of the Hearing Examiner's Decision for a determination of whether his findings of fact meet the substantial evidence standard. Here, on the primary factual issue, whether PTI's static pile composting method promoted aerobic decomposition, the Examiner found evidence insubstantial and insufficient to support a reasoned decision. CP 2106, 2107 (Conclusions 3 and 8). Effectively, the proof failed under subsection four (4) of the writ statute: "whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination." In so concluding, the Hearing Examiner delivered an extremely detailed rendition of the exact method by which the two, large static piles at PTI's Maltby site are constructed, noting particularly that, "a typical large static pile at PTI's Maltby site measures about 150' by 375' and is 40' high when first formed." CP 2100, 2101, and 2102. Drawing from the testimony of PTI's own expert witness, Dr. Henry, the Examiner also made findings as to the method by which organics decompose to create compost, and the technical variables affecting that decomposition process. CP 2102. Finally, the Hearing Examiner reported on the data Henry collected through sampling of PTI's Maltby pile in May 2007, noting specifically Henry's findings as to porosity and temperature in his test samples. The Hearing Examiner relates Henry's own acknowledgement that the pile contains an anaerobic

core, the extent of which is unknown to the expert. CP 2103. None of these facts were challenged by PTI at the Superior Court level. Its only claim of a factual error was the Hearing Examiner's statement that, "Henry cannot explain how the end product would have an aerobic decomposition smell when some portion of the pile core is likely anaerobic." CP 2103.

On the basis of these findings of fact, the Hearing Examiner proceeded to address the related legal conclusion: "Does the static pile composting method employed by PTI promote aerobic decomposition?" His inability to answer the question either affirmatively or negatively is addressed in two places in the Decision and Order as follows:

These data results do not constitute a scientifically valid study in the Examiner's opinion. We have no information on study protocols. We do not know where, how, or at what frequency the measurements were taken. No control of the age of the materials sampled is evident. Depth of measurement generally only scratches the surface, literally, of the large static pile in operation at PTI's Maltby site: With a pile at least 150 feet wide and 40 feet deep, the core is some 75 feet from the outer sides and 40 feet below the top. The results are interesting, but not scientifically valid nor necessarily representative of average conditions throughout the pile or over the life of the composting process. CP 2102 and 2103, footnote 15.

The Examiner further explains his inability to reach a related legal conclusion in paragraph three (3) of his Conclusions:

Given the evidence in the record of this hearing, this question cannot be answered in either the affirmative or the negative. The core of the pile is anaerobic according to PTI's consultant. The extent of the anaerobic conditions, both areally throughout the pile and temporally over the decomposition period, is unknown. The handful of tests performed by PTI this Spring do not constitute a rigorous study of the pile. The tests performed by PTI this Spring did not extend over a long enough period to allow any conclusions to be reached regarding conditions over time. The results of the tests performed by PTI this Spring do indicate that aerobic conditions existed at the time in portions of the pile. What they do not indicate is whether PTI's large static pile method "promotes" aerobic decomposition. CP 2106.

Applying the substantial evidence test (albeit with a negative perspective), this court should find that "a fair minded, rational person" would understand the ineffectiveness of samples drawn only to a depth of six feet to determine conclusively conditions residing in the core of a monolithic pile of the dimensions identified by the Hearing Examiner. Even PTI's own expert, Dr. Henry, declined to claim knowledge of conditions in the massive core of the pile hastily tested only two weeks prior to the hearing. CP 2621. The Hearing Examiner properly found the facts regarding processes in that core to be undeterminable from the record produced at the hearing, and SHD contends that this is the "truth" which would be deduced by a fair minded, rational person considering the same evidence. This substantial evidence test should therefore be deemed met.

In light of this fact finding, based on substantial evidence, the Hearing Examiner's conclusion of law should also stand. Because the testing and data collected by PTI's experts is inadequate to allow meaningful fact finding regarding the condition of the pile beyond its outer shell, it is not possible to determine whether the large static pile method promotes aerobic decomposition (CP 2106) or whether PTI's Maltby composting operation meets applicable standards. CP 2107, Hearing Examiner's Conclusion (8). As these were factual and legal issues upon which PTI had the burden of proof and persuasion, its appeal seeking to strike from its 2006 permit the condition contained in Section VI was properly denied.

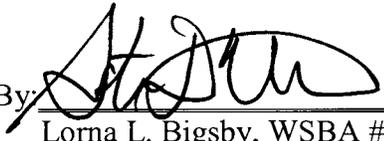
V. CONCLUSION

The Hearing Examiner's Decision and Order of May 23, 2007 should be affirmed by this court, and the Superior Court's February 26, 2009 Order on Writ of Review, which reversed that decision, vacated.

DATED this 20th day of August, 2009.

Respectfully submitted,

BELL & INGRAM, P.S.

By: 
Lorna L. Bigsby, WSBA #5546
Steven D. Uberti, WSBA #6671
Attorneys for Appellant

APPENDIX

1. Solid Waste Facility Permit #SW-093
Permit Period: July 1, 2006 to June 30, 2007 A-1
2. Snohomish Health District Environmental Health
Hearing Examiner Decision and Order
(May 23, 2007)..... A-9
3. Snohomish County Superior Court
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Solid Waste Operating Permit..... A-28
4. January 4, 2006 Correspondence from DOE to PTI..... A-38
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APPENDIX 1



SOLID WASTE FACILITY PERMIT #SW-093

Issued by the Snohomish Health District in accordance with the provisions of Chapter 70.95 of the Revised Code of Washington (RCW), Chapter 173-350 of the Washington Administrative Code (WAC) and the Snohomish Health District Sanitary Codes, Chapter 3.1 and 3.2 (Adopted text of WAC 173-350).

PERMIT PERIOD: JULY 1, 2006 TO JUNE 30, 2007

PERMITTEE AND ADMINISTRATIVE INFORMATION

NAME OF FACILITY:	Pacific Topsoils, Inc. Composting - Maltby
FACILITY LOCATION:	8616 219th Street SE, Woodinville, Washington 98072
FACILITY OWNER:	Dave and Sandra Forman
FACILITY OPERATOR:	Janusz Bajsarowicz
PHONE:	425.337.2700
PERMIT TYPE:	Composting Facility
ANNUAL FEE:	\$2246.00

The conditions of this permit are contained on the following pages. This permit is the property of the Snohomish Health District and may be suspended or revoked upon violation of any rules and regulations applicable hereto. This permit is not transferable to a different site, and must be renewed annually. This permit or a legible copy must be displayed or stored in a manner, which allows easy access, by operating personnel.

Geoffrey W. Crofoot, R.S.
Solid Waste and Toxics Section
Environmental Health Division

Date of Issuance

SECTION I: STANDARD PERMIT CONDITIONS

- A. This permit shall remain the property of the Snohomish Health District (Health District). The permit may be revoked, suspended, or appended upon violation of the permittee of any applicable local, state, or federal laws, or any of the conditions of this permit, by the Health Officer or any authorized agent of the Health District. If the permit is revoked, there is a procedure specified in the Snohomish Health District Sanitary Code, Chapters 3.1, *Solid Waste Handling Regulations*; and 3.2, Chapter 173-350 WAC *Solid Waste Handling Standards*, to appeal the revocation.
- B. As a general condition of this permit, the permittee shall comply with Snohomish Health District Sanitary Code, Chapters 3.1, *Solid Waste Handling Regulations*; and 3.2, Chapter 173-350 WAC *Solid Waste Handling Standards* or other regulations, which may be subsequently adopted that affect this facility. Where any conflicts between any regulations are present, the more stringent regulations shall be in effect.
- C. All conditions of this permit shall be followed for the permittee to remain in compliance. The permittee shall be responsible for all acts and omissions of all contractors and agents of the permittee. This requirement shall continue for the life of the site, including closure activity.
- D. By applicant's receipt of this permit, applicant grants permission to any duly authorized officer, employee, or representative of the Health Officer of the Health District, or Washington Department of Ecology, to enter and inspect the permitted facility at any reasonable time for the purpose of determining compliance with Snohomish Health District Sanitary Code, Chapters 3.1, *Solid Waste Handling Regulations*; and 3.2, Chapter 173-350 WAC *Solid Waste Handling Standards*, and/or the conditions of this permit.
- E. This permit or a legible copy of the original shall be displayed or stored in a manner which allows easy access by operating personnel.
- F. This permit shall be subject to suspension or revocation if the Health District finds:
1. That the permit was obtained by misrepresenting or omitting any information that could have affected the issuance of the permit or will affect the current operation of the facility;
 2. That there has been a significant change in quantity or character of the solid waste or method of solid waste handling, unless such change has been approved in advance by the Health District; or
 3. That there has been a violation of any of the conditions contained in this permit.
- G. This permit may be amended by the Health District. More stringent restrictions may be imposed on the facility during the period the permit is valid. Amendments shall be made in writing and become specific conditions of the permit.
- H. The operating permit shall be renewed annually, and if needed, additional conditions may be placed upon the permit at the time of renewal. A permit application shall be submitted at least thirty (30) days prior to the expiration date of the existing permit.

SECTION II: PERFORMANCE STANDARDS

The owner or operator shall:

- A. Design, construct, operate, and close all facilities in a manner that does not pose a threat to human health or the environment;
- B. Comply with Chapter 90.48 RCW, Water Pollution Control and implementing regulations, including Chapter 173-200 WAC, Water Quality Standards for Ground Waters of the State of Washington;
- C. Conform to the approved local comprehensive solid waste management plan prepared in accordance with Chapter 70.95 RCW, Solid Waste Management – Reduction and Recycling, and/or the local hazardous waste management plan prepared in accordance with Chapter 70.105 RCW, Hazardous Waste Management;
- D. Not cause any violation of emission standards or ambient air quality standards at the property boundary of any facility and comply with Chapter 70.94 RCW, Washington Clean Air Act; and
- E. Shall comply with all other applicable local, state, and federal laws and regulations.

If the performance standards of this section are not met, corrective actions (approved by the Health District) shall be designed and implemented, and enforced on a time schedule approved by the Health District.

SECTION III: SPECIFIC CONDITIONS

- A. The Pacific Topsoils, Inc. Compost Facility - Maltby shall operate in accordance with the approved Plan of Operation received by the Health District February 17, 1998, as part of PTI-Maltby's Revised General Solid Waste Handling Permit Application. The permittee shall notify the Health District in writing prior to any deviation from or change in the operating plan. These changes will require Health District approval prior to implementation.
- B. Feedstock for composting shall be limited to type 1 as defined in WAC 173-350-100.
- C. Conditions specifically regarding the acceptance of Pre-consumer Food Waste:
 1. PTI must follow the plan of operation as proposed in the August 9, 2001 correspondence to the Health District.
 2. All PCFW must be contained at all times on an impermeable pad that prevents leachate from impacting surface water, ground water or soils.
 3. All rounds and other ejected PCFW material which is not incorporated must be collected and disposed of or collected and re-ground at regular intervals so that there is not accumulation of unincorporated PCFW available for scavenging.

PERMIT # SW-093

PERMIT PERIOD: JULY 1, 2006 TO JUNE 30, 2007

Page 4 of 8

4. PTI must process all PCFW feedstock during eight hours. There will be no holding of PCFW overnight. There will be no acceptance of PCFW if it cannot be processed (incorporated into the main pile) prior to the end of the working day.
5. PTI must comply with requirements set by other regulatory agencies such as but not limited to Puget Sound Clean Air Agency and Snohomish County Planning and Development.
6. If changes are needed in the plan of operations, PTI must submit these changes to the Health District for review prior to the implementation of the changes.

D. Additional Permitted Feedstocks

- **Diatomaceous Earth from Breweries and Wineries** - Spent diatomaceous earth (DE) is defined as a filter media comprised of siliceous remains of diatoms, and organic material which is filtered out of the final product. PTI is permitted to accept spent DE specifically from Redhook and Chateau St. Michelle.
 - **Wax Coated Cardboard and Plane Non-Colored Brown Cardboard** - Provided the following conditions are met.
 1. Composting standards outlined in WAC 173-350-220 are met or acceded.
 2. Performance standards outlined in WAC 173-350-040 are met.
 3. All current SHD Solid Waste Facility Permit Conditions for permit #SW-093 are met.
 4. The addition of wax-coated cardboard will not result in litter conditions or material blowing down from the pile.
 5. Cardboard must be free of contamination such as plastics, metals and CMPCFW other than permitted feedstock's.
 6. Finished compost with integrated wax coated cardboard must meet the same analytical standards as outlined in permit # SW-093 and WAC 173-350-220(4)
 7. The addition of wax-coated cardboard will be limited to the proposed volume.
- E. The permittee shall remain in compliance with the site's Puget Sound Clean Air Agency (PSCAA) Order of Approval To Construct, Install, or Establish a Two-Acre Yard Waste Composting Operation" (PSAPCA Order No. 7265, dated July 9, 1998).
- F. The facility must comply with all requirements of its Ecology Storm water Baseline General Permit For Industrial Activity, Permit No. SO3-003119.
- G. The facility must comply with all requirements of its King County Department of Natural Resources Wastewater Discharge Authorization No. 611.

H. The facility must comply with all requirements of its Cross Valley Water District permit(s) for discharge of leachate to the sanitary sewer.

- Surface water samples must be drawn and analyzed to provide baseline data for surface water conditions before feedstock is accepted. Surface water sampling locations and a list of sample parameters must be submitted to the Health District in advance of sampling, and approved by the Health District in advance of sampling.

I. The permittee shall not accept any of the following materials at the facility for uses in compost and topsoil production:

- Solid waste or industrial waste as defined in 173-350-100 WAC, and the Snohomish Health District Sanitary Code, Chapter 3.1-100, unless otherwise specifically permitted by the Health District.
- Mixed waste or garbage.
- Paper, including newspaper.
- Sewage sludge, septage or biosolids.
- Ash.
- Plastic bags.
- Post consumer food waste
- Tires.
- Roofing materials, including wood shingles.
- Tarpaper.
- Insulation.
- Sheetrock, gypsum wallboard, or wallboard paper.
- Treated or painted wood as outlined in WAC 173-350-100, under the terms "Wood derived fuel" and "Wood waste."
- Building demolition debris.
- "Contaminated soils" as defined in WAC 173-350-100. (NOTE: Site personnel shall follow plan outlined in the Plan of Operation when screening for potentially contaminated soils.)
- Any materials not specifically approved by the Health District in advance of receipt by the facility.

J. Only clean street sweepings, which meet the following criteria, may be accepted:

1. Incidental litter (trash) has been removed.

2. Testing demonstrates less than 200 ppm total petroleum hydrocarbon (TPH) concentration (using an accepted test method), and levels of total metals less than those outlined in Method A residential cleanup standards of the Department of Ecology's Model Toxics Control Act Cleanup Regulation.
 3. Testing is not required if the street sweepings contain 90%, or more (by volume), of recognizable vegetative debris (e.g., leaves, conifer needles, branches), and no obvious evidence of contamination is noted.
- K. Any incoming loads containing greater than 10% regulated solid waste must be rejected.
- L. The permittee must not accept more than 160,000 cubic yards, or 53,333 tons, (Phase One), whichever amount is the lesser, of yard debris, per year.
- M. Material shall be composted using the static pile method, as per the approved permit application. Pile(s) of compost must be limited to forty (40) feet in height during the initial construction. No new materials may be added on top of the pile(s) after settling occurs during the composting process.
- N. All leachate-generating materials at the facility must be placed on an impervious asphalt pad.
- O. The leachate collection system (pad, sump, sump pump, and tanks) must be inspected routinely by site personnel for signs of disrepair or leakage. Inspection logs must be maintained on site.
- P. All leachate shall be contained on the pad or in the leachate collection tanks and either recirculated onto the pile or piped to the sanitary sewer. Under no circumstances can leachate be discharged to surface water, groundwater or upon the surface of the ground.
- Q. The permittee must follow an odor-control plan as detailed in the approved Plan of Operation. Processing of completed compost must stop if distinct malodors are produced when breaking into the pile(s), or if processing takes place during temperature inversions or during periods of calm winds. If the odor-control measures outlined in the facility's Plan of Operation fail to control the production of malodors at the site, the facility must stop accepting materials and transport the odor-causing material to a permitted landfill. If malodors are caused by the leachate collection system, and are not easily correctable, the Health District may require leachate discharge to the sewer system.
- R. On-site dumpster for incidental waste that cannot be composted, such as garbage, must be rodent resistant, have a tight fitting lid and be emptied weekly.
- S. The permittee shall keep the following records on site at all times, and make them available for Health District review upon request:
1. Self-inspection reports.
 2. Source, type, and quantity of waste accepted.
 3. Records of temperature readings for each batch of compost produced.
 4. Records of any laboratory analysis performed on compost.

SECTION IV: TESTING REQUIREMENTS

- A. Compost produced at the facility shall be sampled and tested per WAC 173-350-220(4)(a)viii.
- B. Compost Testing Frequency: Monthly.
- C. Finished compost must not exceed the allowable contaminant levels for compost as stated in WAC 173-350-220(4)(a)(viii.)
- D. Annual reports must be submitted to the Health District, and the Washington Department of Ecology.
- E. All analytical samples for compost quality must be processed by a Department of Ecology-accredited laboratory.

SECTION V: FACILITY CLOSURE CONDITIONS

- A. The permittee must notify the Health District of the intent to close the operation, no later than sixty (60) days prior to final receipt of regulated waste.
- B. At closure, all piles of material must be removed from the premises, the site must be decontaminated, and the permittee must contact the Health District indicating completion of this condition.
- C. Leachate stored in aboveground storage tanks, or in/on other parts of the leachate collection system at the time of closure (i.e., in pipes, underground storage tanks, on pad, etc.) must be disposed of according to applicable regulations in effect at the time of closure (i.e., discharge into sanitary sewer system, etc.).

SECTION VI: COMPLIANCE SCHEDULE FOR OPERATING

- A. RCW 70.95.030 (4) states that:
 - "Composted material" means organic solid waste that has been subjected to controlled aerobic degradation at a solid waste facility in compliance with the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material.
- B. WAC 173-350 echoes the state RCW.
- C. Composting processes at the Maltby location do not meet the aforementioned definitions and can not meet the requirements without either change to the process or change to the RCW and subsequently the WAC.

- D. PTI must either seek a legislative remedy to this compliance issue or change the process so that it complies with the current regulation with in the compliance period.
- E. PTI's compliance period will begin with the issuance of the 2006-2007 operating permit and end when the 2008-2009 operating permit expires on June 30, 2009

SECTION VI: APPROVED PERMIT AMENDMENTS

Date approved	Request and Conditions
	The permittee must comply with the conditions set forth in the site's Snohomish County Planning and Development Services "Water Storage Tank or Reservoir Permit" (Permit No. 99110506 WT), issued on October 11, 1999, and expiring on October 10, 2001.
	The permittee is currently operating under a revised Grading Plan (revision dated May 12, 1999), which differs from the Grading Plan received by the Health District February 17, 1998, as part of the PTI-Maltby Revised General Solid Waste Handling Permit Application.
August 17, 2004	<ol style="list-style-type: none"> 1 PTI-Bothell is permitted to accept only those waste currently defined in the current operating permit. As such, if PTI is currently accepting a material other than what is listed in that permit, it must be documented and reported to the Health District within thirty days of the date of this permit. 2. PTI-Bothell will submit a request to the Health District for any new or un-permitted waste/feedstock that PTI wishes to import to the site. The request should include the following: <ul style="list-style-type: none"> - Origin of the material and contact for the generator - Volume accepted at PTI - Brief summary of the process used to create the waste - A completed waste designation form, if necessary - Analytical results, if needed 3. Please note changes in section III C.
August 17, 2004	Spent Diatomaceous Earth is approved as a feedstock.
August 17, 2004	Pre-consumer Food Waste is approved as a feedstock.
August 17, 2004	Wax Coated Cardboard and Plain Non-Colored Brown Cardboard
August 17, 2004	Changes to testing language, which is more reflective of requirements, outlined in WAC 173-350-220(4)(a)viii.
July 1, 2005	Parameters listed in WAC 173-350-220 for compost analysis must be met or material will be considered a solid waste.

APPENDIX 2

Before the
SNOHOMISH HEALTH DISTRICT
ENVIRONMENTAL HEALTH HEARING EXAMINER

DECISION AND ORDER

In re: A Step Two appeal from First Section VI¹ of Solid Waste Facility Permit #SW-093 for the period July 1, 2006 -- June 30, 2007

Case No.: SWA 06-01

Appellant: Pacific Topsoils, Inc., represented by Jane Koler, Attorney at Law

Respondent: Snohomish Health District, Environmental Health Division, represented by Steven Uberti, Attorney at Law

Summary of Order: Appeal DENIED

Date of Issuance: May 23, 2007

INTRODUCTION

Pacific Topsoils, Inc. (PTI), 805 80th Street SW, Everett, Washington 98203, filed a timely appeal on October 18, 2006, from the Snohomish Health District's (Health District's) October 11, 2006, denial of PTI's Step One appeal. (Exhibit 1.232 - 227²)

¹ The Permit contains two Section VI's.

² Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision and Order is based upon all documents in the record.

The attachment to Exhibit 1 is a collection of documents arranged with the oldest document on the bottom and the newest on top. Cumulative page index numbers ascend from the bottom to the top. Thus, the first page of a multi-page document has a higher index number than does the last page (since the last page is closer to the bottom of the stack). To make it easier for the reader to find a document, the Examiner will cite multi-page documents within Exhibit 1 as follows: The first index number will be the document's first page; the second, lower, index number will be the document's last page.

(Footnote continued on next page.)

The subject property is located at 8616 219th Street SE, Woodinville, Washington 98072. (Exhibit 1.211)

The Health District's Environmental Health Hearing Examiner (Examiner) held an open record hearing beginning at 10:00 a.m. on Friday, May 4, 2007, in Room 304 at the Health District's offices, 3020 Rucker Avenue, Everett, Washington.³ The hearing was continued to and concluded on May 18, 2007, in the offices of Bell & Ingram, P.S., 1804 Hewitt Avenue, Suite 700, Everett, Washington. The Health District gave notice of the hearing as required by the Snohomish Health District Sanitary Code (SHDSC).⁴ (Exhibit 3.16)

Sworn testimony was presented by:

Janusz Bajsarowicz
Sally Brown
Dave Malins
Peter Christiansen
Robert Pekich
Sandra Forman

Charles Henry
Nonda Stoen
Geoffrey Crofoot
Holly Wescott
Marietta Sharp
Gary Hanada

The following exhibits were entered into the hearing record during the hearing:

- Exhibit 1: Summary and Position Statement of the Snohomish Health District, April 19, 2007, with Attachments 1.1 – 1.233
- Exhibit 2: Background Submission from Snohomish Health District to Hearing Examiner, January 18, 2007, without attachments⁵
- Exhibit 3.1: Letter, November 17, 2006, Hanada to PTL, setting hearing date for January 10, 2007
- Exhibit 3.2: Appellant's Motion for Stay of Appeal and Assignment of hearing Date Which Will Allow for Testing, January 9, 2007, with Declarations of Dave Forman and Charles Henry
- Exhibit 3.3: E-mail, January 16, 2007, Galt to Uberti and Koler, establishing schedule for replies to Motion

³ On November 17, 2006, the Health District noted the hearing for January 10, 2007. (Exhibits 1.233 or 3.1) Procedural motions cancelled that hearing date and resulted in setting the May hearing date. (Exhibits 3.2 – 3.15)

⁴ Written notice of the continuation was not necessary as the date, time, and place of the continuation were announced by the Examiner on the record of the first session.

⁵ All attachments to Exhibit 2 were later incorporated into Exhibit 1. Therefore, their inclusion would be duplicative.

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- Exhibit 3.4: Respondent's Response to Appellants Motion for Stay of Appeal, January 18, 2007
- Exhibit 3.5: Appellant's Reply to Response to Appellant's Motion for Stay of Appeal, January 30, 2007
- Exhibit 3.6: Interlocutory Order Denying Motion for Stay of Appeal, February 2, 2007
- Exhibit 3.7: Letter, February 9, 2007, Uberti to Koler, suggested hearing dates
- Exhibit 3.8: Appellant's Motion to Revise Hearing Examiner's Order and Request to Authorize Discovery, February 15, 2007
- Exhibit 3.9: Letter, February 20, 2007, Uberti to Koler, scheduling
- Exhibit 3.10: Respondent's Response to Appellant's Request to Authorize Discovery, February 26, 2007
- Exhibit 3.11: Appellant's Motion to Schedule Hearing in Early May, February 26, 2007
- Exhibit 3.12: E-mail, February 27, 2007, Galt to Koler and Uberti, extending response/reply deadlines
- Exhibit 3.13: Letter, February 27, 2007, Uberti to Galt, hearing date
- Exhibit 3.14: Appellant's Reply to Response to Appellant's Request to Authorize Discovery, March 2, 2007
- Exhibit 3.15: Interlocutory Order Granting Motion to Revise Hearing Examiner's Order and Denying Request to Authorize Discovery, March 5, 2007
- Exhibit 3.16: Letter, March 7, 2007, Darst to PTI, formal notice of hearing date, time, and place
- Exhibit 4: Appellant's Statement of Additional Authorities, May 3, 2007
- Exhibit 5: Charles Henry's Curriculum Vitae
- Exhibit 6: Charles Henry's PowerPoint presentation (35 slides)
- Exhibit 7: Sally Brown's Curriculum Vitae
- Exhibit 8: Respondent's Response to Appellant's Statement of Additional Authorities, May 11, 2007
- Exhibit 9: John E. Galt's Resume
- Exhibit 10: Excerpt from Concise Explanatory Statement associated with adoption of Chapter 173-350 WAC, consisting of Letter, PTI to Department of Ecology, August 27, 2002
- Exhibit 11: Letter, Puget Sound Air Pollution Control Agency to Syrdal, July 9, 1998

The Examiner intends, and has no knowledge or belief to the contrary, that the requirements, limitations, and conditions imposed by the instant decision are only such as are lawful and within the authority of the Examiner to impose pursuant to District code and resolutions.

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ISSUES ⁶

Did the Health District's application of WAC composting rules deprive PTI of due process? Does the large static pile composting method employed by PTI promote aerobic decomposition? Has the Health District required use of a totally aerobic composting method? Did the Health District act in an arbitrary manner with respect to PTI's Maltby permit? ⁷ Is PTI entitled to damages under RCW 64.40.100? Has the Health District's conduct involved illegal, unauthorized rule making? Does PTI's Maltby composting operation meet applicable standards? ⁸

FINDINGS OF FACT

1. The Health District renewed PTI's Solid Waste Facility (SWF) Permit #SW-093 (the operating permit) for its Maltby composting facility (the Maltby site) on August 28, 2006, for a term from July 1, 2006, to June 30, 2007 (the 2006 Permit). First Section VI of the 2006 Permit reads in full as follows:

A. RCW 70.95.030(4) states that:

- "Composted material" means organic solid waste that has been subjected to controlled aerobic degradation at a solid waste facility in compliance with

⁶ This statement of the issues is a re-phrasing of the relief requested as set forth in Part III of PTI's appeal. (Exhibit 1.228 and 227)

⁷ The Step Two appeal cites "the Local Project Review Statute codified at Chapter 37D RCW" with respect to this issue. (Exhibit 1.228, § II.16) "Chapter 37D RCW" is an incomplete and incorrect RCW citation: An RCW chapter citation consists of two parts separated by a "." [Chapter 1.04 RCW] The Examiner knows of no "Local Project Review Statute" *per se*. Chapter 36.70B RCW, Local Project Review, applies to "local government," defined as "a county, city, or town." [RCW 36.70B.020(2)] The Health District is neither a county, city, nor town. Therefore, by definition, Chapter 36.70B RCW does not apply to the Health District.

⁸ Appellant PTI submitted at the opening hearing session a Statement of Additional Authorities (Exhibit 4) which contains additional challenges and which phrases the issues in a substantially different fashion than does the Appeal itself (Exhibit 1.232 – 227). A Statement of Additional Authorities submitted during the appeal hearing cannot add to or modify the issues as set forth in the statement of appeal. The Examiner declines to consider substantive issues first raised in Appellant's Statement of Additional Authorities.

The Statement of Additional Authorities argues that the statute and rules are unconstitutionally vague as applied. (Exhibit 4, p. 11 *et seq.*) A Hearing Examiner lacks authority to consider state or federal constitutional issues. [*Exendine v. City of Sammamish*, 127 Wn. App. 574, ___ P.2d ___ (2005); *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 995 P.2d 33 (2000)]

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the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material.

- B. WAC 173-350 echoes the state RCW.
- C. Composting processes at the Maltby location do not meet the aforementioned definitions and can not meet the requirements without either change to the process or change to the RCW and subsequently the WAC.
- D. PTI must either seek a legislative remedy to this compliance issue or change the process so that it complies with the current regulation with in [sic] the compliance period.
- E. PTI's compliance period will begin with the issuance of the 2006-2007 operating permit and end when the 2008-2009 operating permit expires on June 30, 2009.

(Exhibit 1.211 - 204, quotation from pp. 205 and 204, bold in original)

- 2. PTI timely filed a Step One appeal with the Health District on September 15, 2006, "appeal[ing] the condition requiring that it change its composting method within the next three years." (Exhibit 1.217 - 212, quote from p. 216) The Health District timely denied PTI's Step One appeal on October 11, 2006. (Exhibit 1.226) This Step Two appeal (challenging the same aspect of the operating permit) timely followed. (Exhibit 1.232 - 227)
- 3. Solid waste management in Washington is shared among the state, counties, cities, and local jurisdictional health departments. [Chapter 70.95 RCW, Solid Waste Management - Reduction and recycling]

The Washington State Legislature passed a number of amendments to Chapter 70.95 RCW during the 1998 Legislative Session. Those amendments included definitions and regulations relating to composting. (Exhibit 1.154) The Washington State Department of Ecology (DOE) is required to "adopt rules establishing minimum functional standards for solid waste handling" [RCW 70.95.060(1)] and to provide technical assistance to jurisdictional health departments [RCW 70.95.260 and .263].

- 4. Prior to February 10, 2003, the minimum functional standards (MFS) were contained in Chapter 173-304 WAC. (See also Chapter 3.4 SHDSC.) DOE updated the MFS in response to the 1998 Legislature's solid waste regulatory changes in a three year rule-making process which culminated with the adoption of Chapter 173-350 WAC, Solid Waste Handling Standards. (Testimony; See also

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Chapter 3.2 SHDSC.) DOE conducted a "substantial public review during the rule making process including scoping workshops, state [Solid Waste Advisory Committee] involvement, support of an external Advisory Committee, direct mailings, focus sheets, advertising and public meetings." (Exhibit 1.152) The Health District advised its permittees and other interested local persons/entities of the DOE rule making process on at least two occasions in 2002. (Exhibits 1.001 and 1.002) The Health District included PTI in those mailings. (Testimony) PTI submitted a comment letter to DOE during the rule making process. PTI's letter stated that "Pacific Topsoils Inc. is a topsoil manufacturer and anticipates a great deal of additional expense to continue composting according to proposed standards in WAC 173-350."⁹ (Exhibit 10, p. 1, ¶ 2) The remainder of PTI's comment letter addressed other aspects of solid waste handling. (Exhibit 10)

Chapter 173-350 WAC became effective February 10, 2003, as to all new facilities. [WAC 1730350(1)] Generally speaking, existing SWFs had to meet the operational requirements of Chapter 173-350 WAC by February 10, 2005, and all performance and design requirements by February 10, 2006. [WAC 173-350(2)(a)] Operators of existing facilities had to initiate a permit modification process with the local jurisdictional health department by July 10, 2004; where modifications were found necessary, the modification application had to include "the date and methods for altering an existing facility to meet" the new rules. [WAC 173-350(2)(c)]

5. The Health District is the jurisdictional health department for the Maltby site. Solid waste handling facilities are required to obtain operating permits from the jurisdictional health department. [RCW 70.95.170 *et seq.*] All SWF permits are automatically reviewed by the DOE which may appeal any SWF permit which it believes does not comply with applicable requirements. [RCW 70.95.185]
6. The definition of "composted material" in Chapter 70.95 RCW was amended by the 1998 Legislature. (Exhibit 1.154) The definition as amended reads:

"Composted material" means organic solid waste that has been subjected to controlled aerobic degradation at a solid waste facility in compliance with the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material.

[RCW 70.95.030(4)] Chapter 173-350 WAC contains two corollary definitions:

⁹ One of PTI's owners testified that PTI did not comment further on the proposed new composting rules because it didn't think the new WAC rules would apply to its composting operation. The text of the 2002 letter indicates otherwise: PTI knew the new rules would apply to it and believed they would cost it money.

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"Composted material" means organic solid waste that has undergone biological degradation and transformation under controlled conditions designed to promote aerobic decomposition at a solid waste facility in compliance with the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material.

"Composting" means the biological degradation and transformation of organic solid waste under controlled conditions designed to promote aerobic decomposition. Natural decay of organic solid waste under uncontrolled conditions is not composting.

[WAC 173-350-100, bold in original] Chapter 173-350 WAC divides compost "feedstocks" into four categories: Types 1 – 4. [WAC 173-350-220] The principal components of each type are: Type 1 = yard and garden wastes; Type 2 = manure and animal bedding; Type 3 = meat and post-consumer food wastes; and Type 4 = municipal and industrial solid wastes and sludges. [WAC 173-350-100]

Subsection 173-350-220(3)(d) WAC sets forth one of the design requirements for composting facilities:

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

7. PTI operated a composting facility in Mill Creek for many years. PTI planned to replace its Mill Creek operation with a similar operation at the Maltby site. The Maltby site had previously been used for other solid waste handling since 1998. (Testimony) PTI has applied for and the Health District has issued renewals for the Maltby site's operating permit (SW-093) annually since 1998. Each renewal application is accompanied by a Plan of Operation. Each SWF operating permit has a one year term (July 1 through June 30).
8. PTI submitted a mid-term Revised Plan of Operation in December, 2002, (2002 Plan) seeking approval to commence composting at the Maltby site. (Exhibit 1.020 – 003) The plan proposed to build two composting pads (2.0 acres and 2.74 acres) and compost only Type 1 feedstocks. The 2002 Plan stated that feedstocks would be placed on the compost pile and not disturbed for six to nine months, that high carbon/nitrogen ratio material would be used to cover the pile, that "anaerobic odors probably exist within the core of the compost pile, [but] they are being trapped and

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decomposed before they can escape.” (Exhibit 1.018) This is referred to as the “large static pile” composting (LSPC) method. Leachate from the pile was proposed to be collected, stored in tanks, and sprayed back over the pile as a way to reduce leachate by evaporation and uptake in the compost materials. (Exhibit 1.018 and testimony)

9. On April 10, 2003, the Health District issued a letter allowing PTI to run a trial project at the Maltby site to mix Type 3 feedstocks (Co-mingled Post Consumer Food Waste or CPCFW) with the Type 1 feedstocks. (Exhibit 1.023 – 022) No evidence exists in the record regarding whether this trial was ever conducted.

PTI’s June 25, 2003, renewal application stated that composting had yet to commence. (Exhibit 1.028 – 024) The 2003 SWF renewal expressly required composting using “the static pile method, as per the approved permit application” with pile height limited to 40 feet “during the initial construction.” (Exhibit 1.036 – 029, quote from § 3.N, p. 1.032)

10. On March 26, 2004, PTI submitted a Revised Plan of Operation (2004 Plan) for the Maltby site. (Exhibit 1.064 – 037) Compost pad sizes were stated as 2.5 acres and 2.0 acres. (Exhibit 1.062) By that time, the leachate collection system was connected to a public sewer line. (Exhibit 1.066) The composting process description in the 2004 Plan is essentially the same as that in the 2002 Plan.

PTI’s July 19, 2004, renewal application stated that no composting had occurred in 2003, but that the 2.5 acre compost pad would be used in 2004. (Exhibit 1.076 – 072) The 2004 SWF renewal again required composting using “the static pile method, as per the approved permit application” with pile height limited to 40 feet “during the initial construction.” (Exhibit 1.085 – 077, quote from § 3.N, p. 1.080)

11. On February 24, 2005, PTI submitted a Revised Plan of Operation (2005 Plan) for the Maltby site. (Exhibit 1.139 – 117) The composting process description in the 2005 Plan is essentially the same as that in the 2002 and 2004 Plans.¹⁰

12. By letter dated January 4, 2006, DOE responded to a Health District inquiry regarding compliance of the large static pile compost methodology with the new provisions of Chapter 173-350 WAC. After reviewing applicable RCW and WAC provisions, DOE opined “that using large static piles as a composting process does not promote aerobic decomposition, and thus does not meet the definition

¹⁰ The hearing record contains neither PTI’s 2005 renewal application nor the Health District’s 2005 renewal SWF permit for the Maltby site.

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of composting.” (Exhibit 1.153, bold in original) DOE suggested that a compliance schedule be negotiated with PTI for the Maltby site. (Exhibit 1.152)

13. PTI submitted a Revised Plan of Operation (2006 Plan) for the Maltby site dated February 7, 2006. (Exhibit 1.179 – 157) The composting process description in the 2006 Plan is essentially the same as that in the 2002, 2004, and 2005 Plans.
14. On March 10, 2006, the Health District forwarded to PTI DOE’s January 4, 2006, letter. The Health District cover letter advised PTI that “[i]n view of the Ecology’s clarified position, the Health District will not consider LSPC a viable composting technology”. (Exhibit 1.182, ¶ 2) The Health District further advised that a schedule for compliance at the Maltby site would have to be negotiated. (Exhibit 1.182)
15. PTI made application for its 2006 renewal on June 12, 2006. The application indicates that no changes to the operation were proposed. The application makes no mention of the LSPC compliance issue. PTI did not propose operational changes because it felt its LSPC process and end product met the standards, change would be expensive, and it was unsure how its end-product under a new process would turn out. (Exhibit 1.188 – 183 and testimony)
16. On July 17, 2006, PTI, the Health District, and DOE met to discuss the LSPC method and the Maltby site. PTI proposed a three month study at the Maltby site to measure various parameters of the compost pile to determine whether the LSPC method promoted aerobic decomposition. (Exhibit 1.190 and 189) During that meeting, one or more representatives of PTI stated that the core of the large static pile was anaerobic.¹¹ DOE recalls a PTI representative stating that not much decomposition occurs in the outer two feet of the pile, that the next 5 – 10 feet of the pile exhibit aerobic decomposition, and that the remainder of the pile is likely anaerobic. (Testimony)
17. DOE further considered the LSPC method after the July 17, 2006, meeting. By E-mail sent August 14, 2006, DOE advised the Health District that DOE “stands by” the January 4, 2006, letter. That correspondence made particular mention of the statements made during the July 17, 2006, meeting:

¹¹ PTI’s counsel tried to suggest that such statements had been speculative when made. The testimony of the two persons who recall having made or likely having made the statement (Bajsarowicz and Henry) does not support that characterization. Whatever they may now think (Henry testified in this hearing that he is certain that a portion of unknown magnitude within the pile’s core is anaerobic); no evidence exists in this hearing record to support such characterization of their statements at the July, 2006, meeting.

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... PTI admits that the center of the pile at Maltby is anaerobic. Since PTI would need to prove their pile was aerobic to be considered in compliance with both the law and the rule, and they have admitted otherwise (unless they want to recant their assertion), there is no reason for them to spend money on a study. There is no other proof that would get past the need to have a controlled aerobic process. The need for a controlled aerobic process is spelled out in the law. Thus they are currently out of compliance with the law.

(Exhibit 1.202, ¶ 4) DOE then suggested that PTI be given three years in which to bring the Maltby facility into compliance. (Exhibit 1.202, ¶ 6)

18. The Health District issued the 2006 operating permit on August 28, 2006. (Exhibit 1.211 – 204) This appeal process then ensued.
19. PTI holds a permit for its Maltby site from the Puget Sound Clean Air Agency (PSCAA), formerly known as the Puget Sound Air Pollution Control Agency (PSAPCA). "PSAPCA has identified the critical work practices and operational controls that [PTI] has used to achieve [satisfactory emission control] and listed them as approval conditions." (Exhibit 11, p. 1, ¶ 3) PTI's PSCAA permit specifies immediate processing of incoming feedstock, no grinding of yard wastes, addition of bulking agents (usually hog fuel) to produce a 30:1 carbon-to-nitrogen ratio, limitation of pile height to 40 feet, leaving the pile unturned for six to nine months, no harvesting before internal temperature drops to 68° F above ambient, and placement of bulking agent as needed to contain odors in the pile. (Exhibit 1.109)
20. PTI receives about 50,000 tons of Type 1 feedstock for composting each year at the Maltby site. PTI has constructed two asphalt composting pads at its Maltby site. A typical large static pile at PTI's Maltby site measures about 150' x 375' and is 40' high when first formed. The piles are formed in three lifts. The basic plan envisions one pile being built while the other pile is being harvested: One pile grows as the other pile shrinks.

Incoming Type 1 feedstock is initially dumped onto the asphalt composting pad and mixed (for the initial lift at least) with hog fuel at an approximate 1:1 ratio to create a mix having a high (not less than 30:1) carbon-to-nitrogen (C/N) ratio. The yard waste is not ground before mixing and placement on the pile, so some goes into the pile as fairly large branches. The mixed feedstock is placed in a row about 20 feet wide and 20 feet high across the narrow end of the pad using a front-end loader. A second row of equal width and height is then placed against the first row, forming the first two rows of the first lift.

At this point, the second lift is started. Incoming feedstock is deposited in a staging area on one end of the first lift. A track hoe, operating on the top of the first lift, moves the material across the first lift surface from the staging area to its position in the second lift. The second lift is placed to a depth of some 10 – 12 feet and a width of about 20 feet on top of the first two rows.

A third lift with a width of about 20 feet and a depth of some 10 – 12 feet is then added across the width of the pad.¹²

At this point, PTI starts the next row of the first lift, then adds another row to the second lift, and finally adds another row to the third lift. The process continues back and forth until enough rows have been placed to cover the entire pad with three lifts to an initial depth of 40 feet.

Operating the track hoe on the lifts compresses the lower lifts, reducing porosity and the ability of air to reach the inner core area. The extent of this effect is not presently known to PTI, the Health District, or DOE.

The pile then remains unmoved for six to nine months. If odor is experienced, the operators identify the area of the pile from which it emanates and cover that area with hog fuel.¹³ PTI used to spray leachate over the pile both to dispose of its leachate and to moisten the pile. Leachate is no longer sprayed over the pile.¹⁴ Water may be sprayed over the pile. PTI does not measure temperature, moisture content, or oxygen concentration in the pile's core area.

When the first pile has been completed, the second pile is started, using the same method. By the time the second pile is started, the beginning end of the first pile is ready for harvesting. The composted material is removed from the pile from top to bottom using a track hoe. The material is then screened. Material which passes through the screen is placed in a windrow where it remains for about two weeks. Material which does not pass through the screen may be returned to the pile for more decomposition or, depending upon its make-up, may be sold as a specialty product. The windrow may be turned occasionally. The end product is tested for compliance with applicable standards; the 2006 Plan does not propose any testing of the pile during the decomposition process.

¹² It is unclear from the testimony whether the third lift is created before the next row of the two lower lifts is added.

¹³ PTT's 2006 Plan states that the entire pile is covered with "High C/N material" – hog fuel. (Exhibit 1.177) This is incorrect according to the testimony at hearing: Hog fuel is added to cover only portions of the pile where odors are escaping.

¹⁴ PTT's 2006 Plan states that leachate is sprayed over the pile. (Exhibit 1.176) This is no longer the case according to testimony at hearing.

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The end product is then sold as "Pacific Garden Mulch" (PGM). PTI sold approximately 109,000 cubic yards of compost in 2006. (Exhibits 1.179 – 157 and 6 and testimony)

21. Compost is formed by an organic decomposition process. Organics can decompose under aerobic (in the presence of air) or anaerobic (in the absence of air) conditions. Organics which decompose anaerobically tend to give off more noxious odors. The rate of decomposition is not constant over time. Some organics decompose rapidly, largely due to bacterial action; the process then slows as other organics begin to decompose, largely through the action of actinomycetes and fungi. (Exhibit 6 and testimony)

Many variables affect the decomposition process. To maintain aerobic decomposition, nutrient balance (the carbon to nitrogen ratio), moisture content of the pile, oxygen level within the pile, porosity of the pile (which directly affects oxygen and moisture content within the pile), and temperature (levels above 55° C must be maintained to kill pathogens) must be controlled. The time required to produce "mature" compost is directly proportional, at least in part, to the amount of energy added to the process in the form of aerating the pile, turning the pile, and/or agitating the pile. (Exhibit 6 and testimony)

22. PTI's composting operations (both at the former Mill Creek and at the current Maltby sites) have had relatively few odor complaints. (Testimony) The Health District's inspectors reported noticeable odor associated with the compost pile(s) during inspections on June 1, 2004, and September 16, 2004. (Exhibits 1.070 and 1.096, respectively); a PSCAA inspector noted odor on a site visit on October 7, 2004 (Exhibit 1.108). PTI had one or two odor complaints at the Maltby site in 2006. (Testimony)

23. PTI hired a consultant (Henry) to help it prove that its process complies with current WAC rules. It was Henry who proposed the study to the Health District and DOE at the July, 2006, meeting. (Testimony)

Henry took nine samples at PTI's Maltby pile during late early May, 2007. Henry found moisture content at one location in the pile to be 58%, within the accepted range for aerobic decomposition. Pile porosity at six inches, three feet, and six feet into the pile was about 45%, typical for a turned pile process using forced aeration. (No information is available for deeper depths into the pile.) Henry found temperatures in the newer portions of the pile to generally be above 55° C while those in the older part of the pile were lower. Oxygen content was not measured.¹⁵ (Exhibit 6 and testimony)

¹⁵ These data results do not constitute a scientifically valid study in the Examiner's opinion. We have no information on study protocols. We do not know where, how, or at what frequency the measurements were taken. No control of the age

(Footnote continued on next page.)

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24. Henry expects that some portion of the pile's core is anaerobic, but he presently has no knowledge of the extent of that area. Anaerobic conditions typically exist from time to time in composting operations, even those which input energy into the process in the form of aeration or turning of the windrow. PTI's finished product (PGM) has an "earthy" smell, which is generally indicative of an aerobic decomposition process. Henry cannot explain how the end product would have an aerobic decomposition smell when some portion of the pile core is likely anaerobic. Henry believes that any odors generated from anaerobic decomposition in the pile's core is largely oxidized by passing through the aerobic "outer shell" of the pile. (Testimony)
25. Any Conclusion deemed to be a Finding of Fact is hereby adopted as such.

PRINCIPLES OF LAW

Authority

Section 1.9.1.7(E) SHDSC authorizes the Examiner to hear and decide appeals from Step One Orders issued by the Health District. The Examiner is empowered "to grant, grant in part, return to the appellant for modification, deny or grant with such conditions, modifications, restrictions as the Examiner finds necessary to comply with the applicable regulations." [SHDSC 1.9.1.7(E)(6)(b)]

Review Criteria

The Examiner is a trier of fact and must decide whether the Health District erred in denying the Appellant's Step One appeal. The requirements and provisions of the SHDSC govern that evaluation.

Standard of Review

The standard of review is the preponderance of the evidence. The Appellant has the burden of proof. [SHDSC 1.10.6(A)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, regulations and resolutions; and the pleadings, positions, and arguments of the parties.

of the materials sampled is evident. Depth of measurement generally only scratches the surface, literally, of the large static pile in operation at PTI's Maltby site: With a pile at least 150 feet wide and 40 feet deep, the core is some 75 feet from the outer sides and 40 feet below the top. The results are interesting, but not scientifically valid nor necessarily representative of average conditions throughout the pile or over the life of the composting process.

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CONCLUSIONS

1. The outcome of this appeal hinges substantially upon interpretation of the four quoted provisions in Finding 6, above. When terms are defined in a statute, they must be used as defined when applying that statute. It matters not that others may have a different definition of a particular term; what matters is the legislature's definition as set forth in the statute or the agency's definition as set forth in the rule.

The legislature's definition of "composted material" in RCW 70.95.030 contains four key elements: To be "composted material" its decomposition must have been controlled, it must have been aerobic, it must have occurred at a solid waste facility, and it must not have been the result of natural, uncontrolled decay.

The corollary WAC definitions add a slight, but important qualifier: The controlled decomposition process must be "designed to promote aerobic decomposition". (Underlining added) This additional qualifier seems to indicate that DOE realized that a totally aerobic composting process is likely not achievable. Based upon the preponderance of the evidence in this hearing record, the Examiner concludes that anaerobic conditions may be encountered in any composting process to some extent and at certain times in the decomposition process. To meet the WAC standard, the composting process must "promote" aerobic decomposition, not merely just have aerobic processes occurring naturally along side anaerobic processes. A process which only oxidizes anaerobic odors without seeking to minimize the anaerobic conditions does not "promote" aerobic decomposition. If a composting process does not "promote" aerobic decomposition, then its product, no matter how it smells or how highly sought after it may be, is not composted material under Chapter 173-350 WAC.

The WAC rule does not prohibit any particular composting process. [WAC 173-350-220(3)(d)] Rather, the WAC prohibits all composting processes which do not promote aerobic decomposition. The WAC is essentially a performance-based rule rather than a prescriptive rule: It tells us the desired outcome without telling us how to achieve it. Each composting operator is free to propose whatever system he/she/it thinks will achieve the desired objective.

Did the Health District's application of WAC composting regulations deprive PTI of due process?

2. The Health District, in crafting First Section VI in PTI's 2006 operating permit, reasonably relied upon statements made by PTI's own representatives. PTI told the Health District and DOE in July, 2006, that the core of its large static pile was anaerobic. The Health District reasonably relied on those statements. Based on those statements, together with the fact that PTI's Plan of Operations had not been materially changed for years even though the WAC rules had changed, the Health District was perfectly justified in concluding that PTI's large static pile method at Maltby did not promote aerobic decomposition.

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Health District regulations allow a person aggrieved by a Health District decision to have a pre-appeal "office conference with the sanitarian who made the decision under dispute." [SHDSC 1.9.1.4] PTI did not avail itself of that opportunity. Health District regulations allow a Step One appellant to have a meeting with the Step One decision-maker before the decision is made "if such meeting has been requested in the appellant's request for STEP ONE Appeal Procedure." [SHDSC 1.9.1.6(C)] PTI did not request such a meeting. PTI cannot now claim that it was deprived of due process. Further, Health District regulations allow for a form of discovery in the Step Two appeal process. [SHDSC 1.9.1.7(E)(3) and (4)] PTI participated in that process.

PTI's counsel argued both that the WAC is not ambiguous (because it doesn't specify a required composting method, PTI may employ LSPC), and also that the lack of specificity in the WAC was a defect that deprived PTI of due process. PTI seems to appreciate the WAC's flexibility on the one hand while decrying it on the other. PTI can't have it both ways. As has been noted, the WAC's composting rules are performance based, not prescriptive.

Does the static pile composting method employed by PTI promote aerobic decomposition?

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

Has the Health District required use of a totally aerobic composting method?

4. First Section VI in the 2006 PTI operating permit does not require a totally aerobic composting process. Rather, it simply states that, based upon the information available to the Health District at the time the permit was written, PTI's large static pile process did not meet the WAC requirement to promote aerobic decomposition. No one representing the Health District or DOE at the hearing stated that composting must be totally aerobic to comply with the statute and rule. What they did say was that the process had to be controlled to promote aerobic and minimize anaerobic conditions.

Did the Health District act in an arbitrary manner with respect to PTI's Maltby permit?

5. The Health District did not act arbitrarily. It acted in reliance upon statements made during the review of PTI's 2006 operating permit application by PTI employees and consultants regarding

ENVIRONMENTAL HEALTH HEARING EXAMINER

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anaerobic conditions within the pile, and the 2006 Plan's statements that feedstocks are placed immediately into the pile and left undisturbed for six to nine months. Given those statements, the Health District's action in imposing First Section VI was fully justifiable.

Is PTI entitled to damages under RCW 64.40.100?

6. PTI is not entitled to damages as it has not prevailed in this appeal.

Has the Health District's conduct involved illegal, unauthorized rule making?

7. The Health District has simply said Bring your process into compliance with the WAC requirement to employ a composting process which promotes aerobic decomposition. It is not trying to make a new rule; it is trying to enforce the WAC rule (with substantial leniency as WAC 173-350-030(2)(a)(ii) required PTI to be in compliance by February 10, 2006).

Does PTI's Maltby composting operation meet applicable standards?

8. Like the question discussed in Conclusion 3, above, this question simply cannot be answered from the evidence in the record. Yes, areas within PTI's large static pile are aerobic; but, areas within the pile are also anaerobic. The proportion of one to the other, both areally and temporally, is unknown. Whether leaving the pile undisturbed for six to nine months promotes aerobic decomposition in a controlled fashion simply cannot be discerned from the sparse technical evidence in the record. It may be that the controls PTI employs during the initial mixing and pile formation is sufficient to promote aerobic decomposition in a controlled environment; or it may not. It may be that wetting down dry feedstock materials during initial pile construction is sufficient to promote aerobic decomposition in a controlled environment; or it may not. A properly vetted study over a sufficient time period is necessary before any defensible conclusion can be reached on this issue.

It must be noted, however, that the Plan of Operation does not outline any regular schedule to test critical pile parameters nor operational steps that would be taken should the results of such tests be outside acceptable limits. Thus, the 2006 Plan seems to rely principally on initial pile formation as its control mechanism. A proper study should be able to determine whether greater operator intervention is need to promote controlled aerobic decomposition within the pile.

9. PTI suggests that because the state wants to encourage recycling, and its compost activity keeps large quantities of yard wastes and other Type I feedstocks out of the waste stream, and because its PGM product is sought after by persons needing mulch, it should be allowed to make the compost in any manner it wants that keeps its costs down. This suggestion is not worthy of significant response. Yes, the state does encourage recycling. But, the state also has set standards, objectives, and parameters to be met in recycling. The provisions regarding composting in Chapter 173-350 WAC are among those standards and parameters. Composting must meet those standards.

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10. Given the prior statements of PTI personnel and the paucity of available evidence, the Health District is perfectly justified in telling PTI that it must prove that its LSPC method meets the WAC objectives. PTI is the one seeking approval of a technique which on its surface appears to have little control after the pile is initially built and which has an anaerobic core (perhaps throughout the entire composting process). PTI's counsel suggested in argument that a proper parallel would be traffic or code enforcement, where the agency must first present at least a *prima facie* case of code violation. That analogy is inappropriate. A more appropriate analogy would be provisions in building codes which require the proponent to prove that some alternative technology will work as well as the system called for by the code.
11. Having concluded that the Health District's placement of First Section VI in PTI's 2006 operating permit was justified by what the Health District knew at the time, the question remains: What, if anything, should now be done to the 2006 operating permit given the uncertainty underlying the significance of PTI's statements about the pile's anaerobic core? First Section VI has had no discernible effect upon PTI's operations during the past year. First Section VI did not shut down PTI's composting operation. The evidence and testimony in this hearing record indicate that it has been in full operation during the year.

The time is fast approaching when PTI will have to file application to renew its operating permit for the next year. (The current permit expires in a little over 30 days.) There is, therefore, little sense in even considering any change to the 2006 permit.

Had this appeal been concluded much earlier in the term of the permit, the situation would have been different. If the evidence in the record were essentially the same as exists in the present hearing record, and if PTI had proposed through the hearing process to undertake a thorough study of its large scale static pile composting process at its Maltby facility, and had it been willing to have that study proposal vetted and overseen by both the Health District and DOE, then the Examiner would have been inclined to modify First Section VI's paragraphs C and D to require conduct of the study during the remainder of the current permit year, with the study ending sufficiently before the end of the permit term to allow the Health District and DOE to evaluate its results and determine whether PTI had shown that its process promotes aerobic decomposition in a controlled fashion. The results of such a study would have been invaluable to the Health District as it reviewed PTI's 2007 renewal application.

12. Any Finding of Fact deemed to be a Conclusion is hereby adopted as such.

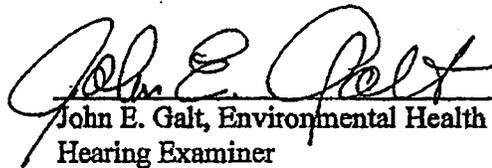
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ORDER

NOW, THEREFORE, on the basis of the foregoing Findings of Fact and Conclusions, the Examiner enters the following **ORDER**:

The Step Two appeal of Pacific Topsoils, Inc. from First Section VI of 2006-2007 operating permit SW-093 is **DENIED**.

Decision and Order issued May 23, 2007.


John E. Galt, Environmental Health
Hearing Examiner

NOTICE

The above Decision and Order of the Examiner is final. The Appellant or the Health Officer may appeal this Decision and Order to the Board of Health within fifteen (15) calendar days of the date of its issuance. An appeal by the Appellant must be filed in writing with the Administration Office of the Health District (Attention: Health Officer), must specify why error is assigned to the Decision and Order, and must be accompanied by a filing fee as established by the Board of Health's fee schedule; an appeal by the Health Officer must be filed in writing with the Chairman (or Vice-Chairman in absence of the Chairman) of the Board of Health and must specify how the Examiner erred in issuing the Decision and Order. An appeal to the Board of Health stays the effect of this Decision and Order. [SHDSC 1.9.1.7(F)] See SHDSC 1.9.1.7(F) for complete appeal instructions.

APPENDIX 3

FILED

FEB 26 2009

SCHWAB, KRASKI
COURT REPORTERS
SNOHOMISH COUNTY WA

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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

PACIFIC TOPSOILS INC., Owner of Maltby
Composting Operation,

Plaintiff,

vs.

SNOHOMISH HEALTH DISTRICT, a
Washington Municipal Corporation,

Defendant.

No. 07-2-06223-6
(Consolidated)
07-2-05026-2

ORDER ON WRIT OF REVIEW
AND COMPLIANCE WITH SOLID
WASTE OPERATING PERMIT

THIS MATTER came before the Court on a Writ of Review appeal pursuant to RCW 7.16.010 through RCW 7.16.140 challenging a decision of the Hearing Examiner dated May 23, 2007 affirming permit Section VI which required Pacific Topsoils, Inc.'s (PTI) to "either seek a legislative remedy, change the process so that it complies with current regulations, or otherwise demonstrate compliance, by June 30, 2009" (from PTI Solid Waste Operating Permit for the period of July 1, 2006 through June 30, 2007).

A hearing on the matter was conducted on November 6, 2008. The Court had before it the certified administrative record. Before the hearing, PTI submitted its "Appellant's Memorandum in Support of Appeal from the Hearing Examiner's Decision

1 and Order,” SHD submitted “Snohomish Health District’s Reply Memorandum,” and
2 the Court permitted PTI to submit further “Pacific Topsoil Reply Brief.” PTI appeared
3 through its counsel of record, Jane Koler of Law Office of Jane Ryan Koler, PLLC; and
4 SHD appeared through its counsel of record, Steven D. Uberti of Bell & Ingram, P.S.

5 On December 18, 2008 the Court issued its written “Ruling on Writ of Review”.

6 **Pursuant thereto:**

7 1. The Court stated “At issue is Washington Administrative Code (WAC) 173-350-
8 220(3)(d) which regulates composting and requires that a composting operation
9 ‘promote aerobic decomposition’ as opposed to anaerobic decomposition.”

10 2. Relative to the Hearing Examiner’s May 23, 2007 decision, and more
11 specifically Findings of Facts one (1) through twenty-four (24), the Court did not
12 identify by specific reference thereto factual determinations that were not
13 supported by substantial evidence. However, since the Hearing Examiner’s
14 decision entitled “Conclusions” contained “mixed statements of fact and law,”
15 and this court reviewed those conclusions in detail by reference, in reversing his
16 decision/conclusions, this court also addresses the related facts in his “Findings
17 of Fact” section. When the Hearing Examiner’s factual findings, wherever they
18 may occur, are inconsistent with this court’s ruling, this court finds that those
19 facts were not supported by substantial evidence in the record.

20 3. The Court did state Factual Background as follows:

21 PTI has been in business operating from various sites for the last
22 27 years. PTI operates under a permit from the Snohomish
23 Health District (SHD) and the Puget Sound Clean Air Authority
24

1 (PSCAA).¹ After a period of rulemaking the Department of
2 Ecology (DOE) authorized new WACs in this area of
3 commerce. This led, in 2006, to a new condition in the SHD
4 permit requiring PTI to stop composting or revamp its process.
5 There were many sessions of negotiations and attempts at
6 arriving at a compromise but none were successful. Much is
7 made of a comment by some PTI officials (not made under oath
8 or with the advice of counsel) that the center of their compost
9 pile was “anaerobic.” This was treated as an admission against
10 interest and DOE directed SHD to give PTI three choices: 1)
11 legislative change, 2) change their operation process, or 3)
12 otherwise demonstrate compliance. PTI appealed.
13
14

15 ¹ The PSCAA permit (HE Exhibit 11) contains very strict process controls. It states in part: “6.
16 All fresh incoming yard waste received by the facility are to be immediately assessed. Bulking
17 materials shall be mixed with the yard waste until a carbon-to-nitrate ration of 30:1 is
18 achieved...7. Static piles shall be limited to 40 feet in height during initial construction... 8.
19 Each compost pile shall remain in place for at least six months undisturbed. Reclamation shall
20 only occur after six months, and only when both the internal temperature of the compost pile
21 drops to 20 degrees C (68 degrees F) above ambient, and a Soliva Jar Test shows the compost
22 has decomposed to a finished state... 9. Should odor be detected emitting from a static
23 compost pile, the area of the emissions shall be identified and the pile sealed with a bulking
24 agent. If a section of the static pile becomes anaerobic, a layer of hog fuel at least two feet in
25 thickness shall be placed on that section to act as a bio-filter. **If the pile continues to emit
26 odors despite these efforts, the section of the pile producing the odors shall be removed
27 and taken to a solid waste disposal facility , as directed by the Snohomish County Solid
Waste Management Division, for final disposal at a solid waste land fill.”** It is this court’s
decision that the Hearing Examiner (HE) completely ignored the terms of this permit which
implements strict process controls on the site in order to maintain aerobic decomposition and
orders the elimination of any anaerobic material. The HE’s Findings of Fact are defective and
incomplete by not including this material. The evidence in the record shows that PTI has not
been in violation of this permit, which means to this court, given the terms of the permit, that
they have maintained an aerobic decomposition process.

1 4. The Court recognized that the Hearing Examiner (HE) made certain
2 conclusions listed in his written opinion as numbers one (1) through
3 twelve (12), of which the Court finds the following conclusions to be in
4 error and the basis as follows:

5 2. **Due Process** – HE found that SHD did not deprive PTI of due
6 process. This Court disagrees. SHD clearly applied an
7 unpublished standard to PTI operations and this without any
8 scientific support or analysis. The HE claims that SHD and DOE
9 can rely on the un-sworn statement of two company principles.
10 This may be so, but this court finds that HE cannot rely on such a
11 statement in the face of sworn expert testimony to the contrary.
12 In this conclusion the HE interpreted the WAC to be a
13 ‘performance based’ regulation and not prescriptive. Then he
14 applies a prescriptive based analysis to PTI operations. First, the
15 conclusion of the HE is nonsense. But even if he were correct he
16 can’t have it both ways. If the WAC is performance based then
17 PTI has the complete right to have its operation evaluated on its
18 end product and not the process involved. If it is ‘process based’
19 then PTI has the right to have its experts heard on its process and
20 rebutted by experts from the other side. This did not happen in
21 this case because no expert scientific testimony was provided by
22 DOE or SHD.

23 3. **Does the PTI process promote aerobic decomposition?** The
24 HE stated “this question cannot be answered in the affirmative or

1 the negative.” This court finds that there is substantial evidence
2 in the record before the HE to the contrary and that he basically
3 ignored it. At the hearing PTI met its burden of proof to show
4 compliance with the permit condition. It offered the expert
5 testimony of two scientists: Dr. Henry, and Dr. Brown whose
6 testimony, while not always artful made a clear prima facie case
7 that the PTI compost pile promoted aerobic decomposition and
8 produced a wholesome product. Dr. Henry testified directly
9 about, odor, pile oxygen, nutrient balance, pile moisture, pile
10 temperature (including the preparation of a chart of field
11 measurements), retention time and nature of the final product
12 (“soil smelling”).² He testified to the existence of actinomycetes
13 – microscopic organisms that can only live in an aerobic
14 environment. Particularly with regard to temperature he found
15 temperatures in excess of 70 degrees F in his pile tests. Dr.
16 Brown supported this conclusion that these temperatures are
17 indicative of aerobic processes. In fact, the PSCAA permit
18 regulates the process in its permits terms by regulating pile
19 temperature. At this point the burden of production shifts to DOE
20 and SHD to show that this science is wrong or inapplicable. This

21 _____
22 ² WAC 173-350-220(3)(D) states in part that: “Composting facilities shall be designed ...[to]
23 promote an aerobic composting process...This requirement is meant to ensure that compost
24 facility designers take into account porosity, nutrient balance, pile oxygen, pile moisture, pile
25 temperature and retention time of composting when designing a facility.” Dr. Henry’s
26 testimony addressed each element of the WAC. Respondents did not supply any testimony
27 which explained how PTI’s operation failed to address these features.

1 never happened in any respect. Respondent did not present any
2 expert scientific testimony – including the factually unsupported
3 opinion of Ms. Wescott.

4 **4. SHD does not require a totally aerobic composting method.**

5 Here again the HE makes a finding and then ignores it. The
6 analysis of the HE suggests that PTI's method must be totally
7 aerobic to be compliant. His analysis is contrary to his finding.

8 **5. Did the Health District Act in an arbitrary manner.** The HE

9 says no. But this court says yes since it did not base its actions or
10 decisions on the science involved in the WAC but on unscientific
11 statements of the owners.

12 **6. Damages to PTI.** The HE found no damages. This decision
13 makes this an open question.

14 **7. Illegal Rule Making by SHD.** The HE says no but this court

15 indicates that along with DOE an unpublished rule was applied to
16 PTI – the “turning of the pile” rule. This was offered in the
17 testimony of Mr. Christiansen (“moving the pile” “that sort of
18 thing”). This testimony is not only unscientific it ignores the
19 process used by PTI. PTI does not have a uniform pile that can
20 be “moved” or “turned”. The pile is actually constructed in a
21 series of cells and then deconstructed by removing parts of the
22 pile cell by cell. This is one reason why the “anaerobic core”
23
24

1 argument fails.³ Each cell is at a different age and decomposes at
2 a different rate than its neighbor, otherwise they could not break a
3 pile down in a stepwise fashion.⁴

4 **8. Does the Maltby Operation Meet WAC?** The HE says no
5 based on his erroneous analysis, but this court holds that there is
6 substantial un-rebutted evidence in the record to the contrary.
7 Since this evidence has not been rebutted this court holds that PTI
8 has demonstrated compliance with the WACS.

9 **9. This is not a proper finding.** It is a statement of opinion.

10 **10. This is not a proper finding.** PTI did prove in this hearing that
11 it complied with the WACs and the HE ignores it with this
12 statement of opinion.

13 **11. This is not a proper finding.** The effect of the permit condition
14 is not moot or undamaging or to be ignored by PTI. In fact, DOE
15 suggested in the email letter from Mr. Crofoot that an option to
16 respond to the condition was to demonstrate compliance.
17 Counsel for SHD indicated that the appeal process is a method to

18 ³ Also the HE's analysis with regard to the need for further scientific study of the pile fails for
19 the same reason. This conclusion assumes some part of the monolithic pile – when the
20 testimony is that it is constructed and deconstructed in cells that are ready at different times. In
21 this scenario the “spot testing” that Dr. Henry performed is highly relevant because that is
22 precisely how you would test any given cell. Each cell has its own core and its own function.
The HE concluded that Dr. Henry's temperature tests were insufficient for a larger mass but his
conclusion is based on an erroneous assumption for which there is no scientific evidence
existing in the record.

23 ⁴ Here again we must look to the PSCAA permit. The controls identified in this permit clearly
24 acknowledge the cellular structure of the pile when it orders “the section of the pile producing
the odors” to be removed. This would not be possible in a monolithic pile and the permit writer
clearly understood this when drafting this provision.

1 demonstrate compliance. This court finds that PTI has
2 demonstrated compliance.

3 5. The Court stated “this Writ is presented to the court via RCW 7.16.010 et
4 seq. Under this statute this court reviews the issues of law de novo and
5 factual findings by determining if they were supported by substantial
6 evidence. In the above recap (paragraph 4) of the HE’s conclusions this
7 court finds that none of his determination were supported by substantial
8 evidence. PTI met its burden of proof.”⁵

9 6. The Court stated, “the “burden of proof” as used by courts and
10 commentators may refer to any one of, or a combination of, the burden of
11 pleading, the burden of producing evidence, and the burden of
12 persuasion. The burden of pleading and producing evidence are usually
13 encompassed within the terms the “burden of production”. This burden
14 is to “produc[e] evidence, satisfactory to the judge, or a particular fact in
15 issue”. Edward M. Clearly McCormick on Evidence § 336, at 947 (3d
16 ed. 1984). “The burden of producing evidence on an issue means the
17 liability to an adverse ruling (generally a finding or directed verdict) if
18 evidence on the issue has not been produced.” *McCormick on Evidence*,
19 at 947. The burden of persuasion is “the burden of persuading the tier of
20 fact that the alleged fact is true.” *McCormick on Evidence*, at 947. It
21 comes into play “only if the parties have sustained their burdens of
22

23 ⁵ PTI argues in its briefing that SHD and DOE had the burden of proof. PTI may be correct in
24 this assertion. However, even if PTI is wrong and they do have the burden of proof they still
prevail based on the shifting of the burden of production rule.

1 producing evidence and only when all of the evidence has been
2 introduced”. *McCormick on Evidence*, at 947.” *Federal Signal*
3 *Corporation v. Safety Factors, Inc.*, 125 Wn.2d 413, 886 P.2d 172
4 (1994).

5 This is where the problem resides in this case. The HE ignored
6 the burden of production and decided the case solely on the burden of
7 persuasion. This is error because he is not allowed to balance and
8 weigh that evidence meets the “preponderance” standard until each
9 side has met its burden of production. Once PTI offered expert
10 scientific testimony to support its compost process the burden shifted
11 to SHD/DOE to respond with scientific testimony – not opinion and
12 surely not reliance on un-sworn, non-scientific statement. In terms of
13 balance there was nothing to balance because the scales were never
14 tipped.

15 This court agrees with PTI that the HE simply ignored valid
16 scientific proof. PTI met its burden of proof and once this was done
17 the burden of production shifted to DOE/SHD and it did not meet its
18 burden of proof. The HE’s decision is accordingly, arbitrary and
19 capricious and is reversed.”

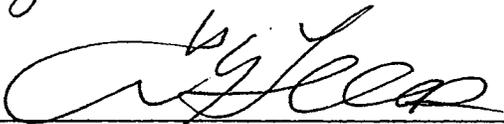
20 **NOW THEREFORE, IT IS HEREBY ORDERED THAT:**

- 21 1. In his decision the Hearing Examiner ignored valid scientific proof.
22 As such, this court finds that none of his conclusions of law were
23 supported by substantial evidence. Pacific Topsoils, Inc. met its
24

1 proof burden. The Hearing Examiner's decision is accordingly,
2 arbitrary and capricious and is reversed.

- 3
- 4 2. Pacific Topsoils, Inc. has proven that its compost process is in
5 compliance with Section VI of the PTI Solid Waste Operating Permit
6 contained in the permit issued during the period of July 1, 2006
7 through June 30, 2007;
- 8 3. Pacific Topsoils, Inc. has proven that its compost process is in
9 compliance with Washington Administrative Code (WAC) 173-350-
10 220(3)(d) which regulates composting and requires that a composting
11 operation 'promote aerobic decomposition'.
- 12 4. The State Department of Ecology and/or Snohomish Health District
13 violated Pacific Topsoils, Inc.'s right to due process by not giving the
14 firm notice that it would apply, in regulating its operations, an
15 unpublished standard, which was lacking in any scientific support or
16 analysis.
- 17 5. The State Department of Ecology and/or Snohomish Health District
18 shall cease and desist any and all enforcement actions under the
19 provisions of Section VI of the PTI Solid Waste Operating Permit
20 and (WAC) 173-350-220(3)(d) based on this court's finding of
21 compliance.

22 DATED this 26th day of February, 2009.

23 
24 _____
JUDGE ERIC Z. LUCAS

APPENDIX 4



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3190 160th Avenue SE • Bellevue, Washington 98008-5452

January 4, 2006

RECEIVED
JAN 09 2006

Snohomish Health District
Environmental Health

Gary Hanada
Environmental Health Supervisor
Snohomish Health District
3020 Rucker Ave. Suite 104
Everett, WA 98201-3900

Dear Mr. Hanada,

RE: Ecology Position on Large Static Pile Composting

The Snohomish Health District (SHD) has asked the Department of Ecology (Ecology), Solid Waste and Financial Assistance Program, for clarification regarding composting in very large static piles. Specifically, SHD has asked if the large static pile method of composting meets the definition of "composting" under WAC Chapter 173-350, Solid Waste Handling Standards. In addition, SHD has asked whether or not Ecology considers large static pile composting to be an aerobic process. The request for clarification was made specifically with respect to Pacific Topsoils, Inc. (PTI), their Maltby composting facility and a potential proposal for a composting facility on Smith Island in Everett, WA. Pacific Topsoils, Inc. currently uses the large static pile method for composting at their Maltby site, and is expected to propose the same composting methodology for their site on Smith Island.

Statutory Authority

RCW 70.95.030 (4) states that:

"Composted material" means organic solid waste that has been subjected to **controlled aerobic degradation** at a solid waste facility in compliance with the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material.

This is the revised definition that passed out of the 1998 Legislative Session. This session also produced Substitute House Bill 2960 which directed the Department of Ecology to look at three issues of the solid waste permit system, including composting, and report back to the Legislature by December 1, 1998. Ecology completed the study and recommended developing compost facility standards as part of the MFS Revisions process.



RECEIVED

JAN 09 2006

Snohomish
Health District

WAC 173-350-100 defines composting as:

“...the biological degradation and transformation of organic solid waste under controlled conditions designed to promote aerobic decomposition. Natural decay of organic solid waste under uncontrolled conditions is not composting.”

The current standards for compost facilities are based largely on existing guidance and stakeholder input. The current 350 definition underwent substantial public review during the rule making process including scoping workshops, state SWAC involvement, support of an external Advisory Committee, direct mailings, focus sheets, advertising and public meetings. No one commented on making changes to defining composting as a “controlled aerobic process”.

Ecology Response

Ecology’s opinion is that using large static piles as a composting process does **not** promote aerobic decomposition, and thus does not meet the definition of composting. Ecology began to clarify this position in a letter to the Tacoma-Pierce County Health Department in April 1999 (letter from Laurie Davies to Glenn Rollins). In that letter, Ecology states “Composting in large static piles is not generally considered an aerobic composting system.” (The correspondence was in reference to a permit application for a composting operation at Wilcox Farm, under the business name South Puget Sound Compost Company.) The adoption of the 350 rule solidifies this position. WAC 350-220(3)(d) states that:

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

Depending on the operation, large static piles are often built by driving on them. This is a standard operational procedure that is used at the PTI Maltby composting facility. This action results in compaction, which removes free air space and destroys porosity in the pile. Given that composting is a dynamic process, Ecology does not require specific measurement of oxygen levels in a pile in order to indicate aerobic activity. Facilities should be operated and maintained with technologies that allow for adjustments to the conditions that support microbial growth. This means the operator must have the ability to adjust the process parameters that lead to aerobic conditions in the piles. Large static piles do not allow for adjustments in the composting process. Piling materials in a large static pile and allowing them to compost without any manipulation is essentially “natural

decay of organic solid waste under uncontrolled conditions." Thus, this operational composting process does not meet the current definition in 350.

Summary

Ecology's opinion is that "large static pile technology" is not composting per state regulations, and the PTI Smith Island site should not be permitted as a composting facility using this technology. Further, the facility located in Maltby is also not composting per state regulations. PTI should be put under a compliance schedule at their Maltby site to bring their operation into conformance with the compost requirements in the - 220 section of the rule. The deadline for facilities to come into compliance with the 350 rule is February 10, 2006. It seems reasonable that since no regulatory authority has taken action to force compliance at Maltby (and we previously allowed approval of this operation), a compliance schedule be negotiated with PTI on changing over the Maltby site to make it 350 compliant.

If PTI disagrees with this assertion, it is incumbent upon them to prove to us otherwise. Any discussion by PTI on this issue needs to be founded in science and be able to stand up to peer review.

If you have further questions regarding this issue, please contact me at the phone number listed below.

Sincerely,



Peter Christiansen
Section Manager
Solid Waste and Financial Assistance Program
Northwest Regional Office

APPENDIX 5

July 17. 2006

PTI Composting Meeting Agenda Maltby Facility

Material Processing – Compost 53 tons/year Type 1 Feedstock

Successful System:

- No odor issues
- Great final product
- Very energy efficient

Other composting systems require 4 times the energy consumption to compost, and still have odor problems, some result with large stockpiles of material.

Pursuing informational form to insure odor issues end at the facility adjacent to us.

Technology companies sold the equipment/process for new composting methods. Money spent on the system doesn't justify its effectiveness.

Any research done by regulators on the effectiveness of low-maintenance systems?

Our project – composting study on our method.

We request approval Statewide. PTI process incorporated into legislation.

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APPENDIX 6

Geoffrey Crofoot

From: Christiansen, Peter (ECY) [PCHR461@ECY.WA.GOV]
 Sent: Monday, August 14, 2006 5:36 PM
 To: Geoffrey Crofoot
 Cc: Wescott, Holly; Sharp, Marietta (ECY); Maurer, Dawn (ECY)
 Subject: PTI

I am following up on our conversation this afternoon regarding the compost operations at Pacific Topsoils (PTI) at Maltby.

After discussions internally with key personnel in the program, Ecology stands by my letter addressed to Gary Hanada on January 4, 2006.

In my letter dated January 4th, I stated that we did not believe the pile to be aerobic, and it was incumbent upon PTI to prove their pile/process was aerobic. We proposed this because we expected PTI would want to argue they met state law the legislature passed as an amendment to RCW 70-95 on 1998:

RCW 70.95.030 (4):

"Composted material" means organic solid waste that has been subjected to controlled aerobic degradation at a solid waste facility in compliance with the requirements of this chapter. Natural decay of organic solid waste under uncontrolled conditions does not result in composted material.

Our rule (WAC 173-350) echoes this. In our meeting with Janusz Bajsarowicz on July 17th here at the NWRO, we heard from Janusz that PTI admits that the center of the pile at Maltby is anaerobic. Since PTI would need to prove their pile was aerobic to be considered in compliance with both the law and the rule, and they have admitted otherwise (unless they want to recant their assertion), there is no reason for them to spend money on a study. There is no other proof that would get past the need to have a controlled aerobic process. The need for a controlled aerobic process is spelled out in the law. Thus they are currently out of compliance with the law.

It is important to emphasize that it is not just Ecology's rule (WAC 173-350) that requires controlled aerobic degradation. Our rule is built on language provided by the State legislature (RCW). Thus, the actual law would need to be changed by the legislature for us to consider a composting process other than controlled aerobic processing to be in compliance.

Because PTI has been operating under what they considered to be a valid permit at PTI since 1998, and they could argue that they had no reason to expect otherwise when 350 passed into rule, it would be fair to give them an adequate amount of time to come into compliance. Since the 350 rule allowed facilities 3 years to meet all performance and design standards, you could use this as a basis for developing a compliance schedule with them. This will allow them time to either come into compliance with the regulations or seek a legislative remedy. The legislative remedy would have to first go through the state legislature who would need to change the definition to include the process that PTI follows. If they were successful at getting the legislative change, Ecology would then, and only then be able to institute a rule change. We cannot institute a rule change that is not supported by state legislation.

There may be other reasons for PTI to continue to study their process. If they are going to propose a change in the legislation as Janusz mentioned at our meeting, they would most likely need to have scientific proof that their method of processing yard and garden debris meet the same standards as an aerobic pile. I cannot counsel you on how the legislative process works, as that is not my expertise. However, I can state confidently that the legislative change would need to be initiated directly by PTI to the legislature through their representative. Ecology is reluctant to question the legislature in the development of the law.

8/15/2006

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