

64395-9

64395-9
ORIGINAL

THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

No. 64395-9-I

SKAGIT COUNTY,

Appellant/Cross-Respondent,

v.

SCOTT WALDAL, SKAGIT HILL RECYCLING, INC., and AVIS,
LLC,

Respondents/Cross-Appellants.

REPLY BRIEF OF CROSS-APPELLANTS

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I. INTRODUCTION

Cross-Appellants Scott Waldal, Skagit Hill Recycling, Inc., and AVIS, LLC (hereinafter “Skagit Hill Recycling”) submit the following reply to the Appellants’ Response and Reply filed by Skagit County (“County’s Response”).

In this cross-appeal, the issue before the Court is whether the superior court erred in granting summary judgment and a permanent injunction prohibiting solid waste handling activities on Skagit Hill Recycling’s property. Central to the superior court’s injunction was the court’s determination that Skagit Hill Recycling did not possess a solid waste permit – because the County had refused to renew Skagit Hill Recycling’s inert waste landfill permit in 2008. In its summary judgment ruling, the superior court held that some type of solid waste permit was necessary in order for Skagit Hill Recycling to engage in solid waste handling activity. CP 3103-3104. The superior court subsequently modified its injunction to require either a solid waste permit or a “determination by an agency or court with jurisdiction of exemption from solid waste permit requirements.” CP 4251.

The superior court erred as a matter of law because (a) a solid waste permit exemption does not require a separate solid waste permit;¹

¹ Nor is there any requirement for a formal “determination of exemption” for the solid waste permit exemptions applicable to Skagit Hill Recycling’s activity. *See* Corrected Brief of Respondents/Cross-Appellants, Appendices 8 through 10.

and (b) even if a permit were required in order to engage in permit-exempt activity, Skagit Hill Recycling continued to hold such a permit because state law and regulations provide for a stay during an appeal of a local government's decision to deny renewal of a permit for an operating recycling facility that receives waste from more than one city or county. RCW 70.95.210; WAC 173-350-710(6)(c).

In response to Skagit Hill Recycling's Brief of Respondents/Cross-Appellants, Skagit County now asserts that Skagit Hill Recycling did not present its argument regarding the statutory stay to the superior court. That assertion is false. The County also argues that the statutory stay does not apply here. That argument is without merit. Finally, the County argues that other grounds support the superior court's summary judgment and injunction – completely disregarding both the standard of review and the evidence in the record. As a matter of law, the superior court's summary judgment and injunction – predicated entirely on the absence of a solid waste permit – is in error and must be reversed.

II. ARGUMENT

A. RCW 70.95.210 Was Argued to the Superior Court.

Skagit County asserts that Skagit Hill Recycling's argument regarding RCW 70.95.210 and WAC 173-350-710(6)(c)² “was not

² The regulation is virtually identical to the statutory provision. See Corrected Brief of Respondents/Cross-Appellants, Appendices 6 and 7. Citations hereinafter to RCW 70.95.210 are intended to refer to the equivalent regulatory provisions of WAC 173-350-710(6)(c) as well as to the statute.

presented to the superior court” and should not be considered by this Court. County’s Response at 20-21. That is not true.

After the superior court announced its decision to grant summary judgment and an injunction on the ground that the defendants were operating without any permit, Skagit Hill Recycling filed a motion for reconsideration. CP 2430-2433; CP 2561-2616; CP 2434-2560. Skagit Hill Recycling specifically pointed out that under RCW 70.95.210, the County’s denial of the permit renewal for Skagit Hill Recycling is not effective until the completion of the appeal process pending before the Pollution Control Hearings Board. CP 2574-2575. Defendants’ Memorandum in Support of Motion for Reconsideration (CP 2561-2576) is attached hereto as Appendix 1. The County responded to Skagit Hill Recycling’s motion for reconsideration.³ CP 2842-2863. The County’s assertion here that “[t]his argument was not presented to the superior court” (County’s Response at 20-21) is utterly false.

B. RCW 70.95.210 Applies Here.

Skagit County argues that Skagit Hill Recycling “does not qualify for the statutory stay.” County’s Response at 21-26. The County is wrong.

³ The County also filed a motion for reconsideration – of the superior court’s denial of the County’s motion for summary judgment on its zoning and land use claims. CP 2641-2657. On November 18, 2009, the superior court denied both motions for reconsideration, and entered the Order Granting and Denying Summary Judgment and Injunctive Relief. CP 3098-3106.

The County's first assertion – that Skagit Hill Recycling did not operate a “waste recycling facility” – is contradicted by the very decision on which the County relies: the County Health Officer's decision to deny renewal of Skagit Hill Recycling's landfill permit. The Health Officer found that a permit is required for Skagit Hill Recycling's recycling of demolition waste, that Skagit Hill Recycling had refused to obtain such a permit because it contended that its activity was permit-exempt, and that therefore it was appropriate to deny renewal of Skagit Hill Recycling's landfill permit. CP 736-739. At its core, the solid waste permitting dispute between these parties involves Skagit Hill Recycling's acceptance of construction and demolition waste for recycling. The County contends that a permit is required for this activity; Skagit Hill Recycling contends that it is permit-exempt. *See* CP 95-128; CP 1783-86; CP 1789-97. The County's contention here that Skagit Hill Recycling is not an “operating waste recycling facility” (County's Response at 22-23) is belied by the record.

The County's second argument – that the statutory stay under RCW 70.95.210 applies only to “recycling permits” – is incorrect as a matter of law. The statute applies to “a permit renewal” – any permit renewal – for “an operating waste recycling facility” that receives waste from more than one city or county. RCW 70.95.210. The County reads the statute as if it provides: “If the jurisdictional health department denies a *recycling* permit renewal or suspends a *recycling* permit for a facility that receives waste from more than one city or county, . . .” The County's

interpretation is incorrect; RCW 70.95.210 does not limit the applicability of the stay to “recycling” permits. If the Legislature had intended such a result, it would have said so. A court “is required to assume the Legislature meant exactly what it said and apply the statute as written.” *Homestreet, Inc. v. State Dept. of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009). A court may not add language to an unambiguous statute even if it believes the legislature “intended something else but failed to express it adequately.” *Id.* at 455.

Moreover, in its summary judgment motion, the County argued that it was entitled to an order enjoining Skagit Hill Recycling’s recycling operations because Skagit Hill Recycling’s landfill permit had not been renewed by the Health Department. CP 100 (listing the issues before the superior court in the County’s motion); CP 118 (“Defendants do not have the necessary solid waste permit and have continued to operate without one since it was not renewed for permit violations on December 31, 2007”). The County successfully persuaded the superior court that the County’s refusal to renew Skagit Hill Recycling’s landfill permit rendered illegal all of Skagit Hill Recycling’s solid waste handling activities – including its permit-exempt recycling operations. CP 3103-3104.

The County cannot have it both ways. If, as the County contended and as the superior court ruled, the renewal of the landfill permit was critical to Skagit Hill Recycling’s ability to conduct any solid waste handling (including permit-exempt recycling) on its property, then the provisions of RCW 70.95.210 apply here.

The County's third argument – that the health department had declared that “continued operation of the waste recycling facility poses a very probable threat to human health and the environment” – is unsupported by the Health Officer's decision in the record. When he made his decision denying the permit renewal in March 2008, the County Health Officer did not make any finding that continued waste recycling at the Skagit Hill Recycling site poses a very probable threat to human health and the environment. CP 739. Instead, he ordered Skagit Hill Recycling to stop accepting construction and demolition waste “until the facility has received a solid waste permit.” CP 739. The Health Officer explicitly allowed Skagit Hill Recycling to continue to accept “clean wood such as the pallets and the stumps and woody landclearing debris which meet the State and local accepted definition of wood waste.” CP 739-740. Indeed, the Health Officer's insistence that Skagit Hill Recycling apply for and obtain a permit for materials recovery and recycling of demolition waste is utterly inconsistent with the notion that Skagit Hill Recycling's operation poses a “very probable threat to human health and the environment.”⁴

⁴ Skagit County misleadingly quotes a so-called “required finding” by the health department, implying that it was part of the Health Officer's decision to deny the permit renewal. County's Response at 25-26. The so-called “finding” cited by Skagit County was not part of the Health Officer's decision to deny renewal of Skagit Hill Recycling's landfill permit. Rather, it is set forth in a June 11, 2009 letter attached to the County's Complaint in this case. CP 13-14. Even if that self-serving letter, obviously generated over one year later solely to buttress the County's litigation position, could suffice as a “declaration” contemplated by RCW 70.95.210 in connection with denial of a permit renewal, it falls short of the mark. It does not state that Skagit Hill Recycling's operation

The County's emphasis on forcing Skagit Hill Recycling to apply for and obtain permits underscores the reality that this is a dispute over permitting requirements and exemptions, and not over a "very probable threat to human health and the environment." See CP 126 ("defendants' failure to pay the fees required for the permits they have failed to obtain conflicts with the county's strong interest in efficient collection of such fees"); CP 127 ("defendants have exploited and/or ignored . . . Health's permitting processes, and have shown that they intend to ignore Health's . . . permitting requirements for their own benefit").

In this appeal, the County continues to emphasize its desire to collect permit fees from Skagit Hill Recycling as a basis for affirming the superior court. County's Response at 18 ("In addition to the obvious environmental concerns, Skagit Hill's failure to pay the fees required for the permits they have failed to obtain conflicts with the county's strong interest in efficient collection of such fees"). The inescapable inference is that the County's so-called "environmental concerns" would evaporate if Skagit Hill Recycling were to acquiesce to the County's demand that it apply for additional solid waste permits and pay additional solid waste permit fees.

poses a *very probable threat* to human health and the environment. A "potential" for harm (CP 13) is not the same thing as a very probable threat.

RCW 70.95.210 provides that the County's denial of the landfill permit renewal is not effective until the completion of the appeal process.⁵ The superior court erroneously relied on the County's denial of the landfill permit renewal to enjoin Skagit Hill Recycling's materials recovery and recycling activities, without recognizing the statutory stay in RCW 70.95.210. If, as the superior court ruled,⁶ Skagit Hill Recycling is required to hold some sort of solid waste permit before it can engage in permit-exempt solid waste handling activities, such a permit still exists by virtue of RCW 70.95.210. *See* Appendix 1 hereto.

C. The County's Remaining Arguments Are Also Without Merit.

The County devotes the remainder of its Response to arguing that other grounds exist for granting summary judgment and injunctive relief against Skagit Hill Recycling. County's Response at 26-48. In so doing, the County simply ignores disputed issues of material fact and hence the applicable standard of review. The County also ignores the well-

⁵ That appeal by Skagit Hill Recycling is not yet concluded. Prior to the superior court decision in this case, the Thurston County Superior Court had reversed the PCHB's summary judgment order. CP 2389; CP 2391-2403; CP 3102. Skagit County filed an appeal of the Thurston County Superior Court's order to Division Two of the Court of Appeals. CP 2425. The County's appeal remains pending. *See Skagit Hill Recycling, Inc. v. Skagit County, et al.*, No. 39859-1-II.

⁶ *See* Order Granting and Denying Summary Judgment and Injunctive Relief (CP 3098-3106) at 7, Finding/Conclusion 20: "To allow the defendants to continue to operate a solid waste handling facility after Skagit County denied renewal of their inert waste landfill permit would make a mockery of the permitting process. It would allow anyone to apply for a permit, have the permit denied, and then proceed to operate until there is a judicial determination that he could not continue. That is not how the permit process works." CP 3104.

established rule that summary judgment may be granted as to only those issues which the moving party has clearly raised in its motion.

Skagit Hill Recycling has already addressed the disputed issues of material fact which preclude summary judgment as to whether its activities are covered by particular solid waste permit exemptions. *See* Corrected Brief of Respondents/Cross-Appellants at 17-29 and 32-43. The County's Response blithely disregards those disputed issues of material fact, as if simply using the word "undisputed" over and over again could make it so.

The County also relies heavily in its Response on "zoning" or "land use" violations as an alternative basis for finding a violation of solid waste regulations and affirming the superior court's summary judgment and injunction. County's Response at 37-46. The County's argument is unavailing.

The County raised direct claims of zoning and land use violations below (CP 100, 129-36), which were rejected by the superior court. The superior court explicitly refused to grant summary judgment on the County's claims of zoning and land use violations because the County had not met its burden of demonstrating the absence of any genuine issue of material fact with respect to whether Skagit Hill Recycling's use of the property was a "grandfathered" or legal nonconforming use under the County's zoning regulations. CP 3103. The County ultimately withdrew its land use claims, rather than face the prospect of having to try those claims in court. CP 4093; CP 4098. The County's bare arguments about

Skagit Hill Recycling's compliance with zoning and land use regulations cannot now be used to support affirmance of the superior court's ruling that Skagit Hill Recycling was violating solid waste regulations.

The County now attempts to transform its bare, unproven arguments about zoning violations into "undisputed evidence" or "undisputed facts" to support summary judgment on the issue of whether Skagit Hill Recycling met the performance requirements for solid waste handling set forth in WAC 173-350-040. County's Response at 27-29, 37-46. This is apparently where the County's argument that this Court should sustain the superior court's summary judgment "if it is supported by any grounds in the record" (County's Response at 13) comes in.

The County now argues for affirmance on "any grounds in the record" because its Motion for Summary Judgment and for Injunctive Relief (CP 95) did not raise the issue of compliance with solid waste performance standards in WAC 173-350-040. CP 95-137.⁷

⁷ Specifically, the only solid waste claims on which the County sought summary judgment were:

1. Are defendants required to have a solid waste permit, issued by Health, to operate a solid waste landfill and/or solid waste handling facility on the Property?
2. If defendants are required to have a solid waste permit, is their continued operation of a solid waste landfill and/or solid waste handling facility on their property without the required permit from the Skagit County Health Department a public nuisance and should such activity be enjoined and abated?

CP 100.

Summary judgment may be granted as to only those issues which the moving party – here, the County – has clearly raised in its motion. *R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 146-47, 969 P.2d 458 (1999); *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 169, 810 P.2d 4 (1991) (“it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought”). As the Supreme Court has explained: “It is unfair to grant the extraordinary relief of summary judgment without allowing the nonmoving party the benefit of a clear opportunity to know on what grounds summary judgment is sought.” *R.D. Merrill Co.*, 137 Wn.2d at 148. The County’s newly-asserted grounds cannot now be relied upon to support affirmance of the superior court’s summary judgment order.

The cases cited by the County (County’s Response at 13) do not support its argument. In *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 54 P.3d 1266 (2002), the court affirmed the trial court’s summary judgment on a breach of contract claim on the exact same basis asserted in the summary judgment motion:

Graff sued Allstate for breach of contract. On cross-motions for summary judgment, the trial court held in favor of Graff on his breach of contract claim, finding that his insurance policy covered the clean up expenses. Graff had argued that *Bowers v. Farmers Ins. Exch.*, 99 Wash.App. 41, 991 P.2d 734 (2000), was controlling.

Id. at 802. The court of appeals affirmed the summary judgment, holding that “*Bowers* is on all fours here.” *Id.* at 805. The court stated: “We follow *Bowers*’ reasoning, and it is consistent with the authority cited therein” and “[t]hus, *Bowers* is controlling.” *Id.* at 806. *Graff* does not stand for the proposition that a trial court’s summary judgment ruling may be affirmed on a ground not raised in the motion.

Nor does *LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989), support the County’s argument. *LaMon* involved a defamation claim in which the Court held that plaintiffs failed to present a prima facie case on the issue of fault, “even when we draw all reasonable inferences from the evidence in favor of the LaMons,” in order to survive the defendants’ summary judgment motion. *LaMon*, 112 Wn.2d at 199. Rejecting the LaMons’ argument that it would be unfair for their case on appeal to be decided on the issue of fault, the Supreme Court explained first that the LaMons had notice of and actually argued the issue of fault below, adding:

Second, an appellate court can sustain the trial court’s judgment upon any theory *established by the pleadings* and supported by the proof, even if the trial court did not consider it. . . . The pleadings establish a defamation cause of action, an essential element of which is the defendants’ fault. Therefore, dismissal for a failure to satisfy the burden of proving fault is based on a theory established by the pleadings. Furthermore, this theory is supported by proof in the record, most notably Butler’s deposition, which was uncontroverted by the LaMons. We conclude that the fault issue is properly before us.

Id. at 201 (emphasis added). *LaMon* does not stand for the proposition that the superior court’s summary judgment may be affirmed “if it is

supported by any grounds in the record” (County’s Response at 13) even if such grounds were not raised below.

Nast v. Michels, 107 Wn.2d 300, 730 P.2d 54 (1986), is similarly inapposite. In *Nast*, there was no disputed issue of material fact. The parties had stipulated to the material facts (the actual costs for copying court case records in King County), so the case was decided purely as a matter of law. *Id.* at 303-09. *In re Request of Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986), is also not relevant. The issue here is not whether this Court is bound by the trial court’s findings of fact; the issue is whether this Court may affirm the superior court’s summary judgment on a ground not raised in the County’s motion. Under *R.D. Merrill Co.* and *Kent Medical Center*, it may not do so.

This Court should disregard the County’s arguments regarding other grounds for affirming the superior court’s summary judgment and injunction against Skagit Hill Recycling. As a matter of law, the superior court’s summary judgment and injunction – predicated entirely on the absence of a solid waste permit, as argued by the County in its motion for summary judgment – is in error and must be reversed.

III. CONCLUSION

For the reasons set forth herein and in its Corrected Brief of Respondents/Cross-Appellants, Skagit Hill Recycling respectfully urges this Court to reverse the summary judgment and injunction in favor of Skagit County in the Final Judgment and Order dated February 5, 2010

and Order Granting Summary Judgment and Injunctive Relief dated
November 18, 2009.

Respectfully submitted this 13th day of October, 2010.

A handwritten signature in black ink, appearing to read "Sarah E. Mack", with a long, sweeping horizontal flourish extending to the right.

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DECLARATION OF DELIVERY

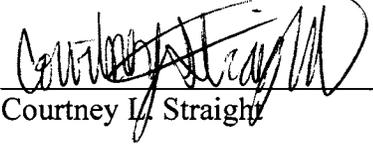
I, Courtney L. Straight, declare as follows:

I sent for delivery by US Postal Service, first-class postage pre-paid, a true and correct copy of the Reply Brief of Cross-Appellants to which this declaration is attached, to the following party of record:

A.O. Denny, Civil Deputy
Skagit County Prosecuting Attorney
Courthouse Annex, 605 S. Third
Mount Vernon, WA 98273

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

Dated October 13, 2010, at Seattle, Washington.



Courtney L. Straight

APPENDIX 1

**Defendants' Memorandum in Support of Motion for Reconsideration
(CP 2561-2576)**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

SKAGIT COUNTY, a municipal corporation
of the State of Washington,

Plaintiff,

v.

SCOTT WALDAL, SKAGIT HILL
RECYCLING, INC., a Washington
corporation, and AVIS, LLC, a Washington
corporation,

Defendants.

No. 09-2-01246-9

DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION FOR
RECONSIDERATION

Scott Waldal, Skagit Hill Recycling, Inc., and AVIS, LLC, submit the following memorandum in support of their motion for reconsideration of the Court's ruling announced on October 23, 2009.

I. INTRODUCTION

In its oral ruling, the Court noted that the Skagit Hill Recycling ("SHR") site is the location of a sand and gravel mine that has been in operation for decades. A portion of the site is still operated as a sand and gravel mine. In addition to extracting and selling inert materials from the pit, the former owners (Betty and Frank Janicki and subsequently John Diamond, aka John Schmid) received inert materials (such as concrete) and non-inert materials (including timber and demolition debris) for processing and resale. As the Court recognized in its October 23, 2009 ruling, disputed issues of material fact preclude summary judgment on the question

1 whether this use of the site was a “grandfathered” legal non-conforming use for zoning purposes,
2 i.e., lawfully established prior to adoption of Skagit County’s current land use regulations.

3 The Court’s summary judgment ruling was predicated only on solid waste permit
4 requirements – specifically, the applicability of RCW chapter 70.95 and WAC chapter 173-350
5 to defendants’ current solid waste handling activities on the SHR site. The Court ruled that
6 defendants do not have a solid waste permit to operate a solid waste facility on the SHR site, and
7 that, on that basis, the County is entitled to summary judgment and a preliminary injunction
8 enjoining defendants’ solid waste handling activities.

9 Defendants respectfully request reconsideration of the Court’s decision pursuant to CR
10 59(a)(7), on the ground that it is contrary to law and not justified by the evidence or reasonable
11 inference from the evidence. This Memorandum addresses the specific reasons why
12 reconsideration should be granted as to each of defendants’ solid waste handling activities on the
13 SHR site.

14 Defendants’ current activities on the SHR site encompass various solid waste handling
15 activities, each of which has different standards and requirements under the state solid waste
16 regulations. Not all solid waste handling activities require a solid waste facility permit; certain
17 activities are exempt from solid waste permitting. *See* RCW 70.95.305.

18 The inert waste landfill permit issued to Skagit Hill Recycling, Inc. in March 2007
19 pertains only to landfilling, i.e., permanent disposal of solid waste in or on land. *See* WAC 173-
20 350-100 (defining “landfill”). The landfill permit does not cover other solid waste handling
21 activities that do not involve landfilling. Nor is a landfill permit a necessary prerequisite to
22 conduct other permit-exempt solid waste handling activities.

23 Solid waste permit exemptions cover the following solid waste handling activities on the
24 SHR site: (1) stockpiling of inert waste; (2) stockpiling of wood waste; (3) stockpiling of wood
25 derived fuel; and (4) materials recovery and recycling of construction and demolition waste.
26 Skagit County does not dispute that the first two activities (stockpiling of inert waste and

1 stockpiling of wood waste) do not require a solid waste handling permit. There are disputed
2 issues of material fact as to whether the third activity (stockpiling of wood derived fuel) meets
3 the permit exemption requirements under the solid waste regulations. There are disputed issues
4 of material fact as to whether the fourth activity (materials recovery and recycling of
5 construction and demolition waste) meets the permit exemption requirements under the solid
6 waste regulations.¹

7 Other activities on the SHR site do not require solid waste permits because such activities
8 do not constitute solid waste handling. For example, solid waste permit requirements do not
9 apply to sand and gravel mining activities on the SHR site. Nor do solid waste permit
10 requirements apply to the existing pile of ash from Sierra Pacific Industries. It is undisputed that
11 the ash is now a registered commercial fertilizer. Prior to its registration as a commercial
12 fertilizer, the ash was accepted as a solid waste pursuant to SHR's 2007 inert waste landfill
13 permit. Defendants contend that in July 2007 the Skagit County Health Department approved
14 the disposal of the Sierra Pacific ash at the SHR site under SHR's inert waste landfill permit.
15 Skagit County denies that the Health Department approved disposal of the ash. There are
16 disputed issues of material fact as to the County's approval of ash disposal under the SHR inert
17 waste landfill permit. In any event, it is undisputed that no ash has been accepted at the SHR site
18 since February 11, 2008, and that the ash is now registered as a commercial fertilizer.

19 Finally, Defendants are not currently landfilling any solid waste, and the County
20 submitted no evidence (other than conclusory allegations) that Defendants have landfilled any
21 solid waste since January 2008. Construing the evidence and all inferences therefrom in the light

22
23 ¹ In fact, Skagit County's decision not to renew the SHR landfill permit was based on the County's notion
24 that by processing construction and demolition waste for materials recovery and recycling, SHR was conducting
25 solid waste handling activities without a required permit. SHR contends that its materials recovery and recycling of
26 construction and demolition waste was and is permit-exempt under the solid waste regulations. This issue – whether
SHR's processing of construction and demolition waste is permit-exempt – is squarely before the Pollution Control
Hearings Board in PCHB No. 08-038. See Part I.E *infra*.

1 most favorable to the non-moving party, there are disputed issues of material fact as to whether
2 defendants are currently engaged in any landfilling activities. Moreover, even if defendants were
3 currently engaged in landfilling, such activity would be covered by SHR's landfill permit, which
4 remains in effect pursuant to state law and Ecology regulations.

5
6 **II. DEFENDANTS' CURRENT ACTIVITIES ON THE SHR SITE DO NOT
REQUIRE SOLID WASTE FACILITY PERMITS.**

7 **A. Stockpiled Inert Waste**

8 It is undisputed that defendants are stockpiling inert materials on the Skagit Hill
9 Recycling site, including cured concrete waste, asphalt rubble, clay, and soils. "Inert waste" is a
10 term of art under state solid waste statutes and regulations. *See* RCW 70.95.065 (Appendix 1
11 attached hereto); WAC 173-350-100 (Appendix 2 attached hereto); WAC 173-350-990
12 (Appendix 3 attached hereto). Cured concrete waste and asphalt waste are specifically listed as
13 inert wastes. RCW 75.95.065(2); WAC 173-350-990(2). A waste need not be listed as "inert" in
14 order to be inert waste. Other wastes not specifically listed as inert may be characterized as inert
15 if the waste meets the criteria for inert waste set forth in WAC 173-350-990(3).

16 It is undisputed that a solid waste facility permit is not required for stockpiling of inert
17 waste on the SHR site. A specific permit exemption covers the stockpiling of inert waste. WAC
18 173-350-320(1)(d) provides that "the storage of inert waste in piles is . . . exempt from solid
19 waste handling permitting." *See* Appendix 4 attached hereto.

20 Skagit County issued an inert waste landfill permit to Skagit Hill Recycling effective
21 March 30, 2007. *See* Declaration of James A. Tupper, Jr., filed herewith (hereinafter "Tupper
22 Decl."), Ex. 1. However, the inert waste landfill permit did not cover the stockpiling of inert
23 waste, and was not required for the stockpiling of inert waste. When the Skagit County Health
24 Officer denied renewal of SHR's landfill permit in March 2008, he explicitly recognized that the
25 stockpiles of inert waste are exempt from permit requirements: "Truly source separated material
26 such as . . . concrete found on the upper portion of the property is clearly exempt from permitting

1 | under WAC 173-350-210(2)(a) if it is received as source separated material and is not a part of
2 | this action.” Tupper Decl., Ex. 2 at 4. Skagit County does not dispute that defendants’ storage
3 | of inert waste on the Skagit Hill Recycling site complies with permit exemption requirements.

4 | Because a solid waste permit is not required for the stockpiles of inert waste, and because
5 | it is undisputed that defendants’ storage of inert waste complies with permit exemption
6 | requirements, under state solid waste laws and regulations Skagit County is not entitled to
7 | summary judgment or injunctive relief with respect to defendants’ storage of inert waste.

8 | **B. Stockpiled Wood Waste**

9 | It is undisputed that defendants are stockpiling non-inert wood waste on the site,
10 | including wood pallets, woody landclearing debris, and stumps. “Wood waste” is defined as
11 | “wood pieces or particles generated as a by-product or waste from the manufacturing of wood
12 | products, construction, demolition, handling and storage of raw materials, trees and stumps.”
13 | This includes “sawdust, chips, shavings, bark, pulp, hogged fuel, and log sort yard waste, but
14 | does not include wood pieces or particles containing paint, laminates, bonding agents or
15 | chemical preservatives such as creosote, pentachlorophenol, or copper-chrome-arsenate.” WAC
16 | 173-350-100. *See* Appendix 2 attached hereto. Wood waste is inherently non-inert under the
17 | inert waste criteria because, for example, it can catch fire. *See* WAC 173-350-990.

18 | Wood waste on the SHR site is chipped and re-used in timber and paper manufacturing or
19 | as a fuel; wood waste is also used in alternative energy production. Declaration of Scott Waldal
20 | (August 6, 2009); Supplemental Declaration of Scott Waldal (September 16, 2009) (Tupper
21 | Decl., Exs. 4 and 5).

22 | It is undisputed that a solid waste permit is not required for this activity. A specific
23 | permit exemption covers the storage of wood waste used for fuel or as a raw material. WAC
24 | 173-350-320(1)(b) provides that “storage piles of wood waste used for fuel or as a raw material .
25 | . . are exempt from solid waste handling permitting.” *See* Appendix 4.

1 Skagit County's solid waste inspector, Britt Pfaff-Dunton, reported after a November
2 2007 inspection that "the piles of . . . wood waste on the upper westerly portion of the property
3 appear to be handled appropriately. The wood waste piles on the upper site appear to contain
4 only wood waste. One of the piles appears to be the ground wood waste from the land clearing
5 debris which are brough [sic] into the site. These piles of wood waste are separated from the
6 area of the site designated for landfilling activities." Declaration of Britt Pfaff-Dunton (July 16,
7 2009), Attachment DD, Compliance Inspection Report (Tupper Decl., Ex. 6).

8 The inert waste landfill permit issued to Skagit Hill Recycling on March 30, 2007 did not
9 cover the stockpiling of wood waste – which is non-inert – and was not required for the
10 stockpiling of wood waste. When he denied renewal of Skagit Hill Recycling's landfill permit in
11 March 2008, the Skagit County Health Officer explicitly recognized that the stockpiles of non-
12 inert wood waste are exempt from permit requirements: "Truly source separated material such
13 as landclearing debris . . . found on the upper portion of the property is clearly exempt from
14 permitting under WAC 173-350-210(2)(a) if it is received as source separated material and is not
15 a part of this action." Tupper Decl., Ex. 2 at 4. The Skagit County Health Officer also ruled:
16 "Skagit Hill Recycling may continue to accept clean wood such as the pallets and the stumps and
17 woody landclearing debris which meet the State and local accepted definition of wood waste.
18 The facility must comply with the wood waste piles standards and performance standards in
19 Chapter 173-350 WAC. This includes keeping all of the exempt waste materials on the upper
20 portion of the property until the non-exempt solid waste is removed from the pit area." *Id.* at 6-
21 7. Skagit County does not dispute that defendants' storage of wood waste on the Skagit Hill
22 Recycling site complies with permit exemption requirements.

23 The Pollution Control Hearings Board also found that storage of wood waste on the
24 Skagit Hill Recycling site is exempt from solid waste permit requirements: "At the top westerly
25 portion of the site material was sorted into piles of clean wood debris. These materials were
26

1 being handled in accordance with the permit and wood waste exemption regulations.” Tupper
2 Decl., Ex. 3 (PCHB Order Granting Summary Judgment, PCHB No. 08-038) at 6.

3 Because a solid waste permit is not required for the stockpiles of wood waste, and
4 because it is undisputed that defendants’ storage of wood waste complies with permit exemption
5 requirements, under state solid waste laws and regulations Skagit County is not entitled to
6 summary judgment or injunctive relief with respect to defendants’ storage of wood waste on the
7 SHR site.

8 **C. Stockpiled Wood-Derived Fuel**

9 It is undisputed that defendants are stockpiling non-inert wood-derived fuel on the site,
10 including painted wood and lumber sorted from demolition debris. “Wood derived fuel” is
11 defined in the state solid waste regulations as “wood pieces or particles used as a fuel for energy
12 recovery, which contain paint, bonding agents, or creosote.” WAC 173-350-100. *See* Appendix
13 2 attached hereto. Wood derived fuel does not include wood pieces or particles coated with paint
14 that contains lead or mercury, or wood treated with other chemical preservatives such as
15 pentachlorophenol, copper naphthanate, or copper-chrome-arsenate. *Id.* Skagit County
16 submitted no evidence that any of those prohibited substances are present in the wood pieces or
17 particles stockpiled as wood derived fuel on the SHR site.

18 A solid waste permit is not required for stockpiling of wood-derived fuel. A specific
19 permit exemption covers the storage of wood derived fuel. WAC 173-350-320(1)(b) provides
20 that “storage piles of . . . wood derived fuel . . . are exempt from solid waste handling
21 permitting.” *See* Appendix 4 attached hereto.

22 It is undisputed that from May 30, 2008 through July 10, 2009, SHR processed and
23 delivered to Kimberly-Clark over 2,300 tons of wood derived fuel. *See* Tupper Decl., Ex. 4, ¶
24 20. Skagit County apparently assumes that the permit exemption in WAC 173-350-320(1)(b)
25 covers only “clean” wood waste, and does not cover storage piles of wood pieces or particles
26 containing paint or creosote. However, the County’s assumption is incorrect as a matter of law.

1 It ignores the applicability of the permit exemption to “wood derived fuel” and ignores the
2 definition of “wood derived fuel” – which explicitly includes wood which contains paint,
3 bonding agents, or creosote. WAC 173-350-100; WAC 173-350-320(1)(b).

4 The inert waste landfill permit issued to Skagit Hill Recycling on March 30, 2007 did not
5 cover the stockpiling of wood derived fuel, and was not required for the stockpiling of wood
6 derived fuel. At best, there are disputed issues of material fact as to whether defendants’ storage
7 of wood derived fuel complies with the permit exemption requirements under WAC 173-350-
8 320(1)(b). Under state solid waste laws and regulations, Skagit County is not entitled to
9 summary judgment or injunctive relief with respect to defendants’ storage of wood derived fuel.

10 **D. Sierra Pacific Boiler Ash**

11 It is undisputed that between July 2007 and February 2008, defendants accepted boiler
12 ash for disposal from Sierra Pacific Industries. It is also undisputed that no boiler ash has been
13 accepted at the SHR site after February 11, 2008. Tupper Decl., Ex. 5 and Exhibits 18 and 19
14 thereto.

15 Defendants accepted the boiler ash beginning in July 2007 only after receiving explicit
16 authorization by the Director of the Skagit County Health Department, Peter Browning. Mr.
17 Waldal received a call on his cellphone from Mr. Browning authorizing acceptance of the Sierra
18 Pacific ash at the SHR site. Tupper Decl., Ex. 4, ¶ 16. Mr. Waldal’s recollection is corroborated
19 by John Diamond, who was present when the call was received. Tupper Decl., Ex. 7 (Decl. of
20 John Diamond (August 6, 2009)), ¶ 7. In addition, despite the obvious presence of the ash pile in
21 February 2008, the Health Officer’s decision to deny renewal of the SHR landfill permit
22 mentions the ash but does not identify the ash pile as a violation of the landfill permit. Tupper
23 Decl., Ex. 2. The inference that must be drawn from this evidence is that as of March 2008,
24 Skagit County deemed the presence of the ash on the SHR site to be consistent with the landfill
25 permit.

1 In this proceeding, Skagit County now contends that the Health Department did not
2 approve disposal of the ash. *See* Decl. of Peter Browning (August 11, 2009) (Tupper Decl., Ex.
3 8). Mr. Browning states neither he “nor anyone from the Health Department approved of the
4 disposal of the ash in any fashion, and certainly not at the Skagit Hill site.” *Id.* ¶ 3. However,
5 Mr. Browning also states that he recalls having a conversation in July 2007 “with Scott Waldal
6 regarding the ash pile. At the time, Sierra Pacific was beginning their application with
7 Washington state Department of Agriculture for use of the ash as a fertilizer. I told Mr. Waldal
8 to cover the pile, and not add anything more to it while Sierra Pacific completed their application
9 with the Department of Agriculture.” *Id.* ¶ 5.

10 Defendants submitted records showing that the first delivery of Sierra Pacific ash to the
11 SHR site was on July 11, 2007, and that total ash deliveries in July 2007 consisted of 120 cubic
12 yards. Tupper Decl., Ex. 5, Exhibit 19. This evidence was not controverted by Skagit County.
13 Skagit County also submitted a declaration by Curt Adcock, Operations Manager for Sierra
14 Pacific, which states that “we assured ourselves through research with appropriate regulatory
15 agencies that the ash would be treated as a solid waste, meaning that all responsibility for the ash
16 passed to Mr. Waldal after we paid him to handle it.” Tupper Decl., Ex. 9, ¶ 3. The inference
17 that must be drawn from Mr. Adcock’s statement is that Sierra Pacific communicated with
18 Skagit County – obviously an appropriate regulatory agency – to determine that it was
19 appropriate to dispose of the ash at the SHR site.

20 Based upon this evidence, there are disputed issues of material fact as to the Skagit
21 County Health Department’s approval of disposal of the Sierra Pacific boiler ash under the SHR
22 inert waste landfill permit. Such disputed issues of material fact preclude summary judgment.

23 It is undisputed that the Sierra Pacific boiler ash is now a registered commercial fertilizer.
24 A solid waste permit is not required for handling of commercial fertilizer. Under state solid
25 waste laws and regulations, Skagit County is not entitled to summary judgment or injunctive
26

1 relief with respect to defendants' past acceptance of Sierra Pacific boiler ash under the inert
2 waste landfill permit, or with respect to the existence of the ash pile on the SHR site.

3 **E. Materials Recovery and Recycling of Construction and Demolition Waste**

4 It is undisputed that defendants have accepted and processed construction and demolition
5 debris – which is non-inert waste – for recovery and resale of metals and other materials that can
6 be recycled and reused. This recycling of construction and demolition debris on the SHR site is
7 at the heart of the dispute between Skagit County and the defendants. Defendants contend that
8 this activity is exempt from permitting under solid waste regulations. Skagit County contends
9 that this activity is not permit-exempt and requires a solid waste handling permit.

10 Skagit County refused to renew the SHR landfill permit. The County made that decision
11 not because of any improper landfilling, but because SHR was processing construction and
12 demolition waste for recycling and reuse instead of directing that waste stream to the recycling
13 and transfer station operated by Skagit County. Tupper Decl., Ex. 2; *see also* Declaration of
14 Britt Pfaff-Dunton (July 16, 2009), Attachment Y at 1 (“Please note that any waste leaving the
15 facility for final disposal must go to the Skagit County Recycling and Transfer Station unless
16 otherwise approved by the Health Department”) (Tupper Decl., Ex. 10).

17 Under state solid waste regulations, a “material recovery facility” is defined as “any
18 facility that collects, compacts, repackages, sorts, or processes for transport source separated
19 solid waste for the purpose of recycling.” WAC 173-350-100. “Recycling” is defined as
20 “transforming or remanufacturing waste materials into usable or marketable materials for use
21 other than landfill disposal or incineration.” *Id.* Materials recovery is exempt from solid waste
22 permitting requirements, if the activity complies with the requirements of WAC 173-350-
23 310(2)(b). WAC 173-350-310(2)(a). *See* Appendix 5 attached hereto. Recycling of solid waste
24 is also specifically exempt from solid waste handling permitting requirements, if the activity
25 complies with the requirements of WAC 173-350-210(2). *See* Appendix 6 attached hereto.

1 WAC 173-350-310(2)(b) provides that materials recovery facilities must comply with
2 certain conditions in order to be exempt from solid waste permitting requirements. An exempt
3 facility may “[a]ccept only source separated recyclable materials and dispose of an incidental
4 and accidental residual not to exceed five percent of the total waste received, by weight per year,
5 or ten percent by weight per load.” WAC 173-350-310(2)(b)(ii).

6 The question whether defendants’ materials recovery and recycling of construction and
7 demolition waste is exempt from solid waste permitting requirements is squarely before the
8 Pollution Control Hearings Board in PCHB No. 08-038. Issue No. 6 in the PCHB’s Pre-Hearing
9 Order is “Whether construction and demolition waste, which includes raw and painted
10 dimensional lumber, painted wood, laminated wood, plywood and press (chip) board, insulation,
11 plastic, synthetic flooring materials, foam, asphalt roofing waste and tires qualify as exempt
12 source separated materials?” Issue No. 7 in the PCHB’s Pre-Hearing Order is “Whether piles of
13 construction and demolition waste, which includes raw and painted dimensional lumber, painted
14 wood, laminated wood, plywood and press (chip) board, insulation, plastic, synthetic flooring
15 materials, foam, asphalt roofing waste and tires, that is stored on the Skagit Hill Recycling site
16 qualify as exempt under WAC 173-350-310 or 320?” Tupper Decl., Ex. 11.

17 Defendants’ evidence shows that the non-recyclable residual from SHR’s materials
18 recovery activities did not exceed the volume specified in WAC 173-350-310(2)(b)(ii). Tupper
19 Decl., Ex. 4, ¶ 20. Skagit County did not controvert that evidence.

20 The crux of the dispute between Skagit County and the defendants turns on whether the
21 construction and demolition waste accepted at the SHR site and processed for recycling and
22 reuse is “source separated” within the meaning of this regulation. The term “source separation”
23 is defined in the State solid waste regulations as “the separation of different kinds of solid waste
24 at the place where the waste originates.” WAC 173-350-100. “Demolition and construction
25 wastes” are specifically listed as a kind of solid waste under the definition of “solid waste,”
26 which includes but is not limited to “garbage, rubbish, ashes, industrial wastes, swill, sewage

1 sludge, demolition and construction wastes, abandoned vehicles or parts thereof, contaminated
2 soils and contaminated dredged material, and recyclable materials.” *Id.*

3 All demolition debris brought to the Skagit Hill Recycling site was source separated, i.e.,
4 not mixed with garbage or any other kind of solid waste. Tupper Decl., Ex. 4, ¶ 18. Skagit
5 County contends that the waste is not “source separated” because it is “mixed” construction and
6 demolition waste. The County’s position is incorrect as a matter of law. “Source separation”
7 does not require each type of recyclable material to be segregated from every other type of
8 recyclable material. Recyclable material in construction and demolition waste can be “mixed” –
9 i.e., not segregated – and still be considered “source separated” under the regulations. For
10 example, state solid waste regulations define “municipal solid waste (MSW)” to include, among
11 other things, “[m]ixed or segregated recyclable material that has been source-separated from
12 garbage, refuse and similar solid waste.” WAC 173-350-100.

13 There are disputed issues of material fact and law as to whether defendants’ materials
14 recovery and recycling activities meet the requirements for exemption from solid waste
15 permitting. It is undisputed that the inert waste landfill permit issued to SHR does not cover
16 materials recovery and recycling of construction and demolition waste. As a matter of law, a
17 landfill permit is not a necessary prerequisite for conducting permit-exempt materials recovery
18 and recycling. Under state solid waste laws and regulations, Skagit County is not entitled to
19 summary judgment or injunctive relief with respect to defendants’ materials recovery and
20 recycling of construction and demolition waste.

21
22 **III. SKAGIT COUNTY IS NOT ENTITLED TO SUMMARY JUDGMENT OR
INJUNCTIVE RELIEF BASED ON LANDFILLING.**

23 Beginning in 1993, Skagit County has authorized the landfilling of inert waste at the
24 Skagit Hill Recycling site. Tupper Decl., Ex. 6. Skagit County submitted no evidence that
25 defendants ever landfilled any non-inert materials. Britt Pfaff-Dunton, a Skagit County Health
26 Department inspector, testified in her deposition that she does not know whether SHR has

1 landfilled any non-inert waste. When asked, “Are you aware of any evidence that Skagit Hill
2 Recycling has landfilled non-inert waste at its facility?” Ms. Pfaff-Dunton replied, “Their facility
3 is permitted for inert waste only. So when non-inert waste is brought in, it is in violation of their
4 permit. So whether it’s landfilled or piled, stored, is irrelevant to their permit conditions.” When
5 she was asked, “Are you aware, though, that they’ve landfilled any non-inert waste at their
6 facility?” Ms. Pfaff-Dunton answered, “I do not know what they have landfilled or not landfilled
7 at their site.” Declaration of Brad Doll (August 6, 2009), Ex. D, at 60:16 – 61:2.

8 Moreover, there are disputed issues of material fact as to whether defendants have
9 landfilled **any** waste – inert or non-inert – since January 2008. Skagit County submitted a series
10 of inspection reports with a declaration by Polly Dubbel which states: “At the time of each of
11 the inspections described above, Skagit Hill Recycling was accepting, dumping, *landfilling*,
12 handling, and otherwise processing solid wastes without a permit.” Declaration of Polly A.
13 Dubbel in Support of County’s Motion for Summary Judgment and for Injunctive Relief (July
14 13, 2009) at 2 (emphasis added). However, none of the inspection reports attached to Ms.
15 Dubbel’s declaration identify any actual landfilling, i.e., the permanent disposal of solid waste in
16 or on land. *See* WAC 173-350-100.

17 Defendants controverted Ms. Dubbel’s allegations by describing the various wastes
18 received at the SHR site and stating that none of those materials were accepted for disposal. Mr.
19 Waldal described his intention to conduct a permit-exempt recycling operation for construction
20 and demolition waste and landclearing waste, and stated his intent “to recycle as much of the
21 material as possible.” Tupper Decl., Ex. 4, ¶ 15. Defendants also submitted records of material
22 received for recycling between 2006 and 2009, and records of materials shipped to Skagit River
23 Steel for reuse. Tupper Decl., Ex. 5, ¶¶ 4-6. From May 30, 2008 through July 10, 2009, SHR
24 delivered to Kimberly-Clark a total of 2,300.5 tons of wood derived fuel from construction and
25 demolition debris. Tupper Decl., Ex. 4, ¶20. During that same period, SHR disposed of a total
26 of 80.34 tons of non-recyclable waste. *Id.* On August 6, 2009, SHR disposed of 13.33 tons of

1 salvageable truck tires at an off-site facility. Tupper Decl., Ex. 5, ¶ 7 and Exhibit 20. On August
2 27, 2009, SHR disposed of 28.22 tons of non-recyclable construction and demolition waste at an
3 off-site facility. Tupper Decl., Ex. 5, ¶ 7 and Exhibit 21. This evidence is consistent with the
4 County's inspection reports, which describe continued processing, stockpiling, and recycling of
5 construction and demolition waste materials, and do not identify any landfilling activity.

6 However, even if defendants had landfilled any inert waste since January 2008, such
7 activities would be covered under the 2007 inert waste landfill permit issued to Skagit Hill
8 Recycling, Inc. (Tupper Decl., Ex. 1).

9 The following facts are undisputed: Skagit County did not suspend or revoke the inert
10 waste landfill permit issued in 2007 to Skagit Hill Recycling, Inc. The effective term of the inert
11 waste landfill permit was from March 30, 2007 to December 31, 2007. On November 7, 2007,
12 defendants made timely application for renewal of the inert waste landfill permit. On December
13 19, 2007, the Skagit County Public Health Department denied renewal of the inert waste landfill
14 permit. On January 4, 2008, defendants requested an appeal hearing before the Skagit County
15 Health Officer of the denial of permit renewal. On March 14, 2008, the Skagit County Health
16 Officer denied defendants' appeal and denied the permit renewal, finding that "Skagit Hill
17 Recycling is not operating an inert waste landfill, nor did they in 2007, but is accepting,
18 stockpiling and processing non-inert solid waste in the inert waste landfill designated facility"
19 and that "Skagit Hill Recycling's current operation at this site is not exempt from solid waste
20 permitting." On April 10, 2008, SHR filed a timely appeal to the Pollution Control Hearings
21 Board of the Health Officer's decision. Before the appeal could be heard, Skagit County filed a
22 dispositive motion urging the PCHB to dismiss SHR's appeal without a hearing on the merits.
23 On December 17, 2008, the Pollution Control Hearings Board granted summary judgment to
24 Skagit County and dismissed SHR's appeal. On September 25, 2009, the Thurston County
25 Superior Court reversed the PCHB's summary judgment order and remanded the appeal to the
26 Pollution Control Hearings Board.

1 On October 2, 2009, Skagit County filed a Notice of Appeal of the Superior Court's order
2 to the Court of Appeals, Division Two. On October 26, 2009, Skagit County asked the Pollution
3 Control Hearings Board to postpone holding its hearing on the merits of SHR's appeal while the
4 County's appeal is pending before the court of appeals. Tupper Decl., Ex. 12.

5 Skagit County's denial of the permit renewal for Skagit Hill Recycling is not effective
6 until the completion of the appeal process. RCW 70.95.210 provides: "If the jurisdictional
7 health department denies a permit renewal or suspends a permit for an operating waste recycling
8 facility that receives waste from more than one city or county, and the applicant or holder of the
9 permit requests a hearing or files an appeal under this section, the permit denial or suspension
10 shall not be effective until the completion of the appeal process under this section, unless the
11 jurisdictional health department declares that continued operation of the waste recycling facility
12 poses a very probable threat to human health and the environment." See Appendix 7 attached
13 hereto. See also WAC 173-350-710(6)(c), attached hereto as Appendix 8.

14 It is undisputed that Skagit Hill Recycling receives and recycles waste from more than
15 one city or county, including waste originating in Mount Vernon, Lake Stevens, Renton,
16 Tacoma, Burlington, Everett, Lynden, Anacortes, Bellingham, Arlington, Marysville, and Sedro
17 Wooley. Supplemental Declaration of Scott Waldal (September 16, 2009) (Tupper Decl., Ex. 5),
18 Exhibits 16-19. When he made his decision denying the permit renewal, the Skagit County
19 Health Officer did not find that continued waste recycling at the SHR site poses a very probable
20 threat to human health and the environment. Rather, the Health Officer found only that a permit
21 is required for SHR's recycling of construction and demolition waste and that SHR had refused
22 to obtain such a permit. Tupper Decl., Ex. 2 at 6. Pursuant to RCW 70.95.210 and WAC 173-
23 350-710(6)(c), the County's denial of the permit renewal is not effective until completion of the
24 appeal process before the Pollution Control Hearings Board. Thus, even if defendants were
25 continuing to landfill inert waste on the SHR site, such activity would be covered by the inert
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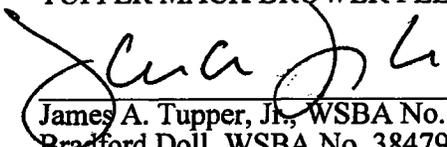
1 waste landfill permit. Under state solid waste laws and regulations, Skagit County is not entitled
2 to summary judgment or an injunction with respect to alleged landfilling activity.

3
4 **IV. CONCLUSION**

5 For the foregoing reasons, Defendants respectfully request that the Court reconsider its
6 ruling of October 23, 2009, and deny the County's motion for summary judgment and injunctive
7 relief.

8 DATED this 2nd day of November, 2009.

9 TUPPER MACK BROWER PLLC

10 

11 James A. Tupper, Jr., WSBA No. 16873
12 Bradford Doll, WSBA No. 38479

13 Attorneys for Defendants Scott Waldal, Skagit Hill
14 Recycling, Inc., and AVIS, LLC

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