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THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

No. 64395-9-I

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SKAGIT COUNTY,

Appellant/Cross-Respondent,

v.

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

Respondents/Cross-Appellants.

CORRECTED BRIEF OF RESPONDENTS/CROSS-APPELLANTS

TUPPER MACK BROWER PLLC
James A. Tupper, Jr., WSBA No. 16873
Sarah E. Mack, WSBA No. 12731
Lynne M. Cohee, WSBA No. 18496
2025 First Avenue, Suite 1100
Seattle, WA 98121
Ph: 206-493-2300 / Fx: 206-493-2310

Attorneys for Respondents/Cross-
Appellants

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I. INTRODUCTION

Respondents/Cross-Appellants Scott Waldal, Skagit Hill Recycling, Inc., and AVIS, LLC (hereinafter “Skagit Hill Recycling”) ask this Court to affirm the sanctions award against Skagit County (“County”) entered by the Honorable Susan K. Cook, Judge of the Skagit County Superior Court.

In the cross-appeal, Skagit Hill Recycling asks this Court to reverse the summary judgment and injunction entered by the Honorable Ronald L. Castleberry, Judge of the Snohomish County Superior Court (sitting by special designation). The issue before this Court on Skagit Hill Recycling’s cross-appeal is whether the superior court erred in granting summary judgment and a permanent injunction prohibiting all solid waste handling activities on Skagit Hill Recycling’s property.

This case arose in June 2009, when the County filed a Complaint for Injunctive Relief in Skagit County Superior Court, seeking “abatement” of Skagit Hill Recycling’s business, a materials recovery and recycling facility and inert waste landfill located at the site of a long-established sand and gravel mine adjacent to State Route 9 north of Sedro-Woolley, Washington. The County claimed entitlement to summary judgment and injunctive relief based on two County decisions: a Health Department denial of renewal of Skagit Hill Recycling’s inert waste landfill permit, and a Planning Department zoning/building code abatement order. When the County filed its motion for summary

judgment and injunctive relief in July 2009, each of those decisions was already the subject of a pending appeal in another superior court.

The County Health Department's denial of the landfill permit renewal had been affirmed on summary judgment by the Pollution Control Hearings Board (PCHB), which decision was on appeal before the Thurston County Superior Court.¹ The County Planning Department's zoning and building code abatement order had been appealed to the Skagit County Hearing Examiner. The Hearing Examiner had refused to hear the appeal, dismissing it as "untimely" at the urging of the Skagit County Prosecuting Attorney, and the Skagit County Board of County Commissioners had affirmed the Hearing Examiner's dismissal. On June 29, 2009, Skagit Hill Recycling filed a Land Use Petition Act appeal of the dismissal in Snohomish County Superior Court.²

On July 2, 2009, Skagit Hill Recycling answered the County's complaint and asserted two counterclaims: (1) for declaratory relief regarding Skagit Hill Recycling's preexisting and lawfully-established use

¹ In September 2009, the Thurston County Superior Court granted Skagit Hill Recycling's appeal, and reversed and remanded the PCHB order for a hearing on the merits. CP 2389. The County appealed the Superior Court's order to the Court of Appeals, Division II (CP 2425), where the case remains pending.

² In February 2010, the Snohomish County Superior Court granted Skagit Hill Recycling's appeal, and remanded the zoning/building code abatement order to the Skagit County Hearing Examiner for a hearing on the merits.

of its property; and (2) for declaratory and injunctive relief for the County's violation of substantive due process.

On July 17, 2009, the County filed a motion in Skagit County Superior Court, seeking summary judgment and injunctive relief on its claims of solid waste violations and land use violations. The County sought this relief from the Skagit County Superior Court, notwithstanding the pending review by other superior courts of the County's solid waste and land use decisions on which it relied (and also notwithstanding Skagit Hill Recycling's counterclaim for violation of its constitutional due process rights, on which the County now relies for its claim of bias on the part of the Skagit County Superior Court).

In response to the County's motion for summary judgment and injunctive relief, Skagit Hill Recycling submitted evidence that it was processing a variety of recyclable materials from demolition waste, activity that was permit-exempt under state solid waste handling regulations. Skagit Hill Recycling also submitted undisputed evidence that it was receiving waste from more than one city or county.

Judge Castleberry of the Snohomish County Superior Court was specially designated to hear motions and the trial of this case. Judge Castleberry granted summary judgment and injunctive relief to the County on its solid waste claims, and ordered abatement of solid waste handling activities on the Skagit Hill Recycling site. The basis for the superior court's summary judgment and injunction was that the County had denied renewal of Skagit Hill Recycling's inert waste landfill permit. The

superior court did not consider the legality of the County's denial of the landfill permit renewal, ruling that that issue was before the PCHB. Nor did the superior court consider the applicability to Skagit Hill Recycling's activities of various permit exemptions for materials recovery, recycling, and waste pile storage – permit exemptions promulgated by the Washington Department of Ecology under a specific directive from the Legislature in RCW 70.95.305. None of those permit exemptions requires that a solid waste facility have a separate landfill permit in order to qualify for the permit exemption.

RCW 70.95.210 and WAC 173-350-710(6)(c) provide that where a local health department denies a permit renewal for an operating waste recycling facility that receives waste from more than one city or county, and the permittee files an appeal to the PCHB, the permit denial is not effective until the completion of the appeal process, unless the health department declares that continued operation of the waste recycling facility poses “a very probable threat to human health and the environment.” When the Skagit County Health Officer denied the landfill permit renewal, he did not find that continued waste recycling at the Skagit Hill Recycling site poses a very probable threat to human health and the environment. Accordingly, even if a landfill permit were a necessary prerequisite to conduct permit-exempt solid waste handling activities, the Skagit Hill Recycling landfill permit remains in effect until the completion of the PCHB appeal process.

The superior court erred in granting summary judgment and injunctive relief to Skagit County prohibiting solid waste handling activities that are permit-exempt. The superior court also erred in granting summary judgment and injunctive relief to Skagit County based upon non-renewal of Skagit Hill Recycling's landfill permit, which permit remains in effect pursuant to state law and regulations. The Superior Court's summary judgment and injunction should be reversed.

II. CROSS-APPELLANTS' ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in entering its Order Granting and Denying Summary Judgment and Injunctive Relief granting Skagit County's motion for summary judgment and injunctive relief as to Issues 1 and 2 on the ground that Skagit Hill Recycling was operating in the absence of any permit authorizing solid waste handling at the site.

2. The superior court erred in entering its Final Judgment and Order granting Skagit County's motion for injunctive relief as to Issues 1 and 2 on the ground that Skagit Hill Recycling was operating in the absence of any permit authorizing solid waste handling at the site.

3. The superior court erred in entering its Order Granting and Denying Summary Judgment and Injunctive Relief granting Skagit County's motion for summary judgment and injunctive relief as to Issues 1 and 2 on the ground that as a matter of law a landfill permit was required before Skagit Hill Recycling could conduct solid waste handling activities,

including materials recovery and recycling, that are permit-exempt under state solid waste regulations.

4. The superior court erred in entering its Final Judgment and Order granting Skagit County's motion for injunctive relief as to Issues 1 and 2 on the ground that as a matter of law a landfill permit was required before Skagit Hill Recycling could conduct solid waste handling activities, including materials recovery and recycling, that are permit-exempt under state solid waste regulations.

5. The superior court erred in entering Finding and Conclusion 17 in the Order Granting and Denying Summary Judgment and Injunctive Relief, to wit: "It is undisputed that the defendants do not have a permit to operate a solid waste facility."

6. The superior court erred in entering Finding and Conclusion 18 in the Order Granting and Denying Summary Judgment and Injunctive Relief, to wit: "When the Skagit County Health Department denied the defendants' application for renewal of the inert waste landfill permit in 2008, the defendants did not seek a stay of that ruling or any writ or other judicial relief staying the denial."

7. The superior court erred in entering Finding and Conclusion 19 in the Order Granting and Denying Summary Judgment and Injunctive Relief, to wit: "Without a valid solid waste permit or some judicial authority staying the denial of such, the defendants cannot lawfully continue to operate a solid waste handling facility."

8. The superior court erred in entering Finding and Conclusion 20 in the Order Granting and Denying Summary Judgment and Injunctive Relief, to wit: “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.”

9. The superior court erred in entering Finding and Conclusion 21 in the Order Granting and Denying Summary Judgment and Injunctive Relief, to wit: “Defendants may not simply ignore the denial of the permit renewal and then proceed without a permit.”

10. The superior court erred in entering Finding and Conclusion 22 in the Order Granting and Denying Summary Judgment and Injunctive Relief, to wit: “The Court concludes as a matter of law that there is no basis for allowing the defendants to operate without a solid waste permit.”

11. The superior court erred in entering Finding and Conclusion 23 in the Order Granting and Denying Summary Judgment and Injunctive Relief, to wit: “Defendants are not exempt from having a valid solid waste permit.”

12. The superior court erred in entering Finding and Conclusion 24 in the Order Granting and Denying Summary Judgment

and Injunctive Relief, to wit: “The defendants’ actions of proceeding without a solid waste permit are a per se nuisance, and Skagit County is entitled to a preliminary injunction enjoining the defendants’ activities undertaken in the absence of a valid solid waste permit and ordering abatement of such activities.”

B. Issues Pertaining to Cross-Appellants’ Assignments of Error

1. Did the superior court commit an error of law by determining that Skagit Hill Recycling did not have a valid landfill permit, where it was undisputed that Skagit Hill Recycling was an operating waste recycling facility that received waste from more than one city or county, that Skagit Hill Recycling had filed an appeal to the Pollution Control Hearings Board of the County’s denial of its landfill permit renewal, and that the County’s decision denying the permit renewal did not declare that continued operation of the waste recycling facility poses a very probable threat to human health and the environment, and where RCW 70.95.210 and WAC 173-350-710(6)(c) provide that under such circumstances the permit denial is not effective until the completion of the appeal process? (Assignments of Error 1, 2, 5, 6, 7, 8, 9, 10, and 12.)

2. Did the superior court commit an error of law and fail to comply with CR 56(c) by granting summary judgment to Skagit County where there were genuine issues of material fact regarding the applicability of RCW 70.95.210 and WAC 173-350-710(6)(c) to Skagit Hill Recycling’s landfill permit? (Assignments of Error 1, 2, 5, 6, 7, 8, 9, 10, and 12.)

3. Did the superior court commit an error of law by determining as a matter of law that a separate solid waste facility permit was required before Skagit Hill Recycling could conduct solid waste handling activities, including materials recovery, recycling, and storage of waste in piles, that are permit-exempt under WAC chapter 173-350, the state solid waste handling regulations? (Assignments of Error 3, 4, 7, 8, 9, 10, 11, and 12.)

4. Did the superior court commit an error of law and fail to comply with CR 56(c) by granting summary judgment to Skagit County where there were genuine issues of material fact regarding the applicability of solid waste permit exemptions under WAC chapter 173-350 to Skagit Hill Recycling's activities? (Assignments of Error 3, 4, 7, 8, 9, 10, 11, and 12.)

5. Did the superior court commit an error of law and fail to comply with CR 56(c) by granting summary judgment and injunctive relief to Skagit County where there were genuine issues of material fact regarding the County Health Department's approval and authorization of Skagit Hill Recycling's acceptance of boiler ash under its inert waste landfill permit? (Assignments of Error 1, 2, 5, 6, 7, 8, 9, 10, 11, and 12.)

III. STATEMENT OF THE CASE

A. **Statutory and Regulatory Framework**

Solid waste handling and disposal in Washington is governed by state law, RCW chapter 70.95, and standards promulgated by the Department of Ecology ("Ecology"), WAC chapter 173-350. The purpose

of the statute is “to establish a comprehensive statewide program for solid waste handling, and solid waste recovery and/or recycling which will prevent land, air, and water pollution and conserve the natural, economic, and energy resources of this state.” RCW 70.95.020.³

The term “solid waste” is defined as “all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials.” RCW 70.95.030(22).⁴ *See also* WAC 173-350-100.⁵

1. State priorities for waste reduction and recycling

The Legislature has set the following priorities, in descending order, for collection, handling, and management of solid waste:

- (a) Waste reduction;
- (b) Recycling, with source separation of recyclable materials as the preferred method;
- (c) Energy recovery, incineration, or landfill of separated waste;

³ The Legislature’s findings (RCW 70.95.010) and declaration of purpose (RCW 70.95.020) are attached hereto as Appendices 1 and 2, respectively.

⁴ Effective June 30, 2010, RCW 70.95.030 was amended to delete subsection (3) and renumber subsections (4) through (29) as subsections (3) through (28). Laws 2010, c. 7, § 86. Citations to RCW 70.95.030 herein are to the subsection numbers in effect as of June 30, 2010.

⁵ Relevant definitions from Ecology’s regulations are set forth in Appendix 3 hereto.

(d) Energy recovery, incineration, or landfill of mixed municipal solid wastes.

RCW 70.95.010(8). *See* Appendix 1.

The statute defines “waste reduction” as “reducing the amount or toxicity of waste generated *or reusing materials.*” RCW 70.95.030(27) (emphasis added). “Recycling” means “transforming or remanufacturing waste materials into usable or marketable materials for use other than landfill disposal or incineration.” RCW 70.95.030(18). “Recyclable materials” are solid wastes “that are separated for recycling or reuse, such as papers, metals, and glass, that are identified as recyclable material pursuant to a local comprehensive solid waste plan.” RCW 70.95.030(17). A “landfill” is “a disposal facility or part of a facility at which solid waste is placed in or on land and which is not a land treatment facility.” RCW 70.95.030(12). An “inert waste landfill” is “a landfill that receives only inert waste, as determined under RCW 70.95.065, and includes facilities that use inert wastes as a component of fill.” RCW 70.95.030(10).⁶ *See also* WAC 173-350-100 (excerpts set forth in Appendix 3 hereto).

⁶ “Inert waste” is a term of art under state solid waste regulations, generally encompassing wastes that do not present a threat to human health or the environment. *See* RCW 70.95.065(2). WAC 173-350-990 lists certain materials (cured concrete, asphaltic materials, and brick and masonry that have been used for structural and construction purposes; ceramic materials; glass; stainless steel; and aluminum) as “listed inert wastes” and sets forth “inert waste characteristics” as criteria for determining whether a solid waste that is not specifically listed will be considered “inert” waste. WAC 173-350-990(2), (3).

The Legislature explicitly intended to expand solid waste recycling, materials recovery, and reuse, RCW 70.95.010(3), and to encourage the development and operation of waste recycling facilities needed to accomplish the “management priority” of waste recycling. RCW 70.95.020(4); WAC 173-350-010(7). The Legislature also explicitly encouraged private industry involvement in these efforts. *See* RCW 70.95.020(6); RCW 70.95.167.

2. Local solid waste plans and regulations

Each county is required to adopt a comprehensive solid waste management plan. RCW 70.95.080. The plan must include a comprehensive waste reduction and recycling element. RCW 70.95.090(6). The waste reduction and recycling element must include “an implementation schedule for the designation of specific materials to be collected for recycling, and for the provision of recycling collection services.” RCW 70.95.090(7). Each county must adopt solid waste regulations that implement the comprehensive solid waste management plan and are consistent with state policies and priorities. RCW 70.95.160. Skagit County has incorporated WAC chapter 173-350 into its ordinance governing solid waste handling. Skagit County Code (“SCC”) 12.16.020.

3. Solid waste permitting system

In general, any person operating a solid waste handling facility must obtain a permit from the local health department. RCW 70.95.170; RCW 70.95.180; WAC 173-350-710(1), (2). Such permits must be

renewed at least every five years. RCW 70.95.190(1). Prior to renewing a permit, the health department is required to conduct a review “to assure that the solid waste handling facility or facilities located on the site continues to meet minimum functional standards of the department, applicable local regulations, and are not in conflict with the approved solid waste management plan.” *Id.*; *see also* WAC 173-350-710(3)(a).⁷

Whenever a health department denies a permit or suspends a permit, the applicant or permit holder may request a hearing before the local health officer. The health officer’s determination is then appealable to the PCHB, which “shall hold a hearing in accordance with the provisions of the Administrative Procedure Act, chapter 34.05 RCW.” RCW 70.95.210. If the health department denies a permit renewal for an operating waste recycling facility that receives waste from more than one city or county, and the permittee files an appeal to the PCHB, the permit denial does not take effect until completion of the appeal process, unless the health department declares that continued operation of the waste recycling facility poses “a very probable threat to human health and the environment.” RCW 70.95.210; WAC 173-350-710(6)(c); *see* Appendices 6 and 7 attached hereto.

⁷ RCW 70.95.190 is attached hereto as Appendix 4. Ecology’s regulation governing the permit application process, permit issuance, and permit renewals (WAC 173-350-710(1) through (3)) is attached hereto as Appendix 5.

4. Solid waste permit exemptions

Not all solid waste handling activities require a permit. Certain activities and facilities are exempt from solid waste permitting pursuant to RCW 70.95.305, which authorizes the Department of Ecology to promulgate rules exempting from the requirement to obtain a solid waste handling permit any category of solid waste handling facility that presents little or no environmental risk, and meets the environmental protection and performance requirements required for other similar solid waste facilities. RCW 70.95.305(1).

Ecology's regulations set forth specific permit exemptions for, *inter alia*, recycling (WAC 173-350-210(2)); materials recovery facilities (WAC 173-350-310(2)); storage piles of wood waste and wood derived fuel (WAC 173-350-320(1)(b)); and storage of inert waste in piles (WAC 173-350-320(1)(d)). Skagit County's solid waste ordinance incorporates the same permit exemptions as set forth in the state regulations. SCC 12.16.110; 12.16.160; 12.16.170.

Material recovery facilities are a type of "intermediate solid waste handling facility," defined as "any intermediate use or processing site engaged in solid waste handling which is not the final site of disposal" including "material recovery facilities, transfer stations, drop boxes, baling and compaction sites." WAC 173-350-100. A "material recovery facility" is defined as "any facility that collects, compacts, repackages, sorts, or processes for transport source separated solid waste for the purpose of recycling." *Id.*

The intermediate solid waste handling facility standards provide a permit exemption for material recovery facilities managed in accordance with WAC 173-350-310(2)(b). WAC 173-350-310(2)(a). A permit-exempt materials recovery facility must (i) meet the performance standards of WAC 173-350-040; (ii) accept “only source separated recyclable materials and dispose of an incidental and accidental residual not to exceed five percent of the total waste received, by weight per year, or ten percent by weight per load;” (iii) allow inspections by Ecology or the local health department; (iv) notify Ecology and the health department of intent to operate; and (v) submit an annual report. WAC 173-350-310(2)(b). *See Appendix 8 attached hereto.*

Solid waste recycling in compliance with the requirements of WAC 173-350-210(2)(b) is also exempt from permitting. WAC 173-350-210(2)(a). A permit-exempt recycling facility must (i) meet the performance standards of WAC 173-350-040; (ii) “accept only source separated solid waste for the purpose of recycling;” (iii) allow inspections; (iv) provide advance notification; and (v) submit an annual report. WAC 173-350-210(2)(b). *See Appendix 9 attached hereto.*

Storage of certain types of solid waste in piles in compliance with the requirements of WAC 173-350-320(1) is also exempt from permitting. Ecology’s regulations provide specific permit exemptions and standards

for “wood waste used for fuel or as a raw material,” “wood derived fuel,” and inert waste stored in piles.⁸

The permit exemptions for materials recovery and recycling each require that the waste be “source separated.” “Source separation” is defined as “the separation of different kinds of solid waste at the place where the waste originates.” RCW 70.95.030(24); WAC 173-350-100. As set forth above, different kinds of solid waste are explicitly listed in the definition of “solid waste” – including “demolition and construction wastes” as a specific kind of solid waste. RCW 70.95.030(22); WAC 173-350-100. “Source separation” is embodied in Ecology’s definition of “material recovery facility” (“any facility that collects, compacts, repackages, sorts, or processes for transport source separated solid waste for the purpose of recycling”). WAC 173-350-100. Ecology’s regulations also address the concept of “source separation” in the definition of “municipal solid waste,” which refers to “[m]ixed or segregated recyclable material that has been source-separated from garbage, refuse and similar solid waste.” WAC 173-350-100. *See* Appendix 3.

⁸ Ecology’s regulations providing permit exemptions and standards for piles of “wood waste used for fuel or as a raw material,” “wood derived fuel,” and storage piles of inert wastes (WAC 173-350-320(1)) are set forth in Appendix 10 hereto.

B. Skagit County Health Department Permit Renewal Denial

1. Skagit Hill Recycling's business

Scott Waldal, the sole owner of Skagit Hill Recycling, Inc. and AVIS, LLC, has worked in the solid waste industry for over 20 years. CP 1818-1819. As part of his work in the solid waste industry, he has cleaned up over 800 contaminated sites, including nine sites for the Washington Department of Ecology. CP 1818. In addition to his experience in hazardous waste site remediation, he has training and continuing education in environmental waste management. *Id.*

Mr. Waldal formed Skagit Hill Recycling, Inc. in 2006 after purchasing an existing sand and gravel mine located at 7705 State Route 9 north of the City of Sedro-Woolley. CP 1819. The property had been used for sand and gravel mining for decades. CP 1995-1996. Beginning in 1993, the County had issued permits for operation of an inert waste landfill at the site. CP 570-576. Mr. Waldal purchased the property to operate it as an inert landfill and recycling facility for wastes such as soils, concrete, asphalt from construction and road building activities, and wastes from construction, demolition, and landclearing projects. CP 1819.

There is a substantial unmet need for construction and demolition recycling services in Skagit County and northwest Washington. Most construction, demolition, and land clearing waste can be recycled and reused. Modern screening equipment can efficiently separate and recover wood, metals and other materials. Wood waste can be chipped and reused in timber and paper manufacturing, as a wood-derived fuel, or in

alternative energy production utilizing biomass energy systems.

Incidental waste present in demolition debris, such as metals, insulation, and carpeting, can also be recycled. CP 1819.

Mr. Waldal obtained a transfer of the prior owner's inert waste landfill permit issued by the County. CP 1820; CP 588; CP 590-591. He understood from his review of solid waste regulations that his recycling activity would be exempt from solid waste permitting. CP 1819-1820.

In 2006, Skagit Hill Recycling accepted cured concrete, asphaltic materials, clay, sand, and approximately 210 cubic yards of construction, demolition and landclearing waste. None of these materials were accepted for disposal. Mr. Waldal's intent was to recycle as much of the material as possible. CP 1821. Skagit Hill Recycling accepted similar materials at the site in 2007. CP 1821.

In addition, Sierra Pacific Industries delivered to the site approximately 6,140 cubic yards of boiler ash, derived from burning land clearing debris and clean wood. CP 1821; *see also* CP 2259-2260; CP 2230-2232. The Sierra Pacific ash was approved for disposal at the Skagit Hill Recycling site by the County Health Department. CP 1821. In a declaration in response to the County's motion for summary judgment and injunctive relief, Mr. Waldal stated that on or about July 11, 2007, Health Department Director Peter Browning called him on the telephone to tell him that the Health Department had approved the Sierra Pacific ash for disposal at the Skagit Hill Recycling site. CP 1821. Mr. Waldal's

recollection was corroborated by John Diamond, who was present at the Skagit Hill Recycling site when the call was received. CP 2028-2029.

Mr. Waldal further stated:

I also remember that Kurt, the operations manager at Sierra Pacific in Burlington, called to confirm that Mr. Browning had separately called Sierra Pacific to approve the disposal. Skagit Hill [Recycling] would not have accepted the ash without the express approval of the Health Department.

CP 1821. The County submitted a declaration by Curt Adcock, Operations Manager for Sierra Pacific Industries. CP 2136-2137. Mr. Adcock's declaration did not controvert Mr. Waldal's recollection, and did not deny that the County Health Department approved disposal of the ash at the Skagit Hill Recycling site. Instead, Mr. Adcock stated that "we properly and lawfully dispose of the ash, seeking out environmentally friendly and sustainable options for its re-use," and that "we assured ourselves through research with appropriate regulatory agencies that the ash would be treated as a solid waste" upon its disposal at the Skagit Hill Recycling site. CP 2136-2137.

Skagit Hill Recycling applied to the Department of Agriculture for registration of the Sierra Pacific ash as a fertilizer. CP 1821; CP 4247-4248. Skagit Hill Recycling was screening existing soil on the site and mixing it with the Sierra Pacific ash to create a valuable topsoil product for gardening and landscaping. *Id.* Mr. Waldal also provided evidence that Skagit Hill Recycling had been sorting construction and demolition

debris since the summer of 2007, and that all demolition debris was source separated as that term is used in the regulations:

Equipment is used at each demolition project to separate out wood waste from all other materials. Prior to demolition each structure is subject to a survey to determine that there is no lead based paint, asbestos or other hazardous materials in the building. Any such materials have to be removed from the structure prior to demolition. Skagit Hill [Recycling] employees are also trained in asbestos management and hazardous material management to further insure that no problem waste is brought to the site.

CP 1822.

During 2007 and early 2008, Skagit Hill Recycling received construction and demolition waste from more than one city or county, including Burlington (CP 2214), Lynden (CP 2215), Anacortes (CP 2221), Bellingham (CP 2222), Arlington (CP 2223), Snohomish County (CP 2224), Sedro Woolley (CP 2239, CP 2254), and Marysville (CP 2262).

From May 30, 2008 through July 10, 2009, Skagit Hill Recycling delivered 2,300.5 tons of wood derived fuel, created from its processing of construction and demolition waste, to Kimberly-Clark. During the same time period, Skagit Hill Recycling disposed of a total of 80.34 tons of non-recyclable waste from construction and demolition debris. CP 1822-1823. Skagit Hill Recycling continued to receive construction and demolition waste from more than one city or county, including Mount Vernon (CP 2206), Lake Stevens (CP 2207), Renton (CP 2209), Tacoma (CP 2210), Burlington (CP 2211), and Everett (CP 2212).

2. Skagit County's solid waste permitting for Skagit Hill Recycling

On September 22, 2006, in response to Skagit Hill Recycling's request to transfer the 2006 inert waste landfill permit held by the prior owner, the County advised Skagit Hill Recycling that "the permit only pertains to the landfilling of inert waste at the facility." CP 590. The County acknowledged Skagit Hill Recycling's intention to stockpile materials for recycling, advised that "the inert waste landfill permit does not excuse you from compliance with other permits or requirements that your business may need" (CP 590-591), and enclosed a form for notification/exemption for recycling and material recovery facilities (CP 594-595). The County reissued the inert waste landfill permit to Skagit Hill Recycling, effective through December 31, 2006. CP 597.

Thereafter, a dispute arose between Skagit Hill Recycling and the County Health Department over Skagit Hill Recycling's materials recovery and recycling of construction and demolition waste. CP 628-629; CP 637. Eventually, the County Health Department issued a Solid Waste Permit for an inert waste landfill to Skagit Hill Recycling, effective from March 30, 2007 to December 31, 2007. CP 647-654. Part II of the permit set forth specific permit conditions. The permit's "Minimum Standards for Performance" included the following "Fill Requirements": "Only inert waste shall be accepted into the facility. Only inert waste shall be stock piled [sic] or landfilled at the facility. . . . No other types of solid waste shall be accepted or allowed at the facility." CP 651. The permit also contained a "Compliance Requirement" which required that Skagit

Hill Recycling “not accept any additional construction and demolition wastes or any other solid wastes except inert waste at the facility.” CP 654.

3. County’s denial of renewal of the 2007 landfill permit

In November 2007, Skagit Hill Recycling submitted an application for renewal of its 2007 landfill permit. CP 697-700. On November 20, 2007, County Health Department staff conducted an inspection of the Skagit Hill Recycling site. CP 702-703. Inspector Britt Pfaff-Dunton reported:

I observed several piles on the top westerly portion of the site including: a pile of clean wood waste, some large woody debris, ground wood waste, soil, and asphalt chunks mixed with soil. All of wood waste piles appeared to consist of only clean wood waste. The wood waste piles were up out of the landfill area and Mr. Waldal indicated that the wood waste would be sold for various uses. *These materials were all being handled and stored in accordance with the permit and under the wood waste exempt pile status.*

. . . . The pit area contained several different piles of construction and demolition (C&D) wastes which were being processed, sorted and ground. Mr. Waldal also had a new piece of equipment which is designed to grind the C&D wastes and can sort out metal from the debris. Some of the piles of C&D near the equipment had been ground up and there was a pile of metal debris from the sorting unit. There was a dumpster in the pit which contained separated metals. There were a few small piles of waste which contained a high percentage of plastics, foam and other solid waste.

The piles of C&D wastes included: dimensional wood scraps, plywood, painted woods, laminates, plastics

including sheeting and piping, foam, laminate flooring, and insulation. Some of the C&D piles contained larger chunks of debris and other piles had been ground into finer pieces. Mr. Waldal indicated that these piles would be sold as clean wood waste and wood derived fuel for use in co-generation burners such as the Sierra Pacific co-gen plant. . .

There was a pile of wood ash which Mr. Waldal said was from the Sierra Pacific mill cogeneration plant in Burlington. The wood ash is a waste derived fertilizer registered through the Department of Agriculture. The ash pile was located in the south westerly portion of the pit and appeared to have been off loaded from the top edge of the pit and dumped into the pit. To the east of the ash pile was another stockpile of concrete and soil. There was not a clear delineation of the storage area for the ash and the piles of inert waste.

There were a few smaller piles of mixed C&D wastes which were located along the eastern wall of the pit. A pile of asphaltic roofing waste was located on the northern edge of the pit area, near the access road.

CP 702-703 (emphasis added). Ms. Pfaff-Dunton's report also stated:

The piles of inert waste and wood waste on the upper westerly portion of the property appear to be handled appropriately. The wood waste piles on the upper site appear to contain only wood waste. One of the piles appears to be the ground wood waste from the land clearing debris which are brought [sic] into the site. These piles of wood waste are separated from the area of the site designated for landfilling activities.

. . . . The pit area has non-inert wastes and non-inert wastes are being processed. The site is not permitted to receive non-inert wastes. The site is not permitted for processing non-inert wastes.

CP 703 (emphasis added).

On December 19, 2007, the County Health Department denied Skagit Hill Recycling's application to renew its inert waste landfill permit. CP 714-732. Skagit Hill Recycling requested a hearing before the County Health Officer pursuant to WAC 173-350-710(6)(b). CP 734. The Health Officer conducted a hearing on February 21, 2008. CP 734. On March 14, 2008, the Health Officer issued his decision denying renewal of the landfill permit. CP 734-740.

In his decision, the Health Officer described a site visit conducted on February 29, 2008 as follows:

Appellant explained his procedure for verifying asbestos-free and lead-free material prior to taking demolition waste; he gave a tour of the site and equipment, including how the shredder operated. Clean landclearing debris, separated asphalt and concrete, and clean woodwaste from pallets which would meet the definition of source separated materials were observed on the upper part of the property. Construction and demolition debris was in the 'pit' or lower portion of the property. The piles of construction and demolition waste observed consisted of wood, sheetrock, wiring, plastics, insulation, and other amounts of materials associated with a building demolition. Some of the construction and demolition piles had been put through the shredder, which removed the ferrous metals. Another pile was going to be put through the shredder to further process out ferrous metals for recycling. The appellant stated that in the future he intended to add additional processing to further separate recyclables and wastes. There was a pile of shredded tires and another pile of unshredded tires and a large pile of ash which were also present in this location. The appellant indicated that they are no longer taking ash.

CP 735.

The Health Officer acknowledged Skagit Hill Recycling's intention "to process all the material and take it off-site for recycling or final disposal at an appropriate landfill, which is a laudable goal." CP 736. The Health Officer did not find that Skagit Hill Recycling had disposed of any non-inert waste in the landfill; he stated only that "by using the inert landfill cell for processing this non-inert waste, the Health Department cannot assure that the non-inert waste is not buried on this site." CP 736. In response to Skagit Hill Recycling's contention that its recycling of construction and demolition waste was permit-exempt, the Health Officer disagreed that the construction and demolition debris was "source separated" because he interpreted "source separation" to require all recyclable materials to be "fully segregated" prior to arriving at the site. CP 736. The Health Officer stated:

Truly source separated material such as landclearing debris and concrete found on the upper portion of the property is clearly exempt from permitting under WAC 173-350-210(2)(a) if it is received as source separated material and is not a part of this action.

CP 737 (emphasis in original). Addressing the Health Department's insistence that Skagit Hill Recycling remove existing piles of construction and demolition waste, the Health Officer acknowledged that materials consisting of permit-exempt wood waste and wood derived fuel were not required to be removed. CP 737 ("Appellant is correct that WAC 173-350-320(1)(b) would apply only if the material was indeed wood waste and wood derived fuel").

The Health Officer concluded that “[t]he heart of this matter appears to be a difference of opinion of definitions. . . . The appellant states that he believes the building demolition material is source separated material. The Health Department contends that under WAC 173-350-100, it is material that is not source separated.” CP 738. The Health Officer entered the following findings:

The inert waste landfill permit is to allow just that, landfilling of inert waste. Other permissible [sic] solid waste handling activities at this site are not in compliance with this permit.

Skagit Hill Recycling is not operating an inert waste landfill, nor did they in 2007, but is accepting, stockpiling and processing non-inert solid waste in the inert waste landfill designated facility.

Definitions in Chapter 173-350 WAC do not support Skagit Hill Recycling conclusions that activity at the site is exempt from permit. The construction and demolition debris, tires and asphalt shingles are not wood waste, wood derived fuel, and it is not source separated recyclable materials. Ecology staff does not support the Skagit Hill Recycling conclusions as documented in the Health Department staff report. The record indicates the appellant was given the opportunity on several occasions to apply for permits that would more closely match what his business plan appears to be, however, no action was taken by the appellant to begin this process.

Skagit Hill Recycling’s current operation at this site is not exempt from solid waste permitting. Skagit Hill Recycling is currently operating an illegal solid waste facility at this site.

CP 739 (emphasis in original).

The Health Officer's Decision provided that "Skagit Hill Recycling Inc. shall not accept any more solid waste such as inert waste for landfilling nor construction and demolition wastes and asphaltic roofing materials *until the facility has received a solid waste permit* from the Health Department. No new solid waste which requires a solid waste permit according to Department of Ecology and the Health Department accepted definitions can be accepted at the facility." CP 739 (emphasis added). However, the Health Officer's Decision 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," because such waste was permit-exempt. CP 739-740. The Health Officer ordered removal of the "construction and demolition debris and asphaltic roofing" to "a permitted solid waste facility." CP 740. The Health Officer did not order Skagit Hill Recycling to remove the Sierra Pacific boiler ash. CP 739-740.

C. Skagit Hill Recycling's Appeal to the PCHB

Skagit Hill Recycling appealed the Health Officer's decision to the Pollution Control Hearings Board in PCHB No. 08-038. CP 742. In August 2008, while the PCHB appeal was pending, County Health Department staff members Polly Dubbel, Britt Pfaff-Dunton, and Corinne Story collaborated on a document entitled "Skagit Hill Recycling Enforcement Options/Questions". CP 2188-2190. The document recited that the County Health Officer had given Skagit Hill Recycling until July 31, 2008 to comply with his decision. CP 2189. The document lists four

items on the Health Department’s “agenda,” beginning with “Stop SHR from bringing additional solid waste on site.” CP 2189. Under the heading “Why do we care?” the document states:

Gravel pit operators and other demolition waste handlers around the county and northwest Washington are very frustrated that Mr. Waldal continues to operate without apparent penalty or enforcement. Complaints have come in to the Department of Ecology and the Health Department from operators that feel that he should not be allowed to operate and that they are being out bid for projects by someone who is not disposing of demolition waste as required by law.

CP 2189-2190. Noting that the PCHB hearing was scheduled to occur in January 2009, the document reveals the staff’s desire “to force compliance before that hearing . . .” CP 2190. The document addresses possible enforcement “options” including awaiting the outcome of the pending PCHB appeal (“We really do not want to go this route”). CP 2190.

The PCHB’s Pre-Hearing Order, issued on September 8, 2008, listed the issues to be decided in the appeal, including whether Skagit Hill Recycling’s materials recovery and recycling activities were exempt from permit requirements. CP 2545-2550. Before the PCHB, the County filed a “dispositive motion” seeking to dismiss Skagit Hill Recycling’s appeal without a hearing on the merits. CP 742. The PCHB decided the motion without oral argument. CP 743. On December 17, 2008, the PCHB granted summary judgment to the County, ruling that Skagit Hill Recycling violated the terms of its 2007 inert waste landfill permit by accepting non-inert construction and demolition wastes, and by failing to

cover and remove existing piles of construction and demolition waste. CP 742-754. The PCHB did not find that Skagit Hill Recycling had illegally landfilled any waste. CP 742-754.

The PCHB specifically acknowledged that Skagit Hill Recycling's handling of wood waste – which was non-inert – did not violate its inert waste landfill permit because it was covered by a permit exemption. CP 747 (“piles of clean wood debris were being handled in accordance with the permit and wood waste exemption regulations”). However, the PCHB explicitly did not address the parties' arguments regarding whether Skagit Hill Recycling's materials recovery and recycling of construction and demolition waste was permit-exempt. CP 752-753 (“The legality or proper characterization of different or additional recycling activity on the site is not relevant to the Board's decision on renewal”).⁹

D. Proceedings Below

On June 12, 2009, the County filed its Complaint for Injunctive Relief, to Abate a Nuisance, and to Recover a Monetary Penalty in Skagit County Superior Court, seeking injunctive relief against Skagit Hill Recycling. CP 1. On June 22, 2009, the County issued subpoenas to Summit Bank, Whidbey Island Bank, and John Diamond. CP 39; CP42; CP 45. On June 23, 2009, the County propounded its First Interrogatories

⁹ The PCHB's decision granting summary judgment to Skagit County was reversed by the Thurston County Superior Court. CP 2389-2390; CP 2391-2403.

and Requests for Production to Skagit Hill Recycling. CP 58-82. On June 30, 2009, the County issued a subpoena to DMSL Construction. CP 53. On July 1, 2009, the County issued a second subpoena to Whidbey Island Bank for its records related to DMSL Construction. CP 48.

On July 2, 2009, Skagit Hill Recycling filed its answer to the complaint, which asserted counterclaims for declaratory and injunctive relief against the County. CP 15.

On July 8, 2009, Skagit Hill Recycling moved to quash the County's subpoenas to third parties DMSL Construction, Summit Bank, and Whidbey Island Bank. CP 83; CP 30-34; CP 35-36; CP 37-82. Third parties also moved to quash. CP 84-90; CP 91-94.

On July 17, 2009, the County filed its Motion for Summary Judgment in Skagit County Superior Court. CP 95. The County filed its opposition to the motion to quash on July 20, 2009. CP 142; CP 150. The County also opposed the request for sanctions. CP 185; CP 193; CP 199; CP 206; CP 226.

On July 24, 2009, Skagit County Superior Court Judge Susan K. Cook held oral argument on the motions to quash the third-party subpoenas. Judge Cook entered orders quashing the subpoenas and directing Deputy Prosecuting Attorney Will Honea to engage in good faith in a CR 26(i) conference. CP 229-230; CP 231-233; CP 234-236.

Judge Cook also ruled that defendants were entitled to sanctions against Skagit County under CR 45 and CR 26, and directed defendants to submit a cost bill, which Skagit Hill Recycling did on August 3, 2009 with

its notice of presentation of a proposed Order Granting Sanctions. CP 283; CP 276-280; CP 281-282. Also on August 3, 2009, the County moved for reconsideration of the Court's decision to grant sanctions. CP 265. On August 4, 2009, the County filed its objection and opposition to Skagit Hill Recycling's proposed order granting sanctions. CP 261.

On August 17, 2009, all judges of the Skagit County Superior Court who had not previously been affidavited by Skagit County recused themselves from hearing this case. CP 362. In a letter dated August 18, 2009, the Skagit County Superior Court Administrator advised counsel that "the Skagit County Judges have either been affidavited or have recused themselves from hearing the above matter. Any motions in the case will be heard in Snohomish County Superior Court. . . . Any trial in this case would be heard in Skagit County Superior Court before a visiting judge." CP 366.

On August 28, 2009, Judge Cook denied the pending motion for reconsideration filed by the County on August 3, 2009. CP 368. On September 30, 2009, Judge Cook entered the Order Granting Sanctions. CP 387-388.

On September 25, 2009, the PCHB's Order Granting Summary Judgment in PCHB No. 08-038 was reversed and remanded by the Honorable Wm. Thomas McPhee, Judge of the Thurston County Superior Court. CP 2389-2390; CP 2391-2403. On October 2, 2009, the County appealed Judge McPhee's decision to the Court of Appeals, Division II. CP 2425-2426.

The County's motion for summary judgment was heard by the Honorable Ronald L. Castleberry of the Snohomish County Superior Court. On November 18, 2009, Judge Castleberry issued an Order Granting and Denying Summary Judgment and Injunctive Relief. CP 3098-3106. After considering Skagit Hill Recycling's motion to modify the order (CP 3743), the Court entered its Final Judgment and Order on February 5, 2010. CP 4249-4253.

IV. ARGUMENT

A. Standard of Review

The appropriate standard of review in Skagit Hill Recycling's cross-appeal hinges on the fact that it is an appeal from a decision granting summary judgment. An appellate court reviewing a superior court's summary judgment decision engages in the same inquiry as the trial court, utilizing the CR 56 summary judgment standards. *Christensen v. Grant County Hospital District*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). When reviewing an order granting summary judgment, the appellate court engages in de novo review, viewing the facts in the record and all reasonable inferences therefrom in the light most favorable to the nonmoving party before the superior court. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007); *Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Summary judgment is appropriate only if the entirety of the pleadings and records before the superior court show that there are no

genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). Where there is a genuine issue of material fact, summary judgment is improper. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 143-44, 969 P.2d 458 (1999). Summary judgment may be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Furthermore, the moving party on the motion for summary judgment before the superior court – in this case, Skagit County – bears the burden of demonstrating by uncontroverted facts that there is no genuine issue of material fact. The moving party is held to a strict standard. *Atherton Condo.*, 115 Wn.2d at 516.

A party seeking preliminary injunctive relief must establish (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either have or will result in actual and substantial injury. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 153, 157 P.3d 831 (2007). The failure to establish any of these criteria requires the denial of injunctive relief. *Id.* A court must apply appropriate equitable criteria and balance the equities in granting an injunction. *Tyler Pipe Industries v. Dept. of Revenue*, 96 Wn.2d 785, 797, 638 P.2d 1213 (1982).

The interpretation of a statute and its implementing regulations is a question of law that the appellate court reviews de novo. *Littleton v. Whatcom County*, 121 Wn. App. 108, 112, 86 P.3d 1253 (2004). The

court's goal is to effectuate the legislature's intent and purpose as it is expressed in the act. *Id.* In ascertaining legislative intent the court must look to the statutory scheme as a whole. *Id.* at 112-113. When interpreting a statute, the court must first determine whether its language is ambiguous; that is, whether it is capable of more than one reasonable interpretation. *Id.* at 113. If the language is plain and unambiguous, the court will ascertain the statute's meaning from the statute itself. *Id.* But if the statute is ambiguous or unclear, the court may look to legislative history to discern legislative intent. *Id.*

B. Skagit Hill Recycling's Current Activities On the Site Do Not Involve Landfilling and Do Not Require Solid Waste Facility Permits.

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

Solid waste permit exemptions cover the following solid waste handling activities on the Skagit Hill Recycling site: (1) stockpiling of inert waste; (2) stockpiling of wood waste; (3) stockpiling of wood derived fuel; and (4) materials recovery and recycling of construction and demolition waste. The core dispute between Skagit Hill Recycling and the County is whether Skagit Hill Recycling's materials recovery and recycling of construction and demolition waste meets the permit

exemption requirements under the solid waste regulations. Skagit County's decision not to renew the Skagit Hill Recycling inert waste landfill permit was based on the County's notion (stemming from a "difference of opinion of definitions") that by processing demolition waste for materials recovery and recycling, Skagit Hill Recycling was conducting solid waste handling activities without a required permit. CP 738-739. Skagit Hill Recycling contends that its materials recovery and recycling of construction and demolition waste was and is permit-exempt under the solid waste regulations. CP 1790, 1795-97; CP 2172-2183.

Other activities on the Skagit Hill Recycling site do not require solid waste permits because such activities do not constitute solid waste handling. For example, solid waste permit requirements do not apply to sand and gravel mining activities on the Skagit Hill Recycling site. Nor do solid waste permit requirements apply to the existing pile of ash from Sierra Pacific Industries. It is undisputed that the ash is a registered commercial fertilizer. CP 703. Prior to its registration as a commercial fertilizer, the ash was accepted as a solid waste pursuant to Skagit Hill Recycling's 2007 inert waste landfill permit, after explicit authorization from the Director of the County Health Department. CP 1821; 2028-29.

Finally, Skagit Hill Recycling is not currently landfilling any solid waste, and the County submitted no evidence (other than conclusory allegations) that Skagit Hill Recycling has landfilled any solid waste since January 2008. Construing the evidence and all inferences therefrom in the light most favorable to the non-moving party – here, Skagit Hill Recycling

– there are disputed issues of material fact as to whether Skagit Hill Recycling is currently engaged in any landfilling activities.¹⁰

1. Skagit Hill Recycling’s stockpiling of inert waste is exempt from permit requirements.

It is undisputed that Skagit Hill Recycling is stockpiling inert materials on the Skagit Hill Recycling site, including cured concrete waste, asphalt rubble, clay, and soils. It is also undisputed that a solid waste facility permit is not required for stockpiling of inert waste on the Skagit Hill Recycling site. A specific permit exemption – WAC 173-350-320(1)(d) – covers the stockpiling of inert waste, and does not require a separate permit for an inert waste landfill.¹¹

When the Skagit County Health Officer denied renewal of Skagit Hill Recycling’s landfill permit in March 2008, he explicitly recognized that the stockpiles of inert waste are exempt from permit requirements: “Truly source separated material such as . . . concrete found on the upper portion of the property is clearly exempt from permitting under WAC 173-350-210(2)(a) if it is received as source separated material and is not a part

¹⁰ Moreover, even if Skagit Hill Recycling were currently engaged in inert waste landfilling, such activity would be covered under its inert waste landfill permit, which remains in effect pursuant to state law and Ecology regulations. *See* Part IV.C *infra*.

¹¹ Skagit County issued an inert waste landfill permit to Skagit Hill Recycling effective March 30, 2007. CP 648-654. That permit clearly contemplated that inert waste would be stockpiled at the facility. CP 651. However, the inert waste landfill permit was not required to authorize the stockpiling of inert waste, because such stockpiling is permit-exempt.

of this action.” CP 737. Skagit County did not dispute that Skagit Hill Recycling’s storage of inert waste on the site complies with permit exemption requirements.

Because a solid waste permit is not required to stockpile inert waste, and because it is undisputed that Skagit Hill Recycling’s storage of inert waste complies with permit exemption requirements, as a matter of law Skagit County was not entitled to summary judgment or injunctive relief with respect to Skagit Hill Recycling’s storage of inert waste.

2. Skagit Hill Recycling’s stockpiling of wood waste is exempt from permit requirements.

It is undisputed that Skagit Hill Recycling is stockpiling non-inert wood waste on the site, including wood pallets, woody landclearing debris, and stumps. Wood waste is inherently non-inert under the inert waste criteria because, for example, it can catch fire. See WAC 173-350-990. Wood waste on the Skagit Hill Recycling site is chipped and re-used in timber and paper manufacturing or as a fuel; wood waste is also used in alternative energy production. CP 1819.

It is undisputed that a solid waste permit is not required for this activity. A specific permit exemption – WAC 173-350-320(1)(b) – covers the storage of wood waste used for fuel or as a raw material, and does not require a separate permit for an inert waste landfill.

Health Department inspector Britt Pfaff-Dunton confirmed after a November 2007 inspection that the piles of wood waste on the Skagit Hill Recycling site “appear to be handled appropriately.” CP 703. The inert

waste landfill permit issued to Skagit Hill Recycling on March 30, 2007 did not cover the stockpiling of wood waste – which is non-inert – and was not required for the stockpiling of wood waste. When he denied renewal of Skagit Hill Recycling’s landfill permit in March 2008, the County Health Officer explicitly recognized that the stockpiles of non-inert wood waste are exempt from permit requirements: “Truly source separated material such as landclearing debris . . . found on the upper portion of the property is clearly exempt from permitting . . . and is not a part of this action.” CP 737. The Health Officer also ruled: “Skagit Hill Recycling may 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. Skagit County did not dispute that Skagit Hill Recycling’s storage of wood waste on the site complies with permit exemption requirements.

The PCHB also found that storage of wood waste on the Skagit Hill Recycling site is exempt from solid waste permit requirements: “At the top westerly portion of the site material was sorted into piles of clean wood debris. These materials were being handled in accordance with the permit and wood waste exemption regulations.” CP 747.

Because a solid waste permit is not required to stockpile wood waste, and because it is undisputed that Skagit Hill Recycling’s storage of wood waste complies with permit exemption requirements, as a matter of law Skagit County is not entitled to summary judgment or injunctive relief with respect to Skagit Hill Recycling’s storage of wood waste on the site.

3. Skagit Hill Recycling's stockpiling of wood derived fuel is exempt from permit requirements.

It is undisputed that Skagit Hill Recycling is stockpiling wood-derived fuel on the site, including painted wood and lumber sorted from demolition debris. "Wood derived fuel" is defined in the state solid waste regulations as "wood pieces or particles used as a fuel for energy recovery, which contain paint, bonding agents, or creosote." WAC 173-350-100. Wood derived fuel does not include wood pieces or particles coated with paint that contains lead or mercury, or wood treated with other chemical preservatives such as pentachlorophenol, copper naphthanate, or copper-chrome-arsenate. *Id.* Skagit County submitted no evidence that any of those prohibited substances are present in the wood pieces or particles stockpiled as wood derived fuel on the Skagit Hill Recycling site. It is undisputed that from May 30, 2008 through July 10, 2009, Skagit Hill Recycling processed and delivered to Kimberly-Clark over 2,300 tons of wood derived fuel. CP 1822.

A solid waste permit is not required for stockpiling of wood-derived fuel. A specific permit exemption – WAC 173-350-320(1)(b) – covers the storage of wood-derived fuel, and does not require a separate permit for an inert waste landfill.

The inert waste landfill permit issued to Skagit Hill Recycling in 2007 did not cover the stockpiling of wood derived fuel, and was not required for the stockpiling of wood derived fuel. As a matter of law,

Skagit County is not entitled to summary judgment or injunctive relief with respect to Skagit Hill Recycling's storage of wood derived fuel.

4. Skagit Hill Recycling's stockpiling of Sierra Pacific boiler ash is exempt from solid waste permitting requirements.

It is undisputed that between July 2007 and February 2008, Skagit Hill Recycling accepted boiler ash for disposal from Sierra Pacific Industries. It is also undisputed that no boiler ash has been accepted at the site after February 11, 2008. Skagit Hill Recycling accepted the boiler ash beginning in July 2007 only after receiving explicit authorization from the Director of the County Health Department, Peter Browning. Mr. Waldal's recollection of the telephone call from Mr. Browning is corroborated by John Diamond, who was present when the call was received. Evidence that Mr. Browning approved disposal of the ash at the Skagit Hill Recycling inert waste landfill is also implicitly corroborated by the declaration of Sierra Pacific Industries' operations manager, Curt Adcock. The inference that must be drawn from Mr. Adcock's statement about "research with appropriate regulatory agencies" is that Sierra Pacific Industries communicated with the County Health Department – obviously an appropriate regulatory agency – to determine that it was appropriate to dispose of the ash at the Skagit Hill Recycling landfill. In addition, despite his observation of the ash on the site in February 2008, the Health Officer did not identify the ash pile as a violation of Skagit Hill Recycling's landfill permit or order its removal. The inference that must

be drawn from the Health Officer's decision is that as of March 2008, the County deemed the presence of the ash on the site to be consistent with Skagit Hill Recycling's landfill permit.

Thus, there are disputed issues of material fact as to the Health Department's approval of disposal of the ash under the Skagit Hill Recycling inert waste landfill permit. Such disputed issues of material fact preclude summary judgment. As a matter of law, the County is not entitled to summary judgment or injunctive relief with respect to Skagit Hill Recycling's past acceptance of the ash under the inert waste landfill permit, or with respect to the continued storage of the ash – now a registered commercial fertilizer – on the site.

5. Skagit Hill Recycling's materials recovery and recycling of construction and demolition waste is exempt from solid waste permitting requirements.

It is undisputed that Skagit Hill Recycling has accepted and processed construction and demolition debris – which is largely non-inert waste – for recovery and resale of metals, wood, plastics and other materials that can be recycled and reused. This recycling of demolition debris is at the heart of the dispute between the County and Skagit Hill Recycling. The County refused to renew Skagit Hill Recycling's landfill permit not because of any improper landfilling, but because Skagit Hill Recycling was processing construction and demolition waste for recycling instead of directing that waste stream to the recycling and transfer station operated by Skagit County. CP 656 (“Please note that any waste leaving

the facility for final disposal must go to the Skagit County Recycling and Transfer Station unless otherwise approved by the Health Department”).

Under the solid waste regulations, materials recovery is exempt from solid waste permitting requirements, if the activity complies with the requirements of WAC 173-350-310(2)(b). WAC 173-350-310(2)(a). Recycling of solid waste is also specifically exempt from solid waste handling permitting requirements, if the activity complies with the requirements of WAC 173-350-210(2). Neither exemption requires the facility operator to have a separate permit for an inert waste landfill.

In this case, Skagit Hill Recycling submitted evidence that the demolition waste it accepted was source separated (i.e., not mixed with garbage or any other kind of solid waste), and that the non-recyclable residuals did not exceed the maximum volume allowed under the permit exemption for materials recovery.

The County’s view of “source separation” (*see* CP 736) is wrong as a matter of law. The County confuses “separating” construction and demolition waste from other kinds of solid waste – which, obviously, is what happens at a demolition site which generates only demolition waste – with “sorting” or “segregating” various materials for recycling, such as wood, plastics, metals, textiles, drywall, etc., which is an inherent part of materials recovery. Demolition and construction waste is a specific kind of solid waste. RCW 70.95.030(22). Demolition waste is thus “source separated” if it originates at a demolition site where it is the only kind of solid waste generated and is not mixed with other kinds of solid waste,

such as garbage. Different recyclable materials may be mixed together and still be considered “source separated” under the solid waste laws and regulations. The sorting of distinct types of recyclable materials – wood, plastics, metals, drywall, etc. – from a load of demolition debris is not “source separation” but materials recovery.

Thus, there are disputed issues of material fact as to whether Skagit Hill Recycling’s materials recovery and recycling activities meet the requirements for permit exemptions under state solid waste regulations. As a matter of law, a landfill permit is not a necessary prerequisite for conducting permit-exempt materials recovery and recycling. Skagit County is not entitled to summary judgment or injunctive relief with respect to Skagit Hill Recycling’s materials recovery and recycling of construction and demolition waste.

C. Skagit County Is Not Entitled to Summary Judgment or Injunctive Relief Based on its Decision Not to Renew Skagit Hill Recycling’s Landfill Permit.

It is undisputed that the County did not suspend or revoke the inert waste landfill permit issued in 2007 to Skagit Hill Recycling, and that Skagit Hill Recycling made timely application for renewal of that permit. It is also undisputed that Skagit Hill Recycling filed a timely appeal to the PCHB of the Health Officer’s decision to deny the permit renewal. It is also undisputed that Skagit Hill Recycling receives and recycles waste from more than one city or county, including waste originating in Burlington, Lynden, Anacortes, Mount Vernon, Lake Stevens, Renton, Tacoma, and Everett. When he made his decision denying the permit

renewal, the County Health Officer did not find that continued waste recycling at the Skagit Hill Recycling site poses a very probable threat to human health and the environment. Rather, the Health Officer found only that a permit is required for Skagit Hill Recycling's recycling of demolition waste and that Skagit Hill Recycling had refused to obtain such a permit because it contended that its activity was permit-exempt.

Pursuant to RCW 70.95.210 and WAC 173-350-710(6)(c), the County's denial of Skagit Hill Recycling's permit renewal is not effective until completion of the appeal process before the PCHB. Thus, even if Skagit Hill Recycling were continuing to landfill inert waste, and even if a landfill permit were a precondition for conducting other permit-exempt activities on the site, the landfill permit remains valid and in effect. It was error for the superior court to find and conclude that Skagit Hill Recycling does not have a valid inert waste landfill permit. As a matter of law, Skagit County is not entitled to summary judgment or injunctive relief based upon the asserted absence of a valid solid waste permit.

D. The County's Appeal Is Without Merit.

An appellate court reviews a trial court's discovery sanctions for abuse of discretion. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009). A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion. *Id.* (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). A trial court abuses its discretion when its order is manifestly

unreasonable or based on untenable grounds. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A discretionary decision rests on “untenable grounds” or is based on “untenable reasons” if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Magana v. Hyundai, supra*, 167 Wn.2d at 582-583. “The trial court is in a better position than an appellate court to determine the appropriate discovery sanctions.” *Id.* at 583 n.5.

Decisions on recusal are also reviewed for abuse of discretion. Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require a judge to recuse herself where there is bias against a party or where impartiality can be questioned. The test for whether a judge should disqualify herself where her impartiality might reasonably be questioned is an objective one. An abuse of discretion will be found only when the court’s decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Leon*, 133 Wn. App. 810, 812-13, 138 P.3d 159 (2006). An appearance of fairness claim requires evidence of the judicial officer’s actual or potential bias. *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). Mere speculation is not enough. *In re Personal Restraint of Haynes*, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

A judicial officer is presumed to perform her functions “regularly and properly and without bias or prejudice.” *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993) (citing *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967)); *In re Wiatt*, 151 Wn. App. 22, 53, 211 P.3d 1030 (2009). A party challenging a judge’s impartiality bears the burden of presenting evidence of actual or potential bias. *State v. Post*, 118 Wn.2d 596, 618, 619 n.9, 826 P.2d 172 (1992). After this burden is met, the court applies an objective test to determine whether a reasonable person with knowledge of the relevant facts would question the judge’s impartiality. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1996). Recusal decisions lie within the sound discretion of the trial court. *In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997).

The County has not overcome the presumption that Judge Cook acted without bias or prejudice. The County claims that the Skagit County judges recused themselves because of allegations against the County and the County Commissioners in Skagit Hill Recycling’s second counterclaim. It is the County’s theory that the judges were concerned that they might be perceived as biased in favor of the Skagit County commissioners, i.e., against Skagit Hill Recycling. The County illogically converts the judges’ recusal out of purported concern about an appearance of partiality in **favor** of the County into an argument that Judge Cook was biased **against** the County.

Here, the County violated the discovery rules before any basis for recusal or disqualification arose. Judge Cook determined that the County

violated the discovery rules before the Skagit County Superior Court judges recused themselves. Having already quashed the subpoenas and decided that sanctions would be awarded against the County, Judge Cook properly exercised her discretion in this case. The superior court judges' recusal due to concern about potential bias in favor of the County did not preclude Judge Cook from finishing up the narrow procedural matters remaining before her, namely, a decision on the County's motion for reconsideration of her decision to award sanctions, and entry of an order specifying the amount of those sanctions. Judge Cook's actions did not violate the judicial canons or the appearance of fairness doctrine.

The cases cited by the County (Appellant's Opening Brief at 14-17, 28-31) do not change this result. In *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 847 P.2d 945 (1993), the court held that a judge personally accused of improper conduct at trial should not preside over a post-trial hearing regarding the truth or falsity of the allegations of misconduct. *Jones*, 69 Wn. App. at 128-29. The County's discussion of *State v. Graham*, 91 Wn. App. 663, 960 P.2d 457 (1998), is also misleading. The court did not hold that a "manifest necessity" exists for recusal once a judge decides to recuse himself. "Manifest necessity" refers to a showing required to allow a retrial without violating the Double Jeopardy clause. *Graham*, 91, Wn. App. at 666-67. *Graham* has no bearing here. Finally, the decision in *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1996), is inapposite; that case involved ex parte contact by the trial court judge. In

the case at hand, there is no evidence of improper ex parte contact and no allegation whatsoever of bias or improper conduct by Judge Cook.

If a party believes that a judge may be unable to act impartially in a case, the party may file an affidavit against the judge without substantiating any claim of prejudice. RCW 4.12.040; 4.12.050; *State v. Dominguez*, 81 Wn. App. 325, 914 P.2d 141 (1996). This statutory right must be exercised before the judge makes any order or ruling involving the exercise of discretion. RCW 4.12.050; *State v. Espinoza*, 112 Wn.2d 819, 774 P.2d 1177 (1989); *State v. Dixon*, 74 Wn.2d 700, 446 P.2d 329 (1968). Failure to do so results in waiver. *Brauhn v. Brauhn*, 10 Wn. App. 592, 518 P.2d 1089 (1974). If a party moves to recuse a judge after rulings have been made, the party must demonstrate bias or prejudice. *State v. Cameron*, 47 Wn. App. 878, 884, 737 P.2d 688 (1987).

The County's argument begs the question of exactly what bias or prejudice is at issue here. If anything, the allegations in the counterclaim raised the potential for bias in favor of the County, not against it. The County did not raise any concern about perceived bias after Skagit Hill Recycling's counterclaim was filed. The County also failed to raise the issue when the Skagit County judges recused themselves, even though the County's motion for reconsideration was pending before Judge Cook at that time. The County filed its Memorandum Regarding Effect of Court's Recusal (CP 369) on September 18, 2009 – 32 days after the judges' recusal and 22 days after Judge Cook denied the County's motion for reconsideration. A party may not sit back and wait until after receiving an

unfavorable ruling and then opportunistically raise the issue of a judge's bias or prejudice. *State v. French*, 78 Wash. 260, 138 P. 869 (1914); *State v. Carlson*, 66 Wn. App. 909, 833 P.2d 463 (1992). Yet that is precisely what the County is attempting to do here.

E. Skagit Hill Recycling Is Entitled to Attorneys' Fees.

The County's appeal and its previously-filed notice for discretionary review based upon the Skagit County Superior Court judges' recusal is nothing more than an attempt to evade payment of the discovery sanctions and to run up the amount of attorneys' fees which Skagit Hill Recycling has incurred – and continues to incur – as a result of the County Prosecuting Attorney's abuse of the discovery process. The same reasons which compelled Judge Cook to impose attorney fee sanctions against Skagit County compel their award in this Court. Where "fees are allowable at trial, the prevailing party may recover fees on appeal as well." *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). This is particularly so where the award of sanctions in the trial court suggests that the appeal is a continuation of the behavior which led to the imposition of sanctions in the first place. *See, e.g., Delaney v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997).

RAP 18.9 authorizes this Court to order a party or counsel who pursues an appeal for the purpose of delay or files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay . . . or to pay sanctions to the court." RAP 18.9(1). Appropriate sanctions may include an award of attorney fees and costs.

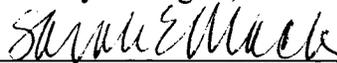
Yurtis v. Phipps, 143 Wn. App. 680, 696, 181 P.3d 849 (2008). Such an award of attorneys' fees is appropriate where a party uses the appeal process in order to avoid a trial court's discretionary award of sanctions for discovery abuses. *E.g.*, *Johnson v. Jones*, 91 Wn. App. 127, 137-38, 955 P.2d 826 (1998). Skagit Hill Recycling hereby requests an award of its attorneys' fees on appeal pursuant to RAP 18.1 and 18.9(a).

Under Washington law, a party is entitled to recover attorneys' fees and costs reasonably incurred in obtaining reversal of a wrongfully-issued injunction. *Cecil v. Dominy*, 69 Wn.2d 289, 418 P.2d 233 (1966); *Talbot v. Gray*, 11 Wn. App. 807, 812, 525 P.2d 801 (1974). Skagit Hill Recycling also hereby requests an award of its attorneys' fees and costs incurred in obtaining reversal of the superior court injunction against the use of its property for lawful solid waste handling activities.

V. CONCLUSION

For the foregoing reasons, Skagit Hill Recycling respectfully urges this Court to reverse the superior court's Final Judgment and Order dated February 5, 2010 and Order Granting Summary Judgment and Injunctive Relief dated November 18, 2009; affirm the superior court's Order Granting Sanctions dated September 30, 2009; and award Skagit Hill Recycling its attorneys' fees on appeal.

Respectfully submitted this 19th day of August, 2010.



James A. Tupper, Jr., WSBA No. 16873
Sarah E. Mack, WSBA No. 12731
Lynne M. Cohee, WSBA No. 18496
TUPPER MACK BROWER PLLC

DECLARATION OF DELIVERY

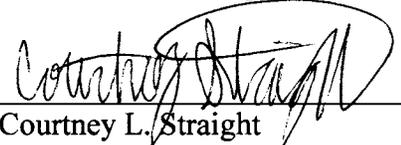
I, Courtney L. Straight, declare as follows:

I sent for delivery by US Postal Service, first-class postage pre-paid, a true and correct copy of the Corrected Brief of Respondents/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 August 19, 2010, at Seattle, Washington.



Courtney L. Straight

4838-4471-1175, v. 1

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Appendix 1
RCW 70.95.010

RCW 70.95.010

Legislative finding — Priorities — Goals.

The legislature finds:

(1) Continuing technological changes in methods of manufacture, packaging, and marketing of consumer products, together with the economic and population growth of this state, the rising affluence of its citizens, and its expanding industrial activity have created new and ever-mounting problems involving disposal of garbage, refuse, and solid waste materials resulting from domestic, agricultural, and industrial activities.

(2) Traditional methods of disposing of solid wastes in this state are no longer adequate to meet the ever-increasing problem. Improper methods and practices of handling and disposal of solid wastes pollute our land, air and water resources, blight our countryside, adversely affect land values, and damage the overall quality of our environment.

(3) Considerations of natural resource limitations, energy shortages, economics and the environment make necessary the development and implementation of solid waste recovery and/or recycling plans and programs.

(4) Waste reduction must become a fundamental strategy of solid waste management. It is therefore necessary to change manufacturing and purchasing practices and waste generation behaviors to reduce the amount of waste that becomes a governmental responsibility.

(5) Source separation of waste must become a fundamental strategy of solid waste management. Collection and handling strategies should have, as an ultimate goal, the source separation of all materials with resource value or environmental hazard.

(6)(a) It should be the goal of every person and business to minimize their production of wastes and to separate recyclable or hazardous materials from mixed waste.

(b) It is the responsibility of state, county, and city governments

to provide for a waste management infrastructure to fully implement waste reduction and source separation strategies and to process and dispose of remaining wastes in a manner that is environmentally safe and economically sound. It is further the responsibility of state, county, and city governments to monitor the cost-effectiveness and environmental safety of combusting separated waste, processing mixed municipal solid waste, and recycling programs.

(c) It is the responsibility of county and city governments to assume primary responsibility for solid waste management and to develop and implement aggressive and effective waste reduction and source separation strategies.

(d) It is the responsibility of state government to ensure that local governments are providing adequate source reduction and separation opportunities and incentives to all, including persons in both rural and urban areas, and nonresidential waste generators such as commercial, industrial, and institutional entities, recognizing the need to provide flexibility to accommodate differing population densities, distances to and availability of recycling markets, and collection and disposal costs in each community; and to provide county and city governments with adequate technical resources to accomplish this responsibility.

(7) Environmental and economic considerations in solving the state's solid waste management problems requires strong consideration by local governments of regional solutions and intergovernmental cooperation.

(8) The following priorities for the collection, handling, and management of solid waste are necessary and should be followed in descending order as applicable:

(a) Waste reduction;

(b) Recycling, with source separation of recyclable materials as the preferred method;

(c) Energy recovery, incineration, or landfill of separated waste;

(d) Energy recovery, incineration, or landfill of mixed municipal solid wastes.

(9) It is the state's goal to achieve a fifty percent recycling rate by 2007.

(10) It is the state's goal that programs be established to eliminate residential or commercial yard debris in landfills by 2012 in those areas where alternatives to disposal are readily available and effective.

(11) Steps should be taken to make recycling at least as affordable and convenient to the ratepayer as mixed waste disposal.

(12) It is necessary to compile and maintain adequate data on the types and quantities of solid waste that are being generated and to monitor how the various types of solid waste are being managed.

(13) Vehicle batteries should be recycled and the disposal of vehicle batteries into landfills or incinerators should be discontinued.

(14) Excessive and nonrecyclable packaging of products should be avoided.

(15) Comprehensive education should be conducted throughout the state so that people are informed of the need to reduce, source separate, and recycle solid waste.

(16) All governmental entities in the state should set an example by implementing aggressive waste reduction and recycling programs at their workplaces and by purchasing products that are made from recycled materials and are recyclable.

(17) To ensure the safe and efficient operations of solid waste disposal facilities, it is necessary for operators and regulators of landfills and incinerators to receive training and certification.

(18) It is necessary to provide adequate funding to all levels of

government so that successful waste reduction and recycling programs can be implemented.

(19) The development of stable and expanding markets for recyclable materials is critical to the long-term success of the state's recycling goals. Market development must be encouraged on a state, regional, and national basis to maximize its effectiveness. The state shall assume primary responsibility for the development of a multifaceted market development program to carry out the purposes of this act.

(20) There is an imperative need to anticipate, plan for, and accomplish effective storage, control, recovery, and recycling of discarded tires and other problem wastes with the subsequent conservation of resources and energy.

[2002 c 299 § 3; 1989 c 431 § 1; 1985 c 345 § 1; 1984 c 123 § 1; 1975-'76 2nd ex.s. c 41 § 1; 1969 ex.s. c 134 § 1.]

Appendix 2
RCW 70.95.020

RCW 70.95.020

Purpose.

The purpose of this chapter is to establish a comprehensive statewide program for solid waste handling, and solid waste recovery and/or recycling which will prevent land, air, and water pollution and conserve the natural, economic, and energy resources of this state. To this end it is the purpose of this chapter:

(1) To assign primary responsibility for adequate solid waste handling to local government, reserving to the state, however, those functions necessary to assure effective programs throughout the state;

(2) To provide for adequate planning for solid waste handling by local government;

(3) To provide for the adoption and enforcement of basic minimum performance standards for solid waste handling, including that all sites where recyclable materials are generated and transported from shall provide a separate container for solid waste;

(4) To encourage the development and operation of waste recycling facilities needed to accomplish the management priority of waste recycling, to promote consistency in the requirements for such facilities throughout the state, and to ensure that recyclable materials diverted from the waste stream for recycling are routed to facilities in which recycling occurs;

(5) To provide technical and financial assistance to local governments in the planning, development, and conduct of solid waste handling programs;

(6) To encourage storage, proper disposal, and recycling of discarded vehicle tires and to stimulate private recycling programs throughout the state; and

(7) To encourage the development and operation of waste recycling facilities and activities needed to accomplish the management priority of waste recycling and to promote consistency in the permitting requirements for such facilities and activities

throughout the state.

It is the intent of the legislature that local governments be encouraged to use the expertise of private industry and to contract with private industry to the fullest extent possible to carry out solid waste recovery and/or recycling programs.

[2005 c 394 § 2. Prior: 1998 c 156 § 1; 1998 c 90 § 1; 1985 c 345 § 2; 1975-'76 2nd ex.s. c 41 § 2; 1969 ex.s. c 134 § 2.]

Appendix 3

WAC 173-350-100 (excerpts)

WAC 173-350-100

Definitions.

"Disposal" or "deposition" means the discharge, deposit, injection, dumping, leaking, or placing of any solid waste into or on any land or water.

"Garbage" means animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking, and serving of foods.

"Inert waste" means solid wastes that meet the criteria for inert waste in WAC 173-350-990.

"Inert waste landfill" means a landfill that receives only inert wastes.

"Intermediate solid waste handling facility" means any intermediate use or processing site engaged in solid waste handling which is not the final site of disposal. This includes material recovery facilities, transfer stations, drop boxes, baling and compaction sites.

"Landfill" means a disposal facility or part of a facility at which solid waste is permanently placed in or on land including facilities that use solid waste as a component of fill.

"Material recovery facility" means any facility that collects, compacts, repackages, sorts, or processes for transport source separated solid waste for the purpose of recycling.

"Municipal solid waste (MSW)" means a subset of solid waste which includes unsegregated garbage, refuse and similar solid waste material discarded from residential, commercial, institutional and industrial sources and community activities, including residue after recyclables have been separated. Solid waste that has been segregated by source and characteristic may qualify for management as a non-MSW solid waste, at a facility designed and operated to address the waste's characteristics and potential environmental impacts. The term MSW does not include:

- Dangerous wastes other than wastes excluded from the requirements of chapter 173-303 WAC, Dangerous waste regulations, in WAC 173-303-071 such as household hazardous wastes;

- Any solid waste, including contaminated soil and debris, resulting from response action taken under section 104 or 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601), chapter 70.105D RCW, Hazardous waste cleanup – Model Toxics Control Act, chapter 173-340 WAC, the Model Toxics Control Act cleanup regulation or a remedial action taken under those rules; nor

- Mixed or segregated recyclable material that has been source-separated from garbage, refuse and similar solid waste. The residual from source separated recyclables is MSW.

"Permit" means an authorization issued by the jurisdictional health department which allows a person to perform solid waste activities at a specific location and which includes specific conditions for such facility operations.

"Processing" means an operation to convert a material into a useful product or to prepare it for reuse, recycling, or disposal.

"Recyclable materials" means those solid wastes that are separated for recycling or reuse, including, but not limited to, papers, metals, and glass, that are identified as recyclable material pursuant to a local comprehensive solid waste plan.

"Recycling" means transforming or remanufacturing waste materials into usable or marketable materials for use other than landfill disposal or incineration. Recycling does not include collection, compacting, repackaging, and sorting for the purpose of transport.

"Solid waste" or "wastes" means all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, contaminated soils and contaminated dredged material, and recyclable materials.

"Solid waste handling" means the management, storage, collection, transportation, treatment, use, processing or final disposal of solid

wastes, including the recovery and recycling of materials from solid wastes, the recovery of energy resources from such wastes or the conversion of the energy in such wastes to more useful forms or combinations thereof.

"Source separation" means the separation of different kinds of solid waste at the place where the waste originates.

"Treatment" means the physical, chemical, or biological processing of solid waste to make such solid wastes safer for storage or disposal, amenable for recycling or energy recovery, or reduced in volume.

"Wood derived fuel" means wood pieces or particles used as a fuel for energy recovery, which contain paint, bonding agents, or creosote. Wood derived fuel does not include wood pieces or particles coated with paint that contains lead or mercury, or wood treated with other chemical preservatives such as pentachlorophenol, copper naphthanate, or copper-chrome-arsenate.

"Wood waste" means solid waste consisting of wood pieces or particles generated as a by-product or waste from the manufacturing of wood products, construction, demolition, handling and storage of raw materials, trees and stumps. This includes, but is not limited to, sawdust, chips, shavings, bark, pulp, hogged fuel, and log sort yard waste, but does not include wood pieces or particles containing paint, laminates, bonding agents or chemical preservatives such as creosote, pentachlorophenol, or copper-chrome-arsenate.

Appendix 4
RCW 70.95.190

RCW 70.95.190

**Permit for solid waste handling facility — Renewal — Appeal —
Validity of renewal — Review fees.**

(1) Every permit for an existing solid waste handling facility issued pursuant to RCW 70.95.180 shall be renewed at least every five years on a date established by the jurisdictional health department having jurisdiction of the site and as specified in the permit. If a permit is to be renewed for longer than one year, the local jurisdictional health department may hold a public hearing before making such a decision. Prior to renewing a permit, the health department shall conduct a review as it deems necessary to assure that the solid waste handling facility or facilities located on the site continues to meet minimum functional standards of the department, applicable local regulations, and are not in conflict with the approved solid waste management plan. A jurisdictional health department shall approve or disapprove a permit renewal within forty-five days of conducting its review. The department shall review and may appeal the renewal as set forth for the approval of permits in RCW 70.95.185.

(2) The jurisdictional board of health may establish reasonable fees for permits reviewed under this section. All permit fees collected by the health department shall be deposited in the treasury and to the account from which the health department's operating expenses are paid.

[1998 c 156 § 4; 1997 c 213 § 4; 1984 c 123 § 9; 1969 ex.s. c 134 § 19.]

Appendix 5

WAC 173-350-710(1), (2), (3)

WAC 173-350-710

(1) *Permit application process.*

(a) Any owner or operator required to obtain a permit shall apply for a permit from the jurisdictional health department. All permit application filings shall include two copies of the application. An application shall not be considered complete by the jurisdictional health department until the information required under WAC 173-350-715 has been submitted.

(b) The jurisdictional health department may establish reasonable fees for permits, permit modifications, and renewal of permits. All permit fees collected by the health department shall be deposited in the account from which the health department's operating expenses are paid.

(c) Once the jurisdictional health department determines that an application for a permit is complete, it shall:

(i) Refer one copy to the appropriate regional office of the department for review and comment;

(ii) Investigate every application to determine whether the facilities meet all applicable laws and regulations, conform to the approved comprehensive solid waste management plan and/or the approved hazardous waste management plan, and comply with all zoning requirements; and

(d) Once the department has received a complete application for review, it shall:

(i) Ensure that the proposed site or facility conforms with all applicable laws and regulations including the minimum functional standards for solid waste handling;

(ii) Ensure that the proposed site or facility conforms to the approved comprehensive solid waste management plan and/or the approved hazardous waste management plan; and

(iii) Recommend for or against the issuance of each permit by the jurisdictional health department within forty-five days of receipt of a complete application.

(e) Application procedures for statewide beneficial use

exemptions and permit deferrals are contained in WAC 173-350-200 and 173-350-710(8), respectively.

(2) *Permit issuance.*

(a) When the jurisdictional health department has evaluated all pertinent information, it may issue or deny a permit. Every solid waste permit application shall be approved or disapproved within ninety days after its receipt by the jurisdictional health department. Every permit issued by a jurisdictional health department shall contain specific requirements necessary for the proper operation of the permitted site or facility.

(b) Every permit issued shall be valid for a period not to exceed five years at the discretion of the jurisdictional health department.

(c) Jurisdictional health departments shall file all issued permits with the appropriate regional office of the department no more than seven days after the date of issuance.

(d) The department shall review the permit in accordance with RCW 70.95.185 and report its findings to the jurisdictional health department in writing within thirty days of permit issuance.

(e) The jurisdictional health department is authorized to issue one permit for a location where multiple solid waste handling activities occur, provided all activities meet the applicable requirements of this chapter.

(3) *Permit renewals.*

(a) Prior to renewing a permit, the health department shall conduct a review as it deems necessary to ensure that the solid waste handling facility or facilities located on the site continue to:

- (i) Meet the solid waste handling standards of the department;
- (ii) Comply with applicable local regulations; and
- (iii) Conform to the approved solid waste management plan and/or the approved hazardous waste management plan.

(b) A jurisdictional health department shall approve or deny a permit renewal within forty-five days of conducting its review.

(c) Every permit renewal shall be valid for a period not to exceed five years at the discretion of the jurisdictional health department.

(d) The department shall review the renewal in accordance with RCW 70.95.190 and report its findings to the jurisdictional health department in writing.

(e) The jurisdictional board of health may establish reasonable fees for permits reviewed under this section. All permit fees collected by the health department shall be deposited in the treasury and to the account from which the health department's operating expenses are paid.

Appendix 6

RCW 70.95.210

RCW 70.95.210

Hearing — Appeal — Denial, suspension — When effective.

Whenever the jurisdictional health department denies a permit or suspends a permit for a solid waste disposal site, it shall, upon request of the applicant or holder of the permit, grant a hearing on such denial or suspension within thirty days after the request therefor is made. Notice of the hearing shall be given [to] all interested parties including the county or city having jurisdiction over the site and the department. Within thirty days after the hearing, the health officer shall notify the applicant or the holder of the permit in writing of his determination and the reasons therefor. Any party aggrieved by such determination may appeal to the pollution control hearings board by filing with the hearings board a notice of appeal within thirty days after receipt of notice of the determination of the health officer. The hearings board shall hold a hearing in accordance with the provisions of the Administrative Procedure Act, chapter 34.05 RCW. If the jurisdictional health department denies a permit renewal or suspends a permit for an operating waste recycling facility that receives waste from more than one city or county, and the applicant or holder of the permit requests a hearing or files an appeal under this section, the permit denial or suspension shall not be effective until the completion of the appeal process under this section, unless the jurisdictional health department declares that continued operation of the waste recycling facility poses a very probable threat to human health and the environment.

[1998 c 90 § 3; 1987 c 109 § 21; 1969 ex.s. c 134 § 21.]

Appendix 7
WAC 173-350-710(6)

WAC 173-350-710

(6) *Permit suspension and appeals.*

(a) Any permit for a solid waste handling facility shall be subject to suspension at any time the jurisdictional health department determines that the site or the solid waste handling facility is being operated in violation of this chapter.

(b) Whenever the jurisdictional health department denies a permit or suspends a permit for a solid waste handling facility, it shall:

(i) Upon request of the applicant or holder of the permit, grant a hearing on such denial or suspension within thirty days after the request;

(ii) Provide notice of the hearing to all interested parties including the county or city having jurisdiction over the site and the department; and

(iii) Within thirty days after the hearing, notify the applicant or the holder of the permit in writing of the determination and the reasons therefor. Any party aggrieved by such determination may appeal to the pollution control hearings board by filing with the board a notice of appeal within thirty days after receipt of notice of the determination of the health officer.

(c) If the jurisdictional health department denies a permit renewal or suspends a permit for an operating waste recycling facility that receives waste from more than one city or county, and the applicant or holder of the permit requests a hearing or files an appeal under this section, the permit denial or suspension shall not be effective until the completion of the appeal process under this section, unless the jurisdictional health department declares that continued operation of the waste recycling facility poses a very probable threat to human health and the environment.

(d) Procedures for appealing beneficial use exemption determinations are contained in WAC 173-350-200 (5)(g).

Appendix 8

WAC 173-350-310(1), (2)

WAC 173-350-310

Intermediate solid waste handling facilities.

(1) *Intermediate solid waste handling facilities - Applicability.* This section is applicable to any facility engaged in solid waste handling that provides intermediate storage and/or processing prior to transport for final disposal. This includes, but is not limited to, material recovery facilities, transfer stations, baling and compaction sites, and drop box facilities. This section is not applicable to:

- (a) Storage, treatment or recycling of solid waste in piles which are subject to WAC 173-350-320;
- (b) Storage or recycling of solid waste in surface impoundments which are subject to WAC 173-350-330;
- (c) Composting facilities subject to WAC 173-350-220;
- (d) Recycling which is subject to WAC 173-350-210;
- (e) Storage of waste tires which is subject to WAC 173-350-350;
- (f) Storage of moderate risk waste prior to recycling which is subject to WAC 173-350-360;
- (g) Energy recovery or incineration of solid waste which is subject to WAC 173-350-240; and
- (h) Drop boxes placed at the point of waste generation which is subject to WAC 173-350-300.

(2) *Materials recovery facilities - Permit exemption and notification.*

(a) In accordance with RCW 70.95.305, material recovery facilities managed in accordance with the terms and conditions of (b) of this subsection are exempt from solid waste handling permitting. An owner or operator that does not comply with the terms and conditions of (b) of this subsection is required to obtain a permit from the jurisdictional health department as an intermediate solid waste handling facility and shall

comply with the requirements of WAC 173-350-310. In addition, violations of the terms and conditions of (b) of this subsection may be subject to the penalty provisions of RCW 70.95.315.

(b) Material recovery facilities shall be managed according to the following terms and conditions to maintain their exempt status:

(i) Meet the performance standards of WAC 173-350-040;

(ii) Accept only source separated recyclable materials and dispose of an incidental and accidental residual not to exceed five percent of the total waste received, by weight per year, or ten percent by weight per load;

(iii) Allow inspections by the department or jurisdictional health department at reasonable times;

(iv) Notify the department and jurisdictional health department, thirty days prior to operation, or ninety days from the effective date of the rule for existing facilities, of the intent to operate a material recovery facility in accordance with this section. Notification shall be in writing, and shall include:

(A) Contact information for facility owner or operator;

(B) A general description of the facility; and

(C) A description of the types of recyclable materials managed at the facility;

(v) Prepare and submit an annual report to the department and the jurisdictional health department by April 1st on forms supplied by the department. The annual report shall detail facility activities during the previous calendar year and shall include the following information:

(A) Name and address of the facility;

(B) Calendar year covered by the report;

(C) Annual quantities and types of waste received, recycled and disposed, in tons, for purposes of determining progress towards achieving the goals of waste reduction, waste recycling, and treatment in accordance with RCW 70.95.010(4); and

(D) Any additional information required by written notification of the department.

Appendix 9
WAC 173-350-210

WAC 173-350-210
Recycling.

(1) *Recycling - Applicability.* These standards apply to recycling solid waste. These standards do not apply to:

(a) Storage, treatment or recycling of solid waste in piles which are subject to WAC 173-350-320;

(b) Storage or recycling of solid waste in surface impoundments which are subject to WAC 173-350-330;

(c) Composting facilities subject to WAC 173-350-220;

(d) Solid waste that is beneficially used on the land that is subject to WAC 173-350-230;

(e) Storage of waste tires prior to recycling which is subject to WAC 173-350-350;

(f) Storage of moderate risk waste prior to recycling which is subject to WAC 173-350-360;

(g) Energy recovery or incineration of solid waste which is subject to WAC 173-350-240;

(h) Intermediate solid waste handling facilities subject to WAC 173-350-310.

(2) *Recycling - Permit exemption and notification.*

(a) In accordance with RCW 70.95.305, recycling of solid waste is subject solely to the requirements of (b) of this subsection and is exempt from solid waste handling permitting. Any person engaged in recycling that does not comply with the terms and conditions of (b) of this subsection is required to obtain a permit from the jurisdictional health department in accordance with the requirements of WAC 173-350-490. In addition, violations of the terms and conditions of (b) of this subsection may be subject to the penalty provisions of RCW 70.95.315.

(b) Recycling shall be conducted in conformance with the following terms and conditions in order to maintain permit exempt status:

(i) Meet the performance standards of WAC 173-350-040;

(ii) Accept only source separated solid waste for the purpose of recycling;

(iii) Allow inspections by the department or jurisdictional health department at reasonable times;

(iv) Notify the department and jurisdictional health department, thirty days prior to operation, or ninety days from the effective date of the rule for existing recycling operations, of the intent to conduct recycling in accordance with this section. Notification shall be in writing, and shall include:

(A) Contact information for the person conducting the recycling activity;

(B) A general description of the recycling activity;

(C) A description of the types of solid waste being recycled; and

(D) An explanation of the recycling processes and methods;

(v) Prepare and submit an annual report to the department and the jurisdictional health department by April 1st on forms supplied by the department. The annual report shall detail recycling activities during the previous calendar year and shall include the following information:

(A) Name and address of the recycling operation;

(B) Calendar year covered by the report;

(C) Annual quantities and types of waste received, recycled and disposed, in tons, for purposes of determining progress towards achieving the goals of waste reduction, waste recycling, and treatment in accordance with RCW 70.95.010(4); and

(D) Any additional information required by written notification of the department.

Appendix 10

WAC 173-350-320(1)

WAC 173-350-320

Piles used for storage or treatment.

(1) Piles used for storage or treatment - Applicability.

(a) This section is applicable to solid waste stored or treated in piles where putrescible waste piles that do not contain municipal solid waste are in place for more than three weeks, nonputrescible waste and contaminated soils and dredged material piles are in place for more than three months and municipal solid waste piles are in place for more than three days. This section is not applicable to:

(i) Waste piles located at composting facilities subject to WAC 173-350-220 that are an integral part of the facility's operation;

(ii) Piles of nonputrescible waste stored in enclosed buildings provided that no liquids or liquid waste are added to the pile; and

(iii) Piles of waste tires or used tires subject to WAC 173-350-350.

(b) In accordance with RCW 70.95.305, storage piles of wood waste used for fuel or as a raw material, wood derived fuel, and agricultural wastes on farms, are subject solely to the requirements of (c)(i) through (iii) of this subsection and are exempt from solid waste handling permitting. An owner or operator that does not comply with the terms and conditions of (c)(i) through (iii) of this subsection is required to obtain a permit from the jurisdictional health department and shall comply with all other applicable requirements of this chapter. In addition, violations of the terms and conditions of (c)(i) through (iii) of this subsection may be subject to the penalty provisions of RCW 70.95.315.

(c) Owners and operators of all storage piles that are categorically exempt from solid waste handling permitting in accordance with (b) of this subsection shall:

(i) Ensure that at least fifty percent of the material stored in the pile is used within one year and all material is used within three years;

(ii) Comply with the performance standards of WAC 173-350-040; and

(iii) Allow department and jurisdictional health department representatives to inspect the waste pile at reasonable times for the purpose of determining compliance with this chapter.

(d) In accordance with RCW 70.95.305, the storage of inert waste in piles is subject solely to the requirements of (e)(i) through (vi) of this subsection and are exempt from solid waste handling permitting. The storage of inert waste in piles at a facility with a total volume of two hundred fifty cubic yards or less is subject solely to the requirements of (e)(iv) of this subsection. An owner or operator that does not comply with the terms and conditions of (e)(i) through (vi) of this subsection is required to obtain a permit from the jurisdictional health department and shall comply with all other applicable requirements of this chapter. In addition, violations of the terms and conditions of (e)(i) through (vi) may be subject to the penalty provisions of RCW 70.95.315.

(e) Owners and operators of all storage piles that are categorically exempt from solid waste handling permitting in accordance with (d) of this subsection shall:

(i) Implement and abide by a procedure that is capable of detecting and preventing noninert wastes from being accepted or mixed with inert waste;

(ii) Ensure that at least fifty percent of the material stored in the pile is used within one year and all the material is used within three years;

(iii) Control public access and unauthorized vehicular traffic to prevent illegal dumping of wastes;

(iv) Comply with the performance standards of WAC 173-350-040;

(v) Allow department and jurisdictional health department representatives to inspect the waste pile at reasonable times for the purpose of determining compliance with this chapter; and

(vi) Notify the department and jurisdictional health department thirty days prior to commencing operations of the intent to store inert waste in accordance with this section. Notification shall be in writing, and shall

include:

- (A) Contact information for the owner or operator;
- (B) A general description and location of the facility; and
- (C) A description of the inert waste handled at the facility.