

No. 39859-1-II

THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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SKAGIT COUNTY and  
SKAGIT COUNTY HEALTH DEPARTMENT,

Appellants,

V.

SKAGIT HILL RECYCLING,

Respondent.

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APPELLANTS' OPENING BRIEF

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**I. Introduction.**

This appeal arises from the decision of the Pollution Control Hearings Board (PCHB), which affirmed the decision of the Skagit County Department of Public Health (Health) to deny Skagit Hill Recycling's (Skagit Hill) application to renew an inert waste permit for calendar year 2008.

The permit that Skagit Hill sought to renew (2007 permit) was an inert waste landfill permit.<sup>1</sup> The 2007 permit clearly and unambiguously required, among other things, that Skagit Hill not accept or stockpile any non-inert waste at the facility. Health would not have issued the 2007 permit to Skagit Hill but for the inclusion of the several restrictive provisions that restricted Skagit Hill's acceptance and stockpiling of non-inert solid waste.

Skagit Hill did not appeal the 2007 permit or any of its conditions, did not seek to modify any of the permit's conditions, and intentionally did not comply with them. The record is replete with evidence of permit

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<sup>1</sup> Health issues solid waste permits for inert waste landfills, limited purpose landfills, intermediate solid waste handling facilities, piles used for storage facilities, recycling facilities, limited moderate risk waste facilities, municipal solid waste facilities, etc.

violations. Yet, Skagit Hill still applied to renew the exact same permit, with the exact same restrictive conditions.

Health determined that the observed violations of the permit conditions were sufficient reason to deny Skagit Hill's application to renew the 2007 permit for calendar year 2008. Following a quasi-judicial public hearing, the Skagit County Health Officer determined that the undisputed violations of the permit supported Health's decision to deny the renewal.

Similarly, PCHB, in *Skagit Hill Recycling v. Skagit County, et al*, PCHB no. 08-038, before which Skagit Hill did not deny that it violated the restrictive permit conditions, determined that uncontroverted evidence established that Skagit Hill had violated the clear and unambiguous conditions of its 2007 inert waste landfill permit. Thus, the PCHB granted Health's motion for summary judgment.

### **III. Issues.**

1. Are the conditions of the 2007 permit, which prohibit Skagit Hill from accepting and stockpiling non-inert waste, require Skagit Hill to remove pre-existing non-inert waste, make reports, etc. material, clear, and unambiguous?

2. Is the evidence that was placed before the PCHB of Skagit Hill's violations of such material permit conditions uncontroverted?

3. Should the PCHB's grant of summary judgment be affirmed?

4. Even if the PCHB should have considered Skagit Hill's argument that its operations were permit exempt, do the undisputed material facts in the record support the PCHB's grant of summary judgment?

#### **IV. Statement of the Case.**

On September 22, 2006, following Skagit Hill's acquisition of property at 7705 State Route 9, Sedro-Woolley, Washington, the Skagit County Department of Public Health (Health) transferred an existing inert waste landfill permit from the previous permittee to Skagit Hill. The transferred permit (2006 permit) was valid until December 31, 2006. CP 99.

During an inspection on September 26, 2006, Health staff advised Ron Johnson, Skagit Hill's operations manager, that Skagit Hill could not accept roofing waste and that construction and demolition wastes, tires and construction trailers were not "part of the current permit." CP 106. During another inspection on October 13, 2006, Health staff advised Johnson that

“the current permit did not allow for non-inert waste to be accepted at the site.” CP 116. On November 20, 2006, Health advised Skagit Hill:

. . . I want to reiterate and ensure that you realize the facility is only permitted as an inert waste landfill per WAC 173-350-410. If you wish to apply for other solid waste activities at the landfill, then you must complete the applicable forms and supply the information requested by the Health Department in order to review your request. You may not legally conduct other solid waste activities at the facility until a permit is issued for those specific activities.

PCHB Index 8, Attachment 9 to Affidavit of Polly Dubbel at 1.<sup>2</sup>

Based on observed violations of the 2006 permit, CP 112-22, Health denied Skagit Hill’s application to renew the 2006 inert waste landfill permit for 2007, CP 124-25, but continued to work with Skagit Hill on the conditions of another inert waste landfill permit for 2007.

While working on a new permit for 2007, Health advised Skagit Hill that “[i]f Skagit Hill Recycling wishes to accept wastes other than inert wastes, you must apply for a permit under the appropriate solid waste regulation heading.” CP 148. As requested by Health, Skagit Hill

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<sup>2</sup> Documents from the record before the PCHB that were not attached to briefs filed with the superior court are identified as “PCHB Index.” Copies of these documents are attached as appendices because there are not serially numbered for the court’s ready reference.

submitted a synopsis of its proposed operations. CP 134-35. Health then advised:

It appears from your synopsis that the piles used for storage or treatment facility permit requirements fit the plan for your facility. Enclosed are two forms for your use” the *solid waste facility application*, and the *piles used for storage or treatment review checklist*. Please complete the solid waste permit application and submit all the necessary information to the Health Department for review.

CP 137.

Skagit Hill did not apply for a different permit. On March 27, 2008, Health directed Skagit Hill to amend the language of a proposed inert waste landfill permit to include the following language:

Only inert wastes shall be accepted at this facility. The inert wastes must be one of the listed inert wastes as detailed in WAC 173-350-990(2) *Criteria for inert waste – Listed inert wastes*. If the waste is not a listed inert waste per WAC 173-350-990(2) then the operator shall receive written permission from the jurisdictional health department and meet WAC 173-350-990(3), *criteria for inert waste*, before the waste may be accepted at the facility.

CP 150.

On March 30, 2007, Skagit Hill submitted a one page “amendment to operations plan.” The amendment stated that Skagit Hill “will cover the debris piles and will remove them by October 2007, at the same time we

will continue to obtain the proper permit from Department of Ecology for this type of material.” Mr. Johnson annotated the amendment:

Skagit Hill Recycling, Inc. received the changes need to our operation plan today Mar. 30, 2007[.] We will make the necessary changes to the [operations] plan and have a revised copy back to Skagit County Health no later than 15 April 2007.

CP 154. Thereafter, Health issued a new inert waste landfill solid waste permit to Skagit Hill Recycling (2007 permit). CP 202-08.

Health advised Skagit Hill that the 2007 permit was “based on the specific conditions placed on the permit” and that “[a]ll conditions of this permit shall be binding upon the facility owner/operator (permittee). . .”

CP 201.

The General Permit Conditions in the 2007 inert waste permit provide, in relevant part, that: (1) “[a]ll conditions of this permit shall be binding upon the facility owner/operator (permittee)”; (2) “[n]othing in this permit shall be construed as excusing the Permittee from compliance with any applicable federal, State, or local statutes, ordinances and/or regulations”; and (3) “[a]mendments will be made in writing and become conditions of this permit.” CP 204-05.

The 2007 permit also imposed “Specific Permit Conditions” on Skagit Hill’s activities. They required Skagit Hill to, among other things: (1) not accept, stockpile, or landfill non-inert waste at the facility (Specific Permit Condition A.3.c.)<sup>3</sup>; (2) “not accept any additional construction and demolition wastes or any other solid wastes except inert waste at the facility” (Specific Permit Condition G. Compliance Requirement); (3) cover existing piles of construction and demolition waste to prevent precipitation from entering the piles (Specific Permit Condition G. Compliance Requirement); (4) remove “[t]he piles of construction and demolition wasted including the asphaltic roofing waste” from the facility by October 1, 2007 (Specific Permit Condition G. Compliance Requirement); and (5) provide a written report of where the construction and demolition waste was disposed of or how it was recycled within 30 days of the removal or processing of the wastes (Specific Permit Condition G. Compliance Requirement.)<sup>4</sup> CP 205-08.

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<sup>3</sup> “Only inert waste shall be accepted into the facility. Only inert waste shall be stock piled or landfilled at the facility. . . . If the waste is not a listed inert waste per WAC 173-350-990(2) then the operator shall receive written permission from the Health Department and meet WAC 173-350-990(3), criteria for inert waste, before the waste may be accepted at the facility. No other types of solid waste shall be accepted or allowed at the facility.”

<sup>4</sup> “Compliance Requirement. Skagit Hill Recycling accepted construction and demolition wastes at the facility in violation of the inert waste landfill facility

Only one amendment was made to the permit. An amended Operations Plan, Revised April 10<sup>th</sup>, 2007, CP 181-86, was “incorporated into the 2007 inert waste landfill permit for Skagit Hill Recycling, replacing the referenced March 30, 2007 operational plan.” CP 177.

The amended Operations Plan did not incorporate any other document into the permit, did not provide for the intentional acceptance of non-inert or mixed solid waste for recycling or any other purpose, and did not excuse Skagit Hill from compliance with the permit’s requirements. Instead, the amended Operations Plan reinforced the restrictive Special Permit Conditions. It provided, in relevant part, that (1) “[o]nly inert materials will be accepted in accordance with WAC 173-350-410”; (2) “[i]f the waste is not listed as inert then the operator must receive written permission from the jurisdictional health department” before Skagit Hill could accept it at their solid waste handling facility; (3) “[a]ny incidental

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permit requirements. As part of the abatement process, Skagit Hill Recycling must not accept any additional construction and demolition wastes or any other solid wastes except inert waste at the facility. The existing piles of construction and demolition wastes must be covered to prevent precipitation from entering the piles. The piles of construction and demolition wastes including the asphaltic roofing waste must be removed from the facility by October 1, 2007. The Health Department must receive a written report of where the construction and demolition waste was disposed of or how it was recycled within 30 days of the removal or processing of the wastes.”

non-inert waste that is dumped at the facility during normal activities will be separated and stockpiled in area until there is sufficient amount to make a load for disposal to an approved facility”; (4) “[a]ny material dumped that is not acceptable will be removed from the dump area immediately upon discovery and put in a designated location for return to the party that dumped it or disposal to an approved landfill or transfer station”; (5) quarterly and annual water sample “results shall be forwarded to the Skagit Health Department within 60 days following each sample event.”

(Operation Plan.) CP 181, 183-84.

Skagit Hill did not appeal the 2007 permit, any of its conditions, or the amendment. Skagit Hill did not seek to further amend the permit.

Health inspected the facility on July 20, 2007, and found that Skagit Hill had not covered or stopped accepting non-inert waste, including construction and demolition debris:

As we stood on the western edge of the pit, I observed a large pile of construction and demolition waste and several smaller piles of waste materials down in the pit area. Mr. Johnson said that Mr. Waldal was planning on purchasing a piece of equipment that would sort and grind the construction and demolition debris. There was an increase in the amount of construction and demolition debris at the site compared to the last inspection.

The piles of construction and demolition wastes included” dimensional wood scraps, plywood, painted woods, laminates, plastics including sheeting and piping, foam, laminate flooring, large quantities of insulation, fiberglass, wiring, roofing, and metals. There were tires mixed into some of the piles.

The piles of waste materials that I observed in the pit area did not meet the definition of wood waste or wood derived fuel because the piles contained other wastes besides wood as described in this report and in the photos.

There was a small pile of wood ash which Mr. Johnson said was from the Sierra Pacific mill cogeneration plant in Burlington. I informed Mr. Johnson that the wood ash had not been registered as a waste derived fertilizer by 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. . . .

Some of the smaller piles of construction and demolition waste along the eastern side of the pit had degraded considerably since the last inspection since the piles had not been tarped during the rainy season.

CP 250-51. The inspection report concluded:

The amount of construction and demolition wastes located in the pit area has increased. The pit area has non-inert and [inert] wastes. The site is not permitted to receive non-inert wastes. The permit allowed them to keep the construction and demolition waste that they had on site in 2006, but the permit does not allow them to bring in additional wastes while they work on applying for the appropriate solid waste permits.

CP 251.

On November 11, 2007, Skagit Hill applied to renew the 2007 inert waste landfill permit for 2008. CP 210-16.

On November 20, 2007, Health staff conducted an inspection to review Skagit Hill's compliance with the 2007 permit. During the November inspection Health "asked Mr. Waldal about the status of the water quality monitoring results that I had reminded him about in the letters dated September 21, 2007 and November 8, 2007." Mr. Waldal said, "They were working on sending the test results to us." CP 262.

Health also observed:

. . . The pit area contained several different piles of construction and demolition waste (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 waste 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 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. The piles of waste materials that I

observed in the pit area did not meet the definition of wood waste or wood derived fuel because the piles contained other wastes besides wood as described in this report and in the photos.

There was a pile of wood ash which Mr. Waldal said was from the Sierra Pacific mill cogeneration plant in Burlington. . . .

CP 262-63. Photographs taken during the inspection showed that non-inert waste was being stockpiled and sorted on site. CP 256, CP 259. Ground up wood chips from the mixed construction and demolition debris was stockpiled on site. CP 255. Photographs also depicted piles of non-inert, mixed waste including wood, painted wood, plastics, insulation, CP 257; wood waste, linoleum, insulation, plastics, tires, metal, CP 260; wood, plywood, composites, linoleum like flooring, plastic sheeting, insulation, carpet pad, fiberglass, plastic piping and coating, tar paper, asphaltic roofing, etc. CP 261.

The pile of ash had grown substantially from what had been observed during previous inspections. Compare CP 257/258 with CP 248. None of the piles of non-inert debris were covered.

The inspection report concluded:

The piles of construction and demolition wastes located in the pit area continue to be processed. It appears that new C & D wastes have been brought in and removed from the site. The processed ground waste has some materials removed, but the resulting ground waste is not

clean wood waste. 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 263.

On December 19, 2007, Health advised Skagit Hill that

Your facility is only permitted as an inert waste landfill per WAC 173-350-410 through December 31, 2007. You are not permitted nor has your facility ever been permitted for any other solid waste handling activities at this location or within Skagit County. . .

CP 219 (emphasis in original.) Health further advised:

Your 2007 inert waste landfill permit contains conditions which must be adhered to in order to remain in compliance with the permit, Chapter 173-350 WAC, Chapter 12.16 SCC, and your inert waste landfill approved operation plan.

CP 220. After referencing the permit's compliance requirements, Health stated:

Skagit Hill Recycling agreed to the above compliance requirement before it was included in the 2007 permit. This compliance requirement provided Skagit Hill Recycling with the opportunity to apply for and obtain the necessary permits to receive approval for other solid waste activities that the inert waste landfill permit did not cover. . . . To date, Skagit Hill Recycling has not taken any steps to receive approval for any other activities other than those allowed by the inert waste landfill permit.

At the last facility inspection on November 20, 2007, Health Department inspectors observed several large piles of mixed construction and demolition debris

including wood; laminated, painted and pressboard wood debris' plastics, plastic and metal piping' insulation, linoleum type flooring, wiring, roofing; etc. The piles of construction and demolition wastes were in various stages of processing. There was a grinder located on site. None of the piles were covered. The amount of construction and demolition materials appears to have increased during the year. There was additional stock piles of materials including, as identified by the operator, wood ash from Sierra Pacific which is registered as a waste derived fertilizer by the Department of Agriculture, landclearing debris comprised mainly of large woody debris, and a pile of waste tires. These materials were located within the area of the facility identified in the approved operation plan as the inert waste landfill cell.

CP 220-21. Health concluded:

Skagit Hill Recycling has not adhered to the 2007 inert waste landfill permit. The approved operation plan and the general and specific conditions set forth in the permit, and Chapter 173-350 WAC have not been met, including but not limited to the following actions on the part of Skagit Hill Recycling:

- Accepting materials other than inert waste into the inert waste landfill facility;
- Processing mixed construction and demolition wastes without an appropriate solid waste permit;
- Failure to adhere to the permit compliance requirement to remove non-inert waste from the facility by October 1, 2007;
- Depositing non-inert wastes and materials into the area of the facility designated as the landfill cell; and
- Failure to submit all of the proposed routine water monitoring was required in the permit.

After reviewing Skagit Hill Recycling, Inc.[’s] request to renew their inert waste landfill permit for 2008, **the Skagit County Public Health Department has determined that the facility is operating in violation of the solid waste handling standards under the applicable State and Skagit County regulations. Therefore, the Skagit County Public Health Department denies the renewal of Skagit Hill Recycling, Inc.[’s] inert waste landfill permit.**

CP 221-22 (emphasis in original.)

Skagit Hill appealed the denial to the Skagit County Health Officer. PCHB Index 8, Exhibit 34 to Affidavit of Polly Dubbel.

Following a public quasi-judicial hearing, the Health Officer made the following findings of fact:

. . . 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 a 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 47.

The Health Officer also found that:

1. The inert waste landfill permit is to allow just that, landfilling of inert waste. Other permissible 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.**

2. Definitions in Chapter 173-350 WAC do not support Skagit Hill Recycling conclusions that the activity at the site is exempt from permit. The construction and demolition debris, tires, and asphalt shingles are not wood waste [or] wood derived fuel, and it is not source separated recyclable materials . . .

**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 51 (emphasis in original.)

Skagit Hill appealed to the PCHB, but did not assign error to any of the Health Officer's findings. CP 395-402.

Skagit County's motion for summary judgment framed four issues, including the following two, for the PCHB:

Does mixed solid waste consisting of construction and demolition materials, including raw and painted dimensional lumber, painted wood, laminated wood, plywood and press (chip) board, insulation, plastic, synthetic flooring materials, foam, asphalt roofing waste and tires, constitute non-inert waste, as defined in Chapter 173-350 WAC, and did acceptance and holding of such waste violate Skagit Hill Recycling's 2007 inert waste permit?

Does Skagit Hill Recycling's acceptance of non-inert waste and failure to remove non-inert waste, which requirement was imposed as a condition in its 2007 inert waste permit for 2007, constitute grounds for denial of Skagit Hill Recycling's application for an inert waste permit for 2008?

PCHB Index 8 (Health's Dispositive Motion at 2). Health presented uncontroverted evidence of permit violations and argued that (1) Skagit Hill's violations of regulations and permit conditions warranted denial of an application to renew a solid waste permit and that (2) no exceptions applied to the construction and demolition debris that Skagit Hill had been accepting, stockpiling, and processing, concluding:

Skagit Hill Recycling failed to comply with the schedule for removing non-inert waste from its facility. It also accepted non-inert waste in violation of its permit conditions and the Skagit County Code. Denial of its renewal application was warranted.

PCHB Index 8 (Health's Dispositive Motion at 10-13.)

Skagit Hill filed a response, CP 342-349, and a declaration from Scott Waldal. CP 53-64.

Mr. Waldal did not deny that Skagit Hill had (1) accepted inert waste at the facility, (2) accepted additional non-inert and construction and demolition wastes, (3) not covered the existing piles of construction and demolition wastes, (4) not removed the piles of construction and demolition wastes including the asphaltic roofing waste by October 1, 2008, (5) not provide a water quality monitoring report to Health, and (6) not provide Health with a written report on the disposal of the construction and demolition waste. CP 54.

Instead of denying that Skagit Hill had intentionally accepted non-inert waste, had not covered debris piles, etc. or arguing that the permit's conditions were vague or ambiguous, Skagit Hill attempted to excuse the evidence of permit violations. CP 345 ("Recycling of construction, demolition and land clearing debris (CDL) is a forward thinking and important aspect of solid waste management in the modern world.") Skagit Hill argued, "the only basis cited by the County to deny the renewal of the inert landfill permit is the fact that recyclables are not source separated."

CP 347. Skagit Hill concluded “[t]he sole basis for this contention in the County’s motion is that recyclables are not source separated.” CP 348.

The PCHB found:

. . . The County concluded that the permit should be denied on several grounds: (1) Accepting materials other than inert waste into the inert waste landfill facility; (2) Processing mixed construction and demolition wastes without an appropriate solid waste permit; (3) Failure to adhere to the permit compliance requirement to remove non-inert waste from the facility by October 1, 2007; (4) Depositing non-inert wastes and materials into the area of the facility designated as the landfill cell; and (5) Failure to submit all of the prescribed routine water monitoring as required in the permit.

CP 39-40. The PCHB determined that “[t]he facts material to the legal conclusions in this matter are not in dispute, and summary judgment is appropriate.” CP 41. The PCHB concluded:

. . . In this case, Skagit County denied Skagit Hill’s renewal application because the company violated the terms of its existing inert waste permit and failed to comply with applicable regulations for handling inert waste on the site.

Skagit County and Skagit Hill negotiated the terms of the 2007 inert waste permit for this location after the County initially denied a renewal of the 2006 permit. The agreed provisions of the 2007 permit specifically limited the approval to inert waste. The 2007 permit was very clear that only inert waste could be accepted into the facility or stockpiled or landfilled at the facility. The evidence, and admissions by Mr. Waldal, show that non-inert material was accepted onto the site in

violation of this permit condition. . . . These conditions constituted violations of the 2007 inert waste landfill permit, which was the only permit in effect for the site. .

. . . Skagit Hill cannot accept the benefits of the agreed permit and reject the responsibilities under the same permit. Skagit Hill failed to stop accepting further construction and demolition debris, failed to cover the existing piles of waste, and failed to remove construction and demolition waste and asphalt roofing from the site by October 1, 2007. This pattern of conduct constitutes a violation of the 2007 inert waste permit.

The issue before the Board is whether Skagit County properly denied a renewal of the 2007 inert waste landfill permit. **The legality of proper characterization of different or additional recycling activity on the site is not relevant to the Board's decision on renewal. . . . The uncontroverted evidence demonstrates that Skagit Hill violated the local regulations established by Skagit County in the specific permit terms. Under WAC 173-350-710, this violation is a lawful basis for denying a renewal application. . . .**

CP 42-43 (emphasis added).

Skagit Hill appealed to the superior court.<sup>5</sup> Following briefing, including a written motion by Health to strike new issues raised for the

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<sup>5</sup> Before the superior court, Skagit Hill argued: (1) The PCHB erroneously ruled on the County's motion for summary judgment that Skagit Hill had failed to comply with the terms of its 2007 inert waste permit; (2) The record shows that material issues of fact exist as to whether Skagit Hill landfilled any non-inert waste in violation of its inert waste landfill permit; (3) The record also shows that material issues of fact exist as to whether the 2007 inert waste landfill permit actually prohibited acceptance and stockpiling of non-inert waste for materials recovery and recycling (as opposed to landfilling); and (4) The

first time on appeal, and argument, the superior court reversed the PCHB. CP 410-13. Health sought and was granted discretionary review. Ruling Granting Review.

**V. Analysis.**

Solid waste activities are heavily regulated. “[N]o solid waste handling facility or facilities shall be maintained, established, or modified until the county, city or other person operating such site has obtained a permit[.]” RCW 70.95.170. Also see *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (“[T]he primary purpose of building permits and building code inspections is to secure to local government consistent compliance with construction, zoning and land use ordinances.”)

A permit is a means of exercising the county’s general police powers. *McQuillin, Municipal Corporations* §26.15 at 8 (3<sup>rd</sup> Ed., 2005). It confers a right to do something which one otherwise would not have a right to do. 33 Am.Jur. Licenses §2 (1941); 53 C.J.S. Licenses §1 (1948).

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permit conditions prohibiting acceptance and stockpiling of non-inert waste for recycling were ultra vires. The county responded, in part, that if the permit conditions were ultra vires, then Skagit Hill was not prejudiced by the denial of its application to renew an ultra vires permit. Health also argued that the 2007 permit was not restricted to landfilling of non-inert waste, but specifically precluded Skagit Hill’s recycling operations, and that SHR’s failure to comply with material permit conditions supported the PCHB’s decision.

It is “a permission or privilege to do what otherwise would be unlawful.” McQuillin, §26.2 at 9. See *State v. Lake City Bowlers' Club, Inc.*, 26 Wn.2d 292, 295, 173 P.2d 783 (1946) (“The term ‘license’ is generally defined as a right granted by some authority to do an act which, without such license, would be unlawful. . . . When a right exists, it is in the nature of a permission and must be exercised according to law.”)

Even in jurisdictions, such as Washington,<sup>6</sup> where a permit may acquire the status of a property right, the “licensee has been regarded as having a right, protected under constitutional guarantees, to retain and use the license **in accordance with its terms and conditions.**” McQuillin, §26.15 at 49 (emphasis added.)

Health denied Skagit Hill’s application to renew the 2007 permit for 2008 because Skagit Hill did not comply with the permit’s material conditions. See *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 899, 602 P.2d 1172 (1979) (“The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval.”) (quoting *Southern Pac. Co. v. Olympian*

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<sup>6</sup> Washington accords property rights to some permits in the context of due process for revoking, etc. See *Bang Nguyen v. Dep’t of Health*, 144 Wn.2d 516, 522 n. 4, 29 P.3d

Dredging Co., 260 U.S. 205, 43 S.Ct. 26, 27, 67 L.Ed. 213 (1922)). Also see *Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 328, 510 P.2d 647 (1973) (citing *Durocher v. King County*, 80 Wn.2d 139, 492 P.2d 547 (1972) (“The authority to grant special permits commonly includes express language empowering the administrative body to grant permits subject to reasonable conditions designed to protect adjacent property and to carry out the purposes of the ordinance.”))

**A. Standard of review.**

The Administrative Procedures Act (APA) governs judicial review of the PCHB's decision. RCW 43.21B.180; *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

Generally, the PCHB's findings are based on a preponderance of the evidence. See WAC 371-08-485(2). However, when the PCHB grants summary judgment, the court must overlay the APA standard of review with the summary judgment standard. See *Verizon Northwest, Inc. v. Washington Employment Security Department*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). Accordingly, the reviewing court views the facts in the record in the light most favorable to the nonmoving party. Summary

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689 (2001) “[A] professional license represents a property interest to which due process

judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law. The reviewing court evaluates the facts in the administrative record de novo and the law in light of the “error of law” standard. *Verizon Northwest*, 164 Wn.2d at 916.<sup>7</sup> Under the “error of law” standard, the court engages in a de novo review of the PCHB’s legal conclusions. *Fort v. State, Department of Ecology*, 133 Wn. App. 90, 135 P.3d 515 (2006) (citing RCW 34.05.570(3)(d); *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998)).

Any issues that Skagit Hill did not raise before the PCHB may not be raised on later appeal. See RCW 34.05.554(1). This rule “is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking.” *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993).

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protections apply.” Skagit Hill has not alleged that it was denied due process.

<sup>7</sup> The superior court’s findings “are not relevant in appellate review of an agency action.” *Aviation West Corp. v. Department of Labor and Industries*, 138 Wn.2d 413, 422, 980 P.2d 701 (1999); also see *Point Allen Service Area v. Washington State Dept. of Health*, 128 Wn. App. 290, 297, 11 5 P.3d 373 (2005) (“In an administrative appeal, we disregard the trial court’s findings and conclusions and review the administrative record by applying the Acts standards directly to the agency record.”) (citing *Tapper v. Employment Security Dept.*, 122 Wn.2d 397, 858 P.2d 494 (1993).)

**B. Skagit Hill lacks standing to pursue this appeal because it was not prejudiced by the PCHB's decision.**

The court shall grant relief only if it first determines that a person seeking relief has been substantially prejudiced by the agency action.

RCW 34.05.570(1)(d).

Skagit Hill was not substantially prejudiced by the PCHB's grant of summary judgment.

First, the 2007 permit clearly and unambiguously restricted Skagit Hill's use of the facility and required Skagit Hill to avoid/take certain actions, make reports, etc. It is uncontroverted that Skagit Hill did not comply with the permit's proscriptive conditions. Skagit Hill has not even argued that it tried to comply. Instead, Skagit Hill argued to the PCHB that it was exempt from permitting requirements. (Before the superior court it added the new argument that the permit conditions were ultra vires.) The court may infer from Skagit Hill's insistence that it does not need to comply with the conditions of the 2007 permit that it never intended to comply.

**Second**, Skagit Hill never appealed the terms and conditions in the 2007 permit and did not seek to modify them.<sup>8</sup> Instead, it applied to renew the exact same permit with the exact same restrictions that it had intentionally ignored and violated.

**Third**, this appeal is about Health's decision to not renew the 2007 permit, with the exact same proscriptive conditions that Skagit Hill opposes and won't follow. Neither the court nor the PCHB has the authority to modify the 2007 permit, a "remedy" that that was not sought from Health or before the PCHB. See RCW 34.05.554 (Except for limited exceptions, issues not raised before the agency may not be raised on appeal.) When it is so obvious that Skagit Hill does not intend to comply with the restrictive conditions, there is no valid reason to reissue the 2007 permit just so the permit violations may continue.

**Fourth**, is too late to "renew" the 2007 permit for 2010. The 2007 permit has expired. Even if the court or the PCHB were to find that Health

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<sup>8</sup> Persons aggrieved by the denial of a permit have the right to file an appeal. See WAC 173-350-710(6) (authorizing appeals to the county Health Officer and then to the PCHB for permit denials.) The notice of appeal need only be delivered to the county Health Officer within ten (10) working days of the challenged order. SCC 14.16.460(3). Skagit Hill's failure to file a timely appeal of the 2007 permit makes the permit conditions binding. *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978) ("Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them.").

erred when it did not renew the 2007 permit for calendar year 2008, there is no way to get that permit extended into 2009 or 2010. Skagit Hill has missed the window to apply for a renewal of any “2008 permit.”

The sum of Skagit Hill’s intentional violations of material permit conditions, its objection to the restrictive conditions, and the fact that the only remedy that it may obtain is a Pyrrhic one-year renewal of the same proscriptive permit presents no victory for Skagit Hill.

Rather than prejudice Skagit Hill, Health and the PCHB did Skagit Hill a favor by denying the renewal of a permit that contained conditions that Skagit Hill so obviously does not want to comply with. As the PCHB observed:

. . . Mr. Waldal now claims that he felt pressured into accepting the terms of the 2007 permit, apparently as justification for his failure to comply with its terms. The company took full advantage of the permit during its term and operated a business on the site that included accepting inert material for disposal. Skagit Hill cannot accept the benefits of the agreed permit and reject the responsibilities under the same permit. . . .

CP 43.

Thus, Skagit Hill did not suffer any prejudice, let alone substantial prejudice, from Health’s and the PCHB’s actions. If the 2007 permit is so

onerous that Skagit Hill feels that it must intentionally violate it on a daily basis and if Skagit Hill refuses to be held accountable under the present permit conditions, then the only solution to Skagit Hill's conundrum is for the court to conclude that Skagit Hill really needs a different permit, not a renewal of the 2007 permit.

Skagit Hill needs a permit with different conditions if it wants to engage in the handling of non-inert waste. It is no "remedy" to require the county to renew a permit that Skagit Hill does not intend to follow. Skagit Hill needs to apply for a new permit, and if such new permit contains conditions that Skagit Hill opposes, Skagit Hill can seek review of such conditions in an appropriate appeal.

Only in an application for a new permit – not in this appeal, which may only renew the same permit with the same proscriptive conditions – does a remedy exist for Skagit Hill.

**C. The PCHB's conclusion of law that Skagit Hill violated material permit conditions is founded on undisputed material facts.**

**1) The proscriptive conditions in the 2007 permit are clear and unambiguous.**

The first test for determining noncompliance with the conditions of the 2007 permit is whether those conditions were clear and unambiguous.

See *Absher Const. Co. v. Kent School Dist. No. 415*, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995) (“Interpretation of an unambiguous contract is a question of law. Thus, ‘[i]f a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision’”) citing *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992).

The following permit condition is not ambiguous:

Facility operations and maintenance shall be conducted in strict compliance with Chapter 173-350 WAC, as amended, Solid Waste Regulations, other applicable federal, state, and local regulations, and the conditions of this permit. In the event of conflict between state and local regulations, the more stringent requirement shall apply.

CP 204. The following condition is not ambiguous:

Only inert waste shall be accepted into the facility. Only inert waste shall be stock piled or landfilled at the facility. . . . If the waste is not a listed inert waste per WAC 173-350-990(2) then the operator shall receive written permission from the Health Department and meet WAC 173-350-990(3), criteria for inert waste, before the waste may be accepted at the facility. No other types of solid waste shall be accepted or allowed at the facility.

CP 205. The permit’s compliance requirement is not ambiguous:

G. Compliance Requirement. Skagit Hill Recycling accepted construction and demolition wastes at the facility in violation of the inert waste landfill facility

permit requirements. **As part of the abatement process, Skagit Hill Recycling must not accept any additional construction and demolition wastes or any other solid wastes except inert waste at the facility. The existing piles of construction and demolition wastes must be covered to prevent precipitation from entering the piles.** The piles of construction and demolition wastes including the asphaltic roofing waste must be removed from the facility by October 1, 2007. The Health Department must receive a written report of where the construction and demolition waste was disposed of or how it was recycled within 30 days of the removal or processing of the wastes.

CP 208 (emphasis added.) The following permit conditions are not ambiguous:

1. The permitted shall prepare and submit the annual report to the Skagit County Health Department and to the Department of Ecology by April 1 of each year. The annual report . . . must include, at a minimum, the following information:

. . .

f. A summary of all water quality monitoring conducted during the report period . . .

CP 206.

Skagit Hill is bound to these permit conditions. It did not file a timely appeal to challenge them. It accepted the benefit of the 2007 permit for its full term. It did not argue that the conditions were vague or ambiguous to Health or the PCHB. Yet it now opposes them with great

vigor. And, oblivious to the irony, Skagit Hill applied to renew the same permit with the same proscriptive conditions that it opposes.

Under the circumstances, the 2007 permit's clear, unambiguous, and unamended conditions establish the standard to test Health's decision to deny the renewal application and the PCHB's grant of summary judgment. See WAC 173-350-710(3)(a):

(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.

**2) The restrictive conditions in the 2007 permit were material conditions, violation of which supported denial of the application to renew the 2007 permit.**

Throughout 2006 and 2007, Health repeatedly advised Skagit Hill that it could not handle non-inert waste at the facility unless it applied for and obtained a different permit. Because of the violations of the 2006 permit, Health imposed specific conditions in the 2007 permit that clearly

and unambiguously barred Skagit Hill from handling non-inert waste at its facility and required the removal of non-inert waste that had been accepted in violation of the 2006 permit. Health would not have issued the 2007 permit to Skagit Hill without such conditions. CP 201 (“Skagit Hill Recycling’s solid waste handling permit for 2007 is based on the specific conditions placed on the permit.”) Thus, the proscriptive conditions that addressed the handling and removal non-inert waste and submission or reports were material, make or break conditions.

Skagit Hill’s intentional, obvious, and repeated violations of these make or break conditions supported Health’s decision to deny the renewal:

Skagit Hill Recycling has not adhered to the 2007 inert waste landfill permit. The approved operation plan and the general and specific conditions set forth in the permit, and Chapter 173-350 WAC have not been met, including but not limited to the following actions on the part of Skagit Hill Recycling:

- Accepting materials other than inert waste into the inert waste landfill facility;
- Processing mixed construction and demolition wastes without an appropriate solid waste permit;
- Failure to adhere to the permit compliance requirement to remove non-inert waste from the facility by October 1, 2007;

- Depositing non-inert wastes and materials into the area of the facility designated as the landfill cell; and
- Failure to submit all of the proscribed routine water monitoring as required in the permit.

After reviewing Skagit Hill Recycling, Inc.[‘s] request to renew their inert waste landfill permit for 2008, **the Skagit County Public Health Department has determined that the facility is operating in violation of the solid waste handling standards under the applicable State and County regulations. Therefore, the Skagit County Public Health Department denies the renewal of Skagit Hill Recycling’ Inc.[‘s] inert waste landfill permit.**

CP 221-22.

**3) Evidence of Skagit Hill’s violations of the proscriptive conditions in the 2007 permit is substantial and uncontroverted.**

Skagit Hill has never challenged the material facts that establish that its activities violated the proscriptive conditions in the 2007 permit.

Skagit Hill did not assign error to the Health Officer’s findings. Thus they are verities on appeal. See *Anderson v. Pierce County*, 86 Wn. App. 290, 936 P.2d 432 (1997) (noting Hearing Examiner’s unchallenged findings of fact are verities on appeal); *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 95 P.3d 377 (2004) (“The City does not appear to

challenge any of the hearing examiner's findings in this case, so they are verities on appeal.")

Similarly, before the PCHB, Skagit Hill did not deny that the photographs, reports, permits, correspondence, and other documents submitted by Health in support of its motion for summary judgment established that Skagit Hill had failed to comply with the clear and unambiguous conditions of the 2007 permit.

Thus, it is uncontroverted that Skagit Hill (1) continued to accept inert waste, including construction and demolition debris, (2) continued to process waste into recyclable and disposable products at the facility during the term of the 2007 permit, (3) did not cover any of the construction and demolition debris, (4) did not remove the piles of construction and demolition debris including roofing waste by October 1, 2007, and (5) did not submit required water monitoring reports,.

Skagit Hill's argument before the PCHB that summary judgment was not warranted because Health had not proven that Skagit Hill's activities were not exempt from permitting, like Scott Waldal's declaration, implicitly admitted the truth of Health's evidence that Skagit Hill had violated material permit conditions. Similarly, before the superior

court, Skagit Hill did not deny the undisputed material facts that supported the several violations identified by Health and the PCHB.<sup>9</sup>

Skagit Hill's arguments to the PCHB and to the superior court missed the point: the undisputed violations of material, clear, and unambiguous permit conditions supported Health's denial of Skagit Hill's application to renew the 2007 permit and the PCHB's grant of summary judgment. Thus, the PCHB held:

The legality of proper characterization of different or additional recycling activity on the site is not relevant to the Board's decision on renewal. . . . The uncontroverted evidence demonstrates that Skagit Hill violated the local regulations established by Skagit County in the specific permit terms.

CP 43-44.

Where, as here, there is no genuine issue as to any material fact, summary judgment was appropriate.<sup>10</sup> And because the facts of permit

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<sup>9</sup> Skagit Hill argued to the superior court that the PCHB failed to resolve disputed issues of material fact about (1) whether Skagit Hill landfilled any materials other than inert waste, (2) the actual meaning and scope of the 2007 landfill permit terms, and (3) whether Skagit Hill's materials recovery and recycling activities meet the criteria for permit exemptions.<sup>9</sup> CP 8. Skagit Hill continued to ignore the impact of the undisputed violations material, clear, and unambiguous permit conditions by arguing that the conditions were ultra vires.

<sup>10</sup> Because Skagit Hill has never challenged the facts of its violations of permit conditions before the PCHB, it cannot do so now. RCW 34.05.554 ("Issues not raised before the agency may not be raised on appeal[.]"); See RAP 2.5(a); *State v. McFarland*, 127 Wn.2d

violations were uncontroverted, summary judgment for Health was appropriate. See *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 751 P.2d 854 (1988) (The reviewing court must accept all facts as true and consider all facts and reasonable inferences in the light most favorable to the nonmoving party.)

**D. As a matter of law, even if the PCHB would have considered Skagit Hill's argument that it was exempt from permitting, it would have found that Skagit Hill's operations were not permit exempt and would have granted summary judgment to Health.**

The court may affirm a summary judgment grant if it is supported by any grounds in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). Also see *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (“[A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.”) Therefore, because Skagit Hill did not challenge the permit or the evidence of permit violations, the court should affirm the PCHB’s decision and need not consider Skagit Hill’s argument, which was raised before the PCHB, that it was exempt from permitting.

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322, 333, 899 P.2d 1251 (1995) (“As a general rule, appellate courts will not consider issues raised for the first time on appeal.”)

However, should the court consider Skagit Hill argument that it was exempt from permitting requirements, it will find that Skagit Hill's operations were not exempt.

Health determined that if Skagit Hill wanted to engage in the operations described in its Synopsis of Recycling Goals, Skagit Hill needed to apply for an intermediate solid waste handling facility permit or a "piles used for storage" permit. CP 137. Such solid waste handling facilities must be "specifically exempted" by regulation to be excused from any permitting requirement. SCC 12.16.080(1).

**1) Skagit Hill does not meet the requirements to qualify for the exemption from permitting for a material recovery facility.**

Skagit Hill's bare claim that it can recycle many components of this mixed municipal waste is insufficient to exempt it from permitting requirements.

**(a) By definition, a solid waste handling facility does not include facilities that dispose of waste.**

Skagit Hill has applied to renew an inert waste landfill permit. Before the PCHB, Skagit Hill did not deny that it had sorted and further ground the construction and demolition debris that it had accepted and stockpiled at the facility, as had been observed during the November 2007

inspection, and or that some waste from the stockpiled debris was destined for disposal. See CP 54 (“This material is removed from the waste at the Skagit Hill facility and disposed of or recycled as appropriate.”) Thus, because Skagit Hill apparently desires to be able to landfill some of the inert residue from its recycling business, it is not a permit exempt intermediate solid waste handling facility. By definition, a solid waste handling facility does not include facilities where waste is disposed of. See WAC 173-350-100 (Intermediate solid waste handling facilities are “any intermediate use or processing site engaged in solid waste handling which is not the final site of disposal.”)<sup>11</sup>

Even if Skagit Hill did not landfill any solid waste, it would still not qualify for the exemption from the permit requirements for a material recovery facility because it cannot meet the applicable performance standards:

(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;

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<sup>11</sup> A “material recovery facility,” which is a sub-category of intermediate solid waste handling facilities, means “any facility that collects, compacts, repackages, sorts, or processes for transport source separated solid waste for the purpose of recycling.” WAC 173-350-100.

(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;

...

WAC 173-350-310(2)(b).

**(b) Skagit Hill did not meet Ecology’s “thou shalt not pollute” performance requirements.**

All solid waste handling facilities must comply with Ecology’s

“thou shall not pollute” performance standards.<sup>12</sup>

The owner or operator of all solid waste facilities subject to this chapter shall:

(1) Design, construct, operate, and close all facilities in a manner that does not pose a threat to human health or the environment;

...

(3) Conform to the approved local comprehensive solid waste management plan prepared in accordance with chapter 70.95 RCW, . . . ;

...

(5) Comply with all other applicable local, state, and federal laws and regulations.

WAC 173-350-040.

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<sup>12</sup> See RCW 70.95.305(3) (“If a facility does not operate in compliance with the terms and conditions established for an exemption [by the Department of Ecology], the facility is subject to the permitting requirements for solid waste handling under [chapter 70.96 RCW].”)

Not pose a threat to human health or the environment. Skagit Hill maintains piles of solid waste – including a pile of ash – in an abandoned quarry. The non-inert waste and ash are not covered. They are exposed to rain and wind and have been observed in a degraded condition. Simple chemistry establishes that chemicals from degraded waste can leach into the surface and groundwater under such conditions. Thus, Skagit Hill operates its facility in a manner that poses a threat to human health or the environment.

Conform to the approved local comprehensive solid waste management plan. Skagit Hill must also conform its operations to the approved local comprehensive solid waste management plan prepared in accordance with chapter 70.95 RCW. Skagit County has adopted a Comprehensive Solid Waste Management Plan (Comprehensive Plan) CP 372-82. The Comprehensive Plan designates the materials that may be recycled in Skagit County:

- Newspaper
- Cardboard
- Food waste
- Office paper, according to current market specifications
- Mixed waste paper, according to current market specifications
- Magazines and catalogs

Metals, including ferrous and non-ferrous  
scrap, tin cans and appliances  
Aluminum cans and foil  
Glass containers  
PET soda bottles, HDPE milk bottles, plastic  
film, and other plastics as markets allow  
Wood, drywall, concrete and asphalt  
Motor oil, antifreeze and car batteries  
Yard debris

CP 381. This list does not include a category for “construction and demolition” debris. Nor does it list the following materials as “designated recyclable materials” in Skagit County: tires, ash, furniture, laminates, linoleum, insulation, asphalt shingles, tar paper, furniture, toys, etc. The uncontroverted evidence establishes that Skagit Hill routinely and intentionally accepts non-designated materials for recycling.

The operator of a solid waste handling facility may “recycle” non-designated materials, but would not be exempt from permitting requirements. Materials that are not listed in the Comprehensive Plan must be handled as municipal waste. Skagit Hill does not have the necessary permit to accept and process municipal waste. Thus, Skagit Hill does not conform to the approved local Comprehensive Solid Waste Management Plan.

Comply with all other applicable local, state, and federal laws and regulations. In his declaration before the PCHB, Waldal stated that the “[a]sh collected at the site is a registered fertilizer[.]” CP 56. Fertilizer cannot be lawfully stored outdoors, uncovered and exposed to the elements:

(1) Dry bulk fertilizer shall be stored inside a structure or device having a roof or cover, sidewalls, and a base sufficiently impermeable to prevent contact with precipitation and surface water; or

**(2) If dry bulk fertilizer is stored outdoors, it shall be placed on a ground cover sufficiently impermeable to prevent seepage or runoff and shall be completely covered with a tarpaulin or other suitable covering to prevent contact with precipitation and surface water.**

...

WAC 16-201-210 (emphasis added.) Even though the 2007 permit required the piles of waste to be covered, the fertilizer was uncovered at all times during the term of the 2007 permit. Thus, Skagit Hill did not comply with other relevant regulations that directly impacted the stockpiled waste.

**(c) Skagit Hill did not accept “source separated” recyclables during the term of the 2007 permit.**

The regulatory requirement for “source separation” is founded on RCW 70.95.305, which authorizes Ecology to “by rule exempt from the

requirements to obtain a solid waste handling permit.” RCW 70.95.305(1).

The legislature clearly provided that regulatory exemptions are not available for “any facility . . . that . . . [h]andles mixed solid wastes that have not been processed to segregate solid waste materials destined for disposal from other solid waste materials destined for beneficial use.”

RCW 70.95.305(2)(c). Thus, Ecology requires that segregation of solid wastes must occur where the waste originated:

“Source separation” means the separation of different kinds of solid waste **at the place where the waste originates.**

WAC 173-350-100 (emphasis added.)

In conflict with the above statute and regulation, Skagit Hill accepts waste that is generated off-site, at “job sites.” The resulting mixture of debris was brought to the Property for stockpiling and later separation.

Concurrent with the source separation requirement, a materials recovery facility may not “dispose of an **incidental and accidental residual** [that exceeds] five percent of the total waste received, by weight per year, or ten percent by weight per load. WAC 173-350-310(2)(b)(ii) (emphasis added.) The court need not consider the percentages under the

facts presented here because this regulatory requirement precludes the intentional<sup>13</sup> acceptance of residual waste. While Skagit Hill's practice of sorting waste after receiving it may be a cost saving factor, it is a violation of solid waste regulations unless Skagit Hill has been permitted as intermediate solid waste handling facility.

**2) Skagit Hill does not qualify for the exemption for storage or recycling of solid waste in piles.**

Certain piles of solid waste used for storage or treatment may be exempted from solid waste permitting. Skagit Hill claimed that its piles of "wood waste" and "wood derived fuel" are exempt from permitting.

The piles of wood waste are not exempt from permitting for the same reason that the recycling is not exempt:

This section does not apply to any facility or category of facilities that: . . . (c) Handles mixed solid wastes that have not been processed to segregate solid waste materials destined for disposal from other solid waste materials destined for a beneficial use.

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<sup>13</sup> Merriam-Webster's On-line Dictionary defines incidental as "occurring merely by chance or without intention or calculation." <http://www.merriam-webster.com/dictionary/incidental>. "Accidental" is defined as "occurring unexpectedly or by chance; happening without intent or through carelessness and often with unfortunate results." <http://www.merriam-webster.com/dictionary/accidental>.

RCW 70.95.305(2)(c). Again, Skagit Hill intentionally accepted and handled mixed solid wastes that contain residue destined for disposal. This precludes Skagit Hill's use of the piles exemption.

However, even if Skagit Hill's claim that its wood waste piles were exempt from permitting were valid, Skagit Hill's stockpiling of tires, roofing material, insulation, carpeting, plastics, fabric (in furniture and toys), etc. precludes its use of the exemption for piles used for storage.

Further,

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

...

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

WAC 173-350-320(1).

As discussed above, Skagit Hill does not meet Ecology's "thou shall not pollute" performance standards.

Further, the exemptions for piles of solid waste need only be considered if the solid waste which comprises the piles could have been accepted at the facility without a permit in the first place. As addressed above, the construction and demolition debris was not source separated,

incidentally accepted, and contained non-designated waste. Skagit Hill can not avoid the permitting requirements – after unlawfully accepting waste without a permit – by later sorting the mixed waste into piles.

Skagit Hill needs a municipal waste<sup>14</sup> permit to engage in the activities that were presented to the PCHB.

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<sup>14</sup> See WAC 173-350-100 (“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: . . . 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.”)

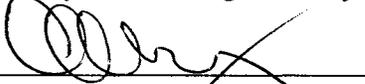
**VI. Conclusion.**

For the reasons set forth above, the Court should affirm the PCHB's grant of summary judgment to Health.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of April, 2010.

RICHARD A. WEYRICH  
Skagit County Prosecuting Attorney

By:

  
\_\_\_\_\_  
A. O. DENNY  
Deputy Prosecuting Attorney  
WSBA #14021

# **Appendix A**

**PCHB Index #8, Skagit County's Dispositive Motion**

1  
2  
3  
4  
5  
6  
7  
8 **WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD**  
9 **ENVIRONMENTAL HEARINGS OFFICE**

10  
11 SKAGIT HILL RECYCLING,

12 Petitioner,

13 vs.

14 SKAGIT COUNTY and SKAGIT COUNTY  
15 HEALTH DEPARTMENT,

16 Respondents,  
17

PCHB NO. 08-038

18  
19 SKAGIT COUNTY'S DISPOSITIVE  
20 MOTION TO AFFIRM DENIAL OF  
21 APPLICATION FOR SOLID WASTE  
22 PERMIT AND TO DISMISS APPEAL

23  
24 COMES NOW Skagit County and moves the Pollution Control Hearings Board (Hearings  
25 Board) for an order affirming the county's denial of Skagit Hill Recycling's application for a solid  
26 waste permit and denying Skagit Hill Recycling's appeal.

27 **STATEMENT OF GROUNDS**

28 The presiding officer has authority to rule on dispositive motions. See WAC 371-08-390.

29 **ISSUES**

Does mixed solid waste consisting of construction and demolition materials, including raw  
and painted dimensional lumber, painted wood, laminated wood, plywood and press (chip) board,  
insulation, plastic, synthetic flooring materials, foam, asphalt roofing waste and tires, constitute  
non-inert waste, as defined in Chapter 173-350 WAC, and did acceptance and holding of such  
waste violate Skagit Hill Recycling's 2007 inert waste permit?

Skagit County's Dispositive Motion

1  
**FILE COPY**

PROSECUTING ATTORNEY  
OF SKAGIT COUNTY  
605 South Third Street  
Mt. Vernon, Washington 98273  
360-336-9460

1 Does Skagit Hill Recycling's acceptance of non-inert waste and failure to remove non-  
2 inert waste, which requirement was imposed as a condition in its 2007 inert waste permit for  
3 2007, constitute grounds for denial of Skagit Hill Recycling's application for an inert waste permit  
4 for 2008?

5 Is demolition and construction waste, of the type and in the manner that Skagit Hill  
6 Recycling accepted it, exempt from inert waste permitting?

7 Does an unresolved administrative appeal, which has been rendered moot by the approval  
8 of a permit for 2007, deprive the Hearings Board of jurisdiction over this appeal?

9 **FACTS**

10 Skagit Hill Recycling's appeal acknowledges that it held an inert waste solid waste permit  
11 for 2007. Skagit County denied Skagit Hill Recycling's application for a solid waste permit for  
12 2008 because (1) it accepted non-inert waste and (2) it failed to comply with conditions regarding  
13 the acceptance and removal of non-inert waste, which were imposed in its 2007 permit.

14 Skagit Hill Recycling's appeal admits that it has accepted construction and demolition  
15 waste, but it does not identify the particular type of waste it accepted. Instead, Skagit Hill  
16 Recycling makes the general assertion that the construction and demolition waste is "wood waste  
17 and wood derived fuel" that is exempt from "solid waste handling permitting."

18 **Facts related to appeal of 2007 notice and order.**

19 On June 21, 2006, Scott Waldal asked that the solid waste permit that had been issued to  
20 Duke's Hill Resource and Recycling Center, located at 7735 State Route 9, Skagit County, be  
21 transferred to him. Exhibits 1, 2.<sup>1</sup> In its letter advising Scott Waldal of the transfer, the Skagit  
22 County Health Department (Department) advised Scott Waldal that the permit "only pertains to  
23 the landfilling of inert waste" and that he had "stated that [he] would abide by the permit  
24 conditions and the plan of operation for the inert waste landfill." Exhibit 3, 4. Scott Waldal's  
25 operation plan, retained from Duke's Hill, provided:

26 **Only inert wastes** (non-combustible, non-dangerous solid wastes  
27 that are likely to retain their physical and chemical structure under  
28

29 <sup>1</sup> The exhibits were listed in the county's "Preliminary List of Issues, Exhibits and Witnesses" filed on or about  
May 8, 2008. Copies are provided as attachments to the affidavit of Britt Pfaff-Dunton.

1 expected conditions of disposal, including resistance to biological  
2 attack and chemical attack from acidic rainwater; examples if these  
3 materials are clean gravels and soils, and cement and asphalt concrete  
4 products from road and site construction.) **may be land filled.**

5 Exhibit 5 (emphasis in original.)

6 During an inspection of Skagit Hill Recycling's landfill a health inspector observed  
7 "woodwaste, carpeting, foam, fiberglass, insulation, wiring, metal, plastics," asphalt "roofing  
8 waste," and a trailer in the landfill. Ron Johnson, facility operator, stated "they got the waste from  
9 a job they were doing and they were going to sort through the waste and recycle what they could  
10 and dispose of the rest of the waste." Exhibit 6, 7. On October 13, 2006, Department personnel  
11 reminded Ron Johnson that "the current inert waste permit did not allow for non-inert waste to be  
12 accepted at the site" and that "if they decided that they wanted to accept and process non-inert  
13 waste, that they would need to get a solid waste permit that would cover the proposed solid  
14 waste handling activities before they started to accept those new wastes." Exhibit 7.

15 On November 14, 2006, Skagit Hill submitted an application to renew its inert waste  
16 landfill permit for 2007. Exhibit 8.

17 On November 20, 2006, the Department reminded Ron Johnson that he had "agreed to  
18 remove the above mentioned wastes [construction and demolition debris and asphalt shingles] to a  
19 licensed disposal site within 10 days." Exhibit 9. Ron Johnson did not provide the requested  
20 documentation of the remedial action. As a result, the Health Department did not issue a solid  
21 waste permit to Skagit Hill Recycling. Instead, on January 16, 2007, the Health Department  
22 issued a notice of violation – for the violations observed on October 16, 2006. The notice of  
23 violation also gave Skagit Hill the opportunity to keep operating if it complied with one of two  
24 abatement schedules. The Notice of violation concluded:

25 If Skagit Hill Recycling does not comply with the abatement schedule  
26 or meet any of the schedule time frames, then Skagit Hill Recycling  
27 shall immediately stop accepting inert waste until such time that a  
28 valid solid waste facility permit has been issued by the Health  
29 Department for the facility. Skagit County Health Department may  
use other enforcement actions, including assessment of civil penalties  
of up to \$1,000 per day for each violation of SC 12.16, if Skagit Hill  
Recycling does not adhere to the abatement schedule. Other remedies

1 provided by law may be taken in addition to the above. A copy of  
2 12.16.460, Hearings and Appeals, has also been included with this  
3 notice.

4 Exhibit 10.

5 On January 29, 2007, Skagit Hill appealed the notice of violation by filing a "Request for  
6 Hearing before the Health Officer to Appeal Notice, Fine, or Order for Violation of Skagit  
7 County Code 12.16." In its notice of appeal, Skagit Hill explained:

8 Facility is currently stockpiling materials and is not required to  
9 remove any construction or demolition waste.

10 . . . Construction and demolition materials are clearly within the  
11 definitions of "wood waste" and "wood derived fuel" under the  
12 WAC; therefore, Skagit Hill Recycling, Inc. is not required to  
13 dispose of it as stated by the Health Inspector. . . . Skagit Hill  
14 Recycling Inc.'s permit cannot be revoked or cancelled without a  
15 major violation. All other requested information is being provided by  
16 the requisite February 1, 2007 deadline.

17 Exhibit 11.

18 On February 12, 2007, Peter Christiansen, Section Manager, Solid Waste and Financial  
19 Assistance Program, Washington Department of Ecology, offered his opinion that the "asphaltic  
20 roofing shingles, insulation, drywall, plasterboard, carpeting or other materials regularly  
21 encountered in demolition debris" are not categorically exempt and that the Washington  
22 Administrative Code has "no exclusion to permitting when a mixed waste is deposited at the site."  
23 Exhibit 14. The construction and demolition waste was still on the site on February 14, 2007.

24 Exhibit 12A.

25 The Health Officer held a hearing on Skagit Hill's appeal on February 20, 2007. In  
26 summary, the Health Officer found (1) that construction and demolition waste is not wood waste  
27 or inert waste and must be removed from the site, (2) Skagit Hill's application for an inert waste  
28 permit was denied because it had "not demonstrated the willingness to comply with those  
29 standards and has not supplied requested information to conduct the review," and (3) that  
30 "[w]aste roofing material is not inert and is not an acceptable waste under the Skagit Hill  
31 Recycling inert waste landfill permit." The Health Officer's decision advised that:

1 If the appellant wants to accept and process other types of solid  
2 waste at the facility, then the facility shall apply for a permit from the  
3 Health Department. Once the applicable permit has been issued, then  
4 the facility can conduct the other permitted activities.

5 The Health Officer's decision also discussed and amended the abatement schedule and  
6 invited Skagit Hill to apply for any permits necessary to accept the types of waste that it wanted  
7 to handle at its facility. Exhibit 13.

8 On March 14, 2007, Skagit Hill filed its appeal of the Health Officer's decision with the  
9 Board of Health. Skagit Hill's appeal raised the following issues:

10 Appellant believes there is no violation. The Department has  
11 incorrectly determined that the storage of construction and  
12 demolition material is subject to solid waste handling regulations and  
13 in violation of the inert waste permit issued to the facility. The  
14 Department refused to issue a permit to the facility for operation in  
15 2007. The Department wrongfully issued an abatement order. The  
16 Department incorrectly determined that the storage of demolition is a  
17 major violation.

18 Exhibit 15.

19 Skagit Hill Recycling explained that construction and demolition material dumped at the  
20 landfill is later run through a machine that pulls out recyclable metals and large pieces of clean  
21 wood. Hand sorting removes smaller pieces of metal and wood. The remaining waste is ground,  
22 exposed to a magnet, and screened. Marketable materials are stockpiled or transported. "Any  
23 material that does not meet the inert status would be stockpiled in a separate area until there is  
24 enough to make a load for disposal to a certified subtitle D landfill." Exhibit 16.

25 While its appeal was pending, Skagit Hill and the Health Department worked through the  
26 requirements necessary to issue a permit to Skagit Hill. Exhibit 17, 18, 19, 20, 21. On April 24,  
27 2007, upon Skagit Hill's request, the Board of Health continued the appeal hearing, which was  
28 scheduled for April 24, 2007, to July 24, 2007. Exhibit 26.

29 On March 30, 2007, Ron Johnson, acting for Skagit Hill Recycling, submitted the  
30 following amendment to their operation plan:

31 This is an amendment to our operation plan in response to a  
32 conversation between Scott Waldal and Peter Browning at approx.  
33 10:26 am. That this time we will cover the debris piles and will

1 remove them by the end of Oct 2007, at the same time will we  
2 continue to obtain the proper permit from the Department of  
3 Ecology for this type of material. If the proper permit is issued before  
4 the end of October 2007 then this material will not be removed but  
recycled as our goal has always been.

5 Exhibit 22. (The Department approved the amended operations plan on May 4, 2007. Exhibit 24.)

6 On March 30, 2007, following Skagit Hill's assertion that it would remove the piles of  
7 construction and demolition debris, as the Health Department had directed in the abatement order,  
8 the Health Department issued a permit that allowed Skagit Hill to operate an inert solid waste  
9 facility. Exhibit 25. The permit, which expired on December 31, 2007, contained general and  
10 specific conditions, including a condition that required Skagit Hill to remove the piles of  
11 construction and demolition debris by October 1, 2007:

12 G. Compliance Requirement.

13 Skagit Hill Recycling accepted construction and demolition wastes at  
14 the facility in violation of the inert waste landfill facility permit  
15 requirements. As part of the abatement process, Skagit Hill  
16 Recycling must not accept any additional construction and  
17 demolition wastes or any other solid wastes except inert waste at the  
18 facility. The existing piles of construction and demolition wastes  
19 must be covered to prevent precipitation from entering the piles. The  
20 piles of construction and demolition wastes including the asphaltic  
roofing waste must be removed from the facility by October 1, 2007.  
The Health Department must receive a written report of where the  
construction and demolition waste was disposed of or how it was  
recycled within 30 days of the removal or processing of the wastes.

21 Exhibit 25.

22 Skagit Hill Recycling did not appeal the issuance of the permit or its conditions.

23 The Health Department has not taken any further action on the notice of violation issued  
24 on January 16, 2007.

25 On July 20, 2007, Department staff observed "an increase in the amount of construction  
26 and demolition waste at the site compared to the last inspection." Exhibit 23.

27 On July 20, 2007, upon Skagit Hill's request, the Board of Health continued the appeal  
28 hearing to September 24, 2007. Exhibit 27. On September 21, 2007, upon Skagit Hill's request,  
29 the Board of Health continued the appeal hearing to November 20, 2007. Exhibit 28. On

1 November 13, 2007, the Health Officer asked Skagit Hill Recycling to strike the hearing on its  
2 appeal of the January 16, 2007, Notice of Violation, because it had been rendered moot when the  
3 county issued an inert waste permit to Skagit Hill. Exhibit 29. Skagit Hill did not agree that the  
4 appeal was moot, but did agree to continue the hearing. Exhibit 29. At this time, no date for a  
5 hearing on the appeal of the January 16, 2007, notice of violation has been set.

6 **Facts related to denial of 2008 application for a solid waste permit.**

7 Skagit Hill Recycling's inert waste landfill permit for 2007 contained general and specific  
8 conditions, including conditions requiring the removal of all previously-accepted non-inert waste  
9 by October 1, 2007. Paragraph G. Compliance Requirement required:

10 Skagit Hill Recycling accepted construction and demolition wastes at  
11 the facility in violation of the inert waste landfill facility permit  
12 requirements. As part of the abatement process, Skagit Hill  
13 Recycling must not accept any additional construction and  
14 demolition wastes or any other solid wastes except inert waste at the  
15 facility. The existing piles of construction and demolition wastes  
16 must be covered to prevent precipitation from entering the piles. The  
17 piles of construction and demolition wastes including the asphaltic  
18 roofing waste must be removed from the facility by October 1, 2007.  
19 The Health Department must receive a written report of where the  
20 construction and demolition waste was disposed of or how it was  
21 recycled within 30 days of the removal or processing of the wastes.

22 Exhibit 25. Skagit Hill Recycling did not appeal this permit or any condition that it imposed.  
23 Skagit Hill Recycling never filed the required report on the disposal of the pre-existing  
24 construction and demolition wastes. There is no evidence that Skagit Hill Recycling ever covered  
25 the pre-existing construction and demolition wastes.

26 On November 11, 2007, Skagit Hill submitted an application to renew its solid waste  
27 permit for 2008. Skagit Hill Recycling again sought a permit to operate an inert waste landfill.

28 Exhibit 30.

29 Department staff observed wood ash, dimensional lumber, plastics, plywood, painted  
wood, laminate flooring, insulation, linoleum, tires, metal, composites, plastic sheeting, carpet

padding, fiberglass, roofing paper, asphaltic roofing, and similar materials in piles at the land fill.<sup>2</sup>

Department staff identified these materials as non-inert waste and advised Skagit Hill Recycling:

The amount of construction and demolition wastes located in the pit area has increased. The pit area has non-inert wastes and [inert] wastes. The site is not permitted to receive non-inert wastes. The [2007] permit allowed them to keep the construction and demolition waste that they had on site in 2006, but the permit does not allow them to bring in additional wastes while they work on applying for the appropriate solid waste permits.

Exhibit 33.

On December 19, 2007, the Health Department denied Skagit Hill's application. The denial was founded largely on Skagit Hill's noncompliance with the conditions in its 2007 permit and on Skagit Hill's continued acceptance of non-inert waste. The denial advised Skagit Hill of its right to appeal:

Skagit Hill Recycling, Inc. has the right to request an appeal hearing on the denial. The appeal process is found in WAC 173-350-710 (attached) which Skagit County adopted under SCC 12.16.310. The regulation provides that appeal of denials of permits for solid waste handling facilities are appealed to the Health Officer, and should further appeal be necessary, to the Pollution Control Hearings Board. See WAC 173-350-710(6).

Exhibit 31, 32.

On January 4, 2008, Skagit Hill filed a request for a hearing before the Health Officer.

Exhibit 34. On February 21, 2008, following a hearing, the Health Officer issued his decision denying Skagit Hill's appeal. See Exhibit A to Notice of Appeal.

Skagit Hill filed an appeal of the Health Officer's decision with the Pollution Control Hearings Board. The Pollution Control Hearings Board has accepted the appeal (PCHB no. 08-038) and has scheduled a pre-hearing conference for May 12, 2008. In addition to its appeal to

---

<sup>2</sup> Piles of clean wood were stored outside of the landfill pit in accordance with the permit and permitting exemptions.

1 the Pollution Control Hearings Board, Skagit Hill filed an appeal of the Health Officer's decision  
2 with the Board of Health.<sup>3</sup>

3 **ANALYSIS**

4 There are two keystone issues in this case. The first is whether the construction and  
5 demolition waste identified in the facts above constitutes non-inert waste. The second is whether  
6 an exemption from the permitting requirements exists for the construction and demolition wastes  
7 identified in the facts above.

8 Minor issues relate to the Hearings Board's jurisdiction.

9 **A. Violations of regulations and permit conditions warrant denial of an application to**  
10 **renew a solid waste permit.**

11 Skagit Hill Recycling bears the burden of proving that the Department's denial of its  
12 application for a solid waste permit should be reversed. WAC 371-08-485(3); see *Northwest*  
13 *Aquatic Ecosystems v. Department of Ecology*, PCHB No. 05-101, Findings of Fact, Conclusions  
14 of Law and Order at 4 (February 15, 2006) ("The appellant Northwest Aquatic has the burden of  
15 proof in challenging Ecology's permit denial");<sup>4</sup> also see ("In appeals to the Board from the  
16 granting or denial of a permit, the appellant bears the initial burden of proof.") Thus, Skagit Hill  
17 Recycling must prove that its operation is exempt from permitting requirements and that the  
18 county's denial of its application was unjustified.

19 The Hearings Board's review is de novo and its findings are based on a preponderance of  
20 the evidence. WAC 371-08-485(1), (2). The governing regulations for the Hearings Board's  
21 conclusions of law are the same as the regulations the Department applied when reviewing Skagit  
22 Hill Recycling's application:

23 . . .  
24 (c) Once the jurisdictional health department determines that an  
25 application for a permit is complete, it shall:  
26 . . .

27  
28 <sup>3</sup> The Board of Health scheduled a hearing for June 10, 2008. This appeal hearing was cancelled at the request of a  
29 lawyer who stated that he represented Skagit Hill Recycling. It does not appear that this lawyer was retained by  
Skagit Hill Recycling. Skagit Hill Recycling has not acted to reschedule this hearing.

<sup>4</sup> Page citations are to Westlaw versions of Hearings Board decisions.

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

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

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

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

18 WAC 173-350-710(1)

19 **B. The denial of Skagit Hill Recycling's application for a 2008 solid waste permit is**  
20 **supported by fact and law.**

21 Skagit Hill Recycling continued to accept mixed demolition and construction waste from  
22 off-site sources throughout 2007. It then removed recyclable materials, including non-inert metals,  
23 from the waste and stored the remaining mixed waste in its landfill. The remaining mixed waste  
24 consisted of raw and painted dimensional lumber, painted wood, laminated wood, plywood and press  
25 (chip) board, insulation, plastic, synthetic flooring materials, foam, asphalt roofing waste and tires.

26 Accepting and storing these mixed non-inert wastes at the landfill is not permitted under Skagit  
27 Hill Recycling's inert waste landfill permit.

28 **1. Skagit Hill Recycling accepted non-inert materials in violation of**  
29 **regulations and permit conditions.**

The criteria for inert waste are set forth in WAC 173-350-990(2). It provides that inert  
waste shall:

- 1 (i) Not be capable of catching fire and burning from contact with  
2 flames;
- 3 (ii) Maintain its physical and chemical structure under expected  
4 conditions of storage or disposal including resistance to biological  
5 and chemical degradation; and
- 6 (iii) Have sufficient structural integrity and strength to prevent  
7 settling and unstable situations under expected conditions of storage  
8 or disposal.

9 While some construction and demolition debris would meet the above criteria, the bulk of the  
10 construction and demolition waste that Skagit Hill Recycling accepted throughout 2007 and 2008,  
11 did not. For example, the wood, laminated flooring, plastic, foam, roofing, and tires are all  
12 capable of catching fire. These and other materials, including the non-stainless steel ferrous metals  
13 that were accepted, are not resistant to biological and chemical degradation. Further, most of  
14 these materials lack structural integrity, especially after they have been shredded and ground  
15 during the recycling process.

16 Skagit Hill Recycling only has a permit to operate an inert waste landfill. Under the  
17 conditions of that permit, it may not accept or store non-inert wastes. Skagit Hill Recycling  
18 ignored this restriction.

19 **2. No exceptions apply for the type of waste that Skagit Hill Recycling**  
20 **has been accepting and holding under its inert waste permit.**

21 Under RCW 70.95.305, the Department of Health may provide for exemptions from the  
22 solid waste permitting requirements.

23 Some materials, including "wood waste used for fuel or as a raw material and wood  
24 derived fuel," are exempt from the requirement that a facility apply for and obtain a solid waste  
25 permit. See WAC 173-350-320(1)(b).

26 The Department is aware of this exemption and did not consider the storage of recycled  
27 wood outside of the landfill to be a violation of the permit. However, Skagit Hill Recycling is not  
28 accepting and storing just "wood waste."

29 "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,

1 sawdust, chips, shavings, bark, pulp, hogged fuel, and log sort yard  
2 waste, **but does not include wood pieces or particles containing**  
3 **paint, laminates, bonding agents** or chemical preservatives such as  
4 creosote, pentachlorophenol, or copper-chrome-arsenate.

5 WAC 173-350-100 (emphasis added.) Under this definition, painted wood, laminated wood, chip  
6 board are not wood waste.

7 Nor is it accepting and storing wood derived fuel.

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

14 WAC 173-350-100.

15 The definition of "wood waste" contemplates the storage of clean wood, not wood mixed  
16 with painted and laminated lumber, plywood, press board, insulation, plastics, synthetic flooring  
17 materials, metal, electrical wiring, foam and asphaltic roofing wastes. Similarly, the definition of  
18 "wood derived fuel" does not contemplate wood contaminated with materials other than certain  
19 paints, bonding agents, and creosote. Aside from the absence of any evidence that Skagit Hill  
20 Recycling has ever indicated that any of its waste would be burned as fuel, Ecology must approve  
21 the fuel for use in an energy recovery or incineration facility. See WAC 173-350-240(1)(d)(ii).  
22 Skagit Hill Recycling's mixed waste would not qualify for such approval.

23 Similarly, Skagit Hill Recycling's operation does not qualify for the recycling exemption  
24 under WAC 173-350-210(2)(a). To qualify and maintain exempt status, Skagit Hill Recycling  
25 needs to conduct its recycling operation in conformance with the terms and conditions set forth  
26 under WAC 173-350-210(2)(b), including conformance with performance standards and  
27 restricting acceptance of materials to "only source separated solid waste for the purpose of  
28 recycling." WAC 173-350-210(2)(b)(ii). Skagit Hill Recycling does not accept source separated  
29 recyclables. See WAC 173-350-100 ("Source separation" means the separation of different kinds  
of solid waste at the place where the waste originates.") Its business is centered on site-separation  
of waste that is generated off-site.

1                   3.       **Noncompliance with the conditions imposed under the preceding**  
2                               **permit warrants denial of an application to renew a solid waste**  
3                               **permit.**

4                   Before approving a renewal, the Department must ensure that the solid waste handling  
5 facility continues to “[m]eet the solid waste handling standards of the department” and  
6 “[c]ompl[ies] with applicable local regulations.” WAC 173-350-710(3)(a).

7                   Because the Department may impose conditions on a permit, failure to comply with permit  
8 conditions – such as the timely removal of non-inert wastes from an inert waste landfill – would  
9 be a failure to meet Department standards. See WAC 173-350-710(2)(a) (“Every permit issued by  
10 a jurisdictional health department shall contain specific requirements necessary for the proper  
11 operation of the permitted site or facility.”)

12                   Similarly, the acceptance of non-inert wastes violates local regulations. See SCC  
13 12.16.060 (“‘Inert waste landfill’ means a landfill that receives only inert waste.”) Any person  
14 who deposits or permits to be deposited any solid waste, other than in an authorized solid waste  
15 facility, shall be subject to an order of abatement, civil penalties, or an injunction. SCC  
16 12.05.080(2)(b), SCC 12.05.080(2)(d), SCC 12.05.440(5).

17                   Skagit Hill Recycling failed to comply with the schedule for removing non-inert waste  
18 from its facility. It also accepted non-inert waste in violation of its permit conditions and the  
19 Skagit County Code. Denial of its renewal application was warranted.

20 **C.       The administrative appeal of the 2007 notice and order to abate is moot and has no**  
21 **impact on this matter.**

22                   Skagit Hill Recycling’s administrative appeal, which was filed on January 29, 2007,  
23 challenged (1) an abatement schedule to remove construction and demolition debris and (2) a  
24 schedule requiring them to supply documents and information necessary for the Health  
25 Department to make a decision on its application for a solid waste permit for 2007.

26                   If any relief from the 2007 notice of violation were warranted, it would consist of the  
27 issuance of a permit.

28                   However, before the administrative appeal was resolved, Skagit Hill provided the  
29 Department with the documentation necessary to support its application for a permit for 2007. As  
part of its application, Skagit Hill Recycling specifically agreed to remove the mixed, non-inert

1 construction and demolition debris. The county then issued a solid waste permit to Skagit Hill  
2 Recycling. The inert waste landfill permit included, as a condition, a new abatement schedule.

3 Skagit Hill Recycling did not appeal the 2007 permit or any of its conditions.

4 The 2007 permit resolved all of the issues Skagit Hill Recycling raised in its appeal of the  
5 2007 notice of violation. It overrode the schedule for submitting application information. That  
6 schedule was no longer relevant once the application was approved and the permit was issued.  
7 Also, the imposition of a new – agreed – abatement schedule overrode the abatement schedule in  
8 the notice of violation. The schedule in the notice of violation was no longer relevant once the  
9 permit was issued.<sup>5</sup> Thus, the issuance of the 2007 permit effectively resolved all of the issues  
10 raised in the appeal of the 2007 notice of violation. This makes the 2007 administrative appeal  
11 moot.

12 “A case is moot if a court can no longer provide effective relief.” *Thomas v. Lehman*, 138  
13 Wn. App. 618, 622 n. 3, 158 P.3d 86 (2007); *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692  
14 P.2d 793 (1984). Generally, an appeal must be dismissed if the questions are moot or abstract, or  
15 where the substantial questions considered at the trial level are no longer at issue. *Sorenson v.*  
16 *City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

17 Significantly, because of Skagit Hill Recycling’s repeated requests for delays in the hearing  
18 on its appeal of the 2007, the 2007 permit has expired on its own terms. Skagit Hill Recycling was  
19 allowed to continue operating throughout 2007, without penalty for its noncompliances. Through  
20 its delays, it could not have obtained any better relief.

21 The 2007 administrative appeal is moot and there is no reason for the Hearings Board to  
22 consider that it has any impact on this appeal.

23 **D. The Hearings Board has jurisdiction over this appeal.**

24 Skagit Hill Recycling filed a duplicate appeal of the denial of its application for a 2008  
25 inert waste permit before the Skagit County Board of Health. Although the administrative appeal  
26 matter has not been resolved, it does not affect the Hearings Board’s jurisdiction over this appeal.  
27

28  
29 <sup>5</sup> The Health Department has not pursued – and does not intend to pursue – any fines or civil penalties related to  
the 2007 notice of violation.

1 The Pollution Control Hearings Board, not the Board of Health, has jurisdiction over the  
2 appeal of a Health Officer's decision on an application for a solid waste permit. The Skagit  
3 County Code provides that appeals involving notices of violation or an order, civil penalty, or  
4 assessment of costs may be appealed to the Health Officer and then to the Board of Health:

5 (1) Persons aggrieved by a **notice of violation, order of unfit for**  
6 **use or other order, civil penalty, or assessed costs** issued pursuant  
7 to this Chapter may request a hearing with the Health Officer for the  
8 purpose of disputing or requesting a stay or modification of such  
9 notice, order, civil penalty, or assessed costs.

10 (6) Upon holding the hearing requested, the Health Officer shall  
11 provide written notice of intent sustaining the order, civil penalty, or  
12 assessed costs within five (5) working days of the hearing. Notice  
13 shall be served personally or via certified mail to the requester and  
14 property owner.

15 (7) Persons still aggrieved subsequent to the Health Officer hearing  
16 may make written request for appeal to the Skagit County Board of  
17 Health and pay the request for appeal fee as listed in the most current  
18 Health Department schedule of charges within ten (10) working days  
19 of the serving of the notice of intent to sustain or modify the order.  
20 The request for appeal must meet the requirements of Subsection (3)  
21 of this Section. The Board of Health will hear the request for appeal  
22 within sixty (60) days of receipt. If the Board of Health sustains the  
23 request for appeal, the fee will be refunded.

24 See SCC 12.16.460 (emphasis added.)

25 In this matter, however, the Health Department did not issue a notice of violation, order,  
26 or civil penalty. The Health Department's action was the denial of an application for a permit. The  
27 denial is not an order as that term is used in Chapter 12.16 SCC.<sup>6</sup>

28 <sup>6</sup> The orders that the Health Department may issue are expressly identified in the code:

- 29 (2) The Health Officer, with or subsequent to the issuance of a notice of violation,  
may do any or all of the following:  
(a) Order immediate cessation of the alleged violation.  
(b) Order the abatement of the alleged violation and establish an abatement  
schedule to be met.

1 Because the denial of an application for a solid waste permit does not constitute a notice  
2 of violation or an order, the appeal procedures provided for under SCC 12.16.460 do not apply in  
3 this case. The applicable procedures for appeals involving the denial of an application for a solid  
4 waste permit are found under SCC 12.14.310 – General Permit Application and Issuance. That  
5 code section incorporates the appeal procedures promulgated by the Department of Ecology. See  
6 SCC 12.14.310 General permit application and issuance (“Refer to WAC 173-350-710.”)

7 WAC 173-230-710 provides, in part:

8 ...

9 (6) Permit suspension and appeals.

10 ...

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

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

---

16  
17 (c) Abate the violation or cause the violation to be abated if the abatement  
18 schedule established in Subsection (2)(b) of this Section is not met.

19 (d) Assess a civil penalty in accordance with the most current “Schedule of  
20 Charges: Skagit County Health Department” for either a general solid waste code  
21 violation or a specific offense defined in SCC 12.16.060, Definitions.

22 (e) Assess all costs incurred by the County associated with the violation including  
23 abatement costs, disposal costs, site remediation costs, and sampling costs.

24 (f) In the instance of the improper dumping or release of a hazardous substance,  
25 assess twice the cost to the violator had the violator disposed of the substance  
26 legally.

27 (g) In the instance of a major illegal dumping offense where more than three (3)  
28 cubic yards of solid waste has been deposited, assess twice the cost to the violator  
29 had the violator disposed of the solid waste legally.

(h) Order the remediation of any land or water where a hazardous substance or  
solid waste has been released as required by the Health Officer.

(i) Require evidence of proper disposal of solid waste, or hazardous substances  
involved in the violation such as receipts from permitted disposal facilities.

(j) In the case of a permitted solid waste facility, order the suspension or  
revocation of a solid waste permit.

(k) Avail herself/himself of any other remedy provided by law.

...

SCC 12.16.440(2).

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

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

10 WAC 173-230-710 (emphasis added.)

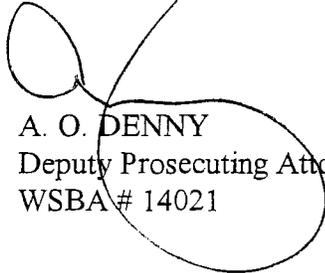
11 Thus, under the Skagit County Code, the only county-level appeal proceeding for the  
12 denial of a permit is a hearing before the Health Officer. Any further appeal on the denial of a  
13 permit must be made to the Pollution Control Hearings Board. WAC 173-230-710(6)(b)(iii).  
14 Because Skagit Hill is appealing a permitting decision and not a notice or order, it exhausted its  
15 county-level appeals when the Health Officer issued his decision.

### 16 CONCLUSION

17 For the reasons set forth above, Skagit County asks that Hearings Board find that Skagit  
18 Hill Recycling's acceptance of mixed construction and demolition waste constitutes the  
19 acceptance of non-inert waste in violation of state regulations and Department-imposed permit  
20 conditions, that its operations are not exempt from the permitting requirements for solid waste  
21 landfills, affirm the denial of Skagit Hill Recycling's application for a solid waste permit for 2008,  
22 and deny Skagit Hill's appeal.

23 Dated this 25<sup>th</sup> day of August, 2008.

24 RICHARD A. WEYRICH  
25 SKAGIT COUNTY PROSECUTING ATTORNEY

26  
27 By:  A. O. DENNY  
28 Deputy Prosecuting Attorney  
29 WSBA # 14021

# **Appendix B**

**PCHB Index #8, Attachment 9 to Affidavit of Polly Dubbel**



*Always working for  
a safer and healthier  
Skagit County*

PETER BROWNING, DIRECTOR  
HOWARD LEIBRAND, M.D., HEALTH OFFICER

700 South 2nd Street Room #301, Mount Vernon, WA 98273  
Telephone (360) 336-9380, Toll free 877-336-9380; Fax (360) 336-9401  
Internet: [www.skagitcounty.net/health](http://www.skagitcounty.net/health)

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November 20, 2006

Ron Johnson  
Skagit Hill Recycling, Inc.  
PO Box 818  
Sedro Woolley, WA 98284

**Re: Solid Waste Permit Renewal Application for 2007 permit**

Dear Mr. Johnson:

Thank you for the solid waste permit renewal application which we received November 14, 2006. In the application you identified Skagit Hills Recycling as currently permitted for municipal solid waste landfill, land application, and an inert waste landfill. I want to reiterate and ensure that you realize the facility is only permitted as an inert waste landfill per WAC 173-350-410. If you wish to apply for other solid waste activities at the facility, then you must complete the applicable forms and supply the information requested by the Health Department in order to review your request. You may not legally conduct other solid waste activities at the facility until a permit is issued for those specific activities.

The current plan of operation for the facility only discusses the landfilling of inert waste. Verbally both you and Scott have stated that you are currently stockpiling inert waste at the facility and do not intend to landfill the various inert wastes that you have accepted over the last few months. The plan of operation must be updated to reflect the current operational status of the facility. Submit a draft revised plan of operation for the inert waste landfill facility to the Health Department no later than December 20, 2006 for Health Department review. The plan of operation will have to meet the approval of the Health Department as part of the permit renewal process for 2007. In the mean time remember that you need to comply with the current plan of operation, which contains monitoring requirements that you need to perform for 2006.

As I have stated several times in the previous discussions, you need to comply with the current plan. I reiterate that I would be glad to help you review any of the facility files. If you need copies of any documents such as the plan of operation, all of the facility records are open for review and copying if you have not received all of the files from the former facility owner.

The Health Department and Department of Ecology conducted a site visit on October 13, 2006. One of the violations noted during the inspection was the presence of construction and demolition debris and asphalt shingles. You agreed to remove the above mentioned wastes to a licensed disposal site within 10 days. Please remit a copy of the disposal receipt to the Health Department for our records.



I have enclosed an invoice for renewal of the inert waste landfill permit for 2007. Please be advised, if an updated plan of operation is not submitted and the plan does not get reviewed and updated to meet the approval of the Health Department, the permit renewal will be contingent upon a Health Department approved revised plan. If you want to conduct other activities that are not covered under the current inert waste landfill permit, we can work with you through the application and permitting process.

Please call me at (360) 336-9380 if you have questions.

Sincerely,

  
Britt Pfaff-Dunton  
Environmental Health Specialist



# **Appendix C**

**PCHB Index #8, Attachment 34 to Affidavit of Polly Dubbel**



Always working for a safer and healthier Skagit County

PETER BROWNING, DIRECTOR  
HOWARD LEIBRAND, M.D., HEALTH OFFICER

700 South 2nd Street Room #301, PO Box 91071, Mount Vernon, WA 98273  
Telephone (360) 336-9380, Toll free 877-336-9380; Fax (360) 336-9401  
Internet: [www.skagitcounty.net/health](http://www.skagitcounty.net/health)

**REQUEST FOR HEARING BEFORE HEALTH OFFICER TO APPEAL NOTICE, FINE, OR ORDER FOR VIOLATION OF SKAGIT COUNTY CODE 12.16**

Appellant Name: Skagit Hill Recycling, Inc. Phone: 360-856-4833

Mailing Address: PO Box 818, Sedro Woolley, WA 98284

Appellant Representative Name: C. Thomas Moser & Heather D. Shand Perkins Phone: 360-428-7900 & 360-336-2000

Mailing Address: 411 Main Street, Mount Vernon, WA 98273 & PO Box 1541, Mount Vernon, WA 98273 (respectively)

Property referenced in enforcement action (Parcel Number and Address):

7705 State Route 9, Sedro Woolley, WA 98284, Parcel #P101465

Violation referenced in enforcement action:

Denial of Solid Waste Permit Renewal Application.

Date enforcement action issued by Health Department: 12/19/07

Reason(s) for request for hearing - please name specific points of appeal:

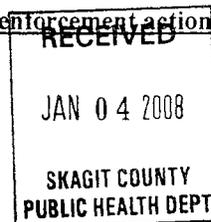
See attached.

(attach additional sheets as necessary)

Signature of appellant: [Handwritten Signature] Date: 01/04/08

Please submit original signed form to Skagit County Health Department within 10 days of receipt of enforcement action

ORIGINAL



**Reasons for request for hearing:**

Skagit Hill Recycling, Inc., hereinafter referred to as "Facility", hereby appeals the Health Department's denial of the Facility's application for renewal of its Inert Landfill Permit. The Facility does not believe it is in violation of its 2007 Inert Waste Landfill Permit for the same reasons that are currently under appeal before the Skagit County Board of Health. Contrary to what the Health Department contends, the Facility did not "agree" to any specific compliance requirements that the County inserted into its 2007 Inert Waste Landfill Permit, including any conditions pertaining to the construction and demolition debris. Rather, the Facility continues to contend it is allowed to stockpile construction and demolition debris under WAC 173-350-320(b). These issues are currently under appeal and litigation will likely be forthcoming.

The 2007 Inert Waste Landfill permit was incorrectly issued containing a specific compliant section addressing the construction and demolition wastes that the County claims was accepted at the facility in violation of the Skagit Hill Recycling 2006 inert waste landfill permit. On January 29, 2007, the Facility filed an appeal of the January 19, 2007 notice of violation issued by the Health Department. The appeal to the Health Officer was denied on February 27, 2007 and the Facility then filed an appeal to the Skagit County Board of Health on March 14, 2007. This appeal was originally scheduled to be heard on April 24, 2007, which was continued to July 24, 2007 and then again to November 20, 2007. The November 20, 2007 hearing date was continued again by agreement of the Facility and the County; however, at that time, the County indicated it believed the appeal was moot. The Facility denied this assertion and requested a hearing date. No hearing date has been set. The Facility appealed the following Health Officer findings:

1. Construction and demolition wastes are not within the definitions of wood waste and wood derived fuel;
2. The facility is not in compliance with inert waste facility permit;
3. The operator is obligated to remove the materials;
4. The operator has committed a major violation;
5. The operator has not provided all requested information to the Department for renewal of the permit;
6. The Facility has not demonstrated willingness to comply with standards and regulations;
7. Waste roofing material is not inert and not acceptable for an inert waste permit;
8. Refusal to acknowledge the pre-existing use of the travel operations at the property;
9. Affirming the abatement schedule issued by the Department;
10. Refusal to recognize exempt activity for stockpiling of material allowed by Washington law.

The Health Department and Health Officer have failed to acknowledge the Facility's grandfathered sand and gravel pit status which dates back to the early 1900's.

Regardless of this pending appeal, the Health Department proceeded to deny the Facility's application for renewal of its inert landfill permit and proceeded to cite violations by the Facility of the

---

current permit, the same issues that are pending appeal that are associated with (1) construction and demolition debris; and (2) asphalt roofing material. It is clear to the Facility that the Health Department and County are compiling alleged violations and issues that have been pending appeal for nearly a year. The 2007 permit renewal application was denied for the same, or substantially the same, reasons as those issues that are pending appeal from the 2006 issues.

As stated in its 2006 appeal, the Facility is currently stockpiling materials and is not required to remove any construction or demolition waste. Pursuant to WAC 173-350-320(b), storage of piles of wood waste used for fuel or as a raw material, wood derived fuel are required to be ensured that at least fifty percent of the material stored in the pile is used within one year and that all of the material is used within three years. Construction and demolition materials are clearly within the definitions of "wood waste" and "wood derived fuel" under the WAC; therefore, Skagit Hill Recycling, Inc. is not required to dispose of it as stated by the Health Inspector. Skagit Hill Recycling, Inc. has been in operation since approximately July of 2006 and, under WAC 173-350-320(b) must use 50% of the material stored in the pile within one year (which has not yet passed) and/or the entire amount in three years (which again has not yet passed). Skagit Hill Recycling, Inc.'s permit cannot be revoked or cancelled without a major violation.

The Facility responds to the Health Department's allegation that the Facility has not adhered to the 2007 inert waste landfill permit for the following reasons as follows:

*Allegation: Accepting materials other than inert waste into the inert waste landfill facility.*

*Response:* The Health Department does not specifically state which, if any, non-inert waste material is being accepted by the Facility. The Facility hereby requests the Department provide specific materials so that it can properly respond. Notwithstanding this request, the Facility believes the Department is referencing the following items, which it responds to accordingly:

*Construction and demolition debris:*

As stated in its appeal and numerous times in this response, the Facility is receiving construction demolition debris, which is defined and classified under WAC 173-350-100 as wood waste and wood derived fuel.

**"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.

WAC 173-350-100.

As such, this material is not considered a non-inert material and is allowable under WAC 173-350-210 and 173-350-320(b).

*Tires:* WAC 173-350-350 sets forth requirements for facilities holding and storing more than 800 tires. The Facility does not have more than 800 tires and is not required to obtain any permits or conduct any further reporting.

*Asphalt shingles:* The Facility believes the Department is contending it is not allowed to receive asphalt shingles as they are presumed to be non-inert material. The Facility is recycling the asphalt shingles and using them in various end products. Again, the Facility is not burying these products and is instead recycling them. Further, asphalt shingles fall under WAC 173-350-210(a) as they are source separated material that can be recycled.

*Allegation:* *Processing mixed construction and demolition wastes without an appropriate solid waste permit.*

*Response:* WAC 173-350-210(a) specifically states as follows:

In accordance with RCW 70.95.305, recycling of solid waste is subject to the requirements of (b) of this subsection and is exempt from solid waste handling permitting. Any person engaging 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 to 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 health 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.

RCW 70.95.315 (emphasis added).

The Health Department is aware that the Facility is receiving source separated construction demolition debris, which is defined and classified under WAC 173-350-100 as wood waste and wood derived fuel.

**"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.

WAC 173-350-100.

The Facility submitted an operation plan to the Health Department which outlined its recycling operations. The Facility is clearly exempt from obtaining a solid waste permit under WAC 173-350-210 and the violation cited by the Health Department is incorrect.

*Allegation:* Failure to adhere to the permit compliance requirement to remove non-inert waste from the facility by October 1, 2007;

*Response:* As stated in its 2006 appeal, the Facility is currently stockpiling materials and is not required to remove any construction or demolition waste. Again, construction and demolition debris is defined as "wood waste" and "wood derived fuel" and is not considered a non-inert waste material. Pursuant to WAC 173-350-320(b), storage of piles of wood waste used for fuel or as a raw material, wood derived fuel are required to be ensured that at least fifty percent of the material stored in the pile is used within one year and that all of the material is used within three years. Construction and demolition

materials are clearly within the definitions of “wood waste” and “wood derived fuel” under the WAC; therefore, Skagit Hill Recycling, Inc. is not required to dispose of it as stated by the Health Inspector. Skagit Hill Recycling, Inc. has been in operation since approximately July of 2006 and, under WAC 173-350-320(b) must use 50% of the material stored in the pile within one year and/or the entire amount in three years (which again has not yet passed).

*Allegation: Depositing non-inert wastes and materials into the area of the facility designated as the landfill cell.*

*Response:* The Facility is not currently burying any material into the landfill cell of its premises. The Health Department has not provided legal authority for which it bases this allegation violation. The Facility cannot respond to an allegation that does not contain legal authority. The Facility hereby requests the legal basis for this allegation.

*Allegation: Failure to submit all of the proscribed routine water monitoring as required in the permit.*

*Response:* The Facility has conducted all water sample tests required by the Health Department is has provided those to the Department at the time of this appeal.

DECLARATION OF DELIVERY

I, Danielle Smith, declare as follows:

I sent for delivery by:  United States Postal Service;  ABC Legal Messenger Service;  electronic mail, a true and correct copy of the document to which this declaration is attached, to [tupper@tuppermackbrower.com](mailto:tupper@tuppermackbrower.com), [mack@tuppermackbrower.com](mailto:mack@tuppermackbrower.com), and [doll@tuppermackbrower.com](mailto:doll@tuppermackbrower.com) for James A. Tupper, Jr., Sarah Mack, and Brad Doll, Tupper Mack Brower, 1100 Market Place Tower, 2025 First Avenue, Suite 1100, Seattle, WA, 98121. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington, this 22<sup>nd</sup> day of April, 2010.



Danielle Smith

FILED  
COURT OF APPEALS  
DIVISION II

10 APR 23 AM 11:35

STATE OF WASHINGTON

BY \_\_\_\_\_

