

Friends of Toppenish Creek

February 1, 2024

Sunnyside City Council
818 E. Edison Ave.
Sunnyside, WA 98944

RE: Appeal of a January 2024 Mitigated Determination of Non-Significance

Dear Sunnyside City Council:

Friends of Toppenish Creek is a 501 C (3) non-profit registered in the State of Washington with a mission stated here:

Friends of Toppenish Creek is dedicated to protecting the rights of rural communities and improving oversight of industrial agriculture. FOTC operates under the simple principle that all people deserve clean air, clean water and protection from abuse that results when profit is favored over people. FOTC works through public education, citizen investigations, research, legislation, special events, and direct action.

Friends of Toppenish Creek (FOTC) appeals the January 2024 Mitigated Determination of Non-Significance (MDNS) Addendum for the proposed Sunnyside Renewable Natural Gas (SS RNG) project pursuant to RCW 43.21C, the State Environmental Policy Act.

Because FOTC believes the City of Sunnyside instructions regarding appeal of the January 2024 MDNS Addendum are incorrect, we will not appeal in Superior Court under RCW 36.70C. We appeal to the legislative authority of the acting local governmental agency, the Sunnyside City Council, pursuant to RCW 43.21C.060, RCW 43.21C.075, WAC 197-11-680, and Sunnyside Municipal Code 18.04.190

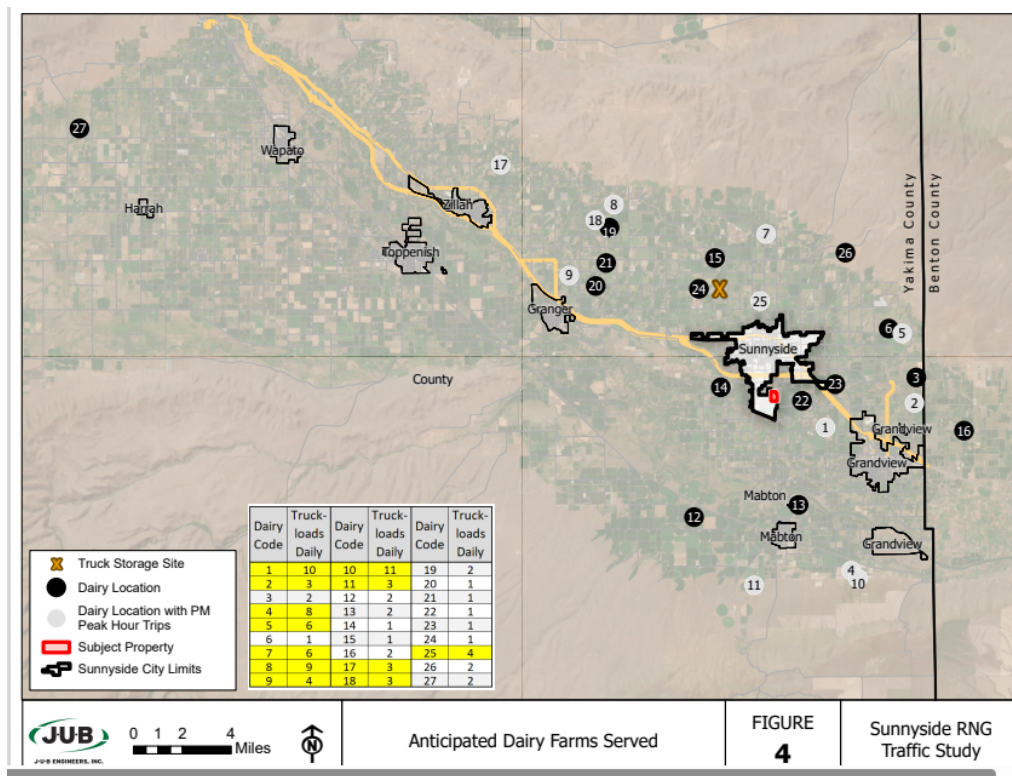
Instructions in the final paragraph of the January 2024 MDNS state:

The city's final decision shall be final and conclusive unless appealed by a party of record with standing to file a land use petition in Yakima County superior court. Such petition must be filed with Yakima County Superior Court within twenty-one days of issuance of the decision, and the proceeding shall follow the requirements as provided in Chapter 36.70C RCW

RCW 43.21C (SEPA) never refers to RCW 36.70C Judicial Review of Land Use Decisions.¹ Instead SEPA prescribes procedures for appeal at RCW 43.21C.060 and RCW 43.21C.075. Our appeal is not over land use. We agree that the Port of Sunnyside is zoned for heavy industrial, and that the Sunnyside Renewable Natural Gas project is heavy industrial. Land use is not disputed. Consequently RCW 36.70C does not apply.

FOTC appeals this MDNS Addendum because the City of Sunnyside:

- Ignored the wishes of the many people who commented on this MDNS. Why should people bother to comment on a project if their input will be ignored?
- Ignored suggestions to relocate the project to another site. This is a request for consideration of an alternative and that is expressly mandated in the statutes.
- Ignored volumes of scholarly evidence that were provided by commenters.
- Ignored evidence of likely significant environmental impacts from the project.
- Failed to adequately respond to legal issues raised by Friends of Toppenish Creek.
- Only addressed environmental issues within the City of Sunnyside and failed to address project impacts in Yakima County. See the map below:



¹ RCW 43.21C does refer to RCW 36.70A Growth Management Planning eighteen times and to RCW 36.70B Local Project Review twice.

According to the WA State Environmental Policy Handbook,² on page 23:

The lead agency is responsible for completing the environmental review process for all agencies with jurisdiction. This means other agencies with jurisdiction do not prepare separate SEPA documents or adopt the environmental documents issued by the lead agency for the same proposal.

This project will impact county roads throughout the LYV.

This project will impact both rural people and city dwellers due to pollution from increased truck traffic and increased air emissions from transporting, digesting, and storing manure.

This project will have an impact on over 40 CAFO dairies in the LYV, with probable benefits for the dairies on the map and probable economic stressors for the remainder.

Agencies with Jurisdiction include the WA State Dept. of Ecology, the WA State Department of Transportation, Yakima County, the Yakima Health District, the Yakima Regional Clean Air Agency.

* * * * *

Further Justification for an Appeal Based on the WA State Environmental Policy Handbook

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SEPA environmental review is required for any state or local agency decision that meets the definition of an “action” and is not categorically exempt. Actions are divided into two categories, “project actions” and “nonproject actions”.

Project actions are agency decisions to license, fund, or undertake a specific project. For example, project actions include construction or alternation of:

- *Public buildings such as city or county offices, jail facilities, public libraries, and school buildings;*
- *Public facilities such as water and sewer lines, electrical lines, and roads; and*
- *Private projects such as subdivisions, shopping centers, other commercial buildings, and industrial facilities.*

² WA State Environmental Policy Handbook available at <https://ecology.wa.gov/getattachment/4c9fec2b-5e6f-44b5-bf13-b253e72a4ea1/2-2018-SEPA-Handbook-Update.pdf#page=46>

FOTC Comment: The State of Washington made this a “project action” by allocating public funds for SS RNG.³

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Consultations are intended to gather information from agencies with expertise. There is no set form that a consultation must take. It is important that it contain sufficient information for agencies to provide valuable comments, including a clear description of the proposal

FOTC Comment: Regarding air emissions, there has been no consultation with either the WA State Dept. of Ecology (Ecology) or the Yakima Regional Clean Air Agency (YRCAA), both of which have expertise on air quality while the City of Sunnyside does not. This is, after all, a large proposed industrial operation to produce methane, a gas that is flammable and explosive at certain concentrations. If the methane were produced from fracking, there would be an automatic Environmental Impact Statement (EIS). Manure methane is not that much different.

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The severity of the impact must be weighed as well as its likelihood of occurring. An impact may be significant if its magnitude would be severe, even if its likelihood is not great. In determining if a proposal will have a significant impact, the responsible official may consider that a number of marginal impacts may together result in a significant impact. Even one significant impact is sufficient to require an environmental impact statement.

FOTC Comments: The likelihood of explosions and fires at the methane plant is not great but would be severe if an explosion or fire occurred.

Multiple marginal impacts include:

- Emissions from transport of manure and digestate to and from dairies
- Wear and tear on county and state roads and highways
- Traffic and traffic safety on roads that serve private residences
- Transport of manure and digestate through the City of Sunnyside
- Emissions from manure lagoons during transfer of manure to trucks

³ Washington Community Economic Revitalization Board Invests \$11.9 Million in Six Counties. 2023. <https://www.commerce.wa.gov/news/washington-community-economic-revitalization-board-invests-11-9-million-in-six-counties/>

- Emissions from transfer of manure to digesters
- Emissions from storage and transport of digestate
- Escape of methane from pipelines
- Escape of methane, hydrogen sulfide and ammonia during the digestion process
- Increased production of hydrogen sulfide and ammonia during the digestion process
- Risk of explosion and fire at the methane plant

If significant impacts are likely, a determination of significance (DS) is issued and the environmental impact statement process is started. If there are no likely significant adverse environmental impacts, a determination of nonsignificance (DNS) is issued. Additional guidance for making the threshold determination is included in WAC 197-11-330.

Pages 22 & 23

When evaluating the proposal, the responsible official must consider a number of issues. The following are examples of the type of questions that need to be answered during the review process.

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Are the permit application(s) and environmental checklist accurate and complete?

FOTC Comments: The MDNS did not acknowledge that permits, certifications, and reports are required for:

- Solid Waste Handling permit
- Construction permit for the truck storage site
- Valid oversize and/or overweight permit for trucks that transport manure and digestate
- Licensure for truckers who drive the trucks that haul manure and digestate
- Potentially certification of an energy site pursuant to RCW 80.50
- Air quality construction permit

Are there any additional studies and/or information available that would help in the evaluation of the proposal? (i.e. an environmental impact statement on the comprehensive plan, or on a similar project, or on a project at a similar location.)

FOTC Comments: Although the MDNS Addendum recognizes the need for a New Source Review Air Permit, there is no requirement for the emissions information in such a permit to be made available for scrutiny prior to issuing an MDNS determination. How can the Lead Agency

determine whether air emissions are significant without factual data? SEPA reviews and air quality permits for other facilities at the Port of Sunnyside should be considered.

FOTC Comments: The Lead Agency has ignored numerous relevant studies that were cited in comments from Amy Van Saun.

- Greenhouse gas and ammonia emissions from digested and separated dairy manure during storage and after land application
- Methane emissions along biomethane and biogas supply chains are underestimated
- State Environmental Policy Act Handbook
- Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, regarding the North Carolina Department of Environmental Quality's Issuance of Permit Nos. AWI310035, AWI301139, AWI230466, and AWS820005 Re: Supplement to Complaint Number 05RNO-21-R4 Regarding the North Carolina Department of Environmental Quality's Issuance of Swine Farm Digester General Permit
- California's Green Energy Subsidies Spur a Gold Rush in Cow Manure
- FALSE PROMISES and HIDDEN IMPACTS of DAIRY DIGESTERS
- Really Terrible Science Experiment Leads to Weeks-long Spill From NC Hog waste Lagoon
- Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley, Washington
- Rethinking Manure Biogas
- Inventory of US Greenhouse Gas Emissions and Sinks
- Wayne Co. Toxic Spill Exposes Lack of NCDEQ Transparency

There is no indication that the City of Sunnyside has even read these documents, much less considered the facts presented in the documents

Are specific studies needed under the

(1) development regulations,

(2) SEPA, or

(3) other local, state, or federal regulations that must be made available prior to making the threshold determination? For example, is a wetland study, a transportation study, or an archaeological review needed?

FOTC Comments: Necessary studies include:

- Health impact on families who live near the proposed digester
- Impact on property values for people who live near the proposed digester
- Traffic impact beyond the immediate proposed SS RNG facility. See map above that shows transport of manure from dairies to the site.
- Cost to county taxpayers for wear and tear on county roads due to increased truck traffic for transport of manure and digestate
- Likelihood of explosions and fires at the facility
- Cumulative impacts associated with proximity to Nutrien Ag Solutions, the Sunnyside Waste Water Treatment Plant, and Windmill Mushrooms
- Impacts on Overburdened Communities. This is a requirement for the WA State Dept. of Ecology, the WA State Dept. of Transportation, and the WA State Dept. of Commerce.
- Economic impact of selling manure on LYV dairies
- Impact of SS RNG on manure management practices at LYV dairies. Will SS RNG preference for liquid manure discourage dairies from implementing manure solids separation? Will SS RNG preference for liquid manure encourage LYV dairies to use flush systems in milk parlors rather than scrape systems?
- Analysis of how much income from the proposed SS RNG project would come from Washington's Cap & Invest program.

Is early consultation with tribes, other agencies, and/or the public required or would it be beneficial? What form should this take?

FOTC Comments: Two of the dairies that plan to supply manure for the digester are located on the Yakama reservation.

Is the project consistent with the local critical area ordinances, development regulations, and comprehensive plans?

Is the proposal consistent with other local, state, and federal regulations (such as those governed by regional air authorities, health districts, and state natural resource agencies)?

Will mitigation/conditions be required by the local development regulations or other local, state, or federal regulations?

What are the likely adverse environmental impacts of the proposal? Have the reasonable concerns of tribes, other agencies, and the public been met?

FOTC Comments: Likely adverse environmental impacts include:

- Increased truck traffic and emissions in Yakima County and on the Yakama Reservation
- Increased emissions of hydrogen sulfide and ammonia from the digestion process
- Emissions from the management of and storage of digestate

- Cumulative impacts associated with proximity to Nutrien Ag Solutions, the Sunnyside Waste Water Treatment Plant, and Windmill Mushrooms
- Impacts to waters of the state

Is the applicant willing to change the proposal to eliminate or reduce the likely adverse environmental impacts of the proposal?

Are there additional environmental impacts that have not been mitigated? Are there possible mitigation measures that could be required using SEPA substantive authority to mitigate those impacts?

Are there likely significant adverse environmental impacts that have not been mitigated to a nonsignificant level?

FOTC Comment: Possible mitigation measure: relocate the project to a more remote area.

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The lead agency is responsible for completing the environmental review process for all agencies with jurisdiction. This means other agencies with jurisdiction do not prepare separate SEPA documents or adopt the environmental documents issued by the lead agency for the same proposal.

FOTC Comments: To our thinking this means the Lead Agency for the SS RNG project, the City of Sunnyside, cannot confine analysis to impacts just within the City of Sunnyside. The SEPA review must address impacts to Yakima County and the entire region.

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Additional public notice efforts are not required, but are encouraged for important or controversial proposals—regardless of environmental significance. Public hearings or meetings can provide additional avenues for public involvement, comment, and discussion. Many agencies have developed innovative means to “get the word out” to affected community members that may not be reached by more traditional methods. Examples include distributing bilingual flyers or advertising on non-English radio stations.

FOTC Comments: The City of Sunnyside did not follow this guidance despite significant expressions of concern and knowledge that many of the impacted people do not speak English. Although the City of Sunnyside is not mandated to follow Environmental Justice policies, the state agencies are, and the city should.

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The SEPA Rules require the responsible official to consider all timely comments made on a DNS. The lead agency may then choose to retain the DNS, issue a revised DNS, or—if significant adverse impacts have been identified—they may withdraw the DNS and issue a determination of significance (DS).

FOTC Comments: The City of Sunnyside did not adequately address many of the public comments that introduced potential significant impacts, specifically:

- Concerns about explosions and fires
- Concerns about cumulative impacts
- Suggestions to relocate the project to a site farther from family homes
- Requests for an Environmental Impact Statement

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Withdrawing the DNS: The lead agency must withdraw the DNS if:

- *There are substantial changes to the proposal that are likely to result in significant environmental impacts;*
- *There is new information available on a proposal’s probable significant adverse environmental impacts; or*
- *The DNS was obtained by misrepresentation or lack of material disclosure on the part of the proponent.*

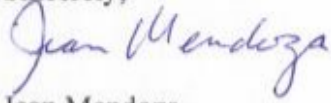
FOTC Comments: Amy Van Saun presented new information regarding manure bio-digesters. The January 2024 MDNS did not address this highly credible material.

There has been a lack of material disclosure by Pacific Ag. On December 4, 2023, FOTC sent Pacific Ag a list of questions that their Chief Development Officer promised to address. So far there are no answers to these questions that are provided to you in Attachment 1.

It is also advisable to withdraw a DNS if the lead agency determines that it needs time to reconsider the significance of the proposal, reassess mitigation needs, or to do additional investigation. A new threshold determination and comment period will be required, but this will prevent the “locking in” of the original DNS by another agency issuing a nonexempt permit. Locking-in of the DNS can restrict the lead agency’s ability to impose additional mitigation measures for impacts not identified in the original DNS, or to require that an EIS be prepared.

Thank you for considering this appeal. FOTC looks forward to a thorough evaluation of the issues raised here and to a fruitful decision that will protect people and the environment.

Sincerely,

A handwritten signature in blue ink that reads "Jean Mendoza". The signature is written in a cursive style with a large initial "J".

Jean Mendoza

Executive Director, Friends of Toppenish Creek
3142 Signal Peak Road
White Swan, WA 98952

Attachment 1 Questions for Pacific Ag

1. Several people in the audience at Thursday night's meeting asked about impacts from the RNG digestate when it is spread on the land. If I recall correctly, you replied that there is testing of the influent and the digestate. To be more specific:
 - A. Where will you test manure? On the farm or at the digester site?
 - B. Where will you test hay and crop residue? On the farm or at the digester site?
 - C. How often will you test manure and crop residue?
 - D. Will you test for:
 - a. Pesticides? Which ones?
 - b. Pesticide coated seeds?
 - c. Veterinary pharmaceuticals? Which ones?
 - d. Bacteria? Coliform? Salmonella? Shigella? Campylobacter? Leptospira? Protozoa? Cryptosporidium? Giardia?
 - e. Antibiotic resistance?
 - E. Will you provide guidelines for farmers telling them how to apply digestate in ways that minimize leaching to groundwater and emission of greenhouse gasses such as nitrous oxide?

2. It is our understanding that digestion takes place because specific microbes are introduced into each tank and these microbes digest the manure and crop residue in steps. It is our understanding that the staff must keep a close eye on the tank contents to make sure conditions such as temperature, moisture, and pH are optimal for digestion, that workers make sure the desired microbes proliferate and other microbes do not. These questions relate to the digestion process.
 - A. What is the volume of each tank?
 - B. How long does it take to fill a tank?
 - C. How long does it take to empty a malfunctioning tank?
 - D. How would you dispose of the tank contents in a situation where the wrong microbes are growing?
 - E. What can go wrong?
 - F. Are there potential chemical and biological processes that might produce gases other than carbon dioxide and methane?
 - G. Please name all the desired microbes that do the work inside the tanks
 - H. Please name all the undesired microbes that might interfere with digestion
 - I. Is there a potential for increased pressure inside a tank due to production of undesired gasses?
 - J. What are your emergency plans in case of a tank explosion?
 - K. Do your emergency plans include a protocol for evacuating neighbors?
 - L. What is the maximum potential range of aerial distribution of materials from a tank in the event of an explosion?
 - M. Please describe protective measures for emergency management personnel assigned to combat fires and explosions at the digester

- N. What is the expected life of a digester tank? Of pipes that transport methane, manure, and other digester components?
 - O. Does the Sunnyside RNG digester include add-ons that capture and process excess ammonia, hydrogen sulfide, and phosphorous?
 - P. How will Sunnyside RNG manage ammonia and hydrogen sulfide that is produced by digestion?
3. What size and type of trucks will transport cellulosic materials and manure?
 4. What is the anticipated weight of each incoming truckload?
 5. Will the SS RNG ask for an overweight exemption?
 6. Will truck drivers possess Commercial Drivers Licenses (CDLs) or will the SS RNG use the agricultural exemption for drivers who transport agriculture goods?
 7. What air monitoring will be installed? Inside the facility? At the fence line?
 8. Which air emissions will be monitored and where? Ammonia? Hydrogen sulfide? Methane? Carbon dioxide? Particulate matter? Other?
 9. What is the predicted composition of the tail gas that is vented to the atmosphere?
 10. Will there be fence line monitoring to provide early warning if leaks pose a danger to neighbors?
 11. What system will be in place to detect significant methane leaks within the plant at the earliest moments?
 12. Why is there only one flare, as opposed to five flares in earlier plans?
 13. What emergency management and firefighting protocols will be in place? Would you share the protocols?
 14. What equipment, training, alarms, will be used to address potentially dangerous levels of methane, hydrogen sulfide, and other air contaminants on the site?
 15. How long will the digesters operate in the mesophilic range? How long will the digesters operate in the thermophilic range? This makes a difference in how many pathogens are destroyed by digestion. (Mesophilic digests at 86 to 115 degrees Fahrenheit. Thermophilic digests at 115 to 140 degrees Fahrenheit. Water boils at 212 degrees Fahrenheit.)
 16. How will settled solids be removed from the digesters, and what is the planned process?
 17. How much digestate will be stored on site at any given time?
 18. How will the solid fraction of digestate be stored prior to transport?
 19. How will liquid digestate be transported off site?

20. Would Pacific Ag require any testing for soils that receive digestate? For emissions of nitrous oxide during digestate storage, during application to soils, and after application?
21. Which rules, regulations and permitting apply to the proposed lagoon?
22. Please describe the liner planned for the proposed lagoon
23. What are the anticipated emissions from the solid fraction of digestate and how will they be managed?
24. Will liquid and solid digestate transported away from the project be covered or open to air?
25. How will dairies store digestate during winter months when they cannot apply it to fields as fertilizer?
26. Are there any requirements in place that ensure digestate will be applied to fields at agronomic rates?
27. Would the facility have sufficient insurance to compensate the families of workers who might be injured or die in a fire or explosion on the facility?
28. What protocols would be in place to ensure proper maintenance as the equipment ages?
29. How often would the proposed digester be checked for corrosion and weaknesses in the system?
30. Will the proposed RNG facility digest the carcasses of unwanted farm animals?
31. We understand that there are five trains of digesters and that three will digest manure. What are your plans for the other two trains?
32. Who will monitor the facility to ensure that daily operations are conducted in a safe manner, and how will they do this, and how often?
33. Is there any reason why Pacific Ag is opposed to an Environmental Impact Statement?

RCW 43.21C.060

Chapter supplementary—Conditioning or denial of governmental action.

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter:

PROVIDED, That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120. Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact. Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a nonelected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency.

[1983 c 117 § 3; 1977 ex.s. c 278 § 2; 1971 ex.s. c 109 § 6.]

RCW 43.21C.075

Appeals.

(1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and

procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.

(2) Unless otherwise provided by this section:

(a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

(b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.

(3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:

(a) Shall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement);

(b) Shall consolidate an appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a proposal) with a hearing or appeal on the underlying governmental action by providing for a single simultaneous hearing before one hearing officer or body to consider the agency decision or recommendation on a proposal and any environmental determinations made under this chapter, with the exception of:

(i) An appeal of a determination of significance;

(ii) An appeal of a procedural determination made by an agency when the agency is a project proponent, or is funding a project, and chooses to conduct its review under this chapter, including any appeals of its procedural determinations, prior to submitting an application for a project permit;

(iii) An appeal of a procedural determination made by an agency on a nonproject action; or

(iv) An appeal to the local legislative authority under RCW 43.21C.060 or other applicable state statutes;

(c) Shall provide for the preparation of a record for use in any subsequent appeal proceedings, and shall provide for any subsequent appeal proceedings to be conducted on the record, consistent with other applicable law. An adequate record consists of findings and conclusions, testimony under oath, and taped or written transcript. An

electronically recorded transcript will suffice for purposes of review under this subsection; and

(d) Shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.

(4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an administrative appeal procedure, such person shall, prior to seeking any judicial review, use such agency procedure if any such procedure is available, unless expressly provided otherwise by state statute.

(5) Some statutes and ordinances contain time periods for challenging governmental actions which are subject to review under this chapter, such as various local land use approvals (the "underlying governmental action"). RCW 43.21C.080 establishes an optional "notice of action" procedure which, if used, imposes a time period for appealing decisions under this chapter. This subsection does not modify any such time periods. In this subsection, the term "appeal" refers to a judicial appeal only.

(a) If there is a time period for appealing the underlying governmental action, appeals under this chapter shall be commenced within such time period. The agency shall give official notice stating the date and place for commencing an appeal.

(b) If there is no time period for appealing the underlying governmental action, and a notice of action under RCW 43.21C.080 is used, appeals shall be commenced within the time period specified by RCW 43.21C.080.

(6)(a) Judicial review under subsection (5) of this section of an appeal decision made by an agency under subsection (3) of this section shall be on the record, consistent with other applicable law.

(b) A taped or written transcript may be used. If a taped transcript is to be reviewed, a record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to designate only those portions of the testimony necessary to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review. A party may provide a written transcript of portions of the testimony at the party's own expense or apply to that court for an order requiring the party seeking review to pay for additional portions of the written transcript.

(c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

(7) Jurisdiction over the review of determinations under this chapter in an appeal before an agency or superior court shall upon consent of the parties be transferred in whole or part to the shorelines hearings board. The shorelines hearings board shall hear the matter and sign the final order expeditiously. The superior court shall certify the final order of the shorelines hearings board and the certified final order may only be appealed to an appellate court. In the case of an appeal under this chapter regarding a project or other matter that is also the subject of an appeal to the shorelines hearings board under chapter 90.58 RCW, the shorelines hearings board shall have sole jurisdiction over both the appeal under this section and the appeal under chapter 90.58 RCW, shall consider them together, and shall issue a final order within one hundred eighty days as provided in RCW 90.58.180.

(8) For purposes of this section and RCW 43.21C.080, the words "action", "decision", and "determination" mean substantive agency action including any accompanying procedural determinations under this chapter (except where the word "action" means "appeal" in RCW 43.21C.080(2)). The word "action" in this section and RCW 43.21C.080 does not mean a procedural determination by itself made under this chapter. The word "determination" includes any environmental document required by this chapter and state or local implementing rules. The word "agency" refers to any state or local unit of government. Except as provided in subsection (5) of this section, the word "appeal" refers to administrative, legislative, or judicial appeals.

(9) The court in its discretion may award reasonable attorneys' fees of up to one thousand dollars in the aggregate to the prevailing party, including a governmental agency, on issues arising out of this chapter if the court makes specific findings that the legal position of a party is frivolous and without reasonable basis.

[1997 c 429 § 49; 1995 c 347 § 204; 1994 c 253 § 4; 1983 c 117 § 4.]

18.04.190 SEPA and agency decisions, provisions adopted by reference.

Regarding the rules and policies for the substantive authority of SEPA such as decisions to mitigate or reject proposals as a result of SEPA and procedures for appealing SEPA determinations to agencies or the courts, the City adopts the following sections of Chapter [197-11](#) WAC by reference:

WAC

[197-11-650](#) Purpose

[197-11-655](#) Implementation

[197-11-660](#) Substantive Authority and Mitigation

[197-11-680](#) Appeals

[197-11-700](#) Definitions

[Ord. 1475 § 2, 1984.]

WAC 197-11-680

Appeals.

(1) **Introduction.** Appeals provisions in SEPA are found in RCW [43.21C.060](#), [43.21C.075](#) and [43.21C.080](#). These rules attempt to construe and interpret the statutory provisions. In the event a court determines that these rules are inconsistent with statutory provisions, or with the framework and policy of SEPA, the statute will control. Persons considering either administrative or judicial appeal of any decision which involves SEPA at all are advised to read the statutory sections cited above.

(2) **Appeal to local legislative body.** RCW [43.21C.060](#) allows an appeal to a local legislative body of any decision by a local nonelected official conditioning or denying a proposal under authority of SEPA. Agencies may establish procedures for such an appeal, or may eliminate such appeals altogether, by rule, ordinance or resolution. Such appeals are subject to the restrictions in RCW [36.70B.050](#) and [36.70B.060](#) that local governments provide no more than one open record hearing and one closed record appeal for permit decisions.

(3) Agency administrative appeal procedures.

(a) Agencies may provide for an administrative appeal of determinations relating to SEPA in their agency SEPA procedures. If so, the procedures must comply with the following:

(i) The agency must specify by rule, ordinance, or resolution that the appeals procedure is available.

(ii) Appeal of the intermediate steps under SEPA (e.g., lead agency determination, scoping, draft EIS adequacy) shall not be allowed.

(iii) Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS. These appeals may occur prior to an agency's final decision on a proposed action.

(iv) An agency shall provide for only one administrative appeal of a threshold determination or of the adequacy of an EIS; successive administrative appeals on these issues within the same agency are not allowed. This limitation does not apply to administrative appeals before another agency.

(v) Except as provided in (a)(vi) of this subsection, the appeal shall consolidate any allowed appeals of procedural and substantive determinations under SEPA with a hearing or appeal on the underlying governmental action in a single simultaneous hearing before one hearing officer or body. The hearing or appeal shall be one at which the hearing officer or body will consider either the agency's decision or a recommendation on the proposed underlying governmental action. For example, an appeal of the adequacy of an EIS must be consolidated with a hearing or appeal on the agency's decision or recommendation on the proposed action, if both proceedings are allowed in agency procedures. If an agency does not provide for a hearing or appeal on the underlying governmental action (either a hearing on the agency's recommendation or an agency appeal hearing after the decision is made), the agency may not hold a SEPA administrative appeal, except as allowed under (a)(vi) of this subsection.

(vi) The following appeals of SEPA procedural or substantive determinations need not be consolidated with a hearing or appeal on the underlying governmental action:

(A) An appeal of a determination of significance;

(B) An appeal of a procedural determination made by an agency when the agency is a project proponent, or is funding a project, and chooses to conduct its review under SEPA, including any appeals of its procedural determinations, prior to submitting an application for a project permit. Subsequent appeals of substantive determinations by an agency with jurisdiction over the proposed project shall be allowed under the SEPA appeal procedures of the agency with jurisdiction;

(C) An appeal of a procedural determination made by an agency on a nonproject action; and

(D) An appeal to the local legislative authority under RCW 43.21C.060 or other applicable state statutes.

(vii) If a county/city to which RCW [36.70B.110](#) applies provides for an administrative appeal, any such appeal of a procedural or substantive determination under SEPA issued at the same time as the decision on a project action shall be filed within fourteen days after a notice of decision under RCW [36.70B.130](#) or after other notice that the decision has been made and is appealable. In order to allow public comment on a DNS prior to requiring an administrative appeal to be filed, this appeal period shall be extended for an additional seven days if the appeal is of a DNS for which public comment is required under this chapter or under county/city rules adopted under SEPA. For threshold determinations issued prior to a decision on a project action, any administrative appeal allowed by a county/city shall be filed within fourteen days after notice that the determination has been made and is appealable. Nothing in this subsection alters the requirements of (a)(v) and (vi) of this subsection.

(viii) Agencies shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.

(b) Agencies providing for administrative appeals shall provide for a record as required by RCW [43.21C.075](#) (3)(c).

(c) If an agency provides an administrative appeal procedure, that procedure must be used before anyone may initiate judicial review of any SEPA issue that could have been reviewed under the agency procedures.

(4) Judicial appeals.

(a) SEPA authorizes judicial appeals of both procedural and substantive compliance with SEPA.

(b) When SEPA applies to a decision, any judicial appeal of that decision potentially involves both those issues pertaining to SEPA (SEPA issues) and those which do not (non-SEPA issues). RCW [43.21C.075](#) establishes time limits for raising SEPA issues, but says that existing statutes of limitations control the appeal of non-SEPA issues. The statute contemplates a single lawsuit.

(c) If there is a time limit established by statute or ordinance for appealing the underlying governmental action, then appeals (or portions thereof) raising SEPA issues must be filed within such time period.

(d) The notice of action procedures of RCW [43.21C.080](#) may still be used. If this procedure is used, then the time limits for judicial appeal specified in RCW [43.21C.080](#) shall apply, unless there is a time limit established by statute or ordinance for appealing the underlying governmental action. If so, the time limit for appeal of SEPA issues shall be the time limit in the statute or ordinance for

the underlying governmental action. If the proposal requires more than one governmental decision that will be supported by the same SEPA documents, then RCW [43.21C.080](#) still only allows one judicial appeal of procedural compliance with SEPA, which must be commenced within the applicable time to appeal the first governmental decision.

(e) If the time limit established by statute or ordinance for appealing the underlying governmental action is less than fifteen days, then the notice of action in RCW [43.21C.080](#)(1) may be given by publishing once within that shorter time period, in a newspaper of general circulation in the area where the property that is the subject of the action is located, and meeting the other requirements of RCW [43.21C.080](#).

(f) If there is no time limit established by statute or ordinance for appeal, and the notice of action provisions are not used, then SEPA provides no time limit for judicial appeals. Appeal times may still be limited, however, by general statutes of limitation or the common law.

(g) For the purposes of this subsection, "a time limit established by statute or ordinance" does not include time limits established by the general statutes of limitation in chapter [4.16](#) RCW.

(5) Official notice of the date and place for commencing a judicial appeal.

(a) Official notice of the date and place for commencing an appeal must be given if there is a time limit established by statute or ordinance for commencing an appeal of the underlying governmental action. The notice shall include:

(i) The time limit for commencing appeal of the underlying governmental action and SEPA issues, and the statute or ordinance establishing the time limit; and

(ii) Where an appeal may be filed.

(b) Notice is given by:

(i) Delivery of written notice to the applicant, all parties to any administrative appeal, and all persons who have requested notice of decisions with respect to the particular proposal in question; and

(ii) Following the agency's normal methods of notice for the type of governmental action taken.

(c) Written notice containing the information required by subsection (5)(a) of this section may be appended to the permit, decision documents, or SEPA compliance documents or may be printed separately.

(d) Official notices required by this subparagraph shall not be given prior to final agency action.

[Statutory Authority: Chapter [43.21C](#) RCW and 1997 c 429. WSR 98-06-092 (Order 97-43), § 197-11-680, filed 3/4/98, effective 3/8/98. Statutory Authority: 1995 c 347 (ESHB 1724) and RCW [43.21C.110](#). WSR 97-21-030 (Order 95-16), § 197-11-680, filed 10/10/97, effective 11/10/97. Statutory Authority: RCW [43.21C.110](#). WSR 95-07-023 (Order 94-22), § 197-11-680, filed 3/6/95, effective 4/6/95; WSR 84-05-020 (Order DE 83-39), § 197-11-680, filed 2/10/84, effective 4/4/84.]