

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF ROCKY TOP (FORT) , an
unincorporated nonprofit organization, and
representative members NANCY LUST, and
CAROLE DeGRAVE,

Petitioners/Appellants

v.

YAKIMA REGIONAL CLEAR AIR
AGENCY, and DTG ENTERPRISES INC.,
d/b/a DTG Recycle - Yakima

Respondents.

PCHB NO. 24-021

**PETITIONERS' RESPONSE TO YRCAA'S
MOTION FOR SUMMARY JUDGMENT**

1 Friends of Rocky Top and its representative members Nancy Lust and Carole DeGrave,
2 provide this response to *Respondent YRCAA's Motion for Summary Judgment*. This response is
3 supported by the *Declaration of Scott Cave in Response to DTG Recycle's Motion* ("Cave
4 Decl.") PCHB Docket No. 38.

5 I. INTRODUCTION

6 Yakima Regional Clean Air Agency ("YRCAA") is an activated air pollution
7 control authority under the State of Washington Clean Air Act (WCAA). RCW 70A.15.1500.
8 Among its responsibilities is the review, conditioning, and approval of the construction or
9 modification of a new stationary source of air contaminants. RCW 70A.15.2210. DTG Recycle
10 and its predecessor ignored this requirement for four decades.¹ An integral component of the
11 permit process is compliance with the State Environmental Policy Act (SEPA). "SEPA is an
12 attempt by the people to shape their future environment by deliberation, not default." *Wild Fish*
13 *Conservancy v. Dep't. of Fish and Wildlife*, 198 Wn.2d 846, 873, 502 P.3d 359 (2022). As the
14 agency receiving the permit application, YRCAA was responsible for SEPA review and
15 compliance. WAC 197-11-050(1).("A lead agency shall be designated when an agency ... is
16 presented with a proposal.")

17 The new source review requires compliance with the State Environmental Policy
18 Act (SEPA). WAC 197-17-055(2)(a)("A proposal exists when an agency is presented with an
19 application...and the environmental effects can be meaningfully evaluated.") Review of an NSR
20 application is to be based upon a complete application which includes the following:

21 To be considered complete, an NOC application must include: the
22 standard Form P, which includes general information about the
23 proposal; *an environmental checklist, which demonstrates the*
24 *proposal's compliance with SEPA requirements*; and
25 nonrefundable filing fee, and, the cite-specific details about the
26 proposal, such as the operation and maintenance plan, design
27 drawings and equipment information.

28 ¹ DTG Recycle filed an application with YRCAA for an "after-the-fact" authorization to establish
29 a "new" stationary source of air emissions. The application was designated NSRP-03-DTGEI-22. The
30 application was eventually determined to be complete on June 29, 2023. *Thronsbury Decl.* ¶3. "At the
latest, the lead agency shall begin environmental review, if required, when an application is complete."
WAC 197-11-055(3)(a). DTG Recycle's application to establish a new stationary source of air emissions
was not exempt from SEPA review.

1 *Cedar Grove Composting, Inc. v. Puget Sound Clean Air Agency*, PCHB No. 19-014c, 21
2 WL4432571 *4 (July 7, 2021). As the first entity receiving the NSR application, YRCAA is
3 responsible for determining the lead agency for environmental review of the proposal. WAC
4 197-11-924(1). YRCAA acknowledges that it did not undertake an independent review of the
5 application under the State Environmental Policy Act (SEPA)..

6 FORT and YRCAA have filed cross-motions for summary judgment on the issue
7 of SEPA compliance. There are no genuine issues of material fact regarding the underlying
8 facts. The following facts are clear and uncontroverted: (1) neither YRCAA nor Yakima
9 County accepted or performed “lead agency” responsibilities for the *NSR Application*; (2) the
10 public and commenting agencies were not notified of the application or provided opportunity to
11 provide SEPA comment; (3) processes and procedures regarding use of existing environmental
12 documents was ignored; (4) no consideration was given to changes to the proposal or new
13 environmental information or environmental impacts of the proposal; and (5) no “hard look” or
14 threshold determination was made on the proposal.

15 YRCAA bears the burden “...to show that environmental factors were considered
16 in a manner sufficient to amount to prima facie compliance with the procedural requirements of
17 SEPA.” *Wild Fish Conservancy*, 198 Wn.2d at 867. Rather than meet its responsibilities under
18 SEPA, YRCAA points the finger in a different direction. It argues that Yakima County was the
19 “lead agency” for purposes of environmental review and that “...YRCAA complied with the
20 requirements for environmental review under SEPA by relying on the lead agency’s threshold
21 determination.” *YRCAA Motion at 7:1-2*. Yakima County neither accepted nor undertook
22 environmental review for a permit over which it had no jurisdiction. The Order of Approval
23 includes the following:

24 Yakima County Planning Department issued a Determination of
25 Non-Significance (DNS) for a new 64 acres expansion to the
26 existing 61 acres LPL pursuant to the State Environmental Policy
27 Act (SEPA) with SEPA number SEP2015-00024 and signed by the
28 County on September 9, 2015. After the Public Hearing held by
29 YRCAA on September 26th, 2023, YRCAA reached out to Yakima
30 County and it was concluded that the SEPA of 2015 determination
is still valid for this project and satisfies SEPA’s requirements. In
addition, a Conditional Use Permit (CUP) was issued by Yakima
County on November 27, 2015; CUP2015-00051.

1 *Thornsbury Decl., Exh. 5, at 4(Finding 1.13)*. A hearsay after-the-fact conversation fails to meet
2 SEPA procedural requirements. "Evidence considered on summary judgment must be
3 admissible. Unauthenticated or hearsay evidence does not suffice." *Spohn v. Department of*
4 *Labor and Industries*, 20 Wn. App.2d 373, 378-79, 499 P.3d 989 (2021); and *Sentinel C3, Inc. v.*
5 *Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014).² YRCAA's motion for summary judgment fails
6 both factually and legally.

7 **II. STATEMENT OF FACTS**

8 YRCAA provides a "Statement of Facts" in support of its motion for summary
9 judgment. *YRCAA Motion 2:4-5:16* The sole fact offered describing YRCAA's environmental
10 review process was the following:

11 After the Public Hearing held by YRCAA on September 26th,
12 2023, YRCAA reached out to Yakima County and it was
13 concluded that the SEPA of 1025 determination is still valid for
14 this project and satisfies SEPA's requirements.

15 *YRCAA Motion 5:10-12*. YRCAA then referenced an opinion contained in a letter
16 dated October 2, 2023 that:

17 After careful review, it is my view that the proposed landfill
18 operation under consideration in your office for a New Source
19 Review (NSR) is adequately covered under the 2015 SEPA
20 threshold determination (SEP2015-00024) issued by Yakima
21 County....

22 *The proposed activity under NSR consideration does not constitute*
23 *a substantial change from the impacts evaluated under SEP2015-*
24 *00024. Therefore, a new threshold determination is not required*
25 *considering any probable environmental impacts covered by the*
26 *range of alternatives and impacts that were analyzed in the*
27 *existing environmental documents.*

28 ² YRCAA relies upon both oral and written hearsay evidence. ER 801-802. Neither purported oral
29 statements or written letters are subject to any recognized hearsay exception. ER 803(8). The public
30 records exception set forth in RCW 5.44.040 is not applicable because "expressions of opinion and the
making of conclusions, are not admissible into evidence as public records." *Steel v. Johnson*, 9 Wn.2d 347,
352-353, 115 P.2 145 (1941); *In re Estate of Jones*, 152 Wn.2d 1, 13n.5, 93 P.3d 147 (2004).

1 YRCAA Motion 4:22-5:4. The sole effort to comply with SEPA responsibilities was that
2 "...YRCAA inquired with the SEPA lead agency as to whether a new SEPA determination was
3 required." *Thornsbury Decl.*, ¶8; *Tahat Decl.*, ¶2.

4 **2.1 YRCAA Relied On An "After-The-Fact" Opinion From Yakima County As**
5 **Sole Basis For Compliance With SEPA Procedural Requirements.**

6 "SEPA demands a thoughtful decision-making process where government agencies
7 conscientiously and systematically consider environmental value and consequences." *Wild Fish*
8 *Conservancy*, 198 Wn.2d at 873. See also *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685,
9 700, 601 P.2d 501 (1979). YRCAA ignored all applicable processes and failed to conduct or
10 engage in *any* environmental review under SEPA of the new source permit application. Yakima
11 County issued a qualified *opinion* regarding process but did not accept lead agency
12 responsibilities or comply with required processes (e.g. review application or current SEPA
13 Checklist, notify agencies or the public, adopt any existing environmental documents, or issue a
14 threshold decision). Yakima County did not issue a threshold decision on the application to
15 establish a new stationary source of air emissions. YRCAA made the decision to issue the Order
16 of Approval without further SEPA process. WAC 197-11-070 provides that "...until the SEPA
17 responsible official *issues* a final determination of nonsignificance or final environmental impact
18 statement, no action concerning the *proposal* shall be taken by a governmental agency." Neither
19 YRCAA nor Yakima County issued notice of this purported decision.

20 **2.2 YRCAA Filed To Adopt Or Independently Assess The Adequacy Of The**
21 **Adopted 2015 DNS.**

22 YRCAA failed to follow required process for assessing sufficiency and adopting an
23 existing environmental document. In *Thornton Creek Legal Defense Fund v. City of Seattle*, the
24 court set forth the following straightforward responsibilities:

25 If an agency adopts an existing document, it must independently
26 assess the sufficiency of the document, identify the document and
27 state why it is being adopted, make the adopted document readily
available, and circulate the statement of adoption.

28 *Thornton Creek Legal Defense Fund*, 113 Wn. App. at 50. Neither YRCAA nor Yakima County
29 followed prescribed process. YRCAA did not assess the sufficiency of the document and no facts
30

1 were provided to substantiate a conclusory statement that there was no "...substantial change
2 from the impacts evaluated under SEP2015-00024."

3 It is clear that YRCAA failed to review any of the original conditional use permit
4 documents. In its 2015 SEPA transmittal letter, Yakima County set forth the following
5 qualification:

6 Enclosed is the Final Threshold Determination (DNS) for the
7 proposal to expand the Anderson Limited Purpose Landfill. We
8 have retained the Threshold Determination *and determined that it*
9 *will not have a probable significant adverse impact on the*
10 *environment since existing development regulations and other*
local, state, and federal laws and rules adequately mitigate
potential adverse environmental impacts.

11 *Thornsbury Decl. Exhibit 3.* This reference is to the Regulatory Reform provisions of RCW
12 43.21C.240. In its land use decision, the project review was conditioned with the following:

- 13 1. The applicant shall obtain all necessary local, state, and federal permits
14 relevant or necessary to the operation of the Refuse Landfill prior to the
15 expansion and commencement of use.***
- 16 2. The applicant must obtain necessary permits and thus control plan approval
17 from the Yakima Regional Clean Air Agency prior to commencing ground
18 disturbance as part of the expansion.

19 *Thornsbury Decl. Exhibit 4.* Anderson failed to obtain the YRCAA permit for a new source of air
20 emissions.

21 The 2015 DNS did not evaluate air impacts and emissions from the landfill. A
22 simple review of the original (and only) SEPA Checklist is illuminating. The complete record
23 with respect to air emissions is the following:

- 24 **a. What types of emissions to the air would result from the**
25 **proposal (i.e., dust, automobile, odors, industrial wood**
26 **smoke) during construction and when the project is**
27 **completed? If any, generally describe and give approximate**
quantities if known.

28 During operations, the facility will receive waste for
29 disposal. Airborne dust will be created as the material is dumped,
30 moved, compacted at the working phase and when cover is placed
over the waste. Consistent with current operations, dust is
controlled by the watering of roads and cover.

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2 During closure construction (in the future), dust will result
3 from construction traffic and earthworks operations associated
4 with installation of the final cover. The contractor will use dust
5 suppression methods, such as sprinkling access roads in work
6 areas, to minimize the amount of dust leaving the LPL site.

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9 **b. Are there any off-site sources of emissions or odor that may**
10 **affect your proposal? If so, generally describe.**

11 No.

12
13 **c. Proposed measures to reduce or control emissions or other**
14 **impacts to air, if any:**

15 Watering and maintaining access roads and cover during
16 operation; installation of native grasses and vegetation during
17 final closure.

18 *Cave Decl. Exh. 15.* PCHB No. 38. No analysis was undertaken with respect to the type and
19 quantity of waste delivered to the site; information on type and amount of air emissions; any
20 analysis of odor; or any other matter related to discharge of air contaminants.

21 Also ignored in the process were significant changes to the scope and extent of
22 landfill operations as well as new environmental information on the site and landfill operations.
23 That information included the following:

- 24 • DTG Recycle added a Materials Recycling Facility (MRF)
25 following acquisition of the landfill. The MRF facility added
26 both structural and processing facilities with significant new
27 levels of waste delivery and volumes.
- 28 • Annual disposal increased from approximately 200,000 cubic
29 yards in 2015 to 695,717 cubic yards in 2022. The content of
30 waste material also changed with higher levels of gypsum,
wood waste, land clearing debris, and other materials that
increased both groundwater and air emission levels.
- Anderson accepted PFAS hazardous materials from the U.S.
Army Yakima Training Center (YTC). *Cave Decl., Exhibit 21.*
PCHB Docket No. 38.
- Based upon neighbor investigation and complaints, the landfill
was determined in August of 2022 to be emitting APH,

1 benzene, anaphthalene emissions that “were found above
2 MTCA Methode B cancer clean up levels for air.” DTG was
3 named as a potentially liable (PLP) by Department of Ecology
4 through letter dated November 2, 2022.

- 5 • On February 2, 2023, Yakima Health District confirmed a
6 subsurface file of the DTG site and required a work plan to
7 ensure compliance. That subsurface fire continues to burn to
8 the present date.
- 9 • Yakima Health District (YHD) did not renew the limited
10 purpose landfill permit on June 30, 2024 because of
11 environmental concerns.

12 Each of these facts arose after the issuance of the 2015 DNS.

13 **III. ISSUES FOR REVIEW**

14 FORT’s cross-motions for summary judgment address the following issues set
15 forth in the *Amended Prehearing Order*:

16 ISSUE 3: Whether YRCAA complied with the procedural
17 requirements for environmental review under SEPA?

18 ISSUE 4: Did YRCAA comply with lead agency rules for
19 designating lead agency including but not limited to
20 WAC 197-11-050 and WAC 197-11-922; WAC 197-
21 11-924, AND WAC 197-11-930?

22 ISSUE 5: Whether YRCAA was obligated to assume lead
23 agency status under the SEPA rules?

24 ISSUE 6: Whether on March 8, 2024, YRCAA failed to comply
25 with SEPA in issuing the New Source Review Order
26 of Approval on Permit #NSRP-03-DTGEI-22 for the
27 Limited Purpose Landfill (LP) located at 41 Rocky
28 Top Rd, Yakima, WA 98909.

29 ***

30 ISSUE 8: Whether Yakima Regional Clean Air Agency
(YRCAA) complied with procedures for use of
existing documents, including WAC 197-11-60, - 630,
- 635 and/or – 640?

1 YRCAA does not identify the specific issue addressed by its motion for summary judgment.
2 FORT assumes that each of the issues are subsumed in YRCAA's motion.

3 IV. STANDARDS FOR SUMMARY JUDGMENT.

4 4.1 Standards for Review of SEPA Procedural Requirements.

5 The parties have filed cross motions for summary judgment on issues pertaining
6 to YRCAA's compliance policies and procedures required by the State Environmental Policy
7 Act (SEPA) review. YRCAA does not address standards for view of SEPA procedural dictates
8 and requirements. The reviewing agency bears the initial burden to "...demonstrate that
9 environmental factors were considered in a manner sufficient to be prima facie compliance with
10 the procedural dictates of SEPA." *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d
11 54 (1978).

12 The procedural duties imposed by SEPA – full consideration to environmental
13 protection – are to be exercised to the fullest extent possible to ensure that the
14 attempt by the people to shape their future environment by deliberation, not
default will be realized.

15 *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 490, 513 P.2d 36
16 (1973). These principles are fundamentally imbedded in the application of SEPA policies and
17 procedures. This is not a case of "deliberation", it is a case of "default".

18 When reviewing a SEPA action, "the court is required to consider the public
19 policy and environmental values of SEPA as well." *Wild Fish Conservancy*, 198 Wn.2d at 866-
20 67. Evidence considered on summary judgment must be admissible; unauthenticated or hearsay
21 evidence does not suffice. *Spohn v. Department of Labor and Industries*, 20 Wn. App.2d 373,
22 378-79, 499 P.3d 989 (2021). YRCAA acknowledges that there are no genuine issues of material
23 fact. It is also clear that the only facts relied upon by YRCAA in support of its motion for
24 summary judgment are recitations of oral and written statements attributed to Yakima County
25 with respect to adequacy of the 2015 DNS related to the 64-acre expansion of the limited
26 purpose landfill. Expressions of opinion are not exempt from hearsay statements.

27 YRCAA offers no facts to establish an independent review of the NSR permit
28 application based upon specific adopted SEPA procedures. Rather, it simply leaps to a
29 conclusion that Yakima County is the "lead agency" and it was required to do nothing in terms
30 of review of the NSR permit application. YRCAA provides hearsay testimony regarding hearsay

1 conversations with Yakima County and provides no substantive record regarding Yakima
2 County's purported environmental review of the application. Evidence submitted in support or
3 opposition of summary judgment must be admissible. *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 127,
4 141, 331 P.3d 40 (2014). Unauthenticated or hearsay evidence does not suffice. *Id.*

5 **4.2 Standards of Review for Summary Judgment.**

6 The parties have filed cross motions for summary judgment on issues relating to
7 YRCAA's compliance with SEPA procedural requirements. "By filing cross motions for
8 summary judgment, the parties concede there are no material issues of fact." *LendingTree, LLC*
9 *v. Department of Revenue*, 12 Wn. App.2d 887, 890, 460 P.3d 640 (2020). On cross motions for
10 summary judgment, the court views the evidence in the light most favorable to the nonmoving
11 party with respect to the particular claim. *West v. Washington Department of Fish & Wildlife*,
12 21 Wn. App.2d 435, 441, 506 P.3d 722 (2022). Evidence considered on summary judgment
13 must be admissible. *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014).
14 "Unauthenticated or hearsay evidence does not suffice." *Id.* YRCAA relies solely upon
15 inadmissible hearsay evidence in support of its argument. YRCAA relies solely upon oral
16 hearsay communications and opinion letters with Yakima County.³ Conclusory statements of
17 fact will not suffice to defeat or support a motion for summary judgment. *Hamblin v. Castillo*
18 *Garcia*, 23 Wn. App.2d 814, 831, 517 P.3d 1080 (2022).

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21 ³ "Hearsay is a statement, other than one made by the declarant while testifying
22 at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER
23 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. Public
24 records, when duly certified, may be admitted in evidence in the courts of this state.
25 RCW 5.44.040; ER 803(a)(8). Not all public documents meeting the literal requirements of
the public records exception are, however, admissible. *State v. James*, 104 Wn. App. 25, 32,
15 P.3d 1041 (2000). Not all public documents meeting the literal requirements of the
public records exception are admissible. To be admissible, the public document must:

- 26 (1) Contain facts rather than conclusions that involve independent
27 judgment, discretion, or the expression of opinion;
- 28 (2) Relate to facts that are of a public nature;
- (3) Be retained for public benefit; and
- (4) Be authorized by statute.

29 *State v. James*, 104 Wn. App. at 32; *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 451, 191 P.3d
30 879 (2008)(holding that "...a report or document prepared by a public official must contain facts and not
conclusions involving the exercise of judgment or discretion or the expression of opinion."); and *Hockett*
v. Seattle Police Department, 31 Wn. App.2d 210, 548 P.3d 271 (2024).

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V. ARGUMENT AND AUTHORITIES

5.1 State Environmental Policy Act (SEPA) Applies Directly to Air Quality Permits Issued Under the Washington Clean Air Act.

YRCAA acknowledges that SEPA applies to review of applications for permits authorizing a *new* source of air emissions.⁴ SEPA directs that “to the fullest extent possible, all branches of government of this state “[u]tilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on the environment.” RCW 43.21C.030(2). The authorization of a new stationary source (of after-the-fact) of air emissions will have an impact on the environment. SEPA is intended to act as a “supplement to or an overlay of other governmental authorizations.” *Washington State Dairy Federation v. Department of Ecology*, 18 Wn. App.2d 259, 308, 490 P.3d 290 (2021). SEPA “...is an attempt by the people to shape their future environment by deliberation, not default.” *Wild Fish Conservancy v. Washington Department of Fish and Wildlife*, 198 Wn.2d 846, 873, 502 P.3d 359 (2022).

Based upon YRCAA’s factual and legal arguments, it is clear that neither YRCAA nor Yakima County followed any SEPA procedures applicable to the permitting a new source of air emissions. The purpose of SEPA regulations “...is to establish uniform requirements or compliance with SEPA. WAC 197-11-020. This case is a clear example of environmental review by “default”, not deliberation.

(a) **As the first agency receiving the NSR application, YRCAA was responsible to determine “Lead Agency.”** SEPA requires agencies to examine the environmental impacts of public and private projects prior to authorizing such projects. *City of Puyallup v. Pierce County*, 21 Wn. App.2d 466, 470, 500 P.3d 216 (2021). The proposal to establish a new stationary source of air emissions is separate and distinct from a conditional use permit under local law for a landfill expansion. YRCAA is the only agency with authority to authorize a new source of air emissions. Yakima County does not hold such authority. Agencies

⁴ A new source review is separate and distinct from a local zoning application for a “refuse landfill” under YCC 15.12.015(3) The conditional use process deal exclusively with zoning compliance. In

1 are bound to "...interpret and administer the [SEPA] policies, regulations, and laws...in
2 accordance with the policies set forth in SEPA and [SEPA] rules." WAC 197-11-030(2)(a).
3 YRCAA provides no authority that allows it to ignore these fundamental review requirements.

4 SEPA has clearly established procedures for designating "lead agency" for
5 environmental review. See WAC 197-11-922-948. "The first agency receiving an application for
6 or initiating a nonexempt proposal shall determine the lead agency for that proposal,..." WAC
7 197-11-924(1). "A proposal exists at that stage in the development when an agency is presented
8 with an application..." WAC 197-11-784. YRCAA was the first agency receiving DTG
9 Recycle's after-the-fact application to establish a new source of air emissions.⁵

10 YRCAA's responsibilities were clear on receipt of the application. YRCAA had
11 responsibility to determine the lead agency for the proposal.

12 If an agency *determines that another agency is the lead agency, it*
13 *shall mail to such lead agency a copy of the application it*
14 *received, together with its determination of lead agency and an*
15 *explanation.* If the agency receiving this determination agrees that
16 it is the lead agency, it shall notify the other agencies with the
17 jurisdiction. If it does not agree, and the dispute cannot be resolved
18 by agreement, the agency shall immediately petition the
19 department of ecology for a lead agency determination under
20 WAC 197-11-946.

21 197-11-924(2). The regulation and facts are clear, unambiguous and uncontroverted. YRCAA
22 received the new source application but failed to follow procedures prescribed by WAC 197-11-
23 924(2). YRCAA is obligated to "...integrate the requirements of SEPA with existing
24 agency...licensing procedures and practices, so that such procedures run concurrently rather than
25 consecutively." WAC 197-11-030(2)(e). YRCAA failed to document its determination (if it
26 made a decision at all); transmit a copy of the application to Yakima County; or provide an
27 explanation of its determination to Yakima County. At no point in this process did Yakima

28 his decision, the Hearing Examiner specifically conditioned the permit on securing a separate air quality
29 permit from YRCAA.

30 ⁵ The new source review permits deals specifically with authorization of permitting a new source
of air emissions. Authority to review the application is vested exclusively in the activated pollution
control authority. RCW 70A.15.2300. That review responsibility may not be delegated to other agencies.
Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency, 29 Wn. App. 2d 89, 540 P.3d 821 (2023).

1 County *accept or assume* lead agency responsibility for the permit application. YRCAA simply
2 ignored WAC 197-11-942(2).

3 This issue in this case is not novel. The Board dealt with a virtually identical SEPA
4 process in *Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency*, 29 Wn. App.2d
5 89, 540 P.3d 821 (2023); and *Advocates for a Cleaner Tacoma v. Puget Sound Clean Air*
6 *Agency*, PCHB No. 19-087c (November 19, 2021).⁶ *Advocates for a Cleaner Tacoma* involved a
7 review of a Notice of Construction (NOC) issued by Puget Sound Clean Air Agency (PSCAA)
8 that authorized the construction of the Tacoma Liquefied Natural Gas (TLNG) facility and
9 related equipment. Two years prior to the submission of the air permit application to PSCAA, the
10 City of Tacoma conducted an initial review of the TLNG facility based upon an application filed
11 for a shoreline substantial development permit. In that process, City of Tacoma was “lead
12 agency” and requested the preparation of an Environmental Impact Statement (EIS) for the
13 proposal. The NOC permit application was filed with PSCAA two years after the City’s approval
14 of the shoreline development permit. In the context, PSCAA undertook an independent review;
15 adopted the prior EIS; and required preparation of a Supplemental EIS (SEIS) for the air quality
16 permit. This is the procedure that should have been followed in this case.

17 YRCAA did not make a determination that Yakima County was the “lead
18 agency.” After receiving comments on the failure to conduct SEPA review, YRCAA simply
19 “reached out” to Yakima County to see if the 2015 DNS applied to the proposal. It was only
20 FORT’s comments that raised this issue with the agency. *Cave Decl. Exhibit 20*. PCHB Docket
21 No. 38. Hasan M. Tahat provided the following explanation:

22 I conducted the new source review (NSR) for the DTG limited
23 purpose landfill that is the subject of this case. During the public
24 comment period, several persons, including counsel for Appellants,
25 submitted comments asserting that a new SEPA determination was

26 ⁶ The Board addressed multiple hearings and determinations in a long series of cases involving
27 *Advocates for a Cleaner Tacoma* and the Tacoma Liquefied Natural Gas facility. In the context of
28 environmental review, Puget Sound Clean Air Agency stood in the shoes of YRCAA and reviewed a new
29 source air quality permit application subsequent to City of Tacoma’s earlier review and issuance of a
30 “substantial development permit under the Shoreline Management Act.” PSCAA accepted its
responsibilities as the agency first receiving the NSR permit application and proceeded with
environmental review and preparation of a “Supplemental EIS”. Even though City of Tacoma issued the
initial Final Environmental Impact Statement (FEIS), environmental review responsibility with respect to
the NSR permit rested with the activated air control agency.

1 required for the limited purpose landfill (LPL). *In responding to*
2 *these comments about SEPA, I contacted the lead agency, Yakima*
3 *County, to verify whether its 2015 Determination of Non-*
4 *Significance (DNS) applied to the proposal. The YRCAA was an*
5 *agency with jurisdiction when the LPL was permitted in 2015 and*
6 *received notice of the DNS at that time. Yakima County informed*
7 *me the 2015 SEPA DNS covered the landfill proposal and*
8 *operations that were the subject of the Notice of Construction*
9 *(NOC) application pending before YRCAA.*

10 *Tahat Decl. ¶12.*⁷ YRCAA provided no facts or authentication of Yakima County's purported
11 review of the application; receipt and review of an updated SEPA checklist; evaluation of project
12 changes or assessment of new environmental information; or any compliance with "lead agency"
13 responsibilities with respect to the application for new source of air emissions. Neither YRCAA
14 nor Yakima County documented or provided notice of this decision. An agency is required to the
15 fullest extent possible, to "...prepare environmental documents that are clear, concise, and to the
16 point, and are supported by evidence that the necessary environmental analyses have been
17 made." WAC 197-11-030(2)(c).

18 Yakima County subsequently wrote a letter dated October 3, 2023 offering the
19 following conclusory opinion:

20 The proposed activity under NSR consideration does not constitute
21 a substantial change from the impacts evaluated under SEP 2015-
22 00024. Therefore, a new threshold determination is not required
23 considering any probable environmental impacts are covered by a
24 range of alternatives *and impacts that were analyzed in the existing*
25 *environmental documents.*

26 *Tahat Decl. Exh. 1.* The hearsay *opinion* was that a "new threshold determination is not
27 required...." This opinion was not incorporated into a written decision. If a threshold
28 determination is to be used unchanged, the agency must follow the adoption procedures set forth
29

30 ⁷ In 2015, Yakima County received a Type III Conditional Use Permit (CUP) application from
Anderson Rock & Demolition Pits to expand the footprint of the existing landfill by 64 (sixty four) acres.
The land use application included a SEPA Checklist. In his approval, Yakima County Hearing Examiner
specifically conditioned approval of the land use component upon applicant obtaining "...necessary
permits and dust control plan approval from Yakima Regional Clean Air Agency prior to commencing
ground disturbance as part of the expansion." Hearing Examiner decision condition 2. Anderson Rock &
Demolition Pits did not obtain the required air emission authorization and permit. Despite this fact, both
Yakima County and YRCAA allowed the operation to proceed on an unregulated basis.

1 in WAC 197-11-600. An adoption notice must be prepared and made available in form
2 prescribed by WA 197-11-965. Neither YRCAA nor Yakima County followed these rules.
3 YRCAA has failed to establish prima facie compliance with SEPA procedures.

4 **(b) Neither YRCAA nor Yakima County complied with “lead agency**
5 **responsibilities. SEPA review does not end with a purported designation of a “lead**
6 **agency.”** The designation of lead agency carries with it specific responsibilities with respect to
7 a proposed action. The lead agency is vested with the responsibility to make a threshold
8 determination (WAC 197-11-330); review the SEPA checklist (WAC 197-11-315); determine if
9 impacts have been analyzed in previously prepared environmental documents (which can be
10 adopted or incorporated by reference)(WAC 197-11-330(2)); notify other agencies (WAC 197-
11 11-924(2)); invite comment from the public and by agencies in the public (WAC 197-11-502);
12 and make determinations regarding use of existing environmental documents. (WAC 197-11-
13 600, et sec). Each step has substantive and procedural implications in ensuring that
14 environmental review is undertaken to the fullest extent possible and agencies and the public are
15 fully informed and engaged.

16 Neither YRCAA nor Yakima County accepted or complied with lead agency
17 responsibilities with respect to the application for new air emission source. There was no honest,
18 informed, or actual review undertaken with regard to the scope of prior review, changes in the
19 original project, or new environmental information.

20 **(c) Yakima County did not evaluate air impacts from the landfill operation**
21 **in the 2015 DNS.** YRCAA “...relied on the lead agency’s determination and its adherence to
22 that determination in Mr. Carroll’s letter when we [YRCAA] responded to public comment and
23 issued the Order of Approval for the DTG application. *Tahat Decl.* ¶3. YRCAA assumed that air
24 emissions and impacts had been evaluated in the 2015 DNS. The fact is, however, that there was
25 no environmental analysis of air emission impacts arising for or relating to the limited purpose
26 landfill. The reason was that review of air impacts was deferred to the point of application for air
27 permits issued by YRCAA.⁸

28
29
30 ⁸ Hearing Examiner specifically conditioned the land use approval to require that “...applicant must obtain necessary permits and dust control plan approval from the Yakima Regional Clean Air Agency prior to commencing ground disturbance as part of the expansion.” 2015 CUP decision condition 2.

1 Yakima County's assurances extended only to impacts evaluated through the
2 2015 review process. It is apparent that neither Yakima County nor YRCAA actually reviewed
3 the air impacts undertaken with regard to the 2015 CUP. The entire review of air impacts was set
4 forth in the SEPA Checklist as follows:

5 **a. What types of emissions to the air would result from the**
6 **proposal (i.e., dust, automobile, odors, industrial wood**
7 **smoke) during the construction and when the project is**
8 **completed? If any, generally describe and give approximate**
9 **quantities if known.**

10 During operations, the facility will receive waste for
11 disposal. Airborne dust will be created as the material is
12 dumped, moved, and compacted at the working phase and
13 when cover is placed over the waste. Consistent with
14 operations, dust is controlled by the watering of roads and
15 cover.

16 During closure construction (in the future), dust will result
17 from construction traffic and earthworks operations associated
18 with installation of the final cover. The contractor will use dust
19 suppression methods, such as sprinkling access roads and work
20 areas, to minimize the amount of dust leaving the LPL site.

21 **b. Are there any off-site sources of emissions or odor that may**
22 **affect your proposal? If so, generally describe.**

23 No.

24 **c. Proposed measures to reduce or control emissions or other**
25 **impacts to air, if any:**

26 Watering and maintaining access roads and cover during
27 operations; installation of native grasses and vegetation during
28 final closure.

29 *Cave Decl. Exh. 15. Attachment A.* PCHB Docket No.38. The 2015 SEPA Checklist further
30 states (1) no hazardous materials have been permitted or accepted for disposal (Section B7.1);
there are not environmentally sensitive areas (Section B8.h); no scenic view will be altered or
obstructed (Section B10.b); existing recreational activities are not identified (Section B12); and,
significantly, there were no exposures to toxic chemicals, fire, or hazardous waste (Section B7).

1 All of these answers were incorrect based on changes to the project and new environmental
2 information.

3 It is clear from a review of the SEPA Checklist and land use decision making
4 documents that Yakima County engaged in no review of landfill operations and air emission
5 impacts from the facility. FORT documented and reported observed impacts from odor, dust,
6 litter, excavation, and blasting over the course of the landfill. These reports and complaints led to
7 the discovery of a subsurface landfill fire that was venting elevated concentrations of volatile
8 organic compound (VOCs) including, benzene, ethylbenzene, number 4-dioxane, as well as
9 elevated temperatures. *Cave Decl. at 505 at*504-520*. PCHB Docket No. 38. These air
10 emissions were generated by the landfill activities approved through the 2007 and 2015
11 conditional use processes. It is irresponsible to ignore these dangerous facts and information.

12 **5.2 YRCAA Failed to Comply With SEPA Procedures Regarding Use of Existing**
13 **Documents and Continuing Review Requirements Related to Project Change**
14 **and New Environmental Information.**

15 Yakima County purportedly advised YRCAA that the 2015 SEPA “covered the landfill
16 proposal and operations” and “alternatives and impacts were analyzed in existing environmental
17 documents.” *Tahat Decl. ¶2 and Exhibit 1*. Neither YRCAA nor Yakima County took any
18 additional steps in the SEPA review process. However, SEPA requires more.

19 **(a) YRCAA failed to follow procedures for use of existing land use documents.**

20 Yakima County and YRCAA apparently reached an agreement that the 2015 DNS was sufficient
21 for purposes of environmental review. If that is the case, SEPA has adopted procedures that must
22 be followed with respect to use of existing environmental documents. WAC 197-11-600
23 recognizes that “...[a]n agency may use environmental documents that have been previously
24 prepared in order to evaluate proposed actions, alternatives, or environmental impacts.” WAC
25 197-11-600(2).

26 An existing document may be used for review of a subsequent proposal through
27 either “adoption” or “incorporation by reference”. WAC 197-11-600(4). Existing documents
28 may be used for a proposal by employing one or more of the following methods:

- 29 (a) ‘Adoption,’ where an agency may use all or part of an existing
30 environmental document to meet its responsibilities under SEPA.
Agencies action on the same proposal for which an environmental
document was prepared are not required to adopt the document; or

1
2 (b) 'Incorporation by reference,' where an agency preparing an environmental
3 document includes all or part of the existing document by reference.

4 (c) An addendum, that adds analyses or information about a proposal but does
5 not substantially change the analysis of significant impacts and
6 alternatives in the existing environmental document.

7 WAC 197-11-600(4)(a)-(c).

8 YRCAA chose to use the 2015 SEPA DNS in place of current environmental
9 review. When an agency uses an existing document *in place of* preparing a new checklist or
10 threshold determination, the agency must follow "adoption" procedures. *Thornton Creek Legal*
11 *Defense Fund v. City of Seattle*, 133 Wn. App. 34, 51-52, 52 P.3d 522 (2002)(holding that failure
12 to issue a formal "adoption notice" violates SEPA review procedures). Adoption procedures are
13 set forth in WAC 197-11-630. And significantly, the agency adopting or referencing an existing
14 environmental document must disclose such fact in the issuance of its own threshold
15 determination. *Moss v. City of Bellingham*, 100 Wn. App. 6, 28, 31 P.3d 703 (2001); and WAC
16 197-11-600(4)(b). YRCAA did not issue its own threshold decision.

17 The first step in the adoption process is *independent review* of the adopted
18 document. WAC 197-11-630(1). No facts are presented to establish either YRCAA or Yakima
19 County conducted an independent review. Conclusory statements do not support summary
20 judgment. *Hamblin v. Castillo Garcia*, 23 Wn. App.2d 814, 831, 517 P.3d 1080 (2022). Even a
21 cursory review of the 2015 SEPA Checklist discloses that significant air impacts were neither
22 identified nor evaluated in the 8-year old environmental review process.

23 Second, YRCAA failed to comply with procedural requirements for adoption of
24 an environmental document as set forth in WAC 197-11-630(2). YRCAA did not take official
25 action to adopt the preexisting environmental document (WAC 197-11-965); send the
26 determination to agencies; or otherwise make the determination known to the public. And no
27 new threshold decision was issued based on the adoption of the 2015 SEPA DNS. YRCAA does
28 not dispute these facts. Each of these requirements is in place to assure that SEPA functions as
29 intended as an environmental "full disclosure" act. *King County v. Friends of Sammamish*
30 *Valley*, _____ Wn.3d _____, 556 P.3d 132 (2024)("SEPA acts as a full
disclosure directive to consider any potential environmental impacts of a project.")

1 YRCAA failed to follow any of the required procedures for adoption of existing
2 environmental documents. And those failures substantively impacted the environmental review
3 process. Agencies such as Department of Ecology and Yakima Health District were not sent
4 copies of the adoption notice and denied the opportunity to comment on environmental review.⁹
5 The public was denied notice of the determination, opportunity to review and comment, and the
6 finality of a threshold determination. YRCAA now seeks to take advantage of the failed process
7 by arguing that FORT failed to join a “necessary party”. The uncontroverted facts are, however,
8 that YRCAA never disclosed the behind-the-scenes process, failed to document and disclose its
9 decision through SEPA required procedures, and to issue a final threshold determination.
10 Yakima County ignored the public and provided no notification of its superficial and conclusory
11 opinion regarding SEPA processes and procedures.

12 **(b) YRCAA and Yakima County failed to consider substantial changes to**
13 **the proposal and new information indicating the proposal’s probable significant**
14 **environmental impact.** As a final and significant point, adoption of an existing environmental
15 document is not permitted where there have been substantial changes to the proposal or new
16 information on the proposal’s significant adverse environmental impact. WAC 197-11-600(3).
17 An agency acting on the same proposal may use an existing environmental document
18 unchanged, *except in the following cases:*

19 *For DNS’s ... preparation of a new threshold determination ...is required if there*
20 *are:*

21 *(i) substantial changes to a proposal so that the proposal is*
22 *likely to have significant adverse environmental impact (or*
23 *lack significant adverse impacts, if a DS is being withdrawn);*
24 *or*

25 *(ii) new information indicating a proposal’s probable*
26 *significant adverse environmental impacts. (This includes*
27 *discovery of any misrepresentation or lack of material*

28 ⁹ Department of Ecology had specific knowledge of historic operations and subsurface fires
29 including emissions of toxic air contaminants. Yakima Health District had refused to renew the limited
30 purpose landfill permits because of regulatory violations and operational impacts. Department of Fish &
Wildlife was denied the opportunity to comment on impacts to the sensitive shrub-steppe habitat and
environment. There was no transparency in YRCAA’s process. Simply conclusory assumptions and
silence.

1 *disclosure. A new threshold determination or SEIS is not*
2 *required if probable significant adverse environmental impacts*
3 *are covered by the range of alternatives and impacts analyzed*
4 *in the existing environmental documents.*

5 WAC 197-11-600(3). The preparation of a new threshold determination is “required” if either
6 situation exists. Required is defined as “...essential, needed, or necessary.” *Webster Dictionary*
7 (2024). SEPA provides no exceptions.

8 Responsibility is placed directly on the “lead agency.” WAC 197-11-340(3)(a)
9 sets forth a similar mandate:

10 The lead agency *shall withdraw a DNS if;*

- 11 (i) There are substantial changes to a proposal so that the proposal
12 is likely to have significant adverse environmental impact;
- 13 (ii) There is significant new information indicating, or on, a
14 proposal’s probable significant adverse environmental impact;
15 or
- 16 (iii) The DNS was procured by misrepresentation or lack of
17 material disclosure; if such DNS resulted from the actions of an
18 applicant, any subsequent environmental checklist on the
19 proposal shall be prepared directly by the lead agency or its
20 consultant at the expense of the applicant.

21 WAC 197-11-340(3)(a). The word “shall” in a statute or regulation “...imposes a mandatory
22 requirement unless a contrary legislative intent is apparent.” *Erection Co. v. Department of*
23 *Labor and Industries*, 121 Wn.2d 513, 517, 852 P.2d 288 (1993). The facts related to change in
24 project scope and new environmental information are uncontroverted in this case.

25 YRCAA relied upon a nine (9) year old SEPA determination that related only to a
26 modest expansion of a preexisting LPL. The 2015 DNS was limited to the 61-acre expansion
27 area for the limited purpose landfill. The administrative record contains no reference of a
28 comparative analysis but seems to ignore the massive increase in production levels documented
29 over the post 2015 production periods. Landfill disposal increased from 152,683 cubic yards in
30 2019 to 709,769 cubic yards in 2022. *Cave Decl. Exhibit 20 at *571*. PCHB Docket No. 38. This
expansion included an additional 164,400 cubic yards of Canadian drywall backing paper

1 (ground gypsum product). *Id.* Also ignored was the addition of the MRF facility and expanded
2 rock crushing and processing operations within Cell one.

3 Of greater concern is the discovery of new environmental information regarding
4 operation of the landfill. Based on neighborhood concerns, investigations confirmed
5 underground fires, perimeter cracks, and air emissions exceeding levels set forth in Model Toxic
6 Control Act (MTCA). The site was declared a MTCA site and parties have entered in an *Agreed*
7 *Order (AO)*. *Cave Decl. Exhibit 19 at **499-520*. PCHB Docket No. 38. Subsurface fires
8 continue to burn with continuing air emissions with concerns that conditions are expanding in the
9 subsurface areas. These facts are directly germane to significant adverse environmental impacts
10 associated with the operation of the limited purpose landfill. There is no basis for ignoring these
11 facts.

12 As a final point, it was discovered in early 2023 that soils removed from the
13 Yakima Training Center's (YTC) former Fire Training Facility was deposited in the former
14 Anderson Landfill (now DTG) for petroleum contamination treatment and disposal. *Cave Decl.*
15 *Exhibit 20 at *558-559*. PCHB Docket No. 38. Subsequent investigation disclosed that the
16 deposited 743 cubic yards of soils contained per-and poly-flouroalkyl substances (PFAS) which
17 is now understood to be toxic at very low concentrations and extremely persistent in the
18 environment.

19 **(c) YRCAA erroneously excluded components of the landfill for purposes of**
20 **environmental and NSR review authorizations.** YRCAA specifically excluded that portion of
21 the landfill that is the location of the subsurface fire (*NSR Approval ¶1.4-1.5*), rock crushing
22 operations (*NSR Approval #1.10*), and the area containing Petroleum Contaminated Soil
23 (PCS)(*NSR Approval ¶1.11*). Also missing from the analysis is a "cumulative" impact
24 consideration of the entire integrated commercial operation. The exclusions are contrary to law.

25 For purposes of new source review, the scope of review is determined by
26 reference to the following definition of "source":

27 (23) "Source" means all of the emissions units including quantifiable fugitive
28 emissions, that are located on one or more contiguous or adjacent properties, and
29 are under the control of the same person, or persons under common control,
30 whose activities are ancillary to the production of a single product or functionally
related group of products.

1 RCW 70A.15.030(23). The integrated commercial landfill and mining operation are under
2 control of a single party. SEPA imposes similar requirements:

3 Proposals or parts of proposals that are related to each other
4 closely enough to be, in effect, a single course of action shall be
5 evaluated in the same environmental document....Proposals or
6 parts of proposals are closely related, and they shall be discussed in
7 the same environmental document, if they:

8 (i) Cannot or will not proceed unless the other proposals (or
9 parts of proposals) are implemented simultaneously with
10 them; or

11 (ii) Are interdependent parts of a larger proposal and depend
12 on the larger proposal as their justification or for their
13 implementation. Phased review is not appropriate when
14 "...[i]t would merely divide a larger system into exempted
15 fragments or avoid discussion of cumulative impacts,...."

16 WAC 197-11-060(5)(d)(ii). The cumulative impact analysis is both applicable to the current
17 analysis as well as the prospective development. *Boehm v. City of Vancouver*, 111 Wn. App.
18 711, 720, 47 P.3d 137 (2002). The facility operates as a single integrated operation with air
19 quality impacted by the collective use including mining and crushing operations, landfill
20 operations, and conditions resulting from such operations including but not limited to subsurface
21 fires and associated toxic air emissions.

22 **5.3 YRCAA Has Filed an Untimely and Unsupportable Motion to Dismiss Because**
23 **of Alleged Failure to Join Necessary and Indispensable Parties to the**
24 **Litigation.**

25 YRCAA has moved the Board to dismiss this appeal based on an alleged failure to join a
26 necessary or indispensable party – Yakima County. The argument is as follows:

27 Because this appeal challenges Yakima County's environmental
28 determinations under SEPA that are applicable to the Facility's
29 expansion, Yakima County is an indispensable party in this matter
30 as the lead agency responsible for making the threshold
 determination complained of in this matter. If any change in
 circumstances or new information has arisen to warrant withdrawal
 of the DNS under WAC 197-11-340(3), it is up to the lead agency,
 Yakima County, to make that decision.

YRCAA Motion at 13:11-16. YRCAA offers this argument as a “defense” to its obligation to conduct SEPA environmental review as a component of its review of an application filed by DTG Recycle to establish a new stationary source of air emissions under the Washington Clean Air Act (WCAA).

A claim “...that a nonparty is at fault,...is an affirmative defense which shall be affirmatively pleaded by the party making the claim.” Civil Rule 12(h)(3)(i). YRCAA did not raise or address this issue at the Prehearing Conference or identify the issue as a matter for resolution in this proceeding. “The party urging dismissal bears the burden of persuasion.” *Automotive United Trades Organization v. State of Washington*, 175 Wn.2d 214, 222, 285 P.3d 52 (2012).

Carole DeGrave documented severe and persistent odor and air impacts beginning in 2020. ¶¶7-10. The daily impacts were documented in notes based upon the level of impact within her property and residential boundaries.

ODOR OBSERVATIONS OF THE ANDERSON LANDFILL BETWEEN AUGUST 2020 AND FEBRUARY 2021

ODOR SCALE

1- MINIMAL BUT AWARE OF IT

2- NOTICEABLE

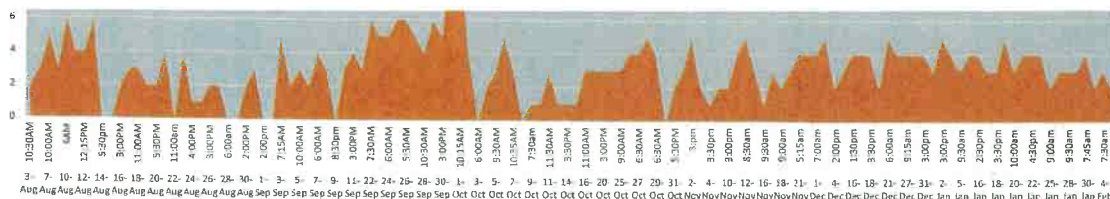
3- OBTRUSIVE

4- VERY IRRITATING

5- SICKENING

6- VERY SICKENING

10- DEFINITE BODY RESPONSE- EYES WATERED, THROAT AND NOSE BURNED, IMMEDIATE HEADACHE



1 *DeGrave Decl. Exhibit 3. Attachment A.* Impact reports were also filed with Department of
2 Ecology through its Environmental Reports Tracking System (ERTS). Odor, dust and air
3 emissions also impacted adjacent orchard operations (Paul Herke); adjacent residential
4 occupancies (Mark Koday and Coyote Canyon neighborhood); and recreational use of trails and
5 biking areas adjacent to the south side of Rocky Top Landfill (Sara Cate, Nancy Lust, and
6 others). These adverse environmental impacts are specific components of environmental review
7 under the State Environmental Policy Act (SEPA). They are real, substantiated, significant and
8 adverse.

9 **(a) Yakima County is not a necessary or indispensable party in this proceeding.**

10 Yakima County neither accepted nor acted as “lead agency” with respect to the application for
11 new stationary source of air emissions. It has no jurisdiction over air quality permits and
12 rendered no environmental decisions. Yakima County simply provided a purported “opinion” to
13 YRCAA that (1) the proposed activity under NSR consideration does not constitute a substantial
14 change from the impacts evaluated under SEP2015-00024; (2) a new threshold determination is
15 not required; and (3) the SEPA of 2015 determination is still valid for this project and satisfies
16 SEPA’s requirements. *Tahat Decl., ¶2 and Exhibit 1.* YRCAA claims to have relied on this
17 advice in concluding that it was unnecessary to conduct SEPA review for new source
18 application.

19 To begin, WAC 371-08-340 identifies necessary parties to this proceeding as “(1)
20 the agency whose decision is being appealed; and (2) the person to whom the decision is directed
21 shall be named as parties.” WAC 371-08-340(2). Service of process was made in a timely
22 manner on the Board and DTG Recycle. As a practical matter, it is feasible to join Yakima
23 County as a party. WAC 371-08-345(2) which provides:

24 A copy of the notice of appeal shall also be served on all other
25 persons named as parties to the appeal. *There is no time limit on*
26 *when such service must be made.*

27 (*Italics added*). While Yakima County was not required to be named as a party, it is permissible
28 to designate them as a party and “...[t]here is no time limit on when such service must be made.”

29 “CR 19 requires joinder of a party with an interest relating to the subject matter of
30 the action where disposition in the party’s absence *may impair the party’s ability to protect its*
interest in the litigation.” *Eugster v. City of Spokane*, 139 Wn. App. 21, 30, 156 P.3d 912 (2007).

1 YRCAA argues that "...Yakima County's joinder is necessary to determine their interest in the
2 validity of the County's determination..." *YRCAA Motion at 13:19-20*. YRCAA is fully capable
3 of defending its SEPA determinations by presenting evidence from Yakima County regarding its
4 "opinion" offered with respect to SEPA's procedural and environmental requirements. These
5 decisions are the responsibility of YRCAA in meeting its burden to establish its "affirmative
6 defense".

7 As a final point, CR 19(a)(1) contemplates joinder of persons where complete
8 relief cannot otherwise be accorded to "those already parties..." *Crosby v. County of Spokane*,
9 137 Wn.2d 296, 308, 971 P.2d 32 (1999).

10 The person must have an "interest relating to the subject of the
11 action" and must be so situated that in his or her absence
12 disposition of the action "may as a practical matter impair or
13 impede his ability to protect that interest" *or leave one who is*
already a party subject to the risk of multiple or inconsistent
obligations."

14 *Crosby v. County of Spokane*, 137 Wn.2d at 308. Yakima County has no separate protectable
15 interest in the current proceeding. And moving forward without the joinder of Yakima County
16 does not place YRCAA in a situation where it is "...subject to the risk of multiple or inconsistent
17 obligations."

18 **(b) Joinder of Yakima County is feasible.** It is feasible to join Yakima County
19 as a party. WAC 371-08-425 authorizes the Board to join both necessary and permissive parties
20 under CR 19 and CR 20. WAC 371-08-345(2) provides that "...[t]here is no time limit on when
21 '...other persons named as parties are served.'" "Whenever the claim *or defense asserted* in the
22 amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to
23 be set forth in the original pleading, the amendment relates back to the date of the original
24 pleading." CR 15(c). FORT does not object to the joinder of Yakima County.

25 **(c) Dismissal of the case is not permitted where joinder is feasible.** In *Five*
26 *Corners Family Farms*, the procedural right alleged to have been violated was to have the
27 Department of Ecology review a permit application and consider whether a withdrawal of
28 groundwater would "impair existing rights or be detrimental to the public welfare." *Id.* 173
29 Wn.2d at 303(holding that appellant's had "...demonstrated a concrete interest that would be
30 affected by the deprivation of that procedural right."). The deprivation of procedural right is even

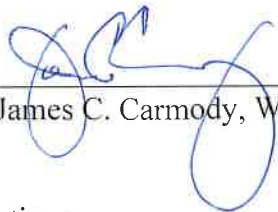
1 more significant in this case. YRCAA issued a permit to establish a new stationary source of air
2 emissions without compliance with SEPA procedural requirements.

3 **CONCLUSION**

4 FORT and its representative members respectfully request that YRCAA's *Motion*
5 *for Summary Judgment* be denied and judgment entered in favor of the nonmoving party.

6 DATED this 30th of December, 2024.

7 MEYER, FLUEGGE & TENNEY, P.S.
8 Attorneys for Friends of Rocky Top

9
10 
11 _____
12 James C. Carmody, WSBA 5205

13 ATTACHMENT A: Chart Of Odor Observations

14 U:\DebbieG\FORT (Friends of Rocky Top)\Summary Judgment\YRCAA - Motion for SJ\Petitioners' Response to YRCAA's Motion for
15 Summary Judgment.doc

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

Pollution Control Hearings Board PO Box 40903 Olympia, WA 98504-0903	<input checked="" type="checkbox"/> CMS Portal
Yakima Regional Clean Air Agency Jeffrey S. Myers Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S. 2674 R.W. Johnson Rd. PO Box 11880 Olympia, WA 98508-1880	<input checked="" type="checkbox"/> Email jmyers@lldkb.com msonneby@lldkb.com
Attorneys for DTG Enterprises Michael L. Dunning Rebecca Human Perkins Coie LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099	<input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Email MDunning@perkinscoie.com RHuman@perkinsCoie.com

DATED at Yakima, Washington, this 30th day of December, 2024.


Erica N. Davis, Legal Assistant

ATTACHMENT A

ODOR OBSERVATIONS OF THE ANDERSON LANDFILL BETWEEN AUGUST 2020 AND FEBRUARY 2021

ODOR SCALE

- 1- MINIMAL BUT AWARE OF IT
- 2- NOTICEABLE
- 3- OBTRUSIVE
- 4- VERY IRRITATING
- 5- SICKENING
- 6- VERY SICKENING
- 10- DEFINITE BODY RESPONSE- EYES WATERED, THROAT AND NOSE BURNED, IMMEDIATE HEADACHE

