STATE OF WASHINGTON
POLLUTION CONTROL HEARINGS BOARD

FRIENDS OF ROCKY TOP (FORT), an unincorporated nonprofit organization, and representative members NANCY LUST, and CAROLE DeGRAVE, Appellant, vs. YAKIMA REGIONAL CLEAN AIR AGENCY, and DTG ENTERPRISES INC., d/b/a DTG Recycle - Yakima, Respondents.	**PCHB NO. 24-021** **RESPONDENT YRCAA'S RESPONSE TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Respondents Yakima Region Clean Air Agency (YRCAA) opposes the motion of Appellants for summary judgment. A primary mission of the State Environmental Protection Act (SEPA) rules is to minimize wasteful duplication of effort and gaps in compliance by assigning responsibility for SEPA compliance to the "lead agency," and within that agency to the "responsible official." R. Settle, *The Washington State Environmental Policy Act*, §10.01, at 10-01 (2024). The responsible official for the lead agency is charged with reviewing an environmental checklist and issuing a threshold determination which is binding on all other agencies with jurisdiction.

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Here, the lead agency charged with review of SEPA compliance for the DTG proposal was Yakima County, who issued Determination of Nonsignificance (DNS) that is binding on agencies with jurisdiction, including YRCAA, to issue subsequent permits for the proposal. Having failed to join the lead agency for this proposal and having failed to appeal the County's SEPA determinations, Appellants seek to shift SEPA responsibilities away from the lead agency onto an agency with jurisdiction over only part of the proposal, YRCAA. This is inconsistent with the SEPA rules and should be rejected by the Board..

II. STATEMENT OF FACTS

YRCAA incorporates the Statement of Facts set forth in its Motion for Summary Judgment and relies upon the Declarations of Marc Thornsbury and Hasan M. Tahat submitted therewith. In Support of Appellant's Motion, the Declaration of Scott Cave includes voluminous documents, including prior SEPA checklists and permit decisions. The Declaration included an undated SEPA Checklist associated with the Hearing Examiner's April 29, 2009 approval of a Conditional Use Permit (CUP). Cave Decl., Exhibit 8. That decision acknowledged comments from YRCAA that an air quality permit would be required for the landfilling operations. *Id.*, Exhibit 9, at p. 411. It was made a condition for the applicant to obtain all permits required from YRCAA. *Id.*, at 414. The Hearing Examiner approved compliance with SEPA by issuance of an MDNS, the final determination being issued on March 1, 2009, and without a SEPA appeal being filed. *Id.* at 392-93

The Cave Declaration also includes a SEPA checklist from May 15, 2015 considered by the lead agency's responsible official when Yakima County issued the DNS in question here. Cave Decl., Exhibit 15. That checklist again acknowledged that an air quality permit or approval would be necessary from YRCAA for their proposal. *Id. at* p.467. In 2017 Yakima County also issued a permit for mining operations, again issuing a DNS. *Id.*, Exhibit 9, at p. 416.

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In November 2019, DTG bought the Anderson Landfill and eventually submitted an application for the air quality permits contemplated in the 2009 permitting and 2015 SEPA Checklist. Following its acquisition, DTG's permit application sought an "after the fact" permit for the landfilling operations, including the Materials Recovery Facility (MRF), a Wood Chipper/Grinder and Crushed Rock Exportation that were being used as part of the LPL operations.

As indicated on the application form, DTG provided YRCAA with the prior 2015 SEPA DNS from the lead agency, Yakima County. Thornsbury Decl., Exhibit 1, NSR Application Appendix A (also found at Cave Decl., Exhibit 2 at 40). The attachment of the prior SEPA determinations is one means that YRCAA's permit application form uses to acknowledge prior SEPA compliance. Alternatively, the applicant can check a box certifying SEPA had been satisfied or was exempt.[1] The form then identified the government agency as the Yakima County Hearing Examiner, Gary Cullier, with a date of April 29, 2009. That was the date that Mr. Cullier issued his decision in CUP 08-074 and SEP 08-041 to approve the CUP for the LPL, running concurrently with the Health District permit. Thus, the DTG permit application submitted to YRCAA pointed to two prior SEPA determinations, attaching the 2015 DNS and identifying Mr. Cullier's decision as a basis for the 2009 SEPA determination.

III. STANDARD OF REVIEW AND BURDEN OF PROOF

Appellant contends that the burden of proof lies with the Agency to show compliance. App. Motion at 12. Appellant treats YRCAA permitting decision as a "Regulatory Order" and in so doing attempts to reverse the burden that an appellant must show that a SEPA determination is clearly erroneous. *Wild Fish Conservancy v. Washington Department of Fish and Wildlife*, 198 Wn.2d 846, 866 (2022). The

[1] Appellants contend that the application is required to contain a government official's certification that SEPA has been satisfied. Motion at 6. That argument misinterprets the form, which provides multiple alternatives to indicate SEPA compliance, including checking a box to indicate attachment of prior SEPA determinations. There is no requirement that another government agency sign the application form.

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petitioner in a SEPA appeal bears the burden to prove that the agency's decision is clearly erroneous. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700-701, 601 P.2d 501 (1979); *Norway Hill v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976); RCW 43.21C.075. *Letto and Stover v. Washington State Department of Ecology; Sleepy Hollow Quarry, Inc.*, 2011 WL 2514360, at *9, PCHB No. 10-063 (June 20, 2011, Findings of Fact, Conclusions of Law, and Order).

Thus, applying the correct standard of review of a threshold determination by an agency under SEPA, the Board must affirm the determination unless it finds that determination to be "clearly erroneous." *Kettle Range Conservation Group v. Washington Dept. of Natural Resources*, 120 Wn.App. 434, 85 P.3d 894 (2003), amended on reconsideration, review denied 152 Wn.2d 1026, 101 P.3d 421. Furthermore, in any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, the decision of the governmental agency must be accorded substantial weight. RCW 43.21C.090. Thus, FORT and its members, as appellants challenging YRCAA's issuance of the air permit solely on SEPA grounds, must show that YRCAA's decision was clearly erroneous.

IV. ARGUMENT

A. AS THE SEPA LEAD AGENCY, YAKIMA COUNTY HAS THE RESPONSIBILITY TO MAKE SEPA DETERMINATIONS FOR THE LANDFILL PROPOSAL

In cases involving multiple permit approvals, like those involved in permitting a landfill, SEPA provides a coordinated approach that minimizes duplication of effort by appointing a lead agency to make the required SEPA determinations. Those determinations are not separately made by each agency on its individual permit decisions but are made early in the process when the environmental impacts can be meaningfully identified and analyzed. WAC 197-11-055(2). The lead agency makes its determinations early in the process even though there may be future agency approvals required. *Id.*

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In conducting environmental review, as the lead agency, Yakima County was required to consider environmental impacts early in the conceptual process as soon as impacts could be reasonably identified. WAC 197-11-055 permits and encourages early environmental review, allowing for projects to develop more detail as they progress. The SEPA rule provides:

> (2) **Timing of review of proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.
>
> > (a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.
> >
> > (i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

The SEPA framework allows for the designation of a lead agency responsible for the environmental analysis and procedural steps under SEPA. *See* WAC 197-11-050. The lead agency evaluates the proposal's likely environmental impacts and issues a determination of significance (DS), a mitigated DNS or a DNS based on this evaluation. *Wild Fish Conservancy v. Washington Department of Fish and Wildlife*, 198 Wn.2d 846, 856 (2022). This determination is then used by other agencies in their decision-making processes. The lead agency "shall be the agency with main responsibility for complying with SEPA's procedural requirements and shall be the only agency responsible for: (a) The threshold determination [of significance]; and (b) Preparation and content of environmental impact statements." WAC 197–11–050(2); *Columbia Riverkeeper v. Port of Vancouver USA*, 189 Wn.App. 800, 807, 357 P.3d 710, 714 (2015), *aff'd*, 188 Wn.2d 80, 392 P.3d 1025 (2017).

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Appellants argue that because YRCAA had jurisdiction to issue a permit, it was required to obtain a new checklist and issue its own SEPA threshold determination. Appellants' argument misinterprets and is contrary to SEPA's definition of a "proposal" which is broader than Appellant's erroneous reading which is focused on each specific step used to implement and carry the proposal forward. WAC 197-11-784 defines proposal and states that:

> A proposal exists at that stage in the development of an action when an agency is presented with an application, or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated.

SEPA thus provides that a "proposal" is viewed broadly as based on the goal and objective, not as a specific action or approval necessary for implementing the proposal. Here the proposal is the establishment of an expanded landfill operation. To achieve this proposal, the proponent was required to obtain multiple permits from agencies, including a conditional use permit from Yakima County Planning Division, an operating permit from Yakima County Health District which is reviewed by the Department of Ecology, and an air quality permit from YRCAA. These multiple permits were specifically identified in the 2015 SEPA Checklist, which also correctly identified Yakima County Planning as the lead agency . Cave Decl., Exhibit 15 at 467.

The SEPA rules provide that for proposals for private projects that require nonexempt licenses from more than one agency, when at least one of the agencies requiring such a license is a county/city, the lead agency shall be that county/city within whose jurisdiction is located the greatest portion of the proposed project area, as measured in square feet. Therefore, Yakima County was the correct lead agency, having received the CUP application and proceeded to issue the DNS for the proposal in 2015.

If an agency with jurisdiction is dissatisfied with the lead agency's determination of nonsignificance (DNS), it has the authority to assume lead agency status and make its own threshold

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determination. *City of Puyallup v. Pierce County*, 8 Wn.App.2d 323 (2019). However, if an agency with jurisdiction does not assume lead agency status, it cannot issue a SEPA threshold determination. The SEPA regulations specify that the lead agency is the only agency responsible for the threshold determination and the preparation and content of environmental impact statements. *Columbia Riverkeeper v. Port of Vancouver USA*, 189 Wn.App. 800, 807 (2015); WAC 197-11-050(2). Therefore, an agency with jurisdiction must affirmatively act to assume lead agency status to issue its own threshold determination under SEPA rules if it chooses to do so. *City of Puyallup v. Pierce County*, 20 Wn.App.2d 466 (2021).

Appellants fault YRCAA for failing to make the required lead agency determination and erroneously argue that YRCAA was the first to receive an application for New Source Review. App. Motion at 17-18. However, under WAC 197-11-924(1), the first agency receiving an application for or initiating a nonexempt proposal shall determine the lead agency for that proposal, unless the lead agency has been previously determined, or the agency receiving the proposal is aware that another agency is determining the lead agency. Here, the first agency receiving an application for the expanded landfill was Yakima County Planning Division, for the Conditional Use Permit, which occurred in 2015. YRCAA commented on that application and YRCAA knew that Yakima County was the lead agency. Thornbury Decl., Ex. 4, at 8. Appellants conflate a "permit action" with a "proposal" and would require a new SEPA determination for each permit by every agency with jurisdiction which is contrary to the structure of requiring a lead agency be designated for an entire proposal, not for individual permit actions needed to effectuate the proposal.

It is also undisputed that following the issuance of the 2015 DNS by Yakima County, YRCAA did not exercise its discretionary authority to assume lead agency status. The only way that an agency with

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jurisdiction may make its own SEPA determination and require additional analysis is to assume lead agency status within 14 days of issuance of the DNS as permitted by WAC 197-11-948(1). An agency with jurisdiction may assume lead agency status only within this fourteen-day period. WAC 197-11-340.

B. SEPA RULES REQUIRE AGENCIES WITH JURISDICTION TO ISSUE PERMITS ON PROPOSALS TO FOLLOW THE LEAD AGENCY'S SEPA DETERMINATION.

Appellants fault YRCAA for not issuing a separate SEPA determination associated with DTG's 2023 "after-the-fact" NSR application. However, the SEPA rules are clear that unless an agency with jurisdiction assumes lead agency status within 14 days of issuance of a DNS by the lead agency, it is bound to follow the lead agency's determination. WAC 197-11-390. The lead agency is the only agency that may issue a SEPA threshold determination. WAC 197-11-050.

Absent a decision to assume lead agency status, agencies acting on the same proposal are required to use existing environmental documents unchanged unless specific circumstances are met. WAC 197-11-600(3). When the responsible official makes a threshold determination, it is final and binding on all agencies. WAC 197-11-390. YRCAA has not assumed lead agency status here. The passage of time does not affect the ongoing validity of the SEPA threshold determination or the requirement of WAC 197-11-340 for agencies with jurisdiction to follow the lead agency's SEPA determination. In *Sound Action v. Washington State Pollution Control Hearings Bd.*, 26 Wn.App. 2d 1039 (2023), the Court of Appeals affirmed PCHB ruling concluding that the threshold determination issued by the City of Bainbridge Island in 2013 fulfilled Washington Department of Fish and Wildlife's SEPA responsibilities in 2019 when it processed an HPA application for bulkhead and dock construction.

To require separate environmental determinations on each specific permit action taken to implement a proposal would violate SEPA's prohibition against piecemealing environmental review. See *City of Bellingham and Squalicum Valley Community Association, Appellants v. Washington State*

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Department of Natural Resources, 2012 WL 1463552, at *5–6, PCHB No. 11-125, PCHB No. 11-130 (Consolidated appeals) (April 9, 2012) (finding that treating a forest practices portion of this development separately from the development itself would violate SEPA's prohibition against piecemealing, and conflict with WAC 197-11-060(3)(b).

Appellants cite two cases, *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App 34, 53 P.3d 522 (2002) and *Kittitas County Conservation v. Kittitas County,* EWGMHB No. 07-1-004c (Compliance Order, Feb. 4, 2009) to argue that the failure to comply with the adoption process voids the alleged reliance on a prior EIS. App. Motion at 21-22. But neither of the cases relied upon by Appellants involved an agency with jurisdiction following the SEPA determinations of another lead agency when issuing its later permit decision. In *Thornton Creek,* the City of Seattle issued a programmatic EIS for its Northgate Area Comprehensive Plan in 1992. The City, acting as lead agency for both proposals, then sought to rely on that EIS in approving Phase I of a developer's 1998 proposed General Development Plan for expansion of the Northgate Mall. The City used the 1991 Draft EIS (DEIS) and the 1992 FEIS and an "addendum" rather than issuing a formal notice of adoption. The Court rejected the contention that a new SEPA process was needed and upheld the City's approval of the developer's GDP.

Appellant's misconstrue the case and incorrectly claim that the court voided the reliance on the prior EIS. Indeed, *Thornton Creek* did not "void" the alleged adoption of a prior EIS at all, contrary to Appellant's assertion, App. Motion at 21. Instead, the Court upheld the agency's actions finding the failure to use the adoption form was harmless error. *Thornton Creek* did not involve an agency with jurisdiction to later issue a permit relying on a SEPA determination from another agency acting as the lead agency. Thus, it does not support Appellant's contention that YRCAA's issuance of the air quality permit to DTG based on the lead agency's SEPA DNS is invalid or "void" because there was not an adoption of

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the threshold determination. Appellant cites no cases that require an agency with jurisdiction to adopt the lead agency's threshold determination.

Similarly, *Kittitas Conservation v. Kittitas County, supra*, was not a case involving an agency with jurisdiction relying upon the determinations of a lead agency. Instead, that case involved Kittitas County's post hoc argument that its SEPA determinations for its 2006 Comprehensive Plan amendments (CPA) could be adopted to cover proposed 2008 CPA. The Board held that the lead agency and its responsible official are authorized to take such an action but did not actually do so in reviewing the 2008 CPA. *Kittitas Conservation,* Order at 48-49. The Board's order points to the lead agency and its responsible official as having this authority, not an agency with jurisdiction, like YRCAA here. Moreover, the Board held that the SEPA determinations for the 2008 CPA were different in material respects from the 2006 CPA. *Id.*, at 48. Thus, the Board rejected the County's SEPA compliance for the 2008 proposed CPA. *Id.,* at 49.

YRCAA is not arguing that it adopted a prior SEPA determination, as was argued by Kittitas County in the *Kittitas Conservation* case. Instead, because it did not assume lead agency status within 14 days of the DNS in this case, YRCAA is required by law to follow the SEPA determinations for the expanded landfill proposal that were made by the lead agency, Yakima County. This requirement permeates the SEPA rules and is not part of a lead agency's formal adoption of prior SEPA documents. As shown below, there is no requirement for an agency with jurisdiction to document or formally adopt the SEPA determinations of the lead agency.

C. YRCAA IS NOT REQUIRED TO FORMALLY ADOPT THE LEAD AGENCY'S SEPA DETERMINATION.

The SEPA rules *allow* a lead agency to adopt existing environmental documents to support a new SEPA determination when a project is similar to a prior proposal. WAC 197-11-948 is permissive in using the term "may" to describe an agency's choice to assume lead agency responsibilities. The SEPA

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rules do not authorize or require an agency with jurisdiction to issue subsequent permits over the same proposal to adopt such documents as part of its own SEPA determination. To make such a requirement would eviscerate the requirements that only the lead agency can issue SEPA threshold determinations for a proposal. WAC 197-11-050.

The SEPA rules do not require an agency with jurisdiction to formally adopt the lead agency's threshold determination. The only way that an agency with jurisdiction can act upon the lead agency's determination is by assuming lead agency status under WAC 197-11-340(2)(e), which was not done in this case. Thus, the SEPA determination became final and binding on all agencies acting on the landfill expansion proposal, including YRCAA. WAC 197-11-390.

Professor Settle's treatise on SEPA acknowledges that formal adoption of SEPA documents is not always required even by lead agencies when they rely upon existing environmental documents. Settle, *The Washington State Environmental Policy Act*, §15.01, at 15-2 (2024), citing *SEAPC v. Cammack II Orchards*, 49 Wn.App.609, 613 744 P.2d 1101 (1987) (holding that an EIS for a prior proposal could be used for a later modified proposal without satisfying formal adoption process requirements). Likewise, Settle points to *Ellensburg Cement Products v. Kittitas County*, 171 Wn.App. 691, 287 P.3d 718 (2012), *aff'd* 179 Wn. 2d 737, 317 P.3d 1037 (2014) where the Court disagreed with the argument by opponents of a gravel mine that a SEPA checklist prepared several years earlier was improperly used by the County without any formal adoption, incorporation by reference or addendum. *Settle, supra,* §15.01, at 15-8.

YRCAA did not issue a notice of adoption because it is not the lead agency and cannot issue a SEPA determination for the DTG landfill proposal. Because YRCAA did not assume lead agency status within 14 days of issuance of the DNS by Yakima County, that authority lies solely with the County under WAC 197-11-050(2)(a) (lead agency shall be only agency responsible for issuing threshold

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determination). In relying upon the existing SEPA determination by Yakima County, contrary to Appellants' argument (App. Motion at 15) it did not ignore environmental review. YRCAA understood Yakima County's determination included acknowledgement that the proposal would require an air permit, and YRCAA proceeded to carefully review DTG's application and issue a permit consistent with Yakima County's determination. YRCAA contacted the responsible official for the lead agency who reaffirmed the applicability of the DNS to its review of DTG's application. Under the SEPA rules, YRCAA was obligated to follow this directive and had no authority to issue its own SEPA determination.

D. APPELLANTS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES BY FAILING TO APPEAL THE DNS ISSUED BY YAKIMA COUNTY AS THE LEAD AGENCY.

Appellants' argument is really a disagreement with the County's SEPA determination made for the proposal to expand and operate the landfill and now argues that there were and are probable significant impacts that should compel a different determination. Appellants could have advanced that argument in 2015 when the County issued its determination. However, Appellants were obligated to challenge the County's DNS through an appeal of the solid waste permit at that time. Having failed to do so, they failed to exhaust administrative remedies and are barred from doing so now. RCW 43.21C.075.

It is settled under the SEPA statute that if an agency accords an aggrieved party an opportunity for administrative review, it must be exhausted. *State v. Grays Harbor Cnty.*, 122 Wn.2d 244, 249, 857 P.2d 1039, 1042 (1993), citing, R. Settle, *The Washington State Environmental Policy Act* § 20(c), at 249–0 to 249–2 (1993). In *State v. Grays Harbor County*, neighboring property owners of a quarry sought review of a surface excavation permit, without allowing completion of administrative proceedings. The Court rejected their appeal, holding that SEPA required exhaustion of available administrative review, and the county ordinance provided for a DNS to be appealed to the board of county commissioners.

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The Board has followed the requirement that appellants who fail to use previously available SEPA remedies may not pursue SEPA appeals to the Board. In *Nooksack Indian Tribe v. State of Washington, Dep't of Ecology*, 1995 WL 879095, PCHB No. 94-148, SHB No. 95-1 (July 11, 1995, Order Granting and Denying Summary Judgment), the Board considered whether the Nooksack Tribe failed to exhaust their administrative remedies by failing to appeal the MDNS issued by the Whatcom County responsible official to the Whatcom County Hearing Examiner. The Board rejected the Nooksack Tribe's SEPA appeal because it did not exhaust remedies prior to appealing to the Board, stating:

> We concur with Warm Creek Hydro that the Nooksacks have failed to exhaust their administrative remedies pertaining to the procedural protections of the State Environmental Policy Act ("SEPA"). The Nooksacks challenge to the threshold determination of the County is governed by the SHB's decision in *Clifford v. City of Renton*, SHB No. 92-52 (1993) (Order Granting and Denying Summary Judgment at 10-15, and Order Granting Summary Judgment Concerning Compliance with the State Environmental Policy Act). RCW 43.21C.075(4) requires exhaustion of administrative remedies, under local appeal procedures pertaining to SEPA procedures, prior to judicial review. The SHB believes that in exercising its quasi-judicial authority in reviewing SEPA issues, its review function is analogous to that of a court.

Id., at *3.

Here, Appellant Nancy Lust personally participated in the CUP hearings on the landfill expansion and received notice of the SEPA DNS by Yakima County, which described how to appeal that determination. Myers Dec., Exhibit 3. As stated in the Hearing Examiner decision approving the CUP, Yakima County did not receive any SEPA appeals from its DNS. Myers Dec., Exhibit 4. Like the Tribe in *Nooksack*, if Appellants disagreed with the County's threshold determination, they should have appealed the DNS to the Hearing Examiner. Appellants failed to exhaust available remedies by failing to appeal the SEPA determination in conjunction with the issuance of the CUP for the landfill expansion in 2015. This forecloses further SEPA appeals, including the present appeal.

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E. THE BOARD CANNOT GRANT EFFECTIVE RELIEF BECAUSE THE APPELLANTS FAILED TO JOIN THE SEPA LEAD AGENCY, WHICH WOULD BE RESPONSIBLE FOR ISSUING ANY NEW SEPA DETERMINATIONS.

The primary responsibility for complying with SEPA lies with the lead agency, which in this case is Yakima County. YRCAA understood the role of the lead agency as the SEPA rules require and followed the DNS issued by the lead agency. The lead agency is the only agency that can issue a SEPA determination for the DTG expansion proposal. Even if Appellants could now challenge the lead agency's determination through this appeal, they failed to join Yakima County and this Board cannot order the County to change its SEPA determination, even if the Board were to conclude that it should be changed. As demonstrated in YRCAA's Motion for Summary Judgment, the failure to join Yakima County is therefore fatal to the Appellant's claims, because the party to whom relief must be directed is not a party.

Appellants contend that changed circumstances warrant a new SEPA determination. App. Motion at 9-11. However, even if that were so, Appellants fail to address who has the authority to withdraw the prior SEPA determination. The SEPA rules provide that such authority lies with the lead agency, not with agencies having jurisdiction such as YRCAA. WAC 197-11-340(3) addresses the requirements for withdrawing a DNS, stating:

> (3)(a) The lead agency shall withdraw a DNS if:
>
> (i) There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;
>
> (ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or
>
> (iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.
>
> (b) Subsection (3)(a)(ii) shall not apply when a nonexempt license has been issued on a private project.
>
> (c) If the lead agency withdraws a DNS, the agency shall make a new threshold determination and notify other agencies with jurisdiction of the withdrawal and new threshold determination. If a DS is issued, each agency with jurisdiction shall commence action to suspend, modify, or revoke any approvals until the necessary environmental review has occurred (see also WAC 197-11-070).

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(Emphasis added).

Thus, only Yakima County, as the lead agency, has the authority to withdraw its DNS and notify YRCAA if it issues a DS based on new information or substantial changes to the proposal. Until it does so, YRCAA is obligated to follow Yakima County's SEPA determinations for this proposal. WAC 197-11-390(3) expressly requires this result, stating:

> Regardless of any appeals, a DS or DNS issued by the responsible official may be considered final for purposes of other agencies' planning and decision making unless subsequently changed, reversed, or withdrawn.

Appellants seek to change, reverse, or compel withdrawal of the DNS issued by the County for this proposal that YRCAA relied upon. To do so, the Board must order Yakima County to withdraw its DNS. Since Yakima County is not a party, the Board cannot provide the relief sought by Appellants on these claims. Yakima County's joinder was necessary for effective relief to be granted. The Appellants failed to join Yakima County and consequently their claims should be dismissed.

V. CONCLUSION

Accordingly, the Respondents respectfully request that the Board deny the Appellants' motion for summary judgment, grant YRCAA's motion for summary judgment and dismiss this appeal.

DATED this 30th day of December 2024.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the attached document and the Declarations of Marc Thornsbury and Hasan M. Tahat to be filed electronically with the Environmental Land Use Hearing Office Case Management System and e-mailed to the below listed parties at:

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DATED this 30th day of December 2024, at Tumwater, WA.

/s/ Tam Truong
_____
Tam Truong, Legal Assistant

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