Yakima Regional Clean Air Agency

Yakima Regional Clean Air Agency

Agencia Regional de Aire Limpio de Yakima

Meeting of the Board of Directors
December 2024

Reunión de la Junta Directiva
Diciembre 2024

December 12, 2024

12 de diciembre de 2024

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Yakima Regional Clean Air Agency

186 Iron Horse Court, Suite 101
Yakima, WA 98901-1468
509-834-2050
www.yakimacleanair.org

Regular Meeting of the Board of Directors

December 12, 2024 – 2:00 P.M.

Yakima City Hall; 129 N Second Street; Yakima, Wash.
Duration – 1 hour (estimated)

AGENDA

1. **Call to Order**
2. **Roll Call**
3. **Changes to the Agenda**
4. **Public Comments**
   The public may address any matter relevant to the business of the Board at this time. Please state your name and the item you wish to address. Comments are limited to three (3) minutes per person.
5. **Public Hearing**
   - 2025 Fee Schedule
6. **Board Meeting Minutes for November 11, 2024**
7. **Resolution 2024-09 Adopting 2025 Fee Schedule**
8. **Executive Director's Report**
9. **Other Business**
10. **Adjournment**

Zoom information
URL: https://us06web.zoom.us/j/6058007569

Meeting ID: 605 800 7569
Phone number: 253-215-8782 or 253-205-0468

If you wish to attend the YRCAA board meeting and require an accommodation due to a disability or need interpretation or translation services, call 509-834-2050 ext. 100 or send an email to admin@yrcaa.org.

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Reunión Ordinaria de la Junta Directiva

12 de Diciembre de 2024 – 2:00 P.M.

Ayuntamiento de Yakima; 129 N Second Street; Yakima, Wash.
Duración – 1 hora (estimativo)

ORDEN DEL DIA

1. **Llamar al Orden**
2. **Registo de Asistencia**
3. **Cambios en la Agenda**
4. **Comentarios Públicos**
   El público puede abordar cualquier asunto relacionado con los asuntos de la Junta en este momento. Indique su nombre y el artículo que desea abordar. Los comentarios están limitados a tres (3) minutos por persona.
5. **Audiencia Pública para Comentarios**
   - Lista de Tarifas para 2025
6. **Actas de la Reunión de la Junta para 11 de Noviembre de 2024**
7. **Resolución 2024-09 Adoptar del la Lista de Tarifas para 2025**
8. **Informe del Director Ejecutivo**
9. **Otros Asuntos**
10. **Conclusión**

Zoom información
URL: https://us06web.zoom.us/j/6058007569

ID de reunión: 605 800 7569
Número de teléfono: 253-215-8782 or 253-205-0468

Si desea asistir a la reunión de la junta de YRCAA y requiere una adaptación debido a una discapacidad o necesita servicios de interpretación o traducción, llame al 509-834-2050 ext. 100 o envíe un correo electrónico admin@yrcaa.org.

1. **Call to Order**
   Chairperson DeVaney called the meeting to order at 2:04 p.m. in the council chambers, Yakima City Hall; 129 N Second St.; Yakima, Washington.

2. **Roll Call**
   Meza conducted roll call and declared a quorum present.
   Board members: Amanda McKinney, County Representative, Present (arrived later)
   Steven Jones, Ph.D., County Representative, Present
   Janice Deccio, Large City Representative, Present
   Jose Trevino, Small City Representative, Absent
   Jon DeVaney, Member-at-Large, Present
   Staff present: Marc Thornsbury, Executive Director
   Jacqueline Meza, Clerk of the Board

3. **Changes to the Agenda**
   DeVaney asked if there were any changes to the agenda. None were requested.

4. **Public Comment**
   DeVaney asked if there were any public comments.

   Dr. Sara Cate (via video-conference) stated her opposition to Resolution 2024-07 and expressed concern the hold harmless provision within it would allow individuals employed by the Agency to avoid doing their required job. She asked whether, if she had a hold harmless ruling from the city council to run red lights on her way to a clinic because she was late, that would be considered reasonable?

   Pam Wickersham stated her family owns property adjacent to, and lives near, the Caton Landfill and described various health problems, including several cancers, experienced by her family around the time of the landfill fire. She noted several members of her family underwent genetic testing with no genetic markers found and suggested if these do not exist, it is reasonable to assume the cause is environmental. Wickersham stated the landfill has been allowed to operate despite being in violation of the law, adding it important everyone follow the law and protect the health of everyone.

   Jean Mendoza, of White Swan, stated that, at the prior board meeting, Commissioner McKinney had implied the Agency Board of Directors had met and discussed the Friends of Rocky Top appeal in executive session and that was not correct. She added it is unfortunate the Board gives the impression it is discussing the matter when that is not the case and suggested the Agency should agree to require an Environmental Impact Study under the State Environmental Protection Act (SEPA) and avoid litigation. Mendoza further suggested the Board is "siding" with an international corporation against the people it represents.

Mendoza questioned whether the Agency Executive Director had improperly assumed the role of public information officer [sic] as the law requires anyone filling that role to receive training and certification. Mendoza apologized for questioning Thornsbury in the event he had received such training. She also questioned whether Thornsbury would have adequate time to perform the work of a public information officer [sic] as he appears to have a heavy workload and noted the Agency has been sued over public information in the past.

Mendoza asked the board members and county commissioners to advertise that board position number three will be coming up for reappointment in December so persons who might be interested in filling the position have the opportunity to do so.

Nancy Lust, Friends of Rocky Top (FoRT), acknowledged the need for additional insurance to protect the board and staff against potential future problems and noted with the current staffing shortage Thornsbury appears to have a heavy workload that can result in mistakes being made. Lust expressed disappointment several staff members have left the Agency for various reasons. She stated the Agency is now involved in a lawsuit with FoRT that is costing it money and added this could have been avoided had the Agency done its job and followed the law. Lust asked who is responsible if it is not the Executive Director and questioned why other staff members were not included in the indemnification.

Lust stated the Agency had sent a letter to the Caton Landfill indicating the disposal of wallboard is a violation of their permit, but wallboard continues to be accepted. She noted despite concern over hydrogen sulfide, the letter did not identify any consequence for the violation—only suggestions as to how to obtain a proper permit—and suggested the Agency is "using a carrot" when it should be "using a stick".

(Amanda McKinney arrived)

Mark Koday, Friends of Rocky Top, expressed opposition to the hold harmless provision of Resolution 2024-07 pertaining to the executive director. He noted he previously served as Chief Dental Officer at the Yakima Valley Farm Workers Clinic and explained if he had harmed the public, he would have been subject to a lawsuit, discipline by the state board, and termination. Koday stated he did the best job he could because it was his responsibility, but also because of the threat of a lawsuit, discipline, and termination. He added he could not imagine if he took an improper action his boss and organization would be sued and he would be held harmless and urged the Board to reconsider adopting the resolution.

Carol DeGrave, a DTG Landfill neighbor, expressed disappointment that business is more important than health. She stated that over a four-year period she had given Thornsbury facts, suggestions, and ideas and he is responsible for not taking action on them. DeGrave stated she has had two years of benzene, naphthalene, and smoke in the air and no one would listen. She added she wore double masks and owls nesting on her property did not have babies for two years. DeGrave remarked it is tragic no one listens to the citizens.

5. **Board Meeting Minutes for October 2024**
   Devaney asked if the board members had an opportunity to review the October minutes. McKinney moved to approve the minutes; Jones seconded the motion. Motion passed 3-0.

6. **Resolution 2024-07 Appointing Agency Officials**
   DeVaney asked Thornsbury to summarize and address the nature of the resolution.

   Thornsbury stated the Yakima County Treasurer requires the board to identify two particular entities, the auditor and primary investigating officer, in order to know who the responsible fiduciary parties are within the agency when engaging in the transactions with the county. He explained the hiring of a new staff accountant prompted a renewal of this resolution with the new person's identity specified. Thornsbury stated that apart from this one change, the resolution remains the same as it has been at least as long as he has been with the Agency.

   DeVaney noted questions were raised concerning liability protection for actions taken, actions not taken, and criminal actions and asked Thornsbury to address those issues. Thornsbury replied the hold harmless provision pertains to civil liability and suggested some people may have mistakenly understood this to be some kind of "get out of jail free card" which is not possible. He referred to the suggestion a hold harmless would allow a person to run through traffic lights and noted that would not be possible as it would be a criminal act.

   Thornsbury stated the language used is not universal, but it is also not uncommon when people are functioning in a public role. He explained when a lawsuit is filed, attorneys often include anyone and everyone potentially related to the issue as parties to the suit including key people employed in an agency. Thornsbury noted whether it is or is not legitimate, attorneys often cast a wide net and leave it to the courts to decide who should be included or excluded. He added there are legal costs to those involved until the court resolves the matter and the hold harmless provision protects people who serve in the public sector from the costs of defending themselves for actions taken on behalf of an agency and often at the direction of a board. Thornsbury remarked legal expenses are incurred from the start this obligates an agency to assist so the employee is not unfairly burdened. He also noted in the absence of such protection, it is more difficult to recruit people to work in the public sector if they can be held personally liable every time someone does not like a decision they have or have not made.

   McKinney stated she has been, and is presently, named in several lawsuits and explained the hold harmless language is very common and does not indemnify a person against criminal acts or intent. She added it includes the phrase "to the fullest extent of the law" because there are legal limitations to the protections is provides. McKinney explained when a person takes action as a public servant, if a lawsuit is brought in which they are named as a party, in the absence of this language that person would, as an individual, be required to provide for their own defense until such time as they are found not to have been liable. She added this is despite the fact they were acting in an official capacity and not as an individual and noted the

presence of a hold harmless provision does not mean there is no option for full restitution to be paid in the event harm is found to have occurred, but it is not a financial burden placed on individuals employed by the government. McKinney stated without such protection people would not want to work in a government capacity and added it is not unique to government and is also used in the private sector. She expressed her belief the language is consistent with normal operations and, despite understanding how it could be alarming, that there are laws in place to protect citizens so in the event real harm is done, restitution will be paid.

Deccio concurred and added it is not uncommon for businesses and agencies to have insurance to cover such circumstanced. Thornsbury noted the Agency does have errors and omissions coverage and, were any significant loss to result, insurance would cover the cost.

DeVaney asked if there were any other questions. McKinney moved to adopt Resolution 2024-07. Jones seconded. Motion passed 3-0.

7. **Resolution 2024-08 Voiding Warrants**
DeVaney asked Thornsbury to summarize Resolution 2024-08.

Thornsbury explained the resolution is strictly a housekeeping matter regarding an error where checks written on an Agency account not related to the County were inadvertently transmitted to the County Treasurer as though they were warrants issued against funds held on behalf of the Agency by the County. He added these were entered into the County system as warrants, but because they were not warrants, they will never clear prompting the County Treasurer to request the Agency adopt this resolution so the non-existent warrants can be officially removed from the books.

Deccio moved to adopt Resolution 2024-08. Jones seconded. Motion passed 3-0.

8. **Executive Director's Report**
Thornsbury noted the absence of financial information in the board packet and explained it will return next month and cover the intervening months. He stated a new staff accountant has been hired and he is busy bringing her on board along with a couple of other additional staff. Thornsbury explained the Agency staffing shortage is getting resolved, but it will take several weeks to get the new employees up to speed.

Thornsbury referred to the staff report concerning fees for 2025 and noted staff had concluded a review of classifications implemented last year. He stated a small number of adjustments were made when errors were discovered internally or pointed out by others. Thornsbury noted staff expected inflation to be relatively modest and, taking into account some complicating factors the outcome of which remains unknown, attempted to identify a reasonably likely cost of living adjustment.

Thornsbury explained staff assessed the projected fee revenues for 2025 and concluded, based on the classification adjustments previous noted and the addition of previously

unregistered sources, there will not be a need to increase fees next year as the above will cover the estimated cost of living adjustment (COLA). He added no increase in the supplemental income from the county and cities is expected to be necessary. Thornsbury cautioned this would not likely be repeated in 2026.

DeVaney thanked Thornsbury and inquired if the matter would involve a hearing. Thornsbury replied the fee schedule will come in resolution form at the December meeting and a hearing will be held at that time. McKinney remarked that after two years of fee increases, she is eager to approve no increase in fees. DeVaney concurred.

Thornsbury reminded the Board the Director's Report during the previous meeting described the loss of several staff for various reasons and, at that time, engagement in a recruiting process. He explained that, at present, there is one open position and three other positions have been filled. Thornsbury noted some time will need to be spent onboarding new staff and work is also beginning on an internal process review and improved documentation to make future onboarding easier. He added there are three pressing needs within the Agency and he is evaluating the remaining empty position to determine how best to utilize it and whether it may be able to address more than one need. Thornsbury stated he expects to begin recruitment for the open position in January, but cautioned there is also an upcoming retirement and he is evaluating how the two may overlap, the potential impact, and the possible need to reassign duties as a result.

DeVaney noted there was public comment regarding training of the Agency Public Records Officer. DeVaney stated his belief the comment incorrectly referred to a "public information officer" but was intended to refer to a "public records officer".

Thornsbury affirmed a public information officer is not an official position whereas a public records officer is an appointed position and required under state law. He added there is a training requirement and noted he completed required training sessions in May to the best of his recollection. Thornsbury stated he had also previously served nearly thirteen years as a public records officer in Klickitat County and is familiar with public records requirements. He also noted the Board will need to go through retraining in approximately two years.

9. **Other Business**

Jones reminded the Board of a comment made by McKinney several months ago regarding the possibility of having a YRCAA staff member deliver a report once a quarter regarding their duties, items the Board should be aware of, and/or improvements that could be made to their position. DeVaney and Deccio concurred.

DeVaney inquired if the board would be comfortable putting that on the January agenda. All members agreed. McKinney suggested it start with tenured staff as there are many new staff members.

DeVaney suggested scheduling an update regarding enforcement of existing landfill permits as the matter continues to be questioned and there are multiple jurisdictions with enforcement authority. He added it might be helpful for the Board to have a review of who is responsible for enforcing overlapping permits issued to entities that may also be regulated by the Departments of Health and Ecology that may have primary enforcement authority the Agency does not possess, despite requirements the permittee adhere to the terms of the Agency permit.

McKinney noted she would be delighted to listen, but might be unable to provide comment given her involvement in current litigation. DeVaney remarked that was the purpose for requesting a staff report.

Thornsbury remarked a statement had been made that at a previous meeting McKinney had implied the Board had entered into an executive session to discuss a particular matter and he wished to clarify the matter. Thornsbury explained the statement was made with respect to discussions concerning pending legal litigation where disclosure of that information could be used by other parties to the suit and, therefore, it is exempt under the Open Public Meetings Act and allowed to occur in executive session. He stated he had been present at the meeting and heard McKinney's statement and disagreed with the characterization, noting it is not possible to hold executive sessions in secret. Thornsbury explained executive sessions must be listed on the agenda, the duration must be specified, and members of the public must be allowed to be present for any action after, or as a result of, the executive session. He noted the absence of an agenda item for an executive session is a clear indication one has not taken place.

DeVaney thanked Thornsbury for the clarification, noting he had intended to address the comment made. McKinney added that no actions or decisions can be made in an executive session.

10. **Adjournment**

Deccio moved to adjourn. Jones seconded. Motion passed 3-0. DeVaney adjourned the meeting at 2:48PM.

Jon DeVaney, Chairperson

Jacqueline Meza, Clerk of the Board

Yakima Regional Clean Air Agency

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STAFF REPORT

Date: December 2, 2024
To: YRCAA Board of Directors
From: Marc Thornsbury, Executive Director
Subject: 2025 Fees - **UPDATE**

Summary
After reviewing the COLA implemented for the current fiscal year and the actual versus the anticipated rate of inflation upon which it was calculated, several inflation projections for 2025, national and international events with the potential to significantly affect inflation in 2025, and current revenue projections, **staff recommends increasing the land clearing fee per acre from $9.03 to $9.84 to bring it more in line with the existing fee per ton, adjusting the minimum from $242 to $246 based on the $9.84 rate, and increasing the new source review fee for temporary and portable sources from $150 to $150 plus actual cost to address the higher costs associated with more complicated situations**. No other adjustments are recommended.

Recommendation
Conduct a public hearing at the December meeting and adopt the no-increase fee schedule presented (and based on the information contained herein).

Background
In 2022, the Board commissioned a compensation survey, the results of which were considered at its October, November, and December meetings in that year. The findings contained within the survey report indicated Agency wages were substantially below market levels due to a decade or more with no or minimal adjustments. To address this, the Board substantially increased wages in a two-part process taking place in fiscal years (FY) 2023-24 and 2024-25. To fund these increases, in calendar years (CY) 2023 and 2024, the Board substantially increased Agency fees that, similar to wages, had seen only minimal adjustments in the prior decade.

In conjunction with the adjustments made, the Board stated its desire to abandon the largely flat registration fees then in place in favor of a structure that assessed such fees on a scale determined by the source with an initial concept proposed and adopted by the Board in 2023. At that time the Board stated its desire to avoid the need for large adjustments in the future and staff recommended the use of an annual cost-of-living adjustment (COLA) between compensation surveys.

For FY 2024-25, and in addition to the second part of the wage adjustment previously adopted, a COLA of four and one-half percent (4.50%) was implemented to account for market changes since the compensation survey of September 2022.

Determining an appropriate annual COLA and fee adjustment is challenging due, in large part, to adoption of the latter at the start of the calendar year (January) while the budget—including any

COLA—is adopted a minimum of six months later at the start of the fiscal year (July). Thus, a one and one-half year gap exists between when a fee structure must be adopted and the last month covered by the budget and COLA funded by it. Finally, at the time fees must be adopted, the most current Consumer Price Index data available is for September, making the data upon which an estimated COLA is partially based nine months old by the time it is implemented.

Analysis

Over the period of September 2022 through September 2023, the actual inflation rate was three and seven-tenths percent (3.70%) while the anticipated rate used to calculate the COLA was four and one-half (4.50%), leaving a difference of eight-tenths of one percent (0.80%).

Staff currently estimates inflation through June 30, 2026, at two and eight tenths percent (2.80%) based on an assessment that included the following:

- The Congressional Budget Office (www.cbo.gov/publication/59431) projects a 2025 inflation rate of 2.2% based on current conditions;
- Statista (www.statista.com/statistics/244983/projected-inflation-rate-in-the-united-states) projects a 2025 inflation rate of 2.0% based on current conditions;
- The Federal Reserve of Philadelphia (www.philadelphiafed.org/surveys-and-data/real-time-data-research/survey-of-professional-forecasters) projects a 2025 inflation rate of 2.4% based on current conditions;
- The Bureau of Labor Statistics (BLS) reports the September 2023 through September 2024 inflation rate as 2.44% (as of the date of this report);
- The BLS (www.bls.gov/charts/consumer-price-index/consumer-price-index-by-category-line-chart.htm) shows the inflation rate generally leveled off in 2023 and 2024;
- There is considerable risk hostilities in the Middle East could expand into a regional conflict and this would likely trigger a significant increase in oil prices—a key driver of inflation;
- There is moderate risk current dock worker labor contract negotiations might collapse resulting in resumption of the strike currently suspended until January 15, 2025. Were a strike to occur, it would result in a substantial increase in consumer goods prices—a key driver of inflation; and
- There is significant risk the incoming administration at the federal level will implement various tariffs and these would serve to increase consumer goods prices—a key driver of inflation (though the impact would be dependent upon the breadth and extent of such tariffs). **Estimates of the potential inflationary impact range from a one percent (1%) to a five percent (5%) increase above the current rate.**

Taking the above into account, staff considers it reasonable a COLA of two percent (2%)—comprised of a potential inflation rate of two and eight-tenths percent (2.80%) less the eight-tenths of one percent covered by the prior COLA.

A similar increase is also anticipated in related expenses that are calculated based on wages paid including Medicare, unemployment, the Public Employees Retirement System (PERS), etc.

The cost for health insurance in 2025 is expected to increase approximately six and twenty-six hundredths percent (6.26%) over 2024. Property and casualty insurance expense in 2025 is

expected to increase twelve and thirty-nine hundredths percent (12.39%) over 2024. Other increases such as Workers' Compensation are not currently known or estimated.

As described during adoption of the new classification-based registration fee structure last year, staff reviewed the initial classifications assigned in response to errors or incorrect information brought to the attention of the Agency and, later, as part of a broad audit to ensure the classifications assigned were correct. The result was the reclassification of twenty-three (23) registrants (or 6%) where a mistake had been made or the classification was found to be based on erroneous information.

Seventeen businesses were added bringing the total number of registered sources to 396 and staff continue to work toward ensuring all sources within the Agency service area are registered and properly permitted. By ensuring all operations subject to registration are identified, the financial burden of registration is spread across a larger number of companies, reducing the cost on an individual basis and ensuring no firm is forced to carry more than their fair share. Modest increases in population (upon which supplemental income revenues are calculated) are also anticipated in 2025.

After reviewing the anticipated costs and revenues described above, **staff recommends increasing the land clearing fee per acre from $9.03 to $9.84 to bring it more in line with the existing fee per ton, adjusting the minimum from $242 to $246 based on the $9.84 rate, and increasing the new source review fee for temporary and portable sources from $150 to $150 plus actual cost to address the higher costs associated with more complicated situations.** No other fee increase is necessary and annual registration fees are shown below.

	2023			2024			Proposed 2025			
Type	Count	Rate	Revenue	Count	Rate	Revenue	**Count**	**Chg.**	**Rate**	**Revenue**
Minor	349	$ 639	$ 223,011							
Class 0				1	$ 236	$ 236	10	0%	$ 236	$ 2,360
Class 1				3	292	877	3	0%	292	877
Class 2				21	387	8,127	16	0%	387	6,192
Class 3				71	547	38,823	53	0%	547	28,981
Class 4				187	816	152,622	190	0%	816	155,070
Class 5				50	1,270	63.511	66	0%	1,270	83,834
Complex Minor	24	1,812	43,488							
Class 6				33	2,036	67,176	40	0%	2,036	81,425
Class 7				4	3,326	13,304	8	0%	3,326	26,607
Class 8				1	5,501	5,501	1	0%	5,501	5,501
Class 9				0	9,168	-	1	0%	9,168	9,168
Class 10				0	15,348	-	0	0%	15,348	-
Synthetic	8	3,749	26,243	8	4,949	37,190	8	0%	4,949	37,190
Total	349		$ 292,742	379		$ 387,366	396			**$ 437,205**
Net Increase						$ 94,624				$ 49,839

Yakima Regional Clean Air Agency
RESOLUTION NO. 2024-09

A Resolution of the Board of Directors
Adopting a Fee Schedule for 2025

WHEREAS, the Board of Directors has authorized the Executive Director to adjust fees annually based on a cost and revenue analysis; and

WHEREAS, the Board of Directors has deemed it necessary to annually adopt minor adjustments to Agency fess in support of an annual cost-of-living adjustment (COLA) to ensure the Agency is able to recruit and retain qualified staff; and

WHEREAS, staff estimate the COLA necessary to compensate for inflation and maintain parity with market wages during FY 2025-26 at two percent (2%) based on a review of various factors including: (a) the inflation rate between September 2022 and the most recent date for which data is currently available; (b) the COLA adopted for the 2024-25 budget; (c) inflation projections for the period covered by fiscal year 2025-26 issued by the Congressional Budget Office, Federal Reserve, and other sources; and (d) various national and global risks with the potential to affect inflation during FY 2025-26; and

WHEREAS, after considering the anticipated COLA set forth above, estimated increases in health, property, and casualty insurance premiums, and the impact on projected revenue of reclassifying six percent (6%) of registered sources, an increase of four and one-half percent (4.5%) in the number of registered sources, and a modest increase in the population of the county as estimated by the Wash. Office of Financial Management, staff conclude the projected FY 2025-26 increase in revenue will equal or exceed the projected increase in expenses; and

WHEREAS, YRCAA Regulation 1 Section 2.02(D)(1) requires fee schedules to be adopted by board resolution;

NOW THEREFORE, BE IT RESOLVED, that the Board does hereby approve and adopt the fee schedule set forth below and authorizes the Executive Director to implement the same for the calendar year 2025.

1. Registration Fee (annual):

Class 0 minor	$236	Class 6 minor	$2,036
Class 1 minor	$292	Class 7 minor	$3,326
Class 2 minor	$387	Class 8 minor	$5,501
Class 3 minor	$547	Class 9 minor	$9,168
Class 4 minor	$816	Class 10 minor	$15,348
Class 5 minor	$1,270	Synthetic minor	$4,949

2. Burn Permit:

Residential (annual)	$55		
Agricultural (per ton)	$1	Minimum (80 tons)	$80
Agricultural (per acre)	$3.75	Minimum (10 acres)	$37.50
Land Clearing (per ton)	$2.42	Minimum (10 tons)	$242
Land Clearing (per acre)	$9.84	Minimum (25 acres)	$246
Conditional (per ton)	$2.42	Minimum (10 tones)	$242
Fire training (per event)	$242		

3. Dust Plan:

Master or project	$370	Site notification (per site)	$170

4. Demolition and Asbestos:

0-10 LF / 0-48 SF	$45	Owner-occupied	$80
11-260 LF / 49-160 SF	$100	Commercial roof	$214
261-999 LF / 161-4,999 SF	$205	Annual notice	$435
1K-10K LF / 5K-50K SF	$495	Emergency notice	$155
>10K LF / >50K SF	$1,190	Revision	$40

5. New Source Review:

Stationary	$400	plus actual cost
Temporary or portable	$150	plus actual cost

6. Air Operating Permit $0 plus actual annual cost

7. Regulatory Order $400 plus actual cost

8. General Permit $400 plus actual cost

9. SEPA Review $400 plus actual cost

10. Public Records:

Paper copy	$0.15	per page
Scanned copy	$0.10	per page
Electronic file	$0.05	per four files
Electronic delivery	$0.10	per gigabyte
Postal/Other delivery	$0	plus actual cost
Mailing materials	$0	plus actual cost
Flash/Portable drive (per dev)	$0	plus actual cost
Customized service	$0	plus actual cost

ADOPTED IN OPEN SESSION this 12th day of December, 2024.

Jon DeVaney, Chairperson

Janice Deccio, Director

Amanda McKinney, Director

Jose Trevino, Director

Steven Jones, Ph.D., Director

ATTEST:

Jacqueline Meza, Clerk of the Board

Yakima Regional
Clean Air Agency

186 Iron Horse Court, Suite 101
Yakima, WA 98901-1468
509-834-2050
www.yakimacleanair.org

2023-2025 Biennium Wood Smoke Reduction Grant Report

November 22, 2024

Board of Directors YRCAA

Distinguished Board Members:

The agency received grant funding in the sum of $1,250,000.00 though the Wood Smoke Reduction Grant for the wood smoke reduction program 2023-2025 biennium. The grant agreement was executed on November 14, 2023, and work began to achieve the goals outlined in the grant.

Short description and Goals:

$937,500.00 has been allocated for the replacement and/or recycling of pre 2020 non- compliant devices.

$250,000.00 has been allocated for the administration of the grant over the biennium.

$62,500.00 has been allocated for the promotion of this project.

The agency will use the funds allocated to remove approx. 222 uncertified/pre-2020 standard Solid Fuel Burning Devices (SFBDs) using a three-part approach.

Part I, low income replacement will remove and recycle approx. 95 SFBDs used by low income residents burning at least 2 cords of wood or 1.5 tons of pellets per year.

Part II, rebate, will remove/recycle approximately 90 SFBDs via a rebate program.

Part III, bounty, will use a drop-off program to remove/recycle approximately. 38 SFBDs.

Results:

Part I, low income, as of the date the of this report the agency has provided assistance for the removal and replacement of 105 pre 2014 solid fuel burning devices with new cleaner burning or electrical devices for low income households throughout Yakima County with 73 change outs in the Upper Yakima County and 32 change outs in the Lower Yakima County.

Of the105 replacement devices provided the new devices installed were as follows:

Upper Yakima County	Lower Yakima County
27 certified wood burning devices,	17 certified wood burning devices,
31 certified pellet devices,	7 certified pellet devices,
6 gas devices,	1 gas devices,
9 electrical devices,	7 electrical devices,

The total funding spent for Part I, of this project totals $759,892.47 there are currently five change-outs in process and ten households on a wait list.

Part II, Rebate, the agency has aided residences, not eligible for Part I, with grant funding for the replacement of pre 2020 non-compliant devices though the rebate program. The agency has provided rebates to 68 households throughout Yakima County with 52 change outs in Upper Yakima County and 16 change outs in Lower Yakima County. Of the 68 replacement devices provided the new devices installed were as follows;

Upper Yakima County	Lower Yakima County
18 certified wood burning devices,	9 certified wood burning devices,
20 certified pellet devices,	5 certified pellet devices,
10 gas devices	1 gas devices
4 electrical devices	1 electrical devices

The total funding spent for Part II, of this project totals $126,150.00 currently there are three rebates in process and 4 households on a wait list.

Part III, Bounty, this program has provided funding for the removal/recycle without replacement of 41 wood burning devices that will no longer be in service. The total funding spent for Part III, of this project totals $12,600.00.

The agency uses two third party qualifiers for qualifying households for the low-income program. Opportunities Industrialization Center (OIC) provides qualifying services to the upper county and Northwest Community Action Center (NCAC) provides qualifying services to the lower county. Each qualification appointment has a cost of $50.00 for a total of $5,250.00 taken from grant funding Part I.

Total funding spent on replacement and or recycle programs to date is $903,892.47 with 214 pre 2020 non-compliant devices removed from service. Five low income and three rebate projects are in process with a projected maximum expenditure of $45,800.00 which would put the total at $949,692.47 an overage of $12,192.47.

The agency has used $29,978.00 of the promotion budget leaving a balance of $32,522.00 to cover the above overage and also leaving $20,329.53 in the promotion budget that will be used

for households on the wait lists. The grant allows the agency to shift funding between tasks up to 10% of the total grant award without amendment.

With a total of 214 pre 2020 non-compliant devices already replaced and/or recycled and eight projects still in process the agency will have achieved our goal of 222 devices removed from service. This will result in improved air quality for residents of the area by removing approximately 42.18 tons of PM2.5 per year. It will also provide to families—and particularly low-income families that would otherwise be unable to secure them—the benefits of cleaner and safer devices for home heating and improved indoor air quality.

With wait lists for both low income and rebates the agency has requested additional grant funding from the Washington State Department of Ecology and that request has been acknowledged.

Respectfully:

Mark Edler
Wood Smoke Reduction Grant
Program Manager

Yakima Regional Clean Air Agency

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Executive Memorandum

Date of Release:	December 5, 2024
Date of Consideration:	December 12, 2024
To:	Honorable YRCAA Board of Directors and Alternates
From:	Office of Engineering and Planning Division
Subject:	November's Compliance, Engineering and Planning Division Report

Issue:
Monthly activities report to the Board of Directors of YRCAA.

Discussion:
The following summarizes some of the activities for the month of November including some additional related information:

- Issued one New Source Reviews (NSR) Order of Approval permit;
- Working on NSR permits;
- Reviewed/responded to 21 SEPA's projects;
- Working on Title V program;
- Issued 3 agricultural burn permits;
- Reviewed/approved 5 Notifications of Demolition / Renovation (NODR);
- Worked on the daily weather forecasts for the burn status and agricultural bun allocation;
- Called one burn ban (stage 1) in November. Started November 30, 2024 through December 4, 2024.
- Issued 4 Dust Control Plans (DCP);
- We expect no exceedances for the month of November as shown in the graphs below;
- Working on several permitting and compliance issues;
- Working with industry, technical assistance and permitting;
- We collected and shipped for analysis approximately 15 air monitoring samples, completed 6 Quality Control (QC) checks on 5 air monitors. Received 10 complaints, issued two Notices of Penalty (NOP). Had 7 inspections for the month of November;

The following Table itemizes, by type, the number of complaints received and the number of NOV's issued, for the month of November 2024:

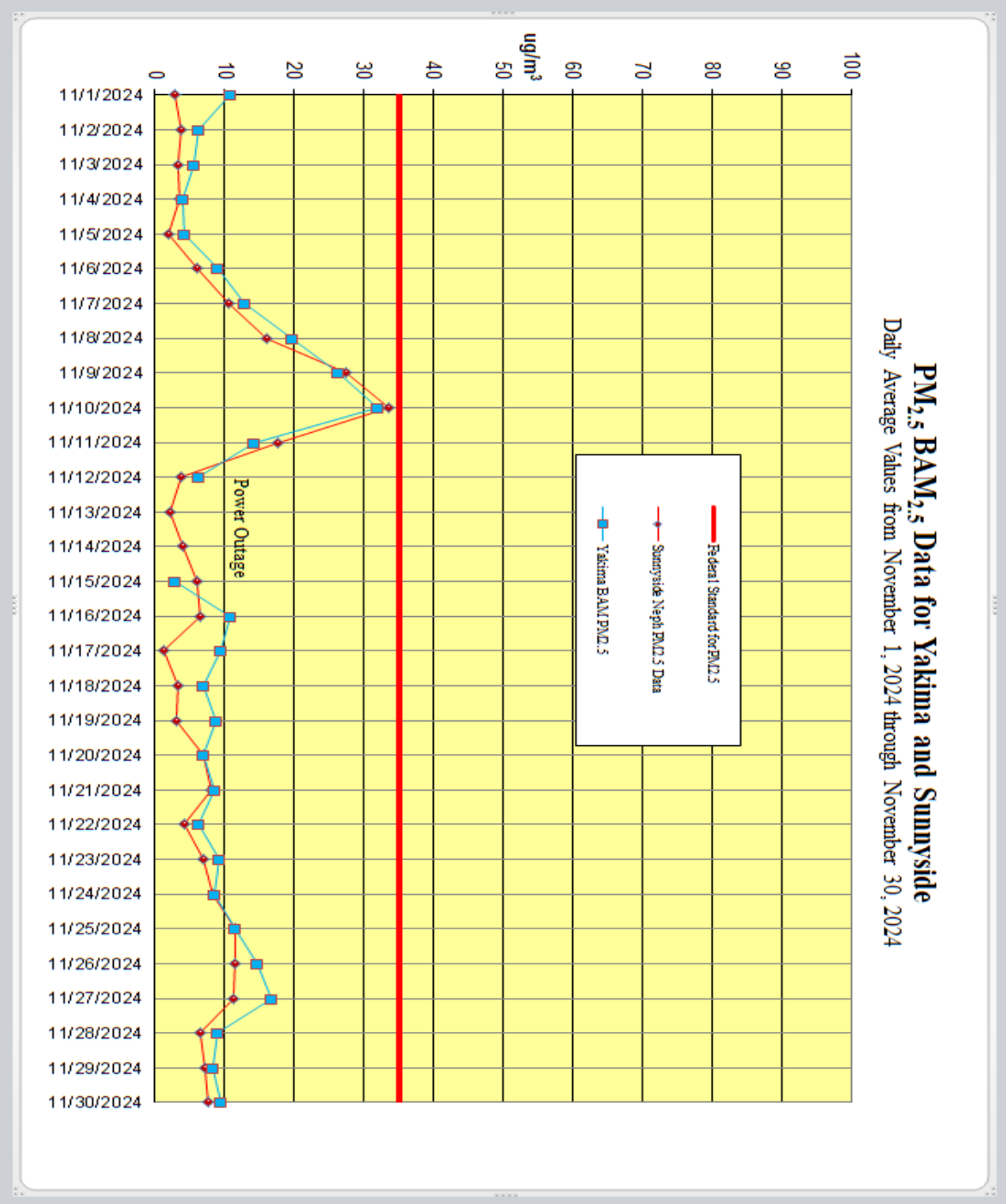
Type of Complaint	Number of Complains	Number of NOV's*	Number of AOD's**
Residential Burning	8		2
Agricultural Burning			
Other Burning and SFBD***	1		
Fugitive / Construction Dust			
Agricultural Dust			
Agricultural Odor			
Other Dust			
Surface Coating			
Odor	1		
Asbestos			
Others and NSR****			
Registration			
Industrial Sources			
TOTALS	**10**	**7**	**2**

* NOV- Notice of Violation
** AOD- Assurance of Discontinues
*** Solid Fuel Burning Device **** New Source Review

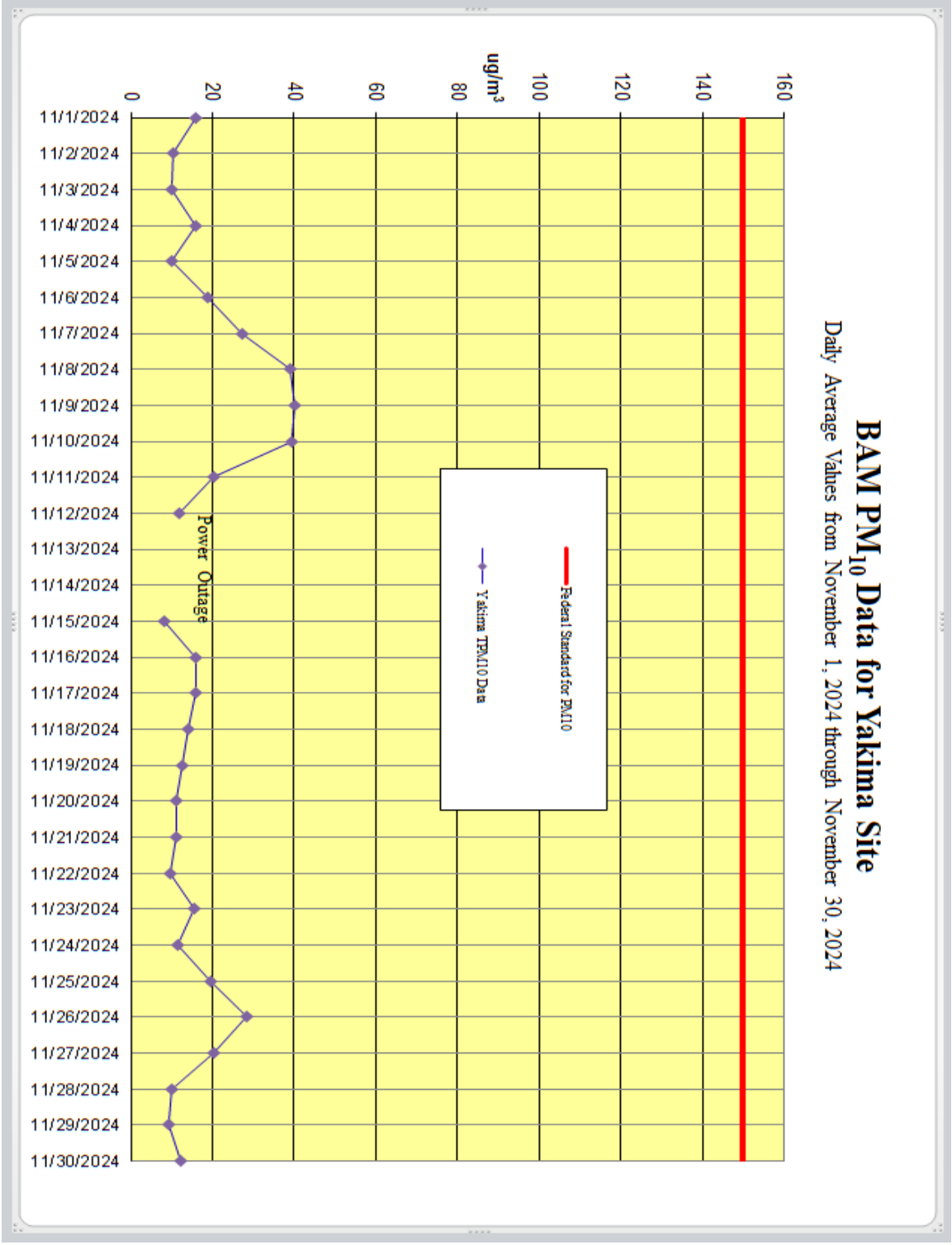
Attachments:

- ✓ *$PM_{2.5}$ Monitor Data for the month of November 2024 and the annual graphs.*
- ✓ *PM_{10} Monitor Data for the month of November 2024.*

- **$PM_{2.5}$ Data**
- We expect no $PM_{2.5}$ exceedances for the month of November.



- **PM_{10}**
- We expect no PM_{10} exceedance for the month of November.


BAM PM10 Data for Yakima Site
Daily Average Values from November 1, 2024 through November 30, 2024
ug/m3
0
20
40
60
80
100
120
140
160
11/1/2024
11/2/2024
11/3/2024
11/4/2024
11/5/2024
11/6/2024
11/7/2024
11/8/2024
11/9/2024
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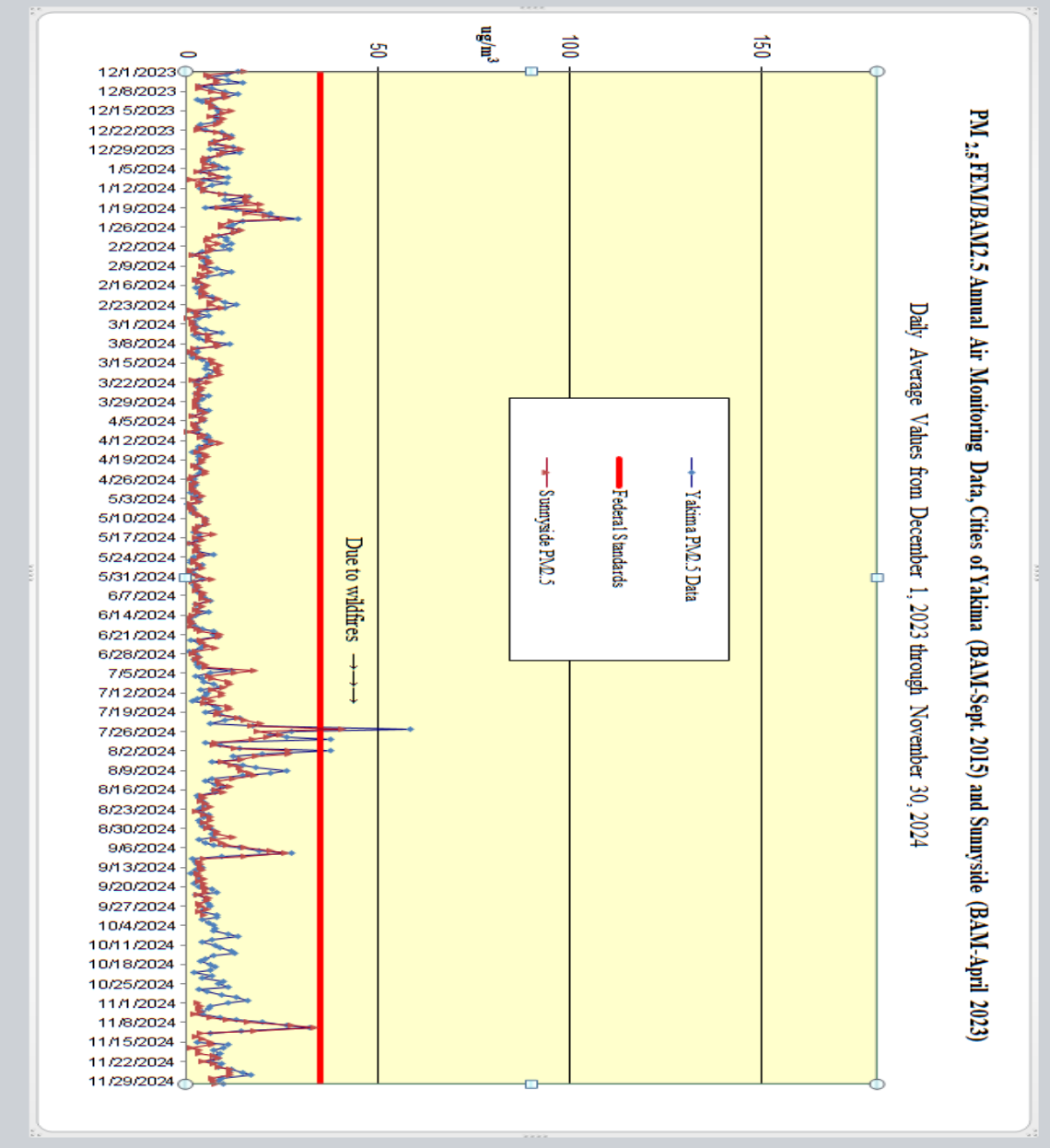
11/24/2024
11/25/2024
11/26/2024
11/27/2024
11/28/2024
11/29/2024
11/30/2024
Power Outage
Federal Standard for PM10
Yakima TEM10 Data

- **Annual PM2.5 Data**

- Annual PM2.5 for Yakima and Sunnyside monitors for the specified periods.



Date of Release: December 5, 2024
Date of Consideration: December 12, 2024
To: Honorable YRCAA Board of Directors and Alternates
From: Office of the Executive Director
Subject: Monthly Activity Report

Activity	FY24 Total	*Current Quarter* Sept. FY25	Oct. FY25	Nov. FY25	FY25 Total to Date
Minor Source Inspections	85	1	7	7	15
Complaints Received	189	8	11	10	29
NOVs Issued	35	1	0	7	8
AODs Issued	7	0		2	2
Warning Notices Issued	7	1		0	1
NOPs Issued	12	0	1	2	3
SEPA Reviews	263	18	23	21	62
AOP Applications Received	1	0	0	0	0
AOPs Issued or Renewed	2	0	0	0	0
Deviations/Upsets Reported	18	1	1	1	3
AOP Inspections	0	0	0	0	0
Public Workshops	2	0	0	0	0
Media Events	2	0	0	0	0
Media Contacts	3	0	0	0	0
Education Outreach Events	2	0	0	0	0
Sources Registered	240	0	0	0	0
NSR Applications Received	12	1	1	1	3
NSR Approvals Issued-Permanent	10	1	0	1	2
NODRs Received	117	5	14	5	24
Agricultural Burn Permits Issued	41	2	1	3	6
Conditional Use Permits Issued	7	0	1	0	1
Residential Burn Permits Issued	764	0	16	0	16
Burn Ban Days	16	0	0	1	1
Public Records Requests Fulfilled	21	2	3	8	13

Acronyms:

AOP - Air Operating Permit; **NODR** - Notification of Demolition and Renovation; **NOP** - Notice of Penalty; **NOV** - Notice of Violation; **NSR** - New Source Review; **SEPA** - State Environmental Policy Act

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF ROCKY TOP (FORT); NANCY LUST and CAROLE DeGRAVE Appellants, v. YAKIMA REGIONAL CLEAN AIR AGENCY and DTG ENTERPRISES INC., dba DTG RECYCLE - YAKIMA Respondents.	PCHB No. 24-021 SECOND AMENDED PREHEARING ORDER

On November 5, 2024, the Pollution Control Hearings Board (Board) received the parties' stipulated motion for revised briefing schedule for dispositive motions. Therin, the parties stipulate that this matter presents legal issues that they believe are amenable to cross-motions for summary judgment and request entry of a revised briefing schedule to accommodate the parties' schedules. The Board finds good cause to GRANT the request.

ORDER

It is ORDERED that the Prehearing Order is amended to allow briefing on cross-motions for summary judgment as follows:

- Responses to Motions for Summary Judgment shall be filed and served no later than **December 30, 2024**;
- Replies on Motions for Summary Judgment shall be filed and served no later than **January 13, 2025**; and

- Deadlines for depositions to be conducted shall be extended until **January 31, 2025**.

Except as amended above, the Prehearing Order shall remain in effect and shall govern the proceedings, unless subsequently modified by order of the Board for good cause upon a party's motion, or at the discretion of the Presiding Officer or the Board.

SO ORDERED this 15th day of November, 2024.

POLLUTION CONTROL HEARINGS BOARD

CHRISTOPHER G. SWANSON, Presiding Officer
Board Member

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' MOTION FOR SUMMARY JUDGMENT

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Friends of Rocky Top and its representative members Nancy Lust and Carole DeGrave, move this Pollution Control Hearings Board ("Board" or "PCHB") for summary judgment on Issues 4 through 8 as more particularly set forth in the Board's *Amended Prehearing Order.*

I. INTRODUCTION

Friends of Rocky Top ("Fort" or "Petitioner") have appealed Yakima Regional Clean Air Agency's issuance of an *after-the-fact* air quality permit to DTG Enterprises, Inc. d/b/a DTG Recycle ("DTG Recycle") that establishes a new stationary source of air emissions for an integrated commercial landfill and mining facility located at 41 Rocky Top Road, Yakima, Washington. ("Rocky Top Landfill"). On March 8, 2024, Yakima Regional Clean Air Agency ("YRCAA") issued *Order of Approval Permit Number NSRP-03-DTGEI-22 ("NSR Permit Approval").* ***Attachment A.*** FORT filed a timely appeal with the Board. FORT's appeal focuses on YRCAA's failure to comply with State Environmental Policy Act ("SEPA") requirements related to the proposal.

By way of background, Anderson Rock and Demolition Pits developed an integrated commercial business over nearly four decades that included a limited purpose landfill (LPL), petroleum contaminated soil remediation facility, material recycling facility (MRF), and a mining and processing operation. Rocky Top landfill has a long history of environmental and operational issues. DTG Recycle purchased the integrated business in 2019. ***Attachment A.***[1] Despite nearly forty (40) years of operation, neither Anderson nor DTG Recycle had applied for or received a New Source Review (NSR) permit from Yakima Regional Clean Air Agency (YRCAA).

YRCAA is an activated pollution control authority established under the Washington Clean Air Act (RCW Ch. 70A.15) empowered to monitor and enforce emission standards for air pollutants, and to review and approve new sources of air pollution. Each stationary source of air emissions is subject to state and federal processes governing new source review of operational facilities. RCW 70A.15.2210, WAC 173-400-700 through WAC 173-400-830. The new source review also requires compliance with the State Environmental Policy Act (SEPA). Review of a NSR application is to be based upon a complete application which includes the following:

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

Cedar Grove Composting, Inc. v. Puget Sount Clean Air Agency, PCHB No. 19-014c, 2021 WL 4432571 *4 (July 7, 2021). YRCAA requires the following with all New Source Review Applications:

> All applications need to be accompanied with a completed SEPA checklist or SEPA determination. YRCAA may process the SEPA determination, if no other agency has done it. In this case a SEPA checklist with proper fees must submitted with the NSR application.

Cave Decl. Exh. 1. Despite these clear requirements, YRCAA ignored SEPA in the review of DTG's NSR application. No SEPA checklist; no threshold determination; no adoption of existing environmental documents; no lead agency; nothing.

This is a troubled and hazardous environmental site. FORT members have suffered the consequences of regulatory oversight and neglect. And the concerns are real. At the heart of the site are subsurface fires releasing toxic emissions that exceed Model Toxic Control Act (MTCA) standards, groundwater is threatened and the shrub-steppe environment destroyed. There is reason for concern.

The facts are uncontroverted. FORT and YRCAA are filing cross-motion for summary judgment. This case is ripe for resolution. Either YRCAA needs to comply with SEPA or it can be allowed to ignore SEPA.

II. FACTUAL BACKGROUND

2.1 Historic Permitting and Operation of Anderson Rock & Demolition Pits Landfill and Mining Operations.

[1] The "owner or operator" of the "facility" is East Mountain Investments, LLC, a Washington limited liability company. East Mountain Investments was formed on August 19, 2019 in conjunction with the acquisition of Anderson Rock & Demolition Pits on November 1, 2019.

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(a) Anderson Rock development of integrated landfill and mining operations. Anderson Rock & Demolition Pits began development of Rocky Top in 1988 with a modest special use permit authorizing surface mining of a 10-acre parcel. The mining operation expanded with a permit authorizing an asphalt plant and increased mining authority.[2] (*Cave Decl. Exh. 7 (SPU-29-92).* All permits were issued by Yakima County.

In 1989, Anderson expanded the operation to include a Construction & Demolition Landfill (CDL). Landfills were originally permitted by Department of Ecology. Through this process, Anderson established both the CDL landfill as well as a 15-acre site for remediation of petroleum contaminated soils. Yakima County authorized unlined demolition pits covered with remediated contaminated soils. It was subsequently learned that the PCS site had received highly toxic PFAs soils from Yakima Firing Center.

Authority to regulate landfills was subsequently transferred to Yakima Health District which issued permits for operation of a limited purpose landfill (LPL) on the site. With regulatory changes, the landfill was converted to a Limited Purpose Landfill (LPL) in 2008.[3] The LPL facility covered 61-acres of the site together with the 15-acre site for petroleum contaminated soil remediation. Mining operations continued with such excavation providing the site for landfill deposits. None of these activities were reviewed or permitted under applicable federal or state air quality regulations.

In 2015, Anderson applied for an expansion of the existing landfill to provide an additional 64-acres of disposal on property lying south of the existing landfill operations. The expansion was reviewed and approved by Yakima County Planning Department in 2015. The

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[2] In reviewing the history of Anderson's operations, Yakima County issued a special property use permit on July 18, 1983 to Ron Anderson for a 10-acre surface mining operation. (SPU-27-183; Permit #675), with expiration set for December 31, 2003. A second special use permit was issued in 1987, allowing the establishment of an asphalt plant and increasing the amount of material mined annually (SPU-21-87; Permit #906).

[3] In 1988-89, state and local agencies approved disposal of demolition waste in the Anderson Site unlined surface mining pits located near the intersection of Summitview Extension Road and Rocky Top Road. Yakima County approved Anderson's unlined-15-acre Petroleum Contaminated Soil (PCS) remediation facility (SPU 41-91) and added sanitary landfill disposal in 1992 (SPU-29-92). The demolition pits were allowed to be covered with remediated PCS. During this period, Anderson accepted 743 cubic yards of PFAS contaminated soil in 2004 for remediation and landfill use and/or disposal. It was during this time (1989-1990) that Department of Ecology (Ecology) transferred solid waste facility permit and enforcement authority to local agencies (Yakima County and Yakima Health District).

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land use application included a SEPA Checklist, Mitigated Determination of Nonsignificance, (MDNS), and Hearing Examiner approval. *Cave Decl. Exhs. 15-17.*

The current operation areas are shown below:

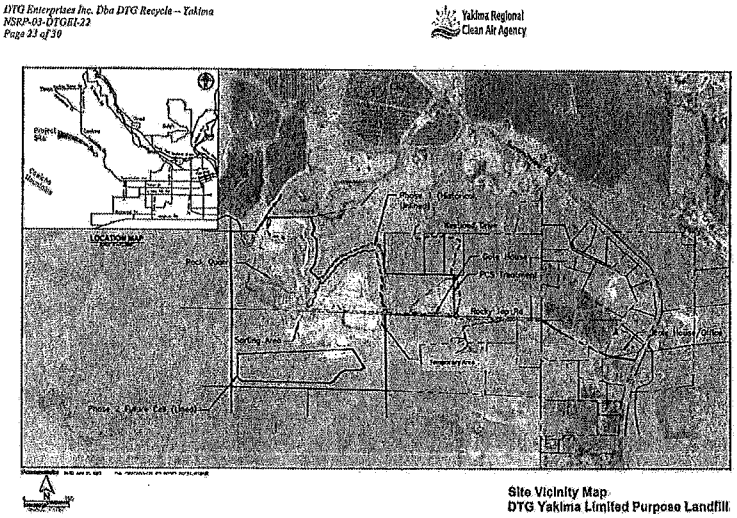

Figure 1: Site Vicinity Map submitted by the Permittee showing Phase 1 (Cell #1), Phase 2 (Cell #2-under construction), Rock Quarry area, Temporary area and old PCS Treatment area.

Attachment B. The site includes Cell 1 (the original 61 acre landfill); Cell 2 (the 2015 landfill expansion area); the 15-acre PCS site; and the MTCA site located within Cell 1. *NSR Permit Approval ¶1.2*

(b) Current status of the property and operations. Mining and processing activities have continued and increased in size within Cell 1. DTG Recycle ceased accepting Petroleum Contaminated Soil (PCS) on November 16, 2021. *NSR Permit Approval ¶1.11.* PCS remediation responsibilities continue, however, with increased concerns raised by Department of Ecology relating to deposits of highly toxic PFAs material from Yakima Firing Center. YRCAA excluded the PSC site from review and consideration in the *NSR* review process.

Landfill gas emissions were discovered, as a result of neighbor reports, in a portion of the landfill on the west slope of Phase 1. *NSR Permit Approval ¶1.4 and ¶1.5.* The cause of toxic air emissions was a subsurface fire. The emissions were determined to exceed levels established by Model Toxic Control Act (MTCA) and operations are currently subject to an Agreed Order (AO) administered by Ecology. *Id.* The subsurface fire was caused by landfill

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deposits and operations. Despite the clear linkage to landfill operations, YRCAA excluded the MTCA site from any environmental assessment in conjunction with the NSR review process.

Yakima Health District (YHD) did not renew the facility's permit for operation of a limited purpose landfill and material recycling facility which expired on June 30, 2023. *NSR Approval* ¶*1.8.*

> The YHD did not renew the Facility's permit which expired on June 30, 2023. Hence, the Facility is currently not accepting demolition waste until all requirements are met by the Facility as indicated in the YHD letter dated June 27th, 2023. This letter states that DTG must cease accepting all solid waste effective on July 1, 2023, until all required conditions are approved by the YHD. The YRCAA office could not find the original permit for the Facility, if any issued. Thus, this expansion for Phase #2/Cell #2, the MRF Wood Chipper/Grinder and the Crushed Rock Exploration are subject to NSR requirements and considered after-the-fact.

NSR Approval ¶*1.8.* As of this date, the limited purpose landfill lacks an operating permit from Yakima Health District.

2.2 YRCAA Review and Determinations on DTG Recycle Application for NSR Review and Operating Permit.

(a) Overview of *NSR Application* and scope of review. DTG submitted a New Source Review (NSR) application to YRCAA for an "after-the-fact" permit for the limited purpose landfill and material recovery facility. The Rocky Topy Landfill operations were determined to be a "new source of air contaminants requiring a NSR permit pursuant to RCW 70A.15.2210 and WAC 173-400-110, 173-460-040." *NSR Permit Approval* ¶*1.12.* The application was an "after-the-fact" application since Anderson and DTG Recycle had operated the facility for more than three decades without the required permit. The operation was described as follows:

> This Facility is a Limited Purpose Landfill (LPL) and has been operating under a Yakima Health District (YHD) permit prior and after its purchase by DTG on November 1, 2019. Phase #1 which is also called Cell #1 began filling while the Facility was under Anderson's ownership and completed filling of the cell under DTG's ownership (around December of 2022). The Facility submitted a New

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> Source Review (NSR) application for expansion to Phase #2 which is also called cell [sic] #2 of LPL operations including a materials recovery facility (MRF), a wood chipper/grinder and Crushed Rock exportation as part of the LPL operations.

Cave Decl. Exh. 2. Excluded from the application are areas of petroleum contaminated soils, rock crushing and mining excavation, and landfill fire site (within Phase 1) that is subject to MTCA enforcement actions. This initial application was expanded when YRCAA requested that Phase #1/Cell #1 be included so that Hydrogen Sulfide (H2S) emissions from this cell could be "...included in this NSR Order of Approval (Order/Permit) as YRCAA could not find the original permit, if any." *Id.*

(b) Review and compliance with State Environmental Policy ACT (SEPA). New Source review permits are subject to SEPA review requirements. YRCAA application policies require submittal of a SEPA Checklist and certification of compliance with SEPA processes and procedures. An applicant is required to provide the following the an NSR permit application.

> All applications need to be accompanied with a completed SEPA checklist or SEPA determination. YRCAA may process the SEPA determination, if no other agency has done it. In this case a SEPA checklist with the proper fees must be submitted with the NSR application.

NSR Application Appendix A. ***Attachment C.*** DTG Recycle did not submit a SEPA Checklist. A checklist would have included a site specific disclosure of all operational aspects of the integrated landfill and mining operations. "Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action *shall be* evaluated in the same environmental document." WAC 197-11-060(3)(b). The administrative record contains no SEPA Checklist for the proposal.

The *NSR Application* also requires *certification* from a governmental agency "...that the SEPA has been satisfied or the project is exempt:...."[4] DTG Recycle submitted only the following:

[4] In addition to the certification requirement, DTG represented to YRCAA and the public as follows:

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Compliance with SEPA (State Environmental Policy Act) - Check One of the Options Below:

- ☒ A DNS or EIS has been Issued by Another Agency for this Project and a Copy is Attached.
- ☐ If no DNS or EIS Exists for this Project, a Completed Checklist for this Project and the SEPA Processing Fee are Attached. *YRCAA SEPA checklist is available by phone, or by our website.*
- ☐ The city/county has established an exemption for this project.
- ☒ I certify that the SEPA has been satisfied or this project is exempt:

April 29, 2009 *Date* by Gary M. Cuillier, Hearing Examiner, Yakima County (File No. CUP 08-074) *Government Agency*

Previous NSR/Air Permits Number issued by YRCAA for the Facility, if any

Describe Input to Output Process (Attach drawings, schematics, prints, or block diagrams) DTG currently operates a surface mine, PCS treatment facility, and a 125-acre LPL site licensed under Yakima Health District and Department of Ecology.

NSR Application Appendix A. While DTG Recycle checked the box that "...I certify that the SEPA has been satisfied or this project is exempt...", the *NSR Application* does not include the required signature from the governmental agency. The application simply inserts the name of Gary M. Cuillier, Hearing Examiner, Yakima County (File No. CUP 08-074) with a date of April 29, 2009. No documentation was provided with respect to environmental review under CUP 08-074.

DTG Recyclee did attach in Appendix C to its Application, two remote environmental documents:

- Determination of Nonsignificance issued by Yakima County SEPA Responsible Official on Anderson proposal to "...[r]emediate petroleum contaminated soil at a fifteen-acre site adjacent to an existing remediation facility." (File No.: ER-43-1992). This DNS applies to the original PCS facility. YRCAA arbitrarily excluded the PCS Facility from the NSR permit.

- Determination of Non-Significance issued by Yakima County SEPA Responsible Official on September 9, 2015 for "...request to expand the existing limited purpose landfill (LPL) by 64 acres for a total area of approximately 125 acres. The

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All applications need to be accompanied with a completed SEPA Checklist or SEPA determination. YRCAA may process the SEPA determination, if no other agency has done it. In this case a SEPA checklist with the proper fees must be submitted with the NSR application.

DTG did not submit a SEPA Checklist for the current or any prior land use application.

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> environmental determination related to the expansion area and itemized the list of accepted waste types as follows:
>
> The types of waste accepted at the LPL are: cured concrete, asphaltic materials, brick and masonry, ceramic materials, glass, stainless steel, aluminum, lime, dirt and rock, CDL (construction, demolition, and land clearing) debris, wood waste, ash, and dredge spoils. All other types of waste, including liquid waste, is prohibited from internment at the LPL.

Significantly, the SEPA review did not consider gypsum, drywall, landscape waste, or other significant waste streams. The application does not include the SEPA Checklist, agency or public comments, staff reports or the Hearing Examiner Decision on the land use application.

The administrative record includes no other documents considered by YRCAA in its SEPA review or of the *NSR Application.* There is no documentation related to review of (1) SEPA Environmental Checklist for the *NSR Application* or any other SEPA checklist; (2) no documentation with respect to adoption or incorporation by reference of existing environmental documents; (3) no documentation regarding acceptance or compliance with lead agency determinations; (4) no threshold determination as required by WAC 197-11-310; (5) no documentation of notice and comment requirements of WAC 197-11-340; and (6) no documentation regarding Yakima County and YRCAA's purported determination that the 2015 *Determination of Non-Significance* was adequate for purposes of SEPA review of the *NSR Application.*

YRCAA made its environmental determination based on a single document and a unsubstantiated and undocumented conclusion reached following a conversation with Yakima County.

> 1.13 Yakima County Planning Department issued a Determination of Non-Significance (DNS) for a new 64 acres expansion to the existing 61 acres LPL pursuant to the State Environmental Policy Act (SEPA) with SEPA Number SEP 2015-00024 and signed by the County in September 9, 2015. *After the Public Hearing held by YRCAA on September 26th, 2023, YRCAA reached out to Yakima County and it was concluded that the SEPA of 2015 determination is still valid for this project and satisfies SEPA's*

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> *requirements*. In addition, a Conditional Use Permit (CUP) was issued by Yakima County on November 27, 2015; CUP 2015-00051.

NSR Permit Approval ¶*1.13*. This is the full and uncontroverted scope of SEPA compliance related to the *NSR Application*.

(c) Subsequent changes and new environmental information arising after 2015. The administrative record discloses no consideration of changes to the LPL or its operations or new information related to environmental impacts of the landfill operations. Among the uncontroverted changes in information are the following:

- DTG Recycle added a Materials Recycling Facility (MRF) following acquisition of the landfill. The MRF facility added both structural and processing facilities with significant new levels of waste delivery and volumes.

- Annual disposal increased from approximately 200,000 cubic yards in 2015 to 695,717 cubic yards in 2022. The content of 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.

- Increase in observed adverse impacts and concerns from adjoining and nearby property owners related to odor and toxic gas emissions.

  > DTG Landfill operations generated observed significant adverse impacts and concerns upon adjoining and nearby property owners including harsh, eye-watering toxic gases and odor complaints. These citizen odor complaints led to regulatory investigations that eventually required DTG to sample ambient air and soil gas, detecting volatile organic compounds (VOCs) at the facility in December 2021 and confirmed in July 2022. Benzine and naphthalene were detected in ambient air concentrations exceeding outdoor air quality standards under the Model Toxics Control Act (MTCA).

- Anderson accepted PCS from all over the state, including Puget Sound and the US Army Yakima Training Center

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(YTC). It has been subsequently determined by Department of Ecology that such materials included 743 cubic yards of PFAS contaminated soil in 2004 for remediation in land use and/or disposal (see Newchurch letter to Martin, dated April 24, 2023). *Cave Decl. Exh. 21.*

- Based upon neighbor investigation and complaints, it was determined in August of 2022 that the land fill was emitting APH, benzene, and naphthalene emissions that "...were found above MTCA Method B cancer cleanup levels for air." DTG was named as a potentially liable person (PLP) by Department of Ecology through letter dated November 2, 2022.

- On January 19, 2023, Department of Ecology "...mobilized to the DTG-Anderson Landfill to observe the area of the landfill that has been previously documented to contain high levels of volatile organic compounds (VOCs) in gas emanating from waste." The visit was prompted by a number of odor complaints filed with Ecology. Thermal images indicated warm zones on the landfill. Site observations disclosed that the soil in the subject area was not frozen and cracks were observed in and adjacent to the road that were "...now significantly larger than in the past." Ongoing combustion was observed beneath the surface.

- On November 1, 2022, Yakima County issued a letter to DTG based upon neighbor complaints regarding operational violations at the DTG Anderson facility. Violations included operations outside of authorized hours and failure to provide vegetative screening as required by CUP 2003-00112/SEP 2003-00055 – Condition #8.

- On February 2, 2023, Yakima Health District confirmed a subsurface fire on the DTG site and required a work plan to ensure compliance.

- DTG and Department of Ecology entered into an Agreed Order (AO) No. DE 21624 under the Model Toxic Control Act (MTCA), Chapter 70A.305 Revised Code of Washington (RCW) and the Cleanup Regulation of Washington Administrative Code (WAC 173-340). YRCAA arbitrarily excluded the MTCA area from the scope of both environmental review and MSR Review process. The established landfill fire is indicative of other conditions

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on the site and potential sites that demand and require environmental review.

- Yakima Health District (YHD) did not renew the limited purpose landfill permit on June 30, 2024 because of environmental concerns.

- DTG ceased acceptance of petroleum contaminated soils.

This site is an environmental nightmare. It is irresponsible to ignore SEPA review processes and requirements and simply turn a blind eye to the evolving adverse environmental impacts generated by DTG's integrated commercial operations.

III. ISSUES FOR REVIEW

This motion for summary judgment addresses the following issues:

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

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

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

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

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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?

There is no genuine issues of fact regarding these issues which can be determined as a matter of law.

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IV. JURISDICTION AND STANDARDS OF REVIEW

4.1 PCHB Has Authority To Review Orders And Determinations From Air Pollution Control Authorities.

The Washington Clean Air Act (WCAA) was enacted in 1967 and created air pollution control authorities in each county to implement and enforce the Act. RCW 70A.15.1500. YRCAA is the activated air pollution control authority for Yakima County, Washington. YRCAA is responsible for implementing, permitting, and enforcing "New Source Performance Standards" (NSPS). RCW 70A.15.2260. The purpose of the NSPS is to prevent deterioration of air quality from the construction of new sources or modification of existing sources. This case involves review of *Order of Approval Permit Number NSRP-03-DTGEI-22* as issued by Yakima Regional Clean Air Agency.[5]

The Board has jurisdiction over the subject matter and parties pursuant to RCW 43.21B.110. This jurisdiction extends to SEPA compliance in the context of a new source review application. *Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency,* PCHB No. 19-087c, 2021 WL 1199738 (Order on PSC's Second Dispositive Motion, March 26, 2021). The scope and standard of review shall be de novo unless otherwise provided by law. WAC 371-08-485(1). "The issuing agency shall have the initial burden of proof in cases involving penalties or regulatory orders. In other cases, the appealing party shall have the initial burden of proof." WAC 371-08-485(3). This case involves a review of a regulatory order. YRCAA bears the initial burden of proof.

4.2 Standards for Summary Judgment.

The parties in this case have agreed to submit cross-motions for summary judgment regarding YRCAA's compliance with the State Environmental Policy Act (SEPA). Summary judgment is a procedure available to avoid unnecessary trials where there is no genuine issue of

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[5] Beginning with the 1970 Clean Air Act Amendments, Congress required the Environmental Protection Agency (EPA) to establish a special set of emission standards for new air pollution sources which have the potential to contribute significantly to air pollution. 42 U.S.C.A. Section 7411. The standards, known as "New Source Performance Standards", must take into consideration cost, non-air impacts and energy requirements. The purpose of the NSPS is to prevent deterioration of air quality from the construction of new sources or modification of existing sources and reduce control costs by building pollution controls into the initial design of plants. *Id.* Operating permits for air contaminant sources are addressed at the state level through RCW 70A.15.2260. Operating permits apply to all sources set forth in RCW 70A.15.2260(4). A final order issued by an Air Pollution Control Authority is

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material fact. *Sound Action v. Department of Fish & Wildlife,* PCHB No. 20-019, 2020 WL 6435179 (October 28, 2020). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law. *Columbia Riverkeeper v. Department of Ecology,* PCHB No. 23-025c, 2024 WL 385011 at *8 (August 12, 2024). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v. Washington Department of Fish & Wildlife,* 21 Wn. App. 2d 435, 440, 506 P.3d 722 (2022). On cross-motions for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party with respect to the particular claim. *Id.,* 21 Wn. App. 2d at 441; and *Anderson v. Akzo Nobel Coatings, Inc.,* 72 Wn.2d 593, 597, 260 P.3d 857 (2011). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law.

Summary judgment has been found appropriate in matters involving environmental review associated with air quality permits. *ASARCO Inc. v. Air Quality Coalition,* 92 Wn.2d 685, 601 P.2d 501 (1979); and *Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency,* 29 Wn. App. 2d 89, 540 P.3d 821 (2023).

V. ARGUMENT AND AUTHORITIES

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

In 1971, the legislature enacted SEPA to inject environmental consciousness into governmental decision-making. *Columbia Riverkeeper v. Port of Vancouver, USA,* 188 Wn.2d 80, 91, 392 P.3d 1025 (2017). 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). SEPA commands agencies to "[i]nitiate and utilize ecological information in the planning and development of natural resource-oriented projects." *Washington State Dairy Federation v. Department of Ecology,* 18 Wn. App. 2d 259, 308, 490 P.3d 290 (2021); RCW 43.21C.030(2)(h). SEPA is intended to act as a "supplement to or an overlay of other

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final unless appealed to the Pollution Control Hearings Board (PCHB) as provided in chapter 43.21B RCW. RCW 70A.15.2530.

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governmental authorization." *Id.;* and *Polygon Corp. v. City of Seattle,* 90 Wn. 2d 59, 66, 578 P.2d 1309 (1978). SEPA review is required for all non-exempt proposals (e.g. regulatory decisions of agencies). WAC 197-11-310. The courts have specifically recognized that SEPA is applicable to supplemental air quality permit applications. *Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency,* 29 Wn. App. 2d 89, 540 P.3d 821 (2023).[6]

While SEPA does not "dictate a particular substantive result," it does mandate that "environmental matters be given proper consideration during decision-making." *Norway Hill Pres. & Prot. Ass'n v. King County Council,* 87 Wn.2d 267, 273, 552 P.2d 674 (1976). To achieve these goals, SEPA requires government agencies to study the likely environmental impacts of ... proposals *before* taking action. RCW 43.21C.030. SEPA directs that all laws "...shall be interpreted and administered in accordance with the policies set forth in [SEPA]". RCW 43.21C.030; and *Puget Soundkeeper Alliance v. Pollution Control Hearings Bd.,* 189 Wn. App. 127, 148, 356 P.3d 753 (2015). The environmental review process is the "vector by which SEPA integrates its policies and requirements into the thoughts and actions of state and local agencies." *Columbia Riverkeeper,* 188 Wn.2d at 105.

5.2 YRCAA Failed to Follow Prescribed Procedures for Designation of Lead Agency and Processing of New Source Review Application. (Issues 3-5 and 8).

YRCAA failed to follow prescribed processes and procedures under SEPA in its review and approval of DTG's NSR permit application. Issue 3 is broad based and deals directly with YRCAA's failure to comply with SEPA review procedures applicable to DTG Recycle's *NSR Application* and YRCAA's issuance of *NSR Permit Approval.* Issues 4 and 5 deal specifically with "lead agency" processes and Issue 8 addresses failure to comply with comply with SEPA procedures for use of existing environmental documents.

(a) Neither YRCAA nor Yakima County conducted any SEPA compliance review of the *NSR Application.* (Issue 3). The administrative record contains no

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[6] In *Advocates for a Cleaner Tacoma,* the Court reviewed determinations by Pollution Control Hearings Board with respect to review of Puget Sound Clean Air Agency's New Source Review under the Washington Clean Air Act for the Tacoma Liquified Natural Gas (TLNG) facility. Included in the appellate review was a review of the adequacy of Supplemental Environmental Impact Statement (EIS) in which Puget Sound Clean Air Agency acted as "lead" agency. City of Tacoma had earlier determined and issued a Final Environmental Impact Statement in the context of an application for "substantial development permit under the Shoreline Management Act." PSCAA required the project proponent to prepare a "Supplemental EIS" when reviewing an air quality permit under the Washington Air Quality Act.

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documentation that either YRCAA or Yakima County followed or complied with threshold determination processes set forth in WAC 197-11-310 with regard to the *NSR Application.* There was no SEPA Checklist for the proposal (WAC 197-11-315); no independent evaluation of prior checklists or environmental documents; no issuance of a threshold determination (WAC 197-11-330); no public notice of the threshold determination or invitation for comment (WAC 197-11-502 and – 510); or compliance with the agency's own procedures (i.e. certification of SEPA compliance).

A single reference within the administrative record regarding SEPA compliance was the following:

> After the Public Hearing held by YRCAA on September 26th, 2023, YRCAA reached out to Yakima County and it was concluded that the SEPA of 2015 determination is still valid for this project and satisfies SEPA's requirements.

NSR Permit Approval ¶*1.13.* The uncontroverted facts are that literally no environmental review was undertaken in any manner that complies with SEPA's established review policies and procedures.

(b) YRCAA acknowledges that it was not the "Lead Agency" for SEPA processes. (Issues 4 and 5). SEPA's regulatory framework requires the responsible official for the "lead agency" to review non-exempt proposals, and make a threshold determination. *City of Puyallup v. Pierce County,* 20 Wn. App. 2d 466, 470, 500 P.3d 216 (2021). See also WAC 197-11-310(1) and (2). DTG Recycle applied for an *after-the-fact* permit to establish a new source of air emissions. There was no "new source. The Rocky Top Landfill had operated for nearly four decades without any serious review of actual or potentially adverse air emissions. The lead agency is required to make a threshold determination deciding whether the proposal requires an EIS, mitigation, or supplemental review processes. WAC 197-11-050(2) – 797, - 330. The lead agency is required to document its determination. WAC 197-11-310, -350. This appeal involves a decision-making process in which no lead agency determinations or processes were followed.

YRCAA admits that it did not act as "lead agency" for the *NSR Application.* In responses to public comment, YRCAA acknowledged that it did not act as "lead agency" for the SEPA required review process.

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> YRCAA is not lead for the SEPA process, but the lead for the NSR. The NSR process analyzes the air emissions impacts. YRCAA consulted with the lead agency for the SEPA as indicated above and maintained [sic] the old SEPA still stands.

Cave Decl. Exh. 20 at 34. (Responsive Summary for Comments Received). In its response, YRCAA suggests that Yakima County was the "lead agency." There is no evidence in the record that Yakima County acted or assumed responsibilities as "lead agency" for the *NSR Application.*

As noted above, the only environmental determination was described as follows:

> Yakima County Planning Department issued a Determination of Non-Significance (DNS) for a new 64 acre expansion of the existing 61 acres LPL pursuant to the State Environmental Policy Act (SEPA) with SEPA No. SEP 2015-00024 and signed by the County on September 9, 2015. *After the Public Hearing held by YRCAA on September 26th, 2023, YRCAA reached out to Yakima 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; CUP 2015-00051.

NSR Permit Approval at ¶1.13. The record contains no documentation that Yakima County was provided the file for the *NSR Application;* reviewed or adopted the prior SEPA threshold determination; invited comments; reviewed changes in scope of operation; considered new environmental information such as landfill fires, MTCA violations, or importation of PFAS; or otherwise undertook any independent review of current land use application. There was no supplemental SEPA Checklist and odd that landfill fires and deposits of PFSA did not raise environmental concerns.

(c) Under SEPA regulations. Yakima Regional Clean Air Agency is the "lead agency" for purposes of the NSR Application. (Issue 4 and 5). Under SEPA, the agency receiving a "proposal" is obligated to determine "lead agency". The rules for designating a lead agency are set forth in WAC 197-11-922 through WAC 197-11-940. A lead agency shall be designated *when an agency is presented with a proposal.* WAC 197-11-924. A "proposal" is defined as follows:

> "Proposal" means a proposed action. A proposal incudes both actions and *regulatory decisions of agencies* as well as any actions proposed by applicants. A proposal exists at

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> that stage in the development of an action when an agency is presented with an application, … and the environmental effects can be meaningfully evaluated.

WAC 197-11-784. WAC 197-11-924 is clear in establishing responsibility for designating the lead agency.

> (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. The lead agency shall be determined by using the criteria in WAC 197-11-926 through 197-1-944.

YRCAA was the first agency receiving the application for New Source Review. It was obligated to determine the "lead agency". This procedure should be familiar to the Board because this is the same procedure follows by Puget Sound Clean Air Agency (PSCAA) with respect to new source review with respect to the Tacoma Liquefied Natural Gas (TLNG) facility.[7] *Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency,* 29 Wn. App. 2d 89, 540 P.3d 821 (2023); and *Advocates for Cleaner Tacoma v. Puget Sound Clean Air Agency,* PCHB No. 19-087c, 2021 WL 6195874, (Findings of Fact, Conclusions of Law, and Order, November 19, 2021). YRCAA was the first agency receiving the application for DTG's "New Source Review." YRCAA did nothing.

If YRCAA believed Yakima County was the "lead agency", it had the following responsibilities.

> *If an agency determines that another agency is the lead agency, it shall mail to such lead agency a copy of the application it received, together with its determination of lead agency and an explanation. If the agency receiving this determination agrees that it is the lead agency, it shall*

[7] In *Advocates for a Cleaner Tacoma,* Puget Sound Energy initially filed an application for substantial development permit with City of Tacoma under the Shoreline Management Act (SMA). The City required preparation of an environmental impact statement (EIS) and issued a Final Environmental Impact Statement (FEIS) in November, 2015. PSC did not submit a new source review application with PSCAA until May of 2017. In January 2018, PSCAA notified PSC that an SEIS was needed with respect to specific items. PSCAA acted as "lead agency" for the NSR permit process and made a determination that supplemental environmental information was required for processing of the air quality permit.

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> *notify the other agencies with jurisdiction.* If it does not agree, and the dispute cannot be resolved by agreement, the agency shall immediately petition the department of ecology for a lead agency determination under WAC 197-11-946.

WAC 197-11-924. YRCAA failed to make the required lead agency determination, did not mail the application of Yakima County, and Yakima County did not accept lead agency responsibilities. As a result of YCRAA's failure to follow SEPA processes, no agency conducted any review in accordance with SEPA procedures.

YRCAA "assumed" that Yakima County was the lead agency but failed to follow any prescribed process to implement and put in place a regulatory compliant lead agency for the application. Public comment alerted YRCAA to SEPA process deficiencies and responsibilities. See e.g. *Cave Decl. Exh. 20.* One commentator stated that "...[f]or too long, Yakima County and the YRCAA have treated SEPA like a nuisance." *Cave Decl. Exh. 20.* YRCAA ignored the comments and provided only the following responses:

> YRCAA is not the leading [sic] agency for SEPA. The SEPA includes several areas, YRCAA looks at the air part/section, in the New Source Review (NSR) helps to make sure that the air emissions will be within thresholds established by federal, state and local laws, rules and regulations. YRCAA is not the lead for the SEPA process, but the lead for the NSR.

Id. YRCAA purportedly "...reached out to Yakima County [after receiving comments and conducting a public hearing] and it was concluded that the SEPA of 2015 determination is still valid for this project and satisfies SEPA's requirements." *NSR Permit Approval at ¶1.13.* This determination, albeit contrary to adopted process, is insufficient to meet SEPA requirements. SEPA demands a "thoughtful decision-making process" where government agencies "conscientiously and systematically consider environmental values and consequences." *ASARCO Inc. v. Air Quality Coalition,* 92 Wn.2d 685, 700, 601 P.2d 509 (1979). While SEPA does not demand any particular substantive result in governmental decision-making, it "...is an attempt by the people to shape their future environment by deliberation, not default". *Wild Fish Conservancy v. Department of Fish & Wildlife,* 198 Wn.2d 846, 872-73, 502 P.3d 359 (2022). YRCAA failed to meet its responsibilities.

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The uncontroverted facts are that *no agency* acted as the lead agency for the NSR permit. This failure is material and consequential. WAC 197-11-050(2) provides 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 the threshold determination as to the specific proposal; and preparation and content of environmental impact statements. Neither a SEPA Checklist nor Supplemental SEPA Checklist were prepared (WAC 197-11.315) and ignored were notice requirements to agencies and the public. And no SEPA threshold determination was made with respect to the proposal.

As a final point, YRCAA failed to follow its own procedures for applications requesting authorization to establish a new source of air emissions. It is uncontroverted that neither a SEPA checklist nor certification from another agency was included in the record to establish compliance with SEPA review requirements.[8]

The failure to follow SEPA processes is not excused by ignorance of the rules, laziness, or incorrect assumptions. The bottom line is there was a total failure to follow SEPA process and procedures.

5.3 YRCAA Failed to Follow Prescribed Process for Use of Existing Environmental Documents. (Issue 8).

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[8] In its *NSR Application,* DTG represented that "...[a] DNS or EIS has been Issued by Another Agency for this Project ..." on April 29, 2009 by Gary M. Cullier, Hearing Examiner, Yakima County (File No. CUP 08074). The certification was not signed by the Government Agency referenced and no documents were provided for review related to File No. CUP 08-074. The *NSR Application* was even more confusing:

> The LPL operation underwent State Environmental Policy Act (SEPA) environmental review with YPD as the lead agency. The most recent environmental checklist was prepared describing a proposed landfill expansion. The review resulted in a Determination of Non-Significance dated September 9, 2015. The addition of the MRF operation did not require SEPA environmental review.
>
> The PCS operation underwent SEPA environmental review with the YPD as the lead agency. An environmental checklist was prepared describing the proposed operation. The review resulted in a Determination of Non-Significance dated September 10, 1992.

NSR Application 1.6. All that was provided was a copy of the Determination of Non-Significance for a proposed expansion of the existing limited purpose landfill (LPL) by 64 acres in 2015. There is no environmental checklist and no documentation disclosing review of the *NSR Application* by Yakima County Planning Department.

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YRCAA contends that is satisfied SEPA procedural and review requirements because a nine (9) year threshold determination for only a portion of the proposal is "still valid."[9]

> After the Public Hearing held by YRCAA on September 26th, 2023, *YRCAA reached out to Yakima County and it was concluded that 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; CUP 2015-00051.

NSR Approval ¶*1.13.* The administrative record contains no documentation or evidence of actual review or comparative evaluation of the referenced environmental document. And it is also uncontroverted that YRCAA did not comply with SEPA requirements for use of existing environmental documents.

(a) YRCAA failed to follow procedures for use of existing land use documents. WAC 197-11-600 recognizes that "...[a]n agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts." WAC 197-11-600(2). An existing document may be used for a proposal through either "adoption" or "incorporation by reference". WAC 197-11-600(4). And significantly, the agency adopting or referencing an existing environmental document must disclose such fact in the issuance of its own threshold decision. *Moss v. City of Bellingham,* 100 Wn. App. 6, 28, 31 P.3d 703 (2001); and WAC 197-11-600(4)(b).[10]

The first step in the adoption process independent review of the adopted document. WAC 197-11-630(1).

> (1) The agency adopting an existing environmental document *must independently review the content of the document and determine that it meets the adopting agency's environmental review standards and needs for the proposal.* However, a document is not required to meet the adopting agency's own procedures for the

---

[9] The *NSR Application* was for expansion of a pre-existing landfill (Phase #1 or Cell #1) that began filling under prior ownership. *NSR Approval* ¶*1.2.* The permit application and approval included Cell #1, the MRF, Wood Chipper/Grinder, Crushed Rock Exportation operations. *NSR Approval* ¶*1.9.* Rock crushing operations, petroleum contaminated soil operations, and the area subject to the landfill fire Agreed Order (AO) were excluded from the permit review process. *NSR Approval* ¶*1.4-1.11.*

[10] The courts have recognized that a reduction in scope of a proposed project does not require a new threshold determination. *SEAPC v. Cammack II Orchards,* 49 Wn. App. 609, 613, 744 P.2d 1101 (1987).

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> preparation of environmental documents (such as circulation, commenting, and hearing requirements) to be adopted.

There is no evidence in the administrative record that YRCAA "independently reviewed" the content of the 2015 conditional use permit record. If an agency makes a threshold determination of "no significant impact under SEPA, ... it must then demonstrate that environmental factors were considered in a manner sufficient to be a prima facia compliance with the procedural dictates of SEPA." *Lassila v. City of Wenatchee,* 89 Wn.2d 804, 814, 576 P.2d 54 (1978); *Boehm v. City of Vancouver,* 111 Wn. App. 711, 718, 47 P.3d 137 (2002). The administrative record does not satisfy YRCAA's burden to establish procedural compliance with SEPA.

Where an agency is using existing documents in place of preparing a new checklist or threshold determination, the required process is to "adopt" the existing environmental document. *Thornton Creek Legal Defense Fund v. City of Seattle,* 113 Wn. App. 34, 51-52, 53 P.3d 522 (2002) (holding that failure to comply with "adoption" process voided alleged adoption of prior EIS). WAC 197-11-630(2) sets for the requirements for adopting an environmental document:

> An agency shall adopt an environmental document by identifying the document and stating why it is being adopted, using the adoption form substantially as in WAC 197-11-965. The adopting agency shall ensure that the adopted document is readily available to agencies and the public by:
>
> (a) Sending a copy to agencies with jurisdiction that have not received the document, as shown by the distribution list for the adopted document; and
> (b) Placing copies in libraries and other public offices, or by distributing copies to those who requested one.

The Eastern Washington Growth Management Hearing Board described the adoption of requirements as follows:

> (1) Determine prior action and the new action have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography;

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(2) Take official action to adopt the pre-existing SEPA document using the adoption form substantially as in WAC 197-11-965; and
(3) Provide a copy of the adopted SEPA document to accompany the current proposals submitted to the decision-maker.

Kittitas County Conservation v. Kittitas County, EWGMHB Case No. 07-1-0004c (February 4, 2009) (finding that Kittitas County failed to comply with applicable procedures for adoption of prior environmental document).

YRCAA did not prepare or circulate an "Adoption Notice" consistent with WAC 197-11-965. Nor was the adoption notice provided to the decision maker prior to agency action. And as a final point, the administrative record contains no documentation of actual independent consideration and evaluation of the prior environmental determination. SEPA requires decision making based upon deliberation, not default.

(b) Adoption of prior DNS is not authorized where there is a change to the proposed new environmental information. As a final and significant point, adoption of an existing environmental document is not permitted where there have been substantial changes to the proposal or new information on the proposals significant adverse environmental impact. An agency acting on the same proposal may use an environmental document unchanged, *except in the following cases:*

> *For DNS's* and EIS's *preparation of a new threshold determination or supplemental EIS is required if there are:*
> *(i) Substantial changes to a proposal so that the proposal is likely to have a significant adverse environmental impact (or lack of significant adverse impacts, if a DS is being withdraws); or*
> *(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of any misrepresentation or lack of material disclosure.). A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.*

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YRCAA relied upon a nine (9) year old SEPA determination related only to a potential expansion area for the LPL. The 2015 DNS was limited to the 61-acre expansion area for the limited purpose landfill. The administrative record contains no reference of a comparative analysis and seems to ignore that the aggregate operations increased from approximately 200,000 cubic yards to over 600,000 cubic yards of material. Also ignored was the addition of the MRF facility and expanded rock crushing and processing operations within Cell 1.

Of greater concern is the discovery of new environmental information regarding operation of the landfill. Based on neighborhood concerns, investigations confirmed underground fires, perimeter cracks, and air emissions exceeding levels set forth in Model Toxic Control Act (MTCA). The site was declared a MTCA site and the parties have entered into an *Agreed Order (AO)*. The subsurface fires continue to burn with continuing air emissions with concerns that the conditions are expanding in the subsurface areas. The significance of this information is that the subsurface fires were caused by landfill operations. YRCAA chose to ignore these facts and excluded consideration of the toxic air emissions in its review of the proposed new source for air emissions. Also ignored was a significant increase in landfill volumes and percentage content of gypsum and drywall products. Each of these has a propensity to generate subsurface fires.

It was also discovered in early 2023, that soils removed from the Yakima Training Center's (YTC) former Fire Training Facility were brought to the former Anderson Landfill (now DTG) for petroleum contamination treatment and disposal in 2004. Subsequent investigation disclosed that the soils deposited within the Anderson site contained per-and poly-flouroalkyl substances (PFAS) which are now understood to be toxic at very low concentrations and extremely persistent in the environment.

It is patently clear that the project scope has changed dramatically since the earlier environmental determination and that significant new information has been discovered with respect to landfill operations including landfill fires, air emissions exceed MTCA levels, acceptance of PFAS materials, expansion of mining and material processing operations, and dramatic increase in volumes of landfill and recycling waste. These considerations are relevant to

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not only consideration of the NSR Application but also to the validity of the underlying threshold determination which requires withdrawal under WAC 197-11-340(3).[11]

(b) YRCAA improperly excluded MTCA site, PCS site, and mining and rock crushing from scope of environmental review. YRCAA specifically excluded that portion of the landfill that is the location of the subsurface fire (*NSR Approval ¶1.4-1.5),* rock crushing operations (*NSR Approval ¶1.10),* or the area containing Petroleum Contaminated Soil (PCS) (*NSR Approval ¶1.11).* Also missing from the analysis is a "cumulative" impact consideration of the entire integrated operations.

Anderson and DTG operate an integrated facility that includes limited purpose landfill, petroleum contaminated soil remediation, MRF operations, and mining and rock crushing operations that are specifically linked to the landfill activities. YRCAA disconnected significant components of the integrated operation in violation of WAC 197-11-060(3)(d) which provides as follows:

> Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5).). Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
>
> (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation. Phased review is not appropriate when "...[i]t would

---

[11] WAC 197-11-340(3)(a) provides as follows:

> (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 impact; 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.

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> merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts, ..."

WAC 197-11-060(5)(d)(ii). The cumulative impact analysis is both applicable to the current analysis as well as prospective development. *Boehm v. City of Vancouver,* 111 Wn. App. 711, 720, 47 P.3d 137 (2002). The facility operates as a single integrated operation with air quality impacted by the collected use including mining and crushing operations, landfill operations, and conditions resulting from such operations including but not limited to subsurface fires and associated air emissions. SEPA requires a landfill operation includes a "significant" environmental risk meaning a reasonable likelihood of more than a moderate adverse impact on environmental quality. WAC 197-11-794(1). Significance involves context and intensity and does not lend itself to a formula or quantifiable test. WAC 197-11-794(2). In the present case, there is no issue that landfill operations can cause significant adverse impacts through subsurface fires venting air contaminants.

5.4 A Failure to Comply With SEPA Procedures Invalidates Issuance of the *NSR Permit Approval.* (Issue 6).

It is well established that a failure to comply with SEPA review standards and requirements mandates remand to conduct proper environmental review and invalidates the underlying land use permit. *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 42, 873 P.2d 498 (1994) (holding that inadequate EIS must be revised and underlying conditional use permit invalidated); *King County v. Washington State Boundary Review Bd. for King County,* 122 Wn.2d 648, 667, 860 P.2d 1024 (1993) (holding that invalid SEPA determination requires invalidation of the related agency action); *Lassila v. City of Wenatchee,* 89 Wn.2d 804, 576 P.2d 54 (1978) (vacating comprehensive plan amendment for failure to make threshold determination under SEPA); *Juanita Bay Valley Community Ass'n v. City of Kirkland,* 9 Wn. App. 59, 510 P.2d 1140 (1973) (remanding grading permit for failure to make threshold determination under SEPA).

CONCLUSION

Friends of Rocky Top and its representative members requests that the Board grant summary judgment and determine that YRCAA failed to follow prescribed environmental

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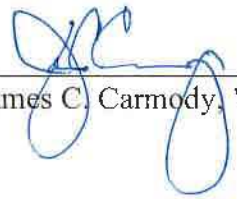
review procedures required under the State Environmental Policy Act (SEPA). It is further requested that the Board invalidate the *NSR Permit Approval* issued by YRCAA.

Dated this 21st day of November, 2024.

MEYER, FLUEGGE & TENNEY, P.S.
Attorneys for Petitioners/Appellants



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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	☑ 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	☑ Email jmyers@lldkb.com
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DATED at Yakima, Washington, this 21st day of November, 2024.

Deborah Girard

Deborah Girard, Legal Assistant

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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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

I. INTRODUCTION

Pursuant to RCW 43.21B.330, CR 56 as incorporated through WAC 371-08-300, WAC 371-08-405, and the November 11, 2024 Second Amended Prehearing Order, Respondent DTG Enterprises, Inc., d/b/a DTG Recycle - Yakima ("DTG"), respectfully moves the Pollution Control Hearings Board ("Board") for an order granting summary judgment and dismissing the appeal filed by Appellant Friends of Rocky Top ("FORT") and

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representative members Nancy Lust and Carole DeGrave. The Board lacks jurisdiction because the Appellants have not satisfied the Board's requirements for standing.[1]

II. STATEMENT OF FACTS

FORT appealed YRCAA's issuance of a New Source Review ("NSR") Order of Approval to DTG Enterprises for its limited purpose landfill facility ("LPL" or the "Facility"), located at 41 Rocky Top Road, Yakima, WA. YRCAA issued the Order of Approval pursuant to the Washington Clean Air Act, Ch. 70A.15 RCW; Washington's air quality regulations found at WAC 173-400-110 and WAC 173-460-040; and the Washington regulation governing LPLs at WAC 173-350-400. Based on its review of DTG's Facility, YRCAA issued the Order of Approval, NSRP-03-DTGEI-22, on March 8, 2024 ("Order of Approval"). Appellants allege that YRCAA did not comply with the State Environmental Policy Act ("SEPA"), Ch. 43.21C RCW, in issuing the Order of Approval. *FORT Notice of Appeal* at 4.

DTG purchased the Facility at 41 Rocky Top Road from Anderson Rock and Demolition Pits ("Anderson") on November 1, 2019. *Order of Approval* at ¶ 1.1. At the time of purchase, the Facility was operating under a Yakima Health District ("YHD") permit, and it continued to do so after DTG bought the property. *Id.* at ¶ 1.2. During its ownership, Anderson applied for New Source Review Order of Approval with YRCAA, but for

[1] *See* Second Amended Prehearing Order, Issue #1. DTG's motion seeks dismissal because Appellants' lack of standing deprives the Board of jurisdiction. However, because the Board typically treats motions regarding standing as motions for summary judgment, DTG's motion is brought as for summary judgement. *See, e.g., Spokane Rock Prods. Inc. v. Spokane Cnty. Air Pollution Control Auth. & Inland Asphalt Co.*, PCHB No. 05-127, 2005 WL 3115535, at *2 (Wash. Pol. Control Bd. Nov. 16, 2005); *Sound Action v. Washington Dep't of Fish & Wildlife*, PCHB No. 17-087, 2018 WL 7349335 (Wash. Pol. Control Bd. May 24, 2018); *Snohomish Cnty. Farm Bureau v. Washington Dep't of Fish & Wildlife*, PCHB No. 11-070, 2011 WL 4695821 (Sept. 30, 2011).

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unknown reasons an Order of Approval was not issued. DTG submitted this New Source Review application beginning in 2020 and pursued the process until the Order of Approval was received in March 2024. *Id.* DTG submitted information allowing YRCAA to evaluate the entire Facility, including Cell #1 and Cell #2 as referenced in the Order of Approval. *Id.* at ¶ 1.3.

The Facility's permit with the YHD expired on June 30, 2023, and was not renewed. *Id.* at ¶ 1.8. YHD issued a letter detailing a set of conditions that must be met in order for DTG to continue operations at the Facility. *See* Declaration of Michael Dunning ("Dunning Decl."), Exhibit A (YHD June 27, 2023 Letter). Those conditions included an approved permit from YRCAA. *Id.* DTG complied with YHD's letter and, since 2023, has been in the process of obtaining the necessary permits and approvals to obtain a permit from YHD and continue to operate the Facility. Since "[t]he YRCAA office could not find an original permit for the Facility," *Order of Approval* at ¶ 1.8, DTG submitted information to YRCAA necessary for an Order of Approval, including information about the LPL's operations in Cell #2, the MRF Wood Chipper/Grinder, the Crushed Rock Exportation, and the inactive Cell #1. The portion of Cell #1 that is currently under evaluation through an Agreed Order with the Department of Ecology pursuant to the Model Toxics Control Act, Chapter 70A.305 RCW ("MTCA"), was not included in the application. *Id.* at ¶ 1.9.

In reviewing DTG's NSR permit application, YRCAA evaluated the information provided by DTG to assess whether a permit could be issued to DTG, and if so, what terms and conditions should be included in the permit. YRCAA also evaluated what, if any, additional SEPA analysis was necessary to support the permit. On September 9, 2015, the Yakima County Planning Department issued a SEPA Determination of Non-Significance (DNS), SEPA #SEP2015-00024. *Order of Approval* at ¶ 1.13. The County's SEPA review

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evaluated the expansion of the LPL, which accepted a variety of waste, including demolition waste. *See* SEP2015-00024 at ¶ 1. Yakima County determined that "the requirements for environmental analysis, protection, and mitigation measures have been adequately addressed in the development regulations and comprehensive plan" adopted under federal, state, and local laws and regulations, and that Yakima County "will not require any additional mitigation measures under SEPA." *Id.* at ¶ 6. Yakima County's decision "was made after a careful review of the environmental checklist, a review of other laws, rules, and regulations, and other information on file with the lead agency." *Id.* Public notice was given and comments accepted on the SEPA determination until September 23, 2015. *Id.* at ¶ 7. In addition to the DNS, Yakima County issued a Conditional Use Permit on November 27, 2015. *Order of Approval* at ¶ 1.13. YRCAA concluded that the 2015 SEPA determination was valid for the Facility project and satisfied SEPA's requirements for issuance of the Order of Approval. *Id.*

In evaluating DTG's application, YRCAA conducted an analysis of the Facility's potential air emissions and found that "[t]he Facility is located in an area that is in attainment with all criteria pollutants." *Id.* at ¶ 2.1. YRCAA also found that "all potential air emissions for this NSR will comply with the NAAWS and the Acceptable Source Impact Level (ASIL) of WAC 173-460-150." *Id.* at ¶ 2.10. The portions of the Facility that are subject to MTCA are also subject to substantive requirements for air, water, and other regulations under the Agreed Order, documentation of which must be submitted to YRCAA. *Id.* at ¶ 2.7. YRCAA issued the Order of Approval, which included several conditions relating to air emissions that DTG must comply with, including certain mitigation measures intended to reduce noise, dust, and odor. *See Order of Approval* at ¶¶ 3.2.1–3.2.13.

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FORT says that it is "a grassroots group of Rocky Top neighbors, businesses, organizations and recreationalists with a shared concern with environmental degradation arising from and related to DTG's operations of its limited purpose landfill and mining/processing business activities." Dunning Decl., Exhibit B (FORT's Response to Interrogatory No. 3). FORT and two of its members filed a Notice of Appeal on April 11, 2024, alleging that YRCAA "proceeded and issued the *Order of Approval* without appropriate, complete and further environmental review." *Notice of Appeal* at ¶ 5.8. Appellants requested "review of the Agency's compliance with the State Environmental Policy Act (SEPA) with respect to the after the fact *NSR Application* filed by DTG Enterprises" related to the Facility. *Id.* at ¶ 6. The relief FORT requested is for the Board to "review [YRCAA's] compliance" with SEPA and the SEPA regulations at WAC 197-11-600 and 197-11-060. *Id.* at ¶ 7.1–7.4. FORT also requested "the PCHB to reverse the *Order of Approval Permit No. NSRP-03-DTGEI-2022* and remand the matter to Agency for appropriate processing in accordance with applicable law." *Id.* at ¶ 7.5. FORT did not discuss in its Notice of Appeal any alleged injuries sustained by its members that would occur because of the issuance of the Order of Approval. *See id.*

III. STATEMENT OF ISSUES

1. Is summary judgment appropriate because FORT has not met its burden of proof to show a particularized injury-in-fact resulting from the issuance of the NSR Order of Approval?

2. Is summary judgment appropriate because FORT has not met its burden of proof to show that its alleged injuries can be redressed by the Board?

IV. EVIDENCE RELIED UPON

DTG relies on:

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- FORT's April 11, 2024 Notice of Appeal;
- YRCAA's March 8, 2011 New Source Review Order of Approval, Permit Number NSRP-03-DTGEI-22;
- Declaration of Michael Dunning and attached exhibits.

V. DISCUSSION

A. Standard of Review.

Summary judgment is a procedure available to avoid unnecessary trials where there is no genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-76, 292 P.3d 128 (Wash. Ct. App. 2012). A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Magula v. Benton Franklin Title Co*., 131 Wn.2d 171, 182 (1997). When determining whether an issue of material fact exists, all facts and inferences are construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co*., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

To establish organizational standing, FORT must show that (1) at least one member would have standing to sue, (2) the purpose of the organization is germane to the issue, and (3) neither the claim nor the relief requires the participation of individual members. *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 894, 337 P.3d 1076 (2014). An organization may establish standing if one of its members demonstrates an injury in fact. *Save A Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d. 401 (1978).

Standing before the Board requires that (1) the appellant must suffer an injury-in-fact that is concrete and particularized; (2) the appellant's injury must fall within the "zone of interests" protected by the statute at issue; (3) the Board must have within its legal power the

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ability to impose a remedy that will redress the appellant's injury. *Thompson v. Wash. Dep't of Ecology,* PCHB No. 11-027, 2011 WL 3679594 at *6 (Aug. 17, 2011). The test for an injury in fact is whether the petitioner has suffered an invasion of a legally protected interest that is concrete, particularized, actual, and imminent. *Okanogan Wilderness League (OWL) v. Wash. Dep't of Ecology,* PCHB No. 98-84, 1998 WL 937218, at *2 (Nov. 24, 1998). "Additionally, the opposing party . . . must be the cause of the injury." *Id.* The redressability element requires that the remedy the appellant seeks is one the Board has the power to grant. *Ctr. for Envtl. Law & Policy (CELP) v. Wash. Dep't of Ecology*, PCHB No. 96-165, 1997 WL 101767, at *5 (Jan. 7, 1997).

The appellant bears the burden of proof to demonstrate standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Snohomish Cnty. Farm Bureau v. Wash. Dep't of Fish and Wildlife*, PCHB No. 11-070, 2011 WL 4695821 (Sept. 30, 2011). A petitioner must satisfy all three elements of the standing test in order for the Board to have jurisdiction. *Allan v. Univ. of Wash.*, 92 Wn. App. 31, 36, 959 P.2d 1184 (Wash. Ct. App. 1998). The Board cannot hear an appeal unless the parties before it have standing to pursue their claims. *CELP*, 1997 WL 101767, at *1.

B. FORT has failed to show that any of its individual members suffered an injury-in-fact.

FORT has provided no evidence demonstrating an injury-in-fact suffered by one of its members that is concrete, particularized, actual, and imminent enough to confer standing to challenge the Order of Approval. *See OWL,* 1998 WL 937218, at *2. FORT's allegations cannot confer standing because 1) they are based on generalized allegations of public harm and 2) they are based on speculative, future injuries that might possibly occur in the future if there is a future permit violation. Neither injury is sufficient to confer standing.

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1. FORT's allegations of generalized public harm are insufficient to establish standing.

Allegations of generalized public harm are insufficient to establish standing. *See Snohomish Cnty. Farm Bureau*, 2011 WL 4695821, at *3 (Sept. 30, 2011); *Kutschkau v. Ecology*, PCHB Nos. 07-061, 07-067, 2007 WL 4919940 at *3 (Dec. 3, 2007); *West v. Pierce County*, SHB No. 07-034, 2008 WL 5510437 at *4 (Sept. 10, 2008). As the Board has previously noted, "Washington law is clear: a citizen group's goals of 'promoting concern for the environment and encouraging intelligent utilization of environmental resources' do not confer standing." *OWL,* 1998 WL 937218, at *2 (quoting *CORE v. Olympia,* 33 Wn. App. 677, 679, 657 P.2d 790 (Wash. Ct. App. 1983)). Instead, an appellant must be "perceptibly affected by the unlawful action in question." *Lujan,* 504 U.S. at 566.

FORT has failed to allege individualized harm sufficient to meet the Board's requirements. Its Notice of Appeal to the PCHB, referencing its wish that the Board "review agency compliance" with SEPA and other regulations, is an allegation of generalized public harm based on an alleged lack of compliance with environmental rules. *See Notice of Appeal,* ¶¶ 7.1–7.4. The Board has previously recognized such allegations are insufficient to establish standing. For example, in *Kutschkau* 2007 WL 4919940, at *3, the Board found that appellants who protested the issuance of a state waste discharge permit could prove no injury other than generalized public harm:

> "The Appellants' notices of appeal fail to allege facts that would create a basis for standing. Appellants make no mention of any injury that they have personally suffered as a result of Ecology's decision not to hold a public hearing or its decision to issue the discharge permit. They claim that Microsoft's discharge to the City of Quincy's wastewater treatment plant will have an impact on water quality. Appellants do not indicate, however, how this alleged impact on water quality would injure their interests. Without this

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> connection, Appellants' allegations are statements of generalized public harm insufficient to confer standing."

Id. at *3.

Here, FORT has similarly failed to allege any facts in its Notice of Appeal that create a basis for standing, because they have stated no facts that support a finding of an injury that is particularized to any member as opposed to a generalized public harm. *See generally Notice of Appeal.* Further, the Statement of Issue for Review and Statement of Requested Relief in FORT's Notice of Appeal makes no mention of any injury or fact related to any individual, but rather states generalized issues regarding YRCAA's compliance with SEPA and other regulations. *See Notice of Appeal,* ¶¶ 6.1, 7.1–7.5. Further, FORT's Notice of Appeal fails to allege how YRCAA's issuance of the Order of Approval or its alleged failure to follow SEPA will specifically injure any individual. FORT has made no request for relief based on any particularized injury and has not alleged any facts to support the claim that they are seeking relief based on anything other than a broad, generalized allegation of public harm due to an alleged lack of compliance with environmental rules. This is not sufficient to confer standing. *See Snohomish Cnty. Farm*, 2011 WL 4695821, at *4 ("it is well settled that an interest in proper implementation of the law or generalized public harm is not sufficient to establish standing").

2. FORT's allegations are remote, hypothetical, and based on an alleged future violation of the NSR permit.

Standing cannot be established where a party alleges conjectural or hypothetical injury. *Snohomish Cnty. Prop. Rights Alliance v. Snohomish Cnty.*, 76 Wn. App. 44, 53, 882 P.2d 807 (Wash. Ct. App. 1994); *Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (Wash Ct. App. 1992). The Board has previously rejected standing based on

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potential injury that might arise if a permit is violated at some future time as too speculative. *West v. Wash. Dep't of Ecology,* PCHB No. 09-077, 2009 WL 3657068 at *7 (Oct. 29, 2009) (allegations of potential injury that might arise if a permit is violated are not sufficient to establish standing); *Thompson,* 2011 WL 3679594, at *7 ("risk of future violations" was too speculative of an injury to confer standing).

FORT failed to allege any specific injuries resulting from YRCCA's issuance of the Order of Approval. *See* Section V.B.1, *supra.* And it only alleges vague "adverse impacts" to individual FORT members in response to DTG's Motion to Dismiss. *See* Declaration of Nancy Lust in Opposition to DTG Enterprises' Motion to Dismiss at ¶ 2. These allegations, even construed in the light most favorable to FORT, are based on previous injuries alleged to have occurred before the Facility was issued the Order of Approval from YRCAA. The current Order of Approval includes numerous permit conditions to address air quality issues. The Order of Approval requires air quality monitoring and imposes a number of conditions DTG must meet. These conditions in the Order of Approval are required to ensure no air quality impacts occur. Further, the Facility has not been in operation since June 2023 due to the mandatory conditions placed on DTG by YHD that must be satisfied prior to reopening the Facility. FORT's allegations of individual injury are therefore based on speculation that DTG might violate the Order of Approval conditions in the future. This is not sufficient to confer standing.

In *Thompson*, 2011 WL 3679594, at *7, the Board found that an appellant who alleged that a permit-holder may be at risk of future violations lacked standing. The Department of Ecology presented evidence showing that the application to Ecology was adequate, and that conditions had been properly imposed to ensure compliance with permitting requirements after review of the application, public comments, and a SEPA

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determination. *Id.* at *7–*8. Ecology also responded to concerns raised by members of the public during the permitting process. *Id.* at *8. As a result, the appellant's belief that the permit was not sufficient and would lead to environmental degradation was "conclusory, and largely speculative," and failed to meet his burden in challenging the adequacy of a SEPA determination. *Id.*

YRCAA has engaged in a similar process: YRCAA reviewed DTG's permit application, provided an opportunity for public comment, considered the comments received (including from FORT), imposed conditions in the NSR permit intended to protect human health and the environment, and incorporated a SEPA analysis. FORT's claims that the Order of Approval will not be sufficient to protect from potential injury in the future is a distant, conclusory, and speculative claim. FORT and its members have not met their burden to show that the permit, or the underlying SEPA decision, have or will result in harm to any individual member of their organization.

Because FORT has failed to claim any injury that is not generalized to the public and is not a speculative, potential future injury, it and its members have failed to establish injury-in-fact sufficient to confer standing.

C. FORT's alleged injuries cannot be redressed by the decision of the Board.

In addition to the requirement that FORT demonstrate particularized, non-speculative injuries in fact, order to establish standing, the Board must have the legal power to impose a remedy that will redress an alleged injury. *Sound Action v. Wash. Dep't of Fish and Wildlife*, PCHB No. 20-022, 2020 WL 7241274 at *8 (Dec. 2, 2020). It must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180–81 (2000) (citing *Lujan,* 504 U.S. at 560–61).

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The Washington Supreme Court has recognized that "demonstrating the redress element of the injury-in-fact test is more difficult when, as here, the government action or inaction being challenged is directed at a third party rather than the party asserting injury." *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd*., 166 Wn. App. 117, 136, 272 P.3d 876 (Wash. Ct. App. 2012). "Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id*. at 137 (quoting *Lujan*, 504 U.S. at 561-62). FORT has failed its difficult task to establish that the Board is able to redress its alleged injuries.

In the *KS Tacoma Holdings* case, hotel owner KS Tacoma appealed the Shoreline Hearings Board's grant of a permit revision to a rival hotel owner. The modified permit increased the floor space of the hotel and allowed changes to the configuration of the building. *Id*. at 123. KS Tacoma appealed the revised permit, alleging injuries to its recreation, view, and aesthetic interests, and requested relief by revoking the revision to the permit. *Id.* at 129. Reviewing KS Tacoma's alleged injuries in the revised permit, the Court found that KS Tacoma could not show that this relief would redress its potential aesthetic and view impacts. Revoking the permit would not redress KS Tacoma's alleged injuries because "Hollander would remain free to finish its project with its choice of aesthetic design, not one guaranteed to please KS Tacoma." *Id*. at 135. For this reason among others, KS Tacoma did not "assert[] material issues of fact relating to the aesthetics or the redressability of the alleged injury that preclude summary judgment[.]" *Id.*

Here, as in *KS Tacoma,* FORT appealed a permit issued to a third party, but it and its members have failed to allege any injury that has occurred because of YRCAA's issuance of the Order of Approval. *See Notice of Appeal.* FORT and its members generally protest

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certain activities at the landfill, alleging generalized "adverse impacts of the operations on neighboring land owners[.]" *See* Declaration of Nancy Lust in Opposition to DTG Enterprises' Motion to Dismiss at ¶ 2. However, the Order of Approval already contains provisions to address those and other issues. *See Order of Approval* at ¶¶ 3.2.1–3.2.13. Appellants generally request that the PCHB to "review Agency compliance" with the SEPA rules but fail to meet their burden as to how that "review" of SEPA will substantially redress injuries they allege. Further, Appellants' request to "reverse the *Order of Approval…* and remand the matter to Agency" fails to establish that their general complaints of noise, odor, visual, or aesthetic impact will be redressed in any meaningful way by a revision of the Order of Approval, if any. Instead, YRCAA may determine that no modification of the Order of Approval is needed. A modified version of the Order of Approval may also contain substantially similar provisions that do not impose additional conditions.

FORT's generalized and speculative allegations of injury are insufficient to meet their burden under the PCHB's standard to establish standing. Additionally, FORT has failed to allege or support how the relief they have requested from the Board will redress those alleged injuries.

VI. CONCLUSION

For the foregoing reasons, DTG respectfully requests that the Board dismiss this appeal for lack of standing.

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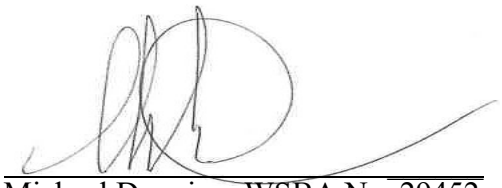
DATED this 21st day of November, 2024.



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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 to be emailed to the below listed parties at:

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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 MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION / MOTION FOR SUMMARY JUDGMENT

Respondents Yakima Region Clean Air Agency (YRCAA) hereby moves the Board for an order granting summary judgment and dismissing the appeal brought by Appellants, Friends of Rocky Top (FORT) and representative members Nancy Lust and Carole DeGrave, of the New Source Review Order of Approval # NSRP-03-DTGEI-22 because there are no genuine issues of material fact on Appellant's claims that the permit was issued in violation of the State Environmental Policy Act (SEPA) and the Respondents are entitled to judgment as a matter of law.

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II. EVIDENCE RELIED UPON

This motion is supported by the Declarations of Marc Thornsbury, Executive Director of YRCAA and Dr. Hasan M. Tahat, YRCAA Engineering and Planning Division Supervisor.

III. STATEMENT OF FACTS

This case arises out of a New Source Review Order of Approval issued by YRCAA on March 8, 2024 to Respondent, DTG Enterprises for its limited purpose landfill, formerly known as the Anderson Rock and Demolition Pits (hereafter "the Facility"). The Facility is a Limited Purpose Landfill (LPL) that operates under a permit issued by the Yakima Health District prior to and following its acquisition by DTG Enterprises. *See Notice of Appeal* at ¶ 5.3; Thornsbury Decl., ¶2.

A. PERMITTING OF SITE AS LIMITED PURPOSE LANDFILL WITH SEPA REVIEW BY YAKIMA COUNTY.

The Facility was permitted under state solid waste rules as a construction, demolition, and land-clearing debris (a.k.a. CDL) landfill and was reclassified as a limited purpose landfill (LPL) in 2008 as required by the state rules that became effective in 2003. Thornsbury Decl., **Exhibit 4,** at 1. It is currently operated under a solid waste LPL permit that was originally issued by Yakima Health District (YHD) on April 8, 2008. *Id.,* **Exhibit 1** at 6. The LPL also has an updated Type III Conditional Use Permit (CUP), which was issued by the Yakima County Planning Division (YPD) based upon a Hearing Examiner's Decision dated November 27, 2015. ***Id.,* Exhibit 4**. The current LPL permit was issued by YHD on June 24, 2020. *Id.,* **Exhibit 1** at 6.

The Facility's most recent SEPA determination was associated with its 2015 Conditional Use Permit application to expand its operations to its current footprint. The Facility concurrently sought a CUP from Yakima County, and a solid waste permit from YHD to expand the LPL footprint onto an adjacent parcel, also owned by Anderson, located immediately south of the existing LPL. Thornsbury

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Decl., **Exhibit 4** at 1-2. The 2015 application proposed to expand the LPL, overlapping with its then existing 61-acre permitted LPL footprint, for a total waste disposal footprint of 125 acres. *Id.*, at 2-3. The 2015 application material addressed the entire expanded LPL as one operating unit. *Id.* at 3.

On July 10, 2015, Yakima County issued a Notice of Application, Notice of Completeness, Notice of Environmental Review, and Notice of Future Public Hearing was mailed to the applicant, agencies with jurisdiction, and adjoining property owners. Thornsbury Decl., ¶ 8, **Exhibit 4**. On November 5, 2015, Yakima County held an open record hearing for conditional use permit and considered public comments. In these proceedings, Appellant Nancy Lust and other members of the public participated by submitting written comments and raising concerns regarding the facility. *Id.* at 2. She was concerned about the use of an unlined facility, assurances that the wastes received at the facility would not endanger groundwater quality and the equity of allowing waste importation from other parts of the state. *Id.*

The Hearing Examiner found that with respect to environmental review, Yakima County was Lead Agency under SEPA and performed environmental review under file number SEP2015-00024. Thronsbury Decl., **Exhibit 4** at 5. Yakima County issued a Determination of Non-Significance (DNS) on September 9, 2015, with the appeal period ending September 23, 2015. *Id.*, **Exhibit 1, (NSR Application, Appendix C).** A final DNS was issued by Yakima County on October 5, 2015. *Id.*, **Exhibit 3.** No appeals were made from the 2015 SEPA determination. *Id.*, **Exhibit 4** *at 5.* The conditional use permit was issued by the Yakima County Hearing Examiner on November 27, 2015. *Id.*, **Exhibit 4.**

B. YRCAA PERMITTING OF PHASE 2 LPL OPERATIONS UNDER NEW SOURCE REVIEW.

On November 19, 2019, DTG Enterprises purchased the Facility located at 41 Rocky Top Road, Yakima, WA. *See,* Notice of Appeal, p. 2, ¶ 5.2. Phase #1 of the LPL (which is also called Cell #1) began filling while the Facility was under the Anderson's ownership and completed filling of the cell under

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DTG's ownership (around December of 2022). Thronsbury Decl., **Exhibit 1** at 3-5. Thereafter, the Facility submitted a New Source Review (NSR) application, NSRP-03-DTGEI-22, to the Yakima Regional Clean Air Agency (YRCAA) for expansion of LPL operations to Phase #2 (also called cell #2) which was eventually determined complete on June 29, 2023. *Id.,* at ¶3. The NSR application for the Phase 2/Cell #2 of LPL operations included a Materials Recovery Facility (MRF), a Wood Chipper/Grinder and Crushed Rock Exportation as part of the LPL operations. *Id.*

The Facility's application did not cover emissions from petroleum contaminated soils (PCS) which were not being accepted by the Facility. Thronsbury Decl., ¶5. Thus, acceptance of PCS materials was not part of the NSR permit. *Id.*, **Exhibit 5** at 3**.** Similarly, a portion of the facility (within Cell No. 1) is subject to the Model Toxics Control Act (MTCA) and covered by a Department of Ecology Agreed Order (AO). The NSR Permit does not include air emissions from the MTCA area. *Id.,* **Exhibit 5** at 2

During its review of the NSR application, YRCAA issued a public notice and solicited public comments on the application. Thronsbury Decl., ¶6. YRCAA conducted a public hearing at 6:00 PM on September 26, 2023. *Id.* To ensure full compliance with Washington Administrative Code (WAC) 173-400-171, and in response to requests for additional time, YCRAA extended the public comment period for thirty (30) days through October 25, 2023. *Id.*

In conducting its review and responding to public comments, YRCAA inquired with the SEPA lead agency as to whether a new SEPA determination was required. Thornsbury Decl., ¶8; Tahat Decl., ¶2. The Responsible Official for the SEPA lead agency informed YRCAA in a letter dated October 3, 2023 that:

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

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

Tahat Decl., Exhibit 1.

YRCAA issued an Order of Approval for NSRP-03-DTGEI-22 on March 8, 2024. Thornsbury Decl., **Exhibit 5**. The Order of Approval found that prior SEPA review had been conducted by Yakima County in 2015, stating:

> Yakima County Planning Department issued a Determination of Non-Significance (DNS) for a new 64 acres expansion to the existing 61 acres LPL pursuant to the State Environment *Policy* Act (SEPA) with SEPA number SEP2015-00024 and signed by the County in September 9, 2015. After the Public Hearing held by YRCAA on September 26th, 2023, YRCAA reached out to Yakima 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.

Id., **Exhibit 5,** at 4 (Finding 1.13).

This appeal followed challenging the reliance on Yakima County's SEPA determination from 2015. However, Yakima County has not been joined as a party.

IV. ARGUMENT

A. STANDARD ON SUMMARY JUDGMENT

Summary judgment shall be granted if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. CR 56(c). An issue of material fact is one upon which the outcome of the litigation depends. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.,* 115 Wn.2d 506, 799 P.2d 250 (1990).

The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc*., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In

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doing so, a moving party is not required to support its motion with evidence negating facts, which the opposing party would be required to prove at trial. *White v. Kent Med. Ctr., Inc*., P.S., 61 Wn. App. 163, 170, 810 P.2d 4, 9 (1991)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). "The moving party must still, however, identify 'those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.'" *Id*. (citing *Celotex*, 477 U.S. 317, at 323). Once the moving party points out the absence of evidence to support an element of the opponent's claim, the burden shifts to the opponent to come forward with such evidence. *American Dog Owners Ass'n v. City of Yakima*, 113 Wn.2d 213, 218, 777 P.2d 1046 (1989).

The non-moving party may not rest on allegations in their pleadings. CR 56(e). If the non-moving party "fails to make a showing sufficient to establish the existence of an element to that party's case, and on which the party bears the burden of proof at trial," then summary judgment should be granted. *Young*, 112 Wn.2d at 225. "In such situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id*.

Further, mere possibility or speculation is not sufficient to defeat a motion for summary judgment. *Doe v. State, Dep't of Transp*., 85 Wn. App. 143, 147, 931 P.2d 196 (1997) (citing *Pelton v. Tri-State Memorial Hosp.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992)). Lastly, questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Central Wash. Bank v. Mendelson-Zeller, Inc*., 113 Wn.2d 346, 353, 779 P.2d 697 (1989); *McKinney v. City of Tukwila*, 103 Wn. App. 391, 13 P.3d 631 (2000).

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B. YRCAA COMPLIED WITH THE REQUIREMENTS FOR ENVIRONMENTAL REVIEW UNDER SEPA BY RELYING UPON THE LEAD AGENCY'S THRESHOLD DETERMINATION.

Appellants appeal asserts non-compliance with the SEPA, Ch. 43.21C RCW. "SEPA is primarily a procedural statute that requires the disclosure of environmental information." *Glasser v. City of Seattle*, 139 Wn.App. 728, 742, 162 P.3d 1134, 1140 (2007)(citing *Save Our Rural Env't v. Snohomish Cnty*., 99 Wn.2d 363, 371, 662 P.2d 816 (1983)). "'SEPA does not demand a particular substantive result in government decision making;' rather, it ensures that environmental values are given appropriate consideration." *Id.* (citing *Moss v. City of Bellingham*, 109 Wn.App. 6, 14, 31 P.3d 703 (2001)(quoting *Anderson v. Pierce Cnty*., 86 Wn.App. 290, 300, 936 P.2d 432 (1997)).

The appellants take issue with four procedural requirements: 1) Whether Yakima County was the lead agency responsible for ensuring compliance with SEPA; 2) Whether YRCAA was obligated to assume lead agency status under SEPA; 3) Whether YRCAA complied with SEPA in the use of existing documents; and 4) Whether YRCAA complied with SEPA in issuing the New Source Review Order of Approval for Permit # NSRP-03-DTGEI-22. The Respondents address each issue in turn.

1. Yakima County was the lead agency responsible for ensuring compliance with SEPA.

SEPA requires agencies to examine the environmental impacts of public and private projects prior to authorizing such projects. *City of Puyallup v. Pierce Cnty*., 20 Wn.App. 2d 466, 470, 500 P.3d 216, 219 (2021), *as amended on reconsideration in part* (June 1, 2022)(citing *City of Puyallup v. Pierce Cnty.*, 8 Wn.App. 2d 323, 331, 438 P.3d 174, 178 (2019)). Unless the proposal is categorically exempt, the lead agency is required to receive a SEPA checklist and review environmental information about a proposal, upon which it issues a threshold determination as to whether the project has significant adverse environmental impacts. WAC 197-11-330. If the proposal has significant adverse impacts, a determination

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of significance is issued and an EIS is required. *Id.* However, if the proposal is determined not to have significant adverse environmental impacts, the agency issues a determination of non-significance (DNS) or can require mitigation measures to reduce the impacts to a level of non-significance (MDNS). The threshold determination is required to be made as close as possible to the time an agency has developed or is presented with a proposal. WAC 197-11-310(2). The threshold determination is the responsibility of the lead agency. WAC 197-11-310(1).

"SEPA's regulatory framework designates a 'lead agency' for projects, and such agency must conduct review of every project that may have an adverse environmental impact to determine the level of environmental impact analysis required to approve the project." *Id*.; WAC 197-11-050. "The first agency receiving an application for or initiating a nonexempt proposal shall determine the lead agency for that proposal. . ." WAC 197-11-924(1). Additionally, 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. . .***" WAC197-11-932 (emphasis added).

Under the SEPA rules, Yakima County was the lead agency for the proposal to permit expanded LPL operations, which was properly determined when the Facility submitted their application with Yakima County for the approval of the landfill expansion at issue. It is undisputed that the LPL landfill expansion in question required multiple licenses from more than one agency. Indeed, the landfill required construction and operating licenses/permits from Yakima County and YHD, in addition to the NSR order of approval issued by YRCAA. Under WAC 197-11-932, Yakima County was correctly determined to be the lead agency responsible for ensuring compliance with SEPA in this matter. As such, there is no question that Yakima County was the proper lead agency responsible for meeting the SEPA requirements with respect to the landfill.

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2. YRCAA was not obligated to assume lead agency status under the SEPA rules.

Appellants contend that YRCAA was obligated to assume lead agency status when it conducted NSR review and re-issue a SEPA threshold determination. Appellants are wrong on the law, which permits an agency to assume lead agency as a matter of discretion, but only within limited parameters. There is no requirement that agencies with jurisdiction assume lead agency status so as to second-guess a previous SEPA threshold determination.

The SEPA Rules are clear that assumption of lead agency status is permissive, not mandatory. **"**After the lead agency issues a DNS or an MDNS, an agency with jurisdiction ***may***, upon review, assume lead agency status." *City of Puyallup*, 20 Wn.App. 2d 466, at 471–72 (emphasis added)(citing WAC 197-11-948; *Pierce County*, 8 Wn. App. 2d at 345). Indeed, "the SEPA Rules allow an agency which is 'dissatisfied' with a lead agency's DNS to assume lead agency status and make its own threshold determination." *King Cnty. v. Washington State Boundary Rev. Bd. for King Cnty*., 122 Wn.2d 648, 661, 860 P.2d 1024, 1031 (1993)(citing WAC 197–11–600(3)(a); WAC 197–11–948). Case law is clear that assumption of lead agency status is optional. *Nw. Steelhead & Salmon Council of Trout Unlimited v. Washington State Dep't of Fisheries*, 78 Wn. App. 778, 787, 896 P.2d 1292 (1995) ruled that

> Upon reviewing the City's DNS designation, the Department had *the option* to assume lead agency status. WAC 197–11–948(1).

(Emphasis in original).

While other agencies "***should use*** this authority to ensure proper compliance with SEPA" nothing in SEPA's procedural requirements mandate that the non-lead agency assume lead agency status – even where they are dissatisfied with the lead agency's DNS threshold determination. *Pierce County*, 8 Wn.App. 2d 323, at 345 (emphasis added).

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Moreover, where an agency with jurisdiction seeks to exercise its discretion to assume lead agency status, it must do so only within a narrow window of time. WAC 197-11-340 provides that an agency with jurisdiction may assume lead agency status within a fourteen-day period after the issuance of a DNS. WAC 197-11-340(2)(e); WAC 197-11-948(1). This provides a specific timeframe within which the agency must act if it chooses to assume lead agency status. Even if YRCAA had issues with the DNS issued by Yakima County, it could not now second-guess that determination and assume lead agency status, as more than fourteen days have passed since the DNS was issued for the landfill's expansion on October 5, 2015. As such, YRCAA was not obligated to assume lead agency status in this instance and was prohibited by the SEPA rules from doing so more than 14 days after issuance of Yakima County's DNS. Summary judgment should be granted to YRCAA on this issue.

3. YRCAA complied with SEPA in issuing the New Source Review Order of Approval on Permit # NSRP-03-DTGEI-22.

"WAC 197–11–600 authorizes agencies, under certain circumstances, to use existing documents to meet all or part of their SEPA responsibilities." *Moss,* 109 Wn.App. 6, at 28. "One method of accomplishing this is 'adoption,' whereby an agency independently reviews the document, determines that it meets the agency's environmental review standards and needs, ensures that it is readily available to the public, and follows adoption notice procedures." *Id.* (citing WAC 197–11–630; WAC 197–11–965).

Here it is clear the YRCAA inquired of the lead agency and relied on the lead agency's SEPA determination consistent with the SEPA rules. YRCAA did not ignore SEPA or its application to the NSR permit review it was conducting. Instead, upon receipt of comments, it inquired with the lead agency who reaffirmed that its SEPA determination applied and need not be revisited. That determination was recited in the Order of Approval, Finding 1.13. Appellants may disagree with the lead agency, but they have not joined them as a party and it is too late to collaterally attack the 2015 SEPA determination. But most

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critically, the SEPA Rules themselves require agencies with jurisdiction to issue permits for a proposal to use the lead agency's SEPA determination. WAC 197-11-390(1) provides that when the responsible official makes a threshold determination, it is final and binding on all agencies, as provided by the SEPA Rules. To reinforce this, WAC 197-11-390(3) makes it unquestionably clear:

> 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.

Because it did not assume lead agency status within the 14 day period allowed by the SEPA Rules, YRCAA has no ability to change, reverse or withdraw another agency's DNS, even if it wanted to. That authority is provided only to the lead agency by WAC 197-11-340(3). Here, the lead agency is Yakima County, not YRCAA. YRCAA must follow the DNS issued by the County unless Yakima County withdraws the DNS pursuant to WAC 197-11-340(3). It did not do so, even when YRCAA inquired as to the validity of the existing determination. Yakima County and the SEPA Responsible Official reaffirmed the validity of the 2015 SEPA DNS in correspondence to YRCAA on October 3, 2023. Thus, YRCAA was required to use the County's SEPA determination when it issued the Order of Approval on March 8, 2024.

Under the SEPA Rules, compliance with environmental review falls upon the lead agency, whose determinations must be followed by other agencies with jurisdiction to approve a proposal, with only limited exceptions. "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; and

(b) Preparation and content of environmental impact statements."

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WAC 197-11-050(2)(a); (b) (emphasis added). The lead agency's determination is then disseminated to other agencies with jurisdiction over the proposal. WAC 197-11-340(2)(b). The non-lead agency may only challenge the lead agency's determination within 14 days, otherwise, the determination becomes final. WAC 197-11-948(2).

Yakima County issued the threshold determination on September 9, 2015. YRCAA did not contest the threshold determination, and as demonstrated, was not obligated to assume lead agency status. Further, no other agency challenged Yakima County's threshold determination within the applicable 14-day period. Thus, Yakima County's threshold determination became final and YRCAA was obligated to rely on it. In addition, prior to issuing the New Source Review Order of Approval, YRCAA contacted Yakima County to determine if the threshold determination covered the area at issue – Yakima County as the lead agency under SEPA specifically confirmed that its DNS covered this proposal. Tahat Decl., **Exhibit 1**. Thus, YRCAA complied with SEPA by relying on the lead agency's SEPA determination when it issued the New Source Review Order of Approval, Permit # NSRP-03-DTGEI-22.

C. THE APPELLANTS HAVE FAILED TO JOIN A NECESSARY AND INDISPENSABLE PARTY TO THIS LITIGATION.

Washington's CR 19 requires that: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action ***shall be joined*** as a party in the action if in the person's absence complete relief cannot be accorded among those already parties. . ." CR 19(a)(1). Under the doctrine of indispensability, "[a] necessary party is one who 'has sufficient interest in the litigation that the judgment cannot be determined without affecting that interest or leaving it unresolved.'" *Metro. Mortg. & Sec. Co. v. Cochran,* 138 Wn.App. 267, 273–74, 156 P.3d 930, 933 (2007)(citing *Harvey v. Bd. of County Comm'rs*, 90 Wn.2d 473, 474, 584 P.2d 391 (1978)). A party is necessary if that party's absence " 'would prevent the trial court from affording complete relief to

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existing parties to the action. *Klineburger v. King Cnty. Dep't of Dev. & Envtl. Servs. Bldg.*, 189 Wn. App. 153, 168, 356 P.3d 223, 230 (2015). "An indispensable party is one without whose presence and participation a complete determination of the case may not be made." *Metro. Mortg. & Sec. Co. v. Cochran*, at 273-4 (citing *Lindberg v. Kitsap County*, 133 Wn.2d 729, 744–45, 948 P.2d 805 (1997)). "The label of 'indispensable' is attached only after deciding that the action cannot proceed without the missing party." *Id.* at 274. "[T]he failure to join an indispensable party warrants dismissal. *Id.* (citing *Cathcart–Maltby–Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 207, 634 P.2d 853 (1981)). This includes SEPA appeals that fail to join an indispensable party. *Waterford Place Condo. Ass'n v. City of Seattle*, 58 Wn. App. 39, 49, 791 P.2d 908 (1990).

Because this appeal challenges Yakima County's environmental determinations under SEPA that are applicable to the Facility's expansion, Yakima County is an indispensable party in this matter 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. Even if Appellants' allegation that changed circumstances arose after the threshold determination was issued, Notice of Appeal ¶5.7, YRCAA and the Board are both powerless to provide relief, as it is up to Yakima County to make this determination to reopen environmental review. As such, Yakima County's joinder is necessary to determine their interest in the validity of the County's SEPA determination and is essential for effective relief to be granted. The appellants have failed to join Yakima County. Thus, their claims should be dismissed.

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V. CONCLUSION

Accordingly, the Respondents respectfully request that the Board grant the motion for summary judgment and dismiss this appeal with prejudice.

DATED this 21st day of November 2024.

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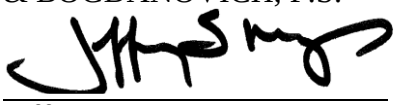

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CERTIFICATE OF SERVICE

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 21st day of November 2024, at Tumwater, WA.

/s/ Tam Truong
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Tam Truong, Legal Assistant

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