



February 11, 2024

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

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

Dear Sunnyside City Council:

This is a follow up to a letter that Friends of Toppenish Creek sent to the Sunnyside City Council on February 10, 2024, regarding appeal of a January 2024 Mitigated Determination of Non-Significance (MDNS) for Pacific Ag's proposed manure methane plant. We will try to explain once more why RCW 43.21C and WAC 197-11 provide for an appeal of the MDNS to the Sunnyside City Council.

- We disagree with Trevor Martin, AICP, regarding the role of the State Environmental Policy Act (SEPA). The statute is not advisory. SEPA has regulatory power.
- This is not a land use or a zoning appeal. We agree that the Port of Sunnyside is zoned for heavy industrial use and that an anaerobic digester is an approved use. Thus SMC Title 19 does not apply. Similarly case law, specifically *Ellensburg Cement Products, Inc. v. Kittitas County*, that ties a land use decision to SEPA does not apply.¹
- FOTC appeals pursuant to RCW 43.21C.060, RCW 43.21C.075, WAC 197-11-680, and Sunnyside Municipal Code 18.04.190. We believe that the City of Sunnyside did not comply with SEPA when issuing the Sunnyside RNG project MDNS. Please read our appeal dated January 30, 2024, and sent on February 1, 2024.

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The heading for the January 25, 2024 MDNS says:

Mitigated Determination of Non-significance (MDNS)

RCW 197-11-350 & SMC 18.04.120

Revised January 25, 2024

¹ We ask whether Mr. Martin has exceeded his authority by citing *Ellensburg Cement Products, Inc. v. Kittitas County*. The citation in his letter refusing our appeal is of the type usually reserved for judges when rendering decisions.

The conclusion for the MDNS states on page 21:

“This MDNS is issued under **197-11-355**. There is no further comment period on the MDNS.”

The Appeal Period states on page 21:

“This MDNS is issued under **WAC 197-11-340(2)**.”

All three cannot be true. In addition:

- RCW 197-11-350 does not exist
- WAC 197-11-355 has never been incorporated by reference into the Sunnyside Municipal Code. See SMC 18.04.080.
- Furthermore SMC 18.04.120 cites WAC 197-11-340(3)(a) that states:

(3)(a) The lead agency shall withdraw a DNS if:

(i) There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;

(ii) There is significant new information indicating, or on, a proposal’s probable significant adverse environmental impacts; or

(iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

FOTC repeats that new information has been submitted, along with evidence that material disclosure was lacking, incomplete, and inadequate to demonstrate absence of environmental impacts.

* * * * *

RCW 43.21C.060 states *Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a nonelected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency.*

Sunnyside has not eliminated such appeals. SMC title 18 applies to environmental regulations. This statute specifically authorizes appeals of SEPA decisions to the local legislative authority of the local governmental agency. SMC Title 19 applies to development regulations, not environmental regulations. SMC Title does not apply.

RCW 43.21C.075 states

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

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

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

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

The City of Sunnyside does have a procedure for appeals of agency environmental determinations under SMC 18.040.190.

FOTC's appeal is in part an appeal of a procedural determination.

The City of Sunnyside is providing funding for the project in the form of roadway improvements. This is an action.

The City of Sunnyside conducted an environmental review of the project prior to issuance of permits.

FOTC's appeal is an appeal to the local legislative authority under RCW 43.21C.060.

RCW 43.21C.075 states

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

According to this statute, FOTC has no choice but to appeal to the local legislative authority, the Sunnyside City Council. We are prohibited from appealing to superior court without first appealing to the city. The Sunnyside Office of Community and Economic Development gave us faulty instructions.

SMC 18.040.190 incorporates WAC 197-11-680 by reference.

WAC 197-11-680 states

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

FOTC's appeal of MDNS File Number: 2023-0200 complies with this statute.

WAC 197-11-680 states

(3) Agency administrative appeal procedures.

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

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

The City of Sunnyside provides for an administrative appeal under SMC 18.040.190. MDNS File Number: 2023-0200 is a final threshold determination.

WAC 197-11-680 states

(3) Agency administrative appeal procedures.

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

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

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

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

Sunnyside is providing funding for the project in the form of roadway improvements.

The City of Sunnyside is the lead agency for SEPA review of the project.

FOTC's appeal is in part an appeal of procedural determinations

The FOTC appeal is an appeal to the local legislative authority under RCW 43.21C.060

WAC 197-11-680 states

(3) *Agency administrative appeal procedures.*

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

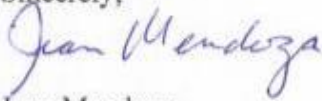
The law prescribes a sequence of actions that citizens must follow to appeal a SEPA threshold determination. FOTC is attempting to follow the law.

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In his February 6, 2024 letter rejecting FOTC's appeal, Trevor Martin stated:

The Mitigated Determination of Nonsignificance is an advisory opinion issued by the SEPA Lead Agency, and not a permit. In order to proceed with an appeal, the MDNS is required to be consolidated with a development permit issued by the agency (See Ellensburg Cement Products, Inc. v. Kittitas County). In the City of Sunnyside SMC Chapter 19.01 specifically outline Land Use Action Types and the types of appeal processes they require. Since the proposed project is a permitted use on the site, the applicant will need to submit a Permitted Uses Requiring a Site Plan Review (Type I) Action Type to the City, which only allows for a Judicial Appeal.

FOTC disagrees as stated above. We believe that the Sunnyside Community and Economic Development Officer sent us misleading instructions that could have derailed a legitimate and important appeal. FOTC reiterates the concerns and request stated in our January 30/February 1, 2024 appeal to the Sunnyside City Council.

Sincerely,

Jean Mendoza

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