

August 17, 2023

Dear Mr. Martin,

In your email cancelling the August 23 hearing to appeal SEPA 2023-0200 you stated,

In order to process an appeal, the MDNS is required to be tied to a development permits, such as a land use review, engineering permit, or building permit. None of those items have been issued for the site at this time, therefore the City cannot process a standalone MDNS appeal.

It is difficult for FOTC to understand this reasoning since Pacific Ag has been talking to local officials, especially the City and Port of Sunnyside, about the project since 2021.

We are aware of provisions in the law for phased review as described in WAC 197-11-060, but we don't see reference to phased review in any of your documents or emails.

In the SEPA checklist the applicant, Pacific Ag, states on page 2/13:

Construction is planned to begin in Q1 2023, after the required project permits are received, and is expected to be completed in Q2 2024. The project is expected to be fully operational, processing manure, and producing renewable natural gas by Summer 2024.

FOTC simply does not understand how this can refer to anything besides a project application; how this timeline can play out absent permit applications in the near future.

The Notice of Environmental Review cites WAC 197-11-928, stating:

This is to notify agencies with jurisdiction and environmental expertise and the public that the City of Sunnyside, Planning Division, has been established as the lead agency, under WAC § 197-11-928 for this project

And WAC 197-11-928 says:

When the proposal involves both private and public activities, it shall be characterized as either a private or a public project for the purposes of lead agency designation, depending upon whether the primary sponsor or initiator of the project is an agency or from the private sector. Any project in which agency

and private interests are too intertwined to make this characterization shall be considered a public project. The lead agency for all public projects shall be determined under WAC 197-11-926.

WAC 197-11-700 says that, under SEPA, *proposal and proposed action are synonymous*. To our thinking the City of Sunnyside acknowledged that there is an ongoing proposed application when you cited WAC 197-11-928.

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FOTC has asked several times whether this is considered a private or a public project. We asked due to differences in the law depending on project type. Again, we ask, “Is the SS RNG project public, or private, or both?”

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In the brief FOTC sent to you yesterday, we listed five legal issues in our appeal. The first issue is substantive. The last four are procedural.

WAC 197-11-680 addresses SEPA appeals. To our reading:

- *(3)(a)(ii) Appeal of the intermediate steps under SEPA (e.g., lead agency determination, scoping, draft EIS adequacy) shall not be allowed.* Therefore, although we have concerns about lead agency designation, we cannot bring up those concerns on appeal.
- *(3)(a)(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.* Therefore, it is permissible to schedule an appeal before permits have been issued.
- *(3)(a)(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; FOTC believes this section applies to the present appeal.*

- (3)(a)(vii) . . . For threshold determinations issued prior to a decision on a project action, any administrative appeal allowed by a county/city shall be filed within fourteen days after notice that the determination has been made and is appealable. FOTC properly appealed and could have missed our window for appeal if we had waited.

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WAC 197-11-340 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.

Given the large amount of new information that FOTC provided in our brief, this might be an opportune time to withdraw the MDNS and re-start the threshold determination process.

Thank you in advance for considering and evaluating our concerns.

Jean Mendoza