No. 44700-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

WAHKIAKUM COUNTY, Respondent

v.

Department of Ecology, State of Washington, Appellant

APPEAL FROM THE ORDER OF THE SUPERIOR COURT

OF THE STATE OF WASHINGTON FOR

WAHKIAKUM COUNTY

RESPONDENT'S BRIEF

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I. FACTS

As this is an appeal on a motion for summary judgment, there are no disputed facts. The complete record is before the court. Briefly, the salient facts are as follows:

In 1992, the State of Washington, in compliance with the federal Clean Water Act, 33 USC §1251 et. seq., changed its regulatory scheme for certain types of solid waste by coining the term "biosolids," defining the term as "municipal sewage sludge that is a primarily organic, semisolid product resulting from the wastewater treatment process, that can be beneficially recycled and meets all requirements under this chapter" and "septic tank sludge, also known as septage, that can be beneficially recycled and meets all requirements under this chapter." RCW 70.95J.010(1). RCW 70.95J then regulated biosolids, and additionally authorized plaintiff Department of Ecology (hereinafter, "Department" or "the Department") to create additional administrative regulations.

RCW 70.95J.020. At the time of its adoption of RCW 70.95J, the legislature declared, "the purpose of this chapter is to provide the department of ecology and local governments with the authority and direction to meet federal regulatory requirements for municipal sewage sludge." RCW 70.95J.007.

The legislature further acknowledged that "sewage sludge can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health." RCW 70.95J.007(e). This accords with federal law acknowledging that sludge contains "toxic pollutants." 33 USC 1345(d)(2)(a)(i). More specifically, after public hearings on the subject, the Wahkiakum County commission found that biosolids and septage contain toxic metals such as "arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc;" that they contain deadly microorganisms such as *"e. coli, heliobacter pylori, legionella, cryptosporidium, giardia,* and various viruses;" and that "disease and heavy metal contamination constitute potential threats to the life and health of humans, pets, livestock, crops, and also the

natural flora and wildlife of the County." CP 48 et. seq. The Ordinance is also attached as Exhibit A.

The Department adopted a regulatory scheme for treating such biosolids for the purpose of mitigating the danger they present, calling for treatment of biosolids to varying levels set by the Department and regulating how each class can be disposed of. The highest level of treatment is Class A, which is the only class of biosolids in which all disease-causing microorganisms have been destroyed. WAC 173-308-160. No level or class of biosolids has been treated to eliminate toxic metal contamination.

Pursuant to its understanding of the state's mandate, the Department provided at WAC 173-308-030(6): "Facilities and sites where biosolids are applied to the land must comply with other applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements."

On April 26, 2011, the Board of Commissioners of Wahkiakum County enacted an ordinance (hereafter, "the

Ordinance") that restricted land application of biosolids (as opposed to burial or incineration, the other methods by which biosolids can be disposed of) to Class A biosolids only. Exhibit A. The Board did not restrict the time, place, or manner of disposal of Class A biosolids or make any restriction regarding the burial or incineration of Class B biosolids or septage. Id.

II. ARGUMENT

A. Standard of Review, Legal Presumptions and Burdens

The Department correctly observes that this court is deciding a purely legal issue and thus decides *de novo*, with no duty of deference to the decision of the Cowlitz County Superior Court in this matter. Smith v. Safeco, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). But "the appellate court engages in the same inquiry as the trial court." Id., quoting Jones v. Allstate Ins. Co., 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). And, as that inquiry is one into the constitutionality of a county ordinance, it is an

inquiry that must be made in a certain way, with certain burdens and presumptions.

Our Supreme Court has ruled that when the issue in litigation is the constitutionality of a duly adopted legislative enactment, the challenger of its constitutionality "must demonstrate that statute's invalidity *beyond a reasonable doubt* and rebut the presumption that all legally necessary facts exist." Johnson v. Johnson, 96 Wash.2d 255, 258, 634 P.2d 877, 882 (1981) [internal quotes omitted] (emphasis added). This presumption has been held applicable to ordinances: an ordinance "is presumed constitutional, requiring the party challenging it to demonstrate that it is unconstitutional *beyond a reasonable doubt*." State v. Immelt, 150 Wash.App. 681, 686, 208 P.3d 1256, 1259 (2009) (emphasis added), citing City of Puyallup v. Pacific NW Bell Tel. Co., 98 Wash.2d 443, 448, 656 P.2d 1035 (1982).

"Beyond a reasonable doubt" is traditionally a burden of proof rather than a burden of persuasion for a matter in which the

facts are, as here, undisputed. This is significant. Of all the inquiries this court makes as a matter of law, this is the only one in which, rather than the traditional "as a matter of law" standard, this court actually has to consider a burden of proof. It is not enough for this court to be persuaded by the Department (which it should not be in any event). It must be persuaded *beyond a reasonable doubt*.

It is thus perhaps an understatement to say, as the Court of Appeals has done in the past, that "In establishing the constitutional invalidity of an ordinance, a heavy burden rests upon the party challenging its constitutionality." Lenci v. City of Seattle, 63 Wash.2d 664, 667-68, 388 P.2d 926 (1964) (citing Letterman v. City of Tacoma, 53 Wash.2d 294, 333 P.2d 650 (1958)). And even this "heavy burden" is not the end of the Department's travail.

"Like statutes, municipal ordinances are presumed constitutional, and courts interpret ordinances in a manner which upholds their constitutionality if possible." Tukwila School Dist.

No. 406 v. City of Tukwila, 140 Wash.App. 735, 743, 167 P.3d 1167, 1171 (2007), citing Leonard v. City of Spokane, 127 Wash.2d 194, 197-98, 897 P.2d 358 (1995).

Furthermore, "Every presumption will be in favor of constitutionality." Id. (citing Winkenwerder v. City of Yakima, 52 Wash.2d 617, 328 P.2d 873 (1958)), HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services, 148 Wash.2d 451, 478, 61 P.3d 1141, 1155 (2003).

In this case, there is no such thing as an unknown fact. If the fact is not in the record, then it is, pursuant to Johnson, supra, presumed to be whatever fact would support constitutionality of the Wahkiakum County ordinance.

In this case, there is no such thing as ambiguity. If the record is not clear, if the law is not clear, then, pursuant to Winkenwerder, supra, and Tukwila, supra, the answer is whatever would support constitutionality of the Wahkiakum County ordinance.

And if, after all this, the Department can show conflict between the ordinances herein, it is still not done: it must show not a conflict, but a "direct and irreconcilable conflict." "If, however, the ordinance and statute can be harmonized, no conflict will be found." HJS Development, 148 Wash.2d at 482 (citations omitted). Furthermore, "A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." State ex rel Schillberg v. Everett District Court, 92 Wn.2d 106, 108, 594 P.2d 448 (1979).

And the Department must make its proof, against all these presumptions, not just to the satisfaction of the court (which would be difficult enough), but *beyond a reasonable doubt*. Immelt, supra. Reasonable minds cannot be allowed to differ as to the result. If the court finds that any reasonable person could come to a conclusion contrary to the Department's, then the Wahkiakum County ordinance is valid.

This court must not allow the Department to take advantage of the fact that "beyond a reasonable doubt" is a very unusual burden for a case resolving on a matter of law, and a very heavy burden for a civil case to leverage this novelty into this court's use of a lighter burden. In this case, it is not enough even for the Department to prove it is right. It must prove *it cannot possibly be wrong.*

B. Harmonizing the Intent of the Legislature With the Cathlamet Ordinance

The County derives its authority to make ordinances from our state constitution at Article 11, §11: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

"Article 11, §11 is a direct delegation of police power. [This power is] as ample within its limits as that possessed by the [state] legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation

reasonable and consistent with the general laws." Brown v. City of Yakima, 116 Wash.2d 556, 559, 807 P.2d 353, 354 (1991), citing Hass v. Kirkland, 78 Wash.2d 929, 932, 481 P.2d 9 (1971) (quoting Detamore v. Hindley, 83 Wash. 322, 326, 145 P. 462 (1915)).

Consistency with the general laws is measured as follows: "An ordinance must yield to a statute on the same subject on either of two grounds: if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized." King County v. Taxpayers of King County, 133 Wash.2d 584, 612, 949 P.2d 1260 (1997), citing Brown v. Yakima, 116 Wash.2d 556, 559, 807 P.2d 353 (1991).

The Department has never argued preemption of the field. Nor would such an argument avail in any event, given the presumptions against preemption in the absence of explicit statutory provision. See, e.g., Hue v. Farmboy Spray Co., 127 Wn.2d 67, 78-79, 896 P.2d 682, 688-89 (1995). Thus, the only

question is whether "a conflict exists that cannot be harmonized." King County v. Taxpayers, supra.

"A county or local ordinance conflicts with state law when it permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits. *Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders* but they may not prohibit the same outright." Weden v. San Juan County, 135 Wash.2d 678, 720, 958 P.2d 273 (1998) (emphasis added) (internal citations omitted).

Much of the argument in this case heretofore has dealt with the proper interpretation of Weden in the context of this controversy. The Department has argued hotly that regulations limiting the land application of biosolids to Class A constitutes an "outright prohibition," or ban. Meanwhile, the County has taken the position that carried the day in Welch v. Board of Sup'rs of Rappahannock County, Va., 888 F.Supp. 753,

759 (W.D.Va.,1995): "Here, the County has not passed a complete ban on sewage sludge within its boundaries; it simply has banned one of three possible methods of use or disposal. [The other two are burial and incineration.] Regardless of the EPA's preference for land application, the Ordinance does not conflict with the federal standards for use or disposal of sewage sludge."

In Wahkiakum County, in addition to the options to bury or burn Class B biosolids and septage pursuant to, e.g., WAC 173-308-020, -080, and -300 , the county has also left the producers of Class B biosolids the option of shipping that waste to one of the other counties in the State of Washington (all of which are larger than Wahkiakum County), or anywhere else in the United States or the world, that will accept it as the "benefit" the Department claims it to be. Additionally, producers of biosolids in Wahkiakum County or anywhere else on Earth are welcome to treat biosolids to Class A standards and spread them upon the surface of the land within Wahkiakum County and would violate neither law nor ordinance by doing so.

The foreclosure of a single option in the disposal of sludge in a single (very small) portion of the state cannot be considered an "outright prohibition" under Weden. In Weden, the court upheld an ordinance prohibiting the state-licensed act of using motorized personal watercraft in county waters. Id. The prohibition the Weden court upheld and called "reasonable regulations of [State] licensed activity within [the County's] borders "is no less onerous than the prohibition complained of here. Weden, supra.

And for further authority on the expectation that counties will enact "reasonable regulations," we need look no further than the Department itself.

It was the Department that propounded WAC 173-308-030(6): "Facilities and sites where biosolids are applied to the land must comply with other applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements."

Wahkiakum County has done nothing more than what WAC 173-308-030(6) contemplates: create a "local land use ordinance" with which land users must comply.

Remember the inquiry the court must make in this matter. We are here to find any possible way to harmonize the Ordinance with the statutory scheme laid down by the legislature. E.g., King County v. Taxpayers, supra. Weden, supra, and WAC 173-308-030(6) have shown us this way. Weden tells us that further regulation within County borders is expected and unexceptionable, (even to the level of prohibiting certain watercraft). WAC 173-308-030(6) shows us the Department itself expects, and expects to comply with, such regulation.

And it does so without limitation. The canons of statutory construction tell us "[t]he word 'including' is a term of enlargement, not limitation." U.S. v. Hoffman, 154 Wash.2d 730, 741, 116 P.3d 999, 1004 (2005). See also Town of Ruston v. City of Tacoma, 90 Wash.App. 75, 84, 951 P.2d 805, 810 (Wash.App. Div. 2,1998): "Generally, the statutory use of

'including' does not exclude entities that are not specifically enumerated thereafter. In re Arbitration of Fortin, 82 Wash.App. 74, 84 n. 4, 914 P.2d 1209 (1996) (citing 2A Norman J. Singer, Sutherland Stat. Const., Intrinsic Aids § 47.23 (5th ed.1992))." So, even if it were not possible (and therefore mandatory, pursuant to Leonard v. City of Spokane, supra) to interpret the Ordinance as a "land use" regulation directly addressed by WAC 173-308-030(6), WAC 173-308-030(6) does not limit itself to obedience only to "zoning and land use requirements, but rather to all "applicable federal, state and local laws, regulations, and ordinances." No one can argue the Ordinance is not an "applicable ordinance" pursuant to WAC 173-308-030(6): it is inarguably an ordinance, and it applies by its own terms.

That is the end of the inquiry – as much of a smoking gun as anyone is going to see in the murky field of environmental regulation. But it is more even than that.

First, WAC 173-308-030(6) is proof that the Department's position regarding local ordinances like

Wahkiakum's has changed since the WACs were written. In order to hold the position that the Ordinance does not control, the Department has to deny its own past policy as memorialized in codes it wrote itself. How can the Department claim that there is no reasonable way for the Ordinance to control when its own professionals, charged with carrying out the legislature's scheme, specifically provided that local ordinances control?

Second, WAC 173-308-030(6) is the decisive response to the Department's argument, in its brief at 27, that because RCW 70.95J contains no "savings clause" permitting local regulation, local regulation conflicts with the purpose of biosolids statutes. In any event, in this state, the Constitution is our "savings clause." Weden, supra, provides that local regulation is presumed acceptable, and Hue, supra, holds that in the absence of specific verbiage preempting the field, local regulation is presumed to be permitted. No "savings clause" is necessary. But, in WAC 173-308-030(6), the Department itself wrote one

anyway. The Department is the author of the very provision it argued did not exist.

Ultimately, though, WAC 173-308-030(6) is most important as evidence of legislative intent. "Where the Legislature charges an agency with the administration and enforcement of an ambiguous statute, we give 'the agency's interpretation great weight in determining legislative intent.' Friends of Columbia Gorge, Inc. v. Wash. State Forest Practices, 129 Wash.App. 35, 47, 118 P.3d 354 (2005) (citing Postema v. Pollution Control Hearings Bd.,142 Wash.2d 68, 77, 11 P.3d 726 (2000))." Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources, 143 Wash.App. 644, 652, 179 P.3d 844, 848 (Wash.App. Div. 2, 2008). While the Department now argues that legislative intent is to overrule local ordinances, WAC 173-308-030(6) was written much closer to events than the Department's pleadings in this case – and when the Department wrote administrative code provisions enacting its interpretation of legislative intent, it provided for additional regulation of

biosolids by local ordinance. This is evidence the Legislature intended additional regulation of biosolids by local ordinance. Thus, it is the present position of the Department that violates legislative intent, not the Ordinance.

C. The Actual Intent of the Legislature

And what is the intent of the legislature, in any event? The Department attempts to persuade the court of its position by making a single case, pointing out provisions in state and federal law that back it up, and eliding contrary views. This shows the Department's fundamental misunderstanding of the burdens and presumptions in this case. As noted supra, it is not enough for the Department to have a persuasive case, even if it did. For it to prevail, there can be no other possible persuasive case. If reasonable minds can differ, it is not for this court to pick the most reasonable solution – it is to find for the County. Therefore the County asks the court to consider this alternative to the Department's theory – which, besides being reasonable (which is all it has to be), also has the advantage of being entirely correct.

The Department bases its theory of legislative intent on RCW 70.95J.005, which contains legislative findings. The Department notes subsection (2): "The legislature declares that a program shall be established to manage municipal sewage sludge and that the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity and is managed in a manner that minimizes risk to public health and the environment." The Department takes the phrase "to the maximum extent possible" out of context and turns it into an overarching declaration of legislative purpose, rather than admitting what it is: an acknowledgment there is only so much reuse a dangerous product like municipal sewage sludge can be subjected to – a "maximum extent."

Subsection (1) of the very same statute notes that sewage sludge is "unavoidable," "often a financial burden," and "can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health." Id. After this litany of disadvantages, a finding that it should be reused "to the

maximum extent possible" does not sound like a universal recommendation, but a limiting proviso.

But more important even than that, the Department bases its argument about legislative *purpose* on a set of legislative *findings*. The legislature's purpose is best found in RCW 70.95J.007, titled "Purpose." The Department barely acknowledges this statute exists, and never cites it in its argument regarding legislative purpose. It provides, *"The purpose of this chapter is* to provide the department of ecology and local governments with the authority and direction *to meet federal regulatory requirements* for municipal sewage sludge." (Emphasis added).

And there you have it. There was no grand legislative design; not in the Washington legislature, anyway. The federal government handed down regulatory requirements and the state legislature dutifully adopted them. This purpose is repeated in RCW 70.95J.020, providing in relevant part:

> (1) The department shall adopt rules to implement a biosolid management program within twelve months of the adoption of federal rules, 40 C.F.R. Sec. 503, relating to technical standards for the use and disposal of sewage sludge. The biosolid management program shall, at a minimum, conform with all applicable federal rules adopted pursuant to the federal clean water act as it existed on February 4, 1987.
>
> (2) In addition to any federal requirements, the state biosolid management program may include, but not be limited to, an education program to provide relevant legal and scientific information to local governments and citizen groups.

Note the way this is worded. The primary purpose of the statute is to comply with new federal regulations; "additional" elements "may" be included as a secondary consideration. The only additional element the legislature mentioned by name was an education campaign, not anything to do with land application or beneficial use. The fact is apparent: The legislature literally didn't care what else the program did as long as it complied with federal regulations.

A deeper look into legislative history shows us the same thing. See the Final Bill Report for ESHB 2640, stating in relevant part:

> The federal Clean Water Act of 1987 required the Environmental Protection Agency (EPA) to develop rules to increase federal requirements for sludge management. In 1989, the EPA adopted rules relating to how states must regulate a sludge management program. These rules, in part, require states to have direct enforcement authority.... The [prior] state solid waste law does not provide the department with direct enforcement authority [as required]... The Department of Ecology is required to develop a biosolid management program that will conform with federal regulations...
>
> CP 66-67

There is no mention here of grand schemes for total reuse of septage sludge. Though it seems unlikely the legislature, which left much in the hands of the Department, would have registered strong objection to such a scheme within the limits of economy and common sense, it certainly played no part in their decision to pass the laws the Department now wishes us to believe were crafted with land application of biosolids at their very heart and soul. All the legislature was concerned with was

complying with federal regulations – laudable, but unhelpful to the Department here.

Since the State of Washington unequivocally declared that its "statutory purpose" is to comply with federal regulation, the only way to know the State's purpose is to know the purpose of the federal regulation. That purpose is made clear in the Federal Clean Water Act:

"*The determination of the manner of disposal or use of sludge is a local determination....*" 33 U.S.C. § 1345(e) (emphasis added). "In addition, although not directly dealing with the use or disposal of sewage sludge, the Act expressly permits states *and localities* to adopt or enforce any standard or limitation with regard to discharges of pollutants, unless such standard or limitation is less stringent than the standards or limitations under the Act. Id. § 1370." Welch v. Rappahannock County, supra, 888 F.Supp. at 756 (W.D.Va.,1995) (emphasis added). The Code of Federal Regulations, taking its cue from the provisions of the CWA itself, provides further: "Nothing in this

part precludes a State *or political subdivision thereof* ... from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge." 40 C.F.R. § 503.5(b) (emphasis added).

This applies equally to issues of land application of biosolids: "... Clean Water Act ... regulations encourage direct land application of sewage sludge, but they do not require that states *or local governments* allow it. See Welch [supra], (EPA's "mere preference [for land application] is vastly different from legislation forcing states and localities to permit land application"). U.S. v. Cooper, 173 F.3d 1192, 1201 (C.A.9 (Cal.),1999) (emphasis added).

With the federal government's statutory scheme – the very one that controls biosolids policy and practice (the Department's regulations, at WAC 173-308, cites the Clean Water Act at least fifteen times) – calling explicitly for local control, and with the Washington State Legislature explicitly

pointing to federal law as the fundamental basis for its own legislative scheme, it is clear this court must determine Wahkiakum County's local ordinance is valid. How can an initiative for local control "thwart the purpose" of a law that has built its preference for local control, in so many words, into its provisions?

Other courts have followed this line of reasoning to its natural conclusion; notably Welch, supra, and Kern, immediately infra. The Kern court noted that the federal preference for local control is "unmistakably clear." Kern, infra, 127 Cal.App. 4th at 1610. And this preference exists for good reason. "[T]he natural consequence of Congress's authorization of local control is variety and inconsistency in the way localities choose to address the subject. What plaintiffs characterize as balkanization is more appropriately characterized as Congress's choosing to exploit one of the strengths of our federal system—its flexibility—by allowing states *and localities* to (1) experiment with different approaches (see New State Ice Co. v.

Liebmann (1932) 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (dis. opn. of Brandeis, J.) [describing states as laboratories that can experiment with different laws]), subject to the minimum national standard contained in Part 503, and (2) adapt their regulations to local conditions, such as geography, climate, soil types and population density." County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern, 127 Cal.App.4th 1544, 1610, 27 Cal.Rptr.3d 28, 76 (Cal.App. 5 Dist., 2005) (emphasis added).

Thus, despite the Department's claims that the central and noble purpose of the biosolids statutes is the state's absolute control over all local disposal initiatives, we find that the central, and, yes, noble, purpose of the biosolids statutes is to carry forward the overarching federal plan for sludge disposal – a plan that has memorialized its preference for local control. Federal law, federal regulation, state law, even state regulation written by the Department contemporaneously with the adoption of this scheme, all provide for local control. It is the County that is in

step with the overarching purposes and policies of the legislature, and the Department that is frustrating those purposes.

D. Expense and Statistics as Proof of a "Total Ban"

The Department argues with great conviction that since 88% of biosolids (and dropping) are currently treated to Class B standards, a prohibition on land application of Class B biosolids is a "total ban." This is absurd on its face. By this logic, homosexuality does not exist in the United States, since less than 88% of people are gay. http://www.gallup.com/poll/6961/what-percentage-population-gay.aspx, retrieved 9/16/13. People with an IQ of over 130 do not exist, since they constitute less than five percent of the population. See, e.g., http://en.wikipedia.org/wiki/Intelligence_quotient, retrieved 9/14/13. The Department has also cured cancer. According to the Center for Disease Control, the "Percent of noninstitutionalized adults who have ever been diagnosed with cancer" is 8.2% -- far beneath the percentage of biosolids that

can be spread on the lands in Wahkiakum County. http://www.cdc.gov/nchs/fastats/cancer.htm, retrieved 9/14/13. We are fortunate to discover that African Americans, at 13.1% of the population of the United States, have not been "totally banned" from the land – unless, that is, when the growing number of treatment facilities treating biosolids to Class A brings the percentage of Class B biosolids down to 86.9%, the Department continues to argue that biosolids are "totally banned." http://quickfacts.census.gov/qfd/states/00000.html, retrieved 9/14/13.

Fun with statistics aside, all agree that the amount of biosolids remaining in the state after 88% are excluded is sufficient to drown Wahkiakum, the smallest county in the state, in excrement. So this is not really about how regulating all but 12% of something is a "ban." Nor, as we have seen above, is it as though Class B biosolids cannot find their final resting place in Wahkiakum County, either through burial or incineration. Nor is the problem that those within Wahkiakum County are not

permitted to create Class B biosolids. They are – but they must bury, incinerate, ship elsewhere, or further treat such waste, rather than spread it on the surface of the lands of this riparian and bucolic county.

But – and this, the Department believes, is its trump card – doing that would be very expensive and spreading Class B biosolids on the surface of the land is cheap. In other words, this is about money. The Department, without any evident sense of irony, makes every argument about the "economic infeasibility" of requiring further safety measures for Class B biosolids that every form of business has made against government regulation since time immemorial.

The question has already been answered in so many words in Johnson v. Johnson, supra, in which another statute was challenged for constitutionality on the grounds it was too expensive: "Although a more cost effective program may be conceivable, that does not render RCW 74.20.040 unconstitutional." Id., 96 Wn.2d at 263.

Remember, the Ordinance is an exercise of Wahkiakum County's police power, which was granted by Article 11, §11 of the Washington State Constitution. Brown, supra. Police power is "[t]hat inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society." Weden, supra, 135 Wn.2d at 692 (citations omitted). "The police power is firmly rooted in the history of this state, and its scope has not declined." Id.

There is no question that it is appropriate to use police power to regulate biosolids. "Biosolids" are composed of "treated human waste." O'Brien v. Appomattox County, 213 F.Supp. 627, 629 (2002). In some ways, they are more obviously hazardous than firearms: "Unlike [g]uns [which] in general are not deleterious devices or products or obnoxious waste materials that put their owners on notice that they stand in responsible relation to a public danger, the dumping of sewage and other pollutants... is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger." United States v. Weitzenhoff,

35 F.3d 1275, 1283 (9th Cir.1993) (internal citations omitted). Besides, the Department's own regulations, the state statutory scheme, and indeed the federal scheme that controls over all are each predicated on the applicability of police power to regulate the disposal of human waste. So the only remaining question is whether the cost of compliance changes the equation.

This is not the first time limits have been sought on the power to protect public safety on the grounds of cost (though it may be the first time any Department of Natural Resources has ever done so). Automotive manufacturers are an instructive example. As they have pointed out, requiring safety belts makes cars more expensive. E.g., Williamson v. Mazda Motor of America, Inc., 131 S.Ct. 1131 (2011). Airbags are more expensive still. E.g., Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 120 S.Ct. 1913 (2000). The thought that a governmental exercise of police power to regulate in favor of the "comfort, safety and welfare of society" can be invalidated on the basis of cost must have been the inspiration of the car companies that were parties to

lawsuits like those. And if that line of reasoning had been accepted, cars would not now have safety belts and airbags.

Businesses are concerned primarily with their bottom lines. Nor is it wrong that this should be so. Municipal entities, in their capacities as stewards of tax dollars, sometimes fall into the trap of thinking they are businesses as well, and steward their money accordingly. This is often a laudable impulse. In many ways, however, these impulses are why safety regulations exist. If the market were exactly as concerned with safety as the people (whose views are expressed, however imperfectly, through the government they create), there would be no need for safety regulations, because businesses would already be acting according to standards the people approve of. But the market is not as concerned with safety as the people. The people do not approve of the cold equations of commerce, where the cost of lives lost is balanced against the cost of safety measures. See, e.g., the infamous Ford Pinto "risk-benefit analysis" case, Grimshaw v. Ford Motor Co., 174 Cal.Rptr. 348 (1981). It is often the role of government to use its police

power to change the equation for the business-minded, and incentivize behavior that is best for the public even though it might not otherwise "cost out."

That is why the Johnson court disregards "cost effectiveness" as a factor. It is not for the government to create the cheapest world, nor yet the cheapest safe world. The police power exists so those who exercise it can make those balancing tests for themselves, rather than have anyone subject to their regulations nullify them on grounds of inconvenience.

And that is also why the documents proposed by the Department to prove "economic infeasibility" do not show a unanimous preference for treatment of sludge to Class B biosolids. Twelve percent of biosolids are already treated to Class A standards. Of the dozen establishments surveyed by the Department, all had considered moving to Class A, and, despite it being more expensive, one of the twelve (8.3% of responding entities) did make the move to Class A – despite it being more

expensive by over a million dollars. CP 429. Why? Because more than money is at stake here. Wahkiakum's position, and this court's, will be vindicated by the same historical forces that caused Cowlitz County to convert its facilities from Class B to Class A levels of sewage treatment regardless of there being a much cheaper alternative. Id. Causing some treatment plants to do involuntarily what others are doing voluntarily hardly constitutes a "ban." And this is particularly so when Class B biosolids can still be both generated and even disposed of within the county pursuant to the Ordinance, as already noted supra.

E. The Slippery Slope Argument

Without getting into the question of what substance must be making this slope slippery, the County will address the Department's argument in its brief at 30 that "If all other counties in the state were to adopt regulations similar to Wahkiakum's, there would be no effective biosolids land application anywhere in the state."

There are two problems with this. First, it is not true on its face. Class A biosolids are welcome on Wahkiakum County land pursuant to the Ordinance. This is the first time the County has heard that "biosolids land application" of Class A biosolids constsitutes "ineffective biosolids land application." (And, of course, there are other ways of disposing of biosolids than land application.) Anyway, if other counties wish to help Wahkiakum County usher in an age of pervasive treatment to Class A biosolids, such "further regulation" is within the counties' power and in the best interest of all citizens. As the court has seen, noneconomic factors are leading us there anyway.

Second, it won't happen. The Department has argued over and over that land application of Class B biosolids constitutes "beneficial use" and Class B biosolids are used "extensively" on such wholesome areas as farms and forests. Brief of Department at 11. If this is so, then other counties will not follow Wahkiakum County's foolish example. They will keep their Class B biosolids and ask for more, including, no doubt, those Wahkiakum County

infelicitously refuses to apply on its own fields and forests. Remember, all inferences are to be drawn in favor of the County, and all facts not known for certain are presumed to favor the County's position. Johnson, supra. In other words, whenever anybody starts a sentence with "If," the uncertainty inherent in the phrase is resolved in favor of the County, and of constitutionality of its duly passed ordinance. The only way the Department can make this argument cognizable in light of the burdens and presumptions in this case would be to present proof that every county *would* prohibit land application of Class B biosolids within its borders, and this the Department has not done.

This court is limited to determining whether the Wahkiakum County Ordinance conflicts with the state law, and Wahkiakum County has no burden to defend the hypothetical future actions of other counties.

F. Precedent Cited By the Department

The Department cites a raft of authority, some persuasive authority from jurisdictions in which this same drama has taken place, some general authority within our state, though nothing local that is directly on point.

1. Out of State Decisions

First, some words about the out of state authority that the Department urges the court to consider persuasive. One fault is primary to them all. In none of these cases, from whatever state, from whatever federal circuit, has the Department established that the law of that jurisdiction regarding supremacy is the same as it is in our state. This state has particularly stringent rules regarding supremacy. Johnson, supra; Immelt, supra. The idea of proving a matter of law beyond a reasonable doubt is firmly entrenched here, but elsewhere this powerful burden may well be unusual. If we do not know whether the cases decided favorably to the Department were decided to a level of "beyond a reasonable doubt," but rather

were decided (as well they may have been) to the more traditional "as a matter of law" standard, then we do not know whether the results in that very case would be the same had it been decided in Washington. This significantly degrades their utility even as persuasive authority. It is the Department's burden to prove this because in the absence of proof, all presumptions and interpretations are to be made in favor of the county. Tukwila, supra; Winkenwerder, supra. The Department has been challenged to do this previously and has not responded, if that gives the court any idea of the probable result.

A second fault shared by all is that the fact that, while some out of state courts have made decisions favoring the Department's point of view, that does not negate the fact that other courts have found differently. See, e.g., Kern, supra, Welch, supra. Again, remember the burden here. If there is a reasonable way to uphold the Ordinance, this court must take it. Johnson, supra, Immelt, supra. Reasonable courts, from federal to state, from coast to coast, have decided that ordinances like Wahkiakum County's

should be upheld. If reasonable minds can differ, then our state law dictates that the ordinance be upheld. So the only thing the Department can do with the weight of persuasive out-of-state authority that could possibly help it is to show that such authority is unanimously against the Ordinance. In the face of any reasonable controversy – and it would be stretching a point to consider the Kern or Welch courts unreasonable – all the Department shows us is that some courts have found the way the Department wishes all courts had found. This is insufficient to carry the Department's burden.

That said, certain of the Department's out-of-state persuasive authority has features of interest. The Department cites Blue Circle Cement, Inc. v. Board of County Com'rs of County of Rogers, 27 F.3d 1499 (C.A.10 (Okl.),1994) in favor of the proposition that the State controls here. In fact, the Blue Circle court goes out of its way to emphasize that both local and state concerns must bow to an overarching federal purpose. "[I]f the [County] ordinance were to run afoul of the Supremacy Clause, it

would *only be* because of the form of implied preemption that precludes a state or local regulation from frustrating the full accomplishment of *congressional purposes embodied in a federal statute.*" Blue Circle, 27 F.2d at 1505 (emphasis added).

The Blue Circle court went on to say, "we must consider 'whether [the local] regulation is consistent with the structure and purpose of the [federal] statute as a whole.'" The internal quotes are to Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) and the bracketed interlineations are inserted by the Blue Circle court. In other words, the Blue Circle court went out of its way to emphasize that it is the federal purpose that controls.

And, as the court has seen, the federal purpose is the same as the county purpose. "The determination of the manner of disposal or use of sludge is a local determination...." 33 U.S.C. § 1345(e). This is "unmistakably clear." Kern, supra, 127 Cal.App. 4th at 1610. Thus, insofar as Blue Circle is of any persuasive

effect, it persuades us to disregard the Department's desires and refer directly to federal purposes, which, as the court already knows, are that a "political subdivision" of a state may impose "more stringent requirements" than propounded elsewhere, 40 C.F.R. § 503.5(b), because sludge disposal is a "local determination." 33 U.S.C. § 1345(e).

The Department's reliance on ENSCO, Inc. v. Dumas, 807 F.2d 743 (8thCir.1986), is simply obsolete. It was distinguished handily in Welch, supra, which the County brought to the court's attention before the Department cited ENSCO:

> Unlike this case, however, ENSCO concerned a situation in which a county passed an outright ban on the treatment and disposal of a substance that federal law affirmatively instructed it to treat and dispose of safely. Here, the County has not passed a complete ban on sewage sludge within its boundaries; it simply has banned one of three possible methods of use or disposal. [The other two are burial and incineration.] Regardless of the EPA's preference for land application, the Ordinance does not conflict with the federal standards for use or disposal of sewage sludge.
>
> Welch, 888 F.Supp. at 757.

Meanwhile, the case of Jacksonville v. Arkansas Dep't of Pollution Control, 308 Ark. 543, 824 SW2d 840 (1992), cited within the distinguished ENSCO case, and the even older Ogden Environmental v. San Diego, 687 F.Supp. 1436 (SD Cal. 1988), were both decided long before Welch or Kern and did not affect either decision. In any event, the Jacksonville case was decided based on the specific provisions of the Resource Conservation and Recovery Act (RCRA), which does not have a local control preference analogous to 33 U.S.C. § 1345(e) built into its terms. Instead, it has various provisions such as 42 U.S.C. § 6929 (1988), which specifically delineate the limits of state authority and the interplay between federal and local regulations.

The case of Ogden Environmental Servicese v. San Diego, 647 F.Supp. 1436 (1988), also decided long before the contrary Welch and Kern cases, suffers from all the various defects complained of in other cases earlier: it is not decided at our "beyond a reasonable doubt" standard (Id., 647 F.Supp. 1441) and

it is not decided under the provisions of the Clean Water Act with its preference for "local decisions."

2. Decisions Within This Jurisdiction

The Department attempts to bring authority from within the state, but has similar difficulties finding analogous situations. One of the cases it relies upon most heavily is Biggers v. City of Bainbridge Island, 162 Wash.2d 683, 694, 169 P.3d 14 (2007). Biggers contains a lot of quotes that might be useful to the Department, had the case actually been decided on the basis of those quotes. However, the Biggers case was decided not by determining that the State and another governmental entity were both permitted to regulate in the same field, but the State's regulations took precedence. Rather, the Biggers case was decided on the ground that the subject the two entities were regulating upon was shoreline management, and that the State had exclusive constitutional power to manage shorelines:

> Article XVII, section 1 of the Washington Constitution declares that shorelines were originally owned by the state, and therefore subject to state regulation. Even after sale or lease of shorelines, the state continues to hold remaining sovereign interests of the public. Indeed, the SMA was expressly based on the proposition that shorelines are of "statewide significance." Local governments do not possess any inherent constitutional police power over state shoreline use.
>
> Biggers, 162 Wash.2d at 694 (emphasis added).

Biggers was not a case, like this one, in which the local government has Constitutional power to regulate the subject matter of the case. That ended the argument in Biggers and any other language in it can only be dicta.

The same problem afflicts the Department's citation of Diamond Parking, Inc., v. City of Seattle, 78 Wn.2d 778, 479 P.2d 47 (1971), for the purpose of showing a conflict between a "coordinated system" of the State's against an ordinance that, in the words of the Department in its brief at 19 (but not the text of the opinion) "interferes with" such a system. The Diamond court

actually held that the City of Seattle had attempted to regulate corporations, which is a task delegated specifically to the legislature by the Washington State Constitution at Art. 12 § 1. Diamond, 78 Wn.2d at 782. There was no conflict to resolve because, as there and not here, the ordinance that was passed was beyond the purview of the police power.

The reason the Department has not analyzed in detail the facts of any Washington case is that there are no analogous cases that favor it. While it bandies about terms like "interferes with," which sounds much more favorable to the Department than the "direct and irreconcilable conflict," it cannot find any cases in the state in which a mere "interference" was found to create a conflict sufficient to invalidate a statute. Its most-cited case, Parkland Light & Water v. Tacoma-Pierce County Bd. of Health, 151 Wn.2d 428, 90 P.2d 37 (2004), involves a case in which a water utility, granted by statute the authority to determine whether to fluoridate its water, found itself in conflict with its local board of health, which, with no statutory or constitutional authority whatever,

passed an ordinance requiring the utility to fluoridate even though the utility had already decided not to. Id., 151 Wn.2d at 429. That's not "interference with methods," that's "direct and irreconcilable conflict." And it is nothing like the illusory conflict in this case. The most analogous case by far is Weden and its prohibition of state-licensed personal watercraft in San Juan County, a case that clearly favors the County. Weden, supra.

The upshot of all the authority cited by the Department is that no case in Washington is both comparable and favorable, while jurisdictions throughout the nation are split. Consensus among the states is as hard to come by now as it has always been. E.g., Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 562 (C.A.5 (Tex.),1997) ("[E]xperts have yet to reach a consensus on the safety of land application of sludge.").

The burden under which the Department labors is such that this state of affairs favors the County and the Ordinance.

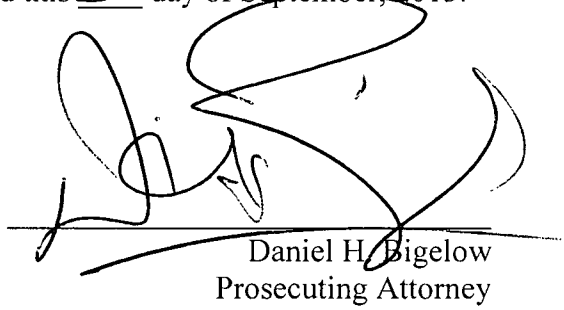
III. CONCLUSION

It is the duty of this court to find any reasonable means to uphold the Ordinance. It must seek any single way to do so, no matter how many other reasonable means exist to do anything else. In many cases this might be an onerous task, but here it is a simple one because there is no conflict between the Legislature's scheme – which contemplates local control, is based on federal law and regulation favoring local control, and spawned administrative code provisions providing for local control – and the Ordinance, which limits just one of several methods of disposal of human waste in just one small area of the state. Pursuant to Weden, supra, further regulation of this nature is presumed effective and permissible – and pursuant to Johnson, supra, no hypothetical parade of horribles can overcome this presumption. Nor can the court credit the arguments that the County is "totally banning" biosolids when the Department itself agrees that 12% of biosolids throughout the state can be legally piled on Wahkiakum County land, which is far more than the County could reasonably be

expected to accept. Nor yet should this court entertain for an instant the invitation of the Department to hold a legislative act unconstitutional because it is costly. The Department itself would be the next victim of such bad policy.

The Ordinance is in the best tradition of, and fully in line with the intent of, federal legislation, the code of federal regulations, the state's legislative scheme, and even the administrative code provisions written by the plaintiff to enforce that code. Since writing that chapter of the WAC, the Department has lost its way. This court should set the Department back on the right path and uphold the Ordinance.

Respectfully submitted this 20th day of ~~September,~~ 2013.



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CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to the following addresses, postage prepaid, on September 20, 2013.

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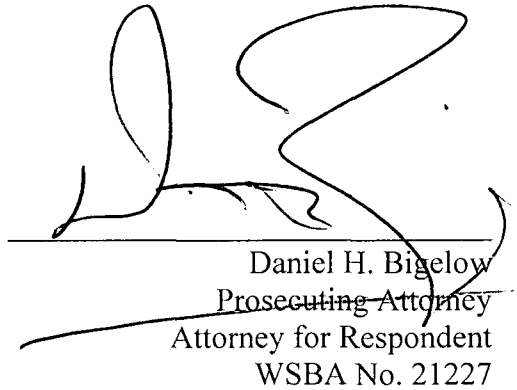

Daniel H. Bigelow
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Attorney for Respondent
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ORDINANCE NO. 151 -11

AN ORDINANCE REGARDING THE REGULATION OF THE USE OF BIOSOLIDS

WHEREAS, the term "biosolid" means sewage sludge that is a primarily (but not entirely) organic, semisolid product resulting from the wastewater treatment process; and

WHEREAS, the term "septage" means biosolids composed primarily of human waste from septic tanks; and

WHEREAS, RCW 70.95J.005(e) reflects the Washington State Legislature's acknowledgement that biosolids "can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health;" and

WHEREAS, among the metals that may pose such risk are arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc; and

WHEREAS, among the microorganisms that may pose such risk are e. coli, heliobacter pylori, legionella, cryptosporidium, giardia, and various viruses; and

WHEREAS, disease and heavy metal contamination constitute potential threats to the life and health of humans, pets, livestock, crops, and also the natural flora and wildlife of the County; and

WHEREAS, the County of Wahkiakum prides itself on the quality of its agriculture, which is of economic benefit and historical importance to the citizens of the County; and

WHEREAS, the benefits of agriculture to the County of Wahkiakum are greatly enhanced by both the quality and the perceived quality, of the County's agricultural goods; and

WHEREAS, the County of Wahkiakum is distinguished by its many rivers and sloughs, which flood to a greater or lesser extent on an annual basis; and

WHEREAS, such floods have the potential to spread items applied on the ground on one property onto such other property as the flood may affect; and

WHEREAS, regulation of the use of septage, sludge, and biosolids is necessary for the protection of the health and welfare of citizens of and visitors to Wahkiakum County and also for the protection of the good reputation of Wahkiakum County agriculture;

NOW THEREFORE, THE COMMISSION OF THE COUNTY OF WAHKIAKUM DOES HEREBY ORDAIN AS FOLLOWS:

Daniel H. Bigelow
Prosecuting Attorney
P.O. Box 397
Cathlamet, Washington 98612
(360) 795-3652

EXHIBIT 1

A new chapter is hereby added to the Wahkiakum County Code in Title 70, to be designated Chapter 70.08, and to read as follows:

70.08.010: Definitions.

(a) "Biosolids" shall have the definition given to that word in WAC 173-308-005(b), as such definition may hereafter amended or recodified.

(b) "Class A Biosolids" means biosolids that meet the requirements for Class A pathogen reduction in WAC 173-308-170, as that administrative code section now exists or may hereafter be amended or recodified.

(c) "Class B Biosolids" means biosolids that meet the requirements for Class B pathogen reduction in WAC 173-308-170, as that administrative code section now exists or may hereafter be amended or recodified.

(d) "septage" means biosolids composed primarily of human waste from septic tanks.

70.08.020: Land Application of Biosolids.

(a) No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum.

70.08.030: Penalty.

(a) Any person who fails to comply with any provision of this chapter shall be subject to a civil penalty not to exceed one thousand dollars for each violation. Each application of a load of biosolids upon the land shall constitute a separate violation.

(b) The civil penalty provided for in this section shall be imposed by a notice in writing either by certified mail with return receipt requested or by personal service, to the person incurring the same. The notice shall describe the violation with reasonable particularity and shall order the acts constituting the violation or violations to cease and desist or, in appropriate cases, may require necessary corrective action to be taken within a specific and reasonable time.

(c) Any civil penalty imposed pursuant to this section shall be subject to review by the Board of County Commissioners as provided in RCWC 86.16.405, as it now exists or may hereafter be amended or recodified.

70.08.040: Interpretation.

This chapter is intended to further regulate the use of biosolids and not to repeal or limit any restrictions upon the use of biosolids that now exist or may hereafter be adopted.

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DULY PASSED AND ADOPTED this 26 day of April, 2011.

BOARD OF COUNTY COMMISSIONERS
OF WAHKIAKUM COUNTY, WASHINGTON

ATTEST:

Marsha LaFarge
Clerk of the Board

Lisa M. Marsyla, Chairman

Daniel L. Cothren, Commissioner

APPROVED AS TO FORM this
____ day of April, 2011:

Blair H. Brady, Commissioner

Daniel H. Bigelow
Prosecuting Attorney

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