COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political subbdivision of Washington State, Respondent.	NO. 44700-2-II RESPONSE TO MOTION FOR LEAVE OF NORTHWEST BIOSOLIDS MANAGEMENT ASSOCIATION, WASHINGTON ASSOCIATION OF CLEAN WATER AGENCIES, AND THE TOWN OF CATHLAMET, TO FILE *AMICUS CURIAE* BRIEF

I. PARTY REQUESTING RELIEF

The County of Wahkiakum requests the relief hereinafter set forth.

II. RELIEF REQUESTED

The County of Wahkiakum requests the court to deny the motion of Northwest Biosolids Management Association, Washington Association of Clean Water Agencies, and the Town of Cathlamet (hereafter referred to in the singular as Applicants for brevity), to file an *amicus curiae* brief herein. If the County's motion is denied, it requests in the alternative that

the County and its amici be permitted leave to respond pursuant to RAP 10.2(g).

III. BASIS FOR MOTION

This motion is based on the record herein; the Motion for Leave of Northwest Biosolids Management Association, Washington Association of Clean Water Agencies, and the Town of Cathlamet, to File *Amicus Curiae* Brief dated May 29, 2014; the proposed brief of the same parties filed on that same date; RAP 10.6(g) permitting objection to motions to file *amicus curiae* briefs; RAP 9.1 regarding composition of the record; and RAP 10.2(g) permitting this court to set a date by which a reply to an *amicus curiae* brief may be filed.

IV. ARGUMENT

On the late afternoon of the final day before *amicus* requests become untimely, two large coalitions representing sludge disposal interests suddenly appeared and purported to find this case, in the words of Applicant's Motion for Leave at 3, one in which they have an "enormous stake." This case has been in various stages of litigation for a number of years, as the court can see by the clerk's papers, and with the exception of the Town of Cathlamet, none of the parties in this or the other *amicus* motion made the same day found it of enormous interest before during the comment period before passage of the county ordinance, during the

pendency of the superior court case herein, or, for that matter, during the months of pendency of this appeal. The County first suggests that the claims of any party that this case is of major interest to them is belied by the casual attitude that led them to ignore this case until, almost literally, the last minute.

But the true inquiry before the court is whether the proposed *amicus* filing "would assist the appellate court." RAP 10.6(a). And upon examining the proposed materials, it is evident that the proposed filings are the exact opposite of assistance.

As this court is well aware, RAP 9.1 provides that the record in this case is limited to the transcripts and clerk's papers herein. See also RAP 9.12, providing in relevant part, "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."

The Association make no bones about its intent to violate these fundamental rules. At 2-3 of its motion, it states it intends to "speak authoritatively" to this court regarding "the benefits, value, and science of biosolids." This is precisely what the Association must not do. All the factual issues of this case have been resolved, and the court needs no further "authoritative speech" on any subject before it.

The Association's proposed brief is larded with references to outside factual sources. It references nine separate new factual sources outside the record at iv of its proposed brief, and peppers its brief with factual asides such as "Were the Court to affirm the trial court, the state's program is likely to collapse... to a patchwork of county bans" (proposed brief at 3), which assumes facts that are not only outside the record, but have not yet come to pass. (The particular example also shows the Association has little faith in the actual benefits of its product.) On the same page, it purports to educate the court about the percentage of water in Class B biosolids and on the inevitability of landfill disposal of biosolids (rather than, say, conversion to Class A) as a result of this court's ruling.

Also, as in the other brief filed of even date, the Association presents bucolic photographs of innocuous-appearing agrarian scenes that are without foundation in the record. Here, at page 7 of its proposed brief, it does so as the beginning of a factual discourse that continues onto page 8, citing new factual authorities twice and the clerk's papers only once. And then there are the factual assertions that do not cite to a source either inside or outside the record, such as the paragraph on the purported health and safety practices of the Tacoma-Pierce County Health Department at page 11 that fails not only the standards of RAP 9.1 and 9.12, but also the test of relevancy itself. This is before we even reach the entirely factual arguments of the proposed brief's part C, "Safety and Experience Confirm

the Benefits and Safety of Biosolids," which is entirely a factual assertion, cites entirely to new factual authority, and undercuts the very basis for septage sludge regulation in the first place. (*See, e.g.,* Weden v. San Juan Cnty., 135 Wn.2d 678, 701, 958 P.2d 273, 284 (1998): Laws must serve a "legitimate public purpose" that makes them "reasonably necessary to protect the public health, safety, morals, or general welfare." There is no need to regulate a safe and beneficial activity.)

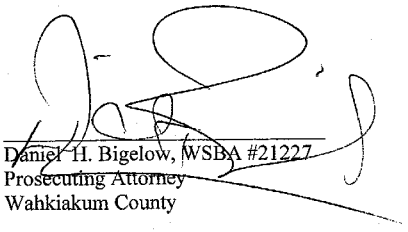
Succinctly put, rather than help this court as it must under RAP 9.1, the Association instead proposes to relitigate this case with facts outside the record – "authoritative speech" by the Association itself, as the Association readily admits – that would not be subject to cross-examination or rebuttal by any party that operates according to the rules. Nor would it "assist" this court to be in the position of trying to tease any legitimate argumentative threads out from the mass of impermissible factual assertions. This is a job the Association should have undertaken itself; and in any event, no new ground is covered.

V. CONCLUSION

If the court does decide to permit the filing of the Association's brief, the County requests leave to respond. But the court should not grant such permission.

The Association claims a significant interest in the outcome of this case, but that is inconsistent with the way a group with its claimed resources failed to intervene at the trial level, or, better yet, at the level of the public comment period before the ordinance complained of was even passed. But even assuming the Association indeed has a tremendous stake in these affairs, that alone does not entitle it to a place before the bar in this case. It must also bring something to the court that adds value. Its description of the facts that it might have been able to prove had it intervened are untimely and unhelpful, and its legal arguments are redundant and purely secondary to its impermissible attempt to supplement the record.

Respectfully submitted this 2nd day of June, 2014.



Daniel H. Bigelow, WSBA #21227
Prosecuting Attorney
Wahkiakum County

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political Subdivision of Washington State, Respondent.	NO. 44700-2-II CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 2nd day of June, 2014, I caused to be served a true and correct copy of the Response to Motion for Leave of Northwest Biosolids Management Association, Washington Association of Clean Water Agencies, and the Town of Cathlamet, to File *Amicus Curiae* Brief in the above captioned matter upon the parties herein as indicated below, by U.S. Mail:

Harold Lee Overton
Attorney at Law
P.O. Box 40117
Olympia, WA 98504-0117

Glen J. Carter
Lewis County Prosecuting Attorney
345 W. Main Street
Chehalis, WA 98532-4802

Konrad J. Liegel
Attorney at Law
1463 E. Republican Street, #190
Seattle, WA 98112

James B. Slaughter
Beveridge & Diamond, P.C.
1350 I Street NW
Washington, DC 20005

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of June, 2014, at Cathlamet, Washington.

Geri L. Rooklidge

GERI L. ROOKLIDGE, Administrative Assistant