No. 44700-2

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.

LEWIS COUNTY'S MOTION TO FILE AMICUS CURIAE BRIEF

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Pursuant to RAP 10.6(b), Lewis County requests permission to file the attached *amicus curiae* brief. Because of its proximity to major transportation routes, Lewis County is a favored location for applying "biosolids," a product of wastewater treatment. Concerned that the application of biosolids containing toxic metals, chemicals and microorganisms, threaten water sources and public health, the county has considered regulation of sewage sludge products. The department of ecology, however, has discouraged the county's efforts, contending ecology alone may regulate biosolids. Ecology's position misconstrues the amendments to the Clean Water Act that RCW 70.95J was enacted to implement and ignores the county's concurrent authority under federal law, RCW 70.95J, and ecology's own rules. Additionally, ecology ignores a county's independent authority under article XI, section 11 of the Washington Constitution to impose supplemental restrictions on biosolids. Finally, ecology's position unnecessarily impairs the ability of counties planning under the Growth Management Act, RCW 36.70A (GMA), to comply with their GMA obligation to protect surface water sources from pollution. For these reasons, as elaborated in the attached Memorandum of Points and Authorities, Lewis County moves this court for permission to file the attached *amicus curiae* brief.

RESPECTFULLY SUBMITTED this 24 day of October, 2013.

GLENN J. CARTER, WSBA# 33863
Chief Civil Deputy Prosecuting Attorney
Of Attorneys for Lewis County

MEMORANDUM OF POINTS AND AUTHORITIES

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Lewis County is the largest county in western Washington. It covers 2,452 square miles and measures approximately ninety (90) miles east to west and twenty-five (25) miles north to south. Thirty-eight percent (38%) of the land in the county is owned by the federal or state government and is devoted to national or state parks, wilderness areas, and monuments. Thirty-seven percent (37%) of the land is privately-owned resource land, primarily devoted to forest resource uses. Only one percent (1%) of the land lies within urban areas, with much of that committed to right of ways and public uses, constrained by critical areas. An additional one percent (1%) is classified as limited rural areas of more intense rural development, including small towns, crossroads, and commercial and residential enclaves in rural areas. The remaining twenty three percent (23%) of the land is considered remote rural land, much of it characterized by steep slopes, wetlands, and hydric soils. Lewis County Comprehensive Plan, Land Use Element, at 4-3.

Because of its abundant rural lands, close proximity to the Puget Sound and major transport routes, Lewis County is a favored site for application and disposal of biosolids generated by Seattle, Tacoma

and other urban areas west of the Cascades. The County is concerned that high levels of use of biosolids threaten public health and the environment, including surface water and groundwater. Initial efforts to develop regulations limiting the use of one class of biosolids have been met with opposition from the department of ecology which has insisted that it alone has the authority to regulate the application of biosolids in the county.

Lewis County is required to plan under the Growth Management Act, RCW 36.90A (GMA). One of the explicit "goals" of the GMA is to "[p]rotect the environment..., including air and water quality, and the availability of water." RCW 36.70A.020(10). To achieve this goal, the GMA requires the County to adopt measures governing rural development that "protect critical areas" as provided in RCW 36.70A.060 and that protect "surface water and groundwater resources" as provided by RCW 36.70A.070(5)(c)(iv). The Growth Management Hearings Board, a state agency, has held that a county is out of compliance with the GMA and may be subject to the sanction of invalidity if it does not take affirmative and adequate action to protect water sources from pollution. *See, e.g., Hirst et al. v. Whatcom County*, GMHB Case No. 12-2-0013 (June 7, 2013). It is no defense to non-compliance or invalidity under the GMA that ecology controls the application of biosolids and believes its regime

is adequate to protect the county's water sources. The county cannot meet the requirements of state law under the GMA without having the right to regulate the application of sewage sludge to rural lands.

II. FAMILIARITY WITH ISSUES

Lewis County has long studied the possibility of adopting regulations of certain classes of biosolids to protect public health and the environment. This county's independent consideration of the issue has been met with strong opposition from the community using biosolids and from the department of ecology. The county has followed the Wahkiakum County dispute with interest and is familiar with the arguments raised by the parties. Lewis County believes the present briefing does not sufficiently address the federal biosolid amendments and rules, the intent of the legislature to implement the federal provisions, the scope of the legislative direction given to ecology, and the county's independent authority to regulate under the police power. Moreover, ecology's position in discussion and in briefing creates an unnecessary conflict between RCW 70.95J and the Growth Management Act, RCW 36.70A.

III. ISSUES TO BE ADDRESSED BY AMICUS CURIAE

The briefs on file do not adequately address the legislative scheme in Washington state governing solid waste management. Biosolids are a relatively small part of a larger state solid waste program that assigns primary responsibility for solid waste management to local government to address the unique needs of each county and city. *See* RCW 70.95.010(6)(c),.020(1), .080(1); *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 101-02, 178 P.3d 960 (2008). While ecology is directed to set minimum standards for biosolids consistent with federal requirements, Washington law reserves to local government the right to impose stricter standards to protect public health and prevent pollution. RCW 70.95.060(1); .065(1); .075; .090(3)(a); .160.

The briefs do not adequately address the legislative history of the biosolids statute and the provisions of the statute and ecology's rules granting local government concurrent regulatory authority over the application of biosolids. RCW 70.95J was enacted to implement the federal bisolids amendments to the Clean Water Act. RCW 70.95J.020(1). The Clean Water Act expressly reserves concurrent authority to local government. 33 U.S.C. §§ 1345(e), 1370. The Environmental Protection Act (EPA) regulations implementing the biosolids amendments expressly reserve to local governments the

authority to impose additional and more stringent requirements than the EPA regulations. 40 C.F.R. § 503.5(b). By authorizing ecology to adopt rules implementing the federal amendments, the state legislature necessarily intended to and incorporated the federal scheme preserving the concurrent authority of local governments.

In fact, when it enacted RCW 70.95J, the Legislature struck from the bill a provision preempting local government measures banning the application of biosolids, clearly reflecting the legislature's intent to preserve local concurrent authority. House Bill Report, HB2640 (1991-92). Similarly, ecology's rules adopted pursuant to the legislative direction in RCW 70.95J acknowledge local government's concurrent authority over the application of biosolids to land. *See* WAC 173-308-030(6).

Ecology's brief recites federal standards for preemption that are inconsistent with Washington law. The Washington Supreme Court has repeatedly held that local ordinances may require more than state law requires where laws are prohibitory or regulatory, that local ordinances do not conflict with state statutes in the constitutional sense merely because they prohibit a wider scope of activity, and that no conflict exists between local ordinances and state law where the ordinances go further in their prohibition – but not counter to the

prohibition in the statute. *State v. Kirwin*, 165 Wn.2d 818, 825-26, 203 P.3d 1044 (2009); *Rabon v. City of Seattle*, 135 Wn.2d 278, 292-93, 957 P.2d 621 (1997); *Brown v. City of Yakima*, 116 Wn.2d 556, 562, 807 P.2d 353 (1991); *State of Washington ex rel. Schillberg v. Everett District Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979). Ecology's brief fails to cite this line of cases, let alone attempt to explain why ecology believes it does not apply. In fact, these precedents strongly support Wahkiakum County's legislation limiting the application of a particular class of biosolids.

Finally, unlike Wahkiakum County, *amicus* Lewis County plans under the GMA and is subject to the requirement of RCW 36.70A.070(5)(c)(iv) of the GMA to adopt measures, including development regulations, that protect surface and groundwater resources from pollution. *See Hirst et al. v. Whatcom County, supra.* The widespread application of biosolids, which indisputably contain pollutants, to County lands in rural areas threatens the ability of the County to comply with the GMA mandate to protect critical areas and water sources upon which both people and wildlife depend. *See also* RCW 36.70A.020(10). Ecology's attempt to exclude counties from exercising their right to regulate the application of biosolids impairs the counties' ability to comply with state law and creates an unnecessary conflict between RCW 70.95J and the GMA.

IV. ADDITIONAL ORAL ARGUMENT

Lewis County respectfully requests the opportunity to argue that the Clean Water Act and federal biosolid rules expressly reserve to local government concurrent authority, that the Washington legislature intended to implement the federal provisions, and that ecology's original rules recognize local government's concurrent authority. However, even if the federal and state biosolids provisions do not grant concurrent local authority, article XI, section 11 of the Washington Constitution grants local government the authority to impose additional restrictions on the application of biosolids. Finally, ecology's position creates an unnecessary conflict with the Growth Board's direction that local governments protect surface water sources from pollution.

DATED this 24th day of October, 2013.

GLENN J. CARTER
Chief Civil Deputy Prosecuting Attorney

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Lewis County is the largest county in western Washington. It covers 2,452 square miles and measures approximately ninety (90) miles east to west and twenty-five (25) miles north to south. Thirty-eight percent (38%) of the land in the county is owned by the federal or state government and is devoted to national or state parks, wilderness areas, or monuments. Thirty-seven percent (37%) of the land is privately-owned resource land, primarily devoted to forest resource uses. Only one percent (1%) of the land lies within urban areas. An additional one percent (1%) is classified as limited rural areas of more intense rural development, including small towns, crossroads, and commercial and residential enclaves in rural areas. The remaining twenty three percent (23%) of the land is considered remote rural land, much of it characterized by steep slopes, wetlands, and hydric soils. Lewis County Comprehensive Plan, Land Use Element, at 4-3.

Because of abundant rural lands, close proximity to the Puget Sound and major transport routes, Lewis County is a favored site for application and disposal of biosolids. The County is concerned that the high levels of current use of biosolids threaten public health

and the environment. The County's initial efforts to develop regulations of the use of biosolids have been met with stiff resistance from the department of ecology which has insisted that it alone has the authority to regulate the application of biosolids in the county.

Lewis County also is concerned that the application of biosolids will impair surface and groundwater sources. The county has a legal responsibility "to protect rural character by protecting surface water and groundwater resources, as required by RCW 36.70A.070(5)(c)(iv)" of the Growth Management Act (GMA) and may be found out of compliance with or in invalidity under the GMA if it does not take affirmative action to protect water sources from pollution. *See, e.g., Hirst et al. v. Whatcom County*, GMHB Case No. 12-2-0013 (June 7, 2013). It is no defense to liability under the GMA that ecology controls the application of biosolids and believes its regime is adequate to protect the county's water sources. The county cannot meet the requirements of state law under the GMA without having the right to regulate the application of bisolids.

II. STATEMENT OF CASE

Lewis County incorporates by reference the Statement of the Case, designated as "Facts," at pages 1 through 4 of the Respondent Wahkiakum County's Brief.

III. ISSUES TO BE ADDRESSED BY AMICUS CURIAE

The briefs on file do not adequately address the legislative scheme in Washington state governing solid waste management. Biosolids are a small part of a larger state solid waste program that assigns primary responsibility for solid waste management to local government to address the unique needs of each county and city. While ecology is directed to set minimum standards for biosolids consistent with federal requirements, Washington law reserves to local government the right to impose stricter standards to protect public health and prevent water pollution.

The briefs do not adequately address the legislative history of the biosolids statute and the provisions of the statute and ecology's rules granting local government concurrent regulatory authority over the application of biosolids. RCW 70.95J was enacted to implement federal amendments to the Clean Water Act. The Clean Water Act and the federal rules, implementing the biosolids

amendments expressly reserve concurrent authority to local government. By implementing the federal amendments, the state necessarily adopted the federal scheme preserving the concurrent authority of local government. In fact, when it enacted RCW 70.95J, the Legislature struck from the bill a provision preempting local government measures banning the application of biosolids. Similarly, ecology's rules adopted pursuant to the legislative direction in RCW 70.95J acknowledge local government's concurrent authority over biosolids.

Ecology's brief recites federal standards for preemption that have no place in and ignore relevant Washington law. The Washington Supreme Court has repeatedly held that a local ordinance may require more than state law requires where laws are prohibitory or regulatory, that a local ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity, and that no conflict exists between a local ordinance and a state law where the ordinance goes farther in its prohibition – but not counter to the prohibition in the statute. Ecology's brief fails to cite these precedents, let alone attempt to explain why they do not apply. In

fact, Washington strongly supports Wahkiakum County's legislation biosolids ordinance.

Finally, unlike Wahkiakum County, amicus Lewis County is subject to the Growth Management Act, RCW 36.70A (GMA), and is subject to the requirement of RCW 36.70A.070(5)(c)(iv) of the GMA to adopt development regulations that affirmatively protect surface and groundwater resources from pollution. *See Hirst et al. v. Whatcom County, supra.* The widespread application of biosolids, which everyone agrees contain pollutants, to County lands threatens the ability of the County protect water quality. Ecology's attempt to exclude counties from exercising their right to regulate the application of biosolids impairs the counties' ability to comply with the GMA.

IV. ARGUMENT

A. SOLID WASTE MANAGEMENT IS PRIMARILY A LOCAL GOVERNMENT FUNCTION

Washington law assigns "primary responsibility" for solid waste management to local government. *See* RCW 70.95.020(1); *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 101-02, 178 P.3d 960 (2007). "It is the responsibility of county and city governments

to assume primary responsibility for solid waste management and to develop and implement aggressive and effective waste reduction and source separation strategies." RCW 70.95.010(6)(c).

Local authority over solid waste programs ensures they meet "the unique needs of each county and city in the state." RCW 70.95.080(1). The legislature therefore has directed the department of ecology ("ecology") to establish "minimum functional standards" for solid waste handling to comply with federal "regulations relating to air and water pollution...and protection of public health," while reserving to local governments the authority to "adopt regulations and ordinances governing solid waste handling" that are "more stringent than the minimum functional standards adopted by the department." RCW 70.95.160.

B. THE FEDERAL GOVERMENT AMENDED THE CLEAN WATER ACT IN 1987 TO PERMIT TREATMENT, TRANSPORTATION AND HANDLING OF BIOSOLIDS

In 1987 the United States Congress amended the federal Clean Water Act, 33 U.S.C. §§ 1251 – 1376, to permit utilization of certain byproducts of the treatment of wastewater, known as "biosolids." *See* 40 C.F.R. § 503.13(b); 58 Fed. Reg. 9256; and, Environmental

Protection Agency, "*Biosolids: Targeted National Sewage Sludge Survey Report – Overview*," January 2009, EPA-822-R-08-014. Notwithstanding treatment, all classes of biosolids contain pollutants, including metals such as arsenic, chromium and cadmium, and chemicals such as semivolatile organics, polycyclic aromatic hydrocarbons, flame retardants, pharmaceuticals, steroids and hormones. "*Biosolids: Targeted National Sewage Sludge Survey Report – Overview*," *supra*. See generally, 58 Fed.Reg. 9256; 40 C.F.R. Parts 501 & 503. Class B biosolids also retain sufficient microorganisms to threaten public health and must be handled and applied in a manner, at times, and in places so as to minimize contact with the public, whether directly or through consumption of crops or other products. Id.

C. THE FEDERAL AMENDMENTS PRESERVE CONCURRENT LOCAL AUTHORITY OVER THE MANNER AND USE OF BIOSOLIDS

The Clean Water Act amendments expressly preserve local government's concurrent regulatory authority over the manner and use of biosolids, stating that "[t]he determination of the manner or use of sludge is a local determination...." 33 U.S.C. § 1345(e). The Act also preserves local government's authority to impose

stricter limitations on the use of biosolids. 33 U.S.C. § 1370. *See also Welch v. Rappahannock County*, 888 F.Supp. 753, 756 (W.D.Va. 1995).

Similarly, the federal rules implementing the Clean Water Act amendments state that "[n]othing in this part precludes a State or political subdivision thereof or interstate agency 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).

D. THE LEGISLATURE DIRECTED ECOLOGY TO ADOPT RULES IMPLEMENTING THE FEDERAL BIOSOLIDS AMENDMENTS, INCLUDING CONCURRENT LOCAL AUTHORITY OVER THE MANNER AND USE OF BIOSOLIDS

The Washington legislature directed the department of ecology to "adopt rules to implement a biosolid management program...[to] conform with all applicable federal rules adopted pursuant to the federal clean water act as it existed on February 4, 1987." RCW 70.95J.020(1). Hence, the Washington legislature directed ecology to adopt biosolids rules conforming, *inter alia*, to the requirement of the federal rules implementing the 1987 biosolids amendments,

namely that "[n]othing in this part precludes a State or political subdivision thereof or interstate agency 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). *See also,* 33 U.S.C. § 1345(e); 33 U.S.C. § 1370. The legislature's intent is confirmed by the decision to strike from the same bill a provision "expressly restricting local government's ability to ban the use or disposal [of biosolids]." House Bill Report, HB2640, attached as Appendix A and incorporated by reference.

E. THE WAC RULES EXPRESSLY RECOGNIZE LOCAL CONCURRENT AUTHORITY OVER THE MANNER AND USE OF BIOSOLIDS

Pursuant to the legislature's direction, ecology adopted biosolids rules that, *inter alia*, require compliance with the federal biosolids rules and local ordinances:

> (5) Facilities and sites where biosolids are applied to the land or sewage sludge is disposed must comply with the federal biosolids rule, 40 C.F.R. Part 503.
>
> (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.

WAC 173-308-030(5) - (6). The referenced federal rule, 40 C.F.R. Part 503, expressly reserves to local government the authority to "impos[e] requirements for the use or disposal of sewage sludge more stringent than the requirements" of the federal rule and to "impose additional requirements for the use or disposal of sewage sludge." 40 C.F.R. § 503.5(b). Therefore, ecology's own rules – like the statute and the Clean Water Act – acknowledge local government's concurrent authority to regulate biosolids.

F. WASHINGTON LAW RECOGNIZES THE RIGHT OF LOCAL GOVERNMENT TO IMPOSE STRICTER CONTROLS

Even if the federal and state rules had not preserved local government's traditional authority to regulate solid waste, article XI, section 11 of the Washington constitution authorizes "[a]ny...county...[to] make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." This section is a direct delegation of the police power to cities and counties and the power delegated is as extensive within its sphere as that possessed by the Legislature.

Weden v. San Juan County, 135 Wn.2d 678, 705, 958 P.2d 273 (1998).

Article XI, section 11 of the Washington constitution also empowers a county to enact an ordinance touching on the same subject matter as a state law, provided the state law is not intended to be exclusive. *Rabon v. City of Seattle*, 135 Wn.2d 278, 287, 957 P.2d 621 (1997); *King County v. Taxpayers of King County*, 133 Wn.2d 584, 611, 949 P.2d 1260 (1997); *Baker v. Snohomish County Department of Planning and Community Development*, 68 Wn.App. 581, 588, 590-91, 841 P.2d 1321 (1992); *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). As already demonstrated, the biosolids statute and ecology's rules are not intended to be exclusive. (*See infra.* at 7 - 10.)

G. A LOCAL ORDINANCE DOES NOT CONFLICT WITH STATE LAW MERELY BECAUSE IT REQUIRES MORE THAN OR PROHIBITS A WIDER SCOPE OF ACTIVITY THAN STATE LAW.

Alternatively, even if the biosolids statute had incorporated an express or implied intent to preempt local ordinances, the biosolids statute preempts only "if a conflict exists such that the two cannot be harmonized." *Weden*, 135 Wn.2d at 693 (quoting *Brown*, 116

Wn.2d at 561); *Rabon*, 135 Wn.2d at 287; *King County*, 133 Wn.2d at 611. Such an irreconcilable conflict does not exist merely because the local ordinance goes further than state law in regulating or prohibiting toxic material, in this case the less-treated class of biosolids that still contains both metals and some microorganisms.

The Supreme Court has repeatedly held that "[a] local ordinance may require more than state law requires" where laws are prohibitory or regulatory. *Rabon*, 135 Wn.2d at 292-93(prohibitory) (emphasis added). See also *Lenci v. City of Seattle*, 63 Wn.2d 664, 670-71, 388 P.2d 926 (1964)(regulatory). "[T]his court has repeatedly stated that a local ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity." *Brown*, 116 Wn.2d at 562, citing *City of Seattle v. Eze*, 111 Wn.2d 22, 33, 759 P.2d 366 (1988)(emphasis added); *State of Washington ex rel. Schilberg v. Everett District Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979); *Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960). No conflict exists between a local ordinance and a state law "where the ordinance goes farther in its prohibition – but

not counter to the prohibition in the statute." *State v. Kirwin*, 165 Wn.2d 818, 825-26, 203 P.3d 1044 (2009); *Eze*, 111 Wn.2d at 33.

For example, in *Brown*, *supra*, a local ordinance was held not to conflict with the state fireworks law where the local ordinance went further in its prohibition of dangerous fireworks than state law by providing for a shorter time period for lawful possession. The Supreme Court upheld the city's imposition of restrictions on the right to possess dangerous fireworks in addition to those imposed by state law. In *Schillberg*, *supra*, the Supreme Court found state law governing the operation of motor boats did not conflict with a local ordinance *banning* the operation of motor boats on a local lake. The Court rejected the argument that compliance with state requirements for licensing a vessel preempted local regulation. The Court held that state law "did not in any way grant permission to operate boats in any place." *Schillberg*, 92 Wn.2d at 108. Similarly, in *Weden, supra*, the Court upheld a county ordinance *banning* personal water vessels throughout county for all but emergency purposes because of threats to swimmers, other vessels, wildlife and habitat, as well as to the area's tourist-based economy. The Court upheld the right of local government to impose the ban. In *Rabon*, supra, the Supreme Court upheld the

city's police power measures requiring the destruction of dangerous dogs, even in circumstances where state law permitted owners to keep them alive. The Court upheld the city ordinance, notwithstanding the conflict, citing the right of the local jurisdiction to go further than the state in prohibiting or regulating dangerous dogs.

The rules governing the management of biosolids require at a minimum that a person seeking to treat, transport or use such waste must apply for and obtain a state permit and comply with state regulations. The rationale for a permit requirement is straightforward: the legislature explicitly found that biosolids contain toxic materials and pose a potential threat to human health and the environment. RCW 70.95J.005(e). As in the case of fireworks, dangerous dogs, and motorized vessels, the application of biosolids is prohibited absent compliance with state licensing statutes and rules. As in those cases, Wahkiakum county is permitted to adopt broader restrictions on the application of biosolids than state law, including an outright ban on certain classes of biosolid. See *Rabon*, 135 Wn.2d at 293; *Brown*, 116 Wn.2d at 562-63.

H. THE COUNTY ORDINANCE DOES NOT PROHIBIT WHAT STATE LAW PERMITS

Contrary to ecology's argument, Wahkiakum County has not "prohibited" what state law "permits." It is undisputed that biosolids contain microorganisms, metals and chemicals that are regulated pollutants under federal and state law. The federal Clean Water Act amendments and the federal biosolids rules implementing those amendments nevertheless permit the limited application of these pollutants to land if the person desiring to use them obtains a permit to do so and otherwise complies with *local laws*. 33 U.S.C. § 1345(e); 33 U.S.C. § 1370; 40 C.F.R. § 503.5(b). Compliance with local laws is a condition to the permit.

Ecology's rules, which the legislature directed "conform with all applicable federal rules adopted pursuant to the federal clean water act," echo the federal requirement, conditioning issuance of the state permit on compliance with the federal biosolids rules and local ordinances. RCW 70.95.020(1); WAC 173-308-030(5) - (6). The rules do not create a right to apply toxic waste to specific Washington lands in spite of local laws; rather, the state right to apply biosolids is explicitly conditioned on compliance with local law. Hence, Wahkiakum county has not outlawed what state law

permits, because state law does not "permit" unless and until the applicant complies with local law.

I. COUNTIES MUST HAVE AUTHORITY TO REGULATE BIOSOLIDS TO COMPLY WITH THE GMA REQUIREMENT TO PROTECT SURFACE WATER RESOURCES FROM POLLUTION.

The Growth Management Act, RCW 36.70A (GMA), requires covered counties, such as Lewis County, to adopt comprehensive plans and development regulations that "[p]rotect the environment and enhance the quality of life, including air and water quality, and the availability of water." RCW 36.70A.020(10). Specifically, the rural element of the county's comprehensive plan must include provisions "[p]rotecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources." RCW 36.70A.070(5)(c)(iv).

The Growth Management Hearings Board (GMHB), a state agency separate from the department of ecology, recently ruled that a county's failure to adopt comprehensive plan provisions and development regulations that affirmatively protect surface water and groundwater resources from pollution from any source do not

comply with the GMA and may be subject to invalidity. *See Hirst et al. v. Whatcom County*, GMHB Case No. 12-2-0013 (June 7, 2013).

Counties planning under the GMA cannot comply with the requirements of the GMA as interpreted by the Growth Board as long as ecology prohibits counties from regulating the use and disposal of biosolids. Indisputably, biosolids contain pollutants, are spread in enormous quantities across rural lands, and affect surface water sources. Ecology's preemptive control over their use precludes counties planning under the GMA from enacting compliant development regulations to protect water sources.

This court should declare that counties retain the concurrent authority over the use of biosolids that the federal government expressly reserved to local government in the Clean Water Act and the rules promulgated thereunder, that the legislature intended to preserve, and that ecology's own rules acknowledge. See 33 U.S.C. §§ 1345(e), 1370; 40 C.F.R. § 503.5(b).

V. CONCLUSION

When Congress amended the Clean Water Act to permit management of biosolids, it did not repeal or modify the provisions of that Act granting local government concurrent regulatory

authority over biosolids. 33 U.S.C. §§ 1345(e), 1370. The federal rules implementing the biosolids amendments expressly state that "[n]othing in this part precludes the State or political subdivisions 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).

When the legislature enacted RCW 70.95J to implement the federal biosolids amendments, it necessarily adopted the provisions of the Act and rules granting concurrent local authority over biosolids. Confirming this intent, the legislature struck from the bill a provision pre-empting local government bans on the application of biosolids. House Bill Report, HB 2640, Appendix A. *See also* RCW 70.95J.007; RCW 70.95J.020(1); RCW 70.95J.030, .080.

When ecology promulgated the Washington rules implementing the federal biosolids amendments in accordance with the RCW 70.95J, ecology expressly conditioned the use of biosolids on compliance with the "federal biosolids rule," which preserved concurrent local authority over biosolids, and with "local laws, regulations and ordinances." WAC 173-308-030(5) - (6).

Accordingly, ecology's position in this litigation that local governments like Wahkiakum county lack concurrent regulatory authority over biosolids is inconsistent with (1) the Clean Water Act, (2) the federal biosolids rule, (3) the legislative history of and the provisions of RCW 70.95J, and (4) ecology's own rules.

Further, ecology's position creates an unnecessary conflict between the regulatory responsibilities of ecology on the one hand and the responsibility of the Growth Board on the other hand. The Growth Board has ruled that the Growth Management Act (GMA) requires local governments to take affirmative steps in their comprehensive plans and development regulations to protect water sources from pollution. Biosolids contain toxic metals, such as mercury and arsenic; chemicals, such as flame retardants; and microorganisms, such as e-coli; all of which are pollutants prohibited or regulated under the Clean Water Act. See 40 C.F.R. § 503.13(b); 58 Fed. Reg. 9256; EPA, "*Biosolids Targeted National Sewage Sludge Survey Report – Overview*," January 2009, EPA-822-R-08-014. While biosolids can enhance soil productivity in the right place, the right amount, and subject to the right restrictions, they also can be harmful to public health and the environment. Id. If local governments are preempted from regulating the use and

disposal of pollutant-rich biosolids, they cannot comply with the GMA directive to protect water sources from pollution. *Hirst et al. v. Whatcom County*, GMHB Case No. 12-2-0013 (June 17, 2013). *See also* RCW 36.70A.020(10); 36.70A.070(5)(c)(iv). If, on the other hand, local governments have concurrent authority over biosolids, there is no conflict between the GMA and RCW 70.95J.

This Court should affirm the true intent of the Clean Water Act, 40 C.F.R. Parts 501 and 503, RCW 70.95J, and ecology's own biosolid rules, and uphold the concurrent authority of local government under these laws and article XI, section 11 of the Washington Constitution, to protect public health and the environment by regulating the use and disposal of biosolids.

RESPECTFULLY SUBMITTED this 24th day of October, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

BY: _____
GLENN J. CARTER, WSBA# 33863
Chief Civil Deputy Prosecuting Attorney

HOUSE BILL REPORT

HB 2640

As Reported By House Committee on:
Environmental Affairs
Appropriations

Title: An act relating to municipal sewage sludge.

Brief Description: Requiring the department of ecology to establish a comprehensive sludge management program.

Sponsor(s): Representatives R. Johnson, Rust, Kremen, Roland, Heavey, Rasmussen and Spanel.

Brief History:
Reported by House Committee on:
Environmental Affairs, January 31, 1992, DPS;
Appropriations, February 9, 1992, DPS(ENA-A APP).

HOUSE COMMITTEE ON ENVIRONMENTAL AFFAIRS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Rust, Chair; Valle, Vice Chair; Horn, Ranking Minority Member; Edmondson, Assistant Ranking Minority Member; Bray; Brekke; G. Fisher; J. Kohl; Neher; Pruitt; and Van Luven.

Staff: Rick Anderson (786-7114).

Background: Sludge is the by-product of the wastewater treatment process. Federal law requires municipal sewage and wastewater to use specified technology (secondary treatment) and to meet state standards for allowable discharges.

Once sludge is separated from wastewater, it is regulated in this state as a solid waste. Local governments have primary enforcement authority for solid waste in this state. Local health departments are responsible for issuing solid waste permits for the use and disposal of municipal sludge. Local permits establish the practices and standards that must be followed by the person owning the land to which the sludge is applied, or by the operator of the disposal facility.

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Most of the sludge generated in the state is beneficially reused through land application to forests and farms. A small percentage of sludge is incinerated in the state.

The permits issued by local health departments can be reviewed by the Department of Ecology. The department can approve a permit or appeal it to the Pollution Control Hearings Board. Permits are renewed annually by the local government; renewals can also be reviewed by the department. The Department of Ecology has developed guidelines for the use and disposal of sludge. These guidelines are used by local health departments when writing permits for sludge.

The Clean Water Act of 1987 required the Environmental Protection Agency (EPA) to develop rules to increase federal requirements of sludge management. In 1989, the EPA adopted rules relating to how states regulate a sludge management program. These rules, in part, require states to have direct enforcement authority, including the power to impose both civil and criminal penalties, and to have the power to delegate permitting authority to local governments. The state solid waste law does not provide the department with direct enforcement authority or the ability to delegate sludge permits to local governments.

The EPA is scheduled to adopt additional rules sometime in 1992 that will establish technical standards for the use and disposal of sludge. These rules will establish numeric standards for toxics and pathogens, and will establish certain best management practices.

Summary of Substitute Bill: The substitute bill requires the Department of Ecology to develop a sludge management program that will conform with recent and proposed federal regulations on municipal sewage sludge. The Department of Ecology is given authority to impose both civil and criminal penalties. The Department of Ecology is also given authority to delegate to local health departments the authority to issue and enforce permits for the use and disposal of municipal sewage sludge. If the Department of Ecology does not act on a local permit within 60 days, the permit is considered approved. Local health departments may appeal a permit decision by the Department of Ecology to the Pollution Control Hearings Board (PCHB).

The Department of Ecology is authorized to promote beneficial uses of municipal sludge. Current definitions of compost are amended to include compost consisting of municipal sewage sludge.

Substitute Bill Compared to Original Bill: The substitute bill deletes Department of Ecology reporting requirements to

the Legislature on the management of municipal sludge. The substitute bill also deletes a provision restricting local government's ability to ban the use or disposal of sludge. The substitute adds provisions giving the Department of Ecology explicit authority to impose civil and criminal penalties and to delegate permitting authority to local health departments. Provisions are also added to provide the Department of Ecology with the authority to reject local health department permits and to allow local health departments to appeal Department of Ecology decisions to the PCHB.

Fiscal Note: Requested January 24, 1992.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill will allow Washington State to comply with federal regulations on municipal sludge management. Controversy over siting issues will be facilitated with a state sludge program. The bill will allow local health departments to continue to issue permits for the use and disposal of sludge.

Testimony Against: None.

Witnesses: K. Britt Pfaff, Skagit County Health Department (pro); Kathleen Collins, Association of Washington Cities (pro); Robert Thode, Barnt Ridge Ranch; Narda Pierce, Department of Ecology; Tom Eaton, Department of Ecology; Vallana Piccolo, Puget Sound Water Quality Authority (pro); Ed Thorpe, Coalition for Clean Water (pro); Dave Hufford, City of Tacoma (pro); Pete Machno, Municipality of Metropolitan Seattle (pro); Mel Kemper Jr., Tacoma Sewer Utility (pro); George F. Tyler; Representative Rob Johnson (pro); and Janice Skinner, Handicapped Representative.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Environmental Affairs be substituted therefor and the substitute bill as amended by Committee on Appropriations do pass. Signed by 24 members: Representatives Locke, Chair; Inslee, Vice Chair; Spanel, Vice Chair; Silver, Ranking Minority Member; Morton, Assistant Ranking Minority Member; Appelwick; Belcher; Brekke; Carlson; Dorn; Ebersole; Hine; Lisk; May; Mielke; Nealey; Peery; Pruitt; Rust; D. Sommers; H. Sommers; Valle; Vance; and Wang.

Staff: Nancy Stevenson (786-7137).

New Background Information: The Water Environment Federation, an international association of water quality and wastewater treatment officials, has endorsed the term "biosolids" to distinguish sludge that has been treated according to state and federal law from sludge that has not been treated. The Environmental Protection Agency may adopt the term biosolids for sludge that meets its proposed technical standards.

Summary of Recommendation of Committee on Appropriations Compared to Recommendation of Committee on Environmental Affairs: The term "biosolids" is incorporated into the bill to distinguish municipal sewage sludge that meets all state and federal standards from sludge that does not. A number of technical changes are made to clarify that sludge not meeting the biosolid standards continue to be regulated as a solid waste. The Department of Ecology is directed to fund the state Biosolid Program, subject to legislative appropriation, through wastewater discharge permit fees.

Fiscal Note: Available.

Effective Date of Substitute Bill as Amended: Ninety days after adjournment of session in which bill is passed.

Testimony For: None.

Testimony Against: None.

Witnesses: None.

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant,	)	NO. 44700-2-II
v.	)	
WAHKIAKUM COUNTY, STATE OF WASHINGTON, Respondent.	)	DECLARATION OF SERVICE

I, Casey L. Cutler, paralegal for Glenn J. Carter, Civil Deputy Prosecuting Attorney, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I served a copy of Lewis County's Motion to File Amicus Brief and Amicus Brief of Lewis County upon the Attorney for the Appellant, Harold Lee Overton, by email at leeol@atg.wa.gov and to the Attorney for the Respondent, Daniel Herbert Bigelow, at eb0@timocharis.com via Division II upload to on October 24, 2013.

DATED this 24th day of October, 2013.

Casey L. Cutler, Sr. Paralegal
Lewis County Prosecuting Attorney Office