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7 **STATE OF WASHINGTON**
8 **COWLITZ COUNTY SUPERIOR COURT**

9 STATE OF WASHINGTON,
10 DEPARTMENT OF ECOLOGY,

11 Plaintiff,

12 v.

13 WAHKIAKUM COUNTY, a political
14 subdivision of Washington State,

15 Defendant.

No. 11-2-00554-3

NOTICE OF APPEAL TO
COURT OF APPEALS

(Clerk's Action Required)

16 TO: THE CLERK OF THE SUPERIOR COURT OF COWLITZ COUNTY;

17 AND TO: WAHKIAKUM COUNTY, Defendant, and DANIEL H. BIGELOW,
18 Defendant's Attorney:

19 YOU AND EACH OF YOU will please take notice that State of Washington,
20 Department of Ecology, the Plaintiff above-named, hereby appeals to the Court of Appeals
21 Division II of the State of Washington, from each and every part of the judgment herein
22 entered in the above-named court on the 22nd day of February 2013, in favor of Wahkiakum
23 County.

24 //

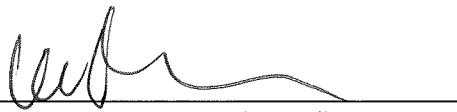
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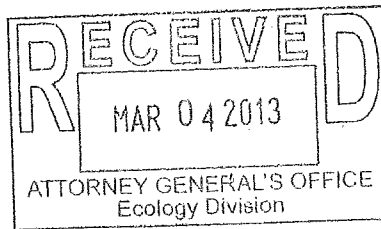
1 A copy of the Order is attached to this notice.

2 DATED this 11 day of March 2013.

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4 ROBERT W. FERGUSON
Attorney General

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6 
7 LEE OVERTON, WSBA #38055
8 Assistant Attorney General

9 Attorneys for Plaintiff
10 State of Washington
11 Department of Ecology
12 (360) 586-2668
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FILED
SUPERIOR COURT

2013 FEB 22 P 3:21

COWLITZ COUNTY
BEVERLY R. LITTLE, CLERK
BY LM

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiffs,

vs.

WAHKIAKUM COUNTY, a political
subdivision of the State of Washington,

Defendant.

NO. 11-2-00554-3

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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On September 30, 2011, this matter came regularly before the court on the motion of Department of Ecology (the Department) for summary judgment and the cross-motion of defendant Wahkiakum County (the County) for summary judgment. At that time, the court heard arguments of counsel for each party and considered the agreed record, which consisted of the Declaration of Daniel Thompson dated August 4, 2011, with its attached Exhibits 1-2; and the Declaration of Lee Overton dated August 10, 2011, with its attached Exhibits 1-3.

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This court determined that a material issue of fact existed as to whether the ordinance complained of constitutes a "ban:" regulation sufficient to thwart the state's statutory scheme. Therefore it denied summary judgment and invited additions to the record. The parties then stipulated to clerk's numbers 19-28; the Department also filed additional argument on September 14, 2012; and the defendant County responded on October 12, 2012.

Additional argument from each party was heard on October 12, 2012.

Findings of Fact and
Conclusions of Law
Page 1

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

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CONCLUSIONS OF LAW:

1. The Department has the burden of proving the Ordinance unconstitutional beyond a reasonable doubt. State v. Immelt, 150 Wn.App. 681, 686, 208 P.3d 1256, 1259 (2009), *reversed on other grounds*, 173 Wn.2d 1 (2011). *See also Johnson v. Johnson*, 96 Wn.2d 255, 258, 634 P.2d 877 (1981) ("To prevail, [Johnson] must demonstrate that statute's invalidity beyond a reasonable doubt and rebut the presumption that all legally necessary facts exist") (internal quotes omitted). Every presumption will be in favor of constitutionality. Lenci v. City of Seattle, 63 Wn.2d 664, 667-8, 388 P.2d 926 (1964). All facts necessary to establish the legality of an ordinance are presumed to exist until disproved by the challenger. Johnson, supra.
2. Pursuant to the standards enumerated in 1., supra, the Department has not established that other jurisdictions will follow the county in adopting versions of the Ordinance. All presumptions are to the contrary. Nor is such fact, even if established, relevant to this inquiry, which is focused on the ordinance before the court.
3. The fact that it is more expensive to treat sludge to Class A standards, as over ten percent of sludge is, has no bearing on the constitutionality of the Ordinance.
4. The Department has been given two opportunities to establish the facts necessary to overcome its burden in this case, but it has failed to do so. The record herein:
 - a. Does not establish that the Ordinance constitutes a "ban" on biosolids application within the County.
 - b. Does not establish that the Ordinance prohibits what the State "unconditionally allows." Ritchie v. Markley, 23 Wn.App. 569, 597 P.2d 449 (1979).
 - c. Does not establish that the Ordinance cannot be harmonized with the laws and regulations of the State of Washington.
5. No issue of material fact exists since all facts not otherwise proved are presumed to favor constitutionality. Johnson, supra.
6. County is entitled to judgment as a matter of law declaring that the Ordinance herein is constitutional.
7. The Department urges this court to take a more restrictive view of the burden of proof and hold the Department to traditional summary-judgment standards despite the fact that the issue in this case is the constitutionality of a duly adopted county ordinance. The court declines to do so,

1 but holds that if it had adopted the standard urged by the Department, the court would have
2 reached the same conclusion and made the same order.

3 **THEREFORE THE COURT HEREBY ORDERS:**

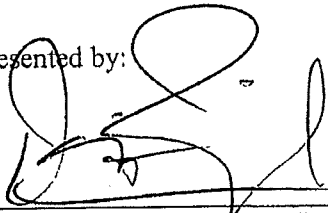
4 **BASED** on the agreed order and the conclusions of law supra, the court hereby orders as follows:

- 5
- 6 1. Department's motion for summary judgment is denied.
- 7 2. County's cross-motion for summary judgment is granted. Wahkiakum County Ordinance #151-
- 8 11 is constitutional.
- 9 3. This case is dismissed with prejudice.


10 Signed this 22 day of Feb, 2013.

11
12 
13 JUDGE

14 Presented by:

15 
16
17 Daniel H. Bigelow, WSBA #21227
18 Prosecuting Attorney
19 Wahkiakum County

20 Approved as to form:

21 
22 Lee Overton, WSBA # 38055
23 Assistant Attorney General
24 For the Department

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Defendant.

No. 11-2-00554-3

CERTIFICATE OF SERVICE

15 Pursuant to RCW 9A.72.085, I certify that on the 11th day of March 2013, I caused to
16 be served Department of Ecology's Notice of Appeal to Court of Appeals in the above-
17 captioned matter upon the parties herein as indicated below:

18 DANIEL H. BIGELOW
19 WAHIAKUM COUNTY PROSECUTING
20 ATTORNEY
64 MAIN STREET, P.O. BOX 397
CATHLAMET, WA 98612

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Express
☐ By Fax
☐ By E-mail

21 the foregoing being the last known address.

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

24 DATED this 11th day of March 2013, in Olympia, Washington.

25
26 
TERESA L. TRIPPEL, Legal Assistant