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March 9, 2011

Mason County Department of Community Development
ATTN: Barbara Adkins, Department Manager
Mason County Building 1
411 N. 5th Street / P.O. Box 279
Shelton, Washington 98584

COPY

RE: Energy Recovery and the Proposed ADAGE Facility

Dear Ms. Adkins:

On August 25, 2010 Pacific International Engineering, PLLC (PIE) issued a memorandum regarding the proposed ADAGE Biomass Electric Power Plant (ADAGE), and therein opined that the project constituted an Energy Recovery Facility and therefore that RCW 70.95.700 required the completion of an Environmental Impact Statement (EIS) prior to operation.

In October 2010 you submitted a written request to this office for a legal opinion, with an attached memorandum from Pacific International Engineering, PLLC (PIE). The attached memorandum posed two questions, only one of which remains at issue and follows:

Would the proposed project be a "solid waste incinerator" or "energy recovery facility" subject to RCW 70.95.700, requiring completion of an environmental impact statement prior to its operation?

In response to your request, on October 20, 2010 this office issued a written legal opinion addressing the question posed above. It is my understanding that this opinion was issued prior to the resubmission by ADAGE of additional information and/or a modified proposal, said resubmission having been pending at the time and subsequently completed on or about November 12, 2010. It is further my understanding that additional information and/or modifications have been submitted by ADAGE in an attempt to address certain concerns.

I am aware of the most recent March 4, 2011 memorandum issued by PIE, making certain recommendations based upon review of the supplemented and now completed submissions by ADAGE. While this memorandum concludes that the submissions by ADAGE support the issuance of an MDNS subject to the application of RCW 70.95.700, it also references the previous determination by Community Development staff, the PIE consultant, and the Mason County Prosecutor's Office that an Environmental Impact Statement was legally required by RCW 70.95.700 because the proposed facility qualified as an energy recovery facility.

I have reviewed all relevant statutory and regulatory provisions, primarily contained in Chapter 70.95 Revised Code of Washington (RCW), Chapters 173-304 and 173-350 Washington Administrative Code (WAC), and Titles 6, 8 and 17 of the Mason County Code (MCC). Each of these provisions contains relevant term definitions, including but not limited to “solid waste”, “wood waste”, “energy recovery”, and “incineration”.¹

It is my understanding that ADAGE proposes to generate energy (electricity) through the process of incineration. I have been advised that ADAGE intends to use the following materials in the incineration process for conversion to energy: “untreated wood or untreated wood products including clean untreated lumber, tree stumps (whole or chipped), tree limbs (whole or chipped) and slash...wood, wood residue, bark, or any derivate fuel or residue thereof, in any form, including but not limited to sawdust, sander dust, biomass chips, scraps, slabs, millings, shavings, and pallets made from wood or other forest residues.”

ADAGE relies upon ORCAA’s Technical Guidance Grid (#NSR TG 016.00) for the proposition that, on a case-by-case basis, material that is otherwise clearly within the statutory and regulatory definitions of “solid waste” might be considered to be a non-waste based upon certain criteria. These criteria are not contained within the statutory framework governing solid waste incineration or energy recovery facilities.

The rationale of this guidance is apparent, but reliance thereon is in my opinion misplaced. While Chapter 70.95 RCW authorizes the Department of Ecology (DOE) to adopt rules in the areas of solid waste handling standards, including energy recovery facilities, and to exempt certain solid wastes from certain requirements of the statute, the DOE does not have the authority to *include* within the definition of “solid waste” that which the legislature expressly chose to remove. *See Littleton v. Whatcom County*, 121 Wash. App. 108, 117-18 (Div. 1, 2004). In my opinion, neither does the DOE nor ORCAA have the authority to *exclude* from the definition of “solid waste” that which clearly falls within the four corners thereof.

ADAGE further relies upon the adoption by the Legislature of regulatory reform seeking reduction of redundancy and duplication in environmental protection between SEPA and other environmental and growth management regulatory frameworks. However, the Legislature has issued minimum functional standards and, by statute, the primary responsibility for adequate solid waste handling and environmental protection is assigned to local governments, like Mason County. 43.21C RCW. 70.95 RCW. *See, Weyerhaeuser v. Pierce County*, 124 Wash. 2d 26 (1994). *See also, Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20 (1990). In implementing State environmental policy and solid waste handling standards, local governments are subject to the clear legislative mandates and requirements of statute, and may not fall below the minimum functional standards set thereby. *See, MCC 6.72.030(a)*.

The provisions of RCW 70.95.700 and WAC 173-350-240(7) are clear and mandatory. “No solid waste incineration or energy recovery facility shall be operated prior to the completion of an environmental impact statement....” RCW 70.95.700.

¹ RCW 70.95.030; WAC 173-304-100; WAC 173-350-100; MCC 6.72.020; MCC 8.52.030; MCC 17.01.240; MCC 17.06.010.

I find no provision in the RCW, WAC, or MCC that would exclude the fuels proposed by ADAGE and summarized above from the various applicable definitions of "solid waste," which include and/or incorporate "wood waste." The undisputed purpose of the proposed facility is to incinerate said materials to generate electricity, resulting in the reduction of the volume of solid waste and conversion of the same into energy. In my opinion, it is this very process that qualifies the proposed ADAGE facility as an "energy recovery facility."

I therefore agree with the previous determinations made by Community Development staff and the Pacific International Engineering consultant, and it remains the opinion of the Mason County Prosecutor's Office that the proposed ADAGE project is an energy recovery facility requiring an Environmental Impact Statement prior to its operation.

I trust that the foregoing analysis helps you in the determinations that you must make in the SEPA process. Please do not hesitate to contact me if you have any questions or concerns about this opinion.

Sincerely:

A handwritten signature in black ink, appearing to read "Michael K. Dorcy", with a long horizontal flourish extending to the right.

MICHAEL K. DORCY

Mason County Prosecuting Attorney