



NISQUALLY INDIAN TRIBE

Department of Natural Resources

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Peter Lyon, SWRO Section Manager
Solid Waste Management Program
Washington State Department of Ecology
300 Desmond Drive SE
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February 7, 2019

Re: Declaration of Non-Significance Issued for Fire Mountain Farms Inc. Application for Coverage Under General Bio-Solids Permit

Mr. Lyon,

The Nisqually Indian Tribe objects to the Declaration of Non-Significance (DNS) issued for the Fire Mountain Farms (FMF) application to qualify for coverage under the General Permit for Biosolids Management for the use of 265 acres adjacent to the Nisqually River and Yelm Creek. Based on our review of available materials, the Tribe believes that the treaty protected rights of the Nisqually Indian Tribe will not be sufficiently protected through this DNS and proposed action, that the DNS violates the State Environmental Policy Act (SEPA) and that the proposed DNS is inconsistent with the State's commitment to protect and restore salmon and Southern Resident Killer Whale (SRKW).

The Nisqually Indian Tribe, as a signatory to the Treaty of Medicine Creek, retains fishing, hunting, and gathering rights in the Nisqually watershed and throughout its traditional use areas in the State of Washington. Numerous federal court decisions have confirmed the State of Washington may not impair habitat critical to the exercise of these rights. The State Environmental Protection Action also protects them by “prevent[ing] or eliminat[ing] damage to the environment and biosphere ... and [by] stimulat[ing] the health and welfare of human beings[.]” RCW 43.21C.010.

FMF currently applies biosolids to soils in a handful of sites across the state and seeks to expand its operations onto 265 acres adjacent to the Nisqually River and Yelm Creek. FMF failed to disclose in its SEPA Checklist a distinguishing characteristic between its current locations and this one: The Nisqually watershed is home to fall Chinook and steelhead—two species listed as

“threatened” under the Endangered Species Act (ESA). These species are present in the waters near and downstream from this site. Chinook salmon from the Nisqually are a critical food source for the SRKW—a species listed as “endangered” under the ESA and prioritized for recovery by the Governor.

The Nisqually Indian Tribe is concerned that the application of biosolids within 1000 feet of the Nisqually River and other smaller water bodies connected to the River will impair habitat critical for salmon and steelhead, will threaten their existence, and will threaten the SRKW. The Tribe lists the section of the mainstem Nisqually that this project would adversely impact as one of our highest priorities for habitat protection and restoration. In addition, our recent water quality studies with the Washington Department of Fish and Wildlife reveal that our steelhead are carrying alarmingly-high levels of the fire retardant PBDE, which may factor in their decline. Yet, the FMF DNS fails to consider or even mention the possible presence of PBDE’s or other toxic materials in the biosolids they seek to land apply in the immediate vicinity of the Nisqually River. This failure to disclose critical environmental information contradicts the precautionary principle of impact avoidance and the Tribe’s treaty rights and violates SEPA’s most fundamental requirement of disclosure of potential adverse environmental impacts. FMF’s proposed land application of biosolids might also qualify as a potential “take” under the ESA of both salmon and the SRKW because any increase in the toxic loading of Nisqually Chinook will likely impact their survival and the SKRW’s survival.

Although no tribal members live in the vicinity of this proposed site, the Tribe has concerns that granting this permit application will adversely impact the approximately 40 drinking water wells downgradient of the proposed bio-solids disposal site. We are concerned that the proposed disposal of bio-solids will hinder our ability to fully implement our recently approved Addendum to the Nisqually Watershed Plan. This Plan was developed to deal with the impacts of exempt wells in the Nisqually watershed, and depends, in part, on an ability and opportunity to strategically take some wells out of production. Contamination from the use of biosolids would impair this effort and would negatively affect our ability to mitigate at a sub-basin level.

Our concerns could be somewhat allayed if we had confidence in FMF’s integrity and in its commitment to follow the requirements associated with a permitted application of biosolids, but its history of permit violations suggest otherwise. We have no confidence in FMF, and we are concerned Ecology does not have the resources necessary to assure FMF’s compliance. Permits are only as good as an applicant’s willingness to comply with its terms and the permitting agency’s ability to accurately monitor, and, if necessary, require that compliance.

FMF’s failure to disclose the existence of salmon and steelhead in the Nisqually Watershed or to disclose or discuss the possible presence of PBDEs or other toxic chemicals in its bio-solids requires Ecology to revoke the DNS. The fact that FMF may apply biosolids in some counties

does not compel a conclusion that it may permissibly do so here because a proposal that might not have a significant impact in one location might in another. *See* WAC 197-11-330(3)(a). When Ecology receives “significant new information indicating a proposal’s probable significant adverse environmental impacts,” such as the Tribe has presented here, it must withdraw its DNS. WAC 197-11-340(3)(a)(ii). It also must withdraw its DNS if it “was procured by misrepresentation or lack of material disclosure.” WAC 197-11-340(3)(a)(iii). If Ecology continues to pursue this DNS, we will insist that it submit to a Section 7 consultation with NOAA over the impacts to the three ESA-listed species potentially affected by this proposal, and we will insist on a Government-to-Government consultation with the Tribe prior to any final approval.

The Tribe contends a determination of significance (DS) is appropriate for this application. Only through a DS and a full assessment of environmental impacts will the Tribe’s concerns be adequately addressed.

Finally, this application is an excellent example of how, in the Tribe’s view, a state agency can and should alter its status quo approach to SEPA review and permitting. The Governor has appropriately stated that the current orca decline is an emergency situation. The Orca task force has been working for a year on a comprehensive set of recommendations many of which the Legislature is currently considering. Recommendation number 3 reads, in part, as follows:

Recommendation 3: Apply and enforce laws that protect habitat.

Washington Department of Fish and Wildlife, Washington Department of National Resources and Washington Department of Ecology must strongly apply and enforce existing habitat protection and water quality regulations.

This recommendation, which is entirely consistent with EO 18-02, requires a higher level of scrutiny for any project that might adversely impact SRKWs. The FMF proposal may well introduce PBDE’s and other toxics into an important salmon producing river, critical to recovery of SRKWs. Of course, the chinook salmon and steelhead themselves are listed as threatened under the ESA. If ever there was a time to apply the law rigorously, to ask hard questions and to insist on understanding all potential adverse impacts before a permit is issued, it is right now.

At a minimum, the Nisqually Tribe requests that Ecology hold FMF’s application in abeyance until Ecology redevelops its Statewide General Permit for Biosolids Management. The Tribe understands FMF’s proposal is being considered under the current Statewide General Permit for Biosolids Management, which expires in 2020. We also understand Ecology will lead an effort this summer to develop a new General Permit using the best available science. The Tribe fully expects to engage with Ecology during the review of the existing Permit and the development of the new one. We are keen to expand the sampling of toxics in the source material, requiring

disclosure of the source material, increasing monitoring of site conditions, and allowing the consideration of previous permit performance and compliance into the new General Permit.

We are confident that upon further consideration you will agree FMF's SEPA Checklist underlying the Agency's DNS is incomplete, and therefore withdraw the DNS under WAC 197-11-340(2) & (3). Because there is potentially an adverse impact to the Tribe's treaty-protected resources, to three ESA-listed species, an unacceptable level of uncertainty regarding toxic loading and a dearth of confidence in FMF's integrity, Ecology should withdraw the DNS, issue a DS and insist on full disclosure of potential adverse impacts before making a permit coverage decision.

Please feel free to contact me if there are any questions at 360-456-5221.

Sincerely,



David A Troutt

Natural Resources Director