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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiff-Respondent, vs. DAVID R. GIBSON, d/b/a BLACK DIAMOND COMPOST PRODUCTS, and VHS PROPERTIES, LLC, Defendants-Appellants.	)	SUPREME COURT NO. 46217-2018 Ada Co. Case No. CV-OC-2015-03540

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District
In and for the County of Ada

Honorable Jonathan Medema, District Judge, Presiding

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2. Whether the district court erred in finding the "observation" made by DEQ Officials during the "inspection/investigation" provided substantial and competent evidence to conclude that a Tier II processing violation had occurred?
3. Whether the district court erred in concluding the operation was a Tier II "solid waste" processing operation, requiring Gibson to file a "site Plan" with DEQ?
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I.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves the Department of Environmental Quality (DEQ) claiming regulatory authority to inspect and regulate agricultural composting operations, knowing that grass clippings and leaves are the sole organic recyclable ingredients used to produce compost and humus in Defendant's (Gibson's) composting operations, nonetheless contending all organic recyclable substances, grass clippings, leaves, compost and humus were a "solid waste". The lower court has described the "issue" at trial "is simply whether Mr. Gibson is operating a Tier II Solid Waste Processing Facility" (R. p. 1203, L21-22).

DEQ filed their "civil action", under I.C. §39-108, against David R. Gibson, d/b/a/ Black Diamond Compost Products (Gibson), and VHS Properties, LLC, (VHS), the owner of the real property, relying upon observations made from an "inspection" and "investigation" of Gibson's operation on March 29, 2013, from which DEQ alleged authority to regulate Gibson's organic composting operations, claiming Gibson was processing/storing in excess of 600 cubic yards of a "solid waste", claiming such organic substances, grass clippings, leaves, compost, and humus, are "solid wastes", not exempt under Idaho statutes, IDAPA Rules, or any Federal legislation that controls what is defined to be "solid waste" under the Environmental Protections Agency's (EPA) enactments, claiming the right to regulate Gibson's operation under DEQ's Solid Waste Management Rules, adopted in 2002-03.

DEQ claimed that Gibson's operation, from that "inspection", was a "Tier II" processing operation of "solid wastes" (in excess of 600 cu. yds.), requiring a "Site Plan" to be filed with DEQ before the operation can continue in that volume of such quantities.

Gibson disputed DEQ's regulatory authority over his composting operations, and vociferously contends certain Idaho statutes, IDAPA Rules, and the effects of certain Federal enactments control the definition of "solid waste", which exclude certain organic recyclable substances, under certain applications, to be excluded from what is defined to be a "solid waste", as the Federal enactment, *Resource Conservation Recovery Act (RCRA)* limits Idaho's ability to broaden that definition, mandated by the *Idaho Solid Waste Facilities Act,* I.C. §39-7401 et seq., as federal limitations are binding on DEQ's interpretation of "solid waste", expressed in I.C. §39-7404, stating certain substances, under certain applications, are excluded by the recycling

provisions within the *Resource Conservation Recovery Act* (*RCRA*), as regulated by 40 CFR 261.2(e), along with the Idaho statutory provision, I.C. §39-7403(50)(e), therein excluding "manure and crop residues" from "solid waste", as similarly addressed in sub-parts of IDAPA Rule, Title 58.

Gibson contends the Idaho Department of Agriculture (*ISDA)* has the statutory authority to regulate composting operations, controlling composting activities, licensing, compost ingredients, and registration requirements, as expressed within Title 22, Chapters 1, 6, 11, 22, 23, and 45.

This appeal does challenge DEQ's entry upon the property on March 29, 2013, "inspecting" the property without a warrant, absent consent, and absent any exigent circumstances, perceived by Appellants to be a violation of I.C. §39-108(1)&(2)(c), aggravated further by concealment of DEQ's warrantless inspection as described within DEQ's pleadings.

This appeal does challenge the district court's conclusion *ISDA* does not have the sole authority to regulate composting activities, challenging the court's conclusion that "grass clippings and leaves" are a "solid waste", though also concluding that ***"compost and humus", the very product generated from such ingredients, are NOT "solid waste"***, concluding that "compost and humus" are **not** regulated by DEQ and **not** within any "Tier II" regulation, as was alleged by DEQ.

This appeal does challenge DEQ's authority to initiate this "civil action", as Gibson's operations were known by DEQ (when a "Division" and as a Department") for decades, knowing the nature and size of Gibson's operations, the sole basis of the alleged violation; that DEQ's knowledge was subject to the substantive right of action restricted by I.C. §39-108(4), therein precluding DEQ's ability to file any alleged "Tier II" violation (size and nature) at Gibson's operations when known to DEQ for decades, always in excess of 600 cu. yds. of composted materials on site on any given occasion.

This appeal challenges DEQ's claim to regulate composting operations, as the ingredients, grass clippings and leaves, being organic plant residue materials, are being used to produce compost and humus products, protected from regulation and controlled by the pre-emptive effects of federal law when recyclable substances are being used as direct ingredients to produce a product, in this instance used as a substitute for commercial products, as defined in 40 CFR 261.2(e).

From the findings and conclusions of the district court, a statutory penalty of $250.00 was imposed against VHS Properties and a $1,000.00 penalty against Gibson; granting injunctive relief so as to limit Gibson's operations from a alleged "Tier II" operation to a "Tier I" operation, restricting Gibson's operation not to exceed 300 yards of "grass clippings and leaves" at any one time, leaving entirely unresolved the question: how do you scientifically differentiate among these substances? What is included in the 300 yards, when "compost and humus" are not "solid waste", complicated further in that "grass clippings and leaves", once ***severed*** from a nutrient source, commence to decompose? Grass clippings and leaves immediately enter a state of decay (compost), the moment separated from its life source, entering a natural death-decay cycle. All organic substances, such as grass and leaves, are deemed a "Plasma" substance, neither characterized to be a solid, liquid or gas, as organic substances are in a state of flux.

From these findings and conclusions, this appeal is taken to the Supreme Court to establish what constitutes the controlling law and regulatory authority over agricultural composting operations, wherein the crux of this appeal pertains to questions of law, requiring interpretation of IDAPA Rules, the intended purpose of statutory language, the pre-emptive effects of federal enactments (*Resource Conservation Recovery Act*), the application of the *Code of Federal Regulations* 40 CFR 261.2(e), and a disposition that organic recyclable substances, grass clippings and leaves, as being used by Gibson, are excluded from "solid waste", and *ISDA* is vested with the authority to regulate composting operations.

B. COURSE OF PROCEEDINGS BELOW

DEQ initiated this "civil action" on March 5, 2015 (R. pp. 13-25), stemming from their "inspection" and "investigation" conducted on March 29, 2013. Upon receipt of service, Defendants responded (R. pp. 34-72), from which a Stipulation to amend (R. pp. 73-87), resulting in the Order (R. pp. 88-90) and DEQ's Amended Complaint (R. pp. 91-102) was filed, with Defendants' Amended Response (R. pp. 103- 141) filed with the district court.

DEQ sought summary disposition (R. pp. 247-270), supported by affidavit of Brian Oakey (R. pp. 147-246), Darrell Early (R. pp. 271-313), Dean Ehlert (R. pp. 314-326), and Paula J. Wilson (R. pp. 327-486). Defendants responded (R. pp.487-506), supported by affidavit of David R. Gibson (R. pp. 507-515). DEQ submitted reply memorandum (R. pp. 524-538), with Affidavit of Jack Gantz (R. pp. 518-520), Supplemental Affidavit of Dean Ehlert (R. pp. 521-523), and motion to strike portions of Gibson's Affidavit (R. pp. 539-562). Defendants filed

Motion to Dismiss (R. pp. 588-589), supported by memorandum (R. pp. 563-588); the parties stipulated to reschedule the Summary proceedings (R. pp. 592-593), hearing set on Motion to Dismiss (R. pp. 594-595) from which DEQ responded (R. pp. 596-607), supported by Affidavit of Brian Rayne (R. pp. 608-618).

DEQ filed Pre-Trial Memorandum (R. pp. 619-646); the court denied Defendants' Motion to Dismiss (R. pp. 647-656), and DEQ's Motion for Summary Judgment (R. pp. 657-682); however vacating summary denial, replacing it with a Supplemental Decision (R. pp. 683-695), wherein the court 1) denied DEQ's motion for Summary Judgment on claims alleged in DEQ's First Amended Complaint; 2) denied DEQ's motion on affirmative defense Defendants' activities were exempt from the Solid Waste Management Rules under IDAPA 58.01.06.03.b **ii,** (whether grass clippings and leaves are "crop (plant) residue"); 3) granted DEQ's motion on affirmative defense Defendants' activities were exempt from Solid Waste Management Rules under IDAPA 58.01.06.03.b **iii** (whether grass clippings and leaves are an "agricultural waste" regulated by *ISDA*; and 4) granted DEQ's motion on affirmative defense that DEQ lacked standing to allege a "violation", and granted DEQ's Motion to strike portions of Gibson's Affidavit (R. pp. 696-697).

DEQ filed Motion as to unpled defenses (R. pp. 698-699) with supporting memorandum (R. pp. 700-702); submitted Amended pre-trial memorandum (R. pp. 703-723), and given the controversy over ownership of the real property, Defendants moved to stay proceedings until ownership was resolved (R. pp. 724-726), and responded to DEQ's Motion in Limine (R. pp. 727-732). A motion to Intervene was filed by Estate of Victoria H. Smith (R. pp. 736-738), with memorandum (R. pp. 739-746), and Declaration (R. pp. 747-793), from which the Estate intervened, resulting in stipulated settlement between DEQ and Estate, releasing and dismissing Estate (R. pp. 794-798), leaving the original parties, DEQ, Gibson, and VHS Properties, LLC.

Defendants filed a Motion to amend pleadings to include specific reference to I.C. §39-108(4), if an "affirmative defense", believed to be a statute of repose, a legislative "substantive deadline" for alleging any substantive claim, (R. pp. 799-840), supported by memorandum (R. pp. 841-852), then met with opposition by DEQ (R. pp. 857-863), even though addressed in summary proceedings, and on August 22, 2017, the motion was denied.

DEQ submitted witness list (R. pp. 866-869), Exhibit list (R. pp. 870-878), Amended Exhibit list (R. pp. 879-887), and Defendants' pretrial memorandum, in support of anticipated

motion for a directed verdict upon conclusion of DEQ's case (Tr. p. 47L. 25; R. pp. 888-912).

Upon receipt of Defendants' memorandum, DEQ filed Third Amended Exhibit list (R. pp. 913-921, eliminating Exhibit No. 10), the 2011 aerial photo within DEQ files confirming DEQ's knowledge of the "nature" and "size" of Gibson's composting operations for decades. (See R. p. 871, Exhibit No. 10; R. p. 880, Exhibit No. 10). Trial commenced September 13, 2017, and upon close of DEQ's case, Defendants moved for directed verdict (Tr. pp. 292, L. 10; p. 471, L. 25, and to strike testimony of Ehlert for violating I.C. §39-108(2)(c) with the unauthorized inspection (Tr. p. 522) confirmed by Ehlert, having entered without warrant, consent, or any exigent circumstances, (Tr. p. 277), violating the restraints imposed by statute to conduct any "inspection" and "investigation" under I.C. §39-108(2)(c), and the admissions contradicting DEQ's pleadings, alleging an "attempted inspection" only, with staff able "to observe [the operation] from the public roadway" (R. p. 93,¶10; p. 94,¶¶12, 13, & 14) stating "the activities at the site include the composting of large volumes of solid waste for the purpose of resale to the public as compost or humus" (R. p. 94, ¶15).

Defendants supported the Motion to Strike with memorandum (R. pp. 921-945) addressing warrantless inspections, opposed by DEQ's response (R. pp. 946-967), with Declaration from Mark Cecchini, (R. pp. 968-992), and Defendants reply memorandum (R. pp. 993-1012), addressing DEQ's concealment of their entry (R. p. 93, ¶10, p. 94, ¶¶ 12, 13, & 14). The court denied Defendants' Motions to Strike (R. pp. 1013-1032), and directed verdict (Tr. p. 471).

Defendants' Closing Arguments were submitted (R. pp. 1033-1074); DEQ's Argument submitted (R. pp. 1075-1090), with further Declaration (R. pp. 1091-1148); DEQ's proposed findings and conclusions (R. pp. 1149-1159); Defendants Reply Arguments (R. pp. 1160-1176) and Defendants' Supplemental Reply Arguments (R. pp. 1177-1197).

The court entered Findings and Conclusions (R. pp. 1198-1218) and Judgment (R. pp. 1219-1221), from which Defendants moved for Reconsideration of Findings and Conclusions (R. pp. 1222-1223), supported by memorandum (1224-1265), met with DEQ's opposition (1266-1281), with Defendants' reply memorandum (R. pp. 1282-1307), supported by Affidavit of Dr. Mir M. Seyedbagheri (R. pp. 1308-1313), with Defendants supplemental memorandum addressing citation error, confirming a court's analysis of Defendants' Motion for Reconsideration is reviewed "substance over form", though amended rule citation was

substantively identical to prior citation. The Court reviewed and denied any amendments, then also denying DEQ's request for attorney fees (R. pp. 1319-1329), awarding expenses in the amount of $3,466.53, and entering Amended Judgment reciting the penalties, injunctive relief, and expenses (R. pp. 1327-1329).

DEQ then sought Rule 60(a) IRCP relief, addressing the injunction (R. pp. 1330-1332), supported by memorandum (R. pp. 1333-1342), with Defendants responded (R. pp. 1343-1354), resulting in denial of DEQ's request (R. pp. 1375-1384).

Defendants timely appealed the Judgment to the Idaho Supreme Court (R. pp. 1355-1374), upon denial of Defendants requested amendments of the Findings and conclusions, with an Amended Notice of Appeal (R. pp. 1385-1391) and a Second Amended Notice of Appeal (1392-1410), to confirm inclusion of the specific Record for citation.

C. STATEMENT OF FACTS

On March 29, 2013, DEQ went to Gibson's composting operations (Black Diamond Composting) to inquire of a possible "odor", and finding none, entered onto the private property to "inspect" and "investigate" (Tr. p. 273, 277) Gibson's operations. The property was owned by VHS Properties, LLC. (R. p. 1201, L. 7-9; Tr. p. 12, L. 13-14, pp. 15-16). The reason for going to the operation, based on Dean Ehlert's testimony, (Tr. p. 272), (hereafter "Ehlert") was comment of a possible "odor" relayed to him by Jack Gantz, a DEQ agent, who told Ehlert another DEQ agent told him of a conversation with Devon Downs (owner of Tree Top Recycling, Inc.), where "odor" entered their conversation, and Downs stated (in essence) "go check out "Diamond Street" or "Black Diamond Composting", suggesting there *may be* an "environmental concern" (Tr. p. 271, L. 1). No written Report was made of the conversation with Downs (Tr. p. 285, L. 9), and Ehlert could not confirm the statement was even made (Tr. p. 270, L. 7), or whether the "operation" was "Diamond Street" or "Black Diamond" (Tr. p. 270), two entirely different operations. Ehlert expressed no basis or showing that any environmental hazard existed or required an investigation.

Ehlert confirmed no odor of any concern at Gibson's operation (Tr. p. 291, L. 1), but Ehlert and Jack Gantz entered the property to conduct an "inspection" and "investigation" (Tr. p. 273, L. 24). DEQ's pleadings described this event as an "attempted inspection" (demonstratively false), concealing the entry actually made (see R. p. 93,¶10; p. 94,¶¶12, 13, & 14). This entry was made without a warrant (Tr. p. 277), was conducted without consent (Tr. p. 277) or exigent

circumstance (Tr. p. 277), the only two exceptions identified for warrantless entry (I.C. §39-108(2)(c)). DEQ alleged "staff was able to observe from the public roadway" (R. p. 93,¶10; R. p. 94,¶¶12, 13, & 14), stating the staff observed "the activities at the site [to] include the *composting of large volumes of solid waste for the purpose of resale to the public as compost or humus"* (R. p. 94, ¶15).

Without taking measurements, samples, or any form of analysis [avoiding evidence of their warrantless entry to inspect and investigate] Ehlert "estimated" the quantity of "materials" to be 10,000 cubic yards, in excess of 600 cubic yards, the threshold for a "Tier II" processing operation (Tr. p. 241, L. 25), believing the operation to be a "Tier II" "solid waste" processing site (R. p. 96, ¶¶ 34, 35, 36, p. 97, ¶¶ 37, 42, 43, 44, 45, and 46; Tr. p. 243). Almost two years after the "inspection", DEQ filed this "civil action" on March 5, 2015, alleging violation of the IDAPA "Tier II" regulations, being a "size" restraint, believing Gibson was processing "solid waste", requiring him to file a "Site Plan" (R. p. 97, ¶¶ 42, 43) and Gibson has failed to file one with DEQ (R. p.98, ¶¶ 44, 45), and such "Site Plan" must be filed before such operation could proceed in such a size of material volumes. (Tr. p 180, L. 2; R. p. 97, ¶¶ 42, 43). Gibson never before was asked to, or required to, file any "Site Plan" with DEQ for any of the past decades, and Gibson declined to do upon contact from DEQ in April, 2013. (R. p. 1203, L. 18-22), as Gibson's composting activities had been in operation at that location since August, 2004. R. p. 499, L. 3), and "solid waste" management rules and regulations were expressed in 2002-03 not apply to his operations (R. p. 511-513, ¶¶ 3, 4, and 5).

Gibson's belief no solid waste regulations applied to his agricultural composting operations was consistent with the lack of any "inspection" or claim of a "Tier II" operation since that operation began in August, 2004 (Tr. p. 499, L. 3). Gibson's understanding, as the subject was discussed, the language within IDAPA 58.01.06.001.03(b)(ii)&(iii) (adopted 2002-03) (Tr. p. 488, L. 3), did not include organic substances, as those rules were understood to exclude crop (plant) residue and agricultural waste materials, which his operations utilized only the plant residues derived from grass and trees, being grass clippings and leaves (R. p. 512, ¶ 4) (Tr. p.243, L. 2; p. 481, L. 23). Gibson understood his operations were subject to regulation by *ISDA only* (Tr. p. 499). Gibson's understanding was that plant residue and his composting operations were excluded from IDAPA Rules governing "solid waste" management and disposal site facilities (Tr. p. 499).

DEQ, as a Division of Health &Welfare, and following the legislative formation of DEQ as a Department in 2000, the agency personnel were familiar with Gibson's composting operations, its "nature" and "size" of production, having documentation of his operations in DEQ files, dating back to 1992 and before Tr. p. 263, L. 12) (R. p. 510-513, ¶¶ 4, 3 (sic), 4, and 5). DEQ's exhibits confirmed their aerial photo of 2011 ((See R. p. 871, Exhibit No. 10; R. p. 880, Exhibit No. 10), and Ehlert's testimony of DEQ documents dating back to 1992 (Tr. p. 263, L. 10). Gibson was told by *ISDA* his composting operations registered with and regulated by *ISDA*, following enactment of the *Right to Farm Act* (*RTFA*) (Title 22, Ch. 45) in 1981, and the *Soil and Plant Amendment Act* (*SAPAA*) (Title 22, Ch. 22) enacted in 2001. (R. p. 94, L. 2).

Gibson understood he was not subject to the IDAPA rules that were adopted circa 2002-03 (R. p. 511, L. 3-6). In preceding years, Central District Health (CDH) and DEQ (a Division of Health & Welfare), knew Gibson was composting grass clippings and leaves for decades, producing compost and humus for soil amendment and plant foliar products since 1974, composting at several locations within Ada County (Tr. p. 491).

Gibson located his composting operations to the Gowen Field Desert Front area in 1988, south of the Municipal airport, (R. p.510, L. 4-7;Tr. p. 490) operating composting activities on agricultural lands first owned by a governmental agency, under I.C. §22-4502(2)(d)(f)&(k), declaring the operation a statewide permitted use (I.C. §22-4501 and §22-4504), eliminating any county "conditional use permit" (CUP) approval. His operations involved plant products, plant byproducts, plant compost and composting activities, addressed in I.C. §22-4502(2)(d)(f)&(k) (R. p. 510, ¶ 4, L.15- 19, ; p. 511, L. 1-9).

Gibson moved slightly westward in 1991, occupying a larger parcel, twenty (20) acres in size, to accommodate expansion. In 2004, he moved a short distance to the south, a larger location, sufficient in size to accommodate further expansion to address plans to introduce compost/humus products to an entire 520 acre parcel, to then operate an agricultural farm/landscape business operation. Gibson operated each composting operation in the same manner, at each location, with production always in excess of 600 cubic yards at any moment in time. (R. p. 513, ¶ 5, L. 1-21).

Gibson maintained his registration, d/b/a Black Diamond Compost Products, with (*ISDA*) (R. p. 511, L. 3-6;Tr. p. 94, L. 2) after *RTFA* came into effect (1981), and has been regulated by *SAPAA*, I.C. §22-2205(1)&§22-2226(a)&(b) since 2001. He has complied with *ISDA's*

regulatory mandates affecting all of his composting activities, operations, compost ingredients and registered products as required by *ISDA* (R. p. 511, L. 3-6; Tr. p. 94, L 2).

From Appellants' posture, these organic substances, grass clippings and leaves, are recyclable plant residue materials, excluded from any definition of "solid waste", mandated by the Federal enactment, *Resource Conservation Recovery Act,(RCRA)* and 40 CFR 261.2(e), deemed to have pre-emptive application as to any "solid waste" definition of material definitions, as these organic recyclable substances are environmentally friendly, part of the natural life cycle of plants, used in agronomy to make compost, and humus, returned to the soil at agronomic rates for the conditioning of soil as an amendment and plant foliar, utilized as a soil nutrient additive for soil restoration and preservation, (I.C. §39-7403(50)(e)) not to be regarded as a substance to be discarded or abandoned in landfill disposal sites.

D. STANDARD OF REVIEW

Appellate Courts review summary proceedings *de novo,* using the same standards as the trial court. *Valiant Idaho, LLC* v. *JV LLC,* 164 Idaho 280, 429 P.3d 168 (2018).

Appellate Courts exercise free review over questions of law. *Fields v. State,* 149 Idaho 399, 400, 234 P.3d 723, 724 (2010); *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cnty*., 159 Idaho 84, 86, 356 P.3d 377, 379 (2015), *Hoffer v. Shappard*, 160 Idaho 868, 380 P.3d 681 (2016), and *AgStar Financial Services, AVA v. Northwest Sand & Gravel, Inc.*, 161 Idaho 801, 391 P.3d 1271 (2017).

Whether a statute applies to a given set of facts is a question of law. *Kidd Island Bay Water Users Co-op. Ass'n, Inc. v. Miller,* 136 Idaho 571, 38 P.3d 609 (2001); *Floyd v. Bd. of Comm'rs*, 131 Idaho 234, 237, 953 P.2d 984, 987 (1998). The interpretation of a statute is a question of law that is to be reviewed de novo. *V-1 Oil Co. v. Idaho State Tax Comm'n,* 134 Idaho 716, 718, 9 P.3d 519, 521 (2000); *Thomas v. Worthington*, 132 Idaho 825, 828, 979 P.2d 1183, 1186 (1999).

II.
ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in ruling DEQ "inspection" and "investigation" of this agricultural composting facility, on March 29, 2013, did not violate I.C. §39-108(2)(c)?

2. Whether the district court erred in finding the "observation" made by DEQ Officials during the "inspection/investigation" provided substantial and competent

evidence to conclude a Tier II processing violation had occurred?

3. Whether the district court erred in concluding the operation was a Tier II "solid waste" processing operation, requiring Gibson to file a "site Plan" with DEQ?

4. Whether "grass clippings and leaves" are "solid wastes", when used as direct ingredients at an agricultural composting operation to produce compost and humus as a substitute for commercial products?

5. Whether "grass clippings and leaves" are expressly excluded from "solid waste", by IDAPA Rule 58.01.06.001.03(b)(ii) & (b)(iii), along with Title 39, Health and Safety, Chapter 1, Idaho Environmental Protection Health Act (EPHA), I.C. §§39-7403(50)(e), and as federal pre-emptive effects is expressed within the *Idaho Solid Waste Facility Act,* (*ISWFA*), I.C §39-7404?

6. Whether the district court erred in not applying Federal Legislation, *Resource Conservation and Recovery Act (RCRA)* and *Code of Federal Regulations*, 40 CFR 261.4(b)(2), which excludes organic recyclable substances from "solid waste", pre-empting DEQ from enforcement of IDAPA Rules with a broader definition of "solid waste", as prohibited by *Idaho Solid Waste Facility Act,* (*ISWFA*), I.C §39-7404?

7. Whether DEQ has authority to regulate agricultural composting operations using grass clippings and leaves to produce compost and humus, restricted by *Environmental Health Protection Act* (*EHPA*), Title 39, Chapter 74. *Idaho Solid Waste Facility Act* (*ISWFA*), I.C. §39-7404, therein prohibiting broader definition of "solid waste" than defined by the Environmental Protection Agency (*EPA*), administered through the *Resource Conservation and Recovery Act* (*RCRA)*?

8. Whether grass clippings and leaves, are deemed to be "abandoned" or "discarded" for disposal, when delivered to an agricultural composting operation for recycling as direct ingredients to produce compost and humus, a product for reintroduction to the soil and plants?

9. Whether IDAPA Rule 58.01.06.001.03(b)(ii) & (b)(iii) were intended to exempt crop (plant) residue and all agricultural waste from "solid waste" regulation?

10. Whether Title 39, (Health and Safety), Chapter 74, *Idaho Solid Waste Facilities Act* (*ISWFA*), was intended to exclude from "solid waste" (I.C. §39-7403(50)(e)) "agricultural waste" ("manures and crop residues" "returned to the soils at agronomic rates"?

11. Whether agricultural composting operations are regulated by (*ISDA*), pursuant to Title 22, Chapters 1, 6, 22, and 45, when organic recyclable substances are direct ingredients used to produce compost and humus?

12. Whether DEQ was prohibited from initiating this civil action, by I.C. 39-108(4)?

13. Whether the district court erred when imposing a penalty of $1,000.00 against Gibson and $250.00 against VHS Properties, LLC under I.C. §39-108?

14. Whether the district court erred when imposing injunctive relief against this agricultural composting operation under I.C. §39-108?

15. Whether the district court erred when awarding DEQ expenses?

16. Whether Appellants are entitled to fees and costs below and on appeal?

III.
ARGUMENT

a. The Inspection of March 29, 2013:

Issue1. The "inspection"/"investigation" on March 29, 2013 violated I.C. §39-108(2)(c);
Issue 2. The "observation" made during the "inspection" and "investigation" failed to produce "competent" evidence to support any "Tier II" alleged violation;
Issue 3.The operation did not constitute a Tier II "solid waste" processing operation.

DEQ's "civil action", alleged a violation of a "Tier II" processing regulations (in excess of 600 cubic yards) (R. pp. 96-97, ¶¶ 34-43), and claiming such presence of a "solid waste" substance is regulated under Solid Waste Management Rules adopted by DEQ in 2002-03 (R. p. 97, ¶37). At trial, Ehlert confirmed he and Jack Gantz engaged an "inspection" and "investigation" of Gibson's composting operations, even after finding no "odor" of any concern to DEQ Tr. pp. 277).

Ehlert testified "information" was relayed to him by Jack Gantz, that another DEQ agent had conversation with Devon Downs, owner of Tree Top Recycling, Inc., and the topic of "odor" was raised, with Downs purportedly stating to the effect: if you want to talk about "odor", go check out "Diamond Street" or "Black Diamond Composting" (Tr. pp. 271).

There was no written Report made of that conversation (Tr. p. 285, L. 9); Ehlert never investigated the basis for the statement (Tr. p.270; p. 285); never confirmed it was made, and never determined which place was being referred to (Tr. p. 286). Ehlert had no contact with Downs (Tr. p. 286) or inquired whether any "information" was on file with DEQ. (Tr. p. 264-265). The comment (Tr. p. 271), was insufficient to lodge any investigation or conduct any inspection or investigation under the statutory provisions of I.C. §39-108(1), which states:

> 39-108. Investigation -- Inspection -- Right of entry -- Violation -- Enforcement -- Penalty -- Injunctions. (1) The director shall cause investigations to be made *upon receipt*

> *of information **concerning an alleged violation of this act or of any rule, permit or order** **promulgated thereunder***, and may cause to be made such other investigations as the director shall deem advisable. (Emphasis added)

There was no "information" of any "alleged violation" of the act, rule, permit or order; no Report of the Downs comment (Tr. p. 285); not even a written Report of the "inspection" and "investigation" of Gibson's operation conducted March 29, 2013 (Tr. p. 292-293). Based upon Ehlert's testimony, these agents went to Gibson's operation only to inquire if any "odor" existed, and finding none from which to engage an "investigation", the agents entered the property and conducted an unauthorized "inspection" and "investigation" (Tr. p. 277). Ehlert and Gantz did so without any warrant, consent, or any exigent circumstance (Tr. p. 277), and their actions were excluded from DEQ's pleadings, where not less than ***four times*** the pleadings stated these agents made their "observation" only from the public roadway ((R. p. 93, ¶10; p. 94, ¶¶12, 13, & 14), observing the presence of rows of materials from the roadway (R. p. 94, ¶13). Ehlert testified these DEQ's allegations were not accurate, admitting they entered the property and engaged their warrantless "inspection/investigation", without consent from the operator or owner, and without any exigent circumstance then relied upon (Tr. p. 277).

In DEQ's pleadings (R. p. 93, ¶13) they allege staff saw "*large piles and windrows of grass clippings, leaves and other organic material constituting solid waste*", effectively claiming **all** materials to be a "solid waste". These pleadings (R. p. 94, ¶15) also alleged "*the activities at the site include the composting of large volumes of solid waste for the purpose of resale to the public as compost or humus*".

Whether relying upon DEQ's pleadings or Ehlert's testimony, DEQ never *quantified* the presence of any "grass clippings or leaves", instead saying "large volumes of solid waste" for the purpose of "resale to the public as compost or humus". (R. p. 95, ¶15).

From a logical standpoint, it was impossible to quantify "grass clippings and leaves" at the facility that late winter, not just because such substances are mixed into the composted materials when received, but the natural effects of organic substances decompose upon mixing, no longer identifiable in that form, as no substances had been delivered to the operation since the late fall of 2012, and whatever "grass clippings and leaves" had been delivered to and received at this operation, the last of which would have been delivered during the preceding summer and before late fall, 2012, so that by March, 2013, whatever had been delivered previously would have decomposed into compost, having effectively decomposed over the winter months.

Grass and leaves are no longer available for delivery after fall, so these agents saw (on March 29, 2013) piles and windrows of "compost and humus", produced from grass clippings and leaves that had been delivered to the facility in previous years.

DEQ has known of the "nature" and "size" of Gibson's operation for decades (Tr. p. 263, L. 12- 19; p. 264, L. 13; p. 265, L 9) composting grass clippings and leaves that were delivered to his operation throughout the growing season to fall each year, since the early 1970's (R. p. 507-508); Tr. p. 491), mixing those substances with other composted substances to generate more compost and humus in his operational activity (Tr. p. 513, L. 8-21).

What DEQ saw, "large volumes of solid waste for the purpose of resale to the public as compost or humus", was composted substances, which the lower court came to conclude was "compost" (R. p. 1213-1214), and this "compost and humus", as determined by the court (R. p. 1213-1214), are ***not*** ***a solid waste, as a matter of definition and as a matter of law.***

Consequently, the evidence presented by DEQ (observations only, and no quantification of "grass clippings and leaves") fail to support the presence of a "solid waste" in a sufficient quantity, on the date of the inspection, March 29, 2013, to even allege a "Tier II" processing operation, even "assuming" grass clippings and leaves were a "solid waste". The IDAPA Rule requires the presence of 600 cubic yards of a "recognized" "solid waste" being processed at the site, none of which can be found to exist in this record, as demonstrated in the argument below.

The lower court found: ***"compost" does not fit the definition of "solid waste"*** (R. pp. 1208-1210), so what DEQ agents observed (as a most liberal interpretation) were piles and windrows of large volumes of "some materials", which DEQ agents "assumed" represented a "solid waste" not then knowing the court would conclude "compost and humus" are not a "solid waste", leaving no credible evidence to show the presence of grass clippings and leaves (in that form) at the operation on March 29, 2013, notwithstanding the fact any such substances during that late winter would meet the definition of compost and humus.

As to this "Tier II" issue, the lower court (R. pp. 1213-1214) concluded the following:

> The Department produced ***little or no evidence from which the Court could determine the makeup of the windrows on the VHS property.*** They contain soil (not solid waste); discarded grass clipping and leaves (solid waste); compost (not solid waste), and humus (not solid waste). Mr. Ehlert offered a very rough approximation that the windrows have a total volume exceeding 10,000 cubic yards. However, the Court cannot determine how much of the windrows are "waste" and how much are not. Mr. Ehlert initially went to the property in March of 2013 due to a complaint of odor from the

property lodged by another composting operation. Mr. Ehlert detected no foul odor. This suggests to the Court that either the volume of grass clippings and leaves in the early stages of decomposition was low or they were well mixed into the windrows. ***From the pictures, the windrows appear to be compost.*** Certainly there are some places where grass and hay or straw are visible and distinguishable as being such. However, ***from the photographs alone, the windrows appear to consist largely of compost. The Court is unwilling to conclude from the windrows alone that the VHS property has at any one time had a volume of greater than 600 cubic yards of waste.*** (Emphasis added)

That finding should have justified Defendants' directed verdict made at the close of DEQ's presentation of evidence; however, the lower court chose to engage in "speculation" and went outside the allegations in the pleadings limited to March 29, 2013, and instead found:

Therefore, the Court must determine if there is other evidence that the VHS property **at any one time** had a volume of grass clippings or leaves greater than 600 cubic yards. The Department presented testimony from a Mr. Scott Frisbie, an employee of the Ada County Highway District. Through his testimony and the documents admitted during his testimony, the Court concludes ACHD delivered 5003 cubic yards of leaves to Mr. Gibson's windrows in 2013; 4,908 cubic yards in 2014; and 1,548 cubic yards in 2015. [*none of this was identified to be there on March 29, 2013*] Is this sufficient evidence from which the Court can conclude that over 600 cubic yards of leaves were on the property at any given time? The Court concludes it is. [*this was not alleged, nor the relief sought in the pleadings*]
Mr. Frisbie testified ACHD delivered the leaves in dump trucks that have a capacity of 12 cubic yards. There was no testimony about how many trucks delivered leaves on any given day. [*or which month, or how incorporated*] However Mr. Frisbie testified most of the leaves were delivered in October, November, and December of each year. [*with winter moisture, this is composted almost immediately*] Given Mr. Gibson's testimony about how slow the composting process can be, [*that only pertains to humus, not compost*] the Court is convinced it is more likely than not that if ACHD delivered even 4000 cubic yards of leaves to Mr. Gibson between October 2013 and December 2013, [*pure speculation, not evidence*] that there must have existed on the property at one time [*what time is that?*] more than 600 cubic yards of leaves. The Court reaches a similar conclusion as to the year 2014. The Court is unwilling to do so as to the year 2015.

Therefore, the Court concludes the Plaintiff has met its burden of proving the claim set forth in its complaint.[*the "claim" pertained to the March 29, 2013 "inspection" that was alleged did not occur*]. (Bracketed inclusions added for emphasis)

Speculation that "at some other time" was not the issue. The issue before the court was whether 600 cubic yards of a "solid waste" was being processed at the Gibson operation on March 29, 2013, not whether VHS Property **at any one time** or at some other time had a volume of "grass clippings or leaves" greater than 600 cubic yards" on the property. The speculative evidence there were a delivery of leaves in different months, and of different

years, appears to be irrelevant to this controversy, as these organic substances, used as compost ingredients, immediately commence decomposition upon delivery, by virtue of the internal heat release, and convert to compost when mixed in and heated up, immediately converting these organic substances to compost, while the development of humus takes a longer process. This process of composting was defined by the court, stating:

> ***Mr. Gibson combines the grass clippings, straw, leaves, and stale hay with dirt in large windrows.*** Trns. pp. 29-32. ***This is done so that Mr. Gibson can turn the piles and allow air to reach the materials to aid in the decomposition process.*** *Id.* Trns. p. 45. ***The purpose of people bringing the grass clippings and other materials is so that it can "be made into compost."*** Trns. p. 33, Ins 11-15. ***The decomposition of those materials produces heat that kills weed seeds and other pathogens.*** Trns p. 47 (R. p. 1201, L. 11-16.

This court will readily see that these organic substances are not being delivered to this operation to be ***"discarded",*** which historically was the classic definition of a "solid waste", but rather delivered to this operation for a specific purpose: the production of compost and humus. As the court found: "***The purpose of people bringing the grass clippings and other materials is so that it can "be made into compost.".*** Upon delivery of these organic substances, the mixture process is done daily, and the transformation is then immediate, so no quantification is even possible by any "observation" months after the organic substances have been delivered. The only relevant issue in DEQ's litigation remains to be: What substance was "observed by DEQ agents on March 29, 2013? The court appears to address that with a conclusion (R. p. 1213), stating: *"However, the Court cannot determine how much of the windrows are "waste" and how much are not"....; "from the pictures, the windrows appear to be compost"....; "from the photographs alone, the windrows appear to consist largely of compost. The Court is unwilling to conclude from the windrows alone that the VHS property has at any one time had a volume of greater than 600 cubic yards of waste".*

Should not that conclusion support the motion for directed verdict? The lower court concluded (R. p. 1208-1210), compost and humus are ***not*** a "solid waste, so the basis to find a "Tier II" operation on March 29, 2013 appears to be entirely flawed, and the fundamental concern within this appeal on the issue of competent evidence is that the court did not have "substantial and competent evidence" to find a "Tier II" violation on March 29, 2013, even ***if*** "grass clippings and leaves" were found to be among any of the windrows and piles, when the evidence presented did not support any quantification of anything, from which to conclude

anything.

To support this evidentiary failure is the fact there has never been any testimony or documentary evidence, by measurement, weight, or scientific analysis, to identify any quantity of "grass clippings and leaves" "observed" at the facility by DEQ on March 29, 2013. This appears to be critical to a determination of a "Tier II" processing operation, and the court declined to include compost, humus, or soil, so where is the evidence to show "grass clippings and leaves" comprised a "cubic yardage" in excess of 600 cu. yds. At this facility to establish a "Tier II" presence on March 29, 2013?

There has been no evidence presented at trial to confirm a Tier II" operation existed on March 29, 2013, and the allegations in the pleadings (R. pp. 92-99) only alleged:

> ¶ 10. On March 29, 2013, the Department attempted to conduct an inspection…
> ¶ 14. At the time of the inspection attempt … observed amounts of solid waste in excess of six hundred (600) cubic yards.
> ¶ 35. At the time of the March 29, 2013 inspection, Defendants had accepted and processed solid waste and had accumulated a volume of such solid waste at the facility in excess of six hundred (600) cubic yards.

No other day, month or year has been alleged, and the relief sought was based upon the alleged "observation" made on March 29, 2013, no other day, month, or year.

A verdict must be supported by substantial and competent evidence. *See Van v. Portneuf Med. Ctr., Inc.,* 156 Idaho 696, 700, 330 P.3d 1054, 1058 (2014); *Ballard v. Kerr,* 160 Idaho 674, 378 P.3d 464 (2016). The verdict must be of such sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper. *See Mackay v. Four Rivers Packing Co.*, 151 Idaho 388, 391, 257 P.3d 755, 758 (2011) (quoting *Mann v. Safeway Stores, Inc.,* 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974)).

This proceeding, being a court trial, requires competent evidence to prove a "Tier II" violation on March 29, 2013, which is not only absent, but the very "observation" made by DEQ, regardless, was based upon an observation that was being made in the midst of a warrantless inspection and investigation, which, we would suggest, explains why DEQ declined to gather any evidence of any substances, knowing it to be an unauthorized presence at this operation.

Consequently, there is no competent evidence to establish the identity of any "solid waste" found at the Gibson operation on March 29, 2013, and lacking any quantitative evidence to support any finding of a "Tier II" processing operation of a "solid waste" that exceeds the

presence of 600 cubic yards, existing at the operation on March 29, 2013 (R. p. 1210, L. 4-5); (Tr. p. 241-243).

Gibson's composting operations have been known to DEQ for decades, and failing to differentiate and quantify any substance, to distinguish between compost, humus, "grass clippings and leaves" (R. pp. 1213-1214), this invalidates any factual basis to find Gibson's operations, on March 29, 2013, to be a "Tier II" processing operation, let alone processing a "solid waste" in violation of any IDAPA Rules. DEQ assumed ALL substances "solid waste" (R. p. 93,¶10; p. 94,¶¶12, 13, 14 & 15), and DEQ assumed ALL substances were "discarded" (See Tr. p. 1213, footnote 2), though once again, the lower court found: "*The purpose of people bringing the grass clippings and other materials is so that it can "be made into compost*." R. p. 1201, L. 15-16) Tr. p. 33, L. 11-15), entirely inconsistent with any conclusion these ingredients were being discarded, and inconsistent with DEQ's own pleading, that stated: "*the activities at the site include the composting of large volumes of solid waste for the purpose of resale to the public as compost or humus"* (R. p. 94, ¶15). Nothing supports the argument these ingredients were intended to be "discarded" or permanently disposed of, as takes place at a landfill disposal site.

Since 1974, there has never been any complaint lodged concerning "odor" or health hazard emanating from Gibson's operation, and this "undocumented" and "unauthorized" "inspection" and investigation cannot provide competent evidence from an unauthorized "observation" of substances at that agricultural composting operation on March 29, 2013.

The record remains silent of any environmental or health hazard at this operation, as there has never been one claimed to exist, and there has never been any "odor" issue raised about Gibson's composting operations at any time from the commencement of his operations (1974) to the present date, and absent the requisite "information" of a "violation" (I.C. §39-108(1)) there exists no basis to even support a warrant for an inspection, and the testimony from Ehlert, confirmed no factual basis to secure a search warrant (Tr. p. 513, L. 12-15) from the district court, and having no consent from the property owner/facility operator, and no exigent circumstance to enter, the inspection remains in violation of I.C. §39-108(2)(c) and unlawful, yet the district court erred in finding the entry and inspection did not violate the statute and declined to exclude the testimony under the exclusionary rule.

As the statute provides, all inspections and investigations conducted by DEQ Officials, *pursuant to their statutory authority*, are subject to, and restrained by the statutory restrictions contained in I.C.§39-108(1) and (2)(a) & (c), wherein it defines the authorization:

> 39-108. Investigation -- Inspection -- Right of entry -- Violation -- Enforcement -- Penalty -- Injunctions.
>
> **(1)** The director shall cause investigations to be made ***upon receipt of information concerning an alleged violation of this act or of any rule, permit or order promulgated thereunder,*** …. .
>
> **(2)** For the purpose of enforcing any provision of this chapter or any rule authorized in this chapter, the director or the director's designee shall have the authority to:
>
> (a) Conduct a ….periodic inspection ***of actual or potential environmental hazards, air contamination sources, water pollution sources and of solid waste disposal sites;***
>
> (b) ….;
>
> **(c)** ***All inspections and investigations conducted UNDER THE AUTHORITY OF THIS CHAPTER*** shall be performed in conformity with the prohibitions against unreasonable searches and seizures contained in the fourth amendment to the constitution of the United States and section 17, article I, of the constitution of the state of Idaho. ***THE STATE SHALL NOT, UNDER THE AUTHORITY GRANTED BY THIS CHAPTER, conduct warrantless searches of private property in the absence of either consent from the property owner or occupier or exigent circumstances such as a public health or environmental emergency;***
>
> (d) Any district court in and for the county in which the subject property is located is authorized to issue a search warrant to the director upon a showing of (i) ***probable cause to suspect a violation,…..*** (All emphasis added)

The authorization for entry upon property by DEQ, to inspect and investigate, is found only in the *Environmental Protection and Health Act*, (EPHA) and only pursuant to I.C.§39-108(1) and §39-108(2)(a) & (c), and the only ***exceptions*** to a warrantless inspection is "consent" or "exigent circumstances", such as ***a public health or environmental emergency***, none of which has been identified or found to be present in this controversy.

Following trial, the district court addressed Defendants Motion to Strike Ehlert's testimony (Tr. p. 521-526), allowing written memorandums (R. pp. 921-945), DEQ's response (R. pp. 946-967), and Defendants reply memorandum (R. pp. 993-1012), expressing concern as to DEQ's concealment of their entry and inspection by deliberately false pleadings (R. p. 93, ¶10, p. 94, ¶¶ 2, 3, & 4). Following hearing on October 10, 2017, the court denied Defendants' motion to strike Ehlert's testimony, (R. pp. 1013-1032), despite Ehlert's "observations" and testimony were the results of an unauthorized entry, inspection, and investigation.

The analysis within the briefs went beyond the scope of the statute, addressing the court's inquiry as to "search warrants" relating to "civil matters", finding no authority in Idaho that interprets the *EPHA* statute concerning DEQ's right of inspection and investigation. Since Idaho's statute expressly limits any warrantless inspections to only *two exceptions*, none of which existed here, there should be no need to review other authority outside the statute, seeking to expand the limited authority granted by I.C. §39-108(2)(c) to DEQ agents to enter upon and conduct inspections and investigations.

When Idaho Legislature formed the Department (DEQ) in 2000, they enacted their limiting statute that addressed what and how inspections and investigations are to be made. They allowed inspections by "warrant", incorporating the Federal and State Constitutions with respect to their issuance to be made only upon "probable cause"; the Legislature then decided to limit any "warrantless" intrusions into the affairs of its citizens and inspections of their operations to only two non-warrant occasions; consent and exigent circumstances, absent which there will be no warrantless inspection or investigation.

The Legislature created the Department, and then enacted the statutory framework from which inspections may occur to enforce their Solid waste management regulations, and the statutory limitations within I.C. §39-108(2(c), are clear and unambiguous, with the limitation:

> (c) ……***the state shall not, under the authority granted by this chapter, conduct warrantless searches of private property in the absence of either consent from the property owner or occupier or exigent circumstances such as a public health or environmental emergency;***

The question one must ask is: Was this "inspection", or "investigation" purportedly being conducted under the authority granted by this chapter, or some other source of authority? The answer, absent authority demonstrating the contrary, is "under this Chapter" only, as no other statute or authority has been cited or suggested. This court is being asked to interpret and apply this statute to the events that occurred on March 29, 2013 at this composting operation, and determine the application of the exclusionary rule, when the entry was unauthorized, as a matter of law. Had DEQ decided to secure a warrant from the district court, the U.S. and Idaho Constitutions would require them to make a showing of "probable cause", as identified in I.C. §39-108(2)(d), and because no probable cause ever existed from any information of a violation, no request was made.

When no warrant is sought, and the only recognized exceptions are limited to "consent and exigent circumstances" to authorize a "warrantless" entry, neither existing in this case, the statute's plain and ordinary language should prevail, and the entry declared to have been unauthorized and the testimony excluded.

The analysis of construction and interpretation of statutes has been expressed in *Hoffer v. Shappard*, 160 Idaho 870, 380 P.3d 681 (2016), stating:

> ***"The objective of statutory interpretation is to give effect to legislative intent."*** *State v. Yzaguirre,* 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). "when interpreting a statute, the ***Court begins with the literal words of the statute...."*** *Williams v. Blue Cross of Idaho,* 151 Idaho 515, 521, 260 P.3d 1186, 1192 (2011*).* ***"If the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect...."*** *Idaho Youth Ranch, Inc. v. Ada Cnty. Bd. of Equalization, 157 Idaho 180, 184-85, 335 P.3d 25, 29-30 (2014) (internal quotations omitted) (quoting St. Luke's Reg' l Med. Ctr., Ltd. v. Bd. of Comm'rs of Ada Cnty., 146 Idaho 753, 755, 203 P.3d 683, 685 (2009)).* ***This Court does not have the authority to modify an unambiguous legislative enactment.*** *Verska v. Saint Alphonsus Reg' l Med. Ctr., 151 Idaho 889, 895, 265 P.3d 502, 508 (2011) (quoting Berry v. Koehler, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962))."* (Emphasis ours).

As stated in *Wheeler v. Idaho Dept. of H&W,* 147 Idaho 257, 207 P.3d 988 (2009):

> "When interpreting a statute, this Court ***must strive to give force and effect to the legislature's intent in passing the statute.*** *Davaz v. Priest River Glass Co., Inc.,* 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). " ***It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole."*** *McLean v. Maverik Country Stores, Inc.,* 142 Idaho 810, 813, 135 P.3d 756, 759 (2006) (citations omitted). " ***Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction."*** *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). (Emphasis ours).

In *State v. Troughton*, 126 Idaho 406, 884 P.2d 419 (1994), the court stated:

> "To answer these questions, we look to the ***grammatical construction of the statute as the legislature intended the statute to be construed according to generally accepted principles of English grammar.*** See *State v. Collinsworth*, 96 Idaho 910, 914, 539 P.2d 263, 267 (1975).

In the absence of consent, exigent circumstance, or the issuance of an inspection warrant upon probable cause, Ehlert had no authorization "under this chapter" to enter upon any property to conduct an inspection or investigation, as to do so violates the limited authority granted under

I.C. §39-108(2)(c). What is of further concern in this case is that the entry was unrelated to the reason for going to the location: inquiry about an "odor" that did not then exist.

Without any information of any violation of IDAPA Rules, DEQ agents went upon the property to "inspect" the "size", but failed to quantify the substances present. It remains undisputed DEQ has known of Gibson's composting operations since 2004, but from this unauthorized entry, sent out a notification of an alleged violation, and then filed their "civil action" on March 5, 2015, alleging a "Tier II" violation under the IDAPA Rules and Regulations, alleging the substances were subject to the "Solid Waste Management Rules governing disposal sites" alleging Gibson was processing in excess of 600 cubic yards on March 29, 2013, erroneously perceiving this agricultural operation contained "solid waste" that had been "discarded".

Aside from DEQ's apparent obsession to control compost ingredients, "grass clippings and leaves", it remains common knowledge once these organic substances are severed from a plant nutrient and water source, they immediately enter a state of decomposition, losing volume and weight in a continuous process, while converting to compost and humus. DEQ's inability to get any volumetric measurement of these decomposing substances is apparent; the reason DEQ declined or failed to quantify anything on March 29, 2013. All they saw could have observed within the rows and piles of substances, since nothing had been delivered to the operation since late fall, would have been essentially (if not entirely) compost, humus, soil and dirt, substances the lower court confirmed were not a "solid waste" (R. p. 1208-1211).

Compost and humus are never defined to be a "waste" anywhere in any statutory codification or regulation, consistent with the Federal enactments that exclude these organic recyclable substances from "solid waste", recognized they are neither abandoned nor discarded, and from a technical standpoint, are not even a "solid" [despite the lower court thought they were a solid (R. p. 1205. L. 7-9) and said it was "simply ridiculous" to suggest otherwise]. These organic substances are regarded a "plasma", not a "solid, as they are never in a "fixed state". Grass clippings alone are 90% water upon arrival, and leaves vary in moisture when delivered, depending on the month of delivery. These substances, because of their water content, are closer to a liquid than a solid, and given their state of continuous flux, are deemed to be in a "plasma" state of flux, not a fixed state as is the characteristic considered in defining a "solid". These organic substances, being the ingredients from which compost and humus are produced, were

neither abandoned nor discarded, as to do such would make them unavailable to produce compost and humus in recycle programs to produce substitutes for commercial fertilizers and foliar products, and the purpose and reason people deliver these substances to Gibson's operations (a factual finding made by the court) has been declared: "The purpose of people bringing the grass clippings and other materials is so that it can "be made into compost." (R. p. 1201, L. 15-16; Tr. p. 33, L. 11-15). There is no finding that anything has been discarded or abandoned at this operation.

The classification of these organic plant residue substances are controlled by specific legislation within Federal enactments, identified in the *Resource Conservation Recovery Act* (*RCRA)* and the *CFR* regulatory provisions (40 CFR 261.2(e), excluding them from "solid waste" within any context of a Solid Waste Management Program, binding on Idaho by the provisions of the *Idaho Solid Waste Facility Act* (ISWFA),(I.C. §39-7404), wherein Idaho has been legislatively bound to establish no broader definition to "solid waste" than is defined by the Federal enactments, and these "organic substances", used as direct ingredients within organic recyclable substance programs to produce a substitute product for a commercial product, is not a "solid waste".

DEQ has never quantified any substance at any time at Gibson's composting operation to support any allegations of a "Tier II" processing operation, be it on March 29, 2013 or any other specific date, as the substances are immediately mixed in with the soil and dirt on the day the ingredients are received, as they must be mixed in with soil to introduce the plethora of organisms from the enriched soil into the ingredients to intensify the decomposition process, create the heat to break down the organic cellulous/fiber molecular structure, destroy weed seeds and pathogens, and utilize the water that is released to continue the process. The lower court's finding that Gibson's operation is a "Tier II" processing operation must be reversed, due to the unlawful and unauthorized entry, and the lack of competent evidence to find that a quantified yardage of "grass clippings and leaves" has been observed on March 29, 2013.

b. Grass Clippings And Leaves Are Not "Solid Waste"?

Issue 4. Grass clippings and leaves are not a "solid waste", when used as direct ingredients to produce compost and humus as a substitute for commercial products.

Issue 5. Grass clippings and leaves are excluded from "solid waste" in IDAPA Rule 58.01.06.001.03(b)(ii) & (b)(iii), and the *Idaho Solid Waste Facility Act,* (*ISWFA*), I.C §39-7404.

Issue 6. The district court erred in failing to rule the *Resource Conservation Recovery Act*

(RCRA) and *Code of Federal Regulations (CFR's*), 40 CFR 261.4(b)(2) and 40 CFR 261.2(e), exclude organic recyclable substances from "solid waste", pre-empting any IDAPA Rule being promulgated with a broader definition of "solid waste", as prohibited by *Idaho Solid Waste Facility Act,* (*ISWFA*), I.C §39-7404.

Issue 7. DEQ has no regulatory authority over agricultural composting operations.

Issue 8. Grass clippings and leaves are neither "abandoned" nor "discarded" for disposal, when utilized as direct ingredients as a substitute for commercial products intended for reintroduction into the soil and as a plant foliar.

Issue 9. IDAPA Rule 58.01.06.001.03(b)(ii) and (b)(iii) exempt crop (plant) residue and all agricultural waste ***regulated by ISDA***, from "solid waste" regulation.

Issue 10. The *Idaho Solid Waste Facilities Act* (*ISWFA*), I.C. §39-7403(50)(e), excludes "agricultural waste" ("manures and crop residues") "returned to the soils at agronomic rates", from "solid waste"

These issues, relating to Idaho statutes and Federal code enactments, are subject to free review by the court, requiring interpretation and construction of statutes, IDAPA Rules, (which rules may be in a temporary state of suspension by Idaho Legislature), and the pre-emptive effects of Federal legislation. The standard and interpretative process has been cited above in *Hoffer v. Shappard*, 160 Idaho 870, 380 P.3d 681 (2016); *State v. Lee*, No. 37213 (Idaho Ct. of Appeals, 6-29-2011) Docket No. 37213, filed June 29, 2011, Opinion No. 38; *State v.Yzaguirre*, 144 Idaho 471, 163 P.3d 1183 (2007); *Wheeler v. Idaho Dept. of Health and Welfare,* 147 Idaho 257, 207 P.3d 988 (2009); *Ada County v. Gibson,* 126 Idaho 854, 893 P. 2d 801 (1995); and *State v. Troughton*, 126 Idaho 406, 884 P.2d 419 (1994), and incorporated in these issues as though cited in full.

The lower court concluded "compost and humus" are **not** a "solid waste, stating (R. pp. 1208-1210), beginning at p.11 of the Findings of Fact, Conclusions of Law the following:

Compost and humus are not solid waste as defined in I.C. § 39-103(13).

> "Mr. Gibson testified as to the process he uses to decompose leaves and grass clippings. He arranges them in windrows so the rows can receive oxygen and mixes them with compost or soil. Rain and snow provide water. In this environment, microorganisms in the soil rapidly consume the nitrogen and carbon in the grass and leaves. This produces heat which kills unwanted seeds. When the microorganisms have consumed some portion of the available organic material, the rows cool. ***What remains is an organic product useful as a fertilizer or soil amendment.***
>
> Mr. Gibson referred to the end goal of this process as being humus. Mr. Gibson testified it can take as many as 10 years to create humus. The parties throughout the trial variously referred to the material in the windrows on the VHS property ***as compost, humus, and soil.*** The Court will explain its understanding of the definition of those terms.

> ***Compost is a mixture that consists largely of decayed [decaying] organic matter used for fertilizing and conditioning land.*** Merriam-Webster's Collegiate Dictionary 255. ***Compost is the term given to partially decayed organic matter. Humus is the material remaining at the ultimate stage of decomposition of organic matter, when the material can no longer be broken down by organic decomposition.*** It is that portion of soil organic matter which is completely amorphous, and has no cellular structure characteristic of plants. Whitehead, D.C. & Tinsley, J., The Biochemistry of Humus Formation, Journal of the Science of Food and Agriculture, Vol. 14, Issue 12, 849-857 (1963). ***Thus at some point in the process of decomposition, the grass clippings and leaves become "compost," at which stage they are useful as a fertilizer or soil amendment. However, compost will continue to decay until it can decay no more. At this point it is properly called humus and it is stable and remains in soil unchanged for long periods of time.***
>
> Using the same definitions of solid waste discussed above, ***the Court finds neither compost nor humus are solid waste under the EPHA. Certainly there is no evidence that people have been discarding compost at the VHS property.*** As is clear from Mr. Gibson's testimony about the process he uses, ***compost and humus both require some investment of energy and time to create.*** Mr. Gibson is making compost from discarded materials, ***but what he creates cannot be said to have been discarded by anyone.*** The solid waste rules support this conclusion as well. The Department has defined "Yard Waste" as: "Weeds, straw, ***leaves, grass clippings***, brush, wood, and other natural, organic, materials typically derived from general landscape maintenance activities." IDAPA 58.01.06.005(52). ***This definition does not include compost or humus made by decomposing any of the materials listed.***
>
> ***When do grass clippings and leaves stop being grass clippings and leaves and become compost?*** There was little evidence presented on this issue at trial. ***As discussed above, in this case, compost simply consists of partially decayed grass and leaves.*** Merriam-Webster defines compost as capable of being used for fertilizing and conditioning. As the trier of fact and in the absence of any evidence to the contrary, the Court will simply apply what it believes to be the plain meaning of compost to this question. ***Grass clippings and leaves become compost when they look like soil; it is black, crumbly in texture, and has no odor of decay, but may smell slightly sweet. Compost smells like earth rather than rotting plants.*** This conclusion is consistent with the Department's definition of recycling which is defined as a process by which waste materials are ***transformed into a new product in such a manner that the original identity as a product is lost. IDAPA 58.01.06.005(37).***

When DEQ created their IDAPA Rules in 2002-2003, (Idaho Legislature may have suspended agency rules temporarly), DEQ was faced with the *Idaho Solid Waste Facilities Act* (*ISWFA*), I.C. §39-7403(50)(e), where "agricultural waste" ("manures and crop residues") "returned to the soils at agronomic rates", were excluded from "solid waste". That provides background to what was intended within the adoption of IDAPA Rule 58, so as to be consistent with the exclusions of organic-agronomic substances (manures and crop residues), as they were

not to be "regulated" as a "solid waste". The lower court concluded "grass clippings and leaves" were not a "crop residue", without reference to any legislative intent that excludes "grass clippings and leaves" as a "crop residue". The court said the definition of crop was "being cultivated for profit or subsistence (R. p. 1212, L. 1-3)). However, the *Idaho Solid Waste Facilities Act* (*ISWFA*), I.C. §39-7404, by limitation, pre-empted DEQ from promulgating any broader definition of "solid waste" than allowed by *RCRA* and the *CFR* provisions (40 CFR 261.2(e)), wherein these organic recyclable substances are excluded from the definition of "solid waste".

The district court grappled with whether "grass clippings and leaves" should be included within a "crop (plant) residue", when analyzing IDAPA Rule 58.01.06.03.(b).(ii), and concluded "these materials are not "crop residue" within the meaning of IDAPA 58.01.06.03.b.ii, because those plants were not "plants being cultivated for profit or subsistence" (R. p. 1212, L. 1-3)). The court did not disclose in its conclusion any statutory definition or legislative intent to confirm "grass clippings and leaves" by and definition, had to be expressly "cultivated for profit or subsistence" in order to be considered a "crop residue" or a "crop (plant) residue". Grass clippings and leaves are a plant residue, severed from turfs and trees, coming from residential lawns, landscaping, turf farms, parks, common landscape areas, tree farms, street groves, residential yards, orchards, etc., all of which substances are processed as a "crop" for profit or subsistence, by many people, as these organic residues are removed from some form of a growth that results in a trimmed plant or root, from which a composting "crop" has been removed, to be utilized in a profitable application, no different than turf farms or orchards, or agricultural commodities, hay, corn, wheat, potatoes, onions beets, etc., as they each have a form of residue, organic in nature, and is a compostable substance. Neither the statutes nor IDAPA Rules define their intended use of "crop", "crop residues" or "crop (plant) residue", beyond I.C. §39-7403(50)(e) defining agricultural wastes, to be "manures and crop residues, returned to the soils at agronomic rates". Aren't these substances an "agricultural waste"? These substances will all become compost, and will be "returned to the soils as agronomic rates", and using that phrase, would envision a "formulated" application, like a specific rate of "compost or humus", as a soil amendment. Otherwise the wording would say something like "crop residues plowed or disked under upon removal of the crops".

This court is left to interpret what was the intended within the exclusions in IDAPA 58,

when excluding ***manure, crop (plant) residue****, and* ***agricultural wastes,*** regulated by *ISDA,* listed in Rule 58.01.06 (Solid Waste Management Rules), subpart .001 (Title and Scope), subpart (.03) (***Wastes Not Regulated Under These Rules),*** (b) (***These Rules Do Not Apply to the following….(b)(ii) and (b)(iii),*** when intended to be returned to the soil at agronomic rates.

Grass clippings and leaves are a "plant residue" severed from some form of a "crop" harvested in the context of a "crop" residue, and used for composting purposes, when intended for delivery to an agricultural composting operation to produce compost and humus. No evidence has been offered to suggest Gibson was operating a "solid waste disposal site". Nothing was buried or permanently discarded. DEQ provided no factual evidence to conclude Gibson's use of these organic recyclable substances were other than direct ingredients for production of compost and humus, for use as an agricultural substitute for commercial fertilizers and commercial foliars.

DEQ's pleadings stated: "the activities at the site include the composting of large volumes of solid waste for the purpose of resale to the public as compost or humus" (R. p. 94, ¶15). Though DEQ believed all substances were thought to be a "solid waste", the court found otherwise, rendering DEQ's overall position grossly flawed. By that pleading, DEQ's allegation has confirmed nothing at the operation was intended to be "discarded" or "abandoned", as DEQ recognizes the substances were delivered and intended "for the purpose of resale to the public as compost or humus", just as the lower court found: "*The purpose of people bringing the grass clippings and other materials is so that it can "be made into compost*." R. p. 1201, L. 15-16) Tr. p. 33, L. 11-15), and the lower court then defined compost and humus in the following manner:

> "Compost and humus are not solid waste as defined in I.C. §39-103(13) (R. p. 1208, L. 5); the court finds neither compost nor humus are solid waste under the EPHA (R. p. 1209, L. 4-5); and that grass clippings and leaves become compost when they look like soil; it is black, crumbly in texture, and has no odor of decay, but may smell slightly sweet" (R. p. 1209, L. 19-21)."

The words used in IDAPA Rule 58.01.06.001.03(b)(ii) and (iii) are not specifically defined, but referencing them as organic substances, they present no health hazard, and *ISDA* has maintained a regulatory involvement to compost, and (b)(iii) referenced the Department of Agriculture, and agriculturally related substances (agricultural waste), derived from manure, and crop residues (organic recyclable substances) addressed also in the *Idaho Solid Waste Facilities Act* (*ISWFA*), as excluded from "solid waste", where I.C. §39-7403(50)(e) defines "agricultural

waste" as "manures and crop residues" "returned to the soils at agronomic rates", stating:

> (50) "Solid waste" means ….. ***These regulations shall not apply to the following solid wastes:*** (e) ***Agricultural wastes, limited to manures and crop residues, returned to the soils at agronomic rates;***

The definition of "solid waste" is also narrowed by the provisions of the *Solid Waste Facilities Act,* (I.C. §39-7404), wherein it states:

> 39-7404. ***Consistency with federal law*** -- Status of appendices. The legislature intends that the state of Idaho enact and carry out a solid waste program that will enable the state to achieve approved state status with respect to solid waste disposal facility ***regulation from the federal government.***
> The legislature finds that subtitle D of *RCRA,* [*Resource Conservation Recovery Act*] and in particular the *code of federal regulations [CFR],* title 40, part 257 and 258, establish complex, detailed and costly provisions for the disposal of solid waste. …..
> ***The board may NOT promulgate any rule pursuant to this act that would impose conditions or requirements more stringent or broader in scope than the referenced RCRA regulations of the United States environmental protection agency or the provisions of this chapter.***

These exclusions have an intended purpose, now excluding organic recyclable substances used as ingredients to make compost and humus, as they are used as a substitute for commercial soil amendments and fertilizers. Grass clippings and leaves are "plant residue", they are organic, and are recyclable.

Appellants contend DEQ lacks any "standing" to regulate these organic recyclable substances, given not only the language used in the statutes and in the IDAPA Rules, but as restricted by the Federal enactment, *RCRA and* 40 CFR 261.2(e), which excludes recyclable substances from "solid wastes", within three types of classifications or categories.

In light of these Federal enactments, Federal courts have been addressing the definition of "solid waste", which historically found the controlling component in defining "solid waste" to be the intended abandonment or permanent discard analysis. With the introduction of the *Resource Conservation Recovery Act (RCRA),* exclusions of recyclable substances became introduced into the definition.

In 1987, the case, *American Mining Congress and Engelhard Corporation v. United States Environmental Protection Agency,* 824 F2d 1177 (1987), discussed the restriction on "solid waste":

> These consolidated cases arise out of EPA's regulation of hazardous wastes under the *Resource Conservation and Recovery Act of 1976 ("RCRA"),* as amended, 42 U.S.C.

Secs. 69016933 (1982 & Supp. III 1985). ….. In plain English, petitioners maintain that EPA has exceeded its regulatory authority in seeking to bring materials ***that are not discarded or otherwise disposed of within the compass of "waste."…..***

……..Relying upon the statutory definition of "solid waste," ***petitioners contend that EPA's authority under RCRA is limited to controlling materials that are discarded or intended for discard.*** ….

……***Congress,*** it will be recalled, ***granted EPA power to regulate "solid waste." Congress specifically defined "solid waste" as <u>"discarded material."</u>*** ….. . ***The challenge to EPA's jurisdictional reach is founded, again, on the proposition that in-process secondary materials are outside the bounds of EPA's lawful authority. Nothing has been discarded, the argument goes, and thus RCRA jurisdiction remains untriggered….***
The ordinary, plain-English meaning of the word "discarded" is "disposed of," "thrown away" or "abandoned." Encompassing materials retained for immediate reuse within the scope of "discarded material" strains, to say the least, the everyday usage of that term. …
The question we face, then, ***is whether, in light of the National Legislature's expressly stated objectives*** and the underlying problems ***that motivated it to enact RCRA in the first instance, Congress was using the term "discarded" in its ordinary sense--"disposed of" or "abandoned"--or whether Congress was using it in a much more open-ended way, so as to encompass materials no longer useful in their original capacity though destined for immediate reuse in another phase of the industry's ongoing production process….***
For the following reasons, we believe the former to be the case. RCRA was enacted, as the Congressional objectives and findings make clear, in an effort to help States deal with the ever increasing problem of solid waste disposal <u>by encouraging the search for and use of alternatives to existing methods of disposal (including recycling) and protecting health and the environment by regulating hazardous wastes.</u> To fulfill these purposes, it seems clear that ***EPA need not regulate "spent" materials that are recycled and reused in an ongoing manufacturing or industrial process. These materials have not yet become part of the waste disposal problem; <u>rather, they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself</u>***. ….. ***In sum, our analysis of the statute reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned.*** …
We are constrained to conclude that, in light of the language and structure of *RCRA*, the problems animating Congress to enact it, and the relevant portions of the legislative history, ***Congress clearly and unambiguously expressed its intent that "solid waste" (and therefore EPA's regulatory authority) be limited to materials that are "discarded" by virtue of being disposed of, abandoned, or thrown away.*** While we do not lightly overturn an agency's reading of its own statute, we are persuaded that by regulating in-process secondary materials, EPA has acted in contravention of Congress' intent.

The concept of compostable organic substances became a later subject, and has since been addressed in the National Park Systems treatment of organic vegetative materials. The Federal National Parks Service, Department of Interior, refer to Solid Waste Disposal Sites and the Code of Federal Regulations (*CFR*), declaring *exemption of compostable substances from being what is otherwise defined as solid wastes,* which is congruent with *ISDA's* compost provisions, and the *Solid Waste Facilities Act,* (*ISWFA)* agricultural waste exclusions, stating:

> **Code of Federal Regulations**
> **Title 36. Parks, Forests, and Public Property**
> **Chapter I. NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR**
> **Part 6. SOLID WASTE DISPOSAL SITES OF THE NATIONAL PARK SYSTEM**
> **§ 6.3. Definitions**
> The following definitions apply to this part:
> ***Agricultural solid waste*** **means solid waste that is generated by the rearing or harvesting of animals, or the producing or harvesting of crops or trees.**
> ***Compostible*** [sic] ***materials*** **means organic substances that decay under natural and/or human-assisted conditions within relatively short time intervals, generally not in excess of ninety days.**
> ***Solid waste disposal site*** **……. include facilities for the incineration of solid waste and transfer stations. *Facilities for the management of compostible [sic] materials are not defined as solid waste disposal sites for the purposes of this part.*** (Emphasis added)

The lower court has reviewed *Safe Air For Everyone v. Meyer,* 373 F.3rd 1035 (2004), a Ninth Circuit Decision, stating in its Findings and Conclusions:

> In *Safe Air*, the Ninth Circuit determined that whether the grass residue left in the fields after farmers harvested Kentucky bluegrass seeds was or was not "solid waste" under *RCRA* depended upon whether the grass residue was 'discarded material.' *Id.* 373 F.3d at 1041. After considering decisions by other circuits, the Ninth Circuit determined it was appropriate to evaluate three questions when determining whether a certain material had been "discarded." Those questions are:
>
> (1) whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself"; (2) whether the materials are being actively reused, or whether they merely have the *potential* of being reused; (3) whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer. *Id.* 373 F.3d at 1043 (internal citations omitted)(emphasis in original).
>
> The Ninth Circuit concluded grass residue was not "solid waste" under *RCRA* because it was actively reused by the original owners, the farmers, in a process beneficial to them. *Id.*

The only difference between *Safe Air* and Gibson's operation is Gibson is not the "original owner" of the organic residue, but Appellants contend that is not controlling in light of

what has materialized with the subsequent inclusion of 40 CFR 261.2(e). Gibson acquired this organic residue by delivery to him for the specific purpose of producing compost and humus, as the court stated, and cited above, and as DEQ has alleged. *RCRA, virtue of 40 CFR 261.2*(e), has excluded these organic recyclable substances from the definition of "solid waste", when utilized within any of their three categories established by the regulation.

A "crop residue" or any "plant residue" (whether it be a grass/lawn/turf/tree/shrub leaf residue), meets the criteria within *RCRA,* whether returned to the soils by the original owner, as a residue decomposed through a natural process, or slated for return to the soils through human management in an agricultural composting operation; either way, the organic substances are destined to re-introduction into the soil through a natural decomposition-management process, being a soil amendment that exhibits what agronomists call a humus–soil enriched dirt composition that restores soils with nutrient enriched additives, not a substance or product to be "abandoned" or "discarded", but intended to be applied upon land in agricultural soil-plant applications and beneficial uses at agronomic rates.

The significance found by the court's reference to *Safe Air* is the recognition *RCRA* is the controlling authority*,* and *RCRA* has since 2004, come to specifically exclude these recyclable materials from "solid waste" when the ***organic substance is used as a direct ingredient to produce a product that is a substitute for commercial products, as addressed below.***

No longer does the question require consideration whether plant residue (grass and leaves) are reused by the ***original owners***, (question 3 in *Safe Air*), since the emphasis now is the material destined for ***beneficial reuse or recycling in a continuous process by the generating industry*** (question 1), and the materials actively ***reused,*** (question 2).

These organic substances, grass clippings and leaves, are being actively ***reused/converted*** by Gibson for a ***beneficial reuse or recycling in a continuous process,*** as a direct ingredient to produce a product intended as a substitute for a commercial product, as identified within the Federal legislation.

The Federal Regulations classify three "types" of substances excluded from "solid waste" (grass clippings and leaves fit all three categories), which Appellants argue is binding upon Idaho through the Idaho *Solid Waste Facilities Act,* (*ISWFA) I.C.* §39-7404, where Idaho has declared the Federal supremacy:

§39-7404. ***Consistency with federal law*** -- Status of appendices. …..

The board may not promulgate any rule pursuant to this act that would impose conditions or requirements more stringent or broader in scope than the referenced *RCRA* regulations of the United States environmental protection agency or the provisions of this chapter**.** (Emphasis added)

The definition of "solid waste" in the *Code of Federal Regulation,* Title 40, Chapter 1 of "the Protection of Environment", Sub-part I, (40 CFR 261.2(e)), identifies ***three types*** of materials excluded from "solid waste", being within *RCRA's* recycling categories and characteristics.

The three categories, within 40 CFR 261.2(e), provide exclusion when "recycled", stating:

§261.2(e) ***Materials that are not solid waste when recycled.***
(1) Materials are not solid wastes when they can be shown to be recycled by being:
(i) ***Used or reused*** as ***ingredients*** in an industrial process ***to make a product***, provided the materials are not being reclaimed; or
(ii) ***Used or reused as effective substitutes for commercial products;*** or
(iii) ***Returned to the original process from which they are generated***, without first being reclaimed or land disposed. The material must be returned as a ***substitute for feedstock materials***.

Grass clippings and leaves meet all three categories, delivered solely to be recycled, not "discarded" or "disposed of", but to be processed into compost and humus at Gibson's agricultural composting operation, which DEQ has alleged (R. p. 94 ¶ 15), recognizing the substances are delivered for the express purpose to produce compost and humus, as direct ingredients to produce a substitute product for commercially produced fertilizers as a soil amendment and plant foliar. These ingredients are expressly excluded through the application of 40 CFR 261.2(e).

This exclusion is now federally mandated, irrespective the scope of regulatory authority vested with *ISDA* by virtue of *RTFA* or *SAPAA,* as the *Idaho Solid Waste Facilities Act,(ISWFA)* I.C. §39-7404, preclude promulgation of rules and regulations by DEQ that seek to impose greater restrictions or conflict with the pre-emptive application of EPA's Federal Regulations (40 CFR 261.2(e)) relating to recycled materials/substances governed by EPA's *Resource Conservation Recovery Act* (*RCRA*) precluding any broader definition of "solid waste" that used in the Federal Legislation/Regulations.

It remains Appellants' position DEQ acknowledged (in 2003) *ISDA* had the right ***to manage and regulate their own agricultural wastes,*** when DEQ adopted Rule 58.01.06.001.03(b)(ii)&(iii), (excluding materials from "solid waste", that are substances consisting of manure and crop (plant) residues intended to be returned to the soil at agronomic rates, **and any agricultural "solid waste"**

which is managed and regulated pursuant to rules adopted by the Idaho Department of Agriculture.

In 2011, the Legislature adopted a clarification amendment to identify ***composting facilities and activities*** to be an agricultural activity within I.C. §22-4502, to make clear such activity was within *ISDA's* regulatory authority.

Consequently, IDAPA Rule 58 cannot include "grass clippings and leaves" to be a "solid waste", as that would create a broader definition of non-excluded materials/substances than allowed by EPA's *RCRA*, which restriction is embraced within the limitations mandated by I.C. §39-7404 that *prevents the promulgation of any rule broader than the coverage of EPA's administration of the Resource Conservation Recovery Act* (*RCRA*), and the Federal regulations (40 CFR 261.2(e)), which expressly established the three categories (types) of materials/substances exempted from "solid waste", being:

> ***Waste Used as an Ingredient:*** *If a material is directly used as an ingredient in a production process without first being reclaimed, then that material is not a solid waste.*
>
> ***Waste Used as a Product Substitute****: If a material is directly used as an effective substitute for a commercial product (without first being reclaimed), it is exempt from the definition of solid waste.*
>
> ***Wastes Returned to the Production Process****: When a material is returned directly to the production process (without first being reclaimed) for use as a feedstock or raw material, it is not a solid waste.*

This court must confirm that grass clippings and leaves ae not a solid waste, as a matter of controlling Federal law.

c. Whether Regulation Of Organic Compost Ingredients Is Vested With *ISDA*

11. The authority to regulate agricultural composting operations is vested with *ISDA*.

ISDA was granted regulatory authority over agricultural composting operations, activities and facilities, (clarifying amendment enacted in 2011 to *RTFA*) as defined in I.C.§22-4502(d)&(f), with whom Gibson's operations, processed products, and activities are registered with *ISDA* under the *Soil and Plant Amendment Act (SAPAA)* adopted by the Idaho Legislature in 2001.

The *Right To Farm Act* (*RTFA*) and *Soil and Plant Amendment Act* (*SAPAA*), set forth in Title 22, Chapters 1, 6, 22, and 45, address organic recyclable substances processed as direct ingredients for the production of compost and humus.

Gibson has remained familiar with each City, County, and State department, division and Agency concerned about compost over the many years, including Ada County Developmental Services, DEQ, Fire District, Ada County solid waste landfill, Central District Health, County Code Enforcement, and DEQ, when a division and as an agency, and in 2009, Gibson was directly involved in extensive litigation over the pre-emptive effects of the statewide "permitted use" for his agricultural composting operations upon agricultural lands, perceived to be regulated by *ISDA*, which brought into the fray the statutory clarification to *ISDA's RTFA,* adopted July 1, 2011, confirming composting activities were always intended to be within the *Right to Farm Act* of 1981, wherein the legislature declared that composting activities are within "the right to engage in farm operations, activities, and facilities to be a natural right, and is recognized as a *permitted use throughout the state of Idaho*", being not only a statewide permitted uses (I.C. §22-4501), but such operations, activities and facilities were *regulated* by *ISDA,* by virtue of I.C. §22-2204. "The department *shall administer, enforce, and carry out this chapter* and may *adopt rules* necessary to carry out its purposes including, but not limited to, ….. ***soil amending or plant amending ingredients, exempted materials***, ***investigational allowances, definitions***…..and disposal of soil amendments and plant amendments and their containers".

That clarification was made retroactive when enacted July 1, 2011, the *direct consequence* of which brought an end to Ada County's litigation, as Ada County wrongfully wanted the property owner to obtain a conditional use permit (CUP), a direct violation of I.C. §22-4501.

These operations were also protected by the language contained in the *Local Land Use Planning Act,* (*LLUPA*) which also pre-empt county regulatory interference in the production of an agricultural product, as declared in I.C. §67-6529:

> 67-6529. APPLICABILITY TO AGRICULTURAL LAND -- (1) No power granted hereby shall be construed to empower a board of county commissioners to enact any ordinance or resolution which deprives any owner of *full and complete use of agricultural land for production of any agricultural product.* (Emphasis ours)

Idaho's *Right to Farm Act*, and Idaho's *Soil and Plant Amendment Act* defined the inter-relationship with agriculture within the State of Idaho and it priority under the *Land Use Planning Act* enacted in 1975, all of which independent body of law existed when the Department of Environmental Quality became an Agency in 2000, formed almost 20 years after the enactment of *RTFA* in 1981, and virtually contemporaneously with the enactment of *SAPAA*

in 2001. There was no grant of any authority to regulate any of these established agricultural activities when DEQ was a division of Health and Welfare, , and no additional power or authority was added, in the enacting language that stated in I.C. §39-102(A)(2): "(2) That all existing, **but no new rights, powers, duties,** budgets, funds, contracts, rulemaking proceedings, administrative proceedings, contested cases, civil actions, and other matters **relating to environmental protection as described in this chapter….. shall be transferred to the board of environmental quality**". What rights and authority existed in *ISDA* remained, without interruption or usurpation, and that pertained to agricultural operations, facilities and activities (specifically including compost).

By coincidence or design, after conclusion of that CUP controversy with Ada County in 2013, Gibson was confronted by DEQ following this "inspection" and "investigation" of his operations, notwithstanding the documented knowledge of Gibson's operations always exceeded 600 cu. yds. of "agricultural related substances, so for the first time, after ten years of complete silence (2003-2013), the assertion of a right to regulate Gibson's composting facilities, as a "solid waste processing site" brought forth another controversy, despite the historical recognition that compost activities were to be regulated by *ISDA*.

Compost substances have never before been regarded as "waste" let alone a "solid waste" by any Agency, and *ISDA* deemed composting the production of an *agricultural product*, not a substance to be "discarded or abandoned", merely because it began from the organic and natural process of decomposition of grass clippings and leaves after being processed at a composting agricultural operation.

Nowhere within the creation of DEQ (2000) did the Idaho legislature grant any authority to that newly created agency to regulate any agricultural activities, operations, or facilities lawfully engaged upon agricultural lands and defined within the enactments of *ISDA*. These soil substances were not substances destined for "disposal", nor deemed a hazardous waste, nor a pollutant. This organic substance is an agricultural product and desired commodity.

I.C. § 22-4502(2)(d) confirm these "agricultural operations" include, "plant compost", as declared in the following language:

> 22-4502. DEFINITIONS. As used in this chapter:
>
> (1) "Agricultural facility" includes, without limitation, any land, building, structure, ditch, drain, pond, impoundment, appurtenance, machinery or equipment that is used in an ***agricultural operation.***

> (2) "Agricultural operation" means an activity or condition that occurs in connection with the ***production of agricultural products*** for food, fiber, fuel and other lawful uses, and ***includes, without limitation:***
> ***(d)*** Planting, irrigating, growing, fertilizing, harvesting or producing agricultural, horticultural, floricultural and viticultural crops, fruits and vegetable products, field grains, seeds, hay, sod and nursery stock, and other plants, **plant products, plant byproducts, plant waste <u>and plant compost;</u> ….** (Emphasis ours)

The last amendment made in July, 2011 was undertaken pursuant to RS20384, therein stating the "Statement of Purpose" to be:

> The purpose of this legislation is to strengthen Idaho's Right to Farm Act by: (1) more comprehensively defining the **agricultural activities to which the protections to the Act apply;** (2) providing that the protections of the Act **apply to expansions to agriculture activities; ….** These changes are based upon provisions to Right to Farm Acts of several other states. (Emphasis ours)

The Legislative intent was expressed in I.C. § 22-4501 to be:

> 22-4501. Legislative Findings and Intent. ……. **<u>The legislature also finds that the right to farm is a natural right and is recognized as a permitted use throughout the state of Idaho.</u>** (Emphasis ours)

Each of the statutory enactments (*Right to Farm* and *Soil and Plant Amendment Acts*) were made congruent with composting activities, operations, and site facilities, confirmed the authority of *ISDA,* and has annually registered Gibson's composted products and his composting operations.

DEQ never before contemplated becoming involved with composting activities, confirmed by their discussions in 2003 (Tr. p. 494), and have ignored Gibson's operations entirely since 2002, until 2013. That during the conversation with DEQ personnel in 2002, their personnel *acknowledged the existence of the pre-emptive and exclusionary effects* contained within their management rules (Tr. p. 497) , which discussions addressed the adoption of the IDAPA Rules that was understood to exclude composting of plant substances and animal manures. Gibson specifically discussed the exclusions in the regulatory provisions to confirm his concerns over his agricultural operations.

In 2002, DEQ officials acknowledged grass clippings and leaves were a crop (plant) residue substance (Tr. p. 499), and composting such substances was excluded from any regulation (Tr. p. 400). None of the substances pose a harm to human or animal health or the environment, as they consist of the same substance found to be dirt, called compost and humus

soils, possessing concentrated nutrients, to be used as plant and soil additives and amendments, critical to crop production in the agricultural industry.

If DEQ is allowed authority to regulate compostable ingredients, before considered to be excluded from the IDAPA Rules, is every farmer who elects to make enriched soil from composted organic residues, whether from "crop" or merely "plant" residues, become exposed to a claim from DEQ when the size of their processing is alleged to be a "Tier II" size? What is the purpose when no hazard exists to human health or the environment?

The mission of DEQ has always been to protect the environment, not regulate organic substances that makes soil, as soil substances are not hazardous wastes, and not placed at a landfill for final disposal. DEQ has alleged Gibson's operation produces compost and humus for sale to the public (R. p. 94 ¶15).

d. Whether DEQ Was Precluded From Filing This Civil Action?

12. DEQ was prohibited from initiating this civil action.

There is a substantive restraint mandated within I.C. §39-108(4), perceived by Appellants to be *standing* and *a statute of repose*, not intended to be construed as a statute of limitations.

The Idaho Legislature, creating DEQ in 2000, adopted the repose statute that declares:

> C. §39-108(4): "no civil or administrative proceeding may be brought to recover for a violation of any provision of this chapter or a violation of any rule, permit or order issued or promulgated pursuant to this chapter more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation".

A statute of limitations is *procedural in nature* while a statute of repose is *substantive* in that it ***defines a right rather than merely limits its enforcement.*** *Resolution Trust Corp. v. Olson,* 768 F. Supp 283 (1991), cited in *Idaho First Bank v. Bridges,* 164 Idaho 178, 426 P.3d 1278 (2018), Footnote # 3. Does the Idaho statute intend to extinguish the right to sue or merely to bar the remedy? See, e.g., *Rosenfield v. HSBC Bank, USA,* 681 F.3d 1172, 1182-83 (10th Cir. 2012) (wherein it is held a statute of repose operates to extinguish the claim after the date lapse).

The "Tier II" violation alleged by DEQ was premised solely upon the "size" of Gibson's composting operations (R. p. 81, ¶ 34), about which DEQ has been infinitely aware of the "size" of Gibson's operations for decades R. p. 513, ¶ 5, L.10-15), being this specific location in continuous operation since 2004, and prior operations since 1991, as records within DEQ files

confirm back to 1992 and before. (Tr. p. 262-263).

DEQ has aerial photographs in their department files, showing county wide activity in all prior years, and of Gibson's operation at this specific location in 2011, revealed in their proposed Exhibit List (R. p. 871, Exhibit No. 10; p. 880, Exhibit No. 10, removed from list (R. p. 914, Exhibit No, 10 "*reserved*"). This Exhibit was not used, as it confirmed DEQ knowledge of the "size" of the composting operation from the annual photos they maintained, having elected to remove that 2011 photo after receiving Defendants' memorandum submitted in support of directed verdict to be made at the close of DEQ's case. That documentary evidence, identified in the Exhibit lists, confirms DEQ's on-going knowledge of the "size" of Gibson's operation for many years before this "civil action" was filed. DEQ declined to offer that proposed exhibit into evidence, though Ehlert acknowledged the documents and records in DEQ files, dating back to 1992 (Tr. p. 263-265). This confirmed the application of the statute (I.C. §39-108(4)) that terminated the two year statutory substantive right DEQ had to file the action, if held to be a statute of repose. DEQ declined to affirmatively allege "lack of knowledge" during the trial proceedings, as the Division/Department, had been well aware of the size of Gibson's agricultural operations for decades, identified in their various forms of documents, files, permits, photos, and records, revealing aerial photographs of the size, many years before March 5, 2013.

I.C. §39-108(4), by virtue of the language used by the Legislature, is to be interpreted to constitute a statute of repose, thereby terminating DEQ's substantive right of action as a result of this historic knowledge, precluded from claiming any substantive right of action by this defective and inoperative civil action, knowing the "size" of the operation has always had in excess of 600 cu. yd. of materials at any one time.

The "size" and "substance" of Gibson's composting activities have been known by every Boise City, Ada County, and Idaho State governmental agency since his operations began in 1974, expanding his operations to this present location in 2004. Gibson had routine contact with officials from each City, County and State agency, State Division, and State Department, following his arrival in the Gowen Field Desert Front area (south of the Municipal Airport) in 1988, because of the potential concern whether his operation would draw birds to the area, a concern to commercial and military plane flight patterns.

All inquiries confirmed his operations never included landfill type wastes, refuse, or disposal as inquiry was made because of the Boise Municipal Airport, accepting his agricultural

operation, regulated by *ISDA,* and not a landfill waste disposal site.

I.C. §39-108(4) appears to be unambiguous; DEQ ***cannot bring the civil action,*** perceived to be a preclusionary statute, terminating a substantive right to engage an action, not a procedural limitation to enforce a valid cause of action. In this instance, this statute precludes DEQ from initiating an action that alleges a violation of a Rule (regarding "size") of an operation known to DEQ for more than two years prior to filing the action. DEQ has never focused just on the amount of "grass clippings and leaves" at the operation, as DEQ claimed ALL substances at the operation were a "solid waste" substance, and all substances present were known to exceed 600 cu. yds. On any day during any year since 2004.

If this statute is one of repose, it constitutes a deadline to file the action, and DEQ has never denied their historic knowledge as to the nature of the operation or its size.

A statute of repose (a non-claim statute), is similar to *standing* or jurisdiction requirement, not an affirmative defense that seeks to bar *enforcement* of a valid claim. This statute cuts off the right to take action, when the deadline has passed. It becomes jurisdictional. A statute of repose sets a *deadline* based on the substantive right to assert an action, separate and apart from the enforcement of an actionable claim within a period of time.

This statute of repose impose a deadline, designed to ***bar DEQ's substantive right, after a specified period of time from the occurrence of the acquisition of their knowledge***.

In some cases, a statute of limitation and a statute of repose apply to the same case, and others the statute of repose cuts off the substantive right of action before a statute of limitations (on a valid claim) has run to preclude enforcement. A statute of repose, I.C. § 6-1403, in the context of product liability, was discussed in *Olsen v. J. A. Freeman Co.,* 117 Idaho 706, 791 P.2d 1285 (1990), wherein the court stated:

> "Idaho's ***statute of repose*** advances a ***policy of finality in legal relationships*** and ***thus furthers the objective of the legislature*** by providing for "the maximum length of time products sellers are subject to liability." The classification established by I.C. § 6-1403 bears a rational relation to the legislative objective. The ***statute of repo***se falls within the "rational basis" test which is generally appropriate to use when reviewing ***statutes which impact social or economic areas and the classification advances legitimate goals in a rational fashion.*** *Leliefeld v. Johnson,* 104 Idaho 357, 659 P.2d 111 (1983)……
>
> "***The role of the judiciary is limited when encountering a limitation when considering legislation, including a statute of repose***. The words of former Chief Justice Donaldson in *Leliefeld* warrant repeating: ***So long as the statute is constitutional, we have no intrinsic ability to review its inherent wisdom or, if it seems unwise, the power to change it.*** Whenever lines are drawn by legislation, some may seem unwise, but the

> responsibility for ***drawing these lines rests with the legislature and judicial review is limited."…..***
>
> Some jurisdictions have determined that the power to enact ***statutes of repose that preclude a cause of action*** is implicit in the legislature's power to abolish rights that have not yet vested. *Rosenberg v. Town of N. Bergen,* 61 N.J. 190, 293 A.2d 662, 667 (1972); *Dague v. Piper Aircraft Corp.,* 275 Ind. 520, 418 N.E.2d 207 (1981). In *Rosenberg,* the Supreme Court of New Jersey explained that a cause of action does not accrue until a careless act results in injury or damage, and observed that the statute in question ... does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action.... ***The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.***

Another statute, arising out of the design or construction of improvements to real property, I.C. §5-241, has also been declared a ***statute of repose,*** not a statute of limitation, in *West v. El Paso Products Co.,* 122 Idaho 133, 832 P.2d 306 (1992), and in *Petrus Family Trust, May 1, 1991 v, Kirk* Docket No. 44784, April 4, 2018, where the Idaho Supreme Court recently stated: "Section 5-241 is a statute of repose, not a statute of limitations, since its operation does not depend on the occurrence or discovery of injury." Id.; accord *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill,* 103 Idaho 19, 23, 644 P.2d 341, 345 (1982); 54 C.J.S. Limitations of Actions § 7 (2017).

The lower court, however, ruled I.C. §39-108(4) is a statute of limitation (R. p. 1212. L. 16-23), stating:

> Defendants argue the words "no civil or administrative proceeding may be brought... more than two years after the director had knowledge or ought reasonably to have had knowledge of the violation" means I.C. § 39-108(4) is a statute of repose; not a statute of limitation. However, similar words appear in other statutes of limitations in Idaho. See I.C. § 6-1403(3) ("No claim under this chapter may be brought") and I.C. § 5-201 ("Civil actions can only be commenced"). The Court concludes I.C. § 39-108(4) is not a statute of repose, it is a statute of limitations. Defendants failed to timely plead that issue as an affirmative defense.

The lower court did not address the language in I.C. §5-241, or to then distinguish the *Petrus Family Trust* case cited above, where I.C. §5-241 was declared a repose, not limitations, but the court did recognize the "quantity" of "material presence" at the compost site was long known to DEQ, and the nature of the composting operation, but not necessarily the *composition* of materials on March 29, 2013 (R. p. 1213, L. 1-9), stating:

> Additionally, Defendants' failed to prove a defense under I.C. § 39-108(4) as a statute of limitations. Defendants' claim that DEQ knew of the size of Mr. Gibson's composting operation since 2004. However, as Defendants have successfully argued themselves, it is one thing to know that Mr. Gibson has a lot of compost. It is another thing entirely to know how much waste he has or has received. *While there is some evidence in the record to suggest employees of the Department knew Mr. Gibson was operating a composting facility prior to 2011, there is no evidence that any DEQ official or employee knew he was receiving discarded materials (as opposed to purchasing grass and leaves), knew those materials were not crop residue (i.e. knew the source of the grass and leaves), or knew the volume of the grass and leaves he was receiving.* (Emphasis added)

None of this "discarded vs "purchase" was raised by DEQ, as it was alleged in the pleadings that all substances a "solid waste", by virtue of the definition of "solid waste(R. p. 80, ¶ 28), and the lower court then concluded "grass clippings and leaves" were "discarded" at this composting operation, though nowhere in this Record is there an allegation or evidence presented that any materials delivered and received at this operation were ever intended to be "discarded" or processed for "disposal"; rather the opposite was alleged by DEQ (R. p. 94, ¶15), stating the intend was to make compost and humus, for sale to the public. The lower court also sought to differentiate between "crop residue" and "plant residue", though deemed by Appellants to be an irrelevant distinctions when viewing "organic recyclable substances" in the context of *RCRA* and 40 CFR 261.2(e)*, controlling the exclusion of these organic recyclable substances from "solid wastes".*

Appellants argue this "civil action" filed by DEQ was void, as the substantive right ceased upon the expiration of the limiting factors of the statute. When I.C. §39-108(4) states: "no civil action may be brought", and declares the trigger event to be DEQ's *knowledge,* it is not a question if Gibson could stop the *enforcement*, as DEQ has no right of action. The Legislature has the authority to enact these type statutes, and this substantive right of action has been limited, like jurisdiction, or standing, as DEQ has a substantive right *to bring an action for any alleged "Tier II" violation, if it is initiated within two years of their knowledge of the "nature" and "size" of the operation*, and DEQ always believed *ALL substances were a "solid waste",* (R. p. 94, ¶ 15).

The Legislature imposed this deadline, and based it upon DEQ's *"knowledge",* not an operator's defense to challenge the *enforcement* of the alleged IDAPA violation. This knowledge of the "nature" and "size" of Gibson's operation has been known since 2004, far in excess of the two year period to act upon the substantive right of action. DEQ's substantive right to allege a

"Tier II" processing size violation terminated in 2006..

When the court declared I.C. §39-108(4) a statute of limitation, in the decision on the motion to dismiss (R. p. 573-576; R. p. 648), Defendants sought to amend their responsive pleadings, to include the statute as an affirmative defense, but the motion was denied.

Nowhere within Title 39, Ch. 1 is any determination expressed that I.C. §39-108(4) must be regarded an "affirmative defense", or regarded as such within Rule 8(c), IRCP; rather the statute appears to be structured as a sustentative right to act, not a limitation of enforcement.

DEQ had knowledge of the "size" of Gibson's operations as always being in excess of 600 cubic yards, and has never denied knowledge, either within their pleadings or at trial, acknowledging records of Gibson's operations dating back to 1992 (Tr. p. 263) and revealing their 2011 aerial photo in trial exhibits (R. p. 871 Exhibit No. 10; R. p. 880, Exhibit No. 10) and testimony (Tr. p. 263) of the size of those agricultural activities for decades.

DEQ personnel (when a Division), made contact with Gibson in 1992-1995 (R. p. 510-513, ¶¶ 4, 3(sic) 4, and 5; Tr. p. 263) when Central District Health officials wanted a "Permit", later stating he was not subject to their jurisdiction after 1995, and reiterating that fact in 2003. (Tr. p. 497). Gibson understood from *ISDA* he did not need any DEQ Division/agency permission to conduct agricultural operations, which included plant and/or crop residues, used in his composting activities on agricultural land, and what he was doing had been deemed to be a "permitted use" statewide under the *Right to Farm Act (RTFA),*specifically defined in I.C.§22-4502(2).

DEQ officials confirmed Gibson's operations were not an environmental concern after 2002, when the regulations were adopted for "solid waste" management, and Gibson never heard from DEQ until the letter of April 2, 2013 (R. p. 17, ¶ 21; R. p. 50, ¶ 21; R. p. 79, ¶18; R. p. 94, ¶ 18; R. p. 125, ¶18), a decade later, stemming from DEQ's "unauthorized" "inspection" on March 29, 2013, which operation had never changed in "nature" or "size".

This former "knowledge" comports to the Legislature's objective to restrict the substantive action identified in the statute. I.C. §39-108(4). If DEQ thought these substances to be "solid waste", how does DEQ explain their decades long lack of interest from 1995 to 2013, when they knew of, and observed, the many thousands of cubic yards of substances at Gibson's operation? How do they explain the passage of ten years following adoption of IDAPA "solid waste" Management Rules in 20002-2003, with no contact, inquiry, or concern?

The provisions of I.C. §39-108(4) meet the legislative intent of a statue of repose, and should be declared that to be the Legislative intent. The Director is also charged with knowledge of the Ada County litigation over the conditional use controversy from 2009 into 2013.

e. Whether Penalties, Injunctive Relief, and Award Of Expenses Is Erroneous?

13. The district court erred when imposing a penalty of $1,000.00 against Gibson and $250.00 against VHS Properties, LLC under I.C. §39-108.
14. The district court erred when imposing injunctive relief against this agricultural composting operation under I.C. §39-108.
15. The district court erred by awarding DEQ expenses under I.C. §39-108.

The imposition of penalties, expenses, and injunctive relief, as the lower court has imposed pursuant to I.C. §39-108(5)(6)&(8), has been granted upon the erroneous finding that DEQ should be held to be the prevailing party, when the law and facts do not support that finding, as there exists no factual or legal basis to find and conclude Defendants violated any of the provisions of the *Environmental Protection and Health Act* (EPHA), or any IDAPA Rules promulgated pursuant to the Act.

The lower court's awarded of expenses under I.C. §39-108(6), along with the imposition of penalties and injunctive relief, must be reversed, as the Findings (R. p. 1217) confirmed neither compost nor humus were a "solid waste", and for that reason, little [actually nothing] was proven to support any "Tier II" processing of a "solid waste", since the lower court concluded: "*The Court is unwilling to conclude from the windrows alone that the VHS property has at any one time had a volume of greater than 600 cubic yards of waste.*", for which reason the court looked beyond the pleadings, concluding a "Tier II" violation, may have occurred *at some other time other than on March 29, 2013*, for which conjecture the court granted DEQ injunctive relief, on the mere conjecture quantities of "grass clippings or leaves" may have, at some other time, been there (R. p. 1210, L. 15-22; R. p. 1211, L. 1-11). The lower court erred in granting relief upon an unpled claim, exceeding the allegations within the pleadings, which themselves were not proven.

Defendants' operations have been a decade old activity since the IDAPA Rules were adopted (2002-03), which operations have been known to DEQ for decades before, where Gibson processes these organic substances, grass clippings and leaves, at this agricultural composting operation, as direct ingredients to produce a product to be used as a substitute for commercial products, declared excluded from any definition of "solid waste", as controlled by

the pre-emptive effects of the *Resource Conservation Recovery Act,* (*RCRA),* within the announced three types of excluded recyclable substances identified within the *Federal Code of Regulations,* 40 CFR 261.2(e), within which these organic recyclable substances, grass clippings and leaves, are among that type of exclusion from the definition of "solid waste", which enactment and regulation is binding and controlling law in Idaho, as Idaho legislature has declared that to be the controlling law on such definitions, pursuant to Idaho's *Solid Waste Facilities Act, (ISWFA),* I.C. §39-7404, prohibiting any broader classification of substances that defined by the Federal enactments.

The lower court, when denying DEQ's Motion for IRCP Rule 60 (a) relief, made rather apparent (R. pp. 1375-1385) within footnote 4, page 7 of the Order (R. p. 1381), that DEQ's IDAPA Rules were a morass of contradiction and confusion, far from a model of clarity, as the court stated: "*If the Department intended this definitional morass to make clear that commercial composting facilities are subject to the solid waste management rules, it has failed to achieve that goal*". Would it not necessarily follow then, given logic in its typical application, that if compost and humus are not a "solid waste", would not logic dictate that the organic recyclable substances that are used as the ingredients that produced that product would be excluded from the definition as well? As Will Rogers once said, "common sense is not so common after all".

f. Whether Appellants Are Entitled To Fees and Costs Below And On Appeal?

16**.** Appellants are entitled to attorney fees and costs below and on appeal?

I.A.R. Rule 41(d) provides the procedural requirements to request attorney's fees; not the authority to grant them. Idaho law requires an award based upon statute or contractual right. *See, e.g., Robbins v. County of Blaine,* 134 Idaho 113, 996 P.2d 813 (2000); *Post v. Murphy,* 125 Idaho 473, 873 P.2d 118 (1994); *Farm Credit Bank of Spokane v. Wissel,* 122 Idaho 565, 836 P.2d 511 (1992). The lower court's analysis begins with Rule 54(e)(1), IRCP, which permits an award of reasonable attorney fees to a prevailing party "when provided for by any statute or contract." That rule provides fees may be awarded under I.C. §12-121 when the court finds the action was brought, or pursued frivolously, unreasonably or without foundation. On occasion, in past decisions rendered by this Supreme Court, this Court has declared that Rule 54 does not apply to awards of fees that are only made on appeal, such as the following statement as derived from *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972 (2010) would so serve to demonstrate:

In the argument portion of their brief, Bagleys did not address their request for an

> award of attorney fees. For example, they did not explain what provision in Idaho Code § 12-120(3) provides for an award of attorney fees in this case. They did not elucidate ***how Idaho Rule of Civil Procedure 54, which is applicable in the district courts and the magistrate's division of the district courts (Idaho R. Civ. P. 1(a)), grants the right to attorney fees on appeal.*** They did not explicate how Idaho Code § 12-123, which does not apply on appeal (*Bird v. Bidwell*, 147 Idaho 350, 353, 209 P.3d 647, 650 (2009)), applies to this particular appeal. They did not enlighten this Court as to how Idaho Appellate Rule 41, which does not provide authority to award attorney fees (*Swanson v. Kraft, Inc.*, 116 Idaho 315, 322, 775 P.2d 629, 636 (1989)), authorizes such an award here. Finally, they did not expound upon how this appeal meets the standard for awarding attorney fees under Idaho Code § 12-121, ***nor did they even state what that standard is.*** 149 Idaho at 805, 241 P.3d at 978 (emphasis added).

See also, *Belstler v. Sheler*, 151 Idaho 819, 827 n. 4, 264 P.3d 926, 834 n. 4 (2011) ("Both parties cite to Rule 54(e)(1) as part of their arguments for attorney fees on appeal, but neither argues how this rule is applicable to the Supreme Court. *See* I.R.C.P. Rule 1(a); *Bagley v. Thomason*, 149 Idaho 799, 805, 241 P.3d 972, 978 (2010).").

In this case, the lower court denied DEQ's request for attorney fees against Defendants, as the court found Defendants had not defended this controversy frivolously, unreasonably or without foundation. These Appellants argue they should prevail on this appeal, and do request an award of attorney fees, both below and on appeal, requesting the court to award reasonable attorney fees to Defendants/Appellants as the prevailing party, under I.C. §12-117, as DEQ has acted without a reasonable basis in fact or law, and under I.C. §12-121, as DEQ brought and pursued this "civil action" frivolously, unreasonably, and without foundation in fact or law.

Appellants argued disposition of this appeal should be determined in Appellants favor, if no other reason than the application of the pre-emptive effects of federal law, the *Resource Conservation Recovery Act* (*RCRA)*, and the *Code of Federal Regulations* (40 CFR 261.2(e)), declared to be binding upon DEQ through the provisions of I.C. §39-7404.

The "inspection" and "investigation" was entirely unauthorized, for which Ehlert's testimony should have been excluded, and Defendants' Motion for Directed Verdict granted, supported further with the lack of competent evidence to establish a "Tier II" "size" presence to support any violation occurred on March 29, 2013, even assuming these organic substances were a "solid waste". DEQ's disregard of the statutory limitations imposed upon any warrantless inspection, and ignoring the limitation to pursue a substantive right of action, is evidence of no foundation, in itself, added to that DEQ's failure to apply Federal legislation to their solid waste

management limitations, raised concern Appellants had to take action against a governmental agency, in similar fashion as was the occasion Appellants were awarded fess below and on appeal as addressed in *McKay Const. Co. v. Ada County Bd. Of County Com'rs,* 99 Idaho 235, 580 P.2d 412 (1978), wherein the court stated:

> "McKay has, in effect, acted as a private attorney general in protecting the public interests expressed by I.C. §§54-1902,-1926. Therefore, on remand the trial court should award reasonable attorney fees to McKay for the original proceedings in the trial court and on appeal, pursuant to I.C. § 12-121."

The intent of the Idaho statute, I.C. §39-7403(50)(e)), IDAPA Rule 58.01.06.001.03(b)(ii) and (iii) excluding residues, and the federal enactment (*RCRA* and 40CFR 261.2(e)) should be controlling on the limited definition of "solid waste", yet DEQ wants to engage a legal debate with Defendants over their claimed authority to regulate this composting operation, when they have taken an undisputed position of non-involvement with this composting operation for decades, to include the passage of a decade since the IDAPA Solid Waste Management Rules were adopted. Should the lower court allow DEQ to get around the "deadline date" which terminates DEQ's substantive right of action by calling it an affirmative defense, in the nature of a statute of limitation? Should DEQ be allowed to seek sanctions for an alleged "Tier II" processing violation, over the precise nature and enormous size of Gibson's operation for decades, and knowing the ingredients used by Gibson have always been grass clippings and leaves?

Appellants recognize the issues as to the application of I.C. §39-108(1)&(2)(c), I.C. §39-108(2)(c), and I.C. §39-108(4), may be considered issues of first impression, as Appellants have found no prior disposition in Idaho on "inspection limitation" under §39-108(1)&(2)(c) and I.C. §39-108(2)(c), or the terminative effects of DEQ's substantive right under §39-108(4), as no citation to those specific provisions of EPHA have been found in Casemaker®.

The lower court found no basis to award fees against Defendants because defending DEQ's "civil action" was not frivolous or unfounded in law or fact, and the lower court stated the following within its Findings and Conclusions:

> Certainly Mr. Gibson has made no effort to comply with DEQ's regulations. Indeed he has vigorously asserted his position that the EPHA and the solid waste management rules do not apply to his composting actions. The Court finds that position, while ultimately unavailing in the Court's view, was one taken in good faith. The regulation of composting facilities is a topic of significant debate in various places and

> states have taken different approaches to how that should be done. The application of the EPHA and the Solid Waste Management Rules to Mr. Gibson's activities was by no means obvious or straightforward. Indeed, despite their arguments about Mr. Gibson processing discarded grass clippings and leaves, the Department's main concern appears to be that he is simply storing large volumes of compost and/or humus which, this Court concludes, is not solid waste.
> R. pp. 1216-1217).

If this court were to determine this controversy to be one of first impression, not an area that is deemed to be settled law, this court may be justified in denying Appellants attorney's fees. Appellants recognize DEQ could argue their misperception of law or their ***interest under the law*** is not unreasonable conduct. Appellants would argue, however, DEQ has pursued this action in bad faith, themselves claiming compost was a solid waste, yet told by the court, using their own version of the rule application, is wrong, as the court found compost and humus are not a "solid waste", yet the debate continues over the "definition" of its ingredients. The allegations within DEQ's pleadings have not been supported by their evidence, or the applicable law, and DEQ was dissatisfied with the limiting effects of the lower court's ruling, thus the reason for their Rule 60(a) motion for relief, as DEQ's theory has become these organic recyclables, compost, humus, leaves and grass clippings, are ALL a "solid waste", subject to their regulatory control, after adoption of the IDAPA Rules in 2002-03, begging the question why they thought differently for a decade after the adoption? It appears more than just a coincidence this "intrusion" and controversy came immediately after the Ada County (CUP) controversy was terminated, as no attempt was made for a decade to inspect or regulate this composting operation, where there has been continuous public knowledge Gibson was registered with the regulatory authority of ISDA, where his ingredients are identified fully within their files and records for decades.

The statutes, I.C. §39-7403(50)(e), I.C. §39-7404, and ultimately the *EPA's administration of the Resource Conservation Recovery Act* (*RCRA*), and the Federal regulations (40 CFR 261.2(e)) should confirm exclusion of these organic composting ingredients from the IDAPA Solid Waste Management Rules, and attorney fees and costs should be awarded to Defendants/Appellants.

E. CONCLUSION

There exists no legal or factual basis to initiate this "civil action" to seek a "violation" of Idaho's IDAPA "Tier II" Solid Waste Management Rule, promulgated by DEQ under EPHA, when neither compost and humus, nor their ingredients, grass clippings and leaves, are defined to be a

"solid waste", as a matter of federal law, being organic recyclable substances, used as direct ingredients in an agricultural composting operation to produce "compost and humus", to be used as a substitute to commercial products, soil amendments, and plant foliars, intended to be applied in an agricultural application to farm lands, at agronomic rates.

The statutory restraints within I.C. §39-108(1)&(2)(c), along with the barring effects of I.C.§39-108(4), are impediments that prohibit this unauthorized "inspection/investigation", and this untimely filing of a "civil action", compounded by the preemptive effects of *RCRA* and 40 CFR 261.2(e), declaring these substances excluded from "solid waste", binding upon DEQ by the limiting effects of I.C. §39-7404, prohibiting broader inclusive definitions of the Solid Waste Management Rules regarding substances never intended to be "discarded" or "abandoned" when delivered to this composting operation for recycling, destined to be processed into the production of compost and humus, never placed for permanent disposal at a regulated solid waste disposal site, federally declared exempt from the effects of DEQ's Solid Waste Management Regulations, subject only to the regulatory enactments identified in Title 22, Chapters 1, 6, 11, 22, 23, and 45, including I.C. §22-4502(1)(2)(d), which controls producing, plant compost, and compost ingredients regulated by ISDA.

Respectfully submitted this 16th day of May, 2019.

__/s/*Vernon K. Smith*/s/________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 16th day of May, 2019 true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was served by iCourt File and Serve upon the following:

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