

1
2
3
4 BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

5 WASTE CONNECTIONS OF
6 WASHINGTON, INC.,

7 Complainant,

8 v.

9 ENVIRO/CON & TRUCKING, INC., a
10 Washington corporation; ENVIROCON, INC.,
a corporation; and WASTE MANAGEMENT
11 DISPOSAL SERVICES OF OREGON, INC.,

12 Respondents.

Case No. TG-071194

ANSWER TO MOTION FOR
SUMMARY DETERMINATION

13 I. PRELIMINARY STATEMENT

14 Complainant, Waste Connections of Washington, Inc.'s ("WCW"), hereby answers the
15 Motion for Summary Determination served March 3, 2008 by Respondent Waste Management
16 Disposal of Oregon ("Waste Management") and Enviro/Con Trucking, Inc. ("ECTI"), or
17 ("Respondents") filed pursuant to WAC 480-07-380(2)(c). In its pleading, the Respondents
18 move for summary dismissal of the Complaint, or in the alternative, dismissal of the "Petition
19 for Declaratory Order," under the premise that the matter is moot and no longer presents a
20 "justiciable controversy" ¶ 1, line 5 of Motion. They announce further that the case is about "a
21 specific job at a specific location involving specific services that have been completed" ¶ 1,
22 lines 5, 6, and therefore conclude axiomatically, the matter is "academic" and the Commission
23 "cannot provide effective relief" ¶ 1, lines 7-8.

24 Respondents' rather startlingly simple hypothesis (albeit based on some unsubstantiated
25 facts (i.e. "the job has been concluded," Tyacke declaration at ¶ 2), should indeed be treated in

ANSWER TO MOTION FOR SUMMARY DETERMINATION - 1

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

1 a summary fashion, but the Motion and its rationale should be rejected on the basis of the facts
2 and law argued below.

3 II. STATEMENT OF PROCEDURAL FACTS SURROUNDING MOTION

4 In opposing the Motion, WCW does not contest the Respondents' excerpting of
5 procedural facts from the Complaint in ¶¶ 2 and 3 of the Motion. Similarly, it does not contest
6 the description of the site as a "remediation site" (the Complaint used that noun), or that
7 MTCA generally governs Washington environmental cleanup sites. While it does dispute the
8 quantification of the amounts of construction and demolition debris, "C&D waste" generated at
9 the site and will present testimony contesting Respondents' quantifications thereof at hearing,
10 it does not believe at this preliminary stage that issue is even relevant.¹

11 Even accepting *arguendo* the Respondents' assertions in its Motion and the entire
12 content of the Tyacke and McNeill declarations, however, the Respondents utterly fail to
13 provide the Commission with facts sufficient to allow a summary determination under WAC
14 480-07-380, let alone other pertinent law that would support dismissal of WCW's Complaint or
15 Petition for Declaratory Oder. Ironically, Respondents' own Motion instead suggests why an
16 adjudication of this matter through a full public hearing with due process guarantees afforded
17 to all parties in development of a complete record is consistent with the public interest. Indeed,
18 a full adjudication may well provide the parties, the regulated industry as a whole and the
19 generating public with additional guidance and articulation on the scope of Commission laws
20 and rules involving CDL waste generation and transportation based on what could be a
21 succinctly developed and relatively discrete factual record.

22
23
24
25 ¹ And, indeed, under CR 56, to which the Commission expressly looks for reference under WAC
480-07-380(2)(a), such facts and/or inferences must be construed in favor of the non-moving party. *See Young v.*
Key Pharmaceuticals, Inc., 112 Wn.2d 216, 226 (1989).

1 III. STATEMENT OF ISSUE

2 Should the Commission dismiss the Complaint or the Alternative Petition for
3 Declaratory Order on the basis of mootness as argued by Respondents in their Motion for
4 Summary Determination?

5 IV. ARGUMENT OPPOSING SUMMARY DETERMINATION

6 Generally, a case is moot “if there is no longer a controversy between the parties, if the
7 question is merely academic, or a substantial question no longer exists.” *Morrison v. Basin*
8 *Asphalt Co.*, 131 Wn. App. 158, 161-162, 127 P.3d 1 (2005) (citations and quotations omitted).
9 However, a case or issue is not “moot” if a court can still provide effective relief, or the activity
10 involves a matter of continuing and substantial public interest. *Id.* at 131 Wn.App. 158,162
11 (citations and quotations omitted). This is also true where declaratory relief is sought. *See,*
12 *e.g., Thomas v. Lehman*, 138 Wn. App. 618, 622-623, 158 P.3d 86 (2007) (holding that
13 requested declaratory relief is not moot under the public interest exception). To determine
14 whether a continuing and substantial matter of public interest exists, the court considers: (1) the
15 public or private nature of the issue, (2) the need for a judicial decision to provide future
16 guidance to public officers, and (3) the likelihood that the issue will recur. *In re Personal*
17 *Restraint Petition of Silas*, 135 Wn. App. 564, 568, 145 P.3d 1219 (2006).² In addition to these
18 three factors, a court may also consider the “the likelihood that the issue will escape review
19 because the facts of the controversy are short-lived.” *Westerman v. Cary*, 125 Wn.2d 277, 286-
20 287, 892 P.2d 1067 (1994) (citation omitted).

21
22
23
24
25 ² The *Silas* Court also noted that an issue of “statutory interpretation that affects all inmates with prior
misdemeanor violations ...that is likely to recur and evade review...” supported continued review under the public
interest standard. 135 Wn.App. 564, 568.

1 A. A finding that Respondents' featured activities are/are not subject to state laws and
2 regulations is a public interest issue.

3 A finding that RCW 81.77.040 and WAC 480-70-221 are or are not applicable to
4 Respondents' activities on the record to be adduced implicates not only WCW's rights as the
5 holder of a certificate authorizing it to transport solid waste in unincorporated Clark County,
6 but more importantly, raises broader issues relating to public health and safety. Solid waste
7 collection is a highly regulated activity and within the jurisdiction of the Commission pursuant
8 to RCW 81.77 *et seq.* The criteria by which the Commission may issue a certificate rests on
9 considerations of the public interest. RCW 81.77.040. The Commission is also statutorily
10 granted authority to expressly adopt categories of solid waste, such as demolition debris, in
11 certificates. RCW 81.77.040. Solid waste collection companies cannot collect and/or transport
12 solid waste without first obtaining a certificate from the Commission upon a finding that the
13 "*public convenience and necessity require such operation.*" RCW 81.77.040 (emphasis
14 added); WAC 480-70-081. Furthermore, companies that operate without a certificate are
15 subject to citations pursuant to WAC 480-70-221, show cause proceedings under RCW
16 81.04.510, and even criminal charges. RCW 81.77.090.

17 B. Upholding the Complaint or the issuance of the Declaratory Order would provide
18 guidance to public officials.

19 Upholding the Complaint or issuing the requested declaratory order would potentially
20 provide useful guidance by the Commission to other public officials and private parties in
21 situations where activities that are allegedly subject to solid waste collections laws and
22 regulations have been commenced or completed prior to, during or after formal complaint or
23 final adjudication of the issue. Assuming this factual record is ultimately so interpreted, such
24 an order could assist public officials enforcing solid waste collections laws, and private solid
25 waste collection companies in understanding that such companies cannot circumvent
compliance with applicable laws and regulations, specifically the certificate requirement of

1 RCW 81.77.040, by simply completing or voluntarily ceasing a challenged activity before a
2 determination that such laws and regulations apply to them.³

3 C. It is possible that Respondents, and other solid waste collection companies, will
4 continue to collect and transport solid CDL wastes in similar circumstances in the
5 future if the Complaint is dismissed or the requested Declaratory Order is rendered
6 moot.

7 Voluntary cessation of allegedly illegal conduct does not moot a case because there is
8 still a likelihood of the illegal conduct recurring. *State v. Ralph Williams' North West Chrysler*
9 *Plymouth, Inc.*, 82 Wn.2d 265, 272, 510 P.2d 233 (1973) (quotations omitted) (hereinafter
10 "*North West Chrysler*"). Otherwise, courts would be leaving "[t]he defendant . . . free to return
11 to his old ways." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). If the
12 defendant can show that the likelihood of recurrence is "sufficiently remote to make...relief
13 unnecessary," only then may a trial court dismiss the case as moot. *Mesquite*, 455 U.S. at 289
14 (citations omitted) (holding that requested injunctive relief was not moot). According to the
15 Washington Supreme Court, the defendant has to "make it absolutely clear the allegedly
16 wrongful behavior could not reasonably be expected to recur in order to avoid an injunction on
17 mootness grounds." *North West Chrysler*, 82 Wn.2d at 272. There is no such showing here
18 that either Respondent or both will not engage in the collection and/or transportation of C&D
19 wastes over the public highways of the State in the future in areas where they lack certificate
20 authority if the action is dismissed as moot.

21 These principles are particularly pertinent where the respondents have completed the
22 alleged illegal activity or it is abandoned after a complaint and before a reviewing body is able

23 ³ Neither is Order No. 3, UT-040535, *Glick/Consider It Done v. Verizon Northwest, Inc.* (Jan. 2005) relied on by
24 Respondents, supportive of the outcome sought by the current Motion. There, it appears the Commission
25 dismissed a complaint and the Complainant's claim for refund as time-barred by the applicable statute, RCW
80.04.240. Clearly, a summary determination that a claim for refund is time-barred is a jurisdictional ruling as
distinguished from a substantive ruling on a summary determination basis that a case is moot. While the
Commission upholds the summary determination on review in the *Glick* case above, it is hardly precedent for the
outcome here that a case be subject to dismissal because the events complained of are completed or otherwise
mooted. A claim that is time barred is not analogous to a claim dismissed for mootness.

1 to evaluate the lawfulness of that activity. If the Commission now rules that i.e., WCW's
2 request for a declaratory order is moot, a procedural loophole that allows solid waste
3 collections companies to evade state laws and regulations could well be created. The
4 Respondents and other solid waste collection companies allegedly operating without a
5 certificate in the present or future would simply have to complete or terminate their contested
6 activities before being formally pronounced in violation of the law. It is likely, then, that they
7 or others could repeat this alleged illegal activity in the future, perhaps at other sites in the
8 state, if alleged noncompliance with applicable laws and regulations were so easy to escape or
9 unilaterally resolve.

10 D. The issue of whether a particular solid waste collection company's activity is subject to
11 state law is also often a short-lived controversy.

12 Courts and administrative agencies may hear a case even if the facts of the controversy
13 are short-lived. For example, in the criminal law context, the Washington Supreme Court has
14 ruled that an issue regarding whether an arrestee may be detained without bail prior to their
15 first appearance is not moot because such detentions last for only a short period of time
16 pending a preliminary appearance. *Westerman*, 125 Wn.2d at 287. Similarly, as just noted
17 above, solid waste collection companies could quite easily complete unauthorized activities
18 prior to a full adjudication of a case against them, particularly in smaller or short-term
19 projects.⁴ Ruling the present case as moot or no longer in dispute in such circumstances would
20 potentially facilitate evasion of the law at a minimum and would encourage a respondent in
21 such situations to expedite completion of hauling on a project and thereby recoup classic "ill-

22
23
24 ⁴ Construction and demolition debris is often generated on projects of relatively short duration, i.e. demolition,
25 remediation and construction sites. That type of solid waste stream generation is, by its nature, temporal, and a
finding of mootness here would seemingly mitigate against any future classification or complaint proceeding ever
resolving whether the allegations of unauthorized collection and transportation of C&D wastes in unincorporated
territory was/is lawful without a certificate of public convenience and necessity.

1 gotten gains.” Surely the laws and rules of the Commission cannot be so cavalierly
2 circumvented or manipulated when issues of lawful regulated activity are raised.

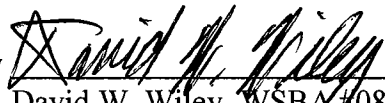
3 Indeed, administrative adjudications by their nature and by their provision of due
4 process guarantees require some material time intervals for notice, hearing, and post-hearing
5 process that typically span many months. Respondents’ premise here would seem to subject
6 any complaint to dismissal for mootness on the basis of the exercise of due process guarantees
7 that benefit all parties in an adjudication. Such an outcome can hardly be viewed as consistent
8 with the fair and impartial administration of the adjudicative process.

9 V. CONCLUSION/PRAAYER FOR RELIEF

10 The pending Complaint or alternative Declaratory Order Petition which seeks to find
11 that Respondents were required to obtain a certificate of public convenience and necessity from
12 the Commission for collecting and transporting C&D Waste from the Evergreen Aluminum
13 remediation site should not be found moot or otherwise lacking in “justiciable controversy.”
14 Even if the Respondents have completed those activities, the complained of collection and
15 transportation involves a matter of continuing and substantial public interest, and a summary
16 dispositive action now would seem wholly contrary to the public interest. Accordingly,
17 Respondents’ Motion for Summary Determination should be denied.

18 DATED this 14 day of March, 2008.

19 WILLIAMS, KASTNER & GIBBS PLLC

20 By 
21 David W. Wiley, WSBA #08614
22 Attorneys for Complainant Waste Connections
23 of Washington, Inc.
24
25