

1
2
3 BEFORE THE WASHINGTON UTILITIES AND
4 TRANSPORTATION COMMISSION

5 In the Matter of Determining the Proper Carrier
6 Classification of:

7 GLACIER RECYCLE, LLC; HUNGRY
8 BUZZARD RECOVERY, LLC; AND T&T
9 RECOVERY, INC.,

DOCKET NO. TG-072226

ANSWER OF INTERVENORS
MURREY'S DISPOSAL COMPANY,
INC., ISLAND DISPOSAL, INC.,
WASTE CONNECTIONS OF
WASHINGTON, INC., LYNNWOOD
DISPOSAL D/B/A ALLIED WASTE OF
LYNNWOOD, and EASTSIDE
DISPOSAL D/B/A ALLIED WASTE OF
BELLEVUE TO RESPONDENTS'
MOTION FOR SUMMARY
ADJUDICATION

10
11
12 **I. PRELIMINARY STATEMENT**

13 / On April 25, 2008, Respondents, Glacier Recycle, LLC, Hungry Buzzard Recovery,
14 LLC and T&T Recovery, Inc. (hereinafter the "Respondents"), served a Motion for
15 Summary Determination on this matter pursuant to WAC 480-07-380. This matter is a
16 complaint and show cause proceeding under R.C.W. 81.04.510 wherein the Staff of the
17 Commission has brought a complaint against the Respondents alleging that activities to
18 be addressed on this record constitute the unauthorized collection of solid waste and
19 violate R.C.W. 81.77.040, *et seq.* The Motion for Summary Adjudication seeks to
20 establish as a matter of law that the Respondents' collection and transportation
21 activities are not subject to regulation under R.C.W. 81.77. For the reasons set forth
22 below, Intervenor's oppose this motion for summary determination of the dispositive
23 issue raised in this proceeding, and ask that the Motion be summarily denied.

24
25 ANSWER OF INTERVENORS MURREY'S DISPOSAL COMPANY, INC.,
ISLAND DISPOSAL, INC., WASTE CONNECTIONS OF WASHINGTON,
INC., LYNNWOOD DISPOSAL D/B/A ALLIED WASTE OF LYNNWOOD,
and EASTSIDE DISPOSAL D/B/A ALLIED WASTE OF BELLEVUE TO
RESPONDENTS' MOTION FOR SUMMARY ADJUDICATION - 1

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

1 **II. STATEMENT OF ISSUE**

2 Under WAC 480-07-380 (2) and CR-56, do the pleadings, argument and supporting
3 declarations establish that the activities of the respondents, as a matter of law, cannot be
4 found to violate R.C.W. 81.77.040, and the Staff’s Complaint and Order to show cause
5 should therefore be dismissed?

6 **III. ARGUMENT AND ANALYSIS IN OPPOSITION TO MOTION FOR SUMMARY
7 DETERMINATION**

8 A. “Respondents are Recyclers” Argument

9 Respondents’ submission in this matter at page 2 announces the operative dispositive
10 issue by simply declaring “[a]ll three respondents are recycling companies.” This type
11 of unilateral and unsupported declaration of operative fact is subsequently laced
12 throughout Respondents’ submission. However, nothing in their pleadings or arguments
13 establish that, as a matter of law, this Commission should dispositively rule on the
14 central issue posed by Respondents at this preliminary point in the hearing process.

15 In supporting its factual argument, the Respondents rely largely on the Larry Fulcher
16 Declaration¹ from the Weyerhauser spokesperson, and cite to it as somehow supporting
17 the ultimate issue finding that these Respondents’ collection and transportation of
18 construction and demolition debris does not constitute operation as “a solid waste
19 collection company,” under R.C.W. 81.77.010 (7), R.C.W. 81.77.040 and WAC 480-
20 70-041.

21 The Respondents further argue the Fulcher declaration supports the characterization of
22 the transported materials as constituting some alleged beneficial use at the Weyerhauser
23 landfill which, despite their ultimate deposit in the landfill, amount to the transportation

24 ¹ Ironically the same declarant upon whom the Staff relies in part in its Partial Motion for Summary Adjudication
also served the same day.

1 of recyclable materials. *Motion* at 8, lines 8, 9. Moreover, they broadly conclude that
2 because, before the transportation to the landfill, “Respondents subject the CDL
3 material to a process designed to extract general recyclables and materials” that renders
4 the transportation of mixed wastes and materials not-solid waste collection pursuant to
5 R.C.W. 81.77.010 (8) or R.C.W. 81.77.010 (9). *Motion* at 8, lines 10-15.

6 Respondents’ summary analyses of this and subsequent issues beg the question of the
7 appropriate characterization of both the original transportation of the mixed waste loads
8 to the MIRF, and/or the characterization of the movements directly from generator to
9 the landfill which an evidentiary proceeding would address. While the Respondents
10 prefer to isolate these movements and emphasize the “mixing” process at the landfill^{2,3}
11 they cannot be separated from an overall characterization of the transportation and
12 collection activities nor the specific evaluation factors cited by Respondent in WAC
13 480-70-016 (4).

14 B. Transportation by or on Behalf of a Generator Destined for Use or Reclamation

15 The alternative argument of Respondents offered in their Petition, apart from their
16 cursory rendition of fact and law purportedly demonstrating the transportation at issue
17 is that of “recyclables,” is that their activities should not be subject to Chapter 81.77
18 R.C.W. because the transportation is “by or on behalf of a commercial generator of
19 recyclable materials to a recycler for use or reclamation.” *Respondents’ Motion* at 8,
20 citing RCW 81.77.010 (8). The previous broad-brush factual ellipsis then continues to

21 _____
22 ² That “mixing” process is addressed head on by Laurie Davies, the Manager of the Washington Department of
23 Ecology’s Solid Waste and Financial Assistance Program, in her declaration submitted by the Staff in its Motion
24 for Partial Summary Adjudication, (See i.e., p.2, ¶¶ 4-7). Davies disputes that, “the use of C&D Material as
25 ‘structural material’ in the landfill” could meet DOE definitions for recycling or could be considered transforming
or remanufacturing waste materials for use other than landfilling. Davies Declaration ¶ 7, p.2.

³ The local Cowlitz County Solid Waste Management Plan similarly defines construction and demolition debris as
“waste” in section 2.1 of the applicable plan.

1 the apparent crux of Respondents' analysis announcing that neither the Respondents
2 nor Weyerhaeuser intend "that the CDL material is being transported merely for
3 disposal." Motion at 9, lines 11-13. While this huge leap of conclusory logic is
4 unsupported by reference to any declaration testimony, even the use of the phrase
5 "transported merely for disposal" contains precisely the type of mixed legal and factual
6 metaphors showing why summary judgment/(adjudication) as urged by Respondents is
7 totally inappropriate here.

8 Indeed, under case law cited below, in Washington, the shipper's intent for disposal is
9 measured on a case-by-case basis against multiple factors in WAC 480-70-011,⁴ as
10 supplanted by Commission and judicial case law that, as demonstrated here, not only do
11 not lend themselves to the summary adjudication urged by Respondents, but suggest
12 instead why the Staff's Motion for Partial Summary Adjudication is well reasoned.

13 IV. ANALYSIS OF RELEVANT AUTHORITIES

14 At this stage of the proceeding, it is important to emphasize that the pivotal legal issue
15 for the examiner and Commission to resolve is whether, as a matter of law, the
16 pleadings and factual declarations submitted to date establish the nature of the
17 transportation movement at issue (i.e. the activity this Commission regulates) as not
18 constituting solid waste transportation under Chapter 81.77 R.C.W. While the
19 Respondents purport to demonstrate this by focusing solely: a) upon the nature of the
20 material transported; and, b) on the alleged end-use activity involving the transported
21

22 ⁴ Staff notes at page 18 of its own Motion that no one is paying for the CDL waste here. Payment (or lack thereof)
23 for receipt of material is but one indicator of the character of the commodity being transported, i.e. "the value of
24 the commodity being transported," WAC 480-70-016 (4)(e). Curbside recycling collection programs currently
25 include a commodity credit mechanism (WAC 480-70-351(2)), under Commission rate regulation, which adjust
"value" with market pricing, either debiting or crediting a ratepayer's account with swings in market values,
underscoring the transitive nature of this indicator in isolation.

1 material, they ignore any analysis of case law in the process.⁵ That caselaw is
2 compelling to a rejection of any conclusion that the C&D materials purporting to be
3 transported here are “recyclable materials,” or alternatively, are subject to “recycling”
4 by the end-user, (Weyerhaeuser,) at its Cowlitz County disposal facility.

5 10 Earlier in its articulations of the distinctions between transportation of solid waste
6 material and that of property (motor carriage), the Commission found “[t]he operative
7 distinction is the purpose of the transportation. If the transportation is for disposal, the
8 material is garbage. If the transportation is to move the item to a location for a higher
9 use, the transportation is motor carriage.” Order M.V. No. 133753, (April 1986), *In re:*
10 *Sunshine Disposal d/b/a Valley Transfer and Storage Application E-19104*, at 6, citing
11 Order M.V.G. No. 1201, *In re: Fedderly-Marion Freight Lines, Inc.*, App. GA-802,
12 (June 1985). Under this early analysis Respondent here would be faced with
13 establishing that the generators tendered the C&D material not for disposal but for
14 recycling and that payment for the transportation and disposal fees still constituted
15 transportation for “recycling” and further establishing that the generators had at least a
16 generalized idea of how the material would be subject to “a higher use.”

17 11 By the early 1990’s, the Commission was continuing its focus on the intended use of
18 the material being transported, looking at factors such as whether the commodity had
19 any commercial value at all, whether the shipper paid the destination site owner to
20 permit “application” of the commodity, whether the destination for the material was
21 regulated by the local health authority as a solid waste disposal facility and how and if
22 the transporter viewed the ultimate destination site “as a dump.” Order M.V. No.

23
24 ⁵Admittedly, they also ignore the threshold statutory definition of C&D material that is the starting point, R.C.W.
25 70.95.030(23), which defines solid waste as including “demolition and construction wastes . . . and recyclable
materials” Accord, *Josef Ventenbergs v. City of Seattle, et al.*, 163 Wn.2d. 92, 102, ___ P.3d. ___ (2008).

1 142137, *In re: Inland Transportation, Inc.*, App. E-19946 (October 1990) at 4. The
2 *Inland Transportation* criteria are clearly not advantageous to the present Respondents.
3 12 As noted by the Staff, likely one of the best guides for characterizing the activities here
4 is *In the Matter of Determining the Proper Classification of Drop Boxes R Us, Inc. and*
5 *In the Matter of Determining the Proper Classification of Puget Willamette Xpress,*
6 *Inc.*, Order M.V.G. No. 1840, Hearing Nos. H-5039 and 5040 (October 8, 1998)
7 (hereinafter known as “*Drop Boxes*”), where almost a decade ago, issues posed in this
8 proceeding and many of the identical arguments were raised by Respondents. There, as
9 here, the Respondents argued that both the RCW 81.77.010 (8) and (9) exemptions
10 qualified the subject activities as exempt from solid waste transportation regulation.

11 Respondents, though purporting the opposite, urge us to step
12 outside the plain meaning of the statutes which define recyclable
13 materials in terms of their source (*i.e.*, commercial or industrial
14 generation (RCW 81.77.010 (8)), how they are collected (*i.e.*,
15 source separated or not; collected at central drop boxes or
16 recycling buy-back center (RCW 81.77.010 (8)), how they are
17 handled after collection (*i.e.*, separated for transformation,
18 remanufacture, or reuse (RCW 70.95.030 (17)), and where they are
19 taken (*i.e.*, other than to landfill disposal or incineration sites
20 (RCW 70.95.030 (18))). Respondents urge us to adopt a broad,
21 abstract definition: “capable of being recycled.”⁶

22 13 Admittedly, Respondents here may make a slightly more involved effort than simply
23 broad-brushing the transportation alone as “recyclable materials transportation,” but do
24 fall into exactly the same analytical trap as the *Drop Boxes* respondent, by urging an
25 overbroad definitional characterization of “capable of being recycled,” that, Ms. Davies
of DOE for one, directly contravenes. Indeed, as the Commission noted in *Drop Boxes*
“[v]irtually anything is ‘capable of being recycled,’ that is capable of being transformed
or remanufactured into useable or marketable material.” *Drop Boxes* at 7.

⁶ *Drop Boxes*, Order M.V.G. No. 1840 at 6.

1 14

The material that Respondents transport is destined for disposal at a landfill. Their mixing of that material for structural and engineering use inside the landfill does not render it a recyclable, nor does the mixing of the waste materials, as defined by RCW 70.95.030(23), constitute "recycling." Based on the declarations submitted to date, it is incontrovertible that the materials destined for the Weyerhaeuser landfill are statutorily-defined C&D solid wastes destined for "permanent disposal" inside a landfill, which *Drop Boxes* instructs brings Respondents' activities fully within the regulatory ambit of the Commission under RCW 81.77.040.

9 15

The U.S. Ninth Circuit Court of Appeals analogously echoed this rationale in the *AGG Enterprises v. Washington County, et al.* 281 F.3d. 1324 (9th Cir. 2002) case, when it upheld the right of municipalities to regulate local solid waste operations involving unseparated mixed construction and demolition debris and recyclable materials. There, under the best case scenario the plaintiffs had estimated, 80-90% of the materials were recyclables. In *AGG*, the Court found that even loads including some recyclable material were not preempted from local regulation by the Federal Aviation Administration Authorizing Act of 1994, and noted in a footnote . . .

About 40% to 50% of the MSW loads taken by AGG is non-recyclable garbage and must be taken to a landfill. Even under the highest proposed recycle rate, when the recycling center 'played with the numbers,' an average of 10% to 20% of the MSW load was non-recyclable . . . This is a lot of garbage, and we cannot accept the argument that Congress precluded local governments from regulating its collection. [emphasis added].

281 F.3d. 1324, 1330.

22 16

Just as Oregon municipalities were affirmed in franchising MSW recyclable loads by the 9th Circuit in *AGG*, this record suggests *AGG* and previous Commission case law fully subject the construction and demolition debris and recyclables collection and

ANSWER OF INTERVENORS MURREY'S DISPOSAL COMPANY, INC., ISLAND DISPOSAL, INC., WASTE CONNECTIONS OF WASHINGTON, INC., LYNNWOOD DISPOSAL D/B/A ALLIED WASTE OF LYNNWOOD, and EASTSIDE DISPOSAL D/B/A ALLIED WASTE OF BELLEVUE TO RESPONDENTS' MOTION FOR SUMMARY ADJUDICATION - 7

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

1 transportation movements in question to regulation by the state of Washington as solid
2 waste under Chapter 81.77 RCW.

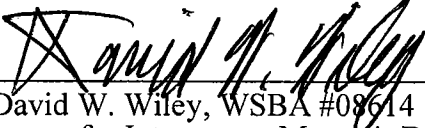
3 17 Here, mixed construction and demolition debris loads move first either to a sorting or
4 transfer facility or directly to a landfill where the materials are "mixed" with other
5 materials and are permanently deposited into a landfill. Nothing in either the Fulcher
6 Declaration or the Respondents' overall Motion distinguishes the collection and
7 transportation movements at issue as anything other than solid waste transportation.
8 Moreover, any inferences to the contrary (assuming they were identifiable), must be
9 construed against the moving party pursuant to WAC 480-07-380 (2)(a), CR 56 and
10 established case law (See, i.e., *Young v. Key Pharmaceuticals*, 112 Wn.2d. 216, 226
11 (1989).

12 **V. CONCLUSION/PRAAYER FOR RELIEF**

13 18 For the foregoing reasons, Intervenors ask that the Respondents' Motion for Summary
14 Adjudication be denied, and that the corollary and simultaneously served Motion for
15 Partial Summary Adjudication of the Staff of the Commission, be granted.

16 DATED this 14 day of May, 2008.

17 WILLIAMS, KASTNER & GIBBS PLLC

18
19 By 
20 David W. Wiley, WSBA #08614
21 Attorneys for Intervenors Murrey's Disposal
22 Company, Inc., Island Disposal, Inc., Waste
23 Connections of Washington, Inc., Lynnwood
24 Disposal d/b/a Allied Waste of Lynnwood, and
25 Eastside Disposal d/b/a Allied Waste of
Bellevue

ANSWER OF INTERVENORS MURREY'S DISPOSAL COMPANY, INC.,
ISLAND DISPOSAL, INC., WASTE CONNECTIONS OF WASHINGTON,
INC., LYNNWOOD DISPOSAL D/B/A ALLIED WASTE OF LYNNWOOD,
and EASTSIDE DISPOSAL D/B/A ALLIED WASTE OF BELLEVUE TO
RESPONDENTS' MOTION FOR SUMMARY ADJUDICATION - 8

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