January 8, 2010

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VIA EMAIL AND U.S. MAIL

Mr. David Danner, Executive Director
Policy and Legislative Issues
Attn.: Records Center
Washington Utilities and Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

Re: TG-080591, Solid Waste Rulemaking Comments to Revised Draft Proposal Establishing New Section in WAC 480-70

Dear Mr. Danner:

On behalf of a number of regulated solid waste collection companies we represent in this rulemaking, including various Waste Connections companies (Waste Connections of Washington, Inc., Murrey's Disposal, LeMay Enterprises, Island Disposal et al.) and Allied/Republic Services (i.e. Eastside Disposal, Sea-Tac Disposal et al.) companies, we are responding to the Commission's notice of November 16, 2009 and its invitation to comment on a more narrowly circumscribed approach to revisions to the solid waste collection rules that were first proposed on May 7, 2008. As the file in this rulemaking will reflect, we previously filed comments on April 10, 2009.

Now, with the more constricted approach in the draft rule as addressed in the "discussion draft" of November 16, 2009, we wanted to offer some further analysis of the modified rule which purportedly seeks to interpret RCW 81.77.010(8), the statutory provision that deals with a definitional exemption from solid waste collection. The Commission's new draft rule indicates the intention of the rule is in effect to better define and articulate when someone engaged in the collection and transportation of mixed CDL waste does not require a solid waste certificate pursuant to RCW 81.77.040.

Initially, we would comment in an overview fashion that we think the draft rule is a constructive step forward in seeking to clarify some of the uncertainty that has existed over the years in this field. Clearly, our clients have lawfully engaged in the collection and transportation of commercial recyclables and construction and demolition debris, both recyclables and solid waste, since their operating certificates were issued to them or their predecessors. One of the more difficult legal issues in this arena is that mixed CDL waste is defined under RCW 70.95.030(23) as solid waste. It is out of that threshold definitional classification context that operations of solid waste collection companies

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should be viewed. In other words, the statutory default is to solid waste collection and in order for loads to qualify as an exemption from that definition, specific circumstances which the rule seeks to more clearly define must be adhered to qualify as transportation of recyclable materials under RCW 81.80 as opposed to solid waste collection.

While we will not revisit here some of the judicial tests established in case law over the years (some of which we alluded to in our April, 2009 initial comment letter), we note that the Commission now appears to be grappling with the definition of solid waste versus recyclable materials transportation through focus on the delivery situs of the loads.

In the draft rule, WAC 480-70-XXX(3)(a) and following subsections, it appears to try to describe under what circumstances the recycling facility to which the materials are delivered would qualify as receipt of mixed CDL loads not subject to characterization as the collection and transportation of "solid waste."

We think that the conditions specified in subparagraphs 3(a) through 3(d) of the draft rule are generally helpful in articulating additional conditions under which mixed CDL collection and transportation would be considered recyclable materials transportation. Clearly, the threshold provision in this regard is subparagraph (b), which requires two separate containers be positioned on a construction or demolition site and which cites to both the Solid Waste Management Act and Department of Ecology regulations in requiring separation of solid waste from reclaimable construction materials on the job site. We believe, as we stated last April, that this "two container" requirement is a prerequisite for enabling the "front end of the haul" to qualify when the materials are delivered at the back end to a qualified processing facility. We also believe that all commercial transporters of mixed recyclables should be required to label the containers they place on job sites with the reference to criteria of materials accepted by their identified recycling facilities.[1]

In furtherance of these requirements and to resolve any factual dispute regarding the collection and delivery of mixed CDL loads, we join the Washington Refuse and Recycling Association in supporting written periodic statements made under oath and subject to penalty of perjury by the mixed CDL recyclables transporter that: (1) identifies the facilities the carrier is delivering materials to and recites to

[1] We also note this was a material element in the previous settlement in the *Lautenbach d/b/a T&T Recovery* complaint case (*See*, TG-041481 (March, 2005), Order No 5. Approving and Adopting Settlement Agreement at ¶ 7, p. 3 and TG-041481 Settlement Agreement at 11).

the knowledge and belief of the transporter that those facilities meet the standards of the Department of Ecology and applicable jurisdictional health departments; (2) memorializes its understanding the loads qualify as mixed recyclable loads under RCW 70.95.400; and (3) verifies the transporter understands that false statements pursuant to their declaration automatically subjects them to complaint and prospective penalty under RCW 81.04.510 or 81.04.110 *et seq.* The act of attesting to the transporter's good faith compliance and a requirement that the transporter complete the verified statements on a periodic basis are also consistent with the 2005 "sham recycler" legislation and with the Legislature's intent to weed out unlawful providers who purport to transport recycle materials that are subsequently delivered to a landfill or, in worst case scenarios, illegally dumped in the environment.

As this rulemaking file will also reflect, we have consistently advocated a standard, such as set forth at page 2 of our April 10, 2009 letter, that precludes the collection and transportation of recyclable materials that contain more than 10% of solid waste by load volume. The November 16, 2009 draft rule diverges from this recommendation. At subsection 3(d)(ii), staff proposes that rather than focus on a percentage rule based on the volume of an individual transported load, the focus again be on the MWF site operations. Thus, it now proposes a minimum of 75% material recycling threshold for qualifying the facility.

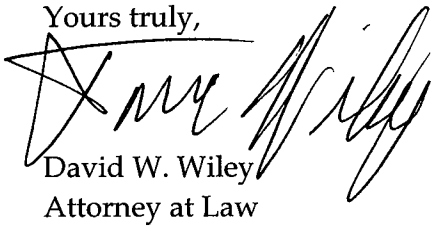
While we acknowledge the Commission's reluctance to endorse a 10% per load percentage standard for the transporter for enforcement reasons, we think the staff's recommendation proposing a minimum 75% recycling (including the diversion of acceptable wood waste to be used as boiler fuel) threshold should be predicated differently. Indeed, we see some of the previous discussion pieces as interdependent to the successful implementation of this portion of the Commission's revised rule. In other words, we believe that adherence to the "two container rule," labeling of recycling containers, the requirement of a declaration under penalty of perjury by the transporter, as well as focus on the results of activity at the recycling processing facility are all critical to meaningful articulations of standards by which mixed CDL loads would not be viewed as solid waste collection and/or transportation. With respect to the 75% recycling standard, to begin with, we believe that this should be based on aggregate *weight* of processed material rather than volume of the material. Clearly, the Commission's rate design for solid waste transportation has transitioned to weight-based rather than volume-based disposal fees and thus a focus on weight versus volume seems consistent therewith. Additionally, while the Commission does and should retain full authority under RCW 81.04 and 81.77 to classify the transportation of loads on a case by case basis, it should be careful that, in establishing any threshold percentage standard, it reserve the right to view activity or classify same on an isolated or an aggregate

basis and thus should not be implicitly codifying any wholesale exemption to RCW 81.77.040 in its establishment of threshold processing facility recycling/diversion standards.

Finally, focus on the material processing facility recycling rate by annual processing weight totals should not detract from the analysis that the solid waste residual, under RCW 81.77.020, WAC 480-70-011 and WAC 480-70-081 be transported by the applicable municipal service, private city contractor, or WUTC-certificated carrier in collecting and transporting the residual solid waste from the identified processing site pursuant to the applicable county solid waste management plan's designated facilities for disposal.

We appreciate the opportunity to initially comment on the revised draft rule and look forward to participating in stakeholder sessions which will undoubtedly address and debate some of the issues raised above. Again, we believe that the Commission staff's current proposal at subsection 3(d)(ii) needs additional elaboration and could only support such a revised standard provided other elements or related requirements in a revised draft rule noted above were also implemented.

Yours truly,



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