

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining the Proper  
Carrier Classification of:

GLACIER RECYCLE, LLC;  
HUNGRY BUZZARD RECOVER, LLC;  
AND T&T RECOVERY, INC.

DOCKET NO. TG-072226

COMMISSION STAFF'S  
RESPONSE TO GLACIER  
RECYCLE, LLC; HUNGRY  
BUZZARD, LLC; AND T&T  
RECOVERY, INC.'S MOTION FOR  
SUMMARY DETERMINATION

**I. INTRODUCTION**

1 Commission Staff hereby responds in opposition to Glacier Recycle, LLC; Hungry Buzzard, LLC; and T&T Recovery, Inc.'s (collectively, "the Respondents") Motion for Summary Determination. The Commission should deny the Respondents' motion because there remain genuine issues of material fact as to whether the Respondents' transportation of construction, demolition, and land clearing ("CDL" or "C&D") waste to the Weyerhaeuser Material Recovery Facility in Longview, Washington is subject to regulation under RCW 81.77.

**II. ARGUMENT**

**A. The Respondents' cross-motion does not place in controversy any facts material to the findings Staff seeks in its motion. Therefore, Staff is entitled to the findings it seeks as a matter of law.**

2 The Respondents do not allege any facts that controvert the facts alleged by Staff in its motion for partial summary determination. Nor do the parties assert that any facts other than those presented in the pleadings and declarations are material to the issues presented in

the cross-motions.<sup>1</sup> Therefore, with respect to the issues presented by the cross-motions, the Commission need only decide how to apply the law to the facts.<sup>2</sup>

**B. If the Commission denies the Respondents' motion and makes the findings Staff has requested, then there will remain issues of material fact as to whether the Respondents' solid waste transportation is merely "occasional" in comparison with the Respondents' activities under RCW 81.80.**

3 If the Commission finds, as Staff requests, that the construction and demolition debris in question is "solid waste" and is not "recyclable material" that is transported to a "recycler," then there may remain issues of material fact as to whether the Respondents' transportation of this solid waste for disposal is merely "occasional" as compared with the Respondent's activities as common carriers of property under RCW 81.80:

Persons holding permits issued by the commission under the provisions of chapter 81.80 RCW, whose primary business is not the collection of solid waste, normally will also need to obtain a certificate of public convenience and necessity if they transport solid waste to a disposal site *on more than an occasional basis* . . .<sup>3</sup>

At the evidentiary hearing in this matter, Staff will ask the Commission to look at information similar to what the Department of Ecology requires operators of "materials recovery facilities" to report.<sup>4</sup> That is, (1) what materials, by type, do the Respondents collect (or receive at their sorting facility), and (2) to whom, and for what purpose, do they deliver the materials.<sup>5</sup> Some parties receiving materials transported by the Respondents may meet the definition of "recyclers," while others may simply be entities engaged in disposal. Based on this intake and outgo data, it should be possible to determine what percentage of materials collected by each of the Respondents is actually transported to recyclers, and what

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<sup>1</sup> Respondents' Motion at 1:22.

<sup>2</sup> CR 56(c).

<sup>3</sup> WAC 480-70-016(1).

<sup>4</sup> WAC 173-350-310(2)(b)(v).

<sup>5</sup> See Staff Motion, Decl. of Jonathan Thompson, Exhibits B, C, and D.

percentage is transported for disposal. This information should enable the Commission to determine whether the Respondents “transport solid waste to a disposal site on more than an occasional basis.” If so, Staff will argue that the Respondents must either alter their practices (by permanently ceasing to collect more than an accidental or incidental amount of material for disposal), or apply for a solid waste collection certificate.

4 For purposes of these cross-motions, Staff and the Respondents are asking the Commission to look at the activities of one entity, to which all three of the Respondents have delivered a significant amount of material, to determine whether the entity is recycling the material or merely disposing of it.

5 Respondents’ motion states that if “transporting CDL materials to Weyerhaeuser’s MRF was an act of mere disposal, logic dictates that the Respondents would simply transport the CDL material to a landfill closer than Weyerhaeuser.”<sup>6</sup> In fact, logic dictates that the reason the Respondents truck waste all the way from central Puget Sound to Cowlitz County and pay a tipping fee to rid themselves is, at least in part because Commission Staff previously advised the industry that such transportation did not require a solid waste certificate;<sup>7</sup> transportation to a municipal solid waste landfill obviously would require a certificate. In this motion, Staff seeks to correct its error.

**C. Respondents fail to allege facts that would support a finding that the construction and demolition debris they haul to Weyerhaeuser is “recyclable material” under the relevant definitions.**

6 The first finding sought by the Respondents is that their “transportation of CDL material is not subject to regulation under RCW 81.77 because Respondents are transporting

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<sup>6</sup> Respondents’ Motion at 10.

<sup>7</sup> Staff Motion at 15.

recyclable materials, not solid waste.”<sup>8</sup> Staff’s motion for partial summary determination explains why Staff believes the Commission should reach the opposite legal conclusion on the same facts.<sup>9</sup> Staff will explain here why it believes the Respondents’ analysis misapplies the law to the undisputed facts.

7           The Respondents base their argument on WAC 480-70-041, in the Commission’s solid waste rules, which defines “recyclable materials” as “materials that are transported for recycling, reprocessing, reclamation, or for any process that extracts or modifies the commodity for reuse or another commercially valuable purpose.”<sup>10</sup>

8           This language does not support the finding that the CDL waste the Respondents deliver to Weyerhaeuser is “recyclable material” for two reasons.

9           First, this language must be read in context with the other relevant definitions of “recyclable material.” When it is read in context, it does not support the Respondent’s apparent interpretation. Specifically, this rule language must be interpreted in a manner that is consistent with the statutory definition of “recyclable materials” at RCW 70.95.030(18):

“Recyclable materials” means those solid wastes that are separated for recycling or reuse, such as papers, metals, and glass, that are identified as recyclable material pursuant to a local comprehensive solid waste plan. Prior to the adoption of the local comprehensive solid waste plan, adopted pursuant to RCW 70.95.110(2), local governments may identify recyclable materials by ordinance from July 23, 1989.

The reason the WAC 480-70-041 definition of recyclable materials must be harmonized with this statutory definition is because the RCW 81.77.010 definition of “solid waste”<sup>11</sup>

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<sup>8</sup> *Id.* at 4.

<sup>9</sup> Staff’s Motion at 15-20.

<sup>10</sup> Respondents’ Motion at 8.

<sup>11</sup> “‘Solid waste’ means the same as defined under RCW 70.95.030, except for the purposes of this chapter solid waste does not include *recyclable materials* except for source separated recyclable materials collected from residences; . . .” [Emphasis added.] RCW 81.77.010(9).

incorporates the RCW 70.95.030 definition of “solid waste,”<sup>12</sup> which itself includes the term “recyclable materials” as a type of solid waste. As such, it is necessary to look not just to RCW 70.95.030’s definition of solid waste, but also to its accompanying definition of the term “recyclable materials.” Both “recyclable materials” and “recycling” are defined in RCW 70.95.030.<sup>13</sup> Thus, the RCW 70.95.030 definitions of “solid waste” and of the “recyclable materials” sub-category of solid waste, are binding on the Commission.<sup>14</sup> This is why Staff’s analysis focuses primarily on the statutory definition of “recyclable material” and, as the legislature directs in that definition, to the local comprehensive solid waste plan’s identification of recyclable materials.

10 As explained in Staff’s motion, the applicable local comprehensive solid waste plan defines recyclable material as follows:

For purposes of this section, materials are defined as recyclable if they are marketable and result in waste stream diversion. A marketable recycled [sic. recyclable] material is defined as material with established end-users who purchase recyclable materials, use them as raw materials, and transform them into new products.<sup>15</sup>

This definition is consistent with the Commission’s definition of recyclable materials as “materials that are transported for recycling, reprocessing, reclamation, or for any process

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<sup>12</sup> “‘Solid waste’ or ‘wastes’ means all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, *and recyclable materials.*” (Emphasis added.) RCW 70.95.030(23).

<sup>13</sup> RCW 70.95.030(18), (19).

<sup>14</sup> In Commission Decision and Order Denying Administrative Review; Affirming and Adopting Initial Order, *In the Matter of Determining the Proper Classification of Drop Boxes R Us, Inc. and In the Matter of Determining the Proper Classification of Puget Willamette Xpress, Inc.*, Order M.V.G. No. 1840, Hearing Nos. H-5039 and 5040, p. 6 (October 8, 1998), the Commission stated:

RCW 81.77.010(9)’s exclusion of recyclable materials from “solid waste ... as defined under RCW 70.95.030” absolutely requires us to look to the definition of “recyclable material” included in RCW 70.95.030. There is no room for us to construe the meaning of terms where the statute itself defines them. [Citations omitted.]

<sup>15</sup> Staff’s Motion for Summary Determination at 11.

that extracts or modifies the commodity for reuse or another commercially valuable purpose.” The Cowlitz County solid waste plan definition offers the advantage of additional specificity (e.g., with regard to “marketability” and “established end-users”).

11           Second, when understood in context of the other relevant definitions of recyclable materials, it is clear that the Respondent’s proposed application of the rule to the facts is incorrect.

12           The Respondents state that “[t]here is no dispute that prior to transportation to Weyerhaeuser’s MRF, Respondents subject the CDL material to a process designed to extract general recyclables and materials specifically for transportation to Weyerhaeuser’s MRF, and out of the general waste stream.”<sup>16</sup>

13           The Respondent’s argument is that something the Respondents do to the CDL *before delivering it to Weyerhaeuser* brings the material within the definition of solid waste. However, there is no evidence that the Respondents are engaged in any activity other than collecting materials from their customers in roll-off boxes, possibly sorting these materials for transportation to different parties, and then transporting the materials to those parties who, in turn, either recycle or dispose of the material.<sup>17</sup> Thus, the Respondents are not themselves “recyclers” in the sense of entities that “transform[] or remanufactur[e] waste materials into usable or marketable materials for use other than landfill disposal or incineration.”<sup>18</sup> At best, they collect and transport materials *to recyclers*.<sup>19</sup>

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<sup>16</sup> Respondents’ motion at CITE, citing Exhibit B.

<sup>17</sup> Respondents’ Motion at 2.

<sup>18</sup> RCW 70.95.030(19).

<sup>19</sup> The exception from solid waste certification upon which the Respondents appear to rely is the language in RCW 81.77.010(8) that “‘solid waste collection’ does not include . . . collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials *to a recycler* for use or reclamation.” (Emphasis added.)

14 Respondents apparently try to equate the word “extract” with sorting or separating. By definition, “‘Recyclable materials’ means those solid wastes *that are separated for* recycling or reuse, such as papers, metals, and glass, that are identified as recyclable material pursuant to a local comprehensive solid waste plan.”<sup>20</sup> “Separation” from other wastes is a necessary, but not dispositive characteristic of recyclable materials. In order to be a “recyclable material,” the material must be separated “*for recycling or reuse*” and not merely for disposal. Thus, the determinative question for these cross-motions is really what the purported “end-user”—which could only arguably be Weyerhaeuser—does with the material. If it recycles the material, then Weyerhaeuser is a “recycler” with respect to the material, and the material is a “recyclable material.” If it merely disposes of the material, then the material is solid waste for purposes of RCW 81.77.010.

**D. Respondents fail to allege facts to support a finding that, by bringing construction and demolition debris to Weyerhaeuser, they are transporting material to a “recycler for use” within the meaning of RCW 81.77.010(8).**

15 The second finding sought by the Respondents is that their “transportation of CDL material is not subject to regulation because it is brought to a ‘recycler for use’ within the meaning of RCW 81.77.010(8).”<sup>21</sup> The Respondents similarly state that “the Respondents’ transportation of CDL material to Weyerhaeuser’s MRF is not subject to regulation because Weyerhaeuser ‘recycles’ and/or ‘reuses’ material.”<sup>22</sup> Additionally, referring to the example regarding soil used as cover for a landfill referred to in WAC 480-70-015(3), they argue, by analogy, that “the CDL material transported to Weyerhaeuser are [sic.] used for a beneficial

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<sup>20</sup> RCW 70.95.030.

<sup>21</sup> Respondents’ Motion at 4.

<sup>22</sup> *Id.* at 8.

purpose; the material is not transported to Weyerhaeuser merely for disposal.”<sup>23</sup>

16 The Respondents cannot seriously argue that Weyerhaeuser “recycles” the CDL that the Respondents deliver to it. (Weyerhaeuser does not consider itself to be recycling when it mixes “structural material” from the Respondents with its own industrial waste for disposal.”<sup>24</sup>) Rather, the Respondents’ argument is that some form of “use,” “reuse,” or “beneficial use” of the material by Weyerhaeuser, *other than recycling*, is sufficient to exempt the Respondents from regulation as solid waste collection companies. Thus, their argument rests on an expansive interpretation of the word “use” in RCW 81.77.010(8).

17 RCW 81.77.010(8) cannot sustain such an expansive interpretation of the word “use.” In order to meet RCW 81.77.010(8)’s commercial recycling exemption from certification as a solid waste company, the carrier must transport (1) “recyclable materials,” (2) “to a recycler,” (3) “for use or reclamation.”<sup>25</sup> Thus, where a company is undisputedly collecting and transporting construction and demolition waste, all three of these statutory criteria must be met for the solid waste certificate exemption to apply. The Respondents’ broad interpretation of the word “use” strays too far from the word “recycling,” and, therefore, comes into conflict with the first and, particularly, the second required element of the exemption. In other words, even if Weyerhaeuser “uses” the material in some sense, that is not sufficient to meet the exemption because Weyerhaeuser is not a “recycler.” For purposes of all of the various materials it receives at its materials recovery facility, Weyerhaeuser is no more a “recycler” than are the Respondents. At best, it separates out

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<sup>23</sup> *Id.* at 10.

<sup>24</sup> Fulcher Decl. at para. 14.

<sup>25</sup> “‘Solid waste collection’ does not include . . . collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation. Transportation of these materials is regulated under chapter 81.80 RCW[.]”



some “recyclable materials” for delivery to other entities that that are actually engaged in “transforming or remanufacturing waste materials into usable or marketable materials for use other than landfill disposal or incineration.”<sup>26</sup> Weyerhaeuser does not deliver any of the “structural material” delivered by the Respondents to recyclers.<sup>27</sup> It delivers it to its landfill.

18           The most reasonable interpretation of the third element of the commercial recyclables exemption (“for use or reclamation”) is that it precludes a motor carrier from transporting material that is only *potentially* recyclable or reusable to an entity that is otherwise engaged in recycling, when there is no intention of *actually* recycling or reusing the material. In other words, the “use” test only applies once a material has been transported to a *recycler*.

19           A more fundamental problem with the Respondent’s argument, however, is that Weyerhaeuser’s purported “use” of the material is *disposal*. Weyerhaeuser’s engineer refers to “waste composition” in the landfill, and states a recommendation that the Headquarters landfill “always strive to accept as much high permeability and structural wastes, such as construction and demolition debris, as possible.”<sup>28</sup> He states that “a reasonable goal for the landfill would be to obtain approximately one-third of its waste stream from ‘structural’ sources.”<sup>29</sup> He further states that “allowing one-third of the current waste stream to consist of C&D and land clearing type of debris is well within the planned landfill capacity, especially since a certain portion of the landfill capacity, albeit undefined, had been allocated to this type of waste even since the beginning.”<sup>30</sup> Thus, the engineer of the

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<sup>26</sup> RCW 70.95.030(19) (definition of “recycling”).

<sup>27</sup> Fulcher Decl. at para. 17.

<sup>28</sup> Fulcher Decl., Exh. B (Dec. 12, 2005 letter).

<sup>29</sup> *Id.* (June 5, 2006 letter at p. 4).

<sup>30</sup> *Id.*

Headquarters landfill clearly views the CDL material as a quite substantial part of the *waste stream* going into the landfill. Given Mr. Fulcher's explanation that it is important to have a mix of materials with various qualities in a landfill,<sup>31</sup> it would be possible to argue that whenever a particular type of waste is mixed with another type of waste to compensate for the shortcomings of the other within the structure of the landfill, that waste is no longer "solid waste" for purposes of the Commission's regulation of solid waste collection companies. This argument is far too "clever" and far too sweeping.<sup>32</sup>

## II. CONCLUSION


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For the foregoing reasons, the Commission should deny the Respondents' Motion for Summary Determination and grant Commission Staff's cross-motion for partial summary determination.

DATED this 15th day of May, 2008.

Respectfully submitted,

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<sup>31</sup> Fulcher Decl. at para. 10-12.

<sup>32</sup> Respondents provide no evidence for their statements regarding the use of crushed glass for drainage layers in the landfill or of chipped tires for drainage layers or protection of bottom liners. Whether these uses would constitute recycling would need to be decided on their own merits.