

BEFORE THE WASHINGTON UTILITIES  
AND TRANSPORTATION COMMISSION

WASTE CONNECTIONS OF  
WASHINGTON, INC.,

Complainant,

v.

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

Respondents.

Case No.: TG-071194

WASTE MANAGEMENT'S AND  
ENVIRO/CON & TRUCKING'S REPLY  
TO INTERVENORS' ANSWERS TO  
WASTE CONNECTIONS, INC.'S  
PETITION FOR ADMINISTRATIVE  
REVIEW

1. COMES NOW Respondents Waste Management Disposal Services of Oregon, Inc. ("Waste Management") and Enviro/Con & Trucking, Inc. ("ECTI") (collectively, "Respondents") to submit this *Reply to Intervenors' Answers to Waste Connections, Inc.'s Petition for Administrative Review* ("Respondents' Reply") refuting the new arguments presented in *Intervenor Clark County's Answer to Petition for Administrative Review* ("Clark County's Answer") and in *Intervenor WRRRA's Reply to Petition for Administrative Review* ("WRRRA's Answer") (collectively, the "Intervenors' Answers").

**I. INTRODUCTION**

2. On March 3, 2008, with the Evergreen Aluminum plant hazardous waste remediation completed and no longer having a reason to zealously advocate their positions, Respondents moved to have the private complaint that was initiated by Waste Connections of Washington, Inc. ("Waste Connections") on June 8, 2007, dismissed as moot. On April 22, 2008, Administrative Law Judge Dennis Moss issued *Order 03 Granting Motion for Summary Determination* (the "Initial Order"). Only academic interests about statewide issues regarding collection of C&D Waste from future or hypothetical industrial sites remained to be adjudicated

by the Commission once the work at the disputed job was completed. Given that there had been no hearing or briefing on the merits in this case and in light of the lack of actual adversity going forward, the Initial Order correctly concluded that the controversy was moot, that the Petitioner had not established a sufficient basis for invoking an exception to mootness, and the matter should be dismissed.

3. On May 30, 2008, Waste Connections filed a *Petition for Administrative Review* challenging the Initial Order (the “Waste Connections Petition”). On June 9, 2008, Respondents filed an *Answer to the Petition for Administrative Review* (“Respondents’ Answer”). The same day, Intervenor Washington Refuse and Recycling Association (“WRRA”) and Clark County also answered the Waste Connection’s Petition, raising new challenges to the Initial Order to which a reply is warranted.

## II. ARGUMENT

4. In support of Waste Connections’ Petition, the Intervenor impermissibly attempt to broaden the issues by offering arguments outside the scope of the questions presented in the Complaint. Intervenor’s Answers focus on narrow points of the Initial Order and ignore the undisputed fact that this case became moot before an evidentiary hearing, that the Respondents now lack adversity and have no interests to zealously advocate in any further proceeding, and that there is at this time no significant and continuing public interest in anything other than an advisory opinion from the Commission on general issues beyond the specific facts of this disputed job.

**A. Clark County’s interests are not relevant to the issues raised by the Complaint and are not sufficient to create a public interest exception when the core dispute is moot.**

5. In their initial petitions, both Intervenor stated that they had no intention to broaden the issues. *Petition to Intervene of Washington Refuse and Recycling Association* (“WRRA Intervention”) ¶ 4 and Clark County’s *Petition to Intervene* (“County’s Intervention”)

¶ 3. Moreover, Clark County responded to *Waste Management's and ECTI's Motion for Summary Determination* by merely joining in the statements and reasoning put forth in *Waste Connection's Answer to Motion for Summary Determination*, failing to suggest any particular public interest it might have in the outcome of the proceeding. Yet, both Intervenor now suggest that Clark County's interests in ensuring compliance with its solid waste management plan should be sufficient to invoke the public interest exception to mootness. That raises an issue beyond the scope of the Complaint, and one that is not relevant to the questions presented. Moreover, Clark County never made this argument to the Administrative Law Judge and should not be allowed to inject it now.

6. If an evidentiary hearing were to take place, the question would be whether hauling waste from the Remediation Site was within the Commission's regulatory authority, not whether it complied with the County's solid waste management plan. The County's authority to manage solid waste would have no significance in a proceeding before the Commission to decide whether Respondents' actions fell under Ch. 81.77 RCW.

7. The basic premise of intervention is that the intervenor's claims and arguments must be related to the action. *See*, Washington Civil Rule 24(a) and (b) and similar Federal Rule of Civil Procedure 24 (a) and (b) (for both intervention as of right and permissive intervention, the intervenor must show that its interests are related to the action). An intervenor is generally not allowed to introduce unrelated claims or issues. *See, e.g., Mt. Hawley Ins. Co. v. Sandy Lake Props. Inc.*, 425 F.3d 1308, 1312 (11<sup>th</sup> Cir. 2005) (upholding district court's denial of a motion for permissive intervention because the proposed intervention was unrelated to the issues presented by the underlying suit); *Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9<sup>th</sup> Cir. 2002) (denying intervention when the intervenor's interests were not closely related to the plaintiff's claims); *Washington Utils. & Transp. Comm'n v. Federal Energy Regulatory Comm'n*, 26 F.3d 935 (9<sup>th</sup> Cir. 1994) (intervenor to an administrative appeal could not bring up new claims); 67A C.J.S. Parties § 96 (generally, intervention is not permitted to enable an intervenor to set up an

independent cause of action or to introduce new issues into the case). Thus, to the extent Intervenor's are challenging mootness by bringing up unrelated claims or issues, such challenges are inappropriate.

8. There is no dispute that a local government like Clark County has constitutional and statutory responsibilities for managing solid waste. Intervening in a private party complaint because of tangential concerns about compliance with the County's plan and ordinances is not, however, evidence of sufficient public interest to overcome the general rule in favor of dismissing a moot case. It broadens the issues beyond the scope of what is presented for resolution and suggests an interest in matters legally irrelevant to the core controversy. It also shows that obviously the Intervenor's, like Waste Connections, really want an advisory opinion about the hauling activities at other industrial cleanup sites, whether in Clark County or elsewhere in Washington State.

**B. Any interest Intervenor's have in the proceeding is not relevant where the direct parties no longer have genuine and opposing interests.**

9. This case is moot, and not just because the disputed hauling has been completed. Even if the broader academic questions related to collection of C&D Waste from hypothetical industrial cleanup sites justified going forward to a hearing, on that topic the parties lack adversity. Intervenor's postulate that any illegal hauler could escape review by simply finishing the job. Putting aside the complete absence of any credible evidence that the factual circumstances at the Evergreen Aluminum plant cleanup is capable of repetition, the argument ignores the other reasons for dismissing this matter. This case is moot for reasons beyond the fact that the challenged activities ceased before a review on the merits. With work at the Evergreen Aluminum remediation site complete, Respondent's no longer have genuine and opposing interests and now have little to debate on the academic position Waste Connections and the Intervenor's advance in this case.

10. To require a hearing on the merits in this case in light of the possible lack of actual adversity going forward would have little value and unfairly burdens the Respondents with the costs of continuing this academic exercise. This situation is not at all similar to a criminal proceeding, where the defendant has obvious motivations for defending its actions. *See* WRRRA Answer. Unlike an enforcement action, there is no penalty to fear from a private complaint proceeding. Although certainly the Respondents dispute that the subject activities were illegal, a strong interest in defending the broader implications of having a determination on the lawfulness of their activities is not present. Given that the outcome of any determination sets no particular precedent and in light of the potentially aligned interests on the abstract issues related to hauling C&D Waste from industrial sources, it is not reasonable to force the parties to litigate further.

11. Even if the Respondents wanted to zealously defend against the erroneous allegations of illegal behavior, there would be no practical effect of a ruling about the Evergreen Aluminum job after-the-fact. Any similar future situation at another site in Washington would still be subject to proof and would still have to be tested against governing statutes and rules, not against any determination made in the context of these very-specific and unique facts.

**C. A case can still be moot even if a declaratory order is sought, and Intervenors are clearly seeking an advisory opinion.**

12. Intervenors seem to believe that it is impossible for a declaratory order request to become moot. In applying the Uniform Declaratory Judgments Act, Washington courts have firmly maintained that, “absent issues of major public importance, a justiciable controversy must exist before a court’s jurisdiction may be invoked under the act.” *Nollette v. Christianson*, 115 Wn.2d 594, 598-99, 800 P.2d 359 (1990). Moreover, even declaratory judgment actions must present “(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be

direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.” *Sequim v. Malkasian*, 157 Wn.2d 251, 274-75; 138 P.3d 943 (2006) (emphasis added).

13. Since a declaratory order as to the Evergreen Aluminum cleanup is moot, the County and WRRRA appear to be seeking an opinion that applies much more broadly. If that is the case, then the Commission is really being asked to opine generally about hauling C&D Waste from industrial sites, without having the benefit of real facts and all parties who might be affected. Indeed, the very fact that the County perceives that this case is not moot demonstrates the potential mischief that can occur if it is not dismissed. The County would be seeking a result that applies to future matters (since the present one is moot) even though the parties and specific facts are not known and not before the Commission, and any determination would not be “final and conclusive.”

**D. Neither participation by Commission Staff nor intervention by Clark County change the fact that this case is moot and no public interest exception is justified.**

14. The Intervenors exaggerate the statements in the Initial Order about Commission Staff participation the same way that Waste Connections does. The Administrative Law Judge did not decide that the case was moot because the Commission Staff did not join in the proceeding. He decided that the case was moot because Waste Connections conceded that it is moot, and then dismissed it because there was no longer any justiciable controversy and Waste Connections did not establish a basis for demonstrating that an exception should apply. Since the burden is on Waste Connections to establish the public interest exception, the Administrative Law Judge merely held that it had not met its burden.

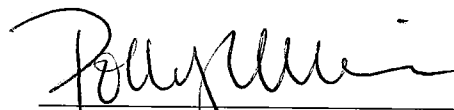
15. Just as the absence of the Commission Staff does not mean there is no public interest, the presence of the County does not mean that there is. The Administrative Law Judge was well aware that the County had intervened. There is no basis to conclude that he ignored the County's intervention when he decided that this case did not meet the requirements to establish

an exception to the mootness doctrine. Indeed, even now, the County notably has not presented any information to establish the public interest exception to the mootness doctrine other than conclusory statements suggesting a connection between its solid waste planning authority and a determination by the Commission about whether Ch. 81.77 RCW applies.

### III. CONCLUSION

16. The Intervenor's Answers raised new challenges to the Initial Order which are irrelevant to the question presented by the Complaint, and do not change the correct outcome of dismissing this moot case prior to hearing because it lacks a justiciable controversy and no public interest exception that can save it from dismissal has been demonstrated. For reasons stated above and presented in *Waste Management's and Enviro/Con & Trucking's Answer to Petition for Administrative Review by Waste Connections of Washington, Inc. of Order 03 Granting Motion for Summary Determination*, the Commission should uphold the Initial Order and dismiss the Complaint.

DATED this 16th day of June, 2008.



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