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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'S REPLY TO THE  
OPPOSITIONS TO MOTION TO  
DISMISS OF WCW, WRAA AND  
CLARK COUNTY

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## I. ARGUMENT

1. There is no dispute that Complainant Waste Connections of Washington, Inc. (“Waste Connections”) “simply wants ‘its day in Court’.”<sup>1</sup> However, the Washington Legislature has plainly set forth a comprehensive regulatory and enforcement scheme which does not permit a day before the WUTC where no authorized remedy may derive from it. Administrative litigation simply for the purpose of a legal “finding” is not authorized and wasteful. Because Waste Connections has failed to plead an entitlement to any statutory remedy – let alone any meaningful one – its Amended Complaint should be dismissed for failure to state a claim upon which relief may be granted.<sup>2</sup>

10           **A.     The Legislature Gave the Commission Broad Powers to Police Its Laws, But**  
11           **Gave Private Parties Only Limited Enforcement Authority That Does Not**  
12           **Permit the Relief Waste Connection Requests.**

12 2. In construing a statute’s enforcement scheme, the Commission is charged with determining  
13 the Legislature’s intent.<sup>3</sup>

14           If the statute’s meaning is plain on its face, then the [Commission]  
15           must give effect to that plain meaning as an expression of  
16           legislative intent. Plain meaning is discerned from the ordinary  
17           meaning of the language at issue, the context of the statute in  
18           which that provision is found, related provisions, and the statutory  
19           scheme as a whole.<sup>4</sup>

20           Thus, in considering the remedies authorized under the Commission’s enforcement statutes,  
21           the plain meaning of the provisions authorizing private actions must be adhered to, as stated  
22           by the actual language in RCW 81.04.110 and as construed in the context of the statutory  
23           scheme as a whole.

24 <sup>1</sup> Response of Intervenor WRA to Motion to File Amended Complaint (“WRA Opposition”) at 2:3.

25 <sup>2</sup> If Waste Connections’ Motion to Amend is denied, then no action is needed on the Environmental Contractors’  
26 Motion to Dismiss.

<sup>3</sup> *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007).

<sup>4</sup> *Id.* at 372-73 (citations and quotation marks omitted).

1 3. The Transportation Act, Title 81 RCW, sets forth a comprehensive administrative mechanism  
2 for regulating public service companies and entities acting as public service companies,  
3 authorizing broad authority and multiple enforcement tools to the Commission and the State  
4 of Washington. The Commission itself may initiate a complaint proceeding against any  
5 company acting as a public service company “in violation, or claimed to be in violation, of  
6 any provision of law or of any order or rule of the commission.”<sup>5</sup> Furthermore, the  
7 Commission may bring a classification proceeding and issue cease and desist orders.<sup>6</sup> The  
8 State may prosecute as a gross misdemeanor unlawful conduct by anyone acting as a public  
9 service company.<sup>7</sup> The State also may bring an action for penalties against a company acting  
10 unlawfully as a public service company.<sup>8</sup> None of those provisions is pertinent here. In this  
11 proceeding, the Commission’s role is adjudicatory only.

12 4. In contrast to the Commission’s panoply of enforcement tools, the Legislature provided  
13 private parties only two limited means of recourse for business harms caused by the alleged  
14 misconduct of entities claimed to be acting as competitors. *First*, a private party may sue a  
15 public service company in court for damages arising from the company’s violation of the  
16 Transportation Act or of a Commission rule.<sup>9</sup> Of course, that provision is not relevant here  
17 because the Environmental Contractors<sup>10</sup> are not public service companies and this action was  
18 not brought in court. *Second*, RCW 81.04.110 permits a regulated business to pursue an  
19 enforcement action against an entity allegedly acting as a public service company in violation  
20 of law – but allows only a limited scope of relief. If such a complaint by a public service  
21 company is substantiated, the relief the Commission may provide is limited to establishing

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22 <sup>5</sup> RCW 81.04.110.

23 <sup>6</sup> RCW 81.04.510.

24 <sup>7</sup> RCW 81.04.385.

25 <sup>8</sup> RCW 81.04.387; RCW 81.04.400; RCW 81.04.405.

26 <sup>9</sup> RCW 81.04.440.

1 “rates, charges, rules, regulations or practices” that are intended to “correct the abuse  
2 complained of.”<sup>11</sup>

3 5. It is under this second provision, RCW 81.04.110, that Waste Connections’ Amended  
4 Complaint seeks relief.<sup>12</sup> Waste Connections contends that RCW 81.04.110 “is an all-  
5 encompassing procedural, substantive and remedial statute.”<sup>13</sup> The Environmental  
6 Contractors are in full agreement with this proposition. The fundamental problem for Waste  
7 Connections, though, is that it is not seeking to “correct the abuse complained of” by  
8 establishment of “uniform rates, charges, rules, regulations or practices in lieu of those  
9 complained of” as allowed by RCW 81.04.110. Rather, although Waste Connections argues  
10 that it “is not seeking ... any relief *unavailable* under the Private Party Complaint Statute,”<sup>14</sup>  
11 Waste Connections reaches outside the plain meaning of the all-encompassing remedial  
12 provision of RCW 81.04.110 to request: (1) a “finding” that the Environmental Contractors’  
13 conduct was unlawful, (2) a “finding” that the allegedly unlawful acts directly damaged  
14 Waste Connections, and (3) a “finding” that these allegedly unlawful acts be eligible for  
15 referral to the Office of the Attorney General and the Commission for possible penalties.<sup>15</sup> It  
16 fails to explain how any of those “findings” would qualify as an available corrective measure  
17 for the perceived abuse of which Waste Connections complains. It suggests that the  
18 “findings” could be used in subsequent proceedings whether brought by the Commission  
19 itself or by Waste Connections in civil litigation, but that is not an allowable remedy in this  
20 litigation under the statute – and is not meaningful to the public interest.

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21 <sup>10</sup> Respondents Waste Management Disposal Services of Oregon, Inc. and Enviro/Con & Trucking, Inc. are  
22 collectively referred to herein as the “Environmental Contractors.”

23 <sup>11</sup> RCW 81.04.110.

24 <sup>12</sup> Proposed Amended Complaint ¶ 10; Waste Connection of Washington, Inc.’s Reply to Opposition to Motion  
25 for Leave to File Amended Complaint, And Alternatively, Opposition to Motion to Dismiss the Amended Complaint  
26 (“Waste Connections’ Opposition Brief”) ¶ 14.

<sup>13</sup> Waste Connections’ Opposition Brief ¶ 15.

<sup>14</sup> *Id.* at 8:1-2 (emphasis added).

<sup>15</sup> Proposed Amended Complaint at ¶ 10

1 6. The Commission may not “add words or clauses to an unambiguous statute when the  
2 legislature has chosen not to include that language.”<sup>16</sup> Rather, the Commission must “assume  
3 the legislature means exactly what it says.”<sup>17</sup> Unlike other statutes such as the Consumer  
4 Protection Act, where the Legislature has authorized to private parties a statutory enforcement  
5 role equivalent to or greater than that of the State, the Legislature plainly and unambiguously  
6 limited business-to-business private causes of action under the Transportation Act. As the  
7 Commission recognizes, “[w]hen a statute provides a specific remedy, but does not include a  
8 different remedy ..., the alternate remedy is excluded.”<sup>18</sup> Thus, the Commission’s inquiry  
9 here must end with the plain language before it.<sup>19</sup> RCW 81.04.110, pled by Waste  
10 Connections, authorizes only the setting of new “uniform rates, charges, rules, regulations or  
11 practices” in a private complaint action.<sup>20</sup>

12 7. So, we circle back to the remedies that Waste Connections has pled, which are not authorized  
13 by the relevant provision of the complaint statute. On the one hand, none of the remedies  
14 offered by the statute were requested: Waste Connections does not request the Commission  
15 to establish “rates, charges, rules, regulations or practices” authorized by RCW 81.04.110.  
16 On the other hand, none of the remedies actually sought are offered by the plain language of  
17 the statute: neither “findings” nor private attorney general actions for penalties are remedies  
18

19 <sup>16</sup> *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

20 <sup>17</sup> *Id.* (quotation marks and citation omitted).

21 <sup>18</sup> *In the Matter of San Juan Express*, Docket No. TS-940956, Fifth Supplemental Order (WUTC Dec. 19, 1994)  
(WUTC lacks authority to enter cease and desist order under RCW 81.04.110 because the Legislature did not  
22 authorize such a remedy); *see also Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S.  
1, 17 (1981) (Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act did not  
create any implied rights of action independent of the citizen suit provisions in those acts.).

23 <sup>19</sup> *Delgado*, 148 Wn.2d at 728. Waste Connection’s lobbying for a broader enforcement role for private parties  
under the Transportation Act is directed at the wrong body. Its lengthy discourse on its view of proper “regulatory  
24 policy,” Waste Connections’ Opposition Brief fn. 25 & ¶ 38, is appropriately presented only to the Legislature.  
25 *State v. Halsten*, 108 Wn. App. 759, 763, 33 P.3d 751 (2001) (In denying a request to broaden list of statutory  
offenses, the Court held, “While this may be a sound argument from a policy standpoint, the court must resist the  
temptation to rewrite an unambiguous statute to suit its notions of what is good public policy. The drafting of a  
statute is a legislative, not a judicial function.”).

26 <sup>20</sup> RCW 81.04.110.

1 articulated by the Legislature in this statute. Having failed to plead an available remedy,  
2 Waste Connection has not stated a claim for which relief can be granted.

3 **a. The Legislature Did Not Allow for Declaratory Findings as a Remedy**  
4 **in a Private Enforcement Action.**

5 8. First, RCW 81.04.110 does not authorize declaratory relief. Waste Connections already  
6 acknowledges that declaratory relief is “unavailable” under RCW 81.04.110.<sup>21</sup> Declaratory  
7 relief is a request for “an order declaring the applicability of the statute, rule, or order in  
8 question to the specified circumstances.”<sup>22</sup> This is, notwithstanding its linguistic contortions,  
9 precisely what Waste Connections seeks through its request for a “finding”:

10 Complainant prays for an order ... finding Respondents singularly  
11 or in concert engaged in the collection and transportation of  
12 construction and demolition debris (“C & D”) waste located at the  
13 previous Evergreen Aluminum remediation site ... in violation of  
14 RCW 81.77.040 and various Commission rules.<sup>23</sup>

15 Because the Legislature undisputedly did not authorize declaratory relief, whether labeled a  
16 “finding” or otherwise, under RCW 81.04.110, and Waste Connections has purposefully not  
17 pled its request for a “finding” under the Administrative Procedure Act’s declaratory  
18 judgment provision,<sup>24</sup> Waste Connections’ request for a factual finding, absent any request  
19 for related adjudicative action, must be dismissed.<sup>25</sup>

20 9. Waste Connections leans on the *San Juan Express, Inc.* case to argue that “the ruling of  
21 lawfulness of the challenged activity in and of itself is sufficiently substantive as the

22 <sup>21</sup> Waste Connections’ Opposition Brief at 8:1-2.

23 <sup>22</sup> RCW 34.05.250(5)(a).

24 <sup>23</sup> Proposed Amended Complaint ¶ 10.

25 <sup>24</sup> Waste Connections’ Opposition Brief ¶ 14 (Waste Connections “has now removed its previously-requested  
26 request for a declaratory order”). Waste Connections suggests that it refrained from filing a separate pleading for a  
27 declaratory ruling in the interests of administrative efficiency, but it well knows that the rule cited by it precludes  
28 such a strategy. WAC 480-07-930(1)(b).

29 <sup>25</sup> The Legislature knew how to allow for a declaration such as the one sought by Waste Connections, and did so  
30 under the Administrative Procedures Act, RCW 34.05.250(5)(a), which is implemented by the Commission in its  
31 procedural rules, WAC 480-07-930.

1 gravamen of the complaint to withstand summary dismissal.”<sup>26</sup> However, that case involved  
2 the reverse of the situation presented here. The private parties started the litigation in court,  
3 then in response to the directive from King County Superior Court, tried to bring a  
4 classification. The Commission rebuffed the efforts to inject private party rights where the  
5 Legislature had specifically limited who could bring such an action. Instead, it handled the  
6 referral as a complaint, in order to respond to the request by the court for a legal  
7 determination, saying:

8           The parties are engaged in litigation in superior court involving the  
9           issue presented to the Commission. The court granted a limited  
10          time to pursue the issue with the Commission. The petition was  
11          designed as a vehicle to secure a Commission decision on the  
12          issue. The Commission determined that the petition should be  
13          treated as a complaint and, with the consent of the parties, set it for  
14          brief adjudication to afford the most expedited review possible.<sup>27</sup>

15 10. In *San Juan Express*, both parties wanted the Commission to answer the Superior Court’s  
16 referral of a question of law and neither party argued that the Commission was without  
17 authority to act under the private party complaint procedure. In fact, RCW 81.04.110,  
18 authorizing complaint proceedings among private parties and Commission determination of  
19 “rules, regulations or practices,” was the proper statutory mechanism to answer the referred  
20 question. Once decided, the Commission’s rule would be acted upon by the Superior Court  
21 in determining the claims for relief before the court and would be observed by all affected  
22 public service companies.<sup>28</sup> *San Juan Express* was not, as here, an empty request for a  
23 finding of unlawfulness.

24  
25 <sup>26</sup> Waste Connections’ Opposition Brief ¶ 35.

26 <sup>27</sup> *San Juan Express*, *supra* fn. 18.

<sup>28</sup> RCW 81.04.110.



1                   **b.     The Legislature Limited the Remedies for Private Parties and**  
2                   **Penalties Are Not Authorized by the Plain Language of the Statute**  
                  **and the Statutory Scheme.**

3 11. Second, RCW 81.04.110 also does not authorize Waste Connections' request for penalties.

4     As Waste Connections readily admits, the Legislature allowed penalties only in RCW  
5     81.04.405.<sup>29</sup> However, RCW 81.04.405 authorizes prosecution for penalties only by the  
6     Commission. Recovery of penalties is reserved exclusively to the State of Washington  
7     through a lawsuit brought by the Attorney General in Superior Court and only for payment to  
8     the State Treasury.<sup>30</sup> RCW 81.04.405 does not authorize private parties to step into the  
9     State's shoes to seek penalties on behalf of the State. Waste Connections seeks to get around  
10    the Statute's plain language by *implying* that private parties may seek penalties on behalf of  
11    the State.

12 12. The question of whether the Transportation Act creates a private right of action to pursue  
13    statutory penalties on behalf of the State is one of statutory construction and the inquiry is  
14    limited solely to determining whether the Legislature intended to create the private right  
15    asserted.<sup>31</sup> An allegation that a statute has been violated and some person harmed does not  
16    automatically give rise to a private cause of action in favor of that harmed person.<sup>32</sup> In fact,  
17    when a statute does not expressly provide for a specific private action, adjudicative bodies  
18    must be very hesitant to find an implied right of action.<sup>33</sup> This is all the more true where a  
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21  
22 <sup>29</sup> Waste Connections appears to concede that there is no express language in RCW 81.04.110 that provides for a  
23 private right to seek penalties in addition to corrective action. Instead, Waste Connections points to RCW 81.04.405  
as the alleged source of a private right of action for penalties under RCW 81.04.110. Waste Connections'  
Opposition Brief ¶ 31.

24 <sup>30</sup> RCW 81.04.405.

25 <sup>31</sup> *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

26 <sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 351.

1 statute, such as the Transportation Act, contains an express provision that authorizes only  
2 limited private party actions.<sup>34</sup>

3 13. The Commission itself has rejected the efforts of private parties to request the imposition of  
4 penalties.<sup>35</sup> Not surprisingly, Waste Connections does not address *Glick v. Verizon*  
5 *Northwest, Inc.* and appears to simply ignore the fact that the Commission itself disagrees  
6 that private rights of action for penalties exist in private cases such as this one, without the  
7 participation of the Commission in its prosecutorial capacity. The Notice of Penalties used  
8 by the Commission Staff plainly describes this procedure:

9           The Commission believes that you have committed a violation of  
10           Washington Administrative Code .... As a result, the Commission  
11           hereby notifies you that it has assessed penalties against you in the  
12           amount \$ \_\_\_\_\_. If you do not act within 15 days, the Commission  
13           may refer this matter to the Office of the Attorney General for  
14           collection. The Commission may then sue you to collect the  
15           penalty.<sup>36</sup>

14 14. Furthermore, neither RCW 81.04.110 nor RCW 81.04.405 authorizes the Commission, in its  
15 adjudicatory function, to “find” that allegedly unlawful conduct is “eligible for referral .. to  
16 the Office of Attorney General and to the Commission” in the hope that the Commission, in  
17 its prosecutorial function, will then be persuaded to initiate a penalty suit in Superior Court.<sup>37</sup>  
18 A request for a “finding” of unlawfulness for possible use in a subsequent action, tied to no

19 <sup>34</sup> See, e.g., *Middlesex County*, 453 U.S. at 17 (The Federal Water Pollution Control Act and Marine Protection,  
20 Research, and Sanctuaries Act did not create any implied rights of action independent of the citizen suit provisions  
in those acts.).

21 <sup>35</sup> As set forth more fully in the Environmental Contractors’ opening brief, in *Glick v. Verizon Northwest, Inc.*,  
22 2005 WL 484651, Docket No. UT-040535, Order 03 (WUTC Jan. 28, 2005), the Commission addressed the issue of  
23 a private party’s right to seek penalties in a matter involving the telecommunications industry and brought under  
24 utility laws parallel to the transportation statutes described above. The Commission held that a private party is  
25 entitled “to prosecute a complaint for his own benefit, *but not to seek penalties on behalf of the state.*” *Id.* (emphasis  
added). As the Commission explained, allowing private parties to seek penalties “could lead to vigilantism in which  
private parties file multiple actions not on their own behalf, but as agents of the state. That would ultimately destroy  
the Commission’s ability to formulate and execute a coherent and cohesive enforcement policy and to accomplish  
regulation in the public interest, as the law requires.” *Id.*

26 <sup>36</sup> See attachment hereto.

<sup>37</sup> Proposed Amended Complaint ¶ 10.

1 request for legal or equitable relief in the present action, is nothing more than “a purely  
2 advisory opinion, instructing another court how to rule” and must be dismissed.<sup>38</sup>

3 15. Consequently, Waste Connections does not have “a right to be heard on its complaint”<sup>39</sup>  
4 given that its request for relief – that is, a request for “findings,” including “eligibility for  
5 referral”<sup>40</sup> – is nowhere found within the Transportation Act’s limited grant of enforcement  
6 authority to disgruntled business competitors.<sup>41</sup>

7 **B. Waste Connections’ “Law of the Case” Arguments Are Misleading and**  
8 **Facile.**

9 16. Waste Connections repeatedly invokes the “law of the case” doctrine to fend off the  
10 Environmental Contractors’ explanations for why the Proposed Amended Complaint has  
11 failed to plead meaningful and authorized remedies.<sup>42</sup> “[T]he law of the case doctrine  
12 ordinarily precludes re-deciding the same legal issues in a subsequent appeal.”<sup>43</sup> Given  
13 Waste Connections’ repeated reworking of the legal findings the Commission made in Order  
14 05,<sup>44</sup> it is worthwhile to actually go back to Order 05 and let the Commission speak for itself.

15 17. First, Waste Connections contends that the Commission held that “although the remedy  
16 sought in the original complaint was moot, the complaint itself was not” and, consequently,

17 <sup>38</sup> *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 593, 191 P.3d 1282 (2008) (“the potential preclusive  
18 effect of a judgment entered in one lawsuit upon issues raised in a second proceeding” does not “constitute a legal  
19 right” sufficient to prevent the first case from becoming moot). With due respect to WRRRA, because a ruling by the  
Commission in this case cannot “result in penalties being imposed” in this action, any ruling on the request for  
penalties would be an “advisory opinion.” WRRRA Opposition at 3:9-10.

20 <sup>39</sup> Waste Connections’ Opposition Brief ¶ 9.

21 <sup>40</sup> Proposed Amended Complaint ¶ 10.

22 <sup>41</sup> Waste Connections at once “understands the need to afford the [Environmental Contractors] all due process  
23 protections under law and rule to fully exhaust their objections to the Complaint and to a hearing,” Waste  
Connections’ Opposition Brief ¶ 37, and thrashes the Environmental Contractors for standing on their due process  
rights. *Id.* ¶ 8. Apparently these due process rights have prevented Waste Connections from quickly pushing its  
unauthorized claims through the Commission. Yet, in a moment of candor, Waste Connections acknowledges its  
24 role in “the depth and breadth of the voluminous pre-hearing arguments and motion practice” in this case. *Id.* ¶ 38.

25 <sup>42</sup> *Id.* ¶¶ 3, 10, 16-18, 38 & fns. 4, 10.

26 <sup>43</sup> *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988).

<sup>44</sup> Oct. 7, 2008 Order 05 Granting Petition for Administrative Review; Reversing Initial Order, and Ordering  
Hearing on the Merits; Granting Motion for Leave to File Reply (“Order 05”).

1 the Environmental Contractors may not now “assert mootness as a reason to ... dismiss[] the  
2 amended complaint.”<sup>45</sup> However, nothing that the Commission itself actually held leads to  
3 the conclusion that it decided the issue of mootness once and for all. The Commission ruled:

4 while the doctrine of mootness applies to the remedy sought in the  
5 complaint (a cease and desist order) ... we must consider whether  
6 there are other remedies that would not be moot if the complaint  
7 were to be amended....<sup>46</sup>

8 One can hardly read this ruling to mean that the amended complaint cannot be attacked for  
9 mootness. While giving Waste Connections another stab at identifying a remedy “that would  
10 not be moot” and that “would be meaningful,” the Commission plainly did not presume the  
11 existence of such a remedy and did not foreclose the Environmental Contractors from  
12 challenging any newly alleged remedy as moot. Given that the request for a series of  
13 findings is the equivalent to seeking a declaratory order, and given that the original complaint  
14 sought the very same sort of academic opinion from the Commission, it should come as no  
15 surprise that the Environmental Contractors are arguing that the Amended Complaint is still  
16 moot.<sup>47</sup>

17 18. Second, Waste Connections contends that the Commission previously considered the issue of  
18 whether the Amended Complaint is functionally making an impermissible end-run around  
19 the classification statute.<sup>48</sup> Waste Connections boldly asserts that the Commission has  
20 already determined:

21 whether RCW 81.04.110 is an independent enforcement  
22 proceeding not requiring resort to RCW 81.04.510 as a  
23 classification prerequisite, and also whether WCW is

24 <sup>45</sup> Waste Connections’ Opposition Brief ¶ 3.

25 <sup>46</sup> Order 05 ¶¶ 16, 18 (emphasis added).

26 <sup>47</sup> At the prehearing conference on August 21, 2009, Counsel for the Environmental Contractors expressed an  
intention to refrain from raising mootness in this Motion to Dismiss. This was based on the expectation that Waste  
Connections would accept the Commission’s invitation to amend its Complaint and seek “other” remedies, i.e.,  
remedies different than the ones originally pled. Waste Connections’ request for a series of “findings” is, however,  
essentially the same as its original request for declaratory relief and so, unfortunately, the issue of mootness is still  
relevant.

<sup>48</sup> Waste Connections’ Opposition Brief fn. 4.

1 impermissibly seeking to “convert” or otherwise mix the separate  
2 enforcement statute metaphors.<sup>49</sup>

3 While it is not clear what mixing the separate enforcement statute metaphors actually  
4 means, it is plain that the Commission neither considered nor decided these questions in  
5 Order 05 when it said:

6 A complaint brought by a private entity under the first paragraph  
7 of RCW 81.04.110 alleging violation of laws or rules is an  
8 enforcement proceeding that may continue, whether or not the  
9 action complained of has ceased, if the remedy sought would be  
10 meaningful.

11 The Commission did not consider the question, because it was never raised before it.<sup>50</sup> The  
12 Commission was, instead, focusing its analysis on whether remedies other than the ones  
13 originally sought might salvage the litigation.<sup>51</sup>

14 19. Third, Waste Connections points to the Commission’s holding that the Staff’s participation  
15 or lack thereof has no bearing on whether the policy issues raised in a private party complaint  
16 are significant. Waste Connections chastises the Environmental Contractors for “reargu[ing]  
17 the ‘Negative Inference’ Premise in their present motion to dismiss.”<sup>52</sup> According to Waste  
18 Connections, the Commission’s decision to draw no inference from Staff’s absence with  
19 regard to the public interest exception to mootness forecloses the Environmental Contractors  
20 from now arguing that in the Transportation Act, the Legislature authorized only the

21 <sup>49</sup> Waste Connections’ Opposition Brief fn. 10; *see also id.* fn. 4.

22 <sup>50</sup> Indeed, the Commission’s assumption that Waste Connections was bringing its complaint under the first  
23 paragraph of RCW 81.04.110 is itself incorrect. *See* Waste Connections’ Opposition Brief ¶ 14.

24 <sup>51</sup> The Environmental Contractors concede that a classification proceeding would not be appropriate because the  
25 activities have ended, and therefore a cease and desist order is moot. The point, however, is that Waste Connections  
26 is seeking just exactly the type of “finding” that would be made in a classification. However, even if classification  
were a condition precedent to any enforcement actions against the Environmental Contractors, a mere finding that a  
G Certificate was needed to conduct the environmental remediation would not meet the requirement in Order 05 that  
Waste Connections plead a “meaningful” remedy. There would be no meaning to such a determination of operating  
without authority, especially when the activity has ceased. Apparently Intervenor WRA and Clark County  
similarly seek an advisory opinion that the Environmental Contractors should have obtained a G Certificate for the  
remediation work. For Clark County it is especially relevant because its ordinance that directs the disposal of solid  
waste to County facilities (and, ultimately, to a landfill owned and operated by Waste Connections) applies only to  
private haulers operating under G Certificates. Clark County Code Section 9.32.020(A).

<sup>52</sup> Waste Connections’ Opposition Brief at 9:14-15.

1 Commission to pursue the bulk of the Statute's enforcement mechanisms, including the  
2 penalties Waste Connection now advances.<sup>53</sup> This is a non sequitur. The question the  
3 Commission decided in Order 05 was whether "Staff's lack of participation [in a private  
4 party complaint] indicates that the policy issues in the proceeding are not significant."<sup>54</sup> The  
5 Commission did not consider, let alone decide, which remedies the Legislature limited to  
6 Commission prosecution actions. Stated differently, the Commission may have ruled that the  
7 Environmental Contractors cannot presume the Staff's motives for not participating, but it  
8 most certainly did not preclude the Environmental Contractor's from pointing to the  
9 undisputed fact that the Staff has not sought to investigate or prosecute the alleged violation.  
10 20. The law of the case doctrine, and its concern that the same legal issue not be re-decided in a  
11 subsequent appeal, has no place here when addressing legal or factual issues that were  
12 neither raised to nor decided previously by the Commission.

13 **C. The Motion to Dismiss Standard Cannot Save Waste Connections' Futile and**  
14 **Baseless Claims for Relief.**

15 21. Waste Connections has failed to plead a request for any relief for which judgment may be  
16 granted. It may not, then, fall on the "public interest" sword<sup>55</sup> to avoid the conclusion that  
17 the Legislature chose to provide private parties a limited means of challenging the conduct  
18 regulated by the Transportation Act and that "findings, "penalties," and "referrals" are not  
19 among the authorized remedies. There can be no public benefit to requiring yet further  
20 litigation of this lawsuit when, more than two years into the litigation, there still are no viable  
21 claims for relief.  
22  
23  
24

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25 <sup>53</sup> *Id.* ¶ 16.

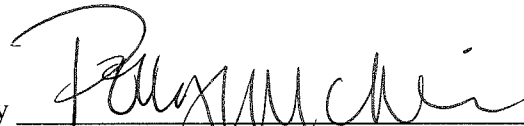
26 <sup>54</sup> Order 05 ¶ 14.

<sup>55</sup> Waste Connections' Opposition Brief ¶ 23.

1 **II. CONCLUSION**

2 22. Waste Connections frankly acknowledges that “it has merely requested a threshold  
3 determination regarding the lawfulness of [the Environmental Contractors’] conduct.”<sup>56</sup>  
4 However, the Commission lacks authority to issue advisory opinions untethered from any  
5 authorized and meaningful relief. The Legislature’s purposeful and plain choice to place the  
6 bulk of enforcement responsibility with the Commission must be given effect. If Waste  
7 Connections feels so strongly that it needs “its day in court”, it should speak to the  
8 Legislature. Until then, Waste Connections cannot seek the relief the Legislature has not  
9 authorized for private businesses. Waste Connections has failed to state a claim for which  
10 any authorized or meaningful relief may be granted and its Amended Complaint should be  
11 dismissed with prejudice.

12 DATED this 21<sup>st</sup> day of September, 2009.

13  
14  
15 By   
16 Polly L. McNeill, WSBA # 17437  
17 Jessica L. Goldman, WSBA # 21856  
18 SUMMIT LAW GROUP PLLC  
19 315 Fifth Avenue South, Suite 1000  
20 Seattle, WA 98104  
21 T: (206) 676-7000  
22 F: (206) 676-7001  
23 Attorneys for Respondent Waste  
24 Management Disposal Services of Oregon,  
25 Inc. and Enviro/Con & Trucking, Inc.

26 <sup>56</sup> *Id.* fn. 34.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by the method as indicated below, pursuant to WAC 480-07-150.

<p><i>Attorneys for Complainant Waste Connections of Washington, Inc.</i> David W. Wiley Williams Kastner PO Box 21926 Two Union Square 601 Union Street Seattle, WA 98111-3926 <a href="mailto:dwiley@williamskastner.com">dwiley@williamskastner.com</a></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>
<p><i>Attorneys for Intervenor Petitioner Clark County</i> Bronson Potter Deputy Prosecuting Attorney Clark County Prosecuting Attorney's Office Civil Division PO Box 5000 Vancouver, WA 98666-5000 <a href="mailto:bronson.potter@clark.wa.gov">bronson.potter@clark.wa.gov</a></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>
<p><i>Attorneys for Intervenor Petitioner Washington Refuse and Recycling Association</i> James K. Sells Ryan Sells Uptegraft, Inc. P.S. 9657 Levin Road N.W., Suite 240 Silverdale, WA 98383 <a href="mailto:jimsells@rsulaw.com">jimsells@rsulaw.com</a></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>

DATED at Seattle, Washington, this 21<sup>st</sup> day of September, 2009.

  
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# WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

## NOTICE OF PENALTIES INCURRED AND DUE FOR VIOLATIONS OF LAWS AND RULES

PENALTY ASSESSMENT: TR-090940  
PENALTY AMOUNT: \$100

The Commission believes that you have committed a violation of Washington Administrative Code (WAC) Code 480-62-300 which requires rail companies to file annual reports with the Commission by May 1 each year. You are classified as such a company. Commission records show that you did not make the filing by the required date of May 1, 2009. Revised Code of Washington (RCW) 81.04.405 allows penalties of \$100 for every such violation. Each and every such violation shall be a separate and distinct offense and, in the case of a continuing violation, every day's continuance shall be and be deemed to be a separate and distinct violation.

As a result, the Commission hereby notifies you that it has assessed penalties against you in the amount \$100, as follows:

On March 2, 2009, the commission mailed 2008 Annual Report forms and 2009 Regulatory Fee packets to rail companies registered in Washington State. A letter from Executive Secretary and Director David W. Danner instructed companies to file annual reports and pay regulatory fees by May 1, 2009. Further, the letter stated failure to file the annual report by May 1 could result in a penalty. Those companies wishing to request an extension to file the annual report were asked to do so prior to May 1, providing a reason for the requested extension.

did not request an extension.

On March 27, 2009, the commission mailed a notice to all rail companies reminding them that 2008 annual reports and 2009 regulatory fees were due by May 1, 2009.

On May 15, 2009, the commission sent letters to those companies that had not yet filed their reports. The letter, signed by David Danner, gave an extension to companies to file their reports by May 29, 2009. In the letter, Mr. Danner stated the commission would not seek a fine from any company with a report received by the commission postmarked no later than May 29.

As of June 23, 2009,  
failed to file the 2008 Annual Report.

This information, if proved at a hearing and not rebutted or explained, is sufficient to support the penalty assessment.

Your penalty is due and payable now. If you believe the violation did not occur, you may request a hearing to contest the penalty assessment. If there is a reason for the violation that you think should excuse you from the penalty, you may ask for mitigation (reduction) of this penalty. See RCW 81.04.405.

You have the right to present your request for review or mitigation at a hearing, but you are not required to do so. If you do, the Commission will review the evidence supporting your request in an informal hearing, called a Brief Adjudicative Proceeding, before an administrative law judge. The administrative law judge will consider your plea and notify you of his or her decision.

**You must act within 15 days after receiving this notice** to do one of the following:

- Pay the amount due.
- Request a hearing to contest the occurrence of the violations.
- Request mitigation to contest the amount of the penalty.

Please indicate your selection on the enclosed form and send it to the Washington Utilities and Transportation Commission, Post Office Box 47250, Olympia, Washington 98504-7250, **within FIFTEEN (15) days** after you receive this notice.

**If you do not act within 15 days**, the Commission may refer this matter to the Office of the Attorney General for collection. The Commission may then sue you to collect the penalty.

DATED at Olympia, Washington, and effective June 30, 2009.



ANN E. RENDAHL  
Administrative Law Judge

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PENALTY ASSESSMENT TR-090940

**PLEASE NOTE:** You must complete and sign this document, and send it to the Commission within 15 days after you receive the penalty assessment. Use additional paper if needed.

I have read and understand RCW 9A.72.020 (printed below), which states that making false statements under oath is a class B felony. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of those matters. I hereby make, under oath, the following statements.

1. **Payment of penalty.** I admit that the violation occurred and enclose \$100 in payment of the penalty.
2. **Request for a hearing.** I believe that the alleged violation did not occur, based on the following information, and request a hearing for a decision by an administrative law judge:
3. **Application for mitigation.** I admit the violation, but I believe that the penalty should be reduced for the reason(s) set out below.
- a) I ask for a hearing for a decision by an administrative law judge
- OR  b) I waive a hearing and ask for an administrative decision on the information I present here:

I declare under penalty of perjury under the laws of the State of Washington that the foregoing, including information I have presented on any attachments, is true and correct.

Dated: \_\_\_\_\_ [month/day/year], at \_\_\_\_\_ [city, state]

\_\_\_\_\_  
Name of Respondent (company) – please print

\_\_\_\_\_  
Signature of Applicant

-----  
**RCW 9A.72.020:**

“Perjury in the first degree. (1) A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law. (2) Knowledge of the materiality of the statement is not an element of this crime, and the actor’s mistaken belief that his statement was not material is not a defense to a prosecution under this section. (3) Perjury in the first degree is a class B felony.”