

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the Matter of Determining the Proper
Carrier Classification of:

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

DOCKET TC-072226

NARRATIVE SUPPORTING
SETTLEMENT AGREEMENT

I. INTRODUCTION

1 This Narrative Supporting Settlement Agreement (Narrative) is filed pursuant to WAC 480-07-740(2)(a) and Order 07 in this docket on behalf of Glacier Recycle, LLC, Hungry Buzzard Recovery, LLC, and T&T Recovery, Inc. (collectively “the Respondent Companies”), and the Staff of the Washington Utilities and Transportation Commission (Staff) (collectively, “the settling parties”). The settling parties have signed the settlement agreement (Agreement), which is being filed concurrently with this Narrative. This Narrative summarizes the Agreement. It is not intended to modify any terms of the Agreement.

II. PROPOSALS FOR REVIEW PROCEDURE

2 Consistent with WAC 480-07-740(2)(b), the settling parties are prepared to present one or more witnesses each at the April 14, 2010, Hearing on Proposed Settlement to testify in support of the proposal and to answer questions concerning the Agreement’s details, and its costs and benefits, should such testimony be required. In addition, counsel for both parties are available to respond to any questions regarding the proposed settlement.

III. SCOPE OF THE UNDERLYING DISPUTE

3 The Respondent Companies each hold a motor freight common carrier permit under RCW 81.80 and each is registered with the Department of Ecology as a transporter of recyclables under RCW 70.95.400 and WAC 173-345. The underlying dispute concerns whether the Respondent Companies were operating as solid waste collection companies, hauling solid waste for compensation without the necessary certificate required by RCW 81.77.040 and Washington Administrative Code (WAC) 480-70-016 when they transported construction and demolition (C&D) debris to a Weyerhaeuser facility in Longview for placement as “structural material” in a private Weyerhaeuser landfill.

4 The Commission regulates collection and transportation of commercial solid waste under RCW 81.77. That chapter (RCW 81.77.040) requires every person to obtain a certificate before operating as a solid waste collection company.¹ RCW 81.77.010(8) provides, however, 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.”

5 Prior to the initiation of this proceeding, Staff was aware that various companies, including the Respondent Companies, were collecting C&D debris from customers performing work at construction and demolition jobsites and hauling at least some portion of that debris to Weyerhaeuser facilities in Longview. Staff was also aware that Weyerhaeuser was charging the haulers a tipping fee for receipt of the C&D material and then mixing it with industrial waste materials being disposed of in its special purpose landfill for the purpose of increasing the overall stability and permeability of materials in that landfill. Staff

advised one or more of the companies, by letter from the Commission Secretary, that such transportation was exempt from regulation as solid waste collection. At that time, Staff's interpretation was that Weyerhaeuser's practice of mixing the C&D debris with Weyerhaeuser's industrial waste to add stability and permeability to the landfill constituted a "higher use" of the C&D debris. Therefore, C&D debris transported for this purpose was a commodity, and was not merely solid waste transported for disposal. As such, in Staff's view at that time, the haulers were properly regulated under RCW 81.80 as motor freight carriers and not under RCW 81.77 as solid waste collection companies.

6 Upon advice of counsel, Staff subsequently changed its position, and informed the respondent companies by letter that they should cease and desist from transporting C&D debris to Weyerhaeuser on the grounds that depositing C&D debris in a landfill, even if for the purpose of adding structure and permeability to the overall waste within the landfill, did not come within the RCW 81.77.010(8) exemption for transportation of commercial recyclables, and that the companies must obtain a solid waste collection certificate before engaging in this transportation.

7 In response, the Respondents retained counsel and expressed their desire to have the legal question regarding the regulatory treatment of transporting C&D material to Weyerhaeuser decided by the Commission.

8 At Staff's request, the Commission issued an Order Instituting Special Proceeding and Notice of Prehearing Conference on Thursday, December 28, 2007. In that Order, the Commission made the following allegations:

¹ "A solid waste collection company shall not operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation." RCW 81.77.040.

(1) The companies are engaged, at least in part, in the business of collecting and transporting recyclable materials, to recyclers, on behalf of commercial generators of construction, demolition and land clearing (CDL) waste, and the companies generally hold themselves out as such.

(2) The CDL waste that the companies collect from their customers contains more than an incidental or accidental amount of solid waste that has no value as a recyclable commodity.

(3) The companies transport this non-recyclable solid waste, on more than an occasional basis, to a Weyerhaeuser facility near Longview, Washington. Weyerhaeuser accepts the material, charging the companies a tipping fee. Weyerhaeuser mixes the CDL waste with waste generated from its own industrial operations and disposes of the mixture in its private landfill near Castle Rock, Washington. Weyerhaeuser accepts the CDL waste because it improves the internal drainage and slope stability of the landfill.

(4) To the extent that the companies transport CDL waste to Weyerhaeuser's facility as described above, the companies are not "collecting or transporting recyclable materials . . . to a recycler for use or reclamation" within the meaning of RCW 81.77.010(8). Instead, the companies are "operat[ing] for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation" within the meaning of RCW 81.77.040.

After setting out these factual allegations, the Order then provided that:

Pursuant to RCW 81.04.510, upon proof of the factual allegations set forth above and demonstration of the applicable legal principles, the Commission is authorized to issue an order requiring the companies to cease and desist from collecting more than an incidental or accidental amount of non-recyclable solid waste materials and transporting such solid waste to the Weyerhaeuser facility, as such activity is solid waste collection subject to regulation under RCW 81.77.

Staff did not recommend penalties, nor did the Order provide for them, because the companies had previously been operating under Staff advice that they did not require solid waste collection certificates. The parties agreed that the law required clarification.

9

On April 25, 2008, Staff and the Respondent Companies filed cross-motions for Summary Determination. The Respondent Companies sought to fully resolve the case as a matter of law by arguing that their hauling of C&D material to the Weyerhaeuser Material Recovery Facility (MRF) in Longview, Washington, should be classified as transportation of recyclables and therefore exempt from regulation under RCW 81.77. In its motion, Staff sought a determination on the same issue, but argued for a finding that the activity should be classified as solid waste collection. Staff asserted that even if it prevailed, it might still be necessary to determine whether the Respondents were hauling C&D debris to Weyerhaeuser on more than an occasional basis. Data request responses supplied by the Respondents showed that each of the companies was operating its own sorting facility to which it would first transport the C&D debris for the purpose of sorting out recyclable materials.² The C&D transported to Weyerhaeuser therefore represented a residual portion of the overall C&D debris collected by the companies for which there was no other end-use.³ WAC 480-70-016(1) implies that transporting solid waste for disposal does not require a certificate as long as that activity is only “occasional” in relation to a motor carrier’s other activities.

10

The Intervenors, Washington Refuse and Recycling Association (WRRRA), Waste Management of Washington (WMW), Murrey’s Disposal Company, 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 filed Answers to Respondents’ Motion for Summary Determination, supporting Staff’s positions and opposing the Respondent Companies’ arguments.

² Order 06, pp. 3, 4.

³ Staff Motion for Summary Determination, pp. 2-4.

11

In June 2008, Judge Torem ruled on the parties' cross-motions, granting Staff's Motion for Partial Summary Determination and denying the Respondent Companies' Motion for Summary Determination. In sum, Order 06 found that transportation of C&D debris for deposit into a landfill constitutes disposal, not recycling, even if the deposited waste benefits the structural integrity of the landfill. Thus, when the Respondent Companies transported C&D debris to the Weyerhaeuser materials recovery facility in Longview, they were hauling solid waste, not recyclables.

12

WAC 480-70-016(4) sets out multiple factors for determining whether a company's operations require a solid waste certificate under RCW 81.77:

- (a) The intent of the shipper;
- (b) The intended destination of the shipment;
- (c) The actual destination of the shipment
- (d) Special handling or conditions placed on the shipment by the shipper and/or receiver;
- (e) The value of the commodity being transported;
- (f) Whether the carrier is primarily engaged in the business of providing solid waste collection or is primarily engaged in the business of providing a service other than the collection of solid waste; and
- (g) Whether the carrier holds itself out to the public as a transporter of solid waste.

Order 06 addressed factors (a) through (e), leaving the final two for further determination: whether Respondent Companies are primarily engaged in business other than transporting solid waste (including the frequency of their transportation of solid waste) and how they hold themselves out to the public.

13

Staff does not believe that the manner in which the Respondents hold themselves out to the public is a concern in this case. All of the companies' marketing materials plainly indicate that the companies hold themselves out as providing a recycling or materials recovery service. Therefore, Staff's view is that the only remaining issue is to decide

whether the Respondent Companies transportation of solid waste to Weyerhaeuser is “more than occasional,” or alternatively, whether the companies are “primarily engaged” in the transportation of commercial recyclables.

14 Since the entry of Order 06, the parties have attempted to resolve the remaining issues through settlement negotiations, as well as through a Commission-sponsored rulemaking, in Docket TG-080591. A major purpose of that rulemaking is to flesh out the commercial recycling exemption in RCW 81.77.010(8). On November 11, 2009, the Commission solicited comments on a draft rule that, unlike a previously circulated draft, is narrowly focused on the question of when a company engaging in for-hire transportation of C&D debris for recycling is exempt from regulation as a solid waste collection company. If adopted by the Commission, the current draft would provide an objective standard, based on the percentage of C&D debris that is ultimately recycled versus disposed, for deciding whether a purported transporter of recyclable C&D debris is “primarily engaged in the business of providing solid waste collection or is primarily engaged in the business of providing a service other than the collection of solid waste” (factor (f) under WAC 480-70-016(4)). The Settling Parties agree that such a standard should be adopted through rulemaking rather than through case-by-case adjudication and therefore propose this Settlement Agreement in resolution of this proceeding.

IV. DESCRIPTION OF PROPOSED SETTLEMENT

15 The settlement first seeks to have the Commission adopt the findings of the Order on Motions for Summary Judgment as its own so that the order will provide the strongest possible precedent for the industry as a whole, should any of the Respondent Companies’ competitors attempt to engage in activities that are foreclosed to the Respondents. The

settlement then makes explicit a restriction that is perhaps only implied in the Order on Motions for Summary Determination—namely, that the Respondent Companies should not haul loads of C&D material directly from their customers' job sites to the Weyerhaeuser facility. The settlement would clarify, however, consistent with Staff's proposed approach in the ongoing rulemaking, and consistent with WAC 480-70-016, that the Respondents would be allowed occasional transportation of residual, post-sorted waste loads to Weyerhaeuser so long as the amount is small in relation to the company's overall activities. The settlement does not attempt to impose a specific quantity restriction in this regard because Staff and the Respondent Companies believe that if such a standard is to be adopted, it should be adopted through rulemaking for application to the industry as a whole. The companies commit to provide the Commission and the intervening parties copies of their annual reports filed with the Department of Ecology covering the years 2009, 2010, and 2011 (and filed by April 1 of the following year). These reports document the quantity of materials handled by the Respondent Companies, in tons, by material type and by destination and final use.⁴

16

The settlement also reflects the long-standing Staff interpretation that when a company is engaged in construction or demolition work (as Respondent T&T Recovery sometimes is), the company may haul away the waste that its activities generate without obtaining a certificate under RCW 81.77. This constitutes private carriage rather than collection of solid waste for compensation.⁵

⁴ See <http://www.ecy.wa.gov/biblio/ecy040168.html> and <http://www.ecy.wa.gov/biblio/ecy040166.html>.

⁵ WAC 480-70-011(1)(g).

V. STATEMENT OF PARTIES' INTERESTS AND THE PUBLIC INTEREST

17

The chief issue to be decided in this proceeding was whether the Respondent Companies' transportation of C&D debris to Weyerhaeuser for use as industrial waste stabilizer constituted transportation of solid waste for disposal. The language of the Order Instituting Proceeding stated that if the allegations were proven, the Commission was authorized to "issue an order requiring the companies to cease and desist from collecting more than an incidental or accidental amount of non-recyclable solid waste materials and transporting such solid waste to the Weyerhaeuser facility, as such activity is solid waste collection subject to regulation under RCW 81.77." The Order on Motions for Summary Determination found transportation of C&D material to Weyerhaeuser was solid waste collection. Consequently, the Respondents ceased transporting material to Weyerhaeuser and would now commit to desist from doing so prospectively and forgo any administrative or judicial review of this decision.

18

The only instance in which the Respondent Companies wish to preserve their ability to haul waste to Weyerhaeuser is when that waste represents a small proportion of residual material left over after the companies sort out materials for *bona fide* reuse or recycling at their materials recovery facilities. Staff believes this is permitted under WAC 480-70-016(1), which implies that persons holding motor carrier permits under RCW 81.80 may transport solid waste to a disposal site on an occasional basis.⁶ Subsection (3) of the same rule indicates that one factor to be considered by the Commission in deciding whether particular operations require a solid waste certificate or a motor carrier permit is "[w]hether the carrier is *primarily* engaged in the business of providing solid waste collection or is

primarily engaged in the business of providing a service other than the collection of solid waste.” (Emphasis added.) Both of these provisions indicate a *de minimus* allowance for operations that would otherwise subject a motor carrier to regulation as a solid waste collection company.

19

Staff arguably could advocate in this proceeding for a numeric criteria for determining what “occasional” means in the context of hauling post-sorted waste to Weyerhaeuser for disposal. However, such an approach would also require the Commission to decide whether other potential destinations or end uses of construction and demolition waste should be regarded as recycling or disposal. A permissible residual waste standard is not possible unless the status of these other debatable uses is decided. Those issues, and the question of what a reasonably attainable recycling rate for C&D debris is, should be decided with input from a broader group of stakeholders. The stakeholders in the Commission rulemaking include not only the parties to this proceeding, but also the Department of Ecology (which administers an integrally related program for registration of transporters of recyclables under RCW 70.95.400 and WAC 173-345), various counties including King, Snohomish and Kitsap (each of which has responsibilities for solid waste planning within its jurisdiction), and companies representing the interests of facilities that receive C&D materials for recycling or other purposes, including Weyerhaeuser.

20

The most recently circulated rules in the pending solid waste rulemaking are targeted at the issue of the extent of the commercial recycling exemption from RCW 81.77 as it pertains to transporters of construction and demolition waste. The Respondents assert, and Staff believes, based on evidence obtained through the extensive discovery in this case, that

⁶ “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

the Respondent companies would be able to meet the recycling rate standard included in Staff's proposed rule (no more than 25 percent post-sorted residual for alternative daily cover, industrial waste stabilizer or other disposal). From stakeholder comments in the rulemaking, Staff does not anticipate any impediments to Staff's proposed approach and Staff will propose that the Commission issue a CR-102 notice of proposed rules substantially similar to the rules that were published for comment in November.

VI. LEGAL POINTS THAT BEAR ON PROPOSED SETTLEMENT


21 In WAC 480-07-700, the Commission states its support for parties' informal efforts to resolve disputes without the need for contested hearings when doing so is lawful and consistent with the public interest. The parties have resolved all of the issues in dispute between them, and their resolution complies with Commission rules and, as explained above, is consistent with the public interest.

VII. CONCLUSION

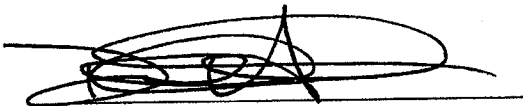
22 Because the parties have negotiated a compromise on all of the issues in this dispute and because the settlement is in the public interest, both parties request that the Commission issue an order approving the Agreement in full.

Respectfully submitted this 19th day of March, 2010.

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convenience and necessity if they transport solid waste to a disposal site on more than an occasional basis."