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2  
3 BEFORE THE WASHINGTON UTILITIES AND  
4 TRANSPORTATION COMMISSION

5 In the Matter of Determining the Proper Carrier  
6 Classification of:

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

DOCKET NO. TG-072226

NARRATIVE STATEMENT OF  
INTERVENORS IN OPPOSITION TO  
PROPOSED SETTLEMENT  
AGREEMENT

10 I. PRELIMINARY STATEMENT

11 1 This opposition to settlement agreement is filed pursuant to WAC 480-07-740(2)(c) in  
12 response to the proposed agreement served March 19, 2010 on behalf of the  
13 Respondents Glacier Recycle, LLC, Hungry Buzzard Recovery, LLC and T&T  
14 Recovery, Inc., collectively the "Respondents," and the staff of the Washington  
15 Utilities and Transportation Commission ("Staff"). The Intervenors, for the purpose of  
16 this joint filing, are Murrey's Disposal Company, Inc., Island Disposal, Inc., Waste  
17 Connections of Washington, Inc., Lynnwood Disposal d/b/a Allied Waste of  
18 Lynnwood, Eastside Disposal d/b/a Allied Waste of Bellevue, and the Washington  
19 Refuse and Recycling Association ("WRRRA"), collectively ("Intervenors.")

20 II. SETTLEMENT PROPOSAL REVIEW PROCESS

21 2 Intervenors, through counsel, will appear at the settlement hearing on April 14, 2010  
22 and will be prepared to present argument and evidence, if necessary, and assert various  
23 rights devolving to them as objecting parties to the proposed settlement under WAC  
24 480-07-740(2)(c).  
25

1 III. MATTERS IN DISPUTE

2 A. The Order on Partial Summary Adjudication, as Did the Staff's Original Motion,  
3 Identified Remaining Issues for Resolution.

4 3 On June 13, 2008, in Order 06, the Administrative Law Judge ("ALJ") Adam Torem in  
5 this proceeding granted the Commission Staff's motion for partial summary  
6 determination and denied the Respondents' cross motion for summary judgment. By  
7 that ruling, the ALJ found that Respondent companies were transporting solid waste in  
8 violation of RCW 81.77.040 in collecting and transporting industrial waste stabilizer to  
9 the Weyerhaeuser landfill in Cowlitz County. The issue "... whether the Respondents,  
10 as holders of permits issued by the Commission under RCW 81.80, have as their  
11 primary business and activity other than the collection of solid waste, and if so, whether  
12 they transport solid waste on more than an occasional basis, or hold themselves out to  
13 the public as providing solid waste collection service" was expressly reserved by the  
14 Staff in their motion for partial summary determination.<sup>1</sup> Similarly, need for  
15 determination of these questions was also reserved by Order No. 06 which noted in its  
16 opening synopsis that these "are issues that still must be resolved at hearing."<sup>2</sup>

17 4 The matters reserved for hearing by Staff's previous motion and Order No. 06 clearly  
18 beg the issue of whether the collection and transportation of those residuals at material  
19 recovery facilities ("MRFs") are in fact subject to regulation under RCW 81.80 or  
20 RCW 81.77.040. This is the focal issue remaining in the proceeding which the putative  
21 settling parties now appear to want to avoid or otherwise minimize. Indeed, the Staff  
22 even qualifies, in its proposed settlement approach, "... that the Respondents would be  
23 allowed occasional transportation of residual, post-sorted waste loads to Weyerhaeuser

24  
25 <sup>1</sup> Commission Staff's Motion for Partial Summary Determination, § 4, page 1, 2.

<sup>2</sup> Docket TG-072226, Order No. 06 on Partial Summary Determination, § 1, page 1.

1 so long as the amount is *small* in relation to the company's overall activities,"<sup>3</sup>  
2 [emphasis added] further diluting even the narrow issue resolution already achieved in  
3 this proceeding.

4 B. The Premise That the Remaining Issues Be Referred/"Punted" to the Pending  
5 Rulemaking is Problematic.

6 5 The settlement agreement does not attempt to impose a specific quantity restriction in  
7 this regard "because Staff and the Respondent Companies believe that if such a  
8 standard is to be adopted, it should be adopted through rulemaking for application to  
9 the industry as a whole."<sup>4</sup> That may have been an auspicious theory at the time, but  
10 now Intervenors believe "legal limbo" has set in.

11 6 This purported nexus between the pending rulemaking in Docket No. TG-080591 and  
12 this proceeding broaches the ultimate issue for the Intervenors in the context of  
13 evaluation and prospective enforcement of the settlement agreement as proposed.  
14 Ironically, it was actually on the initiation of the rulemaking in Docket No. TG-080591,  
15 originally noticed approximately one month before Order No. 06 was issued in this  
16 proceeding which had advised in its May 9, 2008 "Notice of Opportunity to File  
17 Written Comments," that the rulemaking would accomplish two primary goals, the  
18 second of which was: "**... whether entities transporting materials under various**  
19 **circumstances are subject to regulation under RCW 81.77 as solid waste collection**  
20 **companies, or under RCW 81.80 as common carriers of property ... New rules**  
21 **may be necessary to add clarity to this issue.**" [emphasis added.] Indeed, well after  
22 the only stakeholder meeting to date in that rulemaking proceeding, on March 11, 2009,  
23 the Staff circulated a "draft proposal for discussion purposes," proposing that current  
24 WAC 480-70-016 be modified in part as follows:

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<sup>3</sup> Narrative Supporting Settlement Agreement at § 15 at page 8.

<sup>4</sup> Narrative Supporting Settlement Agreement at § 15 at page 8.

1           **(6)     Transporting Recyclable Materials to a Sorting Facility**

2           Unless the following conditions are met, a motor carrier transporting mixed  
3           recyclable materials to a sorting facility must have a solid waste certificate  
4           issued by the commission:

5           (a)     any residual left over after sorting out material for non-disposal purposes  
6           must be transported from the sorting facility to a disposal site by a certificated  
7           solid waste collection company or by a municipality that provides solid waste  
8           collection service itself or by contract.<sup>5</sup>

9           \*\*\*\*\*

10          7       Most of the Intervenors supported the proposed effect of Draft Rule 6(a) circulated by  
11          the Staff and initially at least endorsed the concept of close tracking of the rulemaking’s  
12          “privity” with this proceeding.

13          C.     The Current Proceeding was Long Suspended, Awaiting Rule Adoption in Docket TG-  
14          080591.<sup>6</sup>

15          8       It was largely on the basis of the Staff’s draft rule proposal at least by this first phase of  
16          the rulemaking in March, 2009 that the Intervenor companies agreed to a recess of this  
17          proceeding and remained in support of a continuance pending actions in the  
18          rulemaking. However, following stakeholder comments filed in May/June, 2009  
19          (almost a year after Order No. 06), no further developments in the rulemaking docket  
20          occurred until November 16, 2009, when the Staff unexpectedly announced it had  
21          revised the goals of the rulemaking and circulated replacement rules which proposed a  
22          wholly new orientation in recommended revisions to WAC 480-70-016.

23          9       The revised Staff rule of November 16, 2009 contained a proposal focused almost  
24          solely now on the MRF itself, and allowing an exempt MRF under Department of

25          <sup>5</sup> March 11, 2009 Staff’s Draft Rule for Discussion Purposes at 3.

<sup>6</sup> Intervenors would also seek leave from the Commission, should additional rule proposals or revisions be again  
          issued during the remainder of this proceeding, to supplement the instant filing with additional argument due to  
          the proposed settlement’s attempted delegation of issues remaining in this proceeding to the rulemaking.

1 Ecology regulations or a permitted MRF that achieves a 75% recycling rate to  
2 essentially immunize for-hire carriers from any requirement to have a solid waste  
3 certificate to deliver C&D waste materials. The previous premise of draft rule 6(a) is  
4 redirected to a focus instead on a percentage threshold of MRF residuals that would  
5 eliminate any certificate requirement under RCW 81.77. Thus, in addition to the  
6 current settlement's apparent reliance on this evolving definitional standard for  
7 certification of collection and transportation activity under RCW 81.77 or 81.80, the  
8 current settlement proposal, in alluding to or predicating its position upon this latest  
9 rule iteration would now even provide that the Respondents "... be allowed occasional  
10 transportation of residual, post-sorted waste loads ... **so long as the amount of**  
11 **residual material is small in relation to the overall amount collected by the**  
12 **Respondent Company**"<sup>7</sup> [emphasis added].

13 D. The Settlement Proposal at Least Indirectly Incorporates the New Staff Draft Rule MRF  
14 Residual Standard that Varies From Existing and Proposed Standards of Law for  
Residual Waste Characterization.

15 10 There is another reason Intervenors question the proposed settlement's reliance upon  
16 subjective "sliding scale" references to the quantity of residuals remaining from MRF  
17 sorting processes and the ability of transporters to move "de minimis," "small amounts"  
18 on an "occasional" basis to disposal sites without a solid waste certificate. In addition  
19 to the impracticality of enforcing such standards, these inexact qualitative limitations  
20 are in conflict with other local government standards. The city of Seattle, for instance,  
21 in SMC 21.36.012, excludes materials that contain more than 10% waste from its  
22 definition of recyclable, beneficially used material by volume. Snohomish County, in  
23 its pending revisions to solid waste ordinances at Chs. 7.35.010 and 7.35.125 of the  
24 Snohomish County Code, echoes the 10% limitation by now proposing in its flow  
25

<sup>7</sup> *Settlement Agreement* at § 10, page 4.

1 control ordinance, “[t]he contents of any containers of solid waste consisting of 10% or  
2 more by volume, of non-recyclable materials, must be processed at a Snohomish  
3 County Solid Waste facility.”

4 11 This divergence from local government definitions of how much residual from  
5 recycling activities constitutes solid waste also raises the specter of conflicts with local  
6 jurisdictional health districts and solid waste management plans implemented pursuant  
7 to RCW 70.95 in exercise of a local government’s police power authority, a concern  
8 Intervenor cited previously on the record at the January 27, 2010 status conference.

9 12 While the Staff and Respondents may now rely on the latest iteration of the proposed  
10 rule in Docket No. TG-080591 and the 25% or less MRF residual “compromise”  
11 standard there proposed, that threshold is undeniably controversial, undoubtedly subject  
12 to potential revision at this point and unsupported by any existing external statutory or  
13 regulatory quantitative reference.

14 13 The Staff’s quantitative threshold in the latest rule rendition also appears contrary to the  
15 U.S. 9<sup>th</sup> Circuit Court of Appeal’s characterization in *AGG v. Washington County et al.*,  
16 281 F.d 3d 1324 (9<sup>th</sup> Cir. 2002), where it had found a solid waste residual factor  
17 collected by an unfranchised hauler as being:

18 . . . undebatable that at least ten to twenty percent of everything AGG  
19 collects, thousands of tons, is ‘garbage and refuse.’ This is a lot of  
20 garbage, and we cannot accept the argument that Congress precluded  
local government entities from regulating its collection.

21 281 F.3d, 1324, 1330.

22 14 The settlement agreement thus now not only eschews a previous draft staff premise on  
23 certification requirements from MRFs, but then delegates the quantification of any  
24 objective standard by which the settlement agreement could be enforced against  
25

1 Respondents to an on-going rulemaking which advocates a divergent measurement  
2 standard for characterizing solid waste transportation.

3 E. The Settlement Agreement Proposes to Attach a Formative, Subjective Definitional  
4 Standard from a Recently-Revised Rulemaking Proposal Onto an Imprecise and  
5 Premature Resolution of this Complaint Action.

6 15 The settlement agreement narrative continues in justifying its “sliding scale” subjective  
7 standard by explaining Respondents could haul solid waste:

8 when . . . waste represents a small proportion of residual material left over  
9 after the companies sort out materials for *bona fide* reuse or recycling at their  
10 materials recovery facilities. Staff believes this is permitted under WAC 480-  
11 70-016(1), which **implies that persons holding motor carrier permits under**  
12 **RCW 81.80 may transport solid waste to a disposal site on an occasional**  
13 **basis.**<sup>8</sup> [Emphasis added.]<sup>9</sup>

14 16 In the Intervenors’ views, to provide for a “de minimis” allowance for “occasional”  
15 operations “implied” as a statutory exemption that would otherwise subject a motor  
16 carrier to regulation as a solid waste collection company creates a “moving target”  
17 loophole significant enough to drive a solid waste collection vehicle through.

18 17 Indeed, it is the interrelation of these subjective interpretations of existing WAC 480-  
19 70-016 and the apparent highly fluid rulemaking definitions now pending for almost  
20 two years at the Commission, that should cause pause for great concern for the  
21 acceptance of the Staff and Respondents’ current proposal. What the Staff and  
22 Respondent Companies are apparently positing is a settlement to be cross-referenced to

23 <sup>8</sup> *Narrative Supporting Settlement Agreement* at § 18 at page 9.

24 <sup>9</sup> The existing rule cited here, WAC 480-70-016, rather than creating a broad exemption to a certificate  
25 requirement, actually states: “. . . 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, or if they hold themselves out to the public as providing solid waste collection service.”

[Emphasis added].

Recall, this rule framed the remaining issue the Staff featured in its motion for partial summary determination  
(See, § 3, above). Yet here, in the Settlement Narrative justification, only the exception is featured, which  
Intervenors believe misinterprets the thrust of the current rule with the exception now seemingly swallowing the  
rule.

1 contingent, prospective developments in a rulemaking which at this point are highly  
2 uncertain as to substance and timing for adoption. Moreover, to feature unspecific  
3 volume or load number amounts described as “de minimis,” based on “allowed  
4 occasional transportation of residual, post-sorted loads”<sup>10</sup> in “implied” statutory  
5 exemption hardly lends any certainty either to a precedential case adjudication ruling or  
6 to a broad prospective rulemaking.<sup>11</sup>

#### 7 IV. CONCLUSION

8 <sup>18</sup> In advocating this current settlement, the Staff and Respondents have offered some  
9 rather novel permutations of current WAC 480-70-016 precisely at the time the Staff  
10 has proposed rules to substantially revise that long-standing regulation. Again, they  
11 appear to have done so largely in a regulatory vacuum based on interpretive fluidity and  
12 then rather hastily submitted this settlement proposal and avoided development of a  
13 hearing record in this complaint action and redirected the remaining issues to a long-  
14 pending rulemaking. Finally, this has all occurred in apparent response to the  
15 Intervenors’ recent opposition to continuing indefinite postponements of this  
16 proceeding, thwarting a record development which might lend substantial guidance not  
17 only to the parties in this proceeding, but might also be useful in formulating exactly  
18

19 <sup>10</sup> *Narrative Supporting Settlement Agreement* at § 15 at page 8.

20 <sup>11</sup> The settlement proposal also leaves open the issue of whether collection and transportation of construction and  
21 demolition debris by Respondents from customer locations to disposal sites other than the Weyerhaeuser facility  
22 requires a certificate of public convenience and necessity (Intervenors would argue that under Order No. 06, such  
23 activity would so require). Additionally, the proposed settlement, on the crux of the issues remaining in Order  
24 No. 06, is also silent about whether shipments of loads to a MRF that are not subject to any sorting activity but are  
25 simply transshipped from a MRF, would also require a certificate under RCW 81.77.040. Again, Intervenors  
believe that any such shipments do not fall within any existing regulatory or statutory exemptions. They also  
believe the proposed settlement if approved without any further evidentiary record could be used as a shield by  
Respondents or “sham recycler” operators under a premise advanced by the settling parties here that this is “de  
minimis” and “the residual material is small in relation to the overall amount collected” (Settlement Agreement,  
§ 10, page 4), or other such facile limitation which transporters might use to unilaterally exempt their operations  
from RCW Title 81.77 coverage.

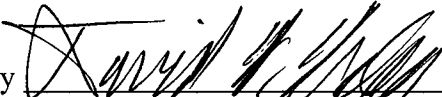


1 the type of difficult definitional standards on specific facts the rulemaking seeks to  
2 facilitate.

3 DATED this 29<sup>th</sup> day of March, 2010.

4 Respectfully submitted,

5 WILLIAMS, KASTNER & GIBBS PLLC

6  
7 By 

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15 RYAN SELLS UPTEGRAFT, INC. P.S.

16  
17 By  *on behalf and  
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**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.

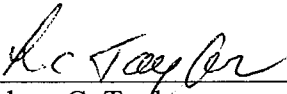
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7 DATED at Seattle, Washington, this 29<sup>th</sup> day of March, 2010.

8   
9 \_\_\_\_\_  
Lyndsay C. Taylor