

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In re the Matter of Determining the Proper	)	DOCKET TG-072226
Carrier Classification of	)	
	)	ORDER 08
GLACIER RECYCLE, LLC;	)	
HUNGRY BUZZARD RECOVERY, LLC;	)	FINAL ORDER APPROVING
AND T&T RECOVERY, INC.	)	AND ADOPTING MULTIPARTY
	)	SETTLEMENT AGREEMENT
	)	SUBJECT TO CONDITION;
	)	AUTHORIZING AND
	)	REQUIRING COMPLIANCE
.....	)	FILINGS

1 ***Synopsis:** The Commission approves and adopts, subject to condition, a multiparty Settlement Agreement filed by Commission Staff and the Respondent Companies that, among other things, confirms that the transportation of construction and demolition debris for deposit into a landfill constitutes disposal, allows the Respondent Companies to temporarily continue limited hauling of residual post-sorted waste loads, and requires each Respondent Company to file its annual report summarizing amounts of materials handled and disposed of each year. The Commission finds the proposed Settlement Agreement, subject to a temporary exemption regarding hauling frequency, implements a reasonable resolution to the remaining issues in this docket.*

**SUMMARY**

2 **PROCEEDINGS.** Docket TG-072226 involves a special proceeding instituted in December 2007 under Revised Code of Washington (RCW) 81.04.510 by the Washington Utilities and Transportation Commission (Commission) on its own motion to determine whether three companies holding motor freight common carrier permits under RCW 81.80 (Respondent Companies) are 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.

3 **PROCEDURAL HISTORY.** The Commission convened an initial prehearing conference in this docket at Olympia, Washington, on Thursday, January 24, 2008, before Administrative Law Judge (ALJ) Adam E. Torem. In June 2008, Judge Torem ruled on the parties' competing motions for partial summary determination and concluded that transportation of construction, demolition, and land clearing (CDL or C&D) debris for deposit into a landfill constitutes disposal. According to the ALJ's ruling, even CDL debris delivered as industrial waste stabilizer (IWS) to benefit the structural integrity of a landfill cannot be considered to be recycled material. Still to be determined at hearing were the primary business focus of the Respondent Companies and how each carrier holds itself out to the public. *Order 06.*

4 In the 18 months following entry of Order 06, the parties engaged in settlement negotiations and also participated in a Commission rulemaking proceeding (Docket TG-080591) designed to address issues similar to those raised in this matter. In December 2009, Judge Torem required the parties to settle the case or prepare for hearing.

5 On March 19, 2010, Commission Staff and the Respondent Companies filed a proposed Settlement. They ask that the Commission adopt and endorse Order 06, allow the Respondent Companies limited permission to continue hauling small amounts of waste for disposal, and require the Respondent Companies to file annual reports detailing the amount of materials they receive, sort, dispose of, and recycle over three years.

6 On March 29, 2010, certain intervenors filed a Narrative Statement in Opposition to the Proposed Settlement Agreement.

7 On April 14, 2010, the Commission conducted an evidentiary hearing on the proposed multiparty Settlement.

8 **PARTY REPRESENTATIVES.** Donald L. Anderson, Eisenhower & Carlson, PLLC, Tacoma, Washington, represents Glacier Recycle, LLC (Glacier), Hungry Buzzard Recovery, LLC (Hungry Buzzard), and T&T Recovery, Inc (T&T) (collectively "the Respondent Companies"). James K. Sells, Ryan Sells Uptegraft,

Inc. P.S., Silverdale, Washington, represents the Washington Refuse and Recycling Association (WRRRA). Polly L. McNeill, Summit Law Group PLLC, Seattle, Washington, represents Waste Management of Washington, Inc. (WMW). David W. Wiley, Williams Kastner & Gibbs PLLC, Seattle, Washington, represents Murrey's Disposal Company, Inc. (Murrey's), Island Disposal, Inc. (Island), Waste Connections of Washington, Inc. (WCW), Lynnwood Disposal d/b/a Allied Waste of Lynnwood (Lynnwood Disposal), and Eastside Disposal d/b/a Allied Waste of Bellevue (Eastside Disposal). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff").<sup>1</sup>

- 9 **COMMISSION DETERMINATION.** The Commission finds on the basis of the evidence presented that Order 06 correctly implements current law and regulations governing transportation of solid waste and recyclables. The Commission further finds that the terms of the proposed Settlement generally provide the Commission and the Respondent Companies with an acceptable compromise to allow Glacier, Hungry Buzzard, and T&T to continue their individual operations without obtaining G-certificates while the Commission deliberates further on the adoption of a new Commission rule governing transportation of solid waste. However, the Respondent Companies' transportation of solid waste to a disposal site might be characterized as occurring more frequently than current rules permit. Accordingly, until the Commission completes its ongoing review of solid waste rules governing this area, the Commission grants the Respondent Companies a temporary exemption to the provisions of WAC 480-70 that would prohibit their transportation of solid waste to a disposal site on more than an occasional basis and, subject to this condition, finds the settlement furthers the public interest and therefore approves and adopts the Settlement Agreement in full resolution of the issues raised in this proceeding.

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<sup>1</sup> In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See RCW 34.05.455.*

**MEMORANDUM**

**I. Background**

- 10 Glacier Recycle operates and maintains a material recovery and recycling facility, commonly known as an “MRF,” in Auburn, Washington. Glacier provides its customers with containers into which they deposit mixed CDL materials, wood waste, and/or asphalt roofing materials. Glacier sorts the incoming waste stream and, in the past, hauled “industrial waste stabilizer” (IWS) to a Weyerhaeuser Company facility in Cowlitz County for disposal.<sup>2</sup>
- 11 Hungry Buzzard operates and maintains a sorting facility in Snohomish County. Hungry Buzzard provides its customers with containers into which they deposit mixed CDL materials, wood waste, metals, and a variety of other potentially recyclable materials. Hungry Buzzard sorts the incoming waste stream and, in the past, hauled some CDL materials to the Weyerhaeuser facility.<sup>3</sup>
- 12 T&T operates and maintains a sorting facility in Bellingham, Washington. T&T provides their customers with containers into which they deposit mixed CDL materials, wood waste, sheetrock, asphalt, and a variety of other materials. T&T sorts its incoming waste stream and hauls some C&D debris to the Weyerhaeuser facility.<sup>4</sup>
- 13 Over the last decade, Commission Staff was aware of various companies in Washington, including Respondent Companies, collecting CDL debris from customers, sorting out recyclables, and then hauling some portion of the residual material to the Weyerhaeuser facility in Longview, Washington. In early 2006, Commission Staff opined that this practice was exempt from regulation as solid waste collection because they classified it as transportation of a commodity. However, Commission Staff changed its position in April 2007, determining that the material being hauled was solid waste subject to regulation under RCW 81.77. Commission

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<sup>2</sup> See Order 06, ¶ 8.

<sup>3</sup> *Id.* at ¶ 9.

<sup>4</sup> *Id.* at ¶ 10.

Staff pursued this action to clarify that depositing CDL debris into a landfill constituted disposal, not recycling, and, pursuant to statute, required a certificate of public convenience and necessity for solid waste, or G-certificate.<sup>5</sup>

- 14 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.
- 15 In June 2008, after considering the parties' cross-motions for partial summary judgment, Judge Torem entered Order 06 and upheld Commission Staff's position. Order 06 addressed the first five factors of WAC 480-70-016(4), leaving the final two factors (f and g) for later determination at an evidentiary hearing that was originally scheduled for September 9-11, 2008.
- 16 The parties entered into settlement negotiations on the remaining issues and, after several continuances of the hearing dates, asked in December 2008 that the procedural schedule be suspended. At that time, the parties believed that the ongoing solid waste rulemaking proceeding (Docket TG-080591) might be the most appropriate and efficient forum for identifying a solution to the remaining issues presented in this docket.

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<sup>5</sup> See Narrative Supporting Settlement Agreement, ¶¶ 5-8.

17 After waiting more than a year, Judge Torem set firm dates for the parties to file a proposed settlement or be ready to present the remaining issues for hearing. On March 19, 2010, Commission Staff and the Respondent Companies (settling parties) filed a proposed settlement. Intervenors WCW, Murrey's, Island, Lynwood Disposal, Eastside Disposal, and the WRRRA oppose portions of the Agreement. Intervenor WMW did not join in the Agreement but does not oppose it.

## II. Settlement Agreement

18 We summarize in this section the settling parties' Agreement, which is attached to, and made a part of, this Order by reference (Appendix A). If any inconsistency between our summary here and the Agreement is perceived, the express terms of the Agreement control, except as explicitly modified below.

19 The settling parties' Agreement consists of three main parts: (a) formalizing the ruling reached in Order 06, (b) addressing the Respondent Companies' ongoing handling of CDL debris, and (c) providing the Commission with a means to enforce the terms of the settling parties' proposal. We set out and review each part of the proposal in turn.

### A. Adoption of Order 06

20 The settling parties request that the Commission endorse and adopt Judge Torem's Order 06 on Motions for Summary Determination thus affording it the precedential effect of a Commission final order.<sup>6</sup> No party objects to this provision of the proposed Settlement.

### B. Respondent Companies – Prohibited and Permitted Activities

21 The settling parties agree that the Respondent Companies will cease and desist from transporting C&D debris directly from customer locations to the Weyerhaeuser

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<sup>6</sup> As part of this request, the Respondent Companies agree to waive whatever rights they might have to pursue administrative or judicial review of Order 06. *See* Settlement Agreement, ¶ 9, and Narrative Supporting Settlement Agreement, ¶ 17.

facility in Longview unless they first obtain a G-Certificate. No party objects to this portion of the proposed Settlement.

22 The settling parties agree that the Respondent Companies may continue their own demolition activities and the associated transport of incidental C&D debris from demolition sites directly to disposal sites without a G-Certificate. No party objects to this portion of the proposed Settlement which reflects the “private carriage” exemption contained in WAC 480-70-011(1)(g).<sup>7</sup>

23 Further, the settling parties agree that the Respondent Companies operating their own MRFs may transport residual post-sort debris to a disposal site, also without a G-Certificate, but only if the amount of residual material disposed of remains “small in relation to the overall amount collected” by the company.<sup>8</sup> The opposing parties object to this language limiting the quantity of residual debris the Respondent Companies can dispose of as too vague and contrary to our existing rules.

### **C. Compliance Filings**

24 The settling parties agree that in 2010, 2011, and 2012, the Respondent Companies must file with the Commission copies of the annual reports they are obligated to file with the Department of Ecology pursuant to WAC 173-350, as well as copies of the Washington State Recycling Survey. The opposing parties question the reliability of the data contained in these reports and, consequently, their relevance for any potential enforcement action.

### **III. Discussion and Decision**

25 WAC 480-07-750(1) states in part: “The commission will approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information

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<sup>7</sup> WAC 480-07-011(1) sets out several collection and hauling operations that are not regulated by the commission, including “the operations of private carriers who, in their own vehicles, transport solid waste purely as an incidental adjunct to some other established private business owned or operated by them in good faith.”

<sup>8</sup> Settlement, ¶ 10.

available to the commission.” Thus, the Commission considers the individual components of the Stipulation under a three-part inquiry. We ask:

- Whether any aspect of the proposal is contrary to law;
- Whether any aspect of the proposal offends public policy.; and,
- Whether the evidence supports the proposed elements of the Settlement Agreement as a reasonable resolution of the issue(s) at hand.

26 The Commission must determine one of three possible results:

- Approve the proposed settlement without condition;
- Approve the proposed settlement subject to condition(s); or,
- Reject the proposed settlement.

After full consideration of all party positions, we find it appropriate to approve the proposed settlement subject to one condition.

27 *Adoption of Order 06.* No party objects to the Settlement’s provision regarding the Commission’s formal endorsement and adoption of Order 06. Commission Staff wishes to see the rationale of that order become precedent that applies to all firms in the solid waste industry, thereby deterring haulers with no solid waste certificate from attempting to engage in activities that are now foreclosed to the Respondents.<sup>9</sup>

28 We have reviewed Order 06 and find that it correctly applies prevailing law and regulations regarding the transportation of solid waste and recyclables, and properly concludes that depositing CDL debris into a landfill is disposal that requires a G-certificate. The Commission will endorse and adopt Order 06 as a precedential decision.

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<sup>9</sup> Narrative Supporting Settlement Agreement, ¶ 15.

- 29 *Ongoing Transportation of CDL Waste Respondent Companies.* The second portion of the Settlement Agreement implements a cease and desist order prohibiting the Respondent Companies from transporting CDL waste to the Weyerhaeuser facility in Longview without a G-certificate. No party objects to this aspect of the proposal and we also conclude that this arrangement reasonably follows from Order 06.
- 30 The second portion the Settlement Agreement goes on to specifically allow for the “private carriage” of construction and demolition debris if a Respondent Company conducts its own demolition operations. As noted above, WAC 480-07-011 exempts from regulation such hauling “incidental” to an established demolition business.
- 31 Further, this portion of the Settlement also carves out a subjective but quantity-based exception designed to allow the Respondent Companies to operate their sorting yards and then transport residual debris to a disposal site without a G-certificate as long as the amount of residual material disposed of is “small in relation to the overall amount collected” by the company. The intervening parties opposing the Settlement object to this language as too vague.
- 32 The settling parties acknowledge that at least one of the Respondent Companies has several trucks per day leave its sorting facility to dispose of residual debris. According to estimates presented at the hearing, outgoing loads of residual debris represent approximately five percent of the company’s total volume. Commission Staff and the Respondent Companies contend that this is a small amount in relation to the overall amount of debris collected and sorted by the company and such daily disposal activity would be allowed under the proposed Settlement.
- 33 The intervenors objecting to the Settlement argue that under the current rules, regular and daily disposal activities should require a G-certificate. WAC 480-70-016(1) provides as follows:

Chapter 81.77 RCW is intended to cover operations of carriers whose primary business is transporting solid waste for collection and/or disposal. 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.

They argue that the “small in relation to” exception violates the temporal restriction of WAC 480-70-016(1) that requires a G-certificate for transporters who dispose of solid waste on more than an occasional basis.

34 The Commission shares the objecting intervenors’ concern with whether or not this aspect of the Settlement is contrary to or violates provisions of WAC 480-70. “Occasional” is defined in WAC 480-70-041 to mean “occurring at irregular and infrequent intervals.” The rule goes on to explain that the term “occasional” is “qualitative, not quantitative, in that the term applies to services that are only performed from time-to-time, not that the solid waste hauling is only a small part of services offered.” At hearing, Commission Staff conceded that it had not applied the temporal limitations of this rule to the proposed Settlement, noting that the ongoing solid waste rulemaking (Docket TG-080591) was reviewing this issue.

35 As presented, we conclude that the Settlement is contrary to WAC 480-70-016(1). Because we believe that resolving this matter now is in the best interest of allowing Commission Staff to focus on completing the pending solid waste rulemaking,<sup>10</sup> we condition our approval of the proposed Settlement by granting a limited exemption to WAC 480-70-016(1) that would terminate 30 days after the effective date of the resolution of the issues in Docket TG-080591. We conclude that this is in the public interest by allowing the parties to continue limited operations until the Commission establishes a rule affecting all carriers similarly situated to the Respondent Companies.

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<sup>10</sup> We understand that the rulemaking in Docket TG-080591 is now on hold awaiting the outcome of this matter.

36 WAC 480-07-110 provides that the Commission may grant an exemption from or modify the application of its rules in individual cases if consistent with the public interest and the purposes of the underlying regulation:

The standard for consideration is the public interest standard. Factors the commission may consider include whether application of the rule would impose undue hardship on the requesting person, of a degree or a kind different from hardships imposed on other similarly situated persons, and whether the effect of applying the rule would be contrary to the underlying purposes of the rule.

Here, we determine it consistent with the public interest to allow the Respondent Companies to continue the types of transportation of residual debris contemplated by the Settlement on an interim basis, expiring 30 days after the effective date of the final adoption resolution in Docket TG-080591. All parties recognize that this arrangement likely will be altered by resolution of the pending rulemaking docket. Therefore, allowing this temporary exemption prevents the Respondent Companies from having to change their operations multiple times over the course of the coming months.

37 *Compliance Filings.* The third and final portion of the proposed Settlement requires the Respondent Companies to file with the Commission copies of the Washington State Recycling Survey and annual reports required by the Department of Ecology under WAC 173-350. We recognize the figures contained in these reports are generated by the individual companies and that some of the data may be difficult to audit with a high degree of accuracy. Nevertheless, we accept Commission Staff's representation that there are sufficient means for verifying this data so as to confirm each company's compliance with the Settlement. We conclude that these quantity-specific reports will allow Commission Staff to adequately enforce the "small in relation to" language contained in the Settlement Agreement.

38 *Summary.* We condition our approval on a temporary exemption to WAC 480-70-016(1). Based on that condition, we find the terms of the Settlement proposed by the parties to reasonably resolve the issues raised in this proceeding for the time being.<sup>11</sup> The settling parties made compromises relative to their respective litigation positions to arrive at end results that are fair, just and supported by the evidence in the record. Further, the terms of the Settlement Agreement prevent the possibility of a sequence of differing regulatory constraints on Glacier, Hungry Buzzard, and T&T due to the Commission's change from its prior interpretation of this area of law and the pending rulemaking in Docket TG-080591. For the time being, the Respondent Companies will be able to continue the majority of their individual operations without obtaining G-certificates pending adoption of a new or revised Commission rule governing transportation of solid waste for the entire industry.

### **FINDINGS OF FACT**

39 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

40 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate the rates,

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<sup>11</sup> We remain troubled by the question of whether the hauling of residual waste from a MRF or similar processing facility to a landfill is "disposal" so that any such transportation must be done by a G-certificated carrier. In that context, we are not convinced that this settlement, in all aspects, represents an accurate interpretation of the requirements of RCW 81.77. That legal issue is at the heart of the pending rulemaking proceeding and will be more fully determined there, as informed by the facts of the solid waste and recycling industries presented in that docket. However, for the time being, while this settlement remains in effect (which the parties acknowledge may only be until the conclusion of the pending rulemaking proceeding), the Commission, in its discretion, will not seek to strictly enforce provisions of RCW 81.77 so long as the terms of this Agreement are adhered to by the Respondent Companies. To the extent that deferring decision on this legal issue is inconsistent with the Commission's rule on approving settlements (WAC 480-07-750(1)), then we grant an exemption to that rule, too, pursuant to WAC 480-07-110(1), in light of the pending rulemaking proceeding that will clarify the Commission's position on what is or is not lawful under RCW 81.77.

rules, regulations, practices, and accounts of public service companies, including solid waste companies.

- 41 (2) Glacier Recycle, LLC, Hungry Buzzard Recovery, LLC, and T&T Recovery, Inc., each hold common carrier certificates from the Commission under RCW 81.80.
- 42 (3) The Commission initiated a proceeding on December 28, 2007, to determine if Glacier Recycle, LLC, Hungry Buzzard Recovery, LLC, and T&T Recovery, Inc., should be classified as solid waste haulers under RCW 81.77.
- 43 (4) In June 2008, an administrative law judge held that the Respondent Companies' transportation of construction, demolition and land clearing waste to be permanently placed in a landfill is disposal of the material subject to regulation under RCW 81.77. *Order 06*.
- 44 (5) In March 2010, Commission Staff and the Respondent Companies filed a Settlement Agreement designed to resolve the remaining issues in this docket.

### **CONCLUSIONS OF LAW**

- 45 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 46 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings.
- 47 (2) Under Washington Administrative Code (WAC) 480-70-016(4)(a-e), depositing CDL debris into a landfill is disposal and requires a solid waste certificate under RCW 81.77.040 unless the carrier is primarily engaged in the business of providing a service other than the collection of solid waste.

- 48 (3) The Respondent Companies should cease and desist from transporting CDL debris from customer locations to the Weyerhaeuser facility in Longview, Washington, without first obtaining a solid waste certificate.
- 49 (4) Subject to the condition of a temporary exemption from the “occasional basis” limitation in WAC 480-097-016(1), the Respondent Companies may continue to dispose of CDL debris generated from their own demolition activities and also residual debris sorted out from recyclable materials at their own material recovery facilities so long as such residual debris remains small in relation to the overall amount collected.
- 50 (5) The Respondent Companies should be required to make annual compliance filings to ensure the amounts of residual debris
- 51 (6) Subject to the condition of a temporary exemption from WAC 480-70-016(1), the Settlement Agreement is consistent with the public interest and should be approved.
- 52 (7) The Commission should retain jurisdiction to effectuate the terms of this Order.

**ORDER**

**THE COMMISSION ORDERS That:**

- 53 (1) The Settlement Agreement proposed by Commission Staff, Glacier Recycle, LLC, Hungry Buzzard Recovery, LLC, and T&T Recovery, Inc., is approved and adopted in full resolution of the issues presented in this matter, subject to the condition that the companies are granted a temporary exemption from the requirements of WAC 480-70-016(1), consistent with the terms of this Order.

- 54 (2) Glacier Recycle, LLC, Hungry Buzzard Recovery, LLC, and T&T Recovery, Inc., are required to make the annual compliance filings described in the Settlement Agreement.
- 55 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective July 9, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.**