

RECEIVED
RECORDS MANAGEMENT
2008 MAR 26 PM 4:03
STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

BEFORE THE WASHINGTON STATE
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 No.: TG-072226

MOTION TO AMEND PROTECTIVE
ORDER

I. INTRODUCTION AND REQUEST FOR RELIEF

Glacier Recycle, LLC, Hungry Buzzard Recovery, LLC, and T&T Recovery, Inc. (collectively, the “**Carriers**”), by and through their counsel of record, hereby move pursuant to WAC 480-07-420 for entry of an Order amending the Protective Order entered on February 29, 2008. The Protective Order should be amended because, as entered, it does not adequately protect the Carriers’ confidential information from dissemination to its competitors.

II. STATEMENT OF RELEVANT FACTS

This administrative hearing concerns the Carriers’ transportation of construction, demolition and land clearing (“**CDL**”) waste to a Weyerhaeuser facility in Longview, Washington. *See generally, Order Instituting Special Proceeding, ¶ 5.*

On February 29, 2008, the Washington Utilities and Transportation Commission (“**Commission**”) entered a Protective Order which, in pertinent part, restricted disclosure of and access to information that might compromise the Carriers’ “ability to compete fairly” or “otherwise impose a business risk” if disseminated to without certain protections provided

1 therein.¹ The Protective Order specifically provides that such confidential information shall only
2 be made available to the “Commissioners, Commission Staff (which may include various experts
3 and consultants), the presiding officer(s), and counsel for the parties for this proceeding,
4 including counsel for Commission Staff, and attorneys’ administrative staff such as paralegals.”
5 Ex. B, ¶ 7 (emphasis added). Notably, the Protective Order does not authorize dissemination of
6 confidential information to the Intervenors themselves.

7 One of the Intervenors, the Washington Refuse and Recycling Association (“WRRA”), is
8 represented by James K. Sells, an attorney with Ryan Sells Upthegraft, Inc. P.S. As noted in the
9 WRRA’s Petition to Intervene, the WRRA is a trade association which represents over thirty
10 solid waste haulers in Washington state. *WRRA Petition*, ¶ 2. Mr. Sells is General Counsel to
11 the WRRA.² Mr. Sells’ former law partner, Gordon Waldren, is one of the WRRA’s lobbyists.
12 *See* Ex. B. The Carriers are not concerned that Mr. Sells will intentionally disseminate their
13 confidential information to the WRRA and/or its members; rather, the Carriers’ concern is that
14 Mr. Sells’ close relationship with the WRRA, its staff and its members will lead to the
15 inadvertent dissemination of such confidential information.³

16 As acknowledged by the entry of a Protective Order in these proceedings, dissemination
17 of the Carriers’ confidential information would have a substantial, detrimental impact on their
18 ability to compete. As such, the Carriers must vigorously protect against the dissemination of
19 this information to their competitors, including the possibility of inadvertent disclosure.

20 III. AUTHORITY AND ARGUMENT

21 WAC 480-07-420(2) provides that the Commission may amend a protective order “to
22 meet the parties’ and the commission’s needs in individual cases.” WAC 480-07-420(3) further
23 provides that:

24
25 _____
26 ¹ A true and correct copy of the Protective Order is attached hereto as Exhibit A.

² A true and correct copy of the WRRA’s “Staff” page on its website is attached as Exhibit B.

³ In filing this motion, the Carriers intend no disrespect to Mr. Sells nor do they intend to impugn his ethics.

1 Upon motion by a party or by the person from whom discovery is sought that
2 establishes a need to protect a party or person from annoyance,
3 embarrassment, oppression, or undue burden or expense, the presiding officer
4 may make any order, including one or more of the following, that:

- 5 (a) The discovery will not be allowed;
6 (b) The discovery will be allowed only on specified terms and
7 conditions;
8 [...] (g) A trade secret or other confidential research, development, or
9 commercial information will not be disclosed or will be disclosed
10 only in a designated way; [...]

11 The presiding officer may order that any party or person provide or permit
12 discovery on such terms and conditions as are just, if the commission denies a
13 motion for a protective order in whole or in part.

14 (Emphasis added).

15 Here, the Protective Order as entered does not adequately protect the Carriers'
16 confidential information from dissemination to the WRRRA and its members. Although the
17 Protective Order provides that counsel for the Intervenors, but not the Intervenors themselves,
18 will have access to the Carriers' confidential information, this provision is not sufficient in light
19 of Mr. Sells' close relationships with the WRRRA and its members. It will be well-nigh
20 impossible for Mr. Sells to meet his ethical obligations in advising his client, the WRRRA, with
21 respect to these proceedings and other matters while maintaining the confidentiality of the
22 Carriers' confidential information, or to adequately safeguard this information from inadvertent
23 disclosure. It is beyond dispute that dissemination of the Carriers' confidential information
24 would have a substantial, detrimental impact on the Carriers' ability to compete. There is also no
25 reasonable dispute that such an impact is precisely what WAC 480-07-420(3) is designed to
26 avoid—"annoyance, embarrassment, oppression, or undue burden or expense;" indeed, the
lasting financial impact disclosure would have upon the Carriers exceeds the interests sought to
be protected in WAC 480-07-420. The Protective Order should be amended accordingly.

///

///

MOTION TO AMEND PROTECTIVE ORDER - 3

00380783.DOC

EISENHOWER 1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
EISENHOWER & CARLSON, PLLC Tel: 253.572.4500
Fax: 253.272.5732

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

VI. CONCLUSION

For the foregoing reasons, the Carriers respectfully request that the Commission enter an Order amending the Protective Order to specifically preclude dissemination of the Carriers' confidential information to the WRRRA's counsel.

DATED this 25 day of March, 2008.

EISENHOWER & CARLSON, PLLC


By: 
Donald L. Anderson, WSBA # 8373
Ian M. Bauer, WSBA # 35563
Attorneys for Glacier Recycle, LLC and
T&T Recovery, Inc.

EXHIBIT A

[Service Date February 29, 2008]

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

In re the Matter of Determining the Proper)	DOCKET TG-072226
Carrier Classification of)	
)	
GLACIER RECYCLE, LLC;)	ORDER 03
HUNGRY BUZZARD RECOVERY, LLC;)	
AND T&T RECOVERY, INC.)	
.....)	PROTECTIVE ORDER
)	

1 The Washington Utilities and Transportation Commission (Commission) finds that a protective order to govern disclosure of proprietary and confidential information is necessary in this proceeding. The Commission provided the parties an opportunity to comment on the need for a protective order and submit proposed orders, considered their comments and submissions, and finds as follows:

- a. It is likely that proprietary and confidential information will be required to resolve the issues in this proceeding.
- b. Absent a protective order, a significant risk exists that confidential information might become available to persons who have no legitimate need for such information and that injury to the information provider could result.

2 Accordingly, the Commission enters this Protective Order in accordance with Revised Code of Washington (RCW) 34.05.446 to govern the discovery and use of proprietary and confidential documents in this proceeding.

A. General Provisions

3 **Confidential Information.** All access, review, use, and disclosure of any material designated by a party to this proceeding as confidential (referred to in this Order as "Confidential Information") is governed by this Order and by Washington Administrative Code (WAC) 480-07-160. The Commission expects Confidential Information may include customer names, customer lists, marketing methods or strategies, business plans and policies, pricing information, and various other materials concerning commercially sensitive information or trade secrets; however,

the party wishing to designate material as Confidential Information carries the burden of proving proper designation (*see* ¶16 of this Order). The Commission requires the parties to redact such information from the primary exhibits and provide redacted versions under separate cover in the manner described below. The Commission may reject a filing or any other submission that fails to segregate Confidential Information, or categorizes clearly public information as confidential.

- 4 Parties must carefully scrutinize potentially confidential material, and limit the amount they designate “Confidential Information” to only information that truly might compromise their ability to compete fairly or that otherwise might impose a business risk if disseminated without the protections provided in this Order. The first page and individual pages of a document determined in good faith to include Confidential Information must be marked by a stamp that reads: “**Confidential Per Protective Order in WUTC Docket TG-072226**”. Placing a Confidential Information stamp on the first page of a document indicates only that one or more pages contains Confidential Information and will not serve to protect the entire contents of the multi-page document. Each page of the redacted version of a document that contains Confidential Information must be marked separately to indicate where confidential information is redacted. The confidential (i.e., unredacted) version must be provided on yellow or canary-colored paper with references (e.g., highlighting or other markings) to show where Confidential Information is redacted in the original document.
- 5 **Confidential and Redacted Versions – Filing Requirements.** Parties must file complete confidential (i.e., unredacted) and redacted versions of testimony, exhibits, and briefs with the Commission. This includes electronic versions (*see* WAC 480-07-140(6)(b)), and requires that all CD-ROMs, diskettes, and electronic mail specify whether the file is confidential, redacted, or public. As required by ¶¶ 30-33 of Order 02, *Prehearing Conference Order*, parties must generally file an original and seven (7) copies of all documents filed with the Commission; however, when filing both confidential and redacted versions of a document with the Commission, only an original plus one (1) redacted copy need be filed (for retention by the records center).
 - a. If a witness has a confidential portion of his/her testimony, the sponsoring party must provide a complete redacted version of the testimony and a complete confidential version, with confidential pages on yellow or canary-colored paper.

- b. Parties must submit (at least) two CD-ROMS, diskettes, or e-mail attachments, one with the electronic version of the confidential text and one with the electronic version of the redacted text.
 - i. Parties MUST identify the confidential CD-ROMs or diskettes with prominent red markings and the word “confidential” in addition to the contents and the docket number. The others must be prominently labeled “redacted” or “public”.
 - ii. Parties MUST identify each confidential digital file with a C in the file name and MUST have the legend “**CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET UG-072226**” prominently displayed on the first page (i.e., the page that appears on the computer screen when the file is opened).

6 **Purpose of Access and Use; Confidentiality.** No Confidential Information distributed or obtained pursuant to this Protective Order may be requested, reviewed, used or disclosed, directly or indirectly, by any party, expert, consultant or counsel or any other person having access pursuant to this Order, except for purposes of this proceeding. Persons having access to the Confidential Information pursuant to this Order must request, review, use or disclose Confidential Information only by or to persons authorized under this Order, and only in accordance with the terms specified in this Order. Without limiting the foregoing, persons having access to Confidential Information shall not use any Confidential Information to design, develop, provide, or market any product, service, or business strategy that would compete with any product of the party asserting confidentiality.

B. Disclosure of Confidential Information

7 **Persons Permitted Access.** No Confidential Information will be made available to anyone other than Commissioners, Commission Staff (which may include various experts and consultants), the presiding officer(s), and counsel for the parties for this proceeding, including counsel for Commission Staff, and attorneys’ administrative staff such as paralegals. However, counsel may authorize those persons designated as their party’s experts in this matter to access any Confidential Information solely for the purposes of this proceeding. Except for the Commission Staff, no such expert may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party (unless this restriction is waived by the party

asserting confidentiality). Any dispute concerning persons entitled to access Confidential Information must be brought before the presiding officer(s) for resolution.

- 8 **Nondisclosure Agreement.** Before being allowed access to any Confidential Information designated for this docket, each counsel and their administrative staff or each expert or consultant must agree to comply with and be bound by this Order on the form of Exhibit A (attorney / staff) or Exhibit B (expert / consultant) attached to this Order. Counsel for the party seeking access to the Confidential Information must deliver to counsel for the party producing Confidential Information a copy of each signed agreement, which must show each signatory's full name, permanent address, and the party with whom the signatory is associated and, in the case of experts or consultants, the employer (including position and responsibilities). The party seeking access must also send a copy of the agreement to the Commission and, in the case of experts or consultants, the party providing Confidential Information shall complete its portion and file it with the Commission or waive objection as described in Exhibit B.

- 9 **Access to Confidential Information.** Copies of documents designated confidential under this Order will be provided in the same manner as copies of documents not designated confidential, pursuant to WAC 480-07-400 and WAC 480-07-405. Requests for special provisions for inspection, dissemination or use of confidential documents must be submitted to the presiding officer if not agreed by the parties. The parties must neither distribute copies of documents that include Confidential Information to, nor discuss the contents of confidential documents with, any person not bound by this Order. Persons to whom copies of documents are provided pursuant to this Order warrant by signing the confidentiality agreement that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.

- 10 **Inadvertent Disclosure.** In the case of inadvertent disclosure of Confidential Information without the appropriate markings to designate confidentiality and invoke the protections of this Order, a party wishing to later designate any previously disclosed item(s) as "Confidential Information" shall immediately notify all receiving parties and, as necessary, the Commission. The previously received item(s) shall be promptly returned to the originating party (in a method akin to the procedures for Return of Confidential Information set out in ¶18 of this Order); the originating party shall promptly replace the items with corrected documents carrying the required markings. In such a circumstance, all parties must take reasonable steps to ensure that

late-designated Confidential Information is afforded the same protections as though originally so designated, to include retrieval of any copies made or shared.

C. Use of Confidential Information in This Proceeding

- 11 **Reference to Confidential Information.** If reference is to be made to any Confidential Information by counsel or persons afforded access to this information during any part of this proceeding including, but not limited to, motions, briefs, arguments, direct testimony, cross-examination, rebuttal and proposed offers of proof, any public reference (i.e., any reference that will not be placed in a sealed portion of the record) shall be either solely by title or by exhibit reference. Any other written reference shall be segregated and marked "Confidential Information," and access to it shall be given solely to persons who are authorized access to the information under this Order. References to the Confidential Information must be withheld from inspection by any person not bound by the terms of this Order.
- 12 In oral testimony, cross-examination or argument, public references to Confidential Information must be on such prior notice as is feasible to the affected party and the presiding officer. Unless alternative arrangements exist to protect the Confidential Information as provided below, there must be minimum sufficient notice to permit the presiding officer an opportunity to clear the hearing room of persons not bound by this Order or take such other action as is appropriate in the circumstances.
- 13 **Protected Use by Agreement.** Any party who intends to use any Confidential Information in the course of this proceeding, including but not limited to testimony to be filed by the party, exhibits, direct and cross-examination of witnesses, rebuttal testimony, or a proffer of evidence, shall give reasonable notice of such intent to all parties and to the presiding officer, and attempt in good faith to reach an agreement to use the Confidential Information in a manner which will protect its trade secret, proprietary, or other confidential nature. The parties shall consider such methods as: (1) use of clearly edited versions of confidential documents, (2) characterizations of data rather than disclosure of substantive data, and (3) aggregations of data. The goal is to protect each party's rights with respect to confidential information while allowing all parties the latitude to present the evidence necessary to their respective cases.
- 14 If the parties cannot reach agreement about the use of confidential information in this proceeding, they must notify the presiding officer, who will determine proper

arrangements to protect the Confidential Information to ensure that all parties are afforded their full due process rights, including the right to cross-examine witnesses.

- 15 **Right to Challenge Admissibility.** Nothing in this Order may be construed to restrict any party's right to challenge the admissibility or use of any Confidential Information on any ground other than confidentiality, including but not limited to competence, relevance, or privilege.
- 16 **Right to Challenge Confidentiality.** Any party may challenge another party's assertion of confidentiality with respect to any information asserted to be entitled to protection under this Order. The presiding officer will conduct an *in camera* hearing to determine the confidentiality of challenged information. The burden of proof to show that such information is properly classified as confidential is on the party asserting confidentiality. Pending determination, the assertedly Confidential Information shall be treated in all respects as protected under the terms of this Order. If the presiding officer determines the challenged information is not entitled to protection under this Order, the information continues to be protected under this Order for ten days thereafter to enable the producing party to seek Commission or judicial review of the determination, including a stay of the decision's effect pending further review.
- 17 **Admission of Confidential Information Under Seal.** The portions of the record of this proceeding containing Confidential Information will be sealed for all purposes, including administrative and judicial review, unless such Confidential Information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to a lawful order of the Commission or of a court having jurisdiction to do so.
- 18 **Return of Confidential Information.** At the conclusion of this proceeding every person who possesses any Confidential Information (including personal notes that make substantive reference to Confidential Information) must return all Confidential Information to the party that produced it, or must certify in writing that all copies and substantive references to Confidential Information in notes have been destroyed, within thirty days following the conclusion of this proceeding, including any administrative or judicial review. These provisions apply to all copies of exhibits which contain Confidential Information and for that reason were admitted under seal. The only exceptions are that exhibits may be preserved by counsel as counsel records,

and a complete record, including Confidential Information, will be preserved by the Secretary of the Commission as part of the Agency's official records.

- 19 **Notice of Compelled Production In Other Jurisdictions.** If a signatory to this protective order is compelled to produce confidential documents in any regulatory or judicial proceeding by the body conducting the proceeding, the signatory must provide notice to the party that provided the confidential information. Such confidential information must not be produced for at least five days following notice, to permit the party that provided such information an opportunity to defend the confidential nature of the material before the regulatory or judicial body that would compel production. Disclosure after that date, in compliance with an order compelling production, is not a violation of this Order.
- 20 **Modification.** The Commission may modify this Order on motion of a party or on its own motion upon reasonable prior notice to the parties and an opportunity for hearing.
- 21 **Violation of this Order.** Violation of this Order by any party to this proceeding or by any other person bound by this Order by overly broad designation of information as confidential, or by unauthorized use or unauthorized divulgence of Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law.

Dated at Olympia, Washington, and effective February 29, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

**EXHIBIT A
(ATTORNEY / STAFF AGREEMENT)**

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET TG-072226

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as attorney or attorney's staff in this proceeding for _____ (party to this proceeding) agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket TG-072226.

I acknowledge that I have read the Protective Order and fully understand its terms and conditions. I further acknowledge that I have reviewed the applicable regulations contained in WAC 480-07, specifically including WAC 480-07-140, WAC 480-07-145, WAC 480-07-160, WAC 480-07-420, and WAC 480-07-423.

Signature

Date

Address

EXHIBIT B
(EXPERT / CONSULTANT AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET TG-072226

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as expert witness or consultant in this proceeding for _____ (party to this proceeding) agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket TG-072226.

I acknowledge that I have read the Protective Order and fully understand its terms and conditions. I further acknowledge that I have reviewed the applicable regulations contained in WAC 480-07, specifically including WAC 480-07-140, WAC 480-07-145, WAC 480-07-160, WAC 480-07-420, and WAC 480-07-423.

Signature

Date

Address

* * * The following portion is to be completed by the responding party and filed with the Commission within 10 days of receipt; failure to do so will constitute a waiver and the above-named person will be deemed an expert having access to Confidential Information under the terms and conditions of the Protective Order.

_____ No objection.

_____ Objection. The responding party objects to the above-named expert having access to Confidential Information. The objecting party shall file a motion setting forth the basis for objection and asking exclusion of the expert from access to Confidential Information.

Signature

Date

EXHIBIT B



WASHINGTON
REFUSE &
RECYCLING
ASSOCIATION

WASHINGTON REFUSE & RECYCLING ASSOCIATION

Home

About Us

WRRA Staff

Member Page



Serving Washington's
Solid Waste Industry
Since 1947

WRRA Staff

Executive:

Washington Refuse & Recycling Association

Brad Lovaas, Executive Director

4160 6th Avenue SE, Suite 205, Lacey, WA 98503
Toll Free: (866) 778-9772 Business Phone: (360) 943-8859
Cell Phone: (360) 280-7723
Fax: (360) 357-6958 Web Address: www.wrra.org
E-Mail: brad@wrra.org

Washington Refuse & Recycling Association

Conan O'Sullivan, Deputy Director
4160 6th Avenue SE, Suite 205, Lacey, WA 98503
Toll Free: (866) 778-9772 Business Phone: (360) 943-8859
Cell Phone: (360) 701-6768
Fax: (360) 357-6958 Web Address: www.wrra.org
E-Mail: conan@wrra.org

Lobbyists:



Vicki Austin, WRRA Lobbyist
8548 Island View Drive NE, Olympia, WA 98506
Business Phone: (360) 485-2026
Cell Phone: (360) 485-2026
Fax: (360) 943-9545
E-Mail: vickaust@comcast.net

Gordon Walgren, WRRA Lobbyist
4105 NW Erland Point Road, Bremerton, WA 98312
Business Phone: (360) 943-1232
Direct Line: (360) 790-5017 Cell Phone: (360) 790-5017
Fax: (360) 373-4371
E-Mail: walgconsult@telebyte.com

Legal:

Error has occurred whi
<http://www.zerowastev>
Please contact web-m

AFFILIATE LINKS

-  [Access Washing!](#)
Provides public a
created by gover
Washington.
 -  [Association of W](#)
AWC represents
towns before the
executive branch
agencies.
- [More Affiliate link](#)

James K. Sells, General Counsel
9657 Levin Road NW, #240, Silverdale, WA 98383
Toll Free: (800) 481-8861 Business Phone: (360) 307-8860
Cell Phone: (360) 981-0168
Fax: (360) 307-8865 Web Address: www.rsulaw.com
E-Mail: jimsells@rsulaw.com

Copyright © 2006 Washington Refuse and Recycling. All Rights Reserved.
Reproduction without express written permission of WRRRA is prohibited.