

October 25, 1994

Mr. Steve McLellan, Secretary  
Washington Utilities and  
Transportation Commission  
1300 Evergreen Park Drive South  
P. O. Box 9022  
Olympia, WA 98504-9022

\*Also Admitted to Oregon Bar

Re: The Disposal Group, Inc. v. Waste Management Disposal Services of Oregon  
Cause No. TG-941154  
Our File No. 144-3 (146)

RECEIVED  
94 OCT 28 9 18:22  
STATE OF OREGON  
UTIL. & TRANSP.  
COMMISSION

Dear Mr. McLellan:

Pursuant to the prehearing conference of October 24, 1994, enclosed are the following exhibits of Complainant, The Disposal Group, Inc.

1. Clark County Solid Waste Management Plan, dated April 1994 (Complainant's Exhibit A) (not enclosed).
2. Contract between Rust Remedial Services, Inc. and Waste Management Disposal Services of Oregon, Inc., dba Oregon Waste Systems, executed by the parties on September 5, 1994 and September 16, 1994. (Complainant's Exhibit B).
3. Contract between Waste Management Disposal Services of Oregon, Inc., dba Oregon Waste Systems and T&G Trucking and Freight, Inc., dated July 1, 1994 (Complainant's Exhibit C).
4. Oregon Department of Environmental Quality "Rule Interpretation for OAR Chapter 340 Division 97: Relating to the Calculation of Disposal Tonnage for Purpose of Fee Payment by Permitted Municipal and Industrial Solid Waste Landfills," effective October 1, 1994 (Complainant's Exhibit D).
5. Letter dated August 9, 1994 from Horenstein & Duggan to Aluminum Company of America (Complainant's Exhibit E).
6. Letter dated August 10, 1994 from Davis Wright Tremaine to Aluminum Company of America (Complainant's Exhibit F).
7. Letter dated August 12, 1994 from Aluminum Company of America to Horenstein & Duggan (Complainant's Exhibit G).

Mr. Steve McLellan  
October 25, 1994  
Page 2

8. Letter dated August 16, 1994 from Horenstein & Duggan to Aluminum Company of America (Complainant's Exhibit H).
9. Declaration of Wes Hickey (Complainant's Exhibit I).
10. Declaration of Patricia Vernon (Complainant's Exhibit J).

Sincerely,

  
CYNTHIA A. HORENSTEIN

CAH:lk

Enclosure

cc: Mark Leichner, The Disposal Group

00144003.L56

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document without enclosures upon all parties of record in this proceeding, by first class mail, postage prepaid, to:

John Prusia  
Administrative Law Judge  
Utilities and Transportation  
Subdivision of the Office of  
Administrative Hearings  
2420 Bristol Court S.W.  
P.O. Box 42489  
Olympia, WA 98504-2489

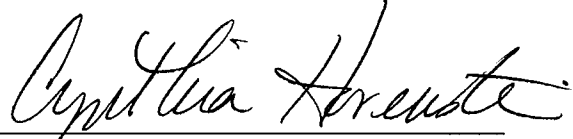
Steven W. Smith  
Assistant Attorney General  
Heritage Plaza Building  
1400 South Evergreen Park Drive S.W.  
Olympia, WA 98504-0128

Bill Rasmussen  
Davis Wright Tremaine  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101-1688  
Attorney for Waste Management

Jack R. Davis  
Allison, Davis & Haffner  
1200 Fifth Avenue, Suite 1900  
Seattle, WA 98101  
Attorney for T&G

Jim Sells  
510 Washington Avenue, Suite 300  
Bremerton, WA 98337  
Attorney for WRRRA/Intervenor

DATED this 25th day of October, 1994.

  
Cynthia A. Horenstein, WSB #17830  
Of attorneys for The Disposal Group,  
Inc.



SERVICE AGREEMENT  
NON-HAZARDOUS WASTE DISPOSAL

Contract # 082293-D  
WMNA # 188962

The above named landfill and corporation are referred to herein as "Facility" and "Contractor," respectively.

Customer Billing Name: Ruet Remedial Services, Inc.

Customer's Billing Address: 4227 Technology Drive

City, State/Province, Zip/Postal Code: Fremont, CA 94538-6337

Customer Contact: August Ochabauer Phone Number: 510-249-4639

Bank Reference: n/a Bank Contact: n/a

Credit will be extended to Customer only with the accompaniment of collateral in the form of cash, surety bond, an approved irrevocable commercial letter of credit in the amount equal to a normal 45 day disposal charge, or in an alternative form acceptable to the Contractor. It is the responsibility of the Customer to keep a surety bond or letter of credit current. Collateral deposits will be adjusted when there is an increase in disposal tonnage and/or rates. Collateral deficiencies must be corrected within 30 days of notice of adjustment required.

This is a legally binding contract, and Contractor agrees to provide and Customer agrees to accept the waste disposal services subject to the terms and conditions specified in this contract.

ESTIMATED MONTHLY AMOUNT OF WASTE FOR LAND DISPOSAL:

50,000 tons  
(Include units e.g. cubic yards, pounds, kilograms)

Special instructions: Please see attached contract.

CUSTOMER

August Ochabauer  
Authorized Signature

OPS. MGR.      9-5-94  
Title                      Date

CONTRACTOR

Dykes  
Representative

Dykes      9/16/94  
Title                      Date

Printed on Recycled Paper

## TERMS AND CONDITIONS OF DISPOSAL AGREEMENT

**The Agreement.** The agreement of the parties for the disposal of waste shall consist of this Agreement, Contractor's Definition of Special Waste, and any Generator's Special Waste Profile Sheet applicable to such waste.

**Waste Accepted at Facility.** Customer warrants that the waste delivered to Contractor hereunder will not contain a regulated quantity of any hazardous, radioactive, or toxic waste or substance as defined by applicable Federal, state, local or provincial laws or regulations.

**Special Waste.** Customer warrants that the waste delivered to Contractor hereunder will not contain any Special Waste unless specifically described on Generator's Special Waste Profile Sheet(s) which is attached hereto or which Contractor later agrees to accept in writing. Special Waste means any solid waste which meets the Contractor's Definition of Special Waste. The parties may incorporate additional Special Waste as part of this Agreement if prior to delivery of such waste to Contractor, Customer has provided a Generator's Special Waste Profile Sheet for such waste and Contractor has approved disposal of such waste in writing. Customer agrees to comply with precautions, limitations, and conditions contained in Contractor's written notice of approval of Special Waste.

**Right of Refusal/Rejection.** Contractor has the right to refuse or reject after acceptance any load of wastes delivered to its Facility if the Contractor believes the Customer has breached (or is breaching) its warranties or agreements hereunder. If Customer delivers wastes in breach of any warranty or agreements herein, Contractor may in its sole discretion either remove and dispose of that waste and charge Customer for the costs or require Customer to promptly remove the waste.

**Limited License to Enter.** During the term of this Agreement, Customer shall have a license to enter the Facility for the limited purpose of, and only to the extent necessary for, off-loading waste at the location and in the manner directed by Contractor. Except in an emergency, or at the express direction of Contractor, Customer's personnel shall not leave the immediate vicinity of their vehicle. After off-loading the waste, Customer's personnel shall promptly leave the Facility. Under no circumstances shall Customer or its personnel engage in any scavenging of waste at the Facility. Contractor may refuse to accept waste from, and shall deny an entrance license to, any of Customer's personnel whom Contractor believes is under the influence of alcohol or other chemical substances.

**Charges and Payment.** Customer agrees to pay Contractor's posted disposal rates which may change from time to time. Customer shall be liable for all taxes, fees, or other charges imposed upon the disposal of Customer's waste by Federal, state, local or provincial laws and regulations. Payment shall be made by Customer within ten (10) days after the date of the invoice from Contractor. In the event that any payment is not made when due, Contractor may terminate the Agreement. Customer agrees to pay a late fee for all past due payments not to exceed the maximum rate allowed by applicable law.

**Term.** This Agreement shall continue in effect until terminated by either party, with or without cause, upon forty-eight (48) hours notice. Customer's representations and warranties regarding the waste delivered and the mutual indemnities shall survive termination of this Agreement.

**Driver's Knowledge and Authority.** Customer warrants that its drivers who deliver waste to Contractor's Facility have been advised by Customer of Contractor's prohibition of deliveries of hazardous, radioactive, or toxic waste to the Facility, of Contractor's restrictions on deliveries of Special Waste to the Facility, of the definitions of "hazardous waste" and "Special Waste" herein provided, and of the terms of this license to enter Contractor's Facility.

**Indemnification.** (a) Contractor agrees to indemnify, save harmless, and defend the Customer from and against any and all liabilities, claims, penalties, forfeitures, suits, and the costs and expenses incident thereto (including costs of defense, settlement, and reasonable attorneys' fees), which it may hereafter incur, become responsible for, or pay out as a result of death or bodily injuries to any person, destruction or damage to any property, contamination of or adverse effects on the environment, or any violation of governmental laws, regulations, or orders caused solely by the negligent or willful act or omissions of Contractor's employees, or its subcontractors in the performance of the Agreement.

(b) Customer agrees to indemnify, save harmless, and defend Contractor from and against any and all liabilities, claims, penalties, forfeitures, suits, and the costs and expenses incident thereto (including costs of defense, settlement, and reasonable attorneys' fees), which it may hereafter incur, become responsible for, or pay out as a result of death or bodily injuries to any person, destruction or damage to any property, contamination of or adverse effects on the environment, or any violation of governmental laws, regulations, or orders caused, in whole or in part by the Customer's breach of any warranty, term or provision of the Agreement, or any negligent or willful act or omission of the Customer, its employees, or subcontractors in the performance of the Agreement.

**Attorney's Fees.** In the event of a breach of the Agreement, the breaching party shall pay all reasonable attorneys' fees, collection fees and costs of the other party incident to any action brought to enforce the Agreement.

**Assignment.** Neither party may assign, transfer or otherwise vest in any other company, entity or person, any of its rights or obligations under the Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld; provided, however, that Contractor may, without any such prior written consent, assign its rights and/or obligations under the Agreement to a subsidiary or affiliate corporation.

**Miscellaneous.** The Agreement shall be binding upon and shall inure in the benefit of the parties hereto and their respective successors and permitted assigns. The Agreement shall be governed by and construed in accordance with the laws of the State in which the Facility is located.

Page 3 of 3  
Contract # 087794-D  
WMNA # 199962

DISPOSAL AND TRANSPORTATION FEES



TAXES, FEES AND SURCHARGES

\$.124 per ton Oregon DEQ fee for Oregon generated waste disposed (includes \$.13 per ton orphan site fee effective 01/01/93).

TERMS OF PAYMENT

30 days net (with approved credit). Without prior credit approval, all charges must be paid upon delivery to landfill.

SPECIAL INSTRUCTIONS

Waste must not contain free liquids.

FROM : Panasonic TAD/FAX

PHONE NO. :

Sep. 19 1994 01:49PM P2

09-19-1994 11:11AM FROM OWS

TO

0879560 P.01

## INDEPENDENT CONTRACTOR AGREEMENT

THIS AGREEMENT (the "Agreement") is made this 1st day of July, 1994, by and between Waste Management Disposal Services of Oregon, Inc., dba Oregon Waste Systems, Inc., ("OWS") and T.G. TRUCKING AND FREIGHT, INC., a Corporation [corporation, partnership or sole proprietorship] ("Contractor").

### RECITALS

1. Contractor is in the trucking business and has sufficient vehicles and the proper permits and licenses to perform such services.
2. OWS desires to contract with Contractor and Contractor desires to contract with OWS to provide services on the terms and conditions set forth herein.
3. OWS is an Equal Opportunity/Affirmative Action employer and does not discriminate on the basis of race, creed, color, national origin, sex, age, disability and disabled or Vietnam Era veteran status and requires that its contractors and subcontractors do the same.

NOW, THEREFORE, in consideration of the foregoing mutual promises and covenants, the parties hereto agree as follows:

#### 1. Performance of Services

- 1.1 Location and Frequency of Services. Contractor agrees to perform such services as may be required under the purchase orders which are issued by OWS (OWS Purchase Order), in the form attached as Exhibit A or similar.
- 1.2 Performance of Services. Contractor agrees to perform the services in a professional and workmanlike manner and in compliance with all applicable laws, ordinances, rules, regulations and permits, including, but not limited to, Motor Carrier Safety Regulations (D.O.T. CFR49383 and 390-395) Vehicle Codes and Commercial Driver Licensing Laws. Contractor also represents and warrants that its employees are properly licensed to operate any motor vehicles and equipment necessary to perform the services herein. Contractor also represents and warrants that, by accepting and performing work under an OWS Purchase Order, that it has obtained all necessary permits and authorizations required by the Oregon Public Utility Commission, the Washington Utilities and Transportation Commission, or other similar State transportation authorities, as applicable.

FROM : Panasonic TAD/FAX

PHONE NO. :

Sep. 19 1994 01:50PM P3

09-19-1994 11:11AM FROM OWS

TO

2839562 P.02

OWS shall have the right to inspect, review and monitor Contractor's performance under this Agreement. If following any such review, OWS believes that Contractor's performance is inadequate, substandard, or is otherwise not in compliance with this Agreement, then OWS shall give notice of such breach to Contractor and Contractor shall have no more than three calendar days following receipt of such notice to cure such breach. If such breach is not cured within such period, OWS may immediately terminate this Agreement and any applicable OWS Purchase Order and pursue such other remedies at law as it may deem necessary.

- 1.3 Costs of Performing Services. Contractor shall bear all costs of performing the services, including, but not limited to: i) all maintenance costs required to maintain its vehicles in a condition and in a manner consistent with practices established by applicable laws, ordinances, regulations and permits, and (ii) all operating costs for equipment, personnel, fuel costs and permit and license fees.

## 2. Compensation

- 2.1 Rate of Compensation. OWS agrees to pay Contractor for the services performed by Contractor at the rate specified in the applicable OWS Purchase Order.
- 2.2 Adjustments to Compensation. Deductions in the payments due Contractor hereunder shall be made by OWS in an amount equal to that which OWS is required to spend on account of the Contractor's failure to perform the services or the amount of any liability or expense incurred by OWS by reason of the breach by Contractor of any of its obligations hereunder.

## 3. Term and Termination

- 3.1 Term. This Agreement shall commence on the date first written above and shall extend for a period of three (3) years unless otherwise terminated pursuant to the provisions of this Agreement.
- 3.2 Termination. This Agreement shall terminate upon the occurrence of any of the following events:
- (a) The filing by or against Contractor of a petition, consent or application under any federal or state bankruptcy law or any other law in which Contractor is alleged to be insolvent or unable to pay its debts as they become due or the making by Contractor of an assignment of the benefit of creditors;



FROM : Panasonic FAX/FAX

PHONE NO. :

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09-19-1994 11:12AM FROM OWS

TO

2839560 P.03

- (b) The failure of Contractor to perform any obligation imposed upon it by this Agreement, or a breach by Contractor of any covenant set forth herein; or
- (c) Thirty (30) days following receipt by Contractor of OWS's written notice of termination.
4. **Confidentiality.** Contractor recognizes and agrees that any information that it may obtain during the course of performing the services concerning the operations, plans, customers and procedures of OWS is confidential and proprietary information. Contractor will not during or after the term hereof in any way utilize such confidential and proprietary information without the prior written consent of OWS, except that Contractor and its employees may use such information disclosed to it by OWS in order to perform the services hereunder.

5. **Matters Relating to Performing Services.**

- 5.1 **Insurance.** Contractor shall be responsible for any personal injury to any person and for any damage to property suffered by the public or by any private person that may be sustained through, or on account of, any negligence, failure or fault of Contractor, or its agents or servants, in complying with any carrying out the terms of this Agreement, and for any negligence which may occur as a fault of Contractor.

Contractor agrees to keep at a minimum the following insurance in full force and effect during the term of this Agreement:

**Workers' Compensation.** (This coverage is required if Contractor employs individuals on either a full- or part-time basis to perform the Services.)

Coverage A            Statutory

Coverage B            One Million

FROM : Panasonic TAD/FAX

PHONE NO. :

Sep. 19 1994 01:51PM PS

09-19-1994 11:13AM FROM OWS

TO

2039560 1.04

Automobile Liability

Bodily Injury            One Million Each Person  
                                 One Million Each Accident

Property Damage    One Million Each Accident

Comprehensive General Liability

Bodily Injury            One Million Each Occurrence  
                                 One Million Aggregate

Property Damage    One Million Each Occurrence  
                                 One Million Aggregate

Cargo                                    Fifty Thousand Each Occurrence

The policy shall be endorsed to provide OWS with thirty (30) days prior written notice of termination, cancellation or material change in coverage. Such insurance shall name OWS as additional insured and shall hold Waste Management harmless of liability and all such actions. Satisfactory evidence of such insurance in an acceptable company shall be submitted to OWS at least ten (10) days after to the execution of this Agreement. OWS shall be the sole judge of what evidence is satisfactory and which company is acceptable. In addition, said certificates of insurance OWS as additional insured shall be resubmitted to on an annual basis.

FROM : Panasonic TAD/FAX

PHONE NO. :

Sep. 19 1994 01:51PM PG

09-19-1994 11:13AM FROM OWS

TO

283560 P.05

6. Miscellaneous

6.1 Independent Contractor. Contractor shall be considered an independent contractor and performing the services hereunder and shall not be deemed an employee, agent or representative of OWS.

It is understood and agreed that the Contractor is, and at all times shall be, an independent contractor and nothing contained herein shall be construed as making Contractor, or any individual whose compensation for services is paid by Contractor, as agent or employee of OWS or authorizing the Contractor to create or assume any obligation or liability for or on behalf of OWS. Further, in connection with any claim for liability against OWS by any reason of any acts of Contractor, Contractor agrees to indemnify and hold OWS and its parent company harmless therefrom.

6.2 Notices. Any notice, request, report or other document required or permitted under this Agreement shall be in writing and sent by registered or certified mail, return receipt requested, postage prepaid and addressed to the party to be notified at the addresses appearing below, or such other address as such party may hereafter designate by written notice. Any such change of address shall be effective upon receipt of said notice.

Oregon Waste Services

Contractor

Doug Coenen  
Division President and  
General Manager  
18177 Cedar Springs Lane  
Arlington, Or 97812

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6.3 Applicable Law. This Agreement shall be governed by the laws of the State of Oregon.

6.4 Entire Agreement. This Agreement (including any schedules attached hereto) constitutes the entire agreement and understanding between the parties with respect to the matters contained herein, and supersedes any prior agreement matters contained herein, and supersedes any prior agreement and understandings relating to the subject matter hereof. The Agreement may be modified or amended by a written instrument executed by both parties hereto.

FROM : Panasonic TAD/FAX

PHONE NO. :

Sep. 19 1994 01:53PM P7

09-19-1994 11:11AM

FROM OWS

TO

2839562 P.06

- 6.5 Legal Fees. If any legal action or any other proceeding is brought of the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the successful or prevailing party or parties shall be entitled to recover reasonable attorney's fees and other costs incurred in that action or proceeding, in addition to any other relief to which it may be entitled.
- 6.6 Incorporation of Exhibits. Each and every Exhibit referred to herein and attached hereto is hereby incorporated herein by reference as it set forth herein in full.
- 6.7 Assignment. This Agreement may not be assigned in whole or in part by one party without prior written consent of the other party, except that this provision shall not prevent the assignment by Waste Management to any subsidiary, parent or affiliated company. If this Agreement is assigned as provided above, it shall be binding upon the Inure and the benefit of the successors and assigns of the parties hereto.
- 6.8 Severability. If any provision of this Agreement is or becomes or is deemed invalid, illegal or unenforceable under the applicable laws or regulations of any jurisdiction, such provision will be deemed amended to the extent necessary to conform to applicable laws or regulations or, if it cannot be so amended without materially altering the intention of the parties, it will be stricken, and the remainder of this Agreement will remain in full force and effect.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

OREGON WASTE SYSTEMS

T & G TRUCKING AND FREIGHT INC

By: [Signature]

By: [Signature]

Title: V.P. Sales & Transportation

Title: President

B:\CONTRACT\AGREE.OWS

Solid Waste Program  
Policy

SEP 26 1994

PERMISSION OFFICE

May Wick  
Approved

9.22.94  
Date Approved

RULE INTERPRETATION FOR OAR CHAPTER 340 DIVISION 97:  
Relating to the Calculation of Disposal Tonnage for Purpose of Fee Payment by Permitted  
Municipal and Industrial Solid Waste Landfills.

A. APPLICABILITY:

1. This interpretation applies to OAR 340-97-110(7) and OAR 340-97-120(3), (4), (5), and (6).
2. The interpretation is applicable to municipal solid waste landfills for payment of permit compliance fee, per-ton solid waste disposal fee, and 1991 Recycling Act permit fee (where appropriate).
3. The interpretation is applicable to non-municipal solid waste landfills for payment of permit compliance fee, and 1991 Recycling Act permit fee (where appropriate).

B. INTERPRETATION:

All materials, both in-state and out-of-state, received by a landfill should be counted in tonnage and fee calculations if that material meets the definition of solid waste and would otherwise be disposed of, regardless of the ultimate use/disposition of the material by the landfill owner/operator.

For the purpose of fee calculation under OAR 340-97-120 (3), (4), (5) and (6), the material received by a landfill should be excluded from the tonnage calculation if it does not meet the definition of solid waste, and is ~~not~~ "clean fill" as defined in OAR 340-93-030 (10).

C. IMPLEMENTATION:

This rule interpretation is effective as of October 1, 1994 and shall be reflected in all tonnage calculations and fee payments due after that date.

**DISCLAIMER:**

This policy statement is intended solely as guidance and does not constitute rulemaking by the Environmental Quality Commission. It may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. DEQ may take action at variance with this policy statement.

HAND DELIVERED

August 9, 1994

\*Also Admitted to Oregon Bar

Mr. R.E. Denius  
Aluminum Company of America  
5509 N.W. Lower River Road  
Vancouver, WA 98660

Re: Wastewater Sludge Impoundment Clean Up  
Our File No. 144-3

Dear Mr. Denius:

Our office represents The Disposal Group, Inc. and Buchmann Sanitary Service, Inc., solid waste collection companies in Clark County, Washington. It has come to our attention that Alcoa has contracted with RUST Remedial Services to close Alcoa's wastewater sludge impoundment in Vancouver, Washington. We understand that the closure includes transportation of the materials to a landfill by a Waste Management company. The Disposal Group and Buchmann Sanitary Service asked us to review whether the proposed transportation of waste from the impoundment at Alcoa's Vancouver site to a landfill is in compliance with Washington's solid waste statutes and regulations.

As you may know, Washington State regulates the transportation of solid waste (see Chapter 81.77 RCW). The agency with oversight of solid waste transportation is the Washington Utilities and Transportation Commission (WUTC). The WUTC issues certificates of public convenience and necessity (garbage certificates or G-Certificates) to authorized providers of solid waste collection service. The Disposal Group and Buchmann Sanitary Service both hold G-Certificates.

The regulatory scheme's premise is that if materials are being transported for compensation to a municipal waste landfill, they are a commodity which requires a Certificate of Public Convenience and Necessity from the WUTC. Because The Disposal Group and Buchmann Sanitary Service are the only haulers with authority from the WUTC to transport waste from Clark County, the contract for transportation from the Alcoa facility is impermissible under Washington law. The Disposal Group is available to meet your

Mr. R.E. Denius  
August 9, 1994  
Page 2

transportation needs. The contact at The Disposal Group is Mark  
Leichner (892-9594).

Please give me a call should you wish to discuss this.

Sincerely,



CYNTHIA A. HORENSTEIN

CAH:dl

cc: Mark Leichner, The Disposal Group (via fax (206) 892-8471)  
Doug Haaga, The Disposal Group (via fax (206) 892-8471)  
Brian Carlson, Clark County Public Services  
(via fax (206) 737-6051)  
Don Lewis, WUTC Transportation Programs Compliance Manager  
(via fax (206) 586-1150)  
Bob Boston, WUTC Enforcement Section (via fax (206) 586-1150)  
R.E. Yester, Alcoa (via fax (412) 553-4822)  
Bob Huber, Alcoa (via fax (509) 664-2163)  
Frank Willman, RUST Remedial Services (via fax (206) 575-4548)  
Bob Schille, Waste Management of Washington  
(via fax (206) 828-2433)

00144003.L39

# DAVIS WRIGHT TREMAINE

LAW OFFICES

2600 CENTURY SQUARE • 1501 FOURTH AVENUE • SEATTLE, WASHINGTON 98101-1688  
(206) 622-3150

WILLIAM K. RAENIUSSEN  
(206) 628-7760

August 10, 1994

VIA FAX (412) 533-4064 and U.S. MAIL

Mr. James Bollenbacher  
Aluminum Company of America  
425 6th Avenue, Rm 1244  
Pittsburgh, PA 15219

Re: Oregon Waste Systems; TOFC/COFC Exemption

Dear Mr. Bollenbacher:

This firm represents Oregon Waste Systems ("OWS"). As we discussed this afternoon by telephone, I am writing in connection with the August 9, 1994 letter to Mr. R.E. Denius of the Aluminum Company of America ("ALCOA") sent by Cynthia A. Horenstein on behalf of The Disposal Group, Inc. and Buchman Sanitary Service, Inc.

Contrary to Ms. Horenstein's contention, a G-Certificate is not required for the intermodal transport of waste from the ALCOA site in Washington to the OWS landfill in Gilliam County, Oregon. Specifically, waste will be placed into sealed intermodal containers at the ALCOA site and hauled by truck to an intermodal railyard in Portland, Oregon, from which the waste will be loaded onto railcars for delivery to the landfill in Oregon. As explained below, Congress and the Interstate Commerce Commission have exempted such trailer-on-flatcar/container-on-flatcar (TOFC/COFC) operations from state regulation.

#### A. TOFC/COFC Exemption from State Regulation.

The Interstate Commerce Commission exempts trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service from state regulation. See 49 CFR 1090.2. The above-described operation

Z5608\50\ 104.LTR  
Seattle

FAX: (206) 628-7040

ANCHORAGE, ALASKA • BELLEVUE, WASHINGTON • BOISE, IDAHO • LOS ANGELES, CALIFORNIA  
PORTLAND, OREGON • RICHLAND, WASHINGTON • WASHINGTON, D.C.



Mr. James Bollenbacher  
August 10, 1994  
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meets the ICC definition of TOFC/COFC service.<sup>1</sup> Consequently, as discussed below, the truck hauling in Washington is exempt from state regulation.

**B. Interstate Transport from Washington to Oregon is Exempt from State Regulation.**

In 1980, Congress enacted the Staggers Rail Act, 94 Stat. 1895, 49 U.S.C. §§ 10101 et seq., which authorized the ICC to exempt from state regulation "transportation that is provided by a rail carrier as a part of a continuous intermodal movement." See 49 U.S.C. 10505(f). In 1981, the ICC adopted regulations exempting both the motor portion and rail portion of TOFC/COFC service from state regulation. See 49 CFR § 1039.13 (1986); see also Improvement of TOFC/COFC Regulation, 364 ICC 731 (1981). This regulation was upheld in American Trucking Ass'n Inc., 656 F.2d 1115 (5th Cir. 1981), which involved an interstate TOFC/COFC shipment.

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Rail trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service means the transportation by rail in interstate or foreign commerce, of:

- (1) Any freight-laden highway truck, trailer or semi-trailer,
- (2) The freight-laden container portion of any highway truck, trailer or semitrailer having a demountable chassis,
- (3) Any freight-laden multimodal vehicle designed to operate both as a highway truck, trailer, or semitrailer and as a rail car.
- (4) Any freight-laden intermodal container comparable in dimensions to a highway truck, trailer, or semi-trailer and designed to be transported by more than one mode of transportation, or
- (5) Any of the foregoing types of equipment when empty and being transported incidental to its previous or subsequent use in the TOFC/COFC service.

49 CFR 1090.1(a).

25608\50\07034.LTR  
Seattle

Mr. James Bollenbacher  
August 10, 1994  
Page 3

In 1987, the U.S. Supreme Court upheld an ICC regulation exempting from state regulation intrastate TOFC/COFC shipments made on trucks owned by railroads. ICC v. Texas, 479 U.S. 450, 107 S.Ct. 787, 93 L.Ed.2d 809 (1987).

C. Expansion of Exemption to Non-Railroad Owned Trucks.

The Supreme Court's 1987 ruling in ICC v. Texas was limited to motor freight service performed with equipment owned and operated by the railroad. See ICC v. Texas, 479 U.S. 450, 457, 107 S.Ct. 787, 93 L.Ed.2d 809 (1987). However, in 1989, the ICC expanded the exemption to include motor truck equipment that is not owned and operated by the railroad. See Improvement of TOFC/COFC Regulations, 6 I.C.C.2d 208 (1989); see also Central State Motor Freight Bureau, 924 F.2d 1099 (D.C. Cir. 1991). This expanded exemption provides:

Except as provided in 49 U.S.C. 10505(e) and (g), 109229(l), and 10530, rail TOFC/COFC

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In ICC v. Texas, 479 U.S. 450, 107 S.Ct. 787, 93 L.Ed.2d 809 (1987), the Supreme Court reversed the Fifth Circuit's decision in Texas v. United States, 770 F.2d 452 (5th Cir. 1985), in which the lower court attempted to limit the exemption from state regulation only to those TOFC/COFC shipments that crossed state lines. The Supreme Court stated: "It is undisputed that the [ICC's] power to grant these exemptions from state regulation is coextensive with its own authority to regulate, or not to regulate, these intermodal movements by rail carrier." ICC v. Texas, 479 U.S. at 455. The Supreme Court hence concluded that, because the ICC has jurisdiction over the intrastate trucking portion of continuous TOFC/COFC transport, the Commission also properly exercised its authority to exempt that same intrastate transport from state regulation. Id. at 456-461.

Therefore, even as to waste originating from customers in Oregon that remains entirely intrastate, the truck haul is nevertheless exempt from state regulation under ICC v. Texas. The Oregon PUC, upon consultation with the Oregon Attorney General, has agreed that such intrastate TOFC/COFC service is exempt from state regulation. See letter from Norman Meyers (Administrator of the Economic Regulation Division of the Oregon PUC) to Northwest Container Services dated May 3, 1993 (attached).

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Seattle

Mr. James Bollenbacher  
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Page 4

service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV (Interstate Commercial, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pick-up and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. The exemption does not apply to a motor carrier service in which a rail carrier participates only as a motor carrier's agent (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.

49 C.F.R. § 1090.2 (emphasis added).

In short, the regulations no longer require that the railroad own and/or operate the trucks used in the motor portion of the TOFC/COFC haul. Therefore, the truck haul in this case is exempt from state regulation, even if it is performed with trucks not owned by the rail carrier.

Please feel free to contact me if you have any questions or would like more information.

Very truly yours,



William K. Rasmussen

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Mr. James Bollenbacher  
August 10, 1994  
Page 5

cc: Mr. Robert Boston, WUTC Enforcement Section  
Mr. Donald Lewis, WUTC Transportation Programs Compliance  
Manager  
Mr. Robert Wallace, WUTC Regulatory Affairs Office  
Mr. Norman Wietting (via fax 206-828-2433)  
Mr. Arthur Dudzinski  
Mr. Robert Schille  
William Jeffry, Esq. (via fax 303-797-6907)  
John Keegan, Esq.

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Boettie

James A. Bollenbacher  
412-553-4255

August 12, 1994

Cynthia A. Horenstein  
Horenstein & Duggan  
First Interstate Tower  
900 Washington Street, Suite 900  
Vancouver, Washington 98666-0694

Re: Alcoa wastewater Sludge Disposal

Dear Ms. Horenstein:

In response to your letter dated August 9, 1994 to Mr. R. E. Denius, I am enclosing a copy of a letter from Davis Wright Tremaine regarding the need for a G-Certificate to transport the sludge from Alcoa's surface impoundment to the landfill in Oregon. It appears from this letter that the statutory provisions that you reference are not applicable to the type of transportation that will occur in this project. This sludge will be shipped interstate by rail car to a state of the art landfill in Oregon. Because you have raised a concern about the legality of this shipment, I thought it fair to allow you to review this letter and offer any counter authority of which you may be aware.

Please understand that Alcoa makes every effort to comply with all laws regarding environmental remediation projects, including transportation regulations. We also strive to protect the environment to the greatest extent possible during these projects. We believe the contractors we have selected for this project are the best to help us in these efforts.

I look forward to your response to the enclosed letter.

Very truly,

James A. Bollenbacher

cc: Russ Lester - 19  
R. E. Denius - Vancouver (by fax)

# HORENSTEIN & DUGGAN P.S.

ATTORNEYS AT LAW

First Interstate Tower • 900 Washington Street • Suite 900  
P O Box 694 • Vancouver, Washington 98666-0694  
(206) 699-4771 • (503) 289-2643 • FAX (206) 694-6413

LaAnne M. Bremer\*  
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Stephen W. Horenstein  
Lee A. Knottnerus\*  
Pat L. Pabis\*  
Margaret Madison Phelan\*  
John R. "Rick" Potter\*  
Albert F. Schlottfeldt\*  
D. Jean Shaw\*  
Eugene H. "Trey" Tennyson III

VIA FAX (412) 553-4064

August 16, 1994

\*Also Admitted to Oregon Bar

James Bollenbacher  
Aluminum Company of America  
425 Sixth Avenue  
Alcoa Building  
Pittsburgh, PA 15219-1850

Re: Alcoa Wastewater Sludge Disposal  
Our File No. 1444-3

Dear Mr. Bollenbacher:

Thank you for your letter of August 12, 1994, and the accompanying letter from William Rasmussen dated August 10, 1994, setting forth his conclusion that the transportation of sludge from Alcoa's Vancouver facility is not regulated by the Washington Utilities and Transportation Commission ("WUTC") because it is intermodal transportation subject to the Interstate Commerce Commission's ("ICC") jurisdiction.

We do not dispute Mr. Rasmussen's analysis of trailer-on-flatcar/container-on-flatcar regulation as it relates to the transportation of freight. However, Mr. Rasmussen's analysis fails to distinguish between the ICC's authority to regulate freight and its lack of authority to regulate solid waste.

We draw your attention to Joray Trucking Corp. Common Carrier Application, 99 MCC 109, 110 (1965), which addressed whether the transportation "of debris is subject to full economic regulation under part II of the Interstate Commerce Act." The ICC noted that, "Section 202 of the act states, in part, that the provisions of part II apply to the transportation of passengers or 'property' by motor carriers engaged in interstate or foreign commerce. Thus, the question arises as to whether the debris to be transported [from New York to New Jersey] is in fact 'property' for purposes of Commission jurisdiction." Id. The ICC concluded, "All things considered we believe that debris and rubble should not be considered property as affects the jurisdictional scope of the Interstate Commerce Act." Id.

James Bollenbacher  
August 16, 1994  
Page 2

In that the ICC has clearly interpreted its jurisdiction to exclude the regulation of solid waste transportation, we look to state law for regulation. As we discussed last week, RCW 81.77.100 is the operative statute which provides that any waste collected within the State of Washington, regardless of whether it is intended for intra or interstate disposal, is subject to WUTC regulation. We refer you to Evergreen Waste Systems, Inc., WUTC Cause No. TG-1911 (1986) for an analysis of RCW 81.77.100.

We suggest a meeting of your remediation project team with participants in Clark County's solid waste system (i.e., Clark County, The Disposal Group and Columbia Resource Company) to discuss your transportation and disposal requirements.

Sincerely,



CYNTHIA A. HORENSTEIN

CAH:dl

cc: Mark Leichner, The Disposal Group  
Doug Haaga, The Disposal Group  
Brian Carlson, Clark County Public Services  
Don Lewis, WUTC Transportation Programs Compliance Manager  
Bob Boston, WUTC Enforcement Section  
R.E. Yester, Alcoa  
Bob Huber, Alcoa  
Frank William, RUST Remedial Services  
Bob Schille, Waste Management of Washington

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BEFORE THE UTILITIES AND TRANSPORTATION COMMISSION  
OF THE STATE OF WASHINGTON

THE DISPOSAL GROUP, INC., dba	)	
Vancouver Sanitary Service and	)	CAUSE NO. TG-941154
Twin City Sanitary Service, a	)	
Washington corporation (G-65);	)	
	)	DECLARATION OF
Complainant,	)	WES HICKEY
	)	
vs.	)	
	)	
WASTE MANAGEMENT DISPOSAL	)	
SERVICES OF OREGON, INC., dba	)	
Oregon Waste Systems,	)	
a Delaware corporation; and T&G	)	
TRUCKING & FREIGHT, CO., an	)	
Oregon corporation;	)	
	)	
Respondents.	)	

I, WES HICKEY, declare as follows:

1. I am General Manager of Finley Buttes Landfill Company. I make this Declaration based on personal knowledge.

2. Finley Buttes Landfill Company submitted a proposal to Rust Remedial Services, Inc. relative to the transportation and disposal of industrial sludge from the Alcoa facility in Vancouver, Washington.

3. The transportation portion of the proposal contemplated the movement of the industrial sludge in ISO containers from the

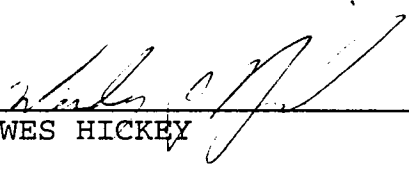


1 Alcoa facility to the Tidewater Barge Lines loading dock  
2 approximately 350 feet south/southeast of the Alcoa facility.

3 4. All transportation from the Alcoa facility to the  
4 Tidewater Barge Lines loading dock would have been on a road that  
5 lies exclusivly on private property.

6 I swear under penalty of perjury under the laws of the State of  
7 Washington that the foregoing is true and correct.

8 Executed at Vancouver, Washington, this 24th day of October,  
9 1994.

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13 WES HICKEY  
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6 BEFORE THE UTILITIES AND TRANSPORTATION COMMISSION  
7  
8 OF THE STATE OF WASHINGTON

9 THE DISPOSAL GROUP, INC., dba )  
 10 Vancouver Sanitary Service and ) CAUSE NO. TG-941154  
 11 Twin City Sanitary Service, a )  
 12 Washington corporation (G-65); )  
 13 Complainant, )  
 14 vs. )  
 15 WASTE MANAGEMENT DISPOSAL )  
 16 SERVICES OF OREGON, INC., dba )  
 17 Oregon Waste Systems, )  
 18 a Delaware corporation; and T&G )  
 19 TRUCKING & FREIGHT, CO., an )  
 20 Oregon corporation; )  
 21 Respondents. )

DECLARATION OF  
PATRICIA VERNON

22 I, PATRICIA VERNON, declare as follows:

23 1. I am employed by the Oregon Department of Environmental  
 24 Quality ("DEQ"). I make this Declaration based on personal  
 25 knowledge.

26 2. My position with DEQ is Solid Waste Policy Manager. My  
 27 responsibilities as Solid Waste Policy Manager include oversight of  
 28 policies and interpretations adopted and implemented by DEQ.

29 3. Based on Oregon Administrative Rules, DEQ assesses  
 30 landfill operators solid waste permit compliance fees, per ton solid

1 waste disposal fees and 1991 Recycling Act permit fees ("disposal  
2 fees").

3 4. Because there has been inconsistent calculation of  
4 materials received at landfills, upon which the disposal fees are  
5 assessed, DEQ adopted "RULE INTERPRETATION FOR OAR CHAPTER 340  
6 DIVISION 97: Relating to the Calculation of Disposal Tonnage for  
7 Purpose of Fee Payment by Permitted Municipal and Industrial Solid  
8 Waste Landfills."

9 5. The Rule Interpretation became effective October 1, 1994.

10 6. Attached as Exhibit "A" to this Affidavit is a true and  
11 accurate copy of the Rule Interpretation.

12 7. A typographical error appears in the Rule Interpretation  
13 at paragraph B, line 7, as noted by DEQ's interlineation on the  
14 attached copy.

15 8. This typographical error is being corrected by DEQ but is  
16 not yet complete.

17 9. Until such time as this typographical error is corrected,  
18 DEQ is using the Rule Interpretation as if the typographical error  
19 had been corrected (i.e., that clean fill is not subject to a  
20 disposal fee).

21 10. Upon completion of this correction, the Rule  
22 Interpretation will have the same effect as Exhibit "A" currently  
23 provides: that clean fill is not subject to disposal fees.

24 I swear under penalty of perjury under the laws of the State of  
25 Washington that the foregoing is true and correct.

26 Executed at Portland, Oregon, this 25<sup>th</sup> day of October,  
27 1994.

28  
29   
30 PATRICIA VERNON