

April 10, 2009

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**VIA EMAIL AND U.S. MAIL**

Mr. David Danner, Executive Director  
Policy and Legislative Issues  
Attn.: Records Center  
Washington Utilities and Transportation Commission  
P.O. Box 47250  
1300 S. Evergreen Park Dr. SW  
Olympia, WA 98504-7250

Re: TG-080591, Solid Waste Rulemaking Comments to Draft Proposal Replacing WAC 480-70-016

Dear Mr. Danner:

On behalf of a number of regulated solid waste collection companies we represent in this rulemaking, we welcome this opportunity to offer some preliminary comments on the draft rule served March 11, 2009 in the proceeding which considers replacing the current WUTC rule definition section above with the language in the draft rule. In general, we support the Commission's revised definition section and take this opportunity to comment on some of the issues highlighted by the proposal, including activities and requirements bearing on source separation, enforcement of WUTC rules in Chapters 81.77 RCW and 81.80 RCW, and characterization of the nature of transportation involving alternative daily cover ("ADC") which you specifically sought comment on from interested parties.

1. Source Separation/Container Requirements

Much of the draft rule focus and recent litigation in the solid waste collection arena centers around construction and demolition and/or clearing debris ("CDL") which is defined as "solid waste" under Washington law, RCW 70.95.030(23). As a threshold definition, everyone should understand that CDL, in isolation, is "solid waste," and typically, solid waste collection companies would be expected to be the predominant haulers of same in areas governed by G-certificates and in territories subject to the Commission's jurisdiction under RCW 81.77.020.

Recent disputes/questions have arisen about characterizing the transportation of CDL based upon (either or both) the nature of mixed CDL loads that contain varying percentages of recyclable materials and the destination of the loads at issue. Your proposed definitional sections at 3(b) and 6 anticipate, or rather seek to address this issue and we believe that the courts and, at least one large Washington municipality, have assisted in this process by providing quantitative measures for when a load, i.e. of

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“mixed” CDL, constitutes “waste.” For instance, the City of Seattle, in SMC 21.36.012, defines “City’s Waste” (which is subject to municipal collection contracts), as all wastes “generated within the City, excluding Unacceptable Waste, Special Waste, and materials destined for recycling or beneficial use, which materials shall contain no more than ten (10) percent non-recyclable or non-beneficially used material by volume.” [Emphasis added] . . . City’s Waste includes all waste remaining after recycling or beneficial use.”

While draft rule subsection 3(b) sets forth the overriding premise that motor carriers may not collect and transport recyclable materials that contain solid waste, a quantitative standard such as Seattle’s for defining when containers of mixed recyclables constitute solid waste transportation would be particularly useful.

Historically, the Commission has made this determination on a case-by-case, fact specific inquiry basis. It has looked at elements such as the intent of the tenderer, the destination of the shipment and other factors in current rule WAC 480-70-016(4)(a) – (g), but as noted, not only Seattle, but federal courts have focused on the percentage of waste in containers as a practical guide to characterizing the nature of transportation . . .

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

*AGG v. Washington County et al.*, 281 F.3d 1324, 1330 (9<sup>th</sup> Cir. 2002).

An additional limitation in the premise at draft rule 3(b) should provide a standard that a motor carrier may not collect and transport recyclable materials that contain more than 10% solid waste by volume.<sup>1</sup>

## 2. Enforcement Standards & Deliveries to and From Materials Recovery Facilities (“MRFs”)

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<sup>1</sup> Note, unlike Seattle’s ordinance, we do not support excluding “beneficial use” material from the maximum 10% limit of waste material in mixed loads, and address “beneficial use”/ADC and appropriateness of certification later in this letter at Section 3, below.

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The draft rule proposal in Subsection 6 and its three subparts concerns the transportation of recyclable materials to a sorting facility of mixed recyclable materials and is a logical compliment to the premise discussed above on characterizing loads of mixed CDL materials.<sup>2</sup> There, the revised rule subsection (a) would require transportation by a solid waste certificate holder or municipal service, where residual waste remains from a MRF for transportation to a disposal site (also consistent with Seattle ordinance cited above), and which we also believe is a logical correlation of draft rule Section 3(b), above.<sup>3</sup> Section 6(b) in isolation is problematic as currently drafted in that while re-emphasizing the “holding out” element for recyclable materials transportation, does not clearly say how that would be established where a load of solid waste material (meeting current statutory and regulatory definitions as such) was transported to a sorting facility by a self-promoted “recycling” company. In other words, we understand the proposed section of the rule as possibly creating an “incidental” exception to a solid waste certificate requirement where a motor carrier transports a load of mixed solid waste CDL to a sorting facility whether or not a “holding out” test was applied.<sup>4</sup>

Subsection 6(c) in part codifies a “two container” requirement that we have long endorsed and features a further requirement that the solid waste generated on site be transported consistently with Title 81.77 RCW. Subsection 6(c), in isolation, is an acceptable threshold test for exemption of transportation of recyclable materials to a sorting facility but is a clearer indicator of the scope of the exemption when read with the provisions of Subsections 6(a) and (b), above.

The issue of mixed wastes load delivery to material recovery facilities of course also raises related concerns of examination and enforcement by the WUTC and other enforcement officers of the operations of a receiving facility for processing recyclable materials, which would include: (1) a review of the local, state and/or federal permits of the receiving facility for handling recyclable materials and

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<sup>2</sup> We note that the draft rule does not indicate in its preamble in subsection (6) that “all” of the following conditions of the rule must be met, and thus address the subsections as if they were independent of each other as to any exemption from RCW 81.77.040.

<sup>3</sup> Unless the MRF residue shipment at issue meets the intended disposal site’s permitting criteria for use as ADC, (including allowable usage volumes), as featured in the applicable solid waste management plan and/or solid waste handling permit and as discussed more specifically in section 3, below.

<sup>4</sup> Delivery of such a load to a materials recovery facility would also appear to violate RCW 70.95.410.

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any valid exemption therefrom; (2) a study of where individual shipments originate and where they are destined; (3) determination of what the shipping documents are reflective of, e.g. what are the arrangements for the facility to receive acceptable material and/or are there criteria for the processor for acceptable contamination levels.

A routine review of the shipping documents involved in particular loads received by the MRF could also be further indicative of the character of transportation in that generators, transporters and receivers of material may very well reflect their understanding of the nature of the materials being transported in those documents.

Finally, an enforcement officer of the WUTC should work with the local county health department officials where the MRF is located to perform visual inspection of the waste composition of any specific load received by the materials processing facility in making an assessment of the character of the load in conjunction with the criteria noted above.

Indeed, in addition to overall review of material recovery facility operations, there are clearly other areas where state and local regulators working together can strengthen enforcement and compliance in the field of solid waste and recyclables collection and transportation. Other areas of enforcement could be examined for greater cooperation and synchronization. Not only is the Commission a frontline regulator and enforcer of solid waste and common carrier transporter regulations, but the Department of Ecology has an important role therein under 2005 legislation codified under RCW 70.95.400 et seq. with its new transporter rules pending final adoption, and Washington counties, both within their individual health department jurisdictional sections and solid waste/public works divisions, are focal points for coordination for health and safety enforcement in the generation, collection, transportation, processing/transfer and disposal of CDL and other materials in this field.

### 3. Alternative Daily Cover Inquiry Response

In its draft rule, the Commission specifically asks for comments on whether the use of waste materials as alternative daily cover ("ADC") should be classified as "recycling or reuse" both at sections 4(f) and 5(c) of the draft rule, and how Commission inspectors might determine whether shipments will be used as ADC or for disposal given that solid waste and ADC materials are transported to landfills. We believe that the issue of the appropriate certification or permitting of the transportation of ADC materials evolves from an understanding that while in isolation ADC is solid waste intended for "beneficial use," as qualified below, it is therefore not "solid waste transportation." Provided that the

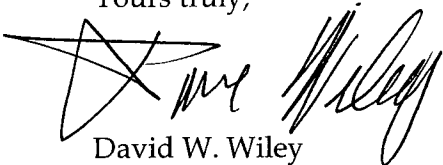
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local health department, the Department of Ecology and/or the Environmental Protection Agency have authorized the component at issue for cover at a landfill, the use of contaminated soils, auto shredder residue ("ASR") and the like at a landfill should not require solid waste certificate authorization for collection and transportation of the material provided the use of the specific material is permitted by those agencies and is designated by the local solid waste management plan.

The Commission is already actively involved in reviewing local solid waste management plans and service level ordinances for compliance with various ratemaking and other issues under RCW 81.77. So long as the ADC material in question is used for a purpose recognized in the local solid waste management plan by a disposal facility whose use complies with applicable local, state and federal environmental permitting requirements, the collection and transportation of such waste material essentially constitutes transportation of a waste material for "beneficial use." Thus, based on the above qualifications, we believe the collection and transportation of waste material as alternative daily cover should not be classified as solid waste transportation provided it complies with the above conditions. On any challenge, the Commission inspectors can verify its permitted and intended use therefor, which again, will begin with a thorough review of the local health jurisdiction's permitting of the disposal facility in question.

The above are offered as initial comments to the draft proposal and we look forward to working with other stakeholders and the Commission staff at further stages of the review, formulation and implementation of any revised solid waste rules that will address the definitions discussed above.

Yours truly,

A handwritten signature in black ink, appearing to read "David W. Wiley". The signature is stylized and written over a large, faint star-shaped graphic.

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