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November 23, 1994

Mr. Steve McLellan, Secretary
Washington Utilities and
Transportation Commission
1300 Evergreen Park Drive South
P.O. Box 9022
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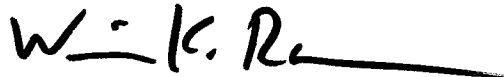
Re: The Disposal Group v. Waste Management Disposal
Services of Oregon d/b/a Oregon Waste Systems,
Washington Utilities and Transportation Commission
Docket No. TG-941154

Dear Mr. McLellan:

Enclosed for filing is the original and three copies of
respondent Oregon Waste Systems' Brief in connection with the
above-referenced matter. Thank you for your assistance.

Very truly yours,

DAVIS WRIGHT TREMAINE



William K. Rasmussen

Enclosure

cc: Parties of Record
Mr. John Prusia, Hearing Officer
Mr. William Jeffry
Mr. Norman Wietting
Mr. Doug Coenen

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BEFORE THE UTILITIES AND TRANSPORTATION COMMISSION
OF THE STATE OF WASHINGTON

THE DISPOSAL GROUP, INC., dba
VANCOUVER SANITARY SERVICE and
TWIN CITY SANITARY SERVICE, a
Washington corporation (G-65),

Complainant,

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,

and

WASHINGTON REFUSE & RECYCLING
ASSOCIATION,

Intervenor.

NO. TG-941154

OREGON WASTE
SYSTEMS' BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTS	2
A. Stipulated Facts	2
B. Additional Facts in the Record	6
III. ARGUMENT AND AUTHORITY	8
A. State Law Exempts the Operation from the Requirements of RCW 81.77	8
1. RCW 81.77.040 Does Not Apply, Because the ALCOA Material Is Not "Solid Waste" for Purposes of RCW 81.77	8
a. The ALCOA Sludge Is a "Recyclable Material."	10
b. The Recyclable Nature of a Material Is Determined by Its Ultimate Use	12
c. Use of Sludge Material as Daily Cover Comports with the Legislature's Waste Reduction and Recycling Policy Goals	15
2. The Collection and Transportation of "Recyclable Materials" Is Exempt from RCW 81.77	17
3. The Oregon DEQ Rule Interpretation Is Irrelevant to the Determination of Whether the ALCOA Sludge Is "Solid Waste" for Purposes of RCW 81.77	18
B. Federal Law Exempts the Operation from State Regulation	22
1. The TOFC/COFC Exemption from State Regulation	22

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3
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6
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a. The TOFC/COFC Exemption Applies
Regardless of Whether or Not the
Material Is Solid Waste 25

b. The ICC Has Jurisdiction Over
Recyclable/Reusable Materials 28

2. The Transportation Service Performed Here Is
Interstate and Protected by the Commerce
Clause 29

3. Enforcement of RCW 81.77 in Favor of Local
Operators Violates the Commerce Clause. 32

IV. CONCLUSION 34

CERTIFICATE OF SERVICE 35

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I. INTRODUCTION.

This case involves the transportation of recyclable material that both state and federal law exempt from the requirements of RCW 81.77. Complainant, The Disposal Group ("TDG"), is asking the Washington Utilities and Transportation Commission to ignore the applicable exemptions and, in effect, is inviting the Commission to exceed its authority.

The ALCOA sludge material transported here is used as "daily cover" at the Oregon Waste Systems Landfill in Arlington, Oregon, a use that is both economically and environmentally beneficial. The sludge is a "recyclable material," which exempts the operation, under applicable state law, from the requirements of RCW 81.77. In addition, federal law (both the Commerce Clause and federal statute and regulation) prohibits the Commission from interfering with the transportation service provided here. This is true regardless of the type of material being transported -- i.e., whether or not the ALCOA sludge material is "solid waste." The Commission, as a creature of statute, should respect the exemptions that apply in this case and dismiss TDG's complaint with prejudice.

1 **II. FACTS.**

2 **A. Stipulated Facts.**

3 The Parties have stipulated to the following facts:

4 1. Rust Remedial Services ("RUST") is a large multi-state
5 environmental company performing land remediation and cleanup
6 operations. It is majority owned by WMX.

7 2. Waste Management Disposal Services of Oregon, Inc. dba
8 Oregon Waste Systems ("OWS") is the operator of a recycling
9 center and landfill at Arlington, Oregon, commonly known as
10 Columbia Ridge Landfill and Recycling Center ("CRLRC"). OWS is
11 wholly owned by Waste Management, Inc. which is wholly owned by
12 WMX.

13 3. RUST was a successful bidder for cleanup and
14 remediation of industrial sludge at the ALCOA plant at or near
15 6200 Old Lower River Road, Vancouver, Washington ("Alcoa site").
16 RUST entered into a contract with ALCOA on July 20, 1994.

17 4. Findley Buttes Landfill Co. in conjunction with
18 Tidewater Barge Company submitted a bid to Rust for
19 transportation and disposal services in connection with ALCOA
20 industrial sludge. RUST did not accept the bid.

21 5. The Disposal Group, Inc. ("TDG") did not bid on
22 collection and transportation of the industrial sludge from the
23 ALCOA site.

24 6. When RUST submitted its bid for the cleanup and
25 remediation, it worked with OWS as a subcontractor. Neither OWS

1 nor RUST included the 4.6% Washington State refuse collection
2 taxes in the bid.

3 7. As part of the contract with ALCOA, RUST is required to
4 remove the sludge from the ALCOA site.

5 8. RUST operates construction and land clearing equipment
6 in removing the sludge from the ALCOA site and loads it into top
7 loading containers mounted on wheeled trailers or chassis at the
8 site.

9 9. RUST contracts with OWS to have the sludge delivered to
10 CRLRC to be used solely as alternate daily cover ("ADC").

11 10. It has been and at all times continues to be the fixed
12 and persisting intent of RUST that the sludge be moved from the
13 ALCOA site in Vancouver, Washington to the CRLRC in Arlington,
14 Oregon in continuous movement.

15 11. OWS contracts with the Union Pacific Railroad and with
16 T&G Trucking and Freight Co. ("T&G") for movement of the loaded
17 containers of sludge from the ALCOA site over the public highways
18 of the States of Washington and Oregon to a railroad siding at or
19 near Portland by T&G for loading onto flat cars operated by Union
20 Pacific for movement in container on flat car ("COFC") for
21 delivery to CRLRC in Arlington, Oregon.

22 12. On or about August 22, 1994, T&G began transporting the
23 sludge from the ALCOA site over the public highways of the States
24 of Washington and Oregon to the railroad siding at or near
25

1 Portland, Oregon, for loading on Union Pacific rail cars for
2 ultimate delivery at CRLRC.

3 13. T&G and Union Pacific Railroad are compensated by OWS
4 for such transportation.

5 14. By letter dated August 22, 1994, OWS requested the
6 Oregon Department of Environmental Quality's ("DEQ") "written
7 notice to proceed with a suitability study for the use of sludge
8 material as an alternative to daily soil cover (ADC) at CRLRC."

9 15. By letter dated August 26, 1994, the DEQ authorized
10 "OWS to proceed with an evaluation of sludge as ADC" at CRLRC
11 ("DEQ's authorization").

12 16. After the sludge from the ALCOA site is delivered to
13 CRLRC, it is used for ADC.

14 17. DEQ's authorization allows:

15 OWS to conduct a test study [of using sludge as
16 ADC] through April 30, 1995. In order for
17 extended approval to be considered, we [DEQ]
18 require OWS to submit a report to DEQ by March 31,
19 1995, documenting the results of the evaluation of
20 the sludge as ADC. At anytime during the test
21 period, if the Department determines that the
22 material is not performing adequately as ADC, the
23 test shall be discontinued. The receipt of this
24 waste must follow your [OWS'] special waste
25 management protocol.

18 18. RUST pays OWS a fixed rate to receive the sludge at
19 CRLRC. The price falls within the range of fifty to seventy
20 percent (50-70%) of OWS' posted gate rate for solid waste.

21 19. OWS accepts materials from other sources at CRLRC at
22 rates below the posted gate rate.

OREGON WASTE SYSTEMS' BRIEF - 4
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1 20. OWS is required to provide daily cover at its landfill
2 pursuant to 40 CFR Section 258.21 and OAR Section 340-94-040 (7)
3 and (8).

4 21. The sludge has value to OWS as alternate daily cover.

5 22. If the sludge material is not useable as ADC, OWS would
6 charge RUST a higher fee for receiving the material at CRLRC.

7 23. If OWS is not permitted to use the sludge material as
8 ADC, OWS will need to locate alternative material for ADC at an
9 expense to OWS.

10 24. TDG provides refuse collection services pursuant to
11 Certificate of Public Convenience and Necessity No. G-65 in the
12 unincorporated areas of Clark County. Such authority includes
13 service to the ALCOA site.

14 25. OWS does not hold a certificate of authority from the
15 Washington Utilities and Transportation Commission to collect and
16 transport solid waste in the State of Washington pursuant to
17 Chapter 81.77 RCW.

18 26. T&G Trucking does not hold a certificate of authority
19 from the Washington Utilities and Transportation Commission to
20 collect and transport solid waste in the State of Washington
21 pursuant to Chapter 81.77 RCW.

1 **B. Additional Facts in the Record.**

2 In addition to the Stipulated Facts, the parties have
3 submitted exhibits which establish the following:

4 If OWS could not use the sludge material as ADC, it would
5 need to locate and use alternative material for ADC at an expense
6 to OWS -- either by excavating soil on site, by offering
7 discounts to other generators for receipt of their ADC material,
8 or by purchasing ADC material directly. Ex. 4, ¶ 10. To date,
9 OWS has not needed to purchase ADC material directly, although
10 other landfills have needed to. Id.

11 The OWS/Rust Agreement contains the following language:

12 "Estimated Monthly Amount of Waste For Land Disposal: 50,000
13 tons." Ex. 1. However, both OWS and Rust understand that the
14 above-quoted contract language simply appears on OWS's standard
15 form contract and does not represent the reality of the
16 situation. Ex. 4, ¶ 11; Ex. 5, ¶ 6. Rust and OWS both agree and
17 understand that the sludge material has value to OWS and will be
18 recycled as daily cover at the CRLRC and not used for disposal.
19 Id. The recycling of the material as daily cover is reflected in
20 the applicable bills of lading, which provide that the material
21 is "to be recycled as daily cover at Columbia Ridge Landfill and
22 Recycling Center." Ex. 11, Ex. 12. Because the material is
23 being recycled, OWS did not include the 4.6 percent Washington
24 State refuse collection tax in its bid to Rust, nor is OWS
25 otherwise collecting that tax. Ex. 4, ¶ 11; Ex. 5, 6..

Similarly, although the OWS/Rust Agreement states in part that Rust "agrees to pay [OWS's] posted disposal rates which may change from time to time," both OWS and Rust understand that the quoted language simply appears on OWS's standard form contract and does not represent the reality of the situation. Ex. 4, ¶ 12; Ex. 5, ¶ 7. Both Rust and OWS agree and understand that Rust is paying less than OWS's posted rates, given the value the material has to OWS as daily cover. Id.

From the beginning of the project excavation, Rust understood that the sludge material had value to OWS as daily cover at the CRLRC and that OWS was not accepting the material for disposal. Ex. 5, ¶ 4. Because OWS was going to recycle the sludge as daily cover, it could offer Rust a favorable rate, which was a material factor in Rust's decision to have the material delivered to the CRLRC in Oregon. Id.

Rust received other offers to transport the sludge from the ALCOA site. For example, the Finley Buttes Landfill Co., in conjunction with Tidewater Barge Lines, offered "to provide transportation and disposal services [to RUST]" in connection with the ALCOA sludge. Ex. 10. Significantly, the Finley Buttes bid also did not include the 4.6 percent Washington State refuse collection tax in its bid to RUST. Id. Ultimately, Rust did not accept the Finley Buttes bid because it was not as attractive as the OWS bid. Ex. 5, ¶ 5.

1 **III. ARGUMENT AND AUTHORITY**

2 Under both state and federal law, the transportation at
3 issue in this proceeding is exempt from the requirements of
4 RCW 81.77. This brief addresses the state law exemption first,
5 and then turns to the federal exemptions.

6 **A. State Law Exempts the Operation from the Requirements**
7 **of RCW 81.77.**

8 Under the express language of the applicable statutory law,
9 and consistent with the Legislature's waste reduction and
10 recycling policy goals enacted in the 1989 Waste Not Washington
11 Act, the use of the ALCOA sludge material as daily cover exempts
12 the operation from the requirements of RCW 81.77.

13 **1. RCW 81.77.040 Does Not Apply, Because the ALCOA**
14 **Material Is Not "Solid Waste" for Purposes of**
15 **RCW 81.77.**

16 RCW 81.77.040 provides in part: "No solid waste collection
17 company shall hereafter operate for the hauling of solid waste
18 for compensation without first having obtained from the
19 commission a certificate declaring that public convenience
20 requires such operation." The linchpin of that sentence is the
21 term "solid waste."

22 For purposes of RCW 81.77, "solid waste" is defined as
23 follows:

24 Solid waste means the same as defined under
25 RCW 70.95.030, except for the purposes of
this chapter solid waste does not include
recyclable materials except for source
separated recyclable materials collected from
residences.

1 RCW 81.77.010(9).

2 RCW 70.95 defines "solid waste" as:

3 all putrescible and nonputrescible solid and
4 semisolid wastes including, but not limited
5 to, garbage, rubbish, ashes, industrial
6 wastes, swill, sewage sludge, demolition and
construction wastes, abandoned vehicles or
parts thereof, and recyclable materials.

7 RCW 70.95.030(19). The definition of "solid waste" under
8 RCW 70.95.030(19) includes sewage sludge and industrial waste and
9 thus would cover the ALCOA sludge material. However, while
10 RCW 70.95.030(19) expressly includes "recyclable materials"
11 within the definition of "solid waste," RCW 81.77.010(9)
12 expressly provides that for purposes of RCW 81.77, "solid waste"
13 does **not** include "recyclable materials" -- "except for source
14 separated recyclable materials collected from residences."

15 The undisputed facts are that OWS uses the ALCOA sludge as
16 daily cover at the landfill and that the material has value to
17 OWS as daily cover. Stip. Facts ¶¶ 16 and 21. The need for
18 daily cover is not some pretext created by OWS, but rather a
19 requirement imposed upon OWS by federal and state law.
20 Stip. Facts ¶ 20. In every respect, the ALCOA sludge is being
21 recycled and reused in an environmentally and economically
22 beneficial manner and is therefore a "recyclable material,"
23 although not "source separated recyclable materials collected
24 from residences." Thus, although the ALCOA sludge is "solid
25 waste" for purposes of RCW 70.95, it is not "solid waste" for

1 purposes of RCW 81.77 and, accordingly, RCW 81.77.040 does not
2 apply.

3 a. The ALCOA Sludge Is a "Recyclable
4 Material." "Recyclable materials" is not defined in RCW
5 81.77. However, "recyclable materials" is defined in RCW 70.95
6 as follows:

7 those solid wastes that are separated for
8 recycling or reuse, such as papers, metals,
9 and glass, that are identified as recyclable
10 material pursuant to a local comprehensive
11 solid waste management plan. Prior to the
12 adoption of the local comprehensive solid
13 waste plan, adopted pursuant to
14 RCW 70.95.110(2), local governments may
15 identify recyclable materials by ordinance
16 from July 23, 1989. (Emphasis added.)

17 RCW 70.95.030(15).

18 The Clark County Comprehensive Solid Waste Management Plan
19 (the "Comprehensive Plan" or the "Plan") recognizes that,
20 "[a]ccording to RCW 70.95 and the [Department of] Ecology, a
21 material may be recycled if it yields a price in the market or
22 has a beneficial end use." Comprehensive Plan at p. 5-19
23 (emphasis added). The Comprehensive Plan "identifies" several
24 ways in which sludge material can be recycled and put to
25 beneficial end use, including: (1) land application of sludges
onto agricultural lands; (2) silviculture -- application of
sludges to forested lands; (3) composting of sludges either alone
or with other organic wastes, such as wood waste, yard debris,
and food wastes; and (4) application of sludge for land

1 reclamation. See Comprehensive Plan at p. 13-37. Indeed, the
2 Plan recognizes that

3 [c]omposting of sludges with readily
4 decomposable wastes, such as yard debris,
5 could use two or more potentially troublesome
6 waste streams and therefore simultaneously
7 reduce the amount of waste requiring disposal
8 and produce a valuable product. (Emphasis
9 added.)

10 Id. at 13-37, 13-38.

11 In particular, the Plan states: "Sludge that has been
12 dewatered, when combined with bulking agents, has been
13 successfully used as daily cover material at landfills." Id. at
14 13-38 (emphasis added).

15 In sum, the Clark County Comprehensive Plan identifies a
16 number of "recyclable" uses for sludge material -- including the
17 very purpose (i.e., as daily cover) for which OWS is using the
18 ALCOA sludge. The ALCOA sludge material therefore meets the
19 definition of "recyclable material" under RCW 70.95.030(15).

20 Further, the use of the ALCOA sludge as daily cover also
21 comports with the Commission's own definition of "recyclable:"

22 For Commission regulation, the term
23 "recyclable" means that the transportation is
24 for recycling, reprocessing, reclamation or
25 for any purpose that extracts or modifies a
commodity or elements within it for reuse or
for another commercially valuable purpose.

Order M.V. No. 143916, In re Safco Safe Transport, Inc., App. No.
P-73623 (October 1991) at p. 3. Thus, under both

1 RCW 70.95.030(19) and Commission precedent, the use of the ALCOA
2 sludge qualifies as a recyclable material.

3 **b. The Recyclable Nature of a Material Is**
4 **Determined by Its Ultimate Use.**

5 The Commission determines whether a transportation service
6 requires G-certificate authority based upon the purpose of the
7 transportation and the end use of the material being transported.

8 The objective distinction is the purpose of
9 the transportation. If the transportation is
10 for disposal, the material is garbage. If
11 the transportation is to move an item to a
12 location for a higher use, the transportation
13 is motor carriage.

14 Order M.V. No. 133753, In re Sunshine Disposal, Inc. v. Valley
15 Transfer & Storage, App. No. E-19104 (April 1986) at p. 6
16 (emphasis added).

17 Conceptually, the value of a tangible material falls into
18 three categories:

- 19 (1) It has value to the holder, who wishes to
20 keep it;
- 21 (2) It has value to the holder, who does not wish
22 to keep it, and the holder sells it or trades
23 it to another; or
- 24 (3) It has no value to the holder, the holder
25 does not or cannot sell it, and the holder
wishes to get rid of it.

Category (3) represents what one normally thinks of as "waste" or
"refuse." But "waste" has two potential fates:

- (a) It is valueless to all and thus will be
disposed of in a landfill (or
incinerated) -- i.e., a non-recycled
material; or

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(b) It has potential value to someone, who will reuse or recycle it -- i.e., a recycled material.

This last distinction governs the Commission's determination of whether a material is "recyclable." Put simply, if the material is transported for actual recycling or reuse, it is a "recyclable material." The Commission has emphasized that its inquiry focusses on the actual use of the material, and not on the labels parties may apply to the material:

Putting the label "waste" on a commodity does not determine whether a solid waste collector or motor carrier may transport it. Nearly all recyclable commodities, by definition, are the products of an initial process or cycle that they ended as waste. Except for the recycling, all recyclables would be subject to disposal. (Citations omitted).

In re Safco at 3.

In determining whether a material is recyclable, the Commission focusses on whether the shipper intends for the material, in fact, to be recycled:

A motor carrier may transport a recyclable commodity if the shipper orders the transportation for recycling, rather than for disposal. Order M.V. No. 133753, In re Sunshine Disposal, Inc. v. Valley Transfer & Storage, App. No. E-19104 (April 1986).

A solid waste collection company may collect and transport materials that shippers intend for disposal. This is true whether or not the label "waste" applies for any other purpose, and whether or not the solid waste carrier sorts or conducts other recycling activity. A shipper may tender brand new items to a solid waste collection company for disposal, if the shipper wants disposal. We

1 deduce the shipper's intention from its
2 tender. If the tender is to a solid waste
3 collection company, the shipper intends
4 disposal. If the shipper tenders a
5 recyclable commodity to a motor carrier, the
6 shipper intends recycling and the
7 transportation must further recycling.

8 In re Safco at 3-4.

9 Here, the ALCOA sludge material has two ultimate fates: (1)
10 it can be shipped for disposal (in which case it is solid waste
11 subject to G-Certificate requirements¹) or (2) it can be
12 beneficially reused in any of the numerous ways identified in the
13 Clark County Comprehensive Plan (in which case it is not subject
14 to G-Certificate requirements). One of the beneficial uses for
15 the ALCOA sludge is as daily cover at a landfill, as the Clark
16 County Plan expressly recognizes. See Comprehensive Plan at p.
17 13-38. The undisputed facts clearly demonstrate that the
18 transportation of the ALCOA sludge is a movement for recyclable
19 purposes. "Rust contracts with OWS to have the sludge delivered
20 to CRLRC to be used as alternative daily cover." Stip. Facts
21 ¶ 9. "After the sludge from the ALCOA site is delivered to
22 CRLRC, it is used for ADC." Stip. Facts ¶ 16.

23 The one wrinkle in this case is that the ALCOA sludge is put
24 to beneficial use at a landfill site, as opposed to a non-
25 landfill site. But that fact does not deprive the sludge of its

¹ This assumes that no other law exempts it from the requirements of RCW 81.77, which is not the case here, given the federal exemptions that apply, as discussed below.

1 "recyclable" character. The fact remains that the sludge is not
2 disposed of -- i.e., it does not use up existing landfill
3 capacity -- but rather is applied as daily cover over the solid
4 waste that is disposed of in the landfill. Daily cover
5 represents a higher use -- an environmentally and economically
6 more beneficial use -- than mere disposal. A material should not
7 lose its character as "recyclable" simply because one puts it to
8 beneficial use at the landfill site, as opposed to at a non-
9 landfill site.

10 **c. Use of Sludge Material as Daily Cover**
11 **Comports with the Legislature's Waste**
12 **Reduction and Recycling Policy Goals.**

13 In determining whether the ALCOA sludge is a "recyclable
14 material," the Commission should seek harmony with the Washington
15 Legislature's principal enactments regarding solid waste and
16 recyclable materials.

17 In 1989, the Legislature enacted the Waste Not Washington
18 Act, which fundamentally redirected solid waste management policy
19 in the state. See Laws 1989, ch. 431. The legislature found
20 that "traditional methods of disposing of solid wastes in this
21 state are no longer adequate to meet the ever-increasing
22 problem." RCW 70.95.010(2). "Waste reduction must become a
23 fundamental strategy of solid waste management."

24 RCW 70.95.010(4). "Source separation of waste material must
25 become a fundamental strategy of solid waste management.

Collection and hauling strategies should have, as the ultimate

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1 goal, the source separation of all materials with resource value
2 or environmental hazard." RCW 70.95.010(5). "It is the
3 responsibility of state, county, and city governments to provide
4 for a waste management infrastructure to fully implement waste
5 reduction and source separation strategies and to process and
6 dispose of remaining waste in a manner that is environmentally
7 safe and economically sound." RCW 70.95.010(6)(b).

8 The Legislature sets forth the "following priorities for the
9 collection and management of solid waste . . . [which] should be
10 followed in descending order as applicable:"

- 11 (a) Waste reduction;
- 12 (b) Recycling, with source separation of recyclable
13 materials as the preferred method;
- 14 (c) Energy recovery, incineration, or landfill of
15 separated waste;
- 16 (d) Energy recovery, incineration, or landfill of
17 mixed wastes.

18 RCW 70.95.010(8).

19 The priorities given to waste reduction and recycling are
20 designed, in part, to preserve existing landfill capacity for as
21 long as possible. OWS's use of the ALCOA sludge as daily cover
22 is fully consistent with the requirements and priorities of
23 RCW 70.95. In particular, the Comprehensive Plan's
24 identification of the value of sludge material, and the
25 material's potential as a "valuable product", comports with the
legislature's express findings in RCW 70.95J.005(d):

1 Properly managed municipal sewage sludge is a
2 valuable commodity and can be beneficially
3 used in agriculture, silviculture and in
4 landscapes as a soil conditioner.²

5 (Emphasis added.)

6 The Commission should interpret its authority and purpose in
7 a manner consistent with RCW 70.95. It can do that only by
8 holding that the ALCOA sludge material, if used as daily cover,
9 is a "recyclable material."

10 **2. The Collection and Transportation of "Recyclable
11 Materials" Is Exempt from RCW 81.77.**

12 Not only does RCW 81.77.040 not apply, but RCW 81.77.140
13 expressly exempts the transportation of recyclable materials from
14 all regulation under RCW 81.77. RCW 81.77.140 provides:

15 Nothing in this chapter shall prevent a
16 recycling company or non-profit entity from
17 collecting and transporting recyclable
18 materials from a buy-back center, drop-box,
19 or from a commercial or industrial generator
20 of recyclable materials, or upon agreement
21 with a solid waste collection company.

22 Nothing in this chapter shall be
23 construed as prohibiting a commercial or
24 industrial solid waste generator of
25 commercial recyclable materials from selling,
conveying, or arranging for transportation of
such material to a recycler for reuse or
reclamation.

26 ² While RCW 70.95J deals with "municipal" sewage sludge --
27 meaning material "generated from a publicly owned wastewater
28 treatment plant, see RCW 70.95J.010(4) -- the "municipal"
29 character of the sewage sludge does not bear on its status as a
30 "valuable commodity." In other words, sewage sludge can be a
31 valuable commodity regardless of whether or not it is
32 "municipal."

1 As a "recyclable material," the ALCOA sludge can be
2 transported free from the requirements of RCW 81.77. This wholly
3 comports with the fact that, for purposes of RCW 81.77, "solid
4 waste" does not include "recyclable materials." See
5 RCW 81.77.010(9). The Legislature created a consistent statutory
6 scheme by which the transport of recyclable materials is not
7 subject to solid waste collection company regulation under
8 RCW 81.77.³ Consequently, under the applicable Washington law,
9 no G-certificate is required here and TDG's complaint should be
10 dismissed.

11 **3. The Oregon DEQ Rule Interpretation Is Irrelevant
12 to the Determination of Whether the ALCOA Sludge
13 Is "Solid Waste" for Purposes of RCW 81.77.**

14 TDG has introduced Exhibit 3, an Oregon Department of
15 Environmental Quality ("DEQ") rule interpretation regarding what
16 materials DEQ has purportedly decided to count in tonnage and fee
17 calculations for purposes of OAR 340-97. Over objection, Exhibit
18 3 was admitted into evidence, based on the Commission's "liberal"
19 application of the rules of evidence regarding relevancy. As

20 ³ Similarly, RCW 81.77.010(8) provides that "solid waste
21 collection does not include . . . collecting or transporting
22 recyclable materials by or on behalf of a commercial or
23 industrial generator of recyclable materials to a recycler for
24 use or reclamation." Again, the exclusion of recyclable
25 materials from the definition of "solid waste collection" is
consistent with RCW 81.77.010(9), which excludes "recyclable
materials from the definition of "solid waste," and is consistent
with RCW 81.77.140, which expressly exempts the transportation of
"recyclable materials" from the requirements of RCW 81.77
entirely.

1 explained below, however, OWS respectfully submits that in view
2 of the applicable law and entire factual record, Exhibit 3 is
3 irrelevant and should be accorded no weight.

4 First, by its own terms, Exhibit 3 "does not constitute
5 rulemaking" by the DEQ. Indeed, the statement's "Disclaimer"
6 provides:

7 It may not be relied upon to create a right
8 or benefit, substantive or procedural,
9 enforceable at law or equity, by any person.
10 DEQ may take action at variance with this
11 policy.

12 Ex. 3. TDG's use of the policy statement in an effort to create
13 rights and benefits in its favor in this proceeding directly
14 violates the express terms of the Disclaimer and the intent of
15 the policy statement. For that reason alone, Exhibit 3 should be
16 accorded no weight.

17 Second, even apart from the Disclaimer, the current status
18 of the rule interpretation further clouds its probative value.
19 The "Interpretation" portion of the statement contains an alleged
20 extra word (the word "not") that renders the policy statement
21 nonsensical. DEQ could have simply reissued the policy statement
22 in corrected form to end the confusion, which should have taken
23 all of about five minutes. Instead, at least as of October 25,
24 1994, DEQ has embarked on a tangled course whereby it says it is
25 using the policy statement as if it has been corrected, even
though the statement has not in fact been corrected. See Ex. 19.
Exhibit 19 does not explain why DEQ is seeking to handle the

1 confusion it has created in this puzzling way, but it suggests
2 that DEQ itself is having trouble coming to grips with the
3 meaning and ramifications of its own policy statement.

4 Third, even if Exhibit 3 did not contain the Disclaimer, and
5 even if DEQ could end the confusion surrounding the existing
6 policy statement, it would still have no bearing on the issues in
7 this proceeding. The operative portion of the DEQ rule provides
8 that all materials received by a landfill are subject to the
9 tonnage and fee calculations "if that material meets the
10 definition of solid waste and would otherwise be disposed of,
11 regardless of the ultimate/use disposition of the material by the
12 landfill owner/operator."

13 This provision is irrelevant to this proceeding for several
14 reasons. Oregon's definition of "solid waste" under OAR 340-93-
15 030(75) is fundamentally different from the definition of solid
16 waste under RCW 81.77.010(9). Specifically, the Oregon
17 definition does not exclude "recyclable materials" as the
18 Washington definition does. Thus, the entire DEQ rule
19 interpretation is based on definitional scheme directly contrary
20 to definitional scheme under RCW 81.77 that the Commission must
21 address here.

22 Further, Exhibit 3 purports that a material is included in
23 the tonnage fee calculation only "if that material meets the
24 definition of solid waste and would otherwise be disposed of."
25 (Emphasis added). Here, however, the record contains no evidence

1 that if the ALCOA sludge were not delivered to OWS for use as
2 daily cover it "would otherwise be disposed of." No evidence
3 exists that the ALCOA sludge would not have been put to one of
4 the several other beneficial uses identified for sludge in the
Clark County Comprehensive Plan.

5 Finally, the fact that Oregon may choose to apply tonnage
6 fees to the recycled daily cover material is irrelevant to the
7 issue of whether the material is classified as solid waste or a
8 recyclable material under Washington law. Oregon could apply a
9 fee in any of several ways. But whether Oregon applies a fee to
10 disposed of material⁴ only and not to daily cover material, or
11 to both materials, or to neither, is simply irrelevant to the
12 real and actual difference between the two types of material.
13 The fact that Oregon may now have chosen to apply the tonnage fee
14 to both the recycled and non-recycled material is not surprising,
15 since that approach generates the most revenue for the state.
16 But that is a policy choice Oregon DEQ has made for revenue
17 purposes, and should not be confused with a determination that
18 recycled daily cover material is "solid waste" for purposes of
19 RCW 81.77.
20
21
22

23 ⁴ By "disposed of material," it is meant that material that
24 is disposed of at in a landfill and uses up existing landfill
25 capacity, as opposed to daily cover material which does not use
up existing landfill capacity.

B. Federal Law Exempts the Operation from State Regulation.

1 Even if the ALCOA material did fall within the Commission
2 regulatory authority under RCW 81.77 (which, as explained above,
3 it does not), federal law still exempts its transportation from
4 state regulation.

1. The TOFC/COFC Exemption from State Regulation.

5 Congress and the Interstate Commerce Commission have
6 exempted all trailer-on-flatcar/container-on-flatcar (TOFC/COFC)
7 service from state regulation, and the Commission should dismiss
8 TDG's complaint on that basis. See 49 CFR 1090.2. The
9 transportation service provided in this case, via sealed
10 intermodal containers, meets the ICC definition of TOFC/COFC
11 service.⁵ See Stip. Facts ¶¶ 10-11; Ex. 3. Consequently, the
12
13

14 ⁵ Rail trailer-on-flatcar/container-on-flatcar
15 (TOFC/COFC) service means the transportation by rail,
in interstate or foreign commerce, of:

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

1 entire intermodal transportation -- including the trucking
2 portion -- is exempt from state regulation (including regulation
3 by the WUTC).

4 The ICC and the courts have continually broadened the
5 TOFC/COFC exemption over the past 14 years. In 1980, Congress
6 enacted the Staggers Rail Act, 94 Stat. 1895, 49 U.S.C. §§ 10101
7 et seq., which authorized the ICC to exempt from state regulation
8 "transportation that is provided by a rail carrier as a part of a
9 continuous intermodal movement." See 49 U.S.C. 10505(f). In
10 1981, the ICC adopted regulations exempting both the motor
11 portion and rail portion of TOFC/COFC service from state
12 regulation. See 49 CFR § 1039.13 (1986); see also Improvement of
13 TOFC/COFC Regulation, 364 ICC 731 (1981). This regulation was
14 upheld in American Trucking Ass'n Inc., 656 F.2d 1115 (5th Cir.
15 1981), which involved an interstate TOFC/COFC shipment.

16 In 1987, the U.S. Supreme Court upheld an ICC regulation
17 exempting from state regulation intrastate TOFC/COFC shipments
18 made on trucks owned by railroads. ICC v. Texas, 479 U.S. 450,
19 107 S.Ct. 787, 93 L.Ed.2d 809 (1987). In that case, the Supreme
20 Court reversed the Fifth Circuit's decision in Texas v. United
21 States, 770 F.2d 452 (5th Cir. 1985), in which the lower court
22 had attempted to limit the exemption from state regulation only
23 to those TOFC/COFC shipments that crossed state lines. The

24 use in the TOFC/COFC service.

25 49 CFR 1090.1(a).

OREGON WASTE SYSTEMS' BRIEF - 23
25608\50\00056.BRF
Seattle

1 Supreme Court stated: "It is undisputed that the [ICC's] power to
2 grant these exemptions from state regulation is coextensive with
3 its own authority to regulate, or not to regulate, these
4 intermodal movements by rail carrier." ICC v. Texas, 479 U.S. at
5 455. The Supreme Court thus concluded that, because the ICC has
6 jurisdiction over the intrastate trucking portion of continuous
7 TOFC/COFC transport, the Commission also properly exercised its
8 authority to exempt that same intrastate transport from state
9 regulation. Id. at 456-461.

10 The Supreme Court's 1987 ruling in ICC v. Texas was limited
11 to motor carrier service performed with equipment owned and
12 operated by the railroad. See ICC v. Texas, 479 U.S. 450, 457.
13 However, in 1989, the ICC expanded the exemption to include motor
14 carrier equipment that is not owned and operated by the railroad.
15 See Improvement of TOFC/COFC Regulations, 6 I.C.C.2d 208 (1989);
16 see also Central State Motor Freight Bureau, 924 F.2d 1099 (D.C.
17 Cir. 1991). The expanded and current TOFC/COFC exemption now
18 provides in relevant part:

19 . . . rail TOFC/COFC service and highway
20 TOFC/COFC service provided by a rail carrier
21 either itself or jointly with a motor carrier
22 as part of a continuous intermodal freight
23 movement is exempt from the requirements of
24 49 U.S.C. subtitle IV [Interstate Commerce],
25 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

1 movement provided by a rail carrier are
2 similarly exempt. Tariffs heretofore
3 applicable to any transportation service
4 exempted by this section shall no longer
5 apply to such service. . . .

6 49 CFR § 1090.2 (emphasis added). In sum, the TOFC/COFC
7 regulations no longer require that the railroad own and/or
8 operate the trucks used in the motor portion of the TOFC/COFC
9 haul. Therefore, the truck haul performed by T&G Trucking in
10 this case is exempt from state regulation, even though it is
11 performed with trucks not owned by the rail carrier.

12 **a. The TOFC/COFC Exemption Applies Regardless of
13 Whether or Not the Material Is Solid Waste.**

14 TDG has argued that the TOFC/COFC exemption would apply,
15 except for that fact that the material being transported is
16 "solid waste." Ex. 17 at 1. TDG points to an old ICC motor
17 carrier decision, Joray Trucking, 99 M.C.C. 109 (1965), in which
18 the ICC held that transportation of rock and debris from
19 demolition sites was not subject to regulation under part II of
20 the Interstate Commerce Act, because rock and debris were not
21 "property" due to their "negative value as a commodity."

22 Joray is distinguishable from this case both factually and
23 legally. Factually, the ALCOA sludge material does not have
24 "negative value." Rather, the material has positive value to OWS
25 for use as daily cover at the landfill. See Stip. Facts ¶ 21.
OWS needs daily cover material to meet federal and state landfill
requirements. Stip. Facts ¶ 20. If OWS were not permitted to
use the sludge material as ADC, OWS would need to locate

alternative material for ADC at an expense to OWS. Stip. Facts

¶ 23. Thus, even under Joray, the material is "property" for purposes of ICC motor carrier jurisdiction.

But facts aside, Joray is also distinguishable legally. Joray involved the ICC's jurisdiction under part II (now subchapter II) of the Interstate Commerce Act, which governs motor carrier transportation. Specifically, 49 U.S.C. § 10521(a) provides in part:

Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor freight carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both are transported by motor carrier . . ." (Emphasis added).

It is possible that the ICC's jurisdiction over motor carriers under subchapter II applies only to transportation of "passengers" and "property." The TOFC/COFC exemption, however, does not derive from subchapter II, but rather is authorized by 49 U.S.C. §§ 10505(a) and (f), which is located in subchapter I (Rail, Rail-Water, Express, and Pipeline Carrier Transportation) of the Act. Subchapter I confers jurisdiction on the ICC over all transportation by rail, not simply that limited to transportation of "passengers" or "property." Specifically, section 10501(a) provides:

Subject to this chapter and other law, the ICC has jurisdiction over transportation

1 (1) by rail carrier, express carrier,
2 sleeping car carrier, water common carrier,
3 and pipeline carrier that is --

4 (A) only by railroad;

5 (B) by railroad and water, when the
6 transportation is under common control,
7 management, or arrangement for a continuous
8 carriage or shipment;

9 (C) by pipeline or by pipeline and railroad or
10 water when transporting a commodity other
11 than water, gas, or oil.

12 (Emphasis added.)

13 Similarly, 49 U.S.C. § 10501(d) provides that the ICC's
14 jurisdiction "over transportation by rail carriers . . . is
15 exclusive." The ICC therefore has jurisdiction over all rail
16 transportation, and thus has the authority to exempt all or part
17 of such service from federal and state regulation, as it has done
18 in the case of TOFC/COFC transportation.

19 TDG's reliance upon Joray and other motor carrier decisions
20 ignores the very purpose of the TOFC/COFC exemption, which is to
21 treat the motor carrier portion of the service as part of the
22 rail service. In ICC v. Texas, the Supreme Court held:

23 We believe, however, that the correct, and
24 certainly the more natural, reading of the
25 statute is that all of the TOFC/COFC service
provided by interstate rail carriers on
equipment they own is "transportation
provided by a rail carrier" subject to the
jurisdiction of the ICC."

1 ICC v. Texas, 479 U.S. at 457. Stated more succinctly, "rail
2 owned truck TOFC/COFC service⁶ is "transportation that is
3 provided by rail carrier." ICC v. Texas, 479 U.S. at 453. In
4 American Trucking Ass'n Inc., 656 F.2d 1115, 1122 (5th Cir.
5 1981), the court expressly rejected the argument that subchapter
6 II requirements applied to TOFC/COFC shipments, given "the broad,
7 plain language used in section 10505(a) and 10505(f)."

8 Finally, courts have held that the TOFC/COFC exception
9 should be interpreted broadly:

10 We note that Congress has chosen not to
11 define narrowly the Commission's exemption
12 authority but instead has extended that
13 authority to "matters related to a rail
14 carrier providing transportation."

15 American Trucking Ass'n Inc., 656 F.2d at 1121. The Commission
16 should not seek to interpret the TOFC/COFC exemption narrowly
17 here.

18 **b. The ICC Has Jurisdiction Over
19 Recyclable/Reusable Materials.**

20 Regardless of whether the ICC has jurisdiction over the
21 transportation of solid waste, the ICC clearly has jurisdiction
22 over the transportation of recyclable/reusable material, such as
23 the "daily cover" material at issue in this case.

24 ⁶ As noted earlier, the ICC no longer now requires the rail
25 carrier to own the trucks to qualify for the TOFC/COFC exemption.
26 See 49 CFR 1092; see also Improvement of TOFC/COFC Regulations, 6
27 I.C.C.2d 208 (1989); Central State Motor Freight Bureau, 924 F.2d
28 1099 (D.C. Cir. 1991).

1 The ICC's jurisdiction over recyclable materials is evident,
2 in part, from 49 U.S.C. § 10731, which authorizes the ICC to
3 investigate the rate structure for the transportation of
4 recyclable or recycled materials by rail carriers providing
5 transportation subject to the jurisdiction of the Commission
6 under subchapter I of Interstate Commerce Act. See 49 U.S.C. §
7 10731(b)(1).

8 Under section § 10731, "recyclable material" means "material
9 collected or recovered from waste for a commercial or industrial
10 use whether the collection or recovery follows end usage as a
11 product." 49 U.S.C. 10731(a)(1). The ALCOA sludge material use
12 as daily cover clearly meets this broad definition of "recyclable
13 material."

14 Therefore, because the ICC has jurisdiction over the
15 transportation of recyclable materials, it has the authority to
16 exempt such transportation from state regulation. Here, pursuant
17 to 49 U.S.C. 10505(a) and (f), Congress and the ICC have exempted
18 TOFC/COFC transportation from state regulation and TDG's
19 complaint should be dismissed.

20 **2. The Transportation Service Performed Here Is
21 Interstate and Protected by the Commerce Clause.**

22 The transportation service performed by T&G Trucking is
23 interstate in nature and therefore also exempt from state
24 regulation under the Commerce Clause, Art. I, § 8, cl. 3., of the
25 United States Constitution. Indeed, the Commission's own
analysis in In Re Enoch Rowland d/b/a Kleenwell Biohazard and

1 General Ecological Consultants, Docket No. TG-920304 (1993),
2 confirms the interstate nature of the transportation service in
3 this case and the Commission's lack of authority over that
4 service.

5 In Kleenwell, the Commission recognized that "the test for
6 determining whether motor freight transportation of valuable
7 commodities between two points in the same state is simply
8 intrastate traffic or is a leg in an interstate movement is the
9 shipper's fixed and persisting intent at the time of the
10 shipment." Kleenwell at 8 (citing Baltimore & Southwestern R.R.
11 Co. v. Settle, 260 U.S. 166, 57 L.Ed. 189, 43 S.Ct. 28 (1922)).
12 Under that test, the Commission found that Kleenwell was not
13 engaged in interstate movement for two reasons: (1) because
14 Kleenwell did not transport the waste directly out of state, but
15 rather hauled it to an in-state warehouse first where it stored
16 and accumulated the waste; and (2) because the shippers did not
17 care where the waste was taken. Kleenwell at 8.

18 This case is distinguishable from Kleenwell on both counts.
19 First, no intermediate in-state stopover occurs. Rather, T&G
20 Trucking picks up the sealed intermodal containers from the ALCOA
21 site and hauls them directly (non-stop) across state lines to the
22 Portland rail site. Second, it is uncontroverted that Rust has
23 the fixed and persisting intent that the sludge be moved from the
24 ALCOA site in Vancouver, Washington to the OWS landfill in
25 Arlington, Oregon in continuous movement. Stip. Facts ¶ 10.

OREGON WASTE SYSTEMS' BRIEF - 30
25608\50\00056.BRF
Seattle

Kleenwell is also distinguishable on another key ground.

1 The Commission found that "Kleenwell has chosen to take the waste
2 across the state line for only one reason -- to evade state
3 regulation of the service." Kleenwell at 8. Here, the record
4 contains no evidence that the ALCOA sludge is transported to the
5 OWS landfill for the purpose of evading Commission regulation.
6 To the contrary, OWS desires the sludge because of its value as
7 daily cover. Stip. Facts ¶ 21. Further, Rust desires to send
8 the sludge to the OWS landfill because it is the most attractive
9 option (as opposed to the less attractive Finley Buttes bid).
10 Ex. 5, ¶ 5.

11 In Kleenwell, the Commission acknowledged that "it is not
12 necessary to request permission from the Commission to transport
13 waste across state lines and in fact the Commission has no power
14 to grant authority of that nature." Kleenwell, at 10. The
15 Commission further recognized that "interstate commerce" begins
16 "when the waste has begun to move as a article of trade from one
17 state to another." Kleenwell at 8. Here, that begins at the
18 very outset of T&G Trucking's service when it begins moving the
19 loaded containers from the ALCOA site for delivery to the
20 Portland rail site. Accordingly, the entire T&G Trucking truck
21 haul is an interstate movement and outside the Commission's
22 regulatory jurisdiction.

3. Enforcement of RCW 81.77 in Favor of Local Operators Violates the Commerce Clause.

1 The Commerce Clause also forbids the Commission from
2 enforcing RCW 81.77 in a manner that discriminates against out-
3 of-state interests, such as T&G Trucking, in favor of an in-state
4 "favored operator," such as TDG.

5 In analyzing state economic regulation under the Commerce
6 Clause, the Supreme Court has erected "a virtually per se rule of
7 invalidity" where state legislation effects "simple economic
8 protectionism." Philadelphia v. New Jersey, 437 U.S. 617, 624
9 (1978). In a recent decision, C & A Carbone, Inc. v. Town of
10 Clarkstown, New York, 511 U.S. ___, 128 L.Ed.2d 399, 114 S.Ct.
11 1677 (May 16, 1994), the Supreme Court invalidated as
12 protectionist a flow control ordinance that required all
13 nonhazardous solid waste within the town to be deposited at a
14 single transfer station for processing and disposal. The Court
15 held that the Commerce Clause did not permit the town to prevent
16 "everyone but the favored local operator from performing the
17 initial processing step" and thus "depriv[e] competitors,
18 including out-of-state firms, of access to a local market."

19 Carbone, 128 L.Ed.2d at 407. The Court reasoned that

20 the article of commerce is not so much the
21 solid waste itself, but rather the service of
22 processing and disposing of it. With respect
23 to this stream of commerce, the flow control
24 ordinance discriminates, for it allows only
25 the favored operator to process waste that is
within the limits of the town. The ordinance
is no less discriminatory because in-state or

in-town processors are also covered by the prohibition.

1 Carbone, 128 L.Ed.2d at 408. (emphasis added).

2 RCW 81.77 is precisely analogous to the flow control
3 ordinance involved in Carbone. Just as the flow control
4 ordinance prevented all firms other than the "favored operator"
5 from processing waste within the town limits, RCW 81.77 prevents
6 all firms except the G-certificate holder from hauling solid
7 waste within a given territory.

8 Protectionist legislation is invalid unless the locality can
9 demonstrate that it has no alternative means of advancing a
10 legitimate local purpose. Maine v. Taylor, 477 U.S. 131, 145-46
11 (1986). In Carbone, the Court rejected the town's attempt to
12 justify the flow control ordinance on health and environmental
13 grounds:

14 Clarkstown has any number of
15 nondiscriminatory alternatives for addressing
16 the health and environmental problems alleged
17 to justify the ordinance in question. The
18 most obvious would be uniform safety
19 regulations enacted without the object to
discriminate. These regulations would ensure
that competitors like Carbone do not
underprice the market by cutting corners on
environmental safety.

20 Carbone, 128 L.Ed.2d at 409. Here, to the extent that the
21 Commission wishes to advance public health and safety interests,
22 it must do so directly -- through uniform safety regulations, for
23 example -- and not in a manner that deprives interstate interests
24 of access to the market.

25 OREGON WASTE SYSTEMS' BRIEF - 33
25608\50\00056.BRF
Seattle

1 In sum, in light of the Supreme Court's recent ruling in
2 Carbone, RCW 81.77 violates the Commerce Clause and is therefore
3 not enforceable to deprive out-of-state interests, like T&G
4 Trucking, of the right to haul materials from Vancouver,
5 Washington across state lines into Oregon.

6 **IV. CONCLUSION**

7 The transportation of the ALCOA sludge is exempt from the
8 requirements of RCW 81.77 under both state and federal law.
9 Accordingly, The Disposal Group's complaint should be dismissed
10 with prejudice.

11 Dated this 23rd day of November, 1994.

12 DAVIS WRIGHT TREMAINE
13 Attorneys for Waste Management
14 Disposal Services of Oregon, Inc.,
15 d/b/a Oregon Waste Systems

16 

17 William K. Rasmussen
18 WSBA #20029

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing same, postage prepaid, to:

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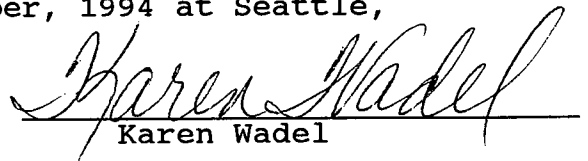
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Dated this 23rd day of November, 1994 at Seattle, Washington.


Karen Wadel

OREGON WASTE SYSTEMS' BRIEF - 35
25608\50\00056.BRF
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