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VIA E-MAIL AND U.S. MAIL

David W. Danner, Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive, SW
P.O. Box 47250
Olympia, Washington 98504-7250

RE: Solid Waste Definitions Rulemaking, Chapter 480-70 WAC
Docket TG-080591

Dear Mr. Danner:

On behalf of Waste Management of Washington, Inc. ("WM"), I am submitting the following comments on the Commission's "discussions draft" of proposed regulations revising the solid waste definitions in its Solid Waste and/or Collection Companies regulations, Chapter 480-70 WAC. WM is very interested in this rulemaking, especially because WM operates solid waste collection and disposal facilities, as well as collection and processing facilities for recyclables. WM supports the goal of these rules, and welcomes the opportunity to clarify when transportation is subject to the Commission's regulation of solid waste collection companies.

WM is submitting these comments as preliminary comments on the "discussion draft" regulations. WM reserves the right to revise, supplement, and/or withdraw any of these comments in response to the actual proposed rules published during the formal comment period, as well as any further discussion drafts.

Comment 1: Waste Management urges the Commission to emphasize that "universal" collection of solid waste is always regulated.

Waste Management supports any and all efforts to make sure that regular, scheduled, and routine collection of solid waste from residences, businesses, and institutions is regulated. The policy underlying Chapter 81.77 RCW when it was first conceived in 1961 was to ensure that all customers received the necessary services of garbage collection, no matter how remote, at rates that are just, fair, reasonable and sufficient. It was intended to prevent "cream-skimming" in which collection was offered at a reasonable cost only to densely-populated and highly-profitable areas. In a sense, solid waste collection was viewed as a type of utility that all citizens needed. WM supports rulemaking that ensures that universal collection services remain regulated.

Comment 2: Waste Management recommends that the Commission adopt Ecology's definition of "municipal solid waste" to more accurately reflect the scope of regulated solid waste collection.

For similar reasons, WM suggests the Commission adopt the definition of "municipal solid waste" set forth in the Department of Ecology's Solid Waste Regulations as a clarification of its regulatory focus. The statutory definition of "solid waste" is unduly broad and creates ambiguities. While the Commission has authority to regulate collection of all materials that fall within its scope, the concept of "municipal solid waste" more clearly reflects the waste stream over which it regularly exercises its oversight. The term is defined as:

> "Municipal solid waste (MSW)" means a subset of solid waste which includes unsegregated garbage, refuse and similar solid waste material discarded from residential, commercial, institutional and industrial sources and community activities, including residue after recyclables have been separated. Solid waste that has been segregated by source and characteristic may qualify for management as a non-MSW solid waste, at a facility designed and operated to address the waste's characteristics and potential environmental impacts. The term MSW does not include:
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> ▪ Dangerous wastes other than wastes excluded from the requirements of chapter 173-303 WAC, Dangerous waste regulations, in WAC 173-303-071 such as household hazardous wastes;
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> ▪ Any solid waste, including contaminated soil and debris, resulting from response action taken under section 104 or 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601), chapter 70.105D RCW, Hazardous waste cleanup -- Model Toxics Control Act, chapter 173-340 WAC, the Model Toxics Control Act cleanup regulation or a remedial action taken under those rules; nor
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> ▪ Mixed or segregated recyclable material that has been source-separated from garbage, refuse and similar solid waste. The residual from source-separated recyclables is MSW.

WAC 173-350-100. This definition would focus the Commission's regulatory orientation, and emphasize its authority over universal solid waste collection. Ecology's definition of "municipal solid waste" captures the essence of what most customers put out for collection. WM therefore recommends that it be adopted by the Commission as a clarification of its primary concern.

WM recognizes that the Commission and Ecology do not have the same regulatory goals: the former is oriented toward economic regulation and the latter is focused on environmental protection. As a result, in some instances there is a legitimate reason for regulatory definitions to diverge. However, to the maximum extent practicable, having consistent definitions would facilitate coordination between the two agencies and enhance common understandings in the regulated community. The Commission's definition of "solid waste" is derived from the one housed in Ecology's statute, and adopting the definition of MSW merely furthers that statutory parity. There are very few situations (e.g., city

contract, self-haul) where collection of MSW would not be regulated by the Commission, and adopting this definition would eliminate some current ambiguities in the regulated community.

Comment 3: Waste Management suggests the Commission clarify that transporting hazardous and non-hazardous waste generated as part of an environmental remediation is not regulated.

Collection of materials generated as a result of cleaning up a contaminated or hazardous waste site, even where some of the waste is non-hazardous, is not the kind of "universal" service that should be subject to Commission tariffs and charges. Where economic regulation is subordinate to risks to human health and the environment, the Commission has less of a regulatory role. Materials outside the definition of MSW deserve greater scrutiny in considering whether the Commission's oversight is necessary.

Arguably, the definition of "solid waste" could be rigidly interpreted to include hazardous waste generated at environmental remediation sites. Yet, today's solid waste companies do not collect that material and historically have not done so under their G-certificate authority. Regulated solid waste collection companies do not hold themselves out for transportation of hazardous waste.

Transporting hazardous waste from an environmental remediation site is highly specialized and markedly different than traditional collection of residential, commercial, and industrial solid waste. There are significant statutory and common law liabilities associated with handling materials generated at remediation projects conducted under the relevant federal and state statutes. *See* 42 U.S.C. 9601, et al. (the "Comprehensive Environmental Response, Compensation and Liability Act of 1980" or "CERCLA"); Ch. 70.105D RCW (the "Model Toxics Control Act" or "MTCA"). Furthermore, decisions about cleanup alternatives – including the transportation and ultimate disposal of contaminated materials – are either made or overseen by the Department of Ecology or the U.S. Environmental Protection Agency. It will be a surprise to EPA or Ecology if the disposal alternatives for waste generated at remediation sites is constrained by Commission regulations.

Excluding only transportation of material that qualifies under the state dangerous waste or federal hazardous waste laws does not completely correct the situation. Again, the regulatory definition of MSW properly reflects practical reality by excluding "any solid waste, including contaminated soils and debris" resulting from CERCLA or MTCA cleanups because some non-hazardous waste is inevitably generated at remediation projects, too. Indeed, contaminated soils often must be cleaned up – i.e., excavated – even if the contamination concentrations fall below hazardous waste levels. Requiring that waste fraction to be separately managed – some by hazardous waste transporters, others by G-certificate haulers – at a remediation project is not practicable and may make off-site disposal options cost-prohibitive, even though preferred by Ecology or EPA.

A remediation site being cleaned up under CERCLA or MTCA may have a variety of chemical contaminants, several different contaminated environmental media (e.g., soil, groundwater, sediments), and varying levels of contamination that may range from non-detect to detectable, but non-hazardous to above-hazardous waste levels. Whether any particular batch of excavated material is hazardous or non-hazardous waste will not be known not until tested. When remediating a site under CERCLA or MTCA,

various waste streams are tested in batches to determine the level of contamination. Sampling data then dictates appropriate handling.

Due to the enormous environmental liabilities associated with generating, transporting, treating and disposing of regulated hazardous waste, the costs of operating a hazardous waste "Subtitle C" disposal facility that can accept the materials are very high and as a result, so are the disposal fees. Parties responsible for remediation activities are concerned first about minimizing liabilities, and are therefore willing to pay the higher costs for greater assurances of controlling risk. They are, however, not unmindful of costs. Thus, efforts are made to identify waste that can be otherwise managed and disposed of at a solid waste "Subtitle D" landfill. Indeed, when the remediation involves contaminated soils or sediments, the option of using the material as daily cover is another common strategy for minimizing remediation expenses.

Because hauling hazardous waste is not a universal service warranting economic regulation, because there is always a fraction of non-hazardous waste at most sites but the amount and nature is not known until after batch testing is conducted, and because transporting contaminated soils, sediments, or groundwater is not offered by solid waste collection companies, the Commission should adopt rules that expressly clarify that waste generated at environmental remediation projects is outside of the scope of its oversight.

WM supports the requirement for having a solid waste container at every remediation project for the MSW generated by contractors or by ongoing businesses at the site, and collection of that waste is properly regulated by the Commission. But for the hazardous and non-hazardous waste generated as part of the remedial action, economic regulation by the Commission is not warranted, was not contemplated when the Commission was established, and has not historically been done pursuant to G-certificate authority.

Comment 4: Waste Management supports exempting materials delivered to a landfill for operational and construction usages.

MSW placed for disposal in a landfill cell is regulated solid waste, no matter how placement "in the hole" may enhance the operational efficiencies of the facility. That does not foreclose the conclusion that some materials delivered to a landfill facility are not solid wastes because they are not accepted for disposal. Materials used in design or operational components pursuant to regulatory oversight by the local permitting agency should not be regulated, because those items delivered to a disposal facility are not "solid waste."

Just because a material is driven through the gates of a landfill, it does not automatically become a solid waste. The material may serve an important function at the landfill, whether in construction of landfill cells, roads or ancillary facilities, or as a substitute for a daily cover. In a sense, a landfill is an ongoing construction project, and frequently materials delivered to it are used in building the facility. For instance, glass cullet is often used as a rock substitute for road bed and tipping area floors. Crushed aggregate is placed in drainage layers in liner systems. Shredded tires can be used to provide drainage. WM does not perceive any controversy about the fact that materials used in landfill construction are not solid waste, and hauling those materials is not regulated.

There is, however, some debate about materials used for cover, and the Commission has specifically invited comment on this point. Cover material is legally required as part of the landfill's construction and operation, and therefore should not be considered "solid waste," either.

In Washington and Oregon, the requirements of landfill cover are regulated similarly, by rules that comport with federal standards. Ecology's regulation states:

> (a) Except as provided in (b) of this subsection, the owners or operators of all MSWLF units must cover disposed solid waste with six inches (fifteen centimeters) of earthen material, i.e., soils, at the end of each operating day, or at more frequent intervals if necessary, to control disease vectors, fires, odors, blowing litter, and scavenging.
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> (b) Alternative materials of an alternative thickness other than at least six inches (15 centimeters) of earthen material may be approved by the jurisdictional health department if the owner or operator demonstrates during the permit process of WAC 173-351-700 that the alternative material and thickness control disease vectors, fires, odors, blowing litter, provides adequate access for heavy vehicles, will not adversely affect gas or leachate composition and controls and scavenging without presenting a threat to human health and the environment.

WAC 173-351-200(2). Thus, soils are the most common material used, and are not "alternative" at all. Landfills are required to use earthen materials by default. WM supports an exemption for transporting earthen materials to landfill to be used as daily or interim cover.

Other materials can be used as daily cover only if the jurisdictional health department approves it, and WM believes alternative daily cover (or "ADC") should also be outside the scope of Commission oversight. Even though the material is placed over the landfill's disposal area, it is a function of a regulatory scheme devoted to protection of human health and the environment. Hauling ADC material to a landfill is well outside the rubric of universal solid waste collection. Economic regulation of this transportation is not necessary to protect consumers, and Ecology's environmental rules implemented by the jurisdictional health department should be given deference.

There is a principled basis for distinguishing between a positive functional utility in the context of a landfill facility component, and accepting waste for disposal. WM urges the Commission to adopt that distinction in these rules.

Comment 5: Waste Management supports the Commission's efforts to clarify when transportation of solid waste is not regulated.

WM suggests the Commission consider the fact that commercial recycling can occur in a variety of scenarios, and potentially narrow the field of debate. In reality, it seems the most contentious practices have to do with collecting mixed recyclables from construction sites.

At least two situations are unambiguously unregulated. One involves transportation directly to the remanufacturer. Transportation of recyclable materials from a commercial or industrial generator directly to a manufacturer or industrial facility that reuses or reclaims the material by transforming or

remanufacturing it into usable materials is unregulated commercial recycling. WM suggests the rule should expressly state that this transportation is not regulated.

Equally obvious is a situation where the generator has actually sorted recyclable commodities into separate containers. If the commercial customer puts cardboard in one box, wood in another, metal in a third, etc., then the haul is unregulated commercial recycling. WM suggests the Commission also expressly state this rule.

This leaves the more common scenario unresolved, where the commercial customer source-separates mixed recyclable materials from solid waste and it is transported to a materials recovery facility or some other interim solid waste handling facility for processing. In this situation, WM believes the Commission is limited in its ability to demarcate between regulated and unregulated hauling. There can be legitimate good faith differences of opinion as to whether any particular load is recyclables or not. Further, enforcement personnel cannot look into every box. Yet, this is the weakest point in the system. Unscrupulous unregulated haulers collect loads of solid waste under the guise that the load is "recyclables." There are, however, some steps that can be taken to ensure the commercial recycler's transportation is bona fide.

Any legitimate commercial recycler would want to require the use of at least two separate boxes for solid waste and recyclable materials, because otherwise the quality of source-separated material is dubious at best. To a certain extent, the quality of the load depends on the shipper's actions, not the carrier's – but it is fair to ask the transporter to enforce this requirement. The Commission's proposed draft addresses this issue, and WM supports emphasizing the need for at least two separate containers in these rules.

At the other end of the haul, the Commission needs a means of verifying that the destination facility is a legitimate recycling processor. In some states, processors are required to maintain a minimum residual or lose certification as a recycler, and therefore the facilities themselves have motivation to police incoming loads. Unfortunately, Washington does not have such a system. Even more problematic is the fact that Ecology's regulatory system "exempts" from the solid waste permitting scheme material recovery facilities claiming to meet stated residual thresholds. As a result, many destination facilities are not permitted by the jurisdictional health department – rightly or wrongly – and there is limited ability to confirm the legitimacy of those operations.

However, requiring some imprimatur of regulatory approval of the processor could curtail the risks of haulers who purport to deliver the load to a "recycler" or MRF yet still divert the load to disposal. One possible solution is to require the local government in which the processing facility is located to identify legitimate processing facilities, either in the solid waste management plan or by ordinance. This would allow the local solid waste personnel, who have the best knowledge about facilities within their jurisdiction, to make the determination, and prevent the Commission from having to inspect facilities about which it may have limited expertise. For example, in some cases transportation of recyclables to a transfer station might be appropriate if the transfer station includes a materials recovery facilities or if the transfer station then loads the recyclable for transport to a recycler.

WM urges the Commission to consider a rule stating that collection of source-separated mixed, unsorted recyclable materials from a commercial or industrial generator for transportation to an interim

solid waste handling facility that processes the materials for use other than disposal or incineration is unregulated only if the facility is designated as a legitimate processing facility by the local solid waste division in which it is located.

Comment 6: Waste Management urges the Commission to very narrowly exempt commercial recycling involving construction and demolition debris.

The Commission should consider a separate set of rules for commercial recyclers who specialize in construction and demolition debris. Construction and demolition debris can present significant risks to human health and the environment, especially if improperly disposed. The fact that construction and demolition debris is predominantly dry rubbish does not mean it is benign or inert materials. As a result, the Commission should err on the side of caution and presume that transportation of mixed loads of construction and demolition debris is regulated solid waste collection.

Further, the motivation of construction contractors to recycle is different from other commercial customers. Retail establishments, industrial customers, and other businesses recycle to save on garbage collection costs, but they typically also need regular, routine, and scheduled collection for the non-recyclable MSW they generate. Construction contractors, however, are generating waste on a single-event basis. Solid waste collection is usually performed on-call during the life of the project, and once the job is done the services are finished. Construction contractors also recycle to save costs, but they have little reason to source-separate in a careful manner.

If separate recyclable commodities are sorted into separate containers at the construction site, transportation of such material to a recycler for reuse or reclamation would clearly be commercial recycling. With mixed loads, however, the ability to actually recycle is limited, the environmental risks are significant, and the likelihood of careful sorting is low. The Commission should consider a higher performance standard for hauling construction and demolition debris that is potentially recyclable.

Comment 7: Waste Management does not support consideration of facility output in determining whether the transportation activity is regulated.

The proposed rule sets out various uses that are, and are not, "for disposal." Although WM for the most part agrees with the Commission's characterizations, relying on the ultimate outcome of the use is troublesome. Whether the transportation is regulated or not could change, depending on how the material is ultimately used and until the final outcome is produced, it would be impossible to know whether a haul is for disposal or not. WM prefers a focus on the customer and the hauler, and to a certain extent the nature of the destination facility.

This section of the draft rule is also problematic because it defines uses that are "not for disposal" in terms of an outcome (e.g., producing combustible gas) and not in terms of whether someone is trying to "get rid of" the materials. Putting aside the concern about inappropriately focusing on the back-end of the system, WM does not agree with any of the proposed distinctions that refer to energy production.

Many landfills are today converting methane gas to energy, yet the solid waste accepted at those facilities is still taken "for disposal." If materials are delivered to a biodigester for disposal, the fact that

it produces combustible gas for energy is not relevant to a determination of whether the transportation is regulated or not. Why is waste fed into a biodigester that produces energy-generating methane any different from waste disposed of into a landfill that also emits energy-generating methane? Similarly, if solid waste is delivered to an incinerator for disposal, whether it produces energy does not change the nature of the collection services.

Transportation of solid waste to an incinerator that is designated as a disposal facility in the local solid waste management plan is regulated, even if energy is produced at the incinerator. If the Commission retains the focus on the final outcome, the other "uses" described are less troubling but the ones relying on energy production will be highly problematic and will quickly become outdated.

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In conclusion, WM commends the Commission for proposing these draft rules. These comments are offered on general concepts and are intended to further the discussion and analysis of the issues presented by the rulemaking. WM looks forward to working with the Commission on subsequent drafts or implementation and would be pleased to suggest specific language for the regulations at the appropriate time.

Sincerely,

Andrew M. Kenefick

Andrew M. Kenefick
(By KM)

LL to WUTC re Comments on Solid Waste Definition (4/10/09)