

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining the Proper
Carrier Classification of:

GLACIER RECYCLE, LLC;
HUNGRY BUZZARD RECOVERY, LLC;
AND T&T RECOVERY, INC.

DOCKET TG-072226

COMMISSION STAFF'S MOTION
FOR PARTIAL SUMMARY
DETERMINATION

I. RELIEF REQUESTED

1 Commission Staff moves for partial summary determination as follows:

2 1. for a finding that Weyerhaeuser is not "recycling," within the meaning of
RCW 70.95.030(19), but is instead "disposing," when it mixes construction and demolition
debris with its industrial waste and then places the mixture in its Headquarters landfill;

3 2. for a finding that construction and demolition debris that the Respondents
transport to Weyerhaeuser for this purpose is "solid waste," as defined by RCW
70.95.030(23), and is neither "recyclable material," as defined by RCW 70.95.030(18), nor
"property" (or a commodity) for purposes of RCW 81.80.

4 The reason that Staff terms this a motion for *partial* summary determination is that,
even if the Commission enters the findings requested by Staff in this motion, the
Commission may still need to determine in this proceeding whether the Respondents, as
holders of permits issued by the Commission under RCW 81.80, have as their primary
business an activity other than the collection of solid waste, and if so, whether they transport

solid waste on more than an occasional basis, or hold themselves out to the public as providing solid waste collection service.¹

II. STATEMENT OF FACTS

5 The Weyerhaeuser Company operates a landfill (called “Headquarters Landfill”) near Castle Rock, Washington, on Weyerhaeuser-owned land adjoining a Weyerhaeuser-owned rail line that connects with the company’s plant in Longview. The purpose of the landfill is to dispose of industrial waste generated by Weyerhaeuser’s own industrial pulp and paper operations. However, the company also accepts certain types of waste from other generators, including construction and demolition debris, contaminated soils, and other industrial wastes.²

6 Almost all of the material that goes into Weyerhaeuser’s landfill (98 percent) is first delivered to Weyerhaeuser’s “materials recovery facility” (MRF) in Longview. The company transports materials by rail (and on rare occasions by truck) from the MRF to the landfill.³

7 Of the material Weyerhaeuser receives at the MRF, 78 percent (by weight) is generated by, and delivered from Weyerhaeuser industrial operations throughout Western Washington and Oregon. However, 14 percent is delivered to the MRF by “independent haulers” and eight percent is delivered by third parties and self-haulers.⁴

8 Weyerhaeuser uses the term “independent haulers” to mean haulers, including the Respondents Glacier Recycle, LLC; Hungry Buzzard Recovery, LLC; and T&T Recovery,

¹ See WAC 480-70-016.

² Fulcher Decl., para. 3.

³ *Id.* at para. 4, 5.

⁴ *Id.* at para. 6.

Inc., who place containers⁵ at a customer's site to collect discarded materials. According to Weyerhaeuser, the independent hauler's customer may be a construction and demolition company whose projects generate debris. (Weyerhaeuser refers to this debris as "structural material.") Again, according to Weyerhaeuser, the customer discards materials into the container and the "independent hauler" picks up the full container and hauls it to the MRF in Longview.⁶

9 Data request responses received from the Respondent companies show this to be a generally accurate description of how the Respondents obtain the construction and demolition debris that they transport to Weyerhaeuser.⁷ However, Weyerhaeuser's description leaves out a few details that bear mentioning. The evidence shows that during 2007 each of the Respondent companies took containers of construction and demolition debris from their customer's locations to sorting facilities operated by each of the respective companies.⁸ At those sorting facilities, the Respondents may have sorted out some material for transport to entities other than Weyerhaeuser (some of which may be recyclers).⁹ The Respondents then transported the remaining construction and demolition debris from their

⁵ Mr. Fulcher's declaration refers to these containers as "drop boxes" in paragraph 6. While this appears to be an accurate description of the type of container, the term, as used here, should not be confused with the way the term is used in RCW 81.77.010(8) (referring to "collecting or transporting recyclable materials from a *drop-box* or recycling buy-back center"). In that context, "drop box" is a term of art. *See* Commission Decision and Order Denying Administrative Review; Affirming and Adopting Initial Order, *In the Matter of Determining the Proper Classification of Drop Boxes R Us, Inc. and In the Matter of Determining the Proper Classification of Puget Willamette Xpress, Inc.*, Order M.V.G. No. 1840, Hearing Nos. H-5039 and 5040, p. 5 (October 8, 1998). "Our review of the record discloses no evidence that Respondents collect or transport recyclable materials from a drop box or recycling buy-back center (*e.g.*, drop-boxes placed at shopping center parking lots as convenient depositories where individuals and businesses may place designated materials such as glass, newspaper, and aluminum cans)." In other words, the term has a meaning in the statute that is more specific than just the type of container.

⁶ *Id.* at para. 7.

⁷ *See generally*, Thompson Decl. Exhs. A-D.

⁸ Thompson Decl. Exh. B (Glacier), Response to Staff DR 13; Exh. C (T&T Recovery), Response to Staff DR's 10 and 14; Exh. D (Hungry Buzzard), Response to Staff DR 1.

⁹ Thompson Decl. Exh. B (Glacier), Response to Staff DR 15; Exh. C (T&T Recovery), Response to Staff DR 15; Exh. D (Hungry Buzzard), Response to Staff DR 11.

sorting facilities to Weyerhaeuser for disposal as structural material in Weyerhaeuser's landfill.¹⁰ In some cases, the Respondents' customers may have delivered the discarded construction and demolition materials to the sorting facility.¹¹ In all cases, the Respondents' customers paid the Respondents for their services and the Respondents paid nothing for the discarded material.¹²

10 During 2007 "independent haulers" that delivered structural material to the Longview facility included Hungry Buzzard, T&T Recovery, Democon (until September of 2007), and Glacier Recycle (beginning in September of 2007).¹³ During 2007 each of these haulers delivered the following amounts of material to the MRF:¹⁴

Hungry Buzzard	11689 tons
T&T Recovery	3258 tons
Democon Container Services	13772 tons
Glacier Recycle	5052 tons

11 "Third parties and self-haulers," include both industrial non-Weyerhaeuser customers and demolition contractors who either haul their own materials or sub-contract out to another hauler.¹⁵

¹⁰ *Id.*

¹¹ Thompson Decl. Exh. B (Glacier), Responses to Staff DRs 3 and 4; Exh. C (T&T Recovery), Response to Staff DR 4; Exh. D (Hungry Buzzard), Response to Staff DR 4.

¹² Thompson Decl. Exh. B (Glacier), Responses to Staff DRs 2 and 18; Exh. C (T&T Recovery), Responses to Staff DRs 2 and 18; Exh. D (Hungry Buzzard), Response to Staff DR 18; This evidence admittedly only addresses cases in which the Respondents pick up a container of discarded material at the customer's location. The fact that customers also must pay to tip their own loads of at the Respondents' sorting facilities (when that is allowed), at least for materials destined for Weyerhaeuser, can be inferred from the fact that the Respondents must pay Weyerhaeuser a tipping fee to rid themselves of the material. It therefore would be an extremely self-defeating business plan for the Respondents not to recover their own tipping fee expense from their customers. In any event, Staff does not believe this fact is in dispute.

¹³ Democon ceased to operate on August 31, 2007. Its operations were taken over by Glacier Recycle, LLC. Thompson Decl., Exh. B (Glacier), Response to Staff DR 19.

¹⁴ Fulcher Decl., para. 19.

¹⁵ *Id.* at para. 7.

12 Weyerhaeuser charges the independent haulers, third parties and self-haulers a fee for accepting their materials at the MRF. Weyerhaeuser calls this a “tipping fee” because the contents of the independent hauler’s trucks are tipped out onto a portion of Weyerhaeuser’s 20-acre asphalt yard at the MRF. The tipping fee varies between \$25 and \$50 per ton, depending on the type and volume of material discarded and Weyerhaeuser’s operational need for the material. The average tipping fee is \$35 per ton.¹⁶

13 When a customer delivers a load to the MRF, Weyerhaeuser first weighs the load. The customer then tips the load onto a portion of the 20-acre asphalt yard. Weyerhaeuser personnel pick through the material using an excavator to remove any large pieces of obviously recyclable materials. These include clean wood, metal, film plastics, carpet padding, and corrugated cardboard. Recyclable materials are placed in drop boxes or separate storage areas for later transport to processors or end users.¹⁷

14 According to Weyerhaeuser, in 2006

all materials either generated on this plant site with the potential to be delivered to the MRF for disposal or delivered to the MRF for disposal, 43 percent by weight, were diverted from the landfill for recycling, reuse, or beneficial application. These materials can include mixed waste paper, film plastics, carpet padding, asphalt, concrete, metal, sort yard debris, wood converted to hog fuel, filtered lime mud, and deink rejects.¹⁸

Weyerhaeuser declined to clarify the declaration that it submitted for this motion to indicate how much of the material, if any, that it receives from the independent haulers (specifically) is removed for transport to processors or end users. However, the declaration does state that

¹⁶ *Id.* at para. 8.

¹⁷ *Id.* at para. 14.

¹⁸ *Id.*

“[e]ssentially, all of the material received from independent haulers, third parties and self-haulers is material that has a beneficial structure for the landfill.” [Emphasis added.]¹⁹

15 Weyerhaeuser personnel stockpile the residual structural materials separately from the company’s industrial waste piles. As company personnel load containers for the train, they alternate scoops of industrial waste and structural residuals to help pre-mix the loads for delivery to the landfill. In some situations, Weyerhaeuser pre-mixes wet industrial waste with structural residuals to stack and dewater the wastes before loading containers and delivering the waste to the landfill.²⁰

16 The company transports nearly all of the mixed industrial waste and structural residual material from the MRF to the landfill by train. A very small percentage is carried by truck.²¹

17 The industrial waste and structural residuals are further mixed at the landfill as the loads are tipped and laid out in thin layers and compacted with a bulldozer. When Weyerhaeuser receives a load at the landfill, it tips the material into the active landfill cell. The company uses a bulldozer to spread and mix the material into thin layers to form slopes.²²

18 The Cowlitz County operating permit at part 10.3(b) contains the requirements for landfill slopes. The permit does not set requirements for how the company is to achieve proper slopes or what materials the company may use to do so.²³

19 According to the Weyerhaeuser manager, Mr. Fulcher, the key to receiving and spreading materials at the landfill is to obtain the proper mix of materials that allows optimal

¹⁹ *Id.* at para. 17.

²⁰ *Id.* at para. 15.

²¹ *Id.* at para. 18.

²² *Id.* at para. 9.

²³ *Id.*

compaction and adequate drainage. "Achieving the correct balance of compaction and drainage becomes more difficult without the structural materials we receive from independent haulers, third parties and self-haulers."²⁴

20 Mixing in "structural materials" is what provides the balance between compaction and drainage. "This is what makes it a stable landfill and explains our need for the structural material supplied by independent, third parties and self-haulers. We mix the structural material with the materials generated and hauled in by Weyerhaeuser, which are generally wet and not free draining in nature, to achieve the proper balance of compaction and drainage in the landfill."²⁵

21 An engineering firm utilized by Weyerhaeuser, Thiel Engineering, advised Weyerhaeuser that:

Increased structural integrity will improve the static and dynamic stability of the landfill. Having a higher static factor of safety will increase the site's reliability My recommendation is that this facility always strive to accept as much high-permeability and structural waste, such as construction and demolition debris, as possible. There is no down side to accepting such waste in the landfill, and there are strong technical benefits.²⁶

III. STATEMENT OF THE ISSUE

22 The following issues are presented for resolution:

23 1. Whether there are genuine issues of fact in dispute regarding the regulatory status of the construction and demolition debris that the Respondents deliver to Weyerhaeuser's Longview facility.

24 2. Whether Weyerhaeuser is "recycling," within the meaning of RCW 70.95.030(19), or is instead "disposing," when it mixes construction and demolition debris

²⁴ *Id.* at para. 10.

²⁵ *Id.* at para. 12.

²⁶ *Id.*, Exhibit B (Dec. 12, 2005, letter).

transported to it by the Respondents with its own industrial waste and then places the mixture in its Headquarters landfill;

25 3. Whether the construction and demolition debris that the respondents transport to Weyerhaeuser, and that Weyerhaeuser receives for the purpose of adding “structural material” to its landfill, is “solid waste,” as defined by RCW 70.95.030(23), and is neither “recyclable material,” as defined by RCW 70.95.030(18), nor “property” (or a commodity) for purposes of RCW 81.80.

IV. EVIDENCE RELIED UPON

26 This motion is based on the Declaration of Jonathan Thompson, Counsel for Commission Staff and:

27 1. Data Requests served upon the Respondents by Commission Staff, attached to the Declaration of Counsel for Commission Staff as Exhibit A.

28 2. Glacier Recycle, LLC’s responses to Commission Staff’s Data Requests, attached to the Declaration of Counsel for Commission Staff as Exhibit B.

29 3. T&T Recovery, Inc.’s responses to Commission Staff’s Data Requests, attached to the Declaration of Counsel for Commission Staff as Exhibit C.

30 4. Hungry Buzzard Recovery, LLC’s responses to Commission Staff’s Data Requests, attached to the Declaration of Counsel for Commission Staff as Exhibit D.

31 5. Selected portions of the 2007 Cowlitz County Solid Waste Management Plan, attached to the Declaration of Counsel for Commission Staff as Exhibit E.

32 6. The Declaration of Larry Fulcher.

33 7. The Cowlitz County 2006 Operating Permit for Weyerhaeuser Regional
Limited Purpose Landfill and Material Recovery Facility, attached to the Declaration of
Larry Fulcher as Exhibit A.

34 8. The December 12, 2005, and June 6, 2006, letters of Richard Thiel, P.E., to
Larry Fulcher, attached to the Declaration of Larry Fulcher as Exhibit B.

35 9. The Declaration of Laurie Davies.

36 10. The June 26, 2007, letter of Peter D. Christiansen to Arthur Wilcowski,
attached to the Declaration of Laurie Davies as Exhibit A.

V. LEGAL AUTHORITY

37 This motion is made pursuant to WAC 480-07-380(2)(a), which provides that “[a]
party may move for summary determination of one or more issues if the pleadings filed in
the proceeding, together with any properly admissible evidentiary support (e.g., affidavits,
fact stipulations, matters of which official notice may be taken), show that there is no
genuine issue as to any material fact and that the moving party is entitled to judgment as a
matter of law.”

**A. Weyerhaeuser is not “recycling” but is instead disposing of the construction and
demolition debris that it refers to as “structural material.”**

38 The Commission regulates collection and transportation of commercial solid waste
under RCW 81.77. That chapter (RCW 81.77.040) requires every person to obtain a
certificate before operating as a solid waste collection company.²⁷ The statute includes a
presumption of exclusivity (i.e., a single certificated service provider in a given area):

When an applicant requests a certificate to operate in a territory already
served by a certificate holder under this chapter, the commission may, after

²⁷ “A solid waste collection company shall not operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation.” RCW 81.77.040.

notice and an opportunity for a hearing, issue the certificate only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission or if the existing solid waste collection company does not object.

39

RCW 81.77.010 adopts the following definitions for the purpose of defining the type of "solid waste" collection that requires a certificate under that chapter:

(7) "Solid waste collection company" means every person or his or her lessees, receivers, or trustees, owning, controlling, operating, or managing vehicles used in the business of transporting solid waste for collection or disposal, or both, for compensation, except septic tank pumpers, over any public highway in this state as a "common carrier" or as a "contract carrier";

(8) Solid waste collection does not include collecting or transporting recyclable materials from a drop-box or recycling buy-back center, nor collecting or transporting *recyclable materials* by or on behalf of a commercial or industrial generator of recyclable materials to a *recycler* for use or reclamation. Transportation of these materials is regulated under chapter 81.80 RCW; and

(9) "Solid waste" means the same as defined under 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.

It is the exemption in RCW 81.77.010(8) for "collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation" that is at issue in this motion.²⁸ RCW 70.95.030, within the Department of Ecology's statutes, provides the definition of solid waste:

(23) "Solid waste" or "wastes" means all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, *demolition and construction wastes*, abandoned vehicles or parts thereof, and recyclable materials.

The same statute also defines "recycling" and "recyclable materials":

(18) "Recyclable materials" means those solid wastes that are separated for recycling or reuse, such as papers, metals, and glass, *that are identified as recyclable material pursuant to a local comprehensive solid waste plan*. Prior

²⁸ See footnote 5, *supra*.

to the adoption of the local comprehensive solid waste plan, adopted pursuant to RCW 70.95.110(2), local governments may identify recyclable materials by ordinance from July 23, 1989.

(19) "Recycling" means transforming or remanufacturing waste materials into usable or marketable materials *for use other than landfill disposal or incineration.*

The italicized portion of the RCW 70.95.030(18) definition of "recyclable materials," set out above, essentially makes the local solid waste management plan (SWMP) the last word on whether a particular material qualifies as a "recyclable material" that is exempt from the 81.77 RCW definition of solid waste. However, the county plan must certainly be consistent with the RCW 70.95.030(19) definition of "recycling."

40 Counties prepare comprehensive solid waste management plans that define recycling programs and recyclable materials. Both the Weyerhaeuser Material Recovery Facility and the Weyerhaeuser Regional Limited Purpose Landfill are located in Cowlitz County. The relevant parts of the Cowlitz County SWMP²⁹ are as follows:

41 2.1 Solid Waste Definitions:

Solid Waste—for the purposes of this Plan, the term "solid waste" encompasses the total waste stream, which is made up of municipal solid waste (MSW), special wastes, and industrial waste.

Special Wastes--Special wastes include *construction, demolition and land-clearing (CDL) waste*, agricultural waste, auto hulks, asbestos wastes, petroleum-contaminated soil, white goods, tires, sewage sludge, and biomedical waste. Special wastes are defined as wastes that require separate handling due to their bulk, water content, or dangerous constituents.

4.3 Designation of Recyclable Materials

²⁹ Thompson Decl., Exh. E.

[The Department of] Ecology's Guidelines for the Development of Local Solid Waste Management Plans requires all local solid waste management plans to develop a list that defines materials as recyclable. For purposes of this section, *materials are defined as recyclable if they are marketable and result in waste stream diversion. A marketable recycled material is defined as material with established end-users who purchase recyclable materials, use them as raw materials, and transform them into new products.*

42 Table 4-3 of the Cowlitz County SWMP defines recyclable materials as: newsprint, corrugated containers, high grade paper, mixed waste paper, container glass, refillable glass, aluminum cans, tin cans, ferrous metals, white goods, non-ferrous metals, PET bottles, HDPE bottles, LDPE packaging, milk and juice cartons, tires, wood, oil, car batteries, and *construction debris (other than wood).*

43 Thus, the Cowlitz County SWMP defines "CDL" material as solid waste. "Construction debris (other than wood)" is "recyclable material" only if the material has established end-users who purchase recyclable materials, use them as raw materials and transform them into new products, and this results in waste stream diversion.

44 Based on the language of the Cowlitz County SWMP, and in particular the marketability and waste stream diversion requirements for "recyclable materials," the "structural residuals" described above are solid waste, not recyclable material. They are CDL waste for which there is (a) no "transformation into new products" and (b) no "waste stream diversion."

45 The Department of Ecology administers at least two programs based on the same statutory definitions of "recyclable materials" and "recycling" that are at issue here. Under RCW 70.95.060, the Department of Ecology establishes minimum functional standards for solid waste handling. Under its RCW 70.95 authority, the Department adopted a rule that exempts certain "material recovery facilities" from

the requirement to obtain an intermediate solid waste handling permit.³⁰

(Intermediate solid waste handling permits are required for facilities such as transfer stations that provide intermediate storage and/or processing of solid waste prior to transport for final disposal.³¹) One of the conditions for this exemption is that the facility “[a]ccept only source separated *recyclable materials* and dispose of an incidental and accidental residual not to exceed five percent of the total waste received, by weight per year, or ten percent by weight per load.”³² This is one basis for the Department of Ecology’s interest in the RCW 70.95.030(18) definition of “recyclable materials.”

46

Additionally, under RCW 70.95.400, “any person or entity that transports recyclable materials from commercial or industrial generators over the public highways of the state of Washington for compensation, and who [is] required to possess a permit to operate from the Washington utilities and transportation commission under chapter 81.80 RCW” must register with the Department of Ecology prior to transporting recyclable materials. The legislature’s intent in enacting this registration requirement in 2005 included “improving recycling, eliminating illegal disposal of recyclable materials, and protecting consumers from sham recycling.”³³ This is a second reason for the Department’s interest in the RCW 70.95.030(18) definition of “recyclable materials.” The Department’s interest closely parallels the Commission’s interest in defining the limits of the RCW 81.77.010(8)

³⁰ WAC 173-350-310(2).

³¹ See WAC 173-350-310; Thompson Decl., Exh. B (Glacier), Response to Staff DR 13. Glacier does not assert the “materials recovery facility” exemption and therefore has a solid waste facility permit.

³² WAC 173-350-310(2)(b)(ii); Based on this definition, it is unclear to Staff whether, and if so how, the Respondents’ sorting facilities or the Weyerhaeuser “MRF” meet this exemption. Glacier, at least, does not claim the exemption. *Id.*

³³ 2005 Laws of Wash. c. 394, sec. 1.

exemption from solid waste collection certification for “collecting or transporting recyclable materials . . . on behalf of a commercial or industrial generator.”

47

The Department’s Solid Waste and Financial Assistance Program has issued an official opinion that the use of ground-up or processed demolition and construction debris for use as “alternative daily cover” in a landfill is not recycling.³⁴ “Alternative daily cover” is material other than earthen material that is placed on the surface of the active face of a municipal solid waste landfill at the end of each operating day to control fires, odors, blowing litter, and scavenging.³⁵ The Department’s analysis is that:

When you look at the definition [of “recycling” under RCW 70.95.030(19)] in its entirety – that recycling is the remaking of materials for use other than landfill disposal or incineration – the phrase “*use other than landfill disposal*” shuts the door on defining any material being used as alternative daily cover as recycling.

This is consistent with Staff’s analysis of the use of construction and demolition debris as “structural material” in the Weyerhaeuser landfill. In her declaration for this motion, Laurie Davies, the Manager of the Department’s Solid Waste Program, states that “it is difficult to see why the use of C&D material as ‘structural material’ in the landfill, as described in Mr. Fulcher’s declaration, would be thought to involve ‘transforming or remanufacturing waste materials into usable or marketable materials for use other than landfill disposal.’”³⁶

48

To summarize, mixing “structural material” with “industrial waste” does not transform the “structural material” into a new product, it remains waste. Mixing “structural material” with “industrial waste” does not result in “waste stream diversion”; the mixed material still goes into a landfill. This activity therefore fails both the “marketable” and “waste stream diversion” tests and is not recycling.

³⁴ Davies Decl., Exh. A.

³⁵ Davies Decl., para. 6.

³⁶ *Id.* at para. 7.

B. The construction and demolition debris that Weyerhaeuser calls “structural material” is neither “property” (or a “commodity”), nor “recyclable material,” but is instead “solid waste.”

49 Staff previously reviewed this transportation activity and concluded that the material the companies transported did not meet the definition of solid waste and, therefore, advised haulers involved in the transportation of these materials to Weyerhaeuser that collection and transportation of construction and demolition material was not subject to regulation under RCW 81.77.³⁷ Staff has since concluded that its advice was in error and advised the Respondents that the material is solid waste subject to regulation under RCW 81.77.

50 Staff’s earlier opinion was that the material in question was a commodity and not “waste” due to Weyerhaeuser’s “use” of the material in its landfill. Although that conclusion was consistent with the reasoning of at least one prior Commission decision,³⁸ it was not consistent with the relevant statutory definition of “solid waste” (described above) that was enacted after that decision.³⁹ That is because the materials are byproducts of construction or demolition activity that have been discarded by, and have no remaining value to, *the customers’ operations*. “Demolition and construction wastes” is a term that is specifically included in the legislature’s definition of “solid waste.” Consequently, anyone collecting or transporting demolition and construction wastes must have a certificate under RCW 81.77. The only exception is if the wastes in question are ultimately “recycled.” For the reasons stated above, Weyerhaeuser’s use of the materials is not “recycling,” and the materials are not “recyclable materials.”⁴⁰

³⁷ Carole Washburn, Executive Secretary, letter to Hub City Recycling, dated March 3, 2006, and to Democon, dated May 24, 2006.

³⁸ See, e.g. *In the Matter of Bayside Waste Hauling & Transfer, Inc.*, Order M.V.G. No. 1234, Hearing No. GA-819 (June 2, 1986).

³⁹ RCW 70.95.030(23).

⁴⁰ See Commission Decision and Order Denying Administrative Review; Affirming and Adopting Initial Order, *In the Matter of Determining the Proper Classification of Drop Boxes R Us, Inc. and In the Matter of*

51 In 1989, the legislature enacted the current definitions of “solid waste” and “recyclable materials.”⁴¹ It also clarified that “[s]olid waste collection does not include collecting or transporting recyclable materials from a drop-box or recycling buy-back center, nor collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation.”⁴² Before the 1989 legislation, there was no guidance from the legislature as to whether haulers of discarded industrial byproducts needed a “garbage” certificate under RCW 81.77 when the materials were delivered to a recycler instead of a landfill.

52 Despite the lack of statutory guidance, the Commission had to decide whether haulers who carried waste materials to a recycler should have a “garbage” certificate, and be regulated under RCW 81.77, or whether they should instead have a common or contract carrier permit, and be regulated under RCW 81.80.⁴³ At that time, the Commission concluded that the answer to which set of regulations applied depended on whether the material was “garbage” or a “commodity.” And, the Commission said, “the distinction between ‘garbage’ and ‘commodity’ turns on whether the material is destined for ‘disposal’ or some ‘higher use.’”⁴⁴ Essentially, the Commission said that what matters is not whether the materials have any continuing value to the “shipper,” but whether they have any “higher use” value to the “consignee” who receives the material. If the Commission had not made the distinction between value to the shipper, which it considered irrelevant, and “higher use”

Determining the Proper Classification of Puget Willamette Xpress, Inc., Order M.V.G. No. 1840, Hearing Nos. H-5039 and 5040 (October 8, 1998). The Commission, at pp. 6 – 11 rejects the argument that “recyclable materials” can be broadly defined as any material that is merely *capable* of being recycled. Instead, the Commission looked to “how the materials are regarded and handled by those who generate them, those who collect and transport them, and those who see ultimately to their disposition.” *Id.* at p. 7.

⁴¹ 1989 Laws of Wash. ch. 431, § 2; RCW 70.95.010.

⁴² *Id.* at § 17; RCW 81.77.010.

⁴³ *In the Matter of Bayside Waste Hauling & Transfer, Inc.*, Order M.V.G. No. 1234, Hearing No. GA-819 (June 2, 1986).

⁴⁴ *Id.* at 4.

to the consignee, which it considered relevant, then the hauling of recyclable materials would have remained “garbage collection” under RCW 81.77. That is because, as the Commission then acknowledged, “[t]hese shippers may reasonably classify all of their by-products as ‘waste’ because these byproducts have no continuing value to the shipper’s operation.”⁴⁵

53

When the legislature adopted the new definitions in 1989, it preserved the Commission’s conclusion that collection and transportation of recyclables should not require a solid waste certificate. However, the new statutory definitions of “solid waste” and “recyclable materials” made obsolete the Commission’s old focus on “value to the consignee” as the defining trait of a commodity. Under the new statutory scheme, whether a material is “waste” is determined from the perspective of the business that seeks to have it removed from its facility or job site. Because “waste” is commonly defined as something that is discarded and useless, the relevant question is whether the material is of any further use (or net value) to the person turning it over to the hauler. If it has no further use or value to the customer, then the material is waste. This is apparent from the fact that the statutory definition of “solid waste” (which replaced the word “garbage”) *includes* “recyclable materials”—in other words, recyclable materials are considered a type of “waste” despite their value *to the recipient* as an input for new products. Rather than adopting the Commission’s somewhat tortured distinction between waste and commodity, the legislature included recyclable materials within the definition of “solid waste.” The legislature preserved the result the Commission already came to regarding recyclables, however, by providing that for purposes of RCW 81.77, “solid waste collection” does not include

⁴⁵ *Id.*

collecting or transporting recyclable materials (except for source separated recyclable materials collected from residences).

54 In its 1998 *Drop Boxes R Us* order,⁴⁶ the Commission appears to have recognized this shift in focus from the value of the material to the recipient, back to value to the person ridding himself of the material. That order cited with favor the following analysis that debris from demolition and excavation work was not subject to economic regulation as carriage of “property” under federal law:

the debris, although it may ultimately serve a purpose in helping to fill wasteland, is not purchased from the contractors who desire its removal and to them it has a negative value as a commodity, The contractors are not concerned with any beneficial ownership of the debris, they do not select the destination to which it is to be taken (they may not even know where it will be taken), and it would appear they relinquish any nominal ownership of the commodity at the time it is loaded and removed from the demolition and excavation site. Thus, we are inclined to conclude that the commodity does not have the attributes commonly associated with the word property.⁴⁷

Similarly, there can be no serious argument here the construction and demolition material in question is not “waste” but is instead “property,” the carriage of which is subject to regulation under RCW 81.80.⁴⁸ Because it is discarded and has no continuing value to the customer, it falls instead under the RCW 70.95.030(23) definition of solid waste.⁴⁹

55 In this case, no one is paying for the CDL waste. The material clearly is of no further use to the Respondents’ customer’s commercial activities, and the fact that it has

⁴⁶Commission Decision and Order Denying Administrative Review; Affirming and Adopting Initial Order, *In the Matter of Determining the Proper Classification of Drop Boxes R Us, Inc. and In the Matter of Determining the Proper Classification of Puget Willamette Xpress, Inc.*, Order M.V.G. No. 1840, Hearing Nos. H-5039 and 5040 (October 8, 1998).

⁴⁷ *Id.* at p. 8, 9.

⁴⁸ RCW 81.80 applies to intrastate “motor carriers.” RCW 81.80.050. All of the potentially applicable definitions of “motor carrier” include the carriage of “property.” RCW 81.80.010.

⁴⁹“Solid waste” or “wastes” means all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, *demolition and construction wastes*, abandoned vehicles or parts thereof, and recyclable materials.

negative value to them is evidenced by their willingness to pay to have it taken away. It is even necessary for the Respondents to pay Weyerhaeuser a tipping fee to take the material. Because the material is “waste,” the only remaining question is whether the Respondent’s collection and transportation of the material is exempt from RCW 81.77 on the grounds that the recipient (Weyerhaeuser) is “recycling” the material. Consistent with the analysis set out above, the answer is no.

56 The Respondents may nonetheless point to an example that the Commission provides in WAC 480-70-016(3) (“if soil is transported to a landfill to become part of the cover of the landfill, the transportation is subject to regulation as a motor carrier under the provisions of chapter 81.80 RCW”) as evidence of an intent on the Commission’s part to exempt carriage of material used as daily cover in a landfill from regulation as transportation of solid waste. It should not be read in that way. The example should be read as referring to soil that has a value and has not merely been discarded as waste. In other words, if the landfill operator purchased topsoil and hired a motor carrier to transport it to the landfill for use as daily cover, the valuable soil would not necessarily meet the statutory definition of “solid waste” or the common definition of “waste” discussed above. If, on the other hand, the statement were interpreted more broadly to mean that any material that might have some “beneficial effect” when disposed of in a landfill therefore is not solid waste, then that interpretation would be in conflict with the statutory scheme discussed above, as well as with the Department of Ecology’s analysis regarding alternative daily cover.

57 To summarize, if a material is discarded by the transporter’s customer as having no value, it is solid waste and is not “property” under RCW 81.80 (or a commodity). Because the Respondents’ customers have discarded the construction and demolition debris and it has

not continuing value to them, it is solid waste. If solid waste is collected and transported for the purpose of disposal, it remains solid waste; if it is collected and transported for recycling, only then it is a recyclable material. Because Weyerhaeuser's "use" of the material does not constitute "recycling" under the relevant definition, the construction and demolition debris at issue here is not "recyclable material."⁵⁰

VI. CONCLUSION

58 For the foregoing reasons, the Commission should make the findings requested by Staff and proceed to a hearing on whether the Respondents, as holders of permits issued by the Commission under RCW 81.80, have as their primary business an activity other than the collection of solid waste, and if so, whether they transport solid waste on more than an occasional basis, or hold themselves out to the public as providing solid waste collection service.⁵¹

DATED this 25th day of April, 2008.

Respectfully submitted,

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⁵⁰See Commission Decision and Order Denying Administrative Review; Affirming and Adopting Initial Order, *In the Matter of Determining the Proper Classification of Drop Boxes R Us, Inc. and In the Matter of Determining the Proper Classification of Puget Willamette Xpress, Inc.*, Order M.V.G. No. 1840, Hearing Nos. H-5039 and 5040 (October 8, 1998).

⁵⁰ 1989 Laws of Wash. ch. 431, § 2; RCW 70.95.010.

⁵¹ See WAC 480-70-016.