Waste Management of Washington, Inc.

See uploaded document for our comments.

WASTE MANAGEMENT

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March 20, 2018

Submitted via Ecology's Online Commenting System Only

Mr. Kyle Dorsey
Washington Department of Ecology
Waste 2 Resources Program
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Subject: Waste Management of Washington, Inc.'s Comments to Chapter 173-350 WAC, Solid Waste Handling Standards – Draft Rule Proposal

Dear Mr. Dorsey:

Waste Management of Washington, Inc. (WMW) is pleased that the Washington Department of Ecology (Ecology) has published their draft WAC 173-350 rule proposal and looks to be wrapping up their years long rulemaking of Chapter 173-350, Solid Waste Handling Standards. For ease in Ecology's review and response, our comments are presented by section of the rule in bold and capital letters. Our comments are then presented in underlined font, followed immediately with our explanation and reasoning for our comment. Comments that address multiple sections of Chapter 173-350 WAC are provided at the end of our comment letter.

WAC 173-350-020 APPLICABILITY

Comment 1: The applicability section should be clear and explicit that if a facility and/or activity no longer meets a categorical exemption, as management and handling of a material stream changes, then that facility and/or activity must comply with Chapter 173-350 WAC.

The applicability statement in Section 173-350-020(1) should be definite and unambiguous that when a facility and/or activity no longer operates within the categorical exemptions provided, then that facility and/or activity must comply with the applicable sections of the rule. For example, contaminated soil which has moved and is no longer at or near the generation point at a project site or steel slag that has been discarded and abandoned. This section should also guide the facility operator to Section 173-350-021, Determination of

Solid Waste, since a material that may have been initially exempted from the rules, via the Applicability section, may, depending on the handling and management of the material, be considered a solid waste if the material meets any of the seven Determination of Solid Waste criteria, as provided by Ecology.

WAC 173-350-021 DETERMINATION OF SOLID WASTE

Comment 2: Ecology has squandered an ideal opportunity to harmonize and simplify the definition of "solid waste."

Although WAC 173-350-021 is a worthy attempt to define what is and is not a solid waste, it should have been simplified and made consistent with other Washington and federal interpretations of "solid waste". Instead, Ecology has crafted a definition of "solid waste" that is complicated and relies on various exceptions. Ecology could have simplified the definition of solid waste to be consistent with the numerous interpretations that Washington courts, hearings boards, Attorney General, agencies, and even Ecology have articulated over the past decades. See, e.g., Littleton v. Whatcom County, 121 Wn. App. 108, 116-117 (2004); PT Air Watchers v. Dept. of Ecology, No. 10-160 (Poll. Control Hearings Bd., May 10, 2011), aff'd, 179 Wn.2d 919 (2014); Department of Ecology's Reply Brief, PT Air Watchers v. Dept. of Ecology, No. 11-2-01270-8 (Thurston Cty. Super. Ct. Feb. 21, 2012); Department of Ecology's Response Brief, PT Air Watchers v. Dept. of Ecology, No. 11-2-01270-8 (Thurston Cty. Super. Ct. Jan. 5, 2012); In re Determining the Proper Carrier Classification of Glacier Recycle, LLC, No. TG-072226 (Wash. Util. & Trans. Comm. 2008); Dept. of Ecology, Technical Information Memorandum No. 93-1, "Recycling of Glass Cullet as Construction Material" (Nov. 9, 1993); Informal Opinion Letter from K. Gerla, Assistant Attorney General to Rep. P. Kremen (Oct. 31, 1994); Letter from Department of Ecology (Sep. 28, 1988), referenced in In the Matter of the Petition For Correction of Assessment of No. 92-035, Wash. Dept. of Revenue, Interpretation and Appeals Div., 12 Wash. Tax Dec. 85; 1992 Wash. Tax LEXIS 1468 (Feb. 20, 1992); In re Petition for Correction of Assessment, No. 06-0296, 26 Wash. Tax Dec. 188; 2006 Wash. Tax LEXIS 939 (Dept. of Revenue, Appeals Division 2006); In re Petition for Correction of Assessment, No. 98-133, 18 Wash. Tax Dec. 153, 1998 Wash. Tax LEXIS 881 (Dept. of Revenue, Appeals Division 1998); In re Petition for Correction of Assessment, No. 92-035, 12 Wash. Tax Dec. 85, 1992 Wash. Tax LEXIS 1468 (Dept. of Revenue, Appeals Division 1992); In re Petition for Prior Determination of Tax Liability, No. 89-435, 8 Wash. Tax Dec. 167, 1989 Wash. Tax LEXIS 1519 (Dept. of Revenue, Appeals Division 1989).

Comment 3: WAC 173-350-021(2)(c) is inconsistent with the regulation and the definition of solid waste.

This provision would define as solid waste a material that "is a by-product generated from the manufacturing or processing of a product, and is placed on the land for beneficial use." Why? If material is used for a beneficial purpose, why is it considered a solid waste? If it is used for a beneficial purpose, then the material would have value and should not be considered a solid waste. Conversely, if a material is placed on land for other than beneficial purposes, it would not be considered a solid waste? It appears that this

provision is misplaced and should be included in the subsection (3) that allows solid wastes to be no longer considered a solid waste if it is used for a beneficial purpose.

Comment 4: The phrase "is separated from solid wastes" should be included in the solid waste determination criteria given in WAC 173-350-021(3).

In prior versions of the draft rule and in the final work product of the Definitions and Determination of Solid Waste workgroups, one of the criteria to determine when a material is no longer a solid waste is that *the material has been separated from other solid wastes.* There was also a new definition created to define separated and separation:

> *"Separation" or "separated" means source-separation or other processing to substantially remove or separate recyclable materials from other non-recyclable solid waste, resulting in less than 10% by weight non-recyclable materials, for the purpose of reuse or recycling.*

Separation from solid wastes is an important distinction to remove a material from regulatory oversight of Ecology and should be included in these criteria. Additionally, requiring separation from solid waste removes any ambiguity in how the material should be managed to no longer be considered solid waste for purposes of this rule. There is a simple solution to remedy the criteria language. WMW recommends adding the words "is separated from solid wastes" to criteria (d) to now state: *(d) the material is stored and managed to preserve its value,* ***is separated from solid wastes****, and is stored in a manner that presents little or no risk to human health and the environment* (emphasis added).

Comment 5: WAC 173-350-021(3)(c) should be revised to include materials that are an effective substitute for materials that would otherwise have to be purchased or acquired.

In some circumstances, the "positive market value" test may be too restrictive a test to determine whether a material is a "waste" or a valuable "commodity. This test should be broadened to include materials that have value to the user because it will be an effective substitute for an alternative product that would otherwise have to be purchased or acquired. This is the same test that EPA uses in its Final Rule on the "Definition of Solid Waste." See 40 CFR 260.43(a)(2)(ii). EPA explained this requirement as:

> This factor, one of the two core legitimacy factors, expresses the principle that the product or intermediate of the recycling process should be a material of value, either to a third party who buys it from the recycler, or **to the generator or recycler itself, who can use it as a substitute for another material that it would otherwise have to buy or obtain for its industrial process**. This factor is also an essential element of the concept of legitimate recycling because recycling cannot be occurring if the product or intermediate of the recycling process is not of use to anyone and, therefore, is not a real product.

EPA, *Revisions to the Definition of Solid Waste Final Rule Compilations: The Legitimate Recycling Standard* at 5 (June 2010).

Moreover, this revision would help to align Ecology's solid waste regulations with its hazardous waste regulations, which state, in part:

> (2) General categories of materials that are not solid waste when recycled.
> (a) Except as provided in subsection (3) of this section, materials are not solid wastes when they can be shown to be recycled by being: ... (ii) **Used or reused as effective substitutes for commercial products**; .... WAC 173-303-017(2).

WAC 173-350-040 PERFORMANCE STANDARDS

Comment 6. Ecology should delete WAC 173-350-040(3) because it is unnecessary and Ecology and local health districts have no authority to enforce laws and regulations delegated to other local, state, and federal authorities.

Subsection (3) requires facilities to "comply with all other applicable local, state, and federal laws and regulations." This is a meaningless and redundant requirement, yet one that could present the potential for mischief. *First*, if other local, state, and federal laws and regulations are applicable, there is no need for Ecology to require compliance with them. If they are "applicable", then they apply and the facility must comply with them already. Adding this provision does not make them "more" applicable.

Second, while this section may appear harmless, it would unlawfully delegate to Ecology or the health districts the authority to enforce laws and regulations that they have no lawful authority to enforce. It could also interfere with the authority of other local, state, or federal authorities to enforce its own laws and regulations. For example, if a local air pollution control district determines that a facility complies with the air regulations, the health district might decide otherwise and seek to enforce the air district regulations under the purported authority of WAC 173-350-040(3). Or, the health district might delay issuing a permit because it thinks that a facility is violating the federal prevailing wage requirements, even though it has no enforcement authority.

Third, non-compliance with another regulation or law should not be grounds for a health district or Ecology to deny or revoke a permit. Even if the violation is proven, the other agency might not believe that it justifies shutting the facility down. So, why should Ecology have the authority to do otherwise?
Fourth, where does this end? If a health district reviews a permit application, it must determine whether the facility "meets the performance standards of WAC 173-350-040." How can the health district review a facility's compliance with every conceivable "local, state, and federal law and regulation"? Will the health district have to inspect for compliance with the building codes or review tax documents to determine whether the operator has paid its taxes correctly? Will it inspect the facilities' fire extinguishers and handrails to determine compliance with WISHA or the ADA? While these examples made

seem absurd, WMW has had direct experience with a health district threatening to withhold a permit because the facility was subject to a MTCA Administrative Order on Consent associated with historical contamination.

WAC 173-350-320 PILES USED FOR STORAGE OR TREATMENT

Comment 7: The 90-day pile exemption in WAC 173-350-320 – Table 320-A should be clarified to prevent long-term facilities from claiming to be exempt by removing each pile of contaminated soils or dredged sediment every 90 days and adding new piles.

For years, there has been confusion over the contaminated soils/dredged sediment piles requirements. Some facilities have avoided permitting by simply making sure all piles are removed every 90 days even though the facility continues to operate as an "exempt piles facility" for much longer, sometimes years. Consider, for example, a facility that receives Pile #1 of contaminated soils on Day 1, then Pile #2 on Day 30, then Pile #3 on Day 60, then Pile #4 on Day 90, and Pile #5 on Day 120, etc. etc. So long as Pile #1 is removed before Day 90, and Pile #2 is removed by Day 120, etc., etc., the facility might argue that it is exempt, even though there are always piles on site and the facility continues to receive new piles every 30 days for years and years. Such an operation would be a permanent facility that should be subject to the permitting requirements of non-exempt facilities managing piles of contaminated soils and sediments. Ecology should revise this section to state that the exemption applies only to temporary piles storage facilities operating for less than 90 days. Any facility that operates for more than 90 days would be required to obtain a permit.

Comment 8. Each operating facility presented in WAC 173-350-320 – Table 320-A should be required to submit notification to Ecology of their intended piles operation.

Each type of operating facility, regardless of the waste material handled, should at the very least be required to notify Ecology of the handling, storage, and management of piles. The materials managed are by their very nature solid waste and, hence, require some type of special handling, even if they are managed and stored in piles. Each waste material type, as provided in the table, has some type of throughput requirement, whether it be storage time or a capacity limit. Given that there is a throughput obligation by the operator, there should be a notification requirement to Ecology. How else will Ecology be able to verify a facility is meeting its throughput requirements, waste materials handled, and is continuing to operate under a permit exemption? Along with the notification requirement, there should be a condition that Ecology, as part of that exemption, is authorized to inspect the site at reasonable times to verify conditions of that exemption.

Comment 9: Handling of Waste Material (4) in piles as given in WAC 173-350-320 – Table 320-A presents potential compliance issues.

If a facility managing Waste Material (4), that is, *brick, cured concrete, or asphaltic material facilities with a water quality sand and gravel or construction stormwater general permit,* and that operator is recycling the materials, then the table points to Section 173-350-210,

Recycling and Material Recovery Facilities. However, subsection 173-350-210 (b) clearly indicates that this section does not apply to storage and treatment of solid waste in outdoor piles; yet, the table references this section as a method to maintain a piles exemption. It may be more useful and evident if the specific requirements to maintain this piles exemption are stated and defined in the table.

With this said, this exemption category leaves another regulatory issue unanswered and undefined: what if that a Waste Material category (4) facility does not recycle the materials, particularly when recycling end markets are no longer available, not viable, or sustainable? What obligations would that facility have to undertake to maintain a piles exemption or will a solid waste handling permit now be required? We suggest that Ecology add clarifying language that addresses these possibilities, especially given today's state of recycling markets.

MULTIPLE SECTIONS OF WAC 173-350

Comment 10: Existing, permitted facilities should not be required to submit facility drawings and construction documents to the local health district for review and approval.

Throughout the draft regulations, Ecology appears to impose a new requirement that all existing, permitted facilities must submit "facility drawings" and "construction documents" to the health department for "review and approval." *See, e.g.,* WAC 173-350-210(5), 173-350-240(6), 173-350-310(5), 173-350-320(5), 173-350-330(5), 173-350-350(5), 173-350-400(5), 173-350-410(5). This is an unreasonable, unnecessary, and unsupported requirement for facilities that have already been designed, constructed, and permitted. What purpose does this serve? How can the health department retroactively review and approve construction, design, and engineering plans for facilities that are already constructed? What standards do they use in determining whether to "approve" construction plans? Some facilities are decades old and may no longer have documents that accurately describe the design and engineering of the facility. The health department should not be able to retroactively require construction or design changes to a facility that has already been constructed. Moreover, health departments need only visit and inspect a solid waste facility to determine whether the facility complies with the design and performance requirements. Requiring every existing solid waste facility to submit facility drawings and construction documents is expensive, burdensome, and serves no reasonable purpose. WMW strongly recommends that these regulations be revised to apply only to new facilities.

Comment 11: The requirement for "all-weather roads" is unnecessary and unsupported.

Throughout the proposed regulations, there are requirements for "all-weather" surfaces and roads (*e.g.*, WAC 173-350-310(3)(a)(x)); however, there is no explanation why all-weather roads or surfaces are required in all circumstances. Presumably, this requirement is aimed at controlling discharges of stormwater, discharges to groundwater, or air emissions from dusty roads. Yet, there are already existing environmental regulations intended to provide these environmental protections. The impervious road requirement

would, for example, be unnecessary for protecting stormwater discharges above benchmarks if the site has no off-site discharges or meets benchmarks with its existing stormwater management system. If there are no impacts from using non-impervious surfaces, what is the purpose for this requirement?

Comment 12: If a facility does not operate in compliance with the terms and conditions to maintain their exemption status, the facility ***should*** be subject to the permitting requirements for solid waste handling.

The current rule proposal asserts in WAC 173-350-210, 173-350-310, and 173-350-320 that if a facility does not operate in compliance with the conditions to maintain their permit exemption status, then that facility may be required to obtain a solid waste handling permit under this chapter. If a facility does not operate in compliance with this subsection, then a facility operator should be subject to the solid waste handling facility permitting requirements. If the operator is not appropriately managing the waste material, such as piles of commingled brick, concrete, or asphaltic materials that remain indefinitely at a facility, for example, then that site is operating as a solid waste handling facility, requiring a permit from the local health department. Therefore, WMW recommends that ***may*** be revised to ***shall*** in the referenced sections (that is, WAC 173-350-210, 173-350-310, and 173-350-320):

> *If a facility does not operate in compliance with the terms and conditions established for an exemption under this subsection, the facility **shall** be subject to the permitting requirements for solid waste handling under this chapter* (emphasis added).

Furthermore, the current rule language of the aforementioned sections requires a solid waste handling permit, and Ecology has not outlined their rationale for diminishing this requirement, especially given that a main objective of this rulemaking was to discourage and curb sham recycling.

Once again, WMW values the opportunity to provide industry comments during this public input process, and we hope that Ecology will give thoughtful consideration to our comments and suggestions.

Please contact Andrew Kenefick at akenefick@wm.com or (425) 825-2003 or Kim Kaminski at kkaminsk@wm.com or (425) 814-7841 if Ecology has any follow-up questions to any comments we provided.

Sincerely,

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For Kim Kaminski
Andrew Kenefick
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