WASHINGTON REFUSE & RECYCLING ASSOCIATION

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The Washington Refuse and Recycling Association (WRRA) represents the private sector solid waste industry in Washington. WRRA member companies and the solid waste industry serve a vital role in public health, safety, and environmental protection. WRRA members are the largest real recyclers in Washington. As such, WRRA and the industry have taken an active role in the WAC 173-350 Rule Update process. WRRA staff and members have participated in workgroups where allowed and have submitted multiple sets of comments on key sections of this rule update. We reiterate those comments, but will not duplicate them here.

WRRA views the WAC 173-350 update process as a perfect opportunity to strengthen and preserve the integrity of Washington's excellent solid waste system by strengthening regulation, eliminating exemptions, and bolstering much needed reporting and enforcement efforts. The current draft of the rule is an improvement over the last in many ways, but we offer the following comments to improve and ensure that it achieves its goals and serves Washington's excellent solid waste handling system.

## I. WAC 173-350-020 & 021 Applicability and Determination of Solid Waste.

The determination of waste test, now WAC 173-350-021, has evolved well over the course of this rulemaking process. If successfully implemented, it should strengthen and support the definition of solid waste in RCW 70.95 by providing clarity for both industry and regulators. When read in conjunction with certain definitional changes, this section has the potential to deregulate many solid waste facilities in Washington. As the Department has been unwilling or unable to provide a list of potentially affected entities, we are unable to fully gauge the scope of these changes and thus are not able to fully support this otherwise useful section. However, definitional changes aside, some clarification is still required to ensure this test can be effectively implemented.



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First, the test needs to define "separation" in a manner consistent with other rule sections WAC 173-350-021(3)(b) states that a material is no longer a waste if, among other factors, it is "separated from solid wastes " Essentially, the test specifies that a material must be "separated" from other solid wastes, though the extent or type of separation is not specified Utilities and Transportation Commission (UTC) statutes and rules also lack a definition of separation and the lack of clarity on this issue has raised significant questions in the past Obviously, a box containing only clean wood save for several old bent rusty nails inadvertently sitting at the bottom of the box should not fail this prong of the test Similarly, the same box full of excess drywall and other debris *should* fail this portion of the test Providing a definition of "separation" that aligns with other rule sections and the spirit of the determination of waste test will provide needed clarity

WRRA was heavily involved in the workgroup that developed this section, and earlier versions *did* define separation This crucial definition has been omitted from both informal drafts of the rule The draft test dated 2-25-15 clarified this section by proposing a definition for "separation " WRRA recommends adopting the 2-25-15 definition of "separation" with several edits to bring it into line with the new WAC 173 350-210 facilities sections

> "Separation" or "separated" means source-separation into individual material streams to remove or separate recyclable materials from other non-recyclable solid waste, resulting in less than 5% by weight non-recyclable materials, for the purpose of reuse or recycling

Defining "separation" provides needed clarity, supports existing regulation, and should be incorporated into the final rule The definition above was heavily discussed and vetted by the stakeholder workgroup The term "separated" is ambiguous standing alone This definition also supports and highlights the crucial statutory provision, source separation of recyclable materials [1]

Second, the rule requires additional clarity with regards to the applicability section, WAC 173-350-020 and the determination of waste test in WAC 173-350 021 A number of the materials or situations described in WAC 173-350-021 could become solid waste or result in a solid waste handling activity depending on how the material is managed or where it is ultimately used or sent for disposal Some examples, (2)(v) "Manufactured topsoil," (2)(s) Collection, transport, and sale of used goods and materials solely for the purpose of reuse," and (2)(z) "Organic materials, used for animal feed or to create animal feed" appear to describe materials and practices that can result in solid waste handling if the materials somehow enter the waste stream One of the more recent additions for steel slag accounts for this issue and states that 173 350 does not apply to steel slag as long as the "material is not abandoned, discarded, or placed in the solid waste stream" in WAC 173-350-020(2)(y) If manufactured topsoil is sent to a transfer station or landfill for disposal for any reason, then it is solid waste

The applicability section as a whole should adopt a similar approach for all categories and note that all materials could become a solid waste and be subject to the determination of waste test in WAC 173-350-021 depending on how they are managed or their final destination A

[1] RCW 70 95 010(5) Source separation of waste must become a fundamental strategy of solid waste management Collection and handling strategies should have as an ultimate goal the source separation of all materials with resource value or environmental hazard

positive change in this section is moving WAC 173-350-021(2)(20) "drop boxes used solely for the collection of recyclable materials" to a more appropriate exemption in WAC 173-350-310, presumably for the very reason discussed above Additional language should be added to WAC 173-350-020 to state that the materials listed therein, *and in fact any materials*, are capable of becoming solid waste depending on the manner in which they are handled

Third, changes to the definition of "recycling" and the addition of "commodity" to WAC 173-350 should receive more scrutiny Department staff has indicated that some changes to the definition of recycling have been poorly received and misunderstood, particularly

> Recycling does not include crushing, shredding, compacting, sorting, baling, or repackaging when those activities are part of collection, intermediate processing, or preparation for the purpose of transport

This language has caused confusion because the act of recycling usually incorporates some or all of these elements Our understanding is that Department staff intended to indicate that something more than mere preparation for transport is required for a material to be recycled The language above is confusing and should be revised, but the original intent behind the language should be preserved Maintaining this distinction between mere preparation and true transformation into something of value is crucial for the new "commodity" definition to have any real meaning

Fourth, WRRA is concerned with language in the Responsive Summary issued with the draft rule On page 2, when discussing the determination of waste test, the response states that

> Many commenters expressed concerns on how the rule might be used by other entities to interpret and seek enforcement The concerns related to the implications of a material being labelled as solid waste or solid waste handling activity The currently effective rule is more restrictive than the currently proposed rule

This response is surprising and not well explained The new determination of waste test was intended as a tool to provide for better clarity and enforcement in solid waste The test is also somewhat restrictive by design with its "any/all" dichotomy to qualify as a waste/escape solid waste regulation We urge the Department provide clarity regarding this statement in any future drafts or other documents issued and note the intent of the test as a tool to promote regulation, enforcement, clarity, and uniformity

Fifth, WRRA is concerned with the language in WAC 173-350 021(2)(g) which states a material is a solid waste if it "has been stockpiled for recycling, reuse, or for use after recycling, but no market is available and stockpiles violate the performance standards of WAC 173-350-040 " It is questionable that the Department has the authority to enforce the solid waste handling standards on a material which is not yet designated as a solid waste, let alone as a precursor to making a determination that a material is solid waste The intent of this language, to capture sites and materials that pose a risk to human health or the environment, is obviously correctly placed However, referencing the performance standards which only apply to solid waste facilities before a material has been deemed a solid waste appears open to challenge This section should be

reworded to address the same situations but do so directly without citation to another section of questionable applicability

Finally, the Department should develop a robust implementation and education plan alongside the formal rule proposal to ensure this test achieves its desired results The determination of waste test and accompanying definitional changes have the potential to dramatically alter the landscape of solid waste handling in Washington State These changes will almost certainly be for the worse if all stakeholders are not included in the implementation and education process that will accompany these rules The Department will also need to play an active role in the implementation process to ensure localities understand and follow the intent of the new rules

Furthermore, a potentially large number of current solid waste facilities with mandatory reporting requirements will likely be deregulated under this new section This may be a positive development for a number of facilities that are good actors and perhaps not truly handling solid waste in the first place As these facilities exit solid waste regulation, so do their mandatory reporting requirements and the accompanying data WRRA is proud of Washington's average 50% recycling rate and the Department should have a substantial plan or mechanism in place to protect that number Washington's recycling rate is an achievement everyone in the solid waste handling community should view with pride, not artificially deflate through deregulation

***Applicability and Determination of Waste Comments Summary:***

- The term "separated" is used in the determination of waste test but not defined "Separation" should be defined and included in the rule, specifying source-separation and the "5% rule" to align the definition with the facilities section updates
- Additional clarity is required in the applicability section to note that materials in that section managed improperly can become solid waste under the determination of waste test
- The definition of recycling in the draft rule should be revised to prevent confusion, but still specify that a true transformation into something of value is required for a material to be recycled
- Language in the Responsive Summary to previous comments should clarify that the determination of waste test is a tool to promote regulation, enforcement, and clarity
- A robust implementation plan from the Department will be required for this and all other sections to achieve their goals This process plan should be substantial and involve all stakeholders, government, and industry

## II. WAC 173-350-210 Recycling and Material Recovery Facilities.

WRRA believes that all solid waste handling facilities should be subject to inspections, audits, and some level of permitting and oversight at both the local and state level A significant amount of solid waste handling activity in Washington already goes effectively unregulated under current Department rules, due in part to a lack of enforcement As a result, sham recyclers

who hurt cities, counties, the state and legitimate lawful companies while exposing Washington citizens to unnecessary environmental risks have proliferated under this environment

The updates to exempt facilities in this draft rule are positive and should do a great deal to limit both the scope of the exemption and the number of qualifying facilities Overall, we hope that the changes will provide for a much stronger enforcement apparatus The rule should shrink the overall universe of exempt facilities and require many more to become permitted Newly permitted facilities will be subject to enforcement under the local permitting regime and the number of exempt facilities should be substantially smaller and easier to observe Again, the Department has not provided a list of potentially affected entities or even estimates as to the number of affected entities As such we are unable to fully support or understand the scope of these changes Further, we will continue to question the legitimacy of any economic impact statements by the Department that does not take into considerations which facilities are impacted, and will not be able to do so until the information is provided and verified Beyond that, the rule still requires several changes to achieve its goals

First and foremost, in the current draft, WAC 173-350-210(2) states that an exempt facility *may* be subject to permitting requirements if it violates the terms of its exemption The "may" in the section must be changed to "shall" or "will" to both comply with statutory authority in RCW 70 95 305 and to provide the regulation with any real chance of effective enforcement Our understanding is that the Department provides technical assistance and attempts to bring operators into compliance before seeking enforcement Violators should be subject to penalty, but to accommodate these competing concerns, the period to achieve compliance should be confined to a 30 day window

> If a facility does not operate in compliance with the terms and conditions established for an exemption under this subsection, the facility ~~may~~ shall be subject to the permitting requirements for solid waste handling under this chapter after 30 days (Italics added)

This change provides operators with a reasonable but rightly limited time to receive technical assistance from the Department and achieve compliance If the operators continue illegal activity for more than 30 days, they must, and rightly so, become permitted to continue operation

Second, the exemption process must be managed as a true process Under the current system, and the current draft, the exemption process is still a "one-off" event whereby an entity files for an exemption, receives it with little to no investigation or debate, and is likely never looked at again Maintaining an exemption should be an annual process and include, at a minimum, an initial inspection by the local by the local Jurisdictional Health Department (JHD), review of the operating plan, and periodic audits and verification of exempt facility records and reports The current process, or lack thereof, is a proven failure and requires a robust and continuing process to maintain throughout the life of an exemption The Department's authority to exempt facilities under RCW 70 95 305 does not provide for a one time process The statute requires the Department to make certain determinations, the result of which may change over time, necessitating a true process to both qualify for and maintain an exemption For over a decade these facilities have operated in a virtually deregulated environment and caused many

problems for industry and local government alike The pendulum now needs to swing the other way

The new draft rule does make a number of positive changes to the exempt facility rules that should provide for better and easier enforcement, but still requires substantial accountability mechanisms Requiring exempt facilities to file an operation plan 30 days prior to open and disclose the destination of materials they receive in their annual reports are much needed updates that should provide for some transparency and potential for enforcement WRRA also supports adjusting the "5% annually/10% by load residuals" rule for exempt facilities to 5% across the board This change removes ambiguity and should provide for better enforcement These improvements are substantial but still leave one large hole in an effective enforcement regime, an actual boots-on-the-ground verification by local health that what is being reported is factual This should include annual inspections and periodic audits of exempt facility records and reports At a minimum, it must include an initial opening inspection and annual verification to *maintain* an exemption

Third, the updated rules draft and accompanying Responsive Summary do a good job of describing what qualifies under the new individual material stream requirement for exempt facilities However, the rule should specify examples of what would not qualify as an individual material stream, namely, construction, demolition, and land-clearing debris (CDL) Between the rule text and the Responsive Summary, individual material streams can consist of a box of only metal of one or several types, a mattress, or a hulk car There are effective arguments for regarding each of these as an individual material stream But as the level of abstraction increases from a box of pure raw material to a complex object like a hulk car, some specification as to what materials do not qualify as individual material streams becomes necessary CDL should be chief among materials that do not qualify, and listed in rule, as it is a clear example of a mixed material stream and has proven to be associated with a class of facilities in dire need of stronger enforcement This is also a reflection of existing law as CDL is specifically included in the statutory definition of solid waste in RCW 70 95 030(22)

Fourth, the updated facilities section should also reference the Transporter Law in WAC 173-345 to collect more of the potential requirements for facility operators in a single place Compliance with the Transporter Law should also be set out in the table as a requirement for exempt facilities where appropriate The new table set forth in the rule should be a good tool for operators to more easily view their obligations, and including the Transporter Law should further that goal and provide for better compliance

Finally, the new exemption for wood waste and concrete at the point of generation should be described in greater detail Currently the rule dedicates only a few words in the table to this exemption and leaves a number of unanswered questions and no guidance for regulators on how to implement the rule

***Recycling and Material Recovery Facilities Comments Summary:***

- Overall rules changes are positive but must go farther in key areas to achieve goals

- Exempt facilities failing to fulfill the conditions of their exemption must become permitted or cease operation if they fail to achieve compliance after 30 days
- The exemption process must be managed as a true process, including an initial inspection, audits, and reporting to maintain an exemption
- Clarification of what cannot qualify as individual material streams for exempt facilities are required in rule, especially for CDL
- Exempt facilities section should reference the Transporter Law WAC 173-345 and require compliance with that Law as a condition of exemption
- Exemption on wood waste and concrete at point of generation requires elaboration

## III. WAC 173-350-320 & 410 Piles used for Storage or Treatment & Inert Waste Landfills.

WRRA viewed the enhanced permitting requirements for piles in the previous draft as a model that other sections should adopt This version appears to back off from the straightforward approach of previous versions in favor of material specific categories and requirements for permit exemption We support some level of permitting and inspection for all solid waste handling facilities

From conversation with DOE staff, our understanding is that exempt facilities under the new WAC 173-350-210 cannot store materials outside in piles and remain exempt under the new rules Both the piles section and exempt facilities section should make this more evident to operators and perhaps include the requirement in each sections respective tables which will likely become "go to" sections of the respective rules The piles section should also specify that a structure must be fully enclosed From our understanding from Department staff, this is the intent of the chapter, but is not fully spelled out in the draft rule The piles section should clearly state structures must be fully enclosed, a mere covering, be it a tarp or a free standing roof will not suffice

The current draft rule maintains the higher threshold for exemption adopted in the previous draft, at 2,000 cubic yards, up from 250 in the current rule WRRA opposes the tenfold increase for piles, the WAC 173-350-410 Inert Waste Landfills, and the WAC 173-350 995 Soil and Sediment Criteria sections In reality, 2,000 cubic yards is a large volume of material Considering an average dump truck somewhere in the range of 10-14 cubic yard capacity, the new rule anticipates up to 200 truckloads of material before a permit is required This expansion is ill advised given Washington's history with exempt facilities and clean-up sites

***WAC 173-350-320 & 410 Piles used for Storage or Treatment & Inert Waste Landfills Comment Summary:***

- The clarity and enhanced permitting requirements of the previous draft are preferable to the material specific approach in the current draft
- The rule should specify that structures must be fully enclosed for purposes of this rule

- Exempt facility and piles sections should have additional language in their respective tables explaining the interplay between these sections and the qualification for exemption under WAC 173-350 210
- The tenfold increase in permitting threshold from 250 cubic yards to 2000 for piles and inert waste landfills should remain at 250 in the final rule

## IV. WAC 173-350-400 Limited Purpose landfills.

In updating the permitting requirements and operating standards for limited purpose landfills, the Department should address longstanding issues with these facilities which impact the goals of other sections Some limited purpose landfills, particularly several facilities located in the Naches River Valley, have proven to be a crucial component of the sham recycling business model

The new exempt facility rules in WAC- 173-350-210 make some progress on addressing sham recycling The sham recycling business model typically requires two components a general lack of oversight so that the sham recycler can operate under the radar and deceive local officials and the customers they serve and a haven for the cheap disposal of the materials they claim to recycle The new facility rules work to at least partially address the first component of this model However, the rules regarding limited purpose landfills should be updated to address the second component of their business model cheap disposal

To help provide for accountability and enforcement, limited purpose landfills should be required to have a scale to meet the design requirements in WAC 173-350-400(4) Volume is too subjective for an effective unit of measurement and provides ambiguity for sham recyclers, weight is more precise The new draft requires "a description of how operators will maintain operating records" on the amount of waste received in WAC 173-350-400(4)(ix) This section should be reworded to specify that accurate and truthful record keeping is a permitting requirement and provide for enforcement, reporting, and auditing of these numbers to address consistent problems with this class of facilities

***WAC 173-350-400 Limited Purpose Landfills Comment Summary:***

- These facilities have provided an avenue for sham recyclers to achieve cheap disposal and require additional oversight In particular, facilities located in the Naches River Valley have a long history of enforcement actions
- The goals of other rule sections will be compromise if action is not taken here
- All limited purpose landfills should be equipped with scales and required to keep accurate and audited logs on the materials they are accepting

## V. WAC 173-350-995 Soil and Sediment Criteria and Use.

WRRA supports the safe and environmentally responsible handling of solid waste Regulation works for solid waste, and contaminated soils are included in the definition of solid waste WRRA supports the general goal of ensuring the safe management and disposal of contaminated soils along with all solid waste However, we continue to have the same concerns with the overall operating structure of the rule The soils rule still falls short in crucial areas

which threaten to undermine both the goals of the rule and Washington's system for the safe and responsible disposal of solid and contaminated waste to ensure public safety and environmental protection

First, the due diligence requirement continues to be problematic and places too much trust and authority in the hands of the entities the rule purports to regulate WRRA and the solid waste industry has seen firsthand the effects of "self-regulation" solid waste facilities with exempt facilities under the current WAC 173-350-210 & 310 Effective regulation of solid waste requires a proactive approach, including actual enforcement, notice, and verification

The draft rule requires that a company using contaminated soils perform "due diligence" to determine whether a soil may be contaminated However, the "due diligence" requirement can be satisfied in various ways short of actually performing analytical tests on soils, and the company does not need to provide any documentation or keep records of whatever steps it took to meet its "due diligence" requirement As written now, a company, on its own, can make the determination not to test a soil for contaminants and use it across the state without keeping any record of where the soil originated, where it was placed, and what (if anything) was done to ensure the soil fell below the soil screening limits Today, many contaminated soils go to highly regulated lined landfills with sophisticated controls to prevent accidental release or harm to the environment, in deep contrast to the unmonitored land application of contaminated soils throughout the state

As discussed above, the "self-authorizing ' nature of the rule and due diligence requirement is extremely problematic Changes to the definition will not cure these structural defects, but will provide for a stronger rule

> "Due diligence" means making a good faith effort using investigative techniques to determine whether there may have been a release on a property Investigative techniques ~~may~~ must include use of one or more of the following techniques, as warranted by circumstances

The current language is permissive and should be made mandatory Furthermore, entities performing "due diligence" should be required to keep detailed records documenting their efforts The "due diligence" requirement is of little real value if there are no mechanisms for accountability

Second, the new draft rule does contain several positive changes with regards to notice, but much more is required The new notice requirements to public health are crucial, but they only apply when managing over 2,000 cubic yards The requirement appears woefully deficient in practical application In the case of an average 10 yard dump truck, an operator can move 200 dump trucks full of potentially contaminated soil before having to notify the local JHD The other new notice provision, requiring an operator to place a deed notice on properties receiving over 2,000 cubic yards of contaminated soil is an interesting, and necessary approach However, the threshold is too high Notice to JHDs regarding the movement of contaminated soils should be required at virtually any level However, at a minimum, notice should be required at the 250 cubic yard level present in the current WAC 173-350 for inert waste landfills

Third, the elimination of the hybrid waste landfills is also a positive change, necessary to both comply with RCW 70 95 065 and ensure protection of human health and the environment We encourage the Department to avoid the creation of any other similar facilities or unlined and potentially hazardous facilities in future iterations of this draft

Fourth, WRRA continues to object to changes in the definition of solid waste in WAC 173-350-100 to accommodate contaminated soils Contaminated soils are already contained within the statutory definition of solid waste in RCW 70 95 and the rule definition in WAC 173 350 This change is unnecessary and confusing The term "impacted soils" is ambiguous and lacks clear meaning to a casual observer The rule section and definitions should proceed with the existing and self-evident definitional term "contaminated soil "

Fifth, the rule proscribes that contaminated soil and sediment managed in accordance with the soils section is not solid waste handling This language is false, problematic with regards to the rest of the rule, and even the definition of solid waste in the rule update Contaminated soils are solid waste, period, no matter what they are called As discussed above, we do not believe the Department should proceed with the soils section as written However, if the Department does proceed, it is crucial to revise this language Contaminated soil managed in accordance with the soil and sediment criteria section should be conditionally exempt from solid waste permitting requirements at most, and not categorically defined outside solid waste entirely The language as written is inconsistent with statutory authority in RCW 70 95 and inconsistent with the Department's own approach in virtually every other section of this rule

Finally, it's not clear that the Department has the statutory authority to enact the soils rule at all The rule essentially creates a new class of largely unregulated exempt facilities The Department's authority in RCW 70 95 305 to exempt facilities is contingent on the facility presenting "little or no environmental risk" and meeting "the environmental protection and performance requirements required for other similar solid waste facilities " Based on the materials in question, contaminated soils, and the lack of notice and reporting requirements, the Department cannot honestly make that determination Further, the rule's new regulatory regime is a large break from established practice and the type of change that ordinarily requires legislation to implement In fact, legislation regarding the movement of contaminated soils has been proposed and rejected in recent legislative sessions

***Soil and Sediment Criteria and Use Comments Summary:***

- The overall structure of the rule, particularly the "due diligence" requirement are largely unaltered, continue to be problematic, and will ultimately undermine the goal of the rule
- The current draft makes some progress with notice to local JHDs, but stronger requirements are needed
- The elimination of the hybrid waste landfills section from the previous draft is both a positive and necessary change and the Department should avoid creating similar facilities in the future
- Changes to the definition of solid waste to accommodate contaminated soils are unnecessary and disingenuous
- Contaminated soils are solid waste and cannot be exempted by rule

- The Department lacks statutory authority to enact this rule and legislation is required for such a sweeping departure from existing practice

## VI. Conclusion

WRRA appreciates the opportunity to comment on these rules still in development and DOE's consideration of WRRA and the solid waste industry's concerns We will continue to call into question any cost-benefit or economic analysis on this proposal until sufficient information is provided on the affected entities Please feel free to contact Rod Whittaker (rod@wrra org) at 360-943-8859 We are eager to elaborate on these comments and offer any perspective or resources necessary to assist DOE staff with the development of this rule

Sincerely,

Brad Lovaas

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