April 27, 1999

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Antitrust Division
U.S. DEPARTMENT OF JUSTICE
1401 H Street, NW • Suite 3000
Washington, D.C. 20530

RE: Comment on Merger Between New Waste Management and Eastern Environmental Services

Dear Mr. Kramer:

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16, this is to submit the formal *Comments* attached to this cover letter on the consent decree that was entered into on December 31, 1998, concerning the merger that had been announced on August 18, 1998, between the new WASTE MANAGEMENT and EASTERN ENVIRONMENTAL SERVICES ("Eastern Merger"). That decree removed the Justice Department's objection to the merger under Hart-Scott-Rodino subject to certain divestitures — subsequently made to now second ranked ALLIED WASTE INDUSTRIES[1]— as well as to the subsequent approval by the federal court for the Eastern District of New York.[2]

The Eastern Merger followed closely on the heels of the pending merger of USA WASTE SERVICES with old WASTE MANAGEMENT ("USA Waste Merger") that had been announced on March 10, 1998, forming the "new" WASTE MANAGEMENT. That merger was settled on July 16, 1998 subject to certain other divestitures, subsequently made to now third ranked REPUBLIC SERVICES,[3] also subject to the approval by the federal court for the Northern District Eastern Division of Ohio.[4]

In addition, just months later on March 9, 1999, the Eastern Merger was followed with the announcement by, then, fourth ranked ALLIED WASTE that it was taking over second ranked BROWNING FERRIS INDUSTRIES ("Allied Merger") to become the "new" ALLIED.[5]

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1 "Allied pays $85 million for WMI facilites," *Waste News* (Apr 12 '99).

2 *Competitive Impact Statement*, Civil No. 98-CV-7168 (Eastern District New York) (Feb 2 '99) ("USA Waste CIS").

3 B. Brown, "Republic reels in WMI's assets," *Waste News* (Oct 5 '98).

4 *Competitive Impact Statement*, Civil Action No. 98-CV-1616 (Northern District Eastern Division Ohio)(Jul 23 '98) ("Eastern CIS").

5 "J. Bailey and S. Lipin, "Allied Waste to Buy Browning-Ferris for Cash," *Wall Street Journal* (Mar 9 '99); B. Brown,
(continued...)

As is documented in the attached *Comments*, which this letter summarizes, if the potential for competitive markets in the solid waste industry is to be maintained in the face of the accelerating pace of consolidation over the last four years, it is essential that the Department consider these three mega-mergers at the same time so that their *combined* impact can be appropriately addressed.

Through most of last year, the solid waste industry had remained largely competitive in most parts of the country, even in the face of intermittent collusive behavior in some localities. However, the only relevant issue before the Justice Department and the Court is not historic conditions, but rather forward looking prospects for the maintenance of competition in the event these three mergers under review are approved — regardless of whether approval is only extended with the sort of limited divestitures that have been ordered so far.

For these three mergers appear to constitute the end game in the industry's long march over nearly 30 years to consolidate into a two or three firm oligopoly of vertically integrated firms with the market power to increase prices through their control over the regional markets for disposal. Now is the last opportunity which Justice has to undertake a remedy commensurate with the magnitude of the problem.

That commensurate remedy is divestiture of disposal from hauling in those geographic markets without either publicly-owned or merchant disposal facilities capable of maintaining competitive conditions for new entrants. It is in contrast with the limited divestitures so far ordered that only require the shuffling of various assets *among the oligopoly players themselves* and shortening contract terms for hauling, but do not extend to breaking the oligopoly's control over the landfills in most markets.

That is the overriding problem because a new or independent hauler can only compete if, when his vehicle tops out, he can offload the waste at a nearby licensed transfer station or landfill where he is charged non-discriminatory tipping fees. Although the barriers to entry in the market for collection are not insurmountable, the barriers for new entrants in the disposal market are. The lever for erecting barriers arises in no small measure from the unintended consequences of environmental regulations such that now only highly engineered, immense-scale operations can be licensed and compete, thereby altering the fundamental structure of the industry. That makes disposal a bottleneck in the solid waste industry. *U.S. v. Terminal Railroad Association,* 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed.810 (1912).

This situation defines the classic case where prices squeezes can be used by the oligopoly which controls the bottleneck in a geographic market to fence out new entrants into the collection market (which by itself does not have high barriers to entry), as well as compel existing independent operators to sell out.

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5 (...continued)
"Allied Waste, BFI form powerhouse," *Waste News* (Mar 15 '99). ALLIED indicates that it will only retain the BFI name in limited markets as its DBA.

Less well recognized is the fact that the *almost* insurmountable barriers to entry into disposal are made virtually unassailable when the vertically integrated oligopoly maintains high market concentration ratios in the markets for both hauling and disposal. For this combined power means that any new entrant with the enormous resources necessary to venture into a merchant disposal facility — and, to date, the only instance of that is GOLD FIELDS MINING's Mesquite landfill in El Centro, California — can be subjected to the flip-side of price squeezes, namely volume squeezes. That is to say, today's economy of scale landfills often need more than 10,000 tons per day waste inflows (that is, the waste from more than six million people) and sometimes as much as 20,000 tpd to profitably amortize the underlying investment. Except for regions with major metropolitan areas which operate their own garbage fleet, the only source for that magnitude of waste is the private hauling giants which are unlikely to support a competitor seeking to disrupt their monopoly power.

In concept, then, once high market ratios are attained by vertically integrated waste firms in both the market for collection and disposal, the market power in each reinforces and cements their power in the other if there is tacit collusion among them. The only check on monopoly pricing once this point is reached is if, and to the extent that, the two or three firm oligopoly in each geographic market decides it prefers to compete for greater market share rather than collude for improved profit margins.

Along precisely the same vein, the Eastern *CIS*, like the USA Waste *CIS* before it, defines the objective which must be achieved in order for the proposed merger to approved:

> "The relief ... will eliminate the anticompetitive effects of the acquisition in commercial waste collection and disposal of MSW from the relevant markets by establishing new, independent and economically viable competitors in each affected market."[6]

Thus, the question to be determined before the proposed Final Judgment is presented for the Court's signature is whether the divestitures of waste collection and disposal operations in New York City (including Eastern's pending proposal to dispose of New York City's residential waste); Pittsburgh, Bethlehem/Allentown, Chambersburg-Carlisle and Scranton, Pennsylvania; Miami-Ft. Lauderdale and suburban Tampa, Florida,[7] will achieve that end by "establishing new, independent and economically viable *competitors*."[8]

More particularly, though, this question must be answered when the actual disposition of

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6 Eastern *CIS*, at p. 11.

7 Eastern *CIS*, at p. 11.

8 *Similar:* whether the divestitures ordered in the USA Waste merger (commercial waste collection and municipal solid waste disposal in 21 geographic markets around the country, including: Akron, Canton, Cleveland and Columbus, Ohio; Allentown, Pittsburgh and Philadelphia, Pennsylvania; Baltimore, Maryland; Denver, Colorado; Detroit, Flint and Northeast Michigan; Houston, Texas; Los Angeles, California; Louisville, Kentucky; Miami and Gainesville, Florida; Milwaukee, Wisconsin; New York, New York; Portland, Oregon; and Tucson, Arizona), USA Waste *CIS* at p. Appendix A, will maintain competition.

those divested assets, including the key landfill assets, are to ALLIED for all of the Eastern divestitures and to REPUBLIC for all of the USA Waste divestitures— that is to say, *to other members of the oligopoly*, even though the number of other bids strongly suggests that other options existed.

Unfortunately, neither *CIS* provides any information to support its claim that competitors will be created. To the opposite effect, and as documented in more detail in the attached *Comments*, virtually every piece of evidence testifies to the opposite effect, namely that the mere shuffling of assets among members of the oligopoly will not establish competitors.

The propensity of the major integrated waste firms which have survived the final shakeout — new WASTE MANAGEMENT, new ALLIED and REPUBLIC, as well as many of the integrated regional players such as SUPERIOR — to act in a way that will improve profit margins rather than increase market share through competition is shown by: ① targeted acquisitions of price breakers; ② asset swaps; ③ volume exchanges; ④ statements of players; ⑤ statements of investment analysts; ⑥ early price rumblings.

First, the two integrated regional firms which were known for submitting low bids— MID-AMERICAN WASTE and LAIDLAW— were taken over by the oligopoly members and their prices raised.

Second, in 1997 the pressure from Wall Street to earn premiums from their core operations led to a new era of cooperation among the integrated major national and regional firms, old WMI, old BFI, old ALLIED, REPUBLIC, former USA WASTE, former AMERICAN DISPOSAL, CASELLA, SUPERIOR, former UNITED WASTE and WASTE CONNECTIONS. They evaluated which of them was dominant in a particular market, and then proceeded to swap local assets to abandon the field where they where they were not the primary, or sometimes the secondary, major player to the one which was. (For a more detailed discussion, *see Comments*, at p. 12.)

As shown in the TABLE accompanying that section, the majors swapped assets in more than 52 markets over the last two years. Often the effect was to withdraw everyone from a market except for the primary integrated oligopoly waste firm, leaving only one or two non-integrated independents who were subject to future price squeezes as competition.

Third, one year later, old WMI, old BFI, then USA WASTE and old ALLIED WASTE began volume exchanges. In a volume exchange, one integrated firm in an area trades dumping capacity in their own landfills to another major hauler without a landfill in that area for an equal amount of space in a competitors' landfill where that firm does not have a facility. (For more details, see p. 15.) This only makes economic sense, it may be noted, if the tipping fees that the integrated firms charge others in areas where they control disposal capacity is greater than the market price for that space.

It also, like the asset swaps, provided ample opportunities to meet, open their books to the other[9] and nurture relationships that signaling conceivably might thrive in. Whether those data exchanges that ensued violated the Sherman Act, *American Column & Lumber Co. v. U.S.*, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284 (1921), or skirted around the perimeter of the law, *Maple Flooring Manufacturers' Assoc. v. U.S.* 268 U.S. 563; 34 S. Ct. 578, 69 L. Ed. 1093 (1925), would depend upon the specific facts of what transpired during the meetings in which these transactions were discussed.

Fourth, the intent of the integrated firms was so strong it became evident in press quotes. A SUPERIOR official predicted that the USA Waste merger "will add stability to the nature of competition. He says in some cases, 'local [Waste Management] operation's activities were somewhat unpredictable.' He expects 'more rational pricing and a more disciplined approach to producing earnings' under the new leadership." And new WASTE MANAGEMENT CEO John Drury said he is hoping that, "with some weaker companies gone from the industry in recent years and continuing consolidation, disposal prices can be increased without losing customers. The disposal glut for most of the 1990s caused dumping prices to plunge, cutting into industry profits." "'This [asset swap] represents a beginning of a changing relationship with Waste Management, which I believe will be helpful for both companies," [according to BFI President and CEO Bruce Ranck." "Swapping assets with BFI affords 'another opportunity for us to improve our competitive position in some markets,' said WASTE MANAGEMENT spokesman William Plunkett."

Fifth, the comments by investment analysts to their clients based upon statements the industry has made to them in meetings providing earnings reports and road shows on new stock issuances is less guarded and more revealing. Below are some excerpts from the attached *Comments* where the citations are found:

As concerns low-ball pricing: "The 'problem' pricing entities have been removed from most markets . Mid-American Waste, which had been in financial trouble for years, had been pricing low in order to maximize cash flow throughout the Midwest and several other markets. Mid-American was acquired by USA Waste in Q2 and pricing was improved immediately throughout these markets. The Laidlaw U.S. operations, which were acquired by Allied Waste in Q1, had not experienced price increases in the majority of its markets for two to three years, and Allied is now raising pricing aggressively in these markets. Similarly, USA is aggressively raising prices in the Laidlaw Canadian operations it acquired in early 1997. *Finally, both BFI and WMX, which for years had been pricing for market share, have embraced strategies that emphasize return on capital instead of volume.*"

As concerns asset swaps: "'This [deal between historic enemies] is something that will test the waters from all sorts of perspectives,'said Michael Hoffman, an analyst with Credit Suisse First Boston. 'If it all works and all are happy, look for billions of dollars of assets owned by the top five companies to change hands.' "Bigger than the assets being dealt [by this exchange] is the symbolic precedent set by the

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9 "An asset swap between [BFI and Allied] late last year [in 1998] gave both sides a chance to look into the other's operations, [Allied CEO Tom] Van Weelen said. 'I guess the realization was that the swaps made eminent sense' and that new awareness spurred the companies to take a more serious look at merging their operations,' he said."B. Brown, "Allied Waste, BFI form powerhouse," *Waste News* (Mar 15 '99).

unusual cooperation between WMI and BFI, said Leone Young, an analyst for Salomon Smith Barney Inc. 'The relationship was much more acrimonious in the past,' Young said. 'It's sort of the thawing of the cold war.'"

As concerns the USA Waste merger: "Historically, the objective of the largest players in the industry, WMX and BFI, was to gain market share. This strategy resulted in low returns on assets, declining profitability, and sub-par returns for shareholders. Recently, the big waste giants have adopted strategies to improve their return on investments of assets." "Many industry players had worried [before USA Waste merged with WMI, according to Barrons] "that Waste Management would hire a new CEO who would try to gain market share by cutting prices. Analysts doubt that tack will be taken by USA Waste's John Drury". "[W]e think the industry should realize better prices in the wake of this consolidation." "'It's going to be a powerful company [according to Piper Jaffray's Melissa White, a former WMX staffer]." "Ms. White and some others expect the combined companies, which will be based [in Houston] and use the Waste Management name, will have increased ability to raise prices in some markets without risk of losing customers." "[Analysts at Goldman Sachs] believe pricing for both WMI and the industry are likely to be headed upward. The company's senior management team and each of the 5 area managers repeatedly addressed the intention to develop better pricing in their markets. Area managers characterized many of the former-WMX markets as underpriced, and stated a desire to be price leaders in their regions."

As concerns the Allied merger: "[A]nother major positive both for Allied and the industry in general [from Allied's acquisition of BFI] is that the elimination of a major competitor should further enhance an already improving industry price environment." "Consolidation within the industry, especially in some key large markets, may allow for better pricing power by waste providers over the next two years." "Likely the greatest impact of the merger of the second [BFI] and third [Allied] trash haulers is more favorable pricing nationwide, analysts predicted." "The Allied-BFI combination will reduce competition in many markets, thus eliminating a driver that kept prices down, said Stacy Gray, an analyst for First Analysis Securities Corp. in Chicago. 'That should prove positive in terms of pricing,' Gray said."

Fifth, even before the ink has dried on the USA Waste and Eastern mergers, and before the settlement has been developed in the Allied merger, WASTE MANAGEMENT instituted "eye-popping spot market price hikes ... at its landfills and incinerators across the country [which] left customers scrambling to cope with higher costs" of as much as 84% at one out of eight of its landfills.[10]

Each of these facts establish a consistent evidentiary record that is consistent with only one conclusion: the intention of the members of the waste oligopoly, which the divestitures do nothing to prevent, is to cooperate, not compete. And the limited divestiture policy will, shortly after the consummation of the Allied merger, permit them to do so.

But, all of this only speaks to the question of whether the divestitures in the targeted

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10 B. Brown, "WMI raises tip fees," *Waste News* (Mar 1 '99).

markets is adequate, not to whether the magnitude of divestitures, nor breadth of markets targeted, was sufficient. It may be noted that there are additional questions that have been raised with regard to these other issues.

For example, in the face of concerns by the New York City TRADE WASTE COMMISSION ("TWC") over the adequacy of the divestitures in the Eastern merger,[11] WMI voluntarily agreed to "divest another $24 million in [collection] revenues on top of the $22 million required by federal regulators." They did this even though the concession did not commit the TWC to withdraw its continuing objections.[12] To rush to more than double the mandated divestitures, even though the new concession did not lock down a waiver of the Commission's objections, would seem to indicate that WASTE MANAGEMENT itself perceives the proposed settlement as something substantially less than demanding.

It may be noted that this parallels the situation with the proposed settlement in the original USA Waste merger. After reviewing the market share data nationwide of the combined companies which USA Waste provided them, analysts originally estimated that between $500 million and $700 million out of the $10 billion company would have to be shed.[13] To everyone's surprise, the ultimate settlement proposal from Justice, however, wound up only seeking $275 million in divestitures.[14]

As prominent Wall Street analyst (and former WMX finance officer), Melissa White of Piper Jaffray noted,

> "'You used to hear Waste Management say, We can't acquire this, we can't acquire that,' because of antitrust concerns. It turns out they should have been making those acquisitions."[15]

But, it turned out that even the light touch which she anticipated from regulators — $500 million — underestimated the actual asset sales ordered by more than 80%.[16]

In view of the fact that —

① The only practical remedy under antitrust law for these disturbing trends, where market power is exercised by oligopoly price signaling, not overt widespread price

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11 B. Brown, "NYC won't OK Eastern-WMI merger," *Waste News* (Jan 11 '99).

12 "It doesn't resolve any issues of the commission in relation to disposal," said the TWC. B. Brown, "Waste giant to divest," *Waste News* (Mar 8 '99).

13 B. Brown, "Merger focus shifts to sales," *Waste News* (Mar 23 '98).

14 B. Brown, "New WMI must divest in 21 areas," Waste News (Jul 20 '98).

15 J. Bailey, "USA Waste Is on a Mission to Expand in Trash Business," *Wall Street Journal* (May 15 '98).

16 *Id.*

fixing, lies in the merger review process;[17]

② The merger end game is now at the Department's doorstep, and

③ There are no societal efficiencies from vertical integration of hauling and disposal that would be lost with divestiture,

the Justice Department should seriously consider, before it loses its last chance to do so, complete divestiture of disposal from hauling in the solid waste industry in those markets without adequate disposal capacity for new entrants outside the control of the oligopoly. *U.S. v. Paramount Pictures*, 334 US 131, 142 68 S.Ct. 915, 921, 92 L.Ed. 1260, 1284 (1948).

Not only is this essential for the maintenance for competition in waste handling, but also in recycling. Even though there are no inherent bottlenecks in the recycling industry, a monopoly in waste will naturally extend itself into recycling. Since increases in diversion is the escape hatch for garbage customers overcharged by a waste oligopoly, the haulers can be expected to ratch recycling fees up at the same time as they hike hauling charges to retain market power.

The attached *Comments* document and elaborate on these points.

Sincerely,

RecycleWorlds
CONSULTING

By

Peter Anderson
PRESIDENT

PA/ji
Enclosure [1]
cc: Federal District Court for the Northern District Eastern Division of Ohio

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17 *Compare, e.g.* : *Pevely Dairy Co. v U.S.* 178 F. 2d 363, 369 (8th Cir. 1949), cert. den. 339 U.S. 942, 70 s.Ct. 794, 94 Led. 1358 (1950), with *C-O-Two Fire Equipment Co. v. U.S.*, 197 F.2d 489, 497 (9th Cir. 1952), cert. den. 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 90 (1952).

March 29, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	}	
STATE OF NEW YORK,	}	
COMMONWEALTH OF PENNSYLVANIA, and	}	
STATE OF FLORIDA,	}	
	}	
Plaintiffs,	}	
	}	
v.	}	Civil No. 98-CV-7168
	}	
WASTE MANAGEMENT, INC.,	}	
OCHO ACQUISITION CORP., and	}	
EASTERN ENVIRONMENTAL SERVICES,	}	
	}	
Defendants.	}	

PUBLIC COMMENTS BY RECYCLEWORLDS CONSULTING, CORP.

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PUBLIC COMMENTS BY RECYCLEWORLDS CONSULTING, CORP.

These comments are submitted on the substance of the Consent Decree in regard to the aggregate impact of the WMI/Eastern merger when viewed in conjunction with the open dockets on the original USA Waste/WMI merger and the pending Allied/BFI merger. In view of the fact that the Competitive Impact Statement is silent on the markets shares for disposal in those geographic markets where the merging firms operations overlap, it is not able to address the issues on a geographic market-by-market basis.

1.0 Matters Supported

1.1 The Consent Decree Focused Divestitures on Disposal

The Consent Decree not only seeks divestitures with regard to collection routes (that historically has been the focus of antitrust review in the solid waste industry), but, goes onto require divestitures in connection with disposal, constituting approximately half of the $22 million in assets required to be shed.[1]

New Waste Management/Eastern Environmental Services Merger **MARKETS IN WHICH DIVESTITURES HAVE BEEN ORDERED IN THE CONSENT DECREE**			
	Landfills	**Transfer Stations**	**Collection**
1	Allegheny County, PA		
2	Bethlehem/Allentown, PA		
3			Scranton, PA
4	Chambersburg-Carlisle, PA		
5			Franklin/Adams/Cumberland Counties, PA
6		New York, NY[2]	
7			Broward County, FL
8			Dade County, FL
9			Hillsborough County, FL
	3	3	5

The extension of divestitures from collection to disposal facilities is critical in view of the fact that there is a bottleneck in the market for disposal that creates the conditions for monopoly power, and is of far more concern than the increased concentration in collection which has lower barriers to entry.

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1 *Competitive Impact Statement* (*CIV*), at p. A-2 to A-4; Merrill Lynch, *Bulletin*: "Waste Management, Inc." (Jan 4 '99).

2 Eastern's PJ's, Atlantic and Vacarro Transfer Stations in Brooklyn, NY. In addition, Eastern's proposed transfer operation of 2,000 tons per day of residential waste from the NYC marine transfer terminal.

Whether, on the other hand, the divestitures reach sufficiently far into the merged firm's ownership of transfer and disposal facilities to protect competition is something that cannot be determined until the Department releases the applicant's submittals showing: ① the list of such facilities owned by each of the merging firms by geographic market; and ② the market share of each of any other firms' facilities in that market to determine the Herfindahl-Hirschman Index..

1.2 Prior Precedents are No Longer Relevant

The 1984 *Waste Management* case[3] impeded vigorous anti-trust activity in the solid waste industry for a number of years. That case, which found that there are no barriers to entry in commercial hauling of solid waste, had reversed earlier rulings holding that a high market share was *prima facie* illegal.[4]

As the Justice Department's action recognizes, more recent changes in the market for disposal — which is a bottleneck for haulers — have overtaken the market analysis utilized by the *Waste Management* court and created a clear basis for appropriate anti-trust action today.

In the period leading up to the *Waste Management* decision in 1984, the market for disposal, like the market for hauling, exhibited low barriers to entry.[5] However, increasingly

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[3] *U.S. v. Waste Management*, 743 F.2d 976 (2d Cir 1984). "We conclude, therefore, that entry by potential competitors may be considered in appraising whether a merger will 'substantially lessen competition. *** Turning to the evidence in this case, we believe that entry into the relevant product and geographic market by new firms or by existing firms in the Forth Worth area is so easy that any anti-competitive impact of the merger before us would be eliminated more quickly by such competition than by litigation" [referring to the court's finding that "a person wanting to start in the trash collection business can acquire a truck, a few containers, drive the truck himself, and operate out of his home."]

[4] *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963).

[5] Parenthetically, on a technical note it was factually a gross overstatement on the part of the *Waste Management* court to have asserted — even if the record in that case erroneously so stated — that there is ease of entry because one person with one truck working out of his house could compete. Essentially, that proposition never did define the nature of the solid waste industry because a hauler needs a backup truck in case his or her main truck breaks down.

Since World War II, in order to improve efficiency by keeping the vehicle on the route longer, compacting trucks have been used, and that involves substantial hydraulics and frequent maintenance and repairs. It would be impossible to remain in business without backup vehicles to cover for periods when the main vehicle is being repaired. Disposal costs are too small in relation to the value added of most businesses for them to risk contracting with an ostensible low cost hauler who cannot demonstrate that he or she can provide reliable service.

The general rule with a well maintained fleet is that one backup truck is needed for every five packer units. Thus, the minimum size entry fleet is five plus one, or six trucks, because if the fleet has less than five trucks, the per unit cost of carrying a backup will be higher, and the ability to be competitive lessened. Packer trucks cost $125,000 and containers associated with each vehicle will add approximately $50,000 (none of which is accepted as collateral by lending institutions). Thus, the cost of entry with five trucks, a backup and containers, is in the order of $1 million.

In addition, another factor affecting entry is recycling. Subsequent to the *Waste Management* decision, recycling has become commonplace and is now provided as a curbside service to residential and commercial customers in more

(continued...)

after 1991 extremely high barriers to entry have arisen in disposal due to environmental regulations and local opposition to landfills. That change in entry conditions has been followed by consolidation of landfill markets, paralleling the earlier consolidation in hauling markets, in most regions of the county. Since disposal is a bottleneck in the solid waste industry, control over landfills (or incinerators or transfer stations) brings with it the power to control hauling through price squeezes and disparate invidious treatment of competitors.

Ironically, it was an environmental watershed that provided the foundation for the sprawling assemblage of local hauling companies operating under a national brand name to approach market power in an industry where, as to hauling, there had before only been substantial — but not insurmountable — barriers to entry.

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5 (...continued)
than 9,000 communities. J. Glenn, "The State of Garbage in America," *BioCycle*, May '98. That service typically is provided by a second fleet of trucks. Although not universal, in a majority of the cases a hauler would need to be able to provide both solid waste and recycling collection to be competitive. Because not everyone participates or sets recyclables out each week, and the quantity of recyclables set out is less than solid waste, the number of recycle trucks is not as many as the trash vehicles. Typically only one-half to two-thirds as many recycle vehicles will be needed as waste packers, and the cost per unit, which does not usually contain packing blades, might only be $90,000 to $115,000. In any event, this could cost close to $300,000 as the minimum size recycling fleet associated with the minimum trash truck fleet. The combined minimum cost of entry, then, is greater than $1.3 million dollars. This is more than 12 times what the *Waste Management* court apparently contemplated. Similarly, myriad regulations covering confidential documents, medical waste and other special wastes to meet the needs of customers today requires more sophistication than can be mustered by most interlopers working out of their house.

Other factors also increase the need for a new entrant to have more than one truck. If, for example, one were bidding to provide residential collection for a city with a population served that is more than 50,000 people, then more than five trucks would be needed to perform the service (about one truck per 10,000 population served).

Furthermore, the horizontal merger guidelines recognize that, for ease of entry to overcome a high Herfindahl-Hirschman Index, it must be achievable within one to two years. In fact, with regard to the market for single family residential hauling, almost all collection that is not publicly provided is franchised by municipal governments with the private sector under two to five year contracts. With regard to the market for commercial hauling (including residential apartments more than 4 units), the use of contracts vary substantially, as noted in the *Competitive Impact Statement* (CIS), at pp. 6-8. They can run either month-to-month or up to 3 years, with automatic renewals (which is becoming increasingly the pattern). Depending upon how many contracts there are and when they come due, contracts may well preclude entry of new firms to take advantage of monopoly pricing within the operative one to two year time frame necessary to meet the definition of ease of entry. In addition, scale economies will make it difficult in many cases to operate the single truck competitively because there are significant efficiencies from having high density on the route of the collection vehicle. Route densities reduce the travel time between stops which either in heavy traffic or extremely low density areas can be a significant fraction of the effective hours available to work each day.

Then, too, most buyers of waste services, also require concurrent recycling, not to mention special waste handling, services, the further increase the cost and complexity of entry.

In summary, even before reaching the bottleneck factor that loomed large as the decade of the 1990's progressed, entry was becoming increasingly difficult— though it took the revolution in the market for disposal to make those barriers virtually insurmountable.

1.2.1 Landfill Regulations

Prior to the early 1970's, there were few regulations restricting construction of landfills, and therefore, the resulting profusion of inexpensive sites meant that landfill-style bottlenecks rarely became a problem. By the second half of the seventies, in response to the political echo from the first Earth Day, this slowly began to change. In 1976, Congress passed the original Resource Conservation and Recovery Act (RCRA) that established general standards for siting landfills, that were intended to minimize pollution in flood plains, groundwater and endangered species habitat.

However, they were not considered enforceable, and so in 1984 RCRA was amended, and, in Subtitle D of that law, EPA was charged with developing enforceable criteria for landfill design, operation, closure and post-closure care adequate to protect human health and the environment from ground water contamination.

In 1988, EPA proposed new landfill standards in compliance with the 1984 amendments to RCRA in Subtitle D, which were promulgated as final rules in 1991 and became effective in 1993.[6]

Two years before, in 1986, an EPA survey found that 78% of the landfills were owned by local governments, 85% did not have any kind of liner, 95% did not have leachate collection system, 83% did not have a gas collection system, and 75% did not monitor groundwater.[7]

Now, under the new regulations, instead of being open dumps located anywhere, all new landfills were to be sited for environmental reasons away from groundwater, lakes and rivers, and, with the explosion in suburban and exurban housing patterns, far away from the collection routes for political reasons. They were to have a single composite liner, a leachate collection system, a leakage detection system, daily cover, a low permeability cover installed at the time of closure, a landfill gas collection and management system, a plan for post-closure care over 30 years and financial assurance to insure that is done. Besides the costs that this implied for new landfills, the rules also created incentives for many existing dumps to close early by freeing landfills that closed by 1991 from any postclosure requirements and those closed by 1993 only needed to comply with post-closure care. 40 C.F.R. §258.

6 The proposed rules were issued at 53 Fed. Reg. 168 (Aug. 30' 88), at p. 3314; the final rules in 56 Fed. Reg 50977 (Oct. 9 '91), codified in 40 CFR Parts 257 and 258. In 1996, additional regulations required gas collection and control systems for landfill gases, primarily methane.

7 R. Glebs, "Landfill Costs Continue to Rise," *Waste Age* (Mar '88).

1.2.2 Costs of Compliance

The costs of all of this on new facilities were very substantial. One early estimate indicated that state of the art landfills in 1975 would have cost between $4.65-$5.08/ton and in the 1990's under the new Subtitle D rules, $20.13-$21.96/ton (1986 dollars)— a four fold increase.[8] Another estimate of the cost of a "state of the art" 1,000 tons per day landfill was over a hundred million including operation, and more than $30 million to build.[9]

Cost of Subtitle D Landfills (1990$)	
Predevelopment costs	$ 7.3 million
Construction costs	25.6 million
Operations Costs	84.1 million
Closure costs	2.5 million
Postclosure costs	5.5 million

SOURCE: ***Waste Age*** **Apr '90**

1.2.3 Unintended Economies of Scale

However, once the Subtitle D requirements took effect and waste firms began designing facilities with the appropriate safeguards intended for the protection of groundwater, something else that tended to increase the anti-competitive structures of the industry was found to flow from the engineering involved.

Landfills, that can cover 100 acres or 1,000 acres are, in practice, built out incrementally in stages in adjoining 10 acre cells. The same 10 acre footprint of a cell — with its substantial underlying financial investment in license reviews, physical composite geomebrane liners, leachate collection systems and gas extraction systems, and overlying 50 ton compactors, associated scale houses and adjoining monitoring wells,[10] could serve any height of waste emplaced above it — subject only to the resulting slope of the facility's sidewalls and any ancillary height limitations.

This is because, in order to prevent landslides of mountains of trash at the sides of the facility, the slope is limited to a ratio of 3:1 or, sometimes, 4:1.[11] Consequently, a smaller landfill with those gradual side slopes would peak out before a larger landfill. Only the largest operations could achieve 100 feet heights that optimize the utilization of the underlying investment for each cell. That is to say, there are very substantial economies of scale in the construction and operation of the engineered landfills that were required by EPA's regulations. In the last few years, the typical landfill has grown ten times from 100 acres to sprawl over 1,000 acres and swallow as much as 10,000 tons of trash

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8 *See* note 5.

9 J. Walsh, "Sanitary Landfill Costs, Estimated," *Waste Age* (Mar and Apr '90)

10 40 C.F.R. Parts 257 and 258.

11 J. Johnson, "Rumpke rebuilds after slide: Men who feared for their lives return to shore up unsteady mountain,"*Waste News* (Dec 22 '97).

each day.[12]

Total costs soared and per unit costs dropped, creating a one-two punch for competition. While combined capital and operating costs soared in excess of hundreds of millions of dollars for the large and mega-landfills — freezing out all but the biggest players — unit costs for these larger operations dropped substantially. On a per ton basis, the new generation of expensively engineered landfills wound up being not that expensive per ton — some estimate less than $20 per ton for a 100 acre site receiving 1,000 tons per day, and even less for the 1,000 acre megafills behemoths taking 10,000 tons per day in those regions anchored with major metropolitan areas that generate enough trash to sustain them — all compared to the average $35/ton gate prices of the time.

The type of smaller disposal facilities, whose construction might be risked by a well capitalized new entrant, became uncompetitive, and large ones were out of reach for all but the biggest, most entrenched firm.

1.2.4 Transfer Stations and Long Hauls

It is true that larger the disposal facility, the wider a region it is necessary to serve in order to provide adequate waste flows to amortize the enormous sums of capital invested. This also, obviously, entails long hauls with its attendant costs that offsets in part the landfill savings.

Those long hauls are accomplished by transfer stations where the smaller collection vehicles tip their load which is, in turn, further compacted and transferred to larger long haul tractor trailers that transport the waste to the landfill. Initially, transfer stations were used in metropolitan areas as congestion made it impractical for the packer to even drive to the city's edge to dump, because so much time would be consumed going to and from the route in stop and go traffic.

By 1990, transfer stations became more common in other areas. As near-in landfill sites became exhausted and it became harder to find new sites that were environmentally suitable and politically acceptable, landfills were sited further away. At some point, depending upon a host of factors but generally over 15 miles, it became less expensive to use a transfer station to reach that outlying landfill than to drive there in the collection vehicle. When EPA's Subtitle D landfill regulations took effect in 1991, coincident with the profusion of upscale scatter site housing, landfills were increasingly forced to locate outside this band.

Thus, before the current era of megafills began, outside forces had already shifted most waste services from direct dumping to transfer stations. Today, the average load of trash is estimated to

[12] *See, e.g.*, B. Brown, "The Largest Landfills in the Land," *Waste News* (Oct 26 '98). New York City's Fresh Kills landfill in Staten Island, and Los Angeles' Puente Hills landfills, are examples of megafills from yesteryear that are exceptions to the general practice of the time.

travel 45 miles to its disposal site, compared to 15 miles ten years ago.[13] The nature of transfer operations is such that most of the cost approximating $5 to $10 per ton for trailer haul ($40-$50/ton for rail haul) is incurred by virtue of the fact of the transfer, and the incremental cost of further distances is minor.

This means that the incremental cost of reaching a regional megafill relative to a local facility is not significant in most areas, so long as the region itself contains enough waste to amortize the enormous investments involved.

For these reasons, where they exist, transfer stations complicate the task of drawing the lines around the geographic market for waste disposal for the purpose of determining whether market power exists. Essentially, the relative distance of landfills controlled by an oligopoly compared to free market priced landfills, then, would need to be evaluated in relation to the relative economies of scale between the two.[14]

If the oligopoly controls both local and regional landfills (or if there are no local landfills), the calculation is simplified. It does not matter whether the line includes or excludes the regional facility: the impact on competition is the same from that control.

If the oligopoly only controls either the local or the regional facility, on the other hand, then a careful calculation must be made. Where oligopoly control exists over the local, but not the regional fill, then market power exists when the incremental transfer cost exceeds the economies of scale. In the opposite case (i.e. when the oligopoly only controls the regional facility), power arises in the opposite circumstance, namely when the economies of scale are greater than the haul cost.

1.3 Barriers to Entry

Two key points bearing on barriers to entry follow out of the forgoing discussion.

1.3.1 Substantial Capital at Risk

The first key point in any analysis of barriers to entry: if a proposed landfill of the average 100 acre size is contested, more than $5 million might be expended before an applicant found out whether it would be approved, and, if it was, more than $30 million would have to be financed before opening for business. Moreover, the licensing process is extensive and cumbersome. Even an uncontested application that involves no environmental complications can take three years to process: controverted ones, five years or more.

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13 Quoted from *Solid Waste Digest*'s editor, James Thompson, in J. Bailey, "Waste Management Cleans Its Books, Not Its Outlook," *Wall Street Journal* (Feb 27 '98).

14 The base cost for transfer operations will vary depending upon the capital intensiveness of the facility, but, in general, the base cost for transfer operations, once a facility is sited, is approximately $5-8/ton. The haul cost for a local landfill (15-30 miles) might be in the order of $2-4/ton, and for long haul (50-100 miles) to a regional facility, $5-10/ton. The economies of scale that mega-landfills might achieve could exceed $10/ton.

Clearly, the regulatory and political environment which landfills inhabit create extremely high barriers to entry — except in cases where independently or publicly owned transfer or disposal operations that are competitively priced offer a viable alternative.

1.3.2 Interaction of Market for Collection and Disposal

The prior paragraph points to the fact that the major investment to site a new landfill creates an insurmountable barrier to entry because of the investment in the disposal facility itself.

Other seemingly confounding events ironically reinforced those barriers further. The major integrated firms were overbuilding capacity as they rushed to stake out market share as the end game of consolidation approached; and, as the size of landfills increased, capacity increments become lumpy and difficult to calibrate to match up with demand. Although hundreds of small unengineered landfills were widely reported to be shuttered, substantially more net capacity was created by the construction of the new generation of a few regional megafills. By 1995, many parts of the country experienced excess capacity conditions, and large customers were able to receive very substantial discounts off of nominal gate rates.[15] By 1997, general price levels had stabilized across the board in most locales.[16]

With demand for landfills soft in the near term, it became clear that it was necessary to also control the market for collection.

1.3.2.1 Volume Squeezes

On the one hand the overcapacity of landfills from time to time made it more difficult to levy premiums on disposal fees and squeeze independent haulers. On the other hand, it is not as well recognized that, when demand for landfills softened in the mid-nineties, it became possible to implement a reverse volume squeeze. The hub and spoke enabled private integrated haulers to use their hauling routes as a pincher to squeeze public and small private landfills by withholding waste flows — instead of the normal squeeze that uses landfills to force out local haulers by raising tipping fees.

Thus, ironically, *short term* intermittent excess capacity for disposal acted to benefit the long term interest of the integrated firms by eliminating or dampening a number of the few remaining uncontrolled landfills. Down the road, this sets the stage to once again use landfills to squeeze independent haulers.

1.3.2.2 Simultaneous Entry

But the fact that the minimum economies of scale for landfill operations is increasing,

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15 J. Bailey, "Waste of a Sort: Curbside Recycling Comforts the Soul, But Benefits Are Scant," *Wall Street Journal* (Nov 9 '95).

16 J. Bailey, "Waste Management Cleans Its Books, Not Its Outlook," *Wall Street Journal* (Feb 27 '98).

especially in regions around major population centers where megafills are potentially sustainable, means that yet another barrier arises.

For these larger and larger facilities require 1,000 to 10,000 tons per day to amortize the capital investment and thus, are white elephants unless accompanied by control over the enormous supplies necessary to sate their appetites.

This creates a Catch 22 against entry into a new market once the point in time is reached where all of the independently owned landfills in the area close down or are bought out. For not only will a new entrant have to put at risk those large sum to pursue an license for a landfill, but simultaneously, it will have to act to lock in the enormous waste flows needed to pay off the debt.

If he starts up shopping for hauling contracts in parallel with the filing of the landfill application, his trucks can be subjected to a price squeeze. If he waits to find supply until he sees if his landfill is approved, his facility can be subjected to a reverse squeeze.

2.0 Matters Where the Consent Decree Is Inadequate

We applaud the Consent Decree for the fact that it went as far as it did in the face of the *Waste Management* case. However, that case is now no longer controlling law in view of altered facts, and, in view of the magnitude of the threat, substantially more is required.

This merger is a key element in a larger consolidation movement that is, with the Allied/BFI announcement, at its end game, in which a three firm oligopoly is in control of the disposal market — the bottleneck in this industry — across much of the country. Limited divestitures will do little if nothing to prevent the linked oligopoly from engaging in monopoly pricing within a year after the antitrust reviews have been completed.

All that will be accomplished is that assets will be swapped back and forth among other members of the waste oligopoly who have evinced a preference to cooperate rather than compete. The fact that that member of the oligopoly is not presently in the geographic markets where the assets are being divested will provide scant hope of restoring competition.

2.1 The Extent of the Mandated Divestitures Appears Inadequate

There is some evidence that the depth of the Justice review may not have been as comprehensive as the facts on the ground demand. For the maintenance of competitive conditions. In the face of concerns by the New York City Trade Waste Commission (TWC) over the adequacy of the divestitures,[17] WMI voluntarily agreed to "divest another $24 million in [collection] revenues on top of the $22 million required by federal regulators," even though the concession did not commit the TWC to withdraw its continuing objections ("[i]t doesn't resolve any issues the commission in

[17] B. Brown, "NYC won't OK Eastern-WMI merger," *Waste News* (Jan 11 '99).

relation to disposal").[18] To rush to more than double the mandated divestitures even though the new concession did not lock down a waiver of the Commission's objections — would seem to indicate that Waste Management itself perceives the proposed settlement as something substantially less than demanding.

It may be noted that this parallels the situation with the proposed settlement in the original USA Waste/Waste Management merger. After reviewing the market share data nationwide of the combined companies which USA Waste provided them, analysts originally estimated that between $500 million and $700 million out of the $10 billion company would have to be shed.[19] To everyone's surprise, the ultimate settlement proposal from Justice, however, wound up only seeking $275 million in divestitures.[20]

As prominent Wall Street analyst (and former WMX finance officer), Melissa White of Piper Jaffray noted, "'You used to hear Waste Management say, We can't acquire this, we can't acquire that,' because of antitrust concerns. It turns out they should have been making those acquisitions."[21] But, it turned out that even the light handed response from regulators that Ms. White anticipated — $500 million — underestimated the actual asset sales ordered by nearly 50%.[22]

However, without more information set forth in the *CIS,* it is impossible to systematically evaluate whether these comments by analysts and competitors are correct based upon a market-by-market review. This point needs to be emphasized. The competitive impact statements have, with the press of business, come to be boiler plate reports. Nothing is specified in them, for example, to explain the guidelines being employed so that commentors can have an informed basis on which to reply. Most important, none of the market-by-market share data which was submitted by the applicants is shown. If for no other reason than the fact that the firms share their books during the asset swaps, it is clear that the competing waste firms know what that data is in each market. The only people not informed is the affected public. Since there is no valid trade secret reasons to keep that part of the submissions confidential, we believe that this data should be provided in *CIS*'s.

2.2 The Denouement of the Divested Assets Is Inadequate

The implied principle applied in the Consent Decree to determine whether any assets should be divested appears to be whether, in any of the 20 (or more) geographic markets considered, the market concentration in commercial hauling or in disposal of the combined firm was greater than the partners prior to the merger. In those cases, the market concentration of the combined firm was required to be brought back down to the pre-merger level of the partner with the greater share

[18] B. Brown, "Waste giant to divest," *Waste News* (Mar 8 '99).

[19] B. Brown, "Merger focus shifts to sales," *Waste News* (Mar 23 '98).

[20] B. Brown, "New WMI must divest in 21 areas," Waste News (Jul 20 '98).

[21] J. Bailey, "USA Waste Is on a Mission to Expand in Trash Business," *Wall Street Journal* (May 15 '98).

[22] *Id.*

through divestitures. In addition, approval of the Justice Department and the applicable state was required for the sale of the divested assets. *Competitive Impact Statement*, at pp. 3-10.

However, we understand that, as a matter of unwritten practice, while divestiture will not be allowed to be made to another major integrated waste company in the same market, it will be allowed to another one of the major national firms not presently in that particular market. *CIS*, at p. 11. This will, according to the Department, establish —

"[N]ew, independent and economically viable competitors in each affected market."[23]

After years of unproductive animosity towards each other, in 1997 the pressure from Wall Street to earn premiums from their core operations led to a new era of cooperation between the integrated majors. Instead of venting competitive hostility toward each other in non-productive activities such as price cutting, they evaluated which of them was dominant in a particular market, and then proceeded to swap local assets to abandon the field where they could not as effectively compete and have a clear field where they were the primary player. The TABLE on the following page shows the swaps that have been reported in the trade press.

Subsequent to the signing of the Consent Decree, Republic Services offered to purchase all of the divested assets for $500 million representing $275 million in revenues from the original USA Waste/Waste Management merger. Republic is the third largest waste firm in the U.S. No information is publicly available about the other 50 suitors, four of whom apparently also bid for the entire basket of assets, nor even on whether Republic's bid was highest.[24] Allied Waste, in turn, purchased all of the $85 million in assets representing $45 million in combined revenues divested from the new WMI merger with Eastern.[25] Combined with BFI, Allied is the second largest waste firm in the industry.

The factual issue, then, is whether Republic's entry into Akron, Canton, Cleveland and Columbus, Ohio; Allentown, Pittsburgh and Philadelphia, Pennsylvania; Baltimore, Maryland; Denver, Colorado; Detroit, Flint and Northeast Michigan; Houston, Texas; Los Angeles, California; Louisville, Kentucky; Miami and Gainesville, Florida; Milwaukee, Wisconsin; New York, New York; Portland, Oregon; and Tucson, Arizona; along with Allied's into New York City and Western Pennsylvania will create a new, independent and economically viable *competitor*.

In fact, just the behavior of this industry since 1997 that is on the public record shows that intense competition began to change to an era of cooperation. That cooperative attitude is conducive to oligopoly pricing in those markets where disposal is within their control.

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[23] *CIS*, at p. 11

[24] B. Brown, "Republic reels in WMI's assets," *Waste News* (Oct 5 '98).

[25] "Allied pays $85 million for WMI facilities," *Waste News* (April 12 '99).

2.2.1 Local Market Swaps

After years of unproductive animosity towards each other, in 1997 the pressure from Wall Street to earn premiums from their core operations led to a new era of cooperation between the integrated majors. Instead of venting competitive hostility toward each other in non-productive activities such as price cutting, they evaluated which of them was dominant in a particular market, and then proceeded to swap local assets to abandon the field where they could not as effectively compete and have a clear field where they were the primary player. The TABLE on the following page shows the swaps that have been reported in the trade press.

Recycle Worlds Consulting
A New Found Lands Company

1 Summary of Asset Swaps Among Solid Waste Firms in 1997 and 1998

	Market	Type of	From/To	Source
2	**Market**	**Type of**	**From/To**	**Source**
3	Phoeniz, AZ	H,L,T	BFI/USA Waste	Waste News, 6/16/97
4	Azusa, CA	L	BFI/USA Waste	Waste News, 6/16/97
5	San Diego, CA	H,T	BFI/USA Waste	Waste News, 6/16/97
6	Loma Linda, CA	H	BFI/USA Waste	Waste News, 6/16/97
7	Tucson, AZ	H	BFI/USA Waste	Waste News, 6/16/97
8	Daytona Beach, FL	H	BFI/USA Waste	Waste News, 6/16/97
9	Fort Pierce, FL	H	BFI/USA Waste	Waste News, 6/16/97
10	Harrisburg, PA	H	BFI/USA Waste	Waste News, 6/16/97
11	Shreveport/Monroe, LA	H	BFI/USA Waste	Waste News, 6/16/97
12	Fort Wayne, IN	H	BFI/USA Waste	Waste News, 6/16/97
13	Hudson Valley, NY	H	BFI/USA Waste	Waste News, 6/16/97
14	Phoenix, AZ		Sanifill, Inc./USA Waste	Waste News, 6/16/97
15	Maryland Suburb	H	Allied Waste /USA Waste	Waste News, 6/16/97
16	Chiquita Canyon	H	Allied Waste /USA Waste	Waste News, 6/16/97
17	Greenwich, CT		United Waste Systems/USA Waste	Waste News, 6/16/97
18	Charlotte, NC	8L, 6T, 8H	USA Waste/Allied	Waste News, 6/16/97
19	Dallas-Fort Worth,TX	For the	USA Waste/Allied	Waste News, 6/16/97
20	Oklahoma City, OK	USA Waste/	USA Waste/Allied	Waste News, 6/16/97
21	S.W. Missouri	Allied asset	USA Waste/Allied	Waste News, 6/16/97
22	S. Illinois	transfer	USA Waste/Allied	Waste News, 6/16/97
23	Suburban Baltimore/DC	T	USA Waste/Allied	Deutsche Morgan 10/1/97
24	Du Bois, PA		BFI/Superior Services, Inc.	Waste News, 6/2/97
25	Columbus, OH		BFI/Superior Services, Inc.	Waste News, 6/2/97
26	Green Bay, WI		BFI/Superior Services, Inc.	Waste News, 6/2/97
27	Seymour, CT	H	BFI/American Disposal Services	Waste News, 6/2/97
28	Greenville, SC	H	BFI/Allied Waste	Waste News, 7/7/97
29	S. Illinois	H	BFI/Allied Waste	Waste News, 7/7/97
30	Columbia, SC	H	BFI/Allied Waste	Waste News, 7/7/97
31	North Carolina		USA Waste/Allied Waste	Waste News, 7/7/97
32	Lee County, SC		USA Waste/Allied Waste	Waste News, 7/7/97
33	Fairfield, IL	L	USA Waste/Allied Waste	Waste News, 7/7/97
34	Charleston, SC		BFI/Waste Industries, Inc.	Waste News, 7/7/97
35	Rocky Mount, NC	H	BFI/Waste Industries, Inc.	Waste News, 8/18/97

Market	Type of	From/To	Source
Kinston, NC	H	BFI/Waste Industries, Inc.	Waste News, 8/18/97
Vancouver,WA	H	BFI/Waste Connections, Inc.	Waste News, 10/13/97
Idaho Falls,ID		BFI/Waste Connections, Inc.	Waste News, 10/13/97
Pocatello, ID		BFI/Waste Connections, Inc.	Waste News, 10/13/97
Detroit, MI	H, T, L	USA/Allied	Waste News, 11/3/97
Farmington, Sante Fe and Taos NM; and Monte Vista and Pagosa, CO	H, T, L	Allied/USA	Waste News, 11/3/97
Peoria, IL		BFI/Waste Management	Waste News, 12/22/97
Madison, WI		BFI/Waste Management	Waste News, 12/22/97
Quebec, Ontario, Alberta, British Columbia	1L, 13H, 3T	USA Waste/WMI	Waste News, 6/16/97
Grand Rapids, Detroit, Flint		USA Waste/Allied Waste Services	Waste News, 12/15/97
Fort Wayne, IN	L	Continental Waste Industries/Republic	Waste News, 6/16/97
Fort Wayne, IN	L	National Serv-All/Republic	Waste News, 6/16/98
Eau Claire, WI	H	BFI/Superior	Waste News, 11/23/98
Elgin, IL	H	Superior/BFI	Waste News, 11/23/98
Cuba City, WI	H	Superior/BFI	Waste News, 11/23/98
Boston, MA; Atlanta, GA; Birmingham, AL; Bellefontain, Celina, Dayton, Toledo and Youngstown, OH		Allied/BFI	Waste News, 12/21/98
St. Louis, MO; midtown Chicago, IL; Branson, MO, St. George, UT		BFI/Allied	Waste News, 12/21/98
Geneva, NY		BFI/Casella	Waste News, 12/21/98
Contra Costa County, CA	H, T, L	BFI/Allied	Waste News, 2/15/99
Issaquah & Maltby, WA	H	Waste Connections/Allied	Waste News, 3/1/99
Norfolk & Fremont, NE	H, T	Allied/Waste Connections	Waste News, 3/1/99
Columbus, NE	L	Allied/Waste Connections	Waste News, 3/1/99
Alabama, Boston, northern Georgia and northern Ohio		Allied/BFI	Waste News, 4/12/99
St. Louis, Chicago, Contra Costa County, CA, northern New Jersey, Branson, MO and St. George, UT		BFI/Allied	Waste News, 4/12/99
H = Hauling; T= Transfer; L= Landfill			

2.2.2 Volume Exchanges

Following the onset of asset swaps in 1997, in 1998 another sign of growing accommodation occurred with volume exchanges among WMI, BFI, USA Waste and Allied Waste. In a volume exchange, one integrated firm in an area trades dumping capacity in their own landfills to another major hauler without a landfill in that area for an equal amount of space in a competitors' landfill where that firm does not have a dump. In this way, they can gain the mutual advantage of lower hauling costs without altering the overall market power of each other.[26]

By itself, volume exchanges can be argued to improve efficiency. But, when former aggressive competitors find repeated occasions to sit down and exchange the use of assets — even when the occasion for doing so is efficiency — it may suggest a new relationship has dawned in which each have come to accept the relative market shares of the other. Once that equilibrium has been reached, signaling is made easier. Frequent get togethers further opportunities for accommodation to be reinforced, signaling to occur and understandings to arise to jointly price squeeze non-cooperating fringe players in a region's landfills.

2.2.3 Acquisition of Haulers with Low Prices

Low ball pricing haulers were acquired in order to set the stage for cooperative price increases. Thus, USA Waste, for example, acquired Mid America which had been pricing low and was a major impediment to the USA Waste's plans to hike rates, and Allied acquired Laidlaw's U.S. operations.

2.2.4 Friendly Mergers and Acquisitions

The first wave of consolidation led by WMI and BFI had proceeded through the acquisition of more than 100 smaller independent haulers each year. Waste Management became the trash giant by stitching together 3,000 family owned haulers.

In the mid-1990's, USA Waste had moved beyond WMI's and BFI's strategy of growing by acquiring more than a hundred small independents each year. To catch up fast, USA Waste moved from its regional base in Houston to become a national player in just three years by embarking upon mergers with and acquisitions of other regional firms which had previously done the work of buying out the family operations in their areas. United, Sanifill, American Waste, Chambers, Western Waste and City Management, all became absorbed by USA Waste, in addition to Mid America, which was acquired to eliminate a intense competitor. Allied acquired American Disposal, along with the Laidlaw Canadian operations that BFI spun off from its acquisition of all of Laidlaw's waste operations. USA Waste, the then number 3 hauler, went on to merge with and take over WMI, the market leader — and then immediately turn around and acquire Eastern Environmental.

[26] B. Brown, "Trades: Trend has Firms Swapping Space," *Waste News* (Feb 23 '98).

Revealingly, the acquisitions were often paid for with the acquirers stock that, at current prices, offered no immediate premium. That is to say, the deal was cut not in return for a current payout for the going value of the firm, but instead by giving the acquired a small equity position among the winners expected to be left at the table in the end game.

2.2.5 Statements by Market Players and Analysts

Here are the reported comments by market observers about the asset swaps —

> "'This [deal between historic enemies] is something that will test the waters from all sorts of perspectives,'said Michael Hoffman, an analyst with Credit Suisse First Boston. 'If it all works and all are happy, look for billions of dollars of assets owned by the top five companies to change hands.'

> "BFI and Waste Managment are selling off properties to each other in markets where one is dominant and the other is a bit play, Hoffman said. 'It's places where they never were able to integrate, to get critical mass.'

> "Bigger than the assets being dealt [by this exchange] is the symbolic precedent set by the unusual cooperation between WMI and BFI, said Leone Young, an analyst for Salomon Smith Barney Inc. 'The relationship was much more acrimonious in the past,' Young said. 'It's sort of the thawing of the cold war.'"[27]

> "Historically, the objective of the largest players in the industry, WMX and BFI, was to gain market share. This strategy resulted in low returns on assets, declining profitability, and sub-par returns for shareholders. Recently, the big waste giants have adopted strategies to improve their return on investments of assets. One aspect of this strategy is to concentrate on areas of strength and exit low return markets. The market share mentality is eroding and return-driven mentality is growing in its place. The proposed merger of UW/WMX should enhance this shift."[28]

> "'This represents a beginning of a changing relationship with Waste Management, which I believe will be helpful for both companies," [BFI President and CEO Bruce] Ranck told analysts."

> "Swapping assets with BFI affords 'another opportunity for us to improve our competitive position in some markets,' said Waste Management spokesman William Plunkett. 'Our goal is to divest business where we cannot offer integrated service and reallocate that capital in markets where we are strong and can improve the situation,' Plunkett said."[29]

> "'This has been a unique time in our industry, when it has been possible to build and strengthen a solid waste company through both public and private transactions ...,' USA Waste CEO John E.

[27] B. Brown, "Let's Trade: BFI, WMI to exchange assets," *Waste News* (Dec 22 '97).

[28] Piper Jaffray, "Environmental Services: Solid Waste — The Second Half of the Season (Ap '98), at p. 3-4.

[29] B. Brown, "WMI-BFI swap grows," *Waste News* (Feb 9 '98).

Drury said."[30]

"Recently, the big waste giants have adopted strategies to improve their return on investments or assets. One aspect of this strategy is to concentrate on areas of strength and exit low return markets."[31]

"An asset swap between [BFI and Allied] late last year [in 1998] gave both sides a chance to look into the other's operations, [Allied CEO Tom] Van Weelen said. 'I guess the realization was that the swaps made eminent sense' and that new awareness spurred the companies to take a more serious look at merging their operations,' he said."[32]

Here are statements concerning the strategy of acquiring non-cooperating firms —

"THREE NEW DEVELOPMENTS ARE BENEFITTING THE INDUSTRY:
"...
"2.**The 'problem' pricing entities have been removed from most markets .** Mid-American Waste, which had been in financial trouble for years, had been pricing low in order to maximize cash flow throughout the Midwest and several other markets. Mid-American was acquired by USA Waste in Q2 and pricing was improved immediately throughout these markets. The Laidlaw U.S. operations, which were acquired by Allied Waste in Q1, had not experienced price increases in the majority of its markets for two to three years, and Allied is now raising pricing aggressively in these markets. Similarly, USA is aggressively raising prices in the Laidlaw Canadian operations it acquired in early 1997. *Finally, both BFI and WMX, which for years had been pricing for market share, have embraced strategies that emphasize return on capital instead of volume.* We believe that all industry players are benefitting from this phenomenon. **For the first time in several years, we are seeing improvement in landfill pricing,** especially in the northeast. We expect the privatization of New York City's disposal to accentuate this trend." (**bold** in original, *italics* added).[33]

"'This has been a unique time in our industry, when it has been possible to build and strengthen a solid waste company through both public and private transactions ...,' USA Waste CEO John E. Drury said."[34]

Here are comments on the acquisition strategies —

"[Peter] Rudd [vice-president of Superior Services] also predicts that the merger will add stability to the nature of competition. He says in some cases, 'local [Waste Management] operation's activities were somewhat unpredictable.' He expects 'more rational pricing and a more disciplined approach to

30 S. Daniels, "USA Waste acquires BFI assets," *Waste News* (Jun 16 '97).

31 Piper Jaffray, *Environmental Services: Solid Waste — The Second Half of the Regular Season* (Apr '98), at p.3-4.

32 B. Brown, "Allied Waste, BFI form powerhouse," *Waste News* (Mar 15 '99)

33 Duetsche Morgan Grenfell, *The Solid Waste Industry* (Oct '97), at. 14.

34 S. Daniels, "USA Waste acquires BFI assets," *Waste News* (Jun 16 '97).

producing earnings' under the new leadership."[35]

"[W]e think the industry should realize better prices in the wake of this consolidation."[36]

"'It's going to be a powerful company [according to Piper Jaffray's Melissa White, a former WMX staffer]." Ms. White and some others expect the combined companies, which will be based [in Houston] and use the Waste Management name, will have increased ability to raise prices in some markets without risk of losing customers."[37]

"[New Waste Management CEO John] Drury said he is hoping that, with some weaker companies gone from the industry in recent years and continuing consolidation, disposal prices can be increased without losing customers. The disposal glut for most of the 1990s caused dumping prices to plunge, cutting into industry profits."[38]

"[Analysts at Goldman Sachs] believe pricing for both WMI and the industry are likely to be headed upward. The company's senior management team and each of the 5 area managers repeatedly addressed the intention to develop better pricing in their markets. Area managers characterized many of the former-WMX markets as underpriced, and stated a desire to be price leaders in their regions."[39]

"[A]nother major positive both for Allied and the industry in general [from Allied's acquisition of BFI] is that the elimination of a major competitor should further enhance an already improving industry price environment."[40]

"Consolidation within the industry, especially in some key large markets, may allow for better pricing power by waste providers over the next two years."[41]

"Likely the greatest impact of the merger of the second [BFI] and third [Allied] trash haulers is more favorable pricing nationwide, analysts predicted.

"Allied CEO and President Thomas Van Weelen, like Waste Management CEO John Drury, focuses on margins and cash flow, said D. Cotton Swindell, an analyst for BT Alex Brown in Baltimore.

"BFI's market share emphasis is less important to Van Weelden than returns, and Van Weelden possesses a greater willingness to raise prices to achieve his goal, Swindell said.

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35 B. Wolpin, "A Strong Current of Change," *World Wastes* (Apr '98), at p. 27.

36 Piper Jaffray, *Environmental Services: Solid Wste — The Second Half of the Regular Season* (Apr '98), at p. 3.

37 J. Bailey, "USA Waste Is on a Mission to Expand in Trash Business," *Wall Street Journal* (May 15 '98).

38 J. Bailey, "Waste Management to Buy East Coast Hauler," *Wall Street Journal* (Aug 18 '98)

39 Goldman Sach's Investment Research, Waste Management Inc. (Part 1 of 2) (Aug 10 '98).

40 Merrill Lynch, "Allied Waste Industries: Proposed Acquisition of Browning Ferris," *Bulletin* (Mar 8 '99), at p. 2.

41 Merrill Lynch, *Bulletin:* "Waste Management Inc." (Sep 17 98).

> "That helps the industry in general," he said.
>
> "The Allied-BFI combination will reduce competition in many markets, thus eliminating a driver that kept prices down, said Stacy Gray, an analyst for First Analysis Securities Corp. in Chicago. 'That should prove positive in terms of pricing,' Gray said."[42]

2.3 Recycling Will Also Be Impacted

The Competitive Impact Statement contains the statement that "there are no good substitutes for disposal of MSW." *CIS,* at p. 8.

In the short term this is true and provides further undergirding, if any were necessary, for the government's insistence on some limited divestitures. However, in the mid to longer term it is not entirely accurate. Just as energy conservation soared with the OPEC price increases for oil in 1979, as the price of disposal increases, the customer's desire to find ways to divert his waste flow from overpriced disposal options will tend to increase, most particularly through source reduction, reuse and/or recycling.

Recycling is estimated to have diverted upwards of 30% of the waste stream, and more in some markets. This has been a significant contributory factor, in addition to overbuilding, in the present excess capacity situation that presently exists in parts of the country.

Were monopoly rents to be imposed on waste services, then it can be expected that the customer will tend to pursue recycling efforts more aggressively until the greater part of the waste stream is diverted from the landfill. The prospect of increasing diversion rates would create a tempering force on the market power of integrated waste firms.

This fact is known to the members of the oligopoly in waste services, and it is not reasonable to expect them to not seek countermeasures. The question here is whether the members of a waste oligopoly that is permitted to form through consent decrees could act to effect recycling negatively in order to avert that threat to their market power.

There is no parallel bottleneck, such as landfills, in the market for recycling. However, for two reasons, a monopoly in the market for waste will tend to "naturally" extend to recycling.

2.2.1 Combined Contracts

Many franchise contracts for residential trash collection will be bid out combined with recycle collection for ease of administration. If your competitor can offer combined service and you cannot, you will be out of the competition. Similarly, many large and small commercial customers will want to consolidate trash and recycle collection in one hauler because waste services are a small part of operating expenses.

[42] B. Brown, "WMI, Allied firmly grasp market control," *Waste News* (Mar 15 '99).

2.2.2 Synergies

Also, there are very substantial synergies from combined waste/recycling services. For diversion diverts waste from the trash truck and from the landfill that makes possible avoided waste collection and disposal costs.[43] These will be lost by a recycle-only firm and make it more difficult if not impossible to compete with a combined operation.

2.2.3 Consolidated MRF's

There is presently ongoing extensive consolidation in the material recovery facility market. KTI is engaged in an extensive consolidation effort among MRF's, including the recent takeover of a competing consolidator, FCR, and with both acquisitions, will own 25 MRFs in 14 states. Their statements to investors indicates that they intend to market successfully to national hauling firms who want a consistent partner.

If the MRF consolidators succeed, one element in their market plan will be to partner with recycle collection operations of the national firms. This will make it very difficult for them to offer favorable terms to a competing non-integrated recycle hauler who is challenging the waste oligopoly.

3.0 Divestiture of Disposal from Hauling is the Appropriate Remedy

The facts clearly demonstrate that the remedies contained in the Consent Decree are inadequate to protect competition, which the Statement specifies as the appropriate target.

Only a dramatic remedy can respond adequately to such a concerted and effective juggernaut against competition within one year in those markets which will not have disposal facilities owned and operated by public bodies.

The only one which is within the power of the Justice Department is to require the divestiture of all disposal capacity including landfills, incinerators and transfer stations from hauling in the solid waste industry. *U.S. v. Paramount Pictures*, 334 US 131, 142 68 S.Ct. 915, 921, 92 L.Ed. 1260, 1284 (1948). *Interstate Circuit v. U.S.* 306 U.S. 208, 226, 227; *U.S. v. Masonite*, 316 U.S. 265, 275.

The reason why it is essential to act in advance of the actual anti-competitive acts that lie in the future is because now is the only time a remedy can be fashioned to maintain competition. For one thing, were the regulators to wait until after monopoly rents are imposed, the small number of firms in the oligopoly combined with the demonstrated record of cooperative behaviors and interactions shows that any collusion will be tacitly done through signaling, rather than by overt acts. This type of conduct is nearly impossible to successfully prosecute. *Pevely Dairy Co. v. U.S.*, 178 F. 2d 363, 369 (8th Cir. 1949), cert. den. 339 U.S. 942, 70 s.Ct. 794, 94 Led. 1358 (1950). This means that the only time to successfully intersect antitrust litigation is during the ramp up to oligopoly

[43] P. Anderson, "Debunking the Two Fleet Myth," *Waste Age* (Oct '95).

control over the bottleneck landfills — that is to say, right now. There are no more major mergers coming through which to interpose substantive divestitures of disposal from hauling.

Much argumentation has been made that there are efficiency gains from consolidation in commercial hauling. We have done studies that have corroborated the fact that gains can be achieved in this regard, albeit not to the degree alleged. Also, the ability of the customer to realize these savings in a one or two hauler town is problematic.

However, in any event, no contention has been raised that the cost of providing waste services to the consumer will be lower due to vertical integration of hauling and disposal. There is none. Internalization, as the industry refers to discarding trash loads at its own landfills, has been related to improved profitability through market power, not capital or operating efficiency.

Divestiture of landfills from hauling should be ordered. Specifically:

① VERTICAL INTEGRATION CONCENTRATION. Divest disposal (i.e. transfer stations, landfills and incinerators) from hauling by integrated firms in those geographic markets[44] with high concentration in the market for disposal,[45] and preclude divestiture to other national or regional consolidators, even if they are not in that market, due to their propensity to collude.

② DISPOSAL MARKET CONCENTRATION. After the divestitures that would be required by par. 1 which should insure competitive hauling conditions (since competitors could no longer control the bottleneck), highly concentrated conditions could arise with new players who might exercise pricing power because the market for disposal does have insurmountable barriers to entry. In each geographic market[46] for disposal with a CR4 among private firms[47] greater than 80% (or some similar benchmark), no further mergers of smaller operators with the largest four should be permitted if no firm owns

[44] The geographic market will turn on where the bottleneck lies, which is the market for disposal. That, in turn, will be affected significantly by the existence of (or the clear potentiality for) transfer stations in or in approximate distance from a population center because these stations sometimes can make it possible for an independent hauler to bypass a integrated firms bottleneck control over local disposal capacity which is overpriced as part of a squeeze play. In the absence of a transfer station, the geographic market may be considered simply to be approximately 40-50 miles around the landfill or incinerator (the typical outer bound of practical driving distance for a packer truck to be away from its collection route). In the actual or potential presence of a transfer station, the geographic market would be substantially wider because the independent hauler could long haul his waste until the incremental haul cost was greater than the amount which the tipping fee needs to be increased to accomplish a squeeze play. That calculation, obviously, needs some deeper fleshing out to be usable.

[45] *E.g.* a CR4 greater than 80%.

[46] The sticking point defining a geographic market in this context is that, in a local area, there may only be one landfill and more may not be able to achieve necessary scale economies due to a low population base. For that reason, in this context as a practical matter, it may be necessary to assume the existence of a transfer station for the purpose of drawing the boundary.

[47] Publicly owned disposal facilities are not, in the absence of special circumstances, a threat to competition.

more than one facility. If one firm among the largest four does own more than one facility in the market, then it should be divested to a firm not among the four.

If that remedy is not selected, then, at a minimum, the new Waste Management should be required to disclose the terms of the bids on its assets, and, after opportunity for supplemental public comment, the limited divested assets should be sold to firms, if any exist among the bidders, not among the firms showing cooperative behavior (i.e. Waste Management, Allied, Superior, Waste Industries, Waste Connections and Casella).