



November 23, 1998

J. Robert Kramer II, Esq.
Chief, Litigation II Section
Antitrust Division
U.S. DEPARTMENT OF JUSTICE
1401 H Street, NW • Suite 3000
Washington, D.C. 20530

RE: Comment on Merger Between USA Waste Services and Waste Management

Dear Mr. Kramer:

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16, this is to provide comment on the Consent Decree that was entered into on July 16, 1998, and noticed in the FEDERAL REGISTER on September 24, 1998, at pp. 51126-51161, concerning the merger that had been announced on March 10, 1998, between USA Waste Services and Waste Management. That decree removed objection to the merger under Hart-Scott-Rodino, subject to certain divestitures.¹

Because the underlying market share data for the disposal market in the major regional geographic markets was not provided in the FEDERAL REGISTER notice or in the public file, it is difficult for the public to provide comprehensive comments that are specific to each geographic market outside of their own. *See, e.g.*, the lead editorial, "Data Search" in the September 14, 1998, issue of *Waste News* (attached). Due to the lack of geographic market-to-market data, these comments are confined to the expected impacts of the proposed merger on competition in the aggregate.

In summary, on the one hand we commend the Justice Department for shifting its focus from the market for hauling to the market for disposal.² On the other hand, the remedies provided in the proposed Consent Decree appear manifestly inadequate to protect competition from a linked oligopoly in the near term in the market for waste services; and the Competitive Impact Statement ignores completely potential impacts on the market for recycling services.

¹ Divestitures were required for 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.

² While 12 collection divestitures have been ordered, 10 transfer station and 18 landfill divestitures were ordered.

Sincerely,

RecycleWorlds
CONSULTING

By

Peter Anderson
PRESIDENT

PA/ji
Enclosure [1]

Comments by RecycleWorlds Consulting Corp.

**Pursuant to the Antitrust Procedures and Penalties Act
on the Competitive Impact Statement, Consent Decree and Final Judgment
In Re United States v. USA Waste Services
in the District Court for the Northern District of Ohio Eastern Division
Civil No. 98-CV-1616**

November 23, 1998

**RecycleWorlds Consulting Corp.
By Peter Anderson, President
4513 Vernon Blvd. • Suite 15
Madison, Wisconsin 53705-4964
608/231-1100 • Fax 608/233-0011
email recycle@msn.fullfeed.com**

Contents

1.0	Matters Supported	1
1.1	The Consent Decree Focused Divestitures on Disposal	1
1.2	Prior Precedents are No Longer Relevant	2
1.2.1	Landfill Regulations	4
1.2.2	Costs of Compliance	5
1.2.3	Unintended Economies of Scale	5
1.2.4	Transfer Stations and Long Hauls	6
1.3	Barriers to Entry	7
1.3.1	Substantial Capital at Risk	7
1.3.2	Interaction of Market for Collection and Disposal	7
1.3.2.1	Reverse Price Squeezes	8
1.3.2.2	Simultaneous Entry	8
2.0	Matters Where the Consent Decree Is Inadequate	9
2.1	The Level of Divestitures Ordered Is Inadequate	9
2.1.1	Local Market Swaps	10
2.1.2	Volume Exchanges	12
2.1.3	Acquisition of Haulers with Low Prices	13
2.1.4	Friendly Mergers and Acquisitions	13
2.1.5	Statements by Market Players and Analysts	14
2.2	Recycling Will Also Be Impacted	16
2.2.1	Combined Contracts	16
2.2.2	Synergies	16
2.2.3	Consolidated MRF's	17
3.0	Divestiture of Disposal from Hauling is the Appropriate Remedy	17



Comments by RecycleWorlds Consulting Corp.

1 These comments are submitted on the substance of the Consent Decree in regard to its
 2 aggregate impact, not on a geographic market-by-market analysis. They are divided between those
 3 matters which we support, on the one hand, and those which, while commendable insofar as they go,
 4 do not appear to provide sufficient relief to protect competition, on the other.
 5

6 **1.0 Matters Supported**

7 **1.1 The Consent Decree Focused Divestitures on Disposal**

8 The Consent Decree not only seeks divestitures with regard to collection routes (that
 9 historically has been the focus of antitrust review in the solid waste industry), but, goes on to place
 10 a higher priority on divestitures in connection with disposal.

11

12

13

<i>USA Waste/Waste Management Merger</i> MARKETS IN WHICH DIVESTITURES HAVE BEEN ORDERED IN THE CONSENT DECREE			
	Landfills	Transfer Stations and Disposal Routes	Collection
14	1 Akron/Canton OH	Akron OH	Akron OH
15	2		Allentown PA
16	3	Baltimore MD	
17	4	Cleveland OH	Cleveland OH
18	5 Columbus OH	Columbus OH	Columbus OH
19	6 Denver CO		Denver CO
20	7 Detroit MI (2)	Detroit MI	Detroit MI
21	8 Flint MI		
22	9		Gainesville FL
23	10 Houston TX (2)	Houston TX	Houston TX
24	11 Los Angeles CA		
25	12 Louisville KY	Louisville KY	Louisville KY
26	13 Miami FL	Miami FL	
27	14 Milwaukee WI (2)		
28	15	New York NY	
29	16 Northeast MI (2)		
30	17 Philadelphia PA	Philadelphia PA	
31	18 Pittsburgh PA		Pittsburgh PA
32	19 Portland OR		Portland OR
33	20		Tucson AZ
	18	10	12



1 This properly reflects the reality of where the threats to competition arise — primarily in the
2 market for disposal, and not so much in the market for hauling.

3 1.2 Prior Precedents are No Longer Relevant

4 The 1984 *Waste Management* case¹ impeded vigorous anti-trust activity in the solid waste
5 industry for a number of years. That case, which found that there are no barriers to entry in
6 commercial hauling of solid waste, had reversed earlier rulings holding that a high market share was
7 *prima facie* illegal.²

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

11 In the period leading up to the *Waste Management* decision in 1984, the market for disposal,
12 like the market for hauling, exhibited low barriers to entry.³ However, increasingly

¹ *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.”]

² *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963).

³ 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 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

(continued...)



1 after 1991 extremely high barriers to entry have arisen in disposal due to environmental regulations
2 and local opposition to landfills. That change in entry conditions has been followed by consolidation
3 of landfill markets, paralleling the earlier consolidation in hauling markets, in most regions of the
4 county.

5 As correctly noted in the Competitive Impact Statement, once a collection vehicle tops out,
6 it must unload at either a transfer point or disposal facility in order to return to the route. Due to
7 environmental regulations, physical and geographic limitations and public opposition, the number of
8 these sites are limited and within the control of a narrowing circle. As such, disposal exhibits the
9 classic characteristics of a bottleneck. *CIS* at p. 8. Since disposal is a bottleneck in the solid waste
10 industry, control over landfills (or incinerators or transfer stations) brings with it the power to control
11 hauling through price squeezes and nonprice discrimination such as making competitor's truck wait
12 at the scale house.

3 (...continued)

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

5 **1.2.1 Landfill Regulations**

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

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

16 In 1988, EPA proposed new landfill standards in compliance with the 1984 amendments to
17 RCRA in Subtitle D, which were promulgated as final rules in 1991 and became effective in 1993.⁴

18 Two years before, in 1986, an EPA survey found that 78% of the landfills were owned by
19 local governments, 85% did not have any kind of liner, 95% did not have leachate collection system,
20 83% did not have a gas collection system, and 75% did not monitor groundwater.⁵

21
22 Now, under the new regulations, instead of being open dumps located anywhere, all new
23 landfills were to be sited for environmental reasons away from groundwater, lakes and rivers, and,
24 with the explosion in suburban and exurban housing patterns, far away from the collection routes for
25 political reasons. They were to have at a minimum a single composite liner, a leachate collection
26 system, a leakage detection system, daily cover, a low permeability cover installed at the time of
27 closure, a landfill gas collection and management system, a plan for post-closure care over 30 years
28 and financial assurance to insure that is done. Besides the costs that this implied for new landfills, the
29 rules also created incentives for many existing dumps to close early by freeing landfills that closed by
30 1991 from any postclosure requirements and those that closed by 1993 only needed to comply with
31 post-closure care. 40 C.F.R. §258. Also, several states imposed more stringent regulations.

⁴ 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.

⁵ 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.⁶ Another estimate of the lifetime 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.⁷

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, which 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 geomembrane liners, leachate collection systems and gas extraction systems, and overlying 50 ton compactors, associated scale houses and adjoining monitoring wells,⁸ 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, 4:1.⁹ 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

⁶ See note 5.

⁷ J. Walsh, “Sanitary Landfill Costs, Estimated,” *Waste Age* (Mar and Apr '90)

⁸ 40 C.F.R. Parts 257 and 258.

⁹ J. Johnson, “Rumpke rebuilds after slide: Men who feared for their lives return to shore up unsteady mountain,” *Waste News* (Dec 22 '97).



1 each day.¹⁰

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

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

13 1.2.4 Transfer Stations and Long Hauls

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

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

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

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

¹⁰ 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 prior years, that are exceptions to the general practice of the time, which were built in conjunction with the overwhelming tonnages generated by metropolises.



1 travel 45 miles to its disposal site, compared to 15 miles ten years ago.¹¹ The nature of transfer
2 operations is such that most of the cost approximating \$5 to \$10 per ton for trailer haul (\$40-\$50/ton
3 for rail haul) is incurred by virtue of the fact of the transfer, and the incremental cost of further
4 distances is minor.

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

8 **1.3 Barriers to Entry**

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

10 **1.3.1 Substantial Capital at Risk**

11 The first key point in any analysis of barriers to entry: if a proposed landfill of the average
12 100 acre size is contested, more than \$5 million might be expended before an applicant found out
13 whether it would be approved, and, if it was approved, more than \$30 million would have to be
14 financed before opening for business. Moreover, the licensing process is extensive and cumbersome.
15 Even an uncontested application that involves no environmental complications can take three years
16 to process: controverted ones, five years or more.

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

20 **1.3.2 Interaction of Market for Collection and Disposal**

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

23 Other seemingly confounding events ironically reinforced those barriers further. The major
24 integrated firms were overbuilding disposal capacity in a rush to stake out market share as the end
25 game of consolidation approached. And, as the size of landfills increased, capacity increments
26 became lumpy and difficult to calibrate to match up with demand. Although thousands of small
27 unengineered landfills were widely reported to be shuttered, substantially more net capacity was
28 created by the construction of the new generation of a few regional megafills. By 1995, many parts
29 of the country experienced excess capacity conditions, and large customers were able to receive very

¹¹ 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).



1 substantial discounts off of nominal gate rates.¹² By 1997, general price levels had stabilized across
2 the board in most locales.¹³

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

5 1.3.2.1 Reverse Price Squeezes

6
7 On the one hand the overcapacity of landfills from time to time made it more difficult to levy
8 premiums on disposal fees and squeeze independent haulers. On the other hand, it is not as well
9 recognized that, when demand for landfills softened in the mid-nineties, it became possible to
10 implement a *reverse* squeeze. The “hub and spoke” — as the waste industry referred to vertical
11 integration — enabled the integrated haulers to use their hauling routes as a pincher to squeeze
12 public and small private landfills by withholding waste flows — instead of the normal squeeze that
13 uses landfills to force out local haulers by raising tipping fees. Thus, *short term* and *intermittent*
14 excess capacity for disposal, acting like commodities — served to benefit the long term interest of
15 the integrated firms by eliminating or dampening a number of the few remaining uncontrolled landfills.
16 Down the road, of course, this enhances the ability to once again use landfills to squeeze independent
17 haulers.

18 1.3.2.2 Simultaneous Entry

19 But the fact that the minimum economies of scale for landfill operations are increasing —
20 especially in regions around major population centers where megafills are potentially sustainable —
21 means that yet another barrier arises.

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

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

¹² J. Bailey, “Waste of a Sort: Curbside Recycling Comforts the Soul, But Benefits Are Scant,” *Wall Street Journal* (Nov 9 ‘95). The reporter charges that the solid waste industry exploited the misperception that there was a landfill shortage in the aftermath of *THE* garbage barge story in 1988. This is only partially correct. While it is true that additional and larger sites were available for new disposal capacity even as the Mobro barge continued its Flying Dutchman quest for a port of entry, the solid waste industry actions to build up massive amounts of new capacity to exploit a “shortage” suggested that they believed the misperception, too.

¹³ J. Bailey, “Waste Management Cleans Its Books, Not Its Outlook,” *Wall Street Journal* (Feb 27 ‘98).



1 If the entrant shops for hauling contracts in tandem with the filing of the landfill application,
2 its trucks can be subjected to a price squeeze while the application pends. If it waits to find supply
3 until after it sees if its landfill is approved, its facility can be subjected to a reverse squeeze.

4 **2.0 Matters Where the Consent Decree Is Inadequate**

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

8 This merger is a key element in a larger consolidation movement that is on the verge of its end
9 game, which will leave three or maybe four national integrated firms in control of the disposal market
10 — the bottleneck in this industry — across much of the country. Limited divestitures will do little
11 if nothing to prevent a linked oligopoly from engaging in monopoly pricing within 1½ to 2 years when
12 most markets for disposal will lock up.

13 All that will be accomplished is that assets will be swapped among other members of the
14 waste oligopoly which have, as shown below, evinced by their behavior a new found preference to
15 cooperate rather than compete. The fact that a particular member of the oligopoly is not presently
16 in the geographic markets where the assets are being divested will provide scant hope of restoring
17 competition.

18 **2.1 The Level of Divestitures Ordered Is Inadequate**

19 The implied principle applied in the Consent Decree to determine whether any assets should
20 be divested appears to be whether, in any of the 20 (or more) geographic markets considered, the
21 market concentration in commercial hauling or in disposal of the combined firm was greater than the
22 either of the partners prior to the merger. In those cases, the market concentration of the combined
23 firm was required to be brought back down to the pre-merger level of the partner with the greater
24 share through divestitures. In addition, approval of the Justice Department and the applicable state
25 was required for the sale of the divested assets. *Competitive Impact Statement*, at pp. 3-10.

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

30 “[N]ew, independent and economically viable competitors in each affected market.” *CIS*, at
31 p. 11

32 Subsequent to the signing of the Consent Decree, Republic Services offered to purchase all
33 of the divested assets for \$500 million. Republic is the third largest waste firm in the U.S. No
34 information is publicly available about the other suitors, four of whom apparently also bid for the



1 entire basket of assets, nor on whether Republic’s bid was highest.¹⁴

2 **The factual issue, then, is whether Republic’s entry into Akron, Canton,**
3 **Cleveland and Columbus, Ohio; Allentown, Pittsburgh and Philadelphia,**
4 **Pennsylvania; Baltimore, Maryland; Denver, Colorado; Detroit, Flint and**
5 **Northeast Michigan; Houston, Texas; Los Angeles, California; Louisville,**
6 **Kentucky; Miami and Gainesville, Florida; Milwaukee, Wisconsin; New York,**
7 **New York; Portland, Oregon; and Tucson, Arizona, will create a new,**
8 **independent and economically viable *competitor* — as opposed to a linked**
9 **member of the oligopoly willing to follow the price lead of the new WMI.**

10 In fact, as documented below, just the behavior of this industry since 1997 that is on the
11 public record shows that intense competition began in that year to change to an era of cooperation.
12 In view of the historic record of collusive conduct in the solid waste industry, it is unreasonable to
13 assume that the cooperative attitude will not lead to oligopoly pricing in those geographic markets
14 where disposal is within the control of the members of the oligopoly.

15 **2.1.1 Local Market Swaps**

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

¹⁴ B. Brown, “Republic reels in WMI’s assets,” *Waste News* (Oct 5 ‘98).



Summary of Asset Swaps Among Solid Waste Firms

Market	Type of	From/To	Source
Phoenix, AZ	H,L,T	BFI/USA Waste	Waste News, 6/16/97
Azusa, CA	L	BFI/USA Waste	Waste News, 6/16/97
San Diego, CA	H,T	BFI/USA Waste	Waste News, 6/16/97
Loma Linda, CA	H	BFI/USA Waste	Waste News, 6/16/97
Tucson, AZ	H	BFI/USA Waste	Waste News, 6/16/97
Daytona Beach, FL	H	BFI/USA Waste	Waste News, 6/16/97
Fort Pierce, FL	H	BFI/USA Waste	Waste News, 6/16/97
Harrisburg, PA	H	BFI/USA Waste	Waste News, 6/16/97
Shreveport/Monroe, LA	H	BFI/USA Waste	Waste News, 6/16/97
Fort Wayne, IN	H	BFI/USA Waste	Waste News, 6/16/97
Hudson Valley, NY	H	BFI/USA Waste	Waste News, 6/16/97
Phoenix, AZ	H	Sanifill, Inc./USA Waste	Waste News, 6/16/97
Maryland suburb	H	Allied Waste /USA Waste	Waste News, 6/16/97
Chiquita Canyon	H	Allied Waste /USA Waste	Waste News, 6/16/97
Greenwich, CT	H	United Waste Systems/USA Waste	Waste News, 6/16/97
Charlotte, NC	8L, 6T, 8H	USA Waste/Allied	Waste News, 6/16/97
Dallas-Fort Worth, TX		USA Waste/Allied	Waste News, 6/16/97
Oklahoma City, OK		USA Waste/Allied	Waste News, 6/16/97
S.W. Missouri		USA Waste/Allied	Waste News, 6/16/97
S. Illinois		USA Waste/Allied	Waste News, 6/16/97
Suburban Baltimore/DC	T	USA Waste/Allied	Deutsche Morgan 10/1/97
Du Bois, PA		BFI/Superior Services, Inc.	Waste News, 6/2/97
Columbus, OH		BFI/Superior Services, Inc.	Waste News, 6/2/97
Green Bay, WI		BFI/Superior Services, Inc.	Waste News, 6/2/97
Seymour, CT	H	BFI/American Disposal Services	Waste News, 6/2/97
Greenville, SC	H	BFI/Allied Waste	Waste News, 7/7/97
S. Illinois	H	BFI/Allied Waste	Waste News, 7/7/97
Columbia, SC	H	BFI/Allied Waste	Waste News, 7/7/97
North Carolina		USA Waste/Allied Waste	Waste News, 7/7/97
Lee County, SC		USA Waste/Allied Waste	Waste News, 7/7/97
Fairfield, IL	L	USA Waste/Allied Waste	Waste News, 7/7/97
Charleston, SC		BFI/Waste Industries, Inc.	Waste News, 7/7/97
Rocky Mount, NC	H	BFI/Waste Industries, Inc.	Waste News, 8/18/97
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

Market	Type of	From/To	Source
Pocatello, ID		BFI/Waste Connections, Inc.	Waste News, 10/13/97
Peoria, IL		BFI/Waste Management	Waste News, 12/22/97
Madison, WI		BFI/Waste Management	Waste News, 12/22/97
Quebec, Ontario, Alberta	1L, 13H, 3T	USA Waste/WMI	Waste News, 6/16/97
Grand Rapids, Detroit, Flint		USA Waste/Allied Waste	Waste News, 12/15/97
Fort Wayne, IN	L	Continental Waste/Republic	Waste News, 6/16/97
Fort Wayne, IN	L	National Serv-All/Republic	Waste News, 6/16/98
Boston, MA	H	Allied/BFI	Waste News, 11/16/98
Atlanta & Birmingham, AL	H	Allied/BFI	Waste News, 11/16/98
Bellefontaine, Celina, Bayton, Toledo & Youngstown, OH	L, T, H	Allied/BFI	Waste News, 11/16/98
St Louis, MO	C, T	BFI/Allied	Waste News, 11/16/98
Chicago, IL	C, T	BFI/Allied	Waste News, 11/16/98
St. George, UT	C, T	BFI/Allied	Waste News, 11/16/98
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
H = Hauling; T= Transfer; L= Landfill			

2.1.2 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.¹⁵

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.

¹⁵ B. Brown, "Trades: Trend has Firms Swapping Space," *Waste News* (Feb 23 '98).

2.1.3 Acquisition of Haulers with Low Prices

Even if the four major national integrated firms are willing to price collusively, it only takes one non-cooperating firm to maintain competition. However, in the waste industry, the non-cooperating entity must have access to an uncontrolled disposal facility to prevent being squeezed. Today, there are a number of regional companies — Superior, Waste Industries, Waste Connections and Casella (American Disposal and Eastern are now in the process of being acquired) — with hub and spoke operations in the areas that they serve to withstand retaliation.

To prevent this from happening, then, the oligopoly must takeover (either by acquisition or cooptation) the price breakers. The behavior of the solid waste industry is consistent with this monopolist strategy.

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 low pricing Laidlaw's U.S. operations. They then explained to the investment analysts that these acquisitions would permit price increases in affected markets.¹⁶ Other regionals, like Superior, have forestalled retaliation by signaling that they would follow the price lead of the new Waste Management in the expectation that profit margins would be better enhanced by cooperation than competition.¹⁷

2.1.4 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.

Tellingly, the acquisitions were sometimes 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

¹⁶ Duetsche Morgan Grenfell, *The Solid Waste Industry* (Oct '97), at. 14.

¹⁷ B. Wolpin, "A Strong Current of Change," *World Wastes* (Apr '98), at p. 27.



1 among the winners expected to be left at the table in the end game.

2 **2.1.5 Statements by Market Players and Analysts**

3 Statements in the trade press, either through inadvertence, to send signals, or to solicit
4 business, can reveal the nature of the industry’s conduct. Here are the reported comments by market
5 observers about the asset swaps —

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

9 “‘BFI and Waste Management are selling off properties to each other in markets where one is
10 dominant and the other is a bit play, Hoffman said. ‘It’s places where they never were able to integrate,
11 to get critical mass.’

12 “‘Bigger than the assets being dealt [by this exchange] is the symbolic precedent set by the unusual
13 cooperation between WMI and BFI, said Leone Young, an analyst for Salomon Smith Barney Inc.
14 ‘The relationship was much more acrimonious in the past,’ Young said. ‘It’s sort of the thawing of
15 the cold war.’”¹⁸

16 “‘Historically, the objective of the largest players in the industry, WMX and BFI, was to gain market
17 share. This strategy resulted in low returns on assets, declining profitability, and sub-par returns for
18 shareholders. Recently, the big waste giants have adopted strategies to improve their return on
19 investments of assets. One aspect of this strategy is to concentrate on areas of strength and exit low
20 return markets. The market share mentality is eroding and return-driven mentality is growing in its
21 place. The proposed merger of UW/WMX should enhance this shift.’”¹⁹

22 “‘This represents a beginning of a changing relationship with Waste Management, which I believe
23 will be helpful for both companies,’ [BFI President and CEO Bruce] Ranck told analysts.”

24 “‘Swapping assets with BFI affords ‘another opportunity for us to improve our competitive position
25 in some markets,’ said Waste Management spokesman William Plunkett. ‘Our goal is to divest
26 business where we cannot offer integrated service and reallocate that capital in markets where we are
27 strong and can improve the situation,’ Plunkett said.’”²⁰

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

29 **“THREE NEW DEVELOPMENTS ARE BENEFITTING THE INDUSTRY:**

18 B. Brown, “Let’s Trade: BFI, WMI to exchange assets,” *Waste News* (Dec 22 ‘97).

19 Piper Jaffray, “Environmental Services: Solid Waste — The Second Half of the Season (Ap ‘98), at p. 3-4.

20 B. Brown, “WMI-BFI swap grows,” *Waste News* (Feb 9 ‘98).

1 “...

2 “2.The ‘problem’ pricing entities have been removed from most markets . Mid-American
3 Waste, which had been in financial trouble for years, had been pricing low in order to maximize cash
4 flow throughout the Midwest and several other markets. Mid-American was acquired by USA Waste
5 in Q2 and pricing was improved immediately throughout these markets. The Laidlaw U.S. operations,
6 which were acquired by Allied Waste in Q1, had not experienced price increases in the majority of its
7 markets for two to three years, and Allied is now raising pricing aggressively in these markets.
8 Similarly, USA is aggressively raising prices in the Laidlaw Canadian operations it acquired in early
9 1997. *Finally, both BFI and WMX, which for years had been pricing for market share, have*
10 *embraced strategies that emphasize return on capital instead of volume.* We believe that all industry
11 players are benefitting from this phenomenon. **For the first time in several years, we are seeing**
12 **improvement in landfill pricing**, especially in the northeast. We expect the privatization of New
13 York City’s disposal to accentuate this trend.” (bold in original, italics added).²¹

14 “‘This has been a unique time in our industry, when it has been possible to build and strengthen a
15 solid waste company through both public and private transactions ...,’ USA Waste CEO John E.
16 Drury said.”²²

17 Here are comments on the acquisition strategies —

18 “[Peter] Rudd [vice-president of Superior Services] also predicts that the merger will add stability
19 to the nature of competition. He says in some cases, ‘local [Waste Management] operation’s activities
20 were somewhat unpredictable.’ He expects ‘more rational pricing and a more disciplined approach to
21 producing earnings’ under the new leadership.”²³

22 “‘It’s going to be a powerful company [according to Piper Jaffray’s Melissa White, a former WMX
23 staffer].” Ms. White and some others expect the combined companies, which will be based [in
24 Houston] and use the Waste Management name, will have increased ability to raise prices in some
25 markets without risk of losing customers.”²⁴

26 “[New Waste Management CEO John] Drury said he is hoping that, with some weaker
27 companies gone from the industry in recent years and continuing consolidation, disposal prices
28 can be increased without losing customers. The disposal glut for most of the 1990s caused
29 dumping prices to plunge, cutting into industry profits.”²⁵

30 “[Analysts at Goldman Sachs] believe pricing for both WMI and the industry are likely to be

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

22 S. Daniels, “USA Waste acquires BFI assets,” *Waste News* (Jun 16 ‘97).

23 B. Wolpin, “A Strong Current of Change,” *World Wastes* (Apr ‘98), at p. 27.

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

25 J. Bailey, “Waste Management to Buy East Coast Hauler,” *Wall Street Journal* (Aug 18 ‘98)



1 headed upward. The company’s senior management team and each of the 5 area managers
2 repeatedly addressed the intention to develop better pricing in their markets. Area managers
3 characterized many of the former-WMX markets as underpriced, and stated a desire to be price
4 leaders in their regions.”²⁶

5 **2.2 Recycling Will Also Be Impacted**

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

8 In the short term this is true and provides further undergirding — if any were necessary —
9 for the government's insistence on some limited divestitures. However, in the mid to longer term it
10 is not entirely accurate. Just as energy conservation soared with the OPEC price increases for oil in
11 1979, as the price of disposal increases, the customer's desire to find ways to divert his waste flow
12 from overpriced disposal options will tend to increase, most particularly through source reduction,
13 reuse and/or recycling.

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

17 Were monopoly rents to be imposed on waste services, then it could be expected that the
18 customer will tend to pursue recycling efforts more. The prospect of increasing diversion rates would
19 create a tempering force on the market power of integrated waste firms.

20 This fact is known to the members of the oligopoly in waste services, and it is not reasonable
21 to expect them to forgo countermeasures. The question here is whether the members of a waste
22 oligopoly that is permitted the Justice Department has not yet determined to prevent could act to
23 effect recycling negatively in order to avert that threat to their market power.

24 There is no parallel bottleneck, such as landfills, in the market for recycling. However, for
25 three reasons, a oligopoly in the market for waste will tend to “naturally” extend itself to recycling.

26 **2.2.1 Combined Contracts**

27 Many franchise contracts for residential trash collection will be bid out combined with recycle
28 collection for ease of administration. If your competitor can offer combined service and you cannot,
29 you will be out of competition. Similarly, many large and small commercial customers will want to
30 consolidate trash and recycle collection in one hauler.

31 **2.2.2 Synergies**

²⁶ Goldman Sach’s Investment Research, Waste Management Inc. (Part 1 of 2) (Aug 10 ‘98).



1 Also, there are very substantial synergies from combined waste/recycling services. Recycling
2 diverts waste from the trash truck and from the landfill that makes possible avoided waste collection
3 and disposal costs.²⁷ These very substantial savings that can offset as much as one half of the cost of
4 waste services will be lost by a recycle-only firm. This will make it more difficult if not impossible
5 for a recycle-only hauler to compete with a combined operation, because it will not realize those
6 offsetting savings on the waste side to reflect in its recycle-only bid.

7 **2.2.3 Consolidated MRF's**

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

13 If the MRF consolidators succeed (which is not certain as evinced by the bankruptcy of Prins
14 in 1996), one element in their market plan will be to partner with recycle collection operations of the
15 national firms. This will make it very difficult for them to offer favorable terms to a competing non-
16 integrated recycle hauler who is challenging the waste oligopoly.

17 **3.0 Divestiture of Disposal from Hauling is the Appropriate Remedy**

18 The facts described in this submission clearly demonstrate that the remedies contained in the
19 Consent Decree are inadequate to protect competition in the solid waste industry in those geographic
20 markets in which there is no disposal capacity owned and operated by a public body or by a company
21 that is presently independent of the major integrated waste firms and unlikely to be acquired by them
22 in the near term.

23 Only a dramatic remedy can respond adequately to such a concerted and effective strategy
24 to monopolize the bottleneck landfill market within 1½ to 2 years in those geographic markets which
25 will not have uncontrolled disposal facilities.

26 The remedy which is within the power of the Justice Department under Section 7 of the
27 Clayton Act is to require the divestiture of all disposal capacity including landfills, incinerators and
28 transfer stations from hauling in geographic markets in which there is no disposal facility owned and
29 operated by a public body or company independent of the majors that will continue to operate for the
30 near to intermediate term. (The other remedy outside of Justice's authority is utility-style regulation
31 of landfills.) This is fundamentally different from the Consent Decree which permits vertical
32 integration by WMI, and the other majors which form the oligopoly, in those geographic markets so
33 long as the post-merger market concentration for disposal (and for collection) does not increase.

²⁷ P. Anderson, "Debunking the Two Fleet Myth," *Waste Age* (Oct '95).



1 Much argumentation in support of consolidation has been made that there are efficiency gains
 2 from size in commercial hauling — note that this ignores residential hauling most of which is already
 3 under franchise. We have done studies that have corroborated the fact that gains can be achieved in
 4 this regard, albeit not anywhere to the degree alleged.²⁸ Also, the ability of the customer to realize
 5 these savings in a one or two hauler town is problematic. But, that debate is not relevant to this
 6 remedy since this outcome does not involve divestitures from within the market for collection.

7 For no contention has been raised that the cost of providing waste services to the consumer
 8 will be lower due to vertical integration of hauling and disposal. And there is none. Internalization,
 9 as the industry refers to the practice of discarding trash loads at its own landfills, has been related to
 10 improved profitability through market power, not capital or operating efficiency. Indeed — and this
 11 devastates any future claim to the contrary — the fact of, and justification for, the recent volume
 12 exchanges demonstrates graphically that internalization is not the same thing as efficiency.

13 A non-integrated, free standing landfill industry will also have the additional benefit of
 14 increasing competition in the market for disposal, especially in the current era in which transfer
 15 stations, which have become the norm, make the incremental cost of further haul distances in search
 16 of lower tip fees less significant. They will also preclude the use of reverse squeezes.

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

²⁸ The general assumptions used were: \$105,000 purchase cost for a 25 yard rear loader that achieved a 5:1 packing ratio, with one operator earning \$20/hour in wages and benefits, working 7.5 effective hours in a 9 hour day, collecting solid waste with a 200 pound/cubic yard density, dumping one hour round trip from the route at a facility with a \$30/ton tip fee, with the overall cost of money on the vehicle and containers before taxes, 23%. The resulting calculation, which was done for a two yard container collected twice weekly, represents the estimated haul charge across the range of possible scenarios, with a probable outcome less than 10%.

Monthly Cost of Commercial Collection (Two Yard Container Twice Weekly)								
		(a)	(b)	(c)	(d)	(e)	(f)	(g)
		Minutes Between Stop				Percent Difference		
		1	2	3	4	(4 to 1)	(4 to 2)	(4:3)
Minutes to Setup	5	\$93	\$100	\$116	\$124	-25.0%	-19.4%	-6.5%
	6	\$100	\$116	\$124	\$132	-24.2%	-12.1%	-6.1%
	7	\$116	\$124	\$132	\$139	-16.5%	-10.8%	-5.0%
	8	\$124	\$132	\$139	\$147	-15.6%	-10.2%	-5.4%

SOURCE: RecycleWorlds Internal Studies (1998).

