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SEP 03 2016

DEPARTMENT OF ECOLOGY  
EXECUTIVE

Total Reclaim, Inc.

RECEIVED

SEP 30 2016

DEPARTMENT OF ECOLOGY V.  
EXECUTIVE

Washington Department of Ecology

Appellant,

Respondent.

**Appeals Processing Desk**

Cc: ☐ Raw/Rac - Cost Recovery

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

Orig: ☒ ATG Docket Clerk

PCHB No.

Initial: JB

Elizabeth Frame Fiscal  
Becky Martin-ATG  
Darin Rice  
- HWTR

**NOTICE OF APPEAL**

**1. Appellant**

Total Reclaim, Inc.  
P.O. Box 24996  
Seattle, WA 98124

**Appellant's Representatives**

Bradley Marten, WSBA No. 13582  
Russell Prugh, WSBA No. 41415  
Marten Law PLLC  
1191 Second Avenue, Suite 2200  
Seattle, WA 98101  
Telephone: (206) 292-2600  
Fax: (206) 292-2601  
Email: [bmarten@martenlaw.com](mailto:bmarten@martenlaw.com)  
[rprugh@martenlaw.com](mailto:rprugh@martenlaw.com)

**2. Identification of the Parties**

Appellant is Total Reclaim, Inc. ("Total Reclaim").

Respondent is State of Washington, Department of Ecology ("Ecology").

**3. Order/Decision Appealed From**

Total Reclaim appeals Ecology's Notice of Penalty, Ecology Docket #13743, a copy of which is attached.

**4. Total Reclaim's appeal is based upon the following pertinent facts:**

- A. Ecology's Notice of Penalty alleges that between April 2009 and December 2015, Total Reclaim sold flat screen devices (collectively "Electronic Devices") to M-Stream, LLC ("M-Stream") instead of recycling those Electronic Devices at Total Reclaim's facilities.

- B. M-Stream is a third-party vendor who purchased the Electronic Devices from Total Reclaim and arranged to transport the Electronic Devices to a facility or facilities in Hong Kong.
- C. It is Total Reclaim's understanding that the facility or facilities in Hong Kong who received the shipments of Electronic Devices from M-Stream evaluated those devices for potential reuse and/or refurbishment, and at least a portion of the Electronic Devices were sold in a secondary market for used Electronic Devices.
- D. Ecology's Notice of Penalty alleges that M-Stream is not a permitted TSD facility under Washington's Hazardous Waste Management Act ("HWMA"). Ecology also alleges that, since Total Reclaim did not recycle the Electronic Devices itself, those Electronic Devices "were fully regulated as dangerous wastes, and Total Reclaim's actions violated the dangerous waste regulations." Specifically, Ecology alleges that Total Reclaim violated WAC 173-303-141(1) by selling the Electronic Devices to M-Stream.
- E. Total Reclaim stopped selling Electronic Devices to M-Stream in January 2016.

**5. The grounds for Total Reclaim's appeal of Notice of Penalty #13743 are as follows:**

- A. Ecology's determination that shipments of Electronic Devices to M-Stream violated WAC 173-303-141(1) is not supported by the facts and is contrary to law. To violate WAC 173-303-141(1), a person must send "dangerous waste," which must also be a "solid waste," to someone other than a permitted TSD facility. Here, Total Reclaim disputes that the Electronic Devices were "solid waste" or "dangerous waste" under the HWMA and Ecology's regulations.
- B. First, to qualify as "dangerous waste," the Electronic Devices at issue must be a "solid waste" under the HWMA. Total Reclaim sold a valuable product (used Electronic Devices) to M-Stream, for which M-Stream arranged for shipment to Hong Kong. Those products were shipped to a facility or facilities in Hong Kong, and those facilities evaluated the Electronic Devices for reuse and/or refurbishment. Thus, the point of generation of any potential solid waste was downstream at the facility or facilities in Hong Kong. Total Reclaim did not sell solid waste to M-Stream.
- C. Second, materials that are used or reused as effective substitutes for commercial products are excluded from classification as solid waste and therefore are not subject to HWMA regulation. WAC 173-303-017(2)(a)(ii). Here, Total Reclaim sold Electronic Devices to M-Stream with the understanding that M-Stream shipped the devices to a facility or facilities that evaluated the Electronic Devices for potential reuse and/or refurbishment and sale in a secondary market for used Electronic Devices. Thus, the Electronic Devices at issue were sold for use or reuse as effective substitutes for commercial products; therefore, they cannot be classified as "solid waste."
- D. Third, a violation of WAC 173-303-141(1) requires that the Electronic Devices at issue qualify as "dangerous waste" under the HWMA and Ecology's regulations. There is a



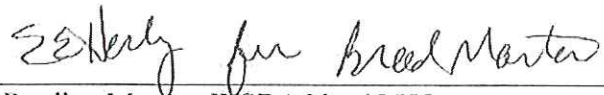
four-step process for determining whether a solid waste designates as a "dangerous waste." WAC 173-303-070(3). The first two steps require a determination of whether the waste is specifically listed as a "dangerous waste." Ecology does not allege that the Electronic Devices at issue here are specifically listed as "dangerous waste" under the HWMA or Ecology's regulations. The third step requires determination of whether the waste exhibits any one of four dangerous waste characteristics as set forth in WAC 173-303-090, and the fourth step requires determination of whether the waste meets the dangerous waste criteria of toxicity or persistence set forth in WAC 173-303-100. Total Reclaim disputes that the Electronic Devices sold to M-Stream for potential reuse and/or refurbishment exhibited any of the four dangerous waste characteristics or met the dangerous waste criteria of toxicity or persistence. As the agency charged with enforcing the HWMA, Ecology bears the burden to show that the Electronic Devices qualify as dangerous wastes under the HWMA.

- E. Finally, the amount of the penalty that Ecology imposed through the Notice of Penalty is excessive in light of the nature of the alleged violations and the circumstances as a whole.

#### 6. Relief Sought

Appellant Total Reclaim seeks the Board's determination that Total Reclaim's actions did not violate WAC 173-303-141(1), and therefore, seeks an order vacating Ecology's Notice of Penalty Docket #13743.

In the alternative, Total Reclaim seeks relief from the amount of the penalty imposed by Ecology.



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Russell Prugh, WSBA No. 41415

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[rprugh@martenlaw.com](mailto:rprugh@martenlaw.com)

Attorneys for Appellant Total Reclaim, Inc.

### Certificate of Service

I hereby certify that on September 30, 2016, I caused the foregoing to be delivered via e-mail and mail:

- For filing with the Clerk of the Pollution Control Hearings Board at the following address:

Pollution Control Hearings Board  
PO Box 40903  
Olympia, WA 98504-0903

I hereby certify that on September 30, 2016, I caused the foregoing to be delivered via courier:

- For service on the Department of Ecology at the following address:

Department of Ecology  
Appeals Processor  
300 Desmond Drive SE  
Lacey, WA 98503

DATED this 30<sup>th</sup> day of September, 2016.

  
\_\_\_\_\_  
Russell Prugh, WSBA No. 41415

MARTEN LAW PLLC



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000

711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

August 31, 2016

Craig Lorch & Jeff Zirkle  
Total Reclaim Inc.  
PO Box 24996  
Seattle, WA 98124

<b>Notice of Penalty Docket #</b>	13743
<b>Site Location</b>	2200 6 <sup>th</sup> Ave South, Seattle
<b>EPA/State ID #</b>	WAD009482803
<b>Penalty Amount</b>	\$444,000
<b>Due Date</b>	Within 30 days after receiving this Notice of Penalty.

Re: Notice of Penalty

Mr. Lorch and Mr. Zirkle:

The Department of Ecology (Ecology) has issued the enclosed Notice of Penalty to Total Reclaim Inc. for violating provisions of:

- Chapter 70.105 Revised Code of Washington (RCW), Hazardous Waste Management Act
- Chapter 173-303 Washington Administrative Code (WAC), Dangerous Waste Regulations

Please read the enclosed Notice of Penalty describing the violation(s) and options for responding to the penalty.

If you have questions please contact Daylin Baker at (425) 649-7014 or [daylin.baker@ecy.wa.gov](mailto:daylin.baker@ecy.wa.gov).

Sincerely,

Darin Rice  
Program Manager  
Hazardous Waste and Toxics Reduction Program

Enclosure: Notice of Penalty  
By certified mail [91 7199 9991 7034 8695 1636]

cc: Penalty Desk -- Fiscal Office, Ecology  
Sharon Aboe, Ecology/NWRO  
Linda Riedel, Ecology/HQ



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

IN THE MATTER OF PENALTY  
ASSESSMENT AGAINST  
Total Reclaim Inc.

)  
)  
)

NOTICE OF PENALTY  
INCURRED AND DUE  
DOCKET # 13743

To: Craig Lorch & Jeff Zirkle  
Total Reclaim Inc.  
PO Box 24996  
Seattle, WA 98124

Notice of Penalty Docket #	13743
Site Location	2200 6 <sup>th</sup> Ave South, Seattle
EPA/State ID #	WAD009482803
Penalty Amount	\$444,000
Due Date	Within 30 days after receiving this Notice of Penalty.

The Department of Ecology (Ecology) has assessed a penalty against Total Reclaim Inc. in the amount of \$444,000 for violating provisions of:

- Chapter 70.105 Revised Code of Washington (RCW), Hazardous Waste Management Act
- Chapter 173-303 Washington Administrative Code (WAC), Dangerous Waste Regulations

Ecology has authority to issue this penalty under RCW 70.105.080 and is basing the penalties on the findings listed in this Notice of Penalty.

**DESCRIPTION OF VIOLATION(S)**

The penalty is based on the following Ecology findings:

**Violation 1:** WAC 173-303-141(1): Failure to send dangerous waste to a permitted TSD facility.

Instead of recycling it as they had committed to do, Total Reclaim sold e-waste to M Stream LLC, which is not a recycler or a TSD and which exported the dangerous electronic wastes (flat screens containing regulated metals including mercury) to a recycling facility in Hong Kong, which is also not a permitted TSD facility.

Additionally, shipping records indicate that Total Reclaim sold e-waste to M Stream LLC for a period of at least 74 months (330 shipments of flat screens from April, 2009 through December, 2015). Other evidence shows that Total Reclaim was fully aware that M Stream did not recycle the e-waste from Total Reclaim and instead shipped the e-waste to an unpermitted and substandard processing facility. Because these electronic wastes were

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not recycled, they were fully regulated as dangerous wastes, and Total Reclaim's actions violated the dangerous waste regulations.

**ELIGIBILITY FOR PAPERWORK VIOLATION WAIVER AND OPPORTUNITY TO CORRECT**

Under RCW 34.05.110, small businesses are eligible for a waiver of a first-time paperwork violation and an opportunity to correct other violations.

Ecology has determined the requirements of RCW 34.05.110 do not apply to the violation(s) described in this Notice of Penalty because you are not a small business as defined in RCW 34.05.110 (9).

Ecology has determined that you are not eligible for an opportunity to correct under RCW 34.05.110 because the effect of the violation poses a potentially significant threat to human health or the environment or causes serious harm to the public interest.

**OPTIONS FOR RESPONDING TO A NOTICE OF PENALTY**

**Option 1: Pay the penalty within 30 days after receiving the Notice of Penalty.**

Make your payment payable to the *Department of Ecology*. Please include the penalty docket number on your payment.

**Mail payment to:**

Department of Ecology  
Cashiering Unit  
PO Box 47611  
Olympia, WA 98504-7611

Note: Ecology may take legal action to collect the penalty if you have not paid 30 days after receiving the Notice of Penalty, and have not appealed.

**Option 2: Appeal to the PCHB and serve Ecology within 30 days after the date of receipt of the Notice of Penalty.**

The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do both of the following within 30 days after the date of receipt of this Notice of Penalty:

- File your appeal and a copy of this Notice of Penalty with the Pollution Control Hearings Board (PCHB) during regular business hours.
- Serve a copy of your appeal and this Notice of Penalty on Ecology in paper form, by mail or in person. E-mail is not accepted.



You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

**ADDRESS AND LOCATION INFORMATION**

Street Addresses	Mailing Addresses
<b>Department of Ecology</b> Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	<b>Department of Ecology</b> Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
<b>Pollution Control Hearings Board</b> 1111 Israel Road SW STE 301 Tumwater, WA 98501	<b>Pollution Control Hearings Board</b> PO Box 40903 Olympia, WA 98504-0903

**CONTACT INFORMATION**

Please direct all questions about this Notice of Penalty to:

Daylin Baker  
Department of Ecology  
Northwest Regional Office  
3190 160<sup>th</sup> Ave SE  
Bellevue, WA 98008  
(425) 649-7014  
Daylin.Baker@ecy.wa.gov

**MORE INFORMATION**

- **Pollution Control Hearings Board Website**  
[www.ecy.wa.gov/Boards\\_PCHB.aspx](http://www.ecy.wa.gov/Boards_PCHB.aspx)
- **Chapter 43.21B RCW – Environmental and Land Use Hearings Office – Pollution Control Hearings Board**  
<http://app.leg.wa.gov/RCW/default.aspx?cite=43.21B>
- **Chapter 371-08 WAC – Practice And Procedure**  
<http://app.leg.wa.gov/WAC/default.aspx?cite=371-08>
- **Chapter 34.05 RCW – Administrative Procedure Act**  
<http://app.leg.wa.gov/RCW/default.aspx?cite=34.05>




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- **Chapter 70.105 RCW – Hazardous Waste Management**  
<http://app.leg.wa.gov/RCW/default.aspx?cite=70.105>
- **Chapter 173-303 WAC – Dangerous Waste Regulations**  
<http://www.ecy.wa.gov/biblio/wac173303.html>

**SIGNATURE**

  
\_\_\_\_\_  
Darin Rice  
Program Manager  
Hazardous Waste and Toxics Reduction Program

  
\_\_\_\_\_  
Date