

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF APPROVING A) RESOLUTION NO. 09-4097
SETTLEMENT AGREEMENT WITH WASTE)
CONNECTIONS OF OREGON, INC, DBA)
ARROW SANITARY SERVICE, INC.,) Introduced by Chief Operating Officer
AMERICAN SANITARY SERVICE, INC, AND) Michael J. Jordan, with the concurrence of
WASTE CONNECTIONS, INC. REGARDING) Council President David Bragdon
METRO NOTICE OF VIOLATION NOS. NOV-)
227-09, NOV-228-09, AND NOV-227A-09)

WHEREAS, in calendar year 2009, Arrow Sanitary Service, Inc. ("Arrow") violated Non-System License ("NSL") Nos. N-029-09A and N-029-09B and American Sanitary Service, Inc. ("American") violated NSL No. N-020-09A by exceeding the tonnage limitations contained therein; and

WHEREAS, Metro issued Notice of Violation Nos. NOV-227-09 and NOV-227A-09 to Arrow and NOV-228-09 to American for these violations; and

WHEREAS, Arrow and American submitted to Metro a timely request for a contested case hearing regarding NOV-227-09 and NOV-228-09; and

WHEREAS, Arrow and American disputed the imposition of a penalty in NOV-227-09 and NOV-227A-09; and

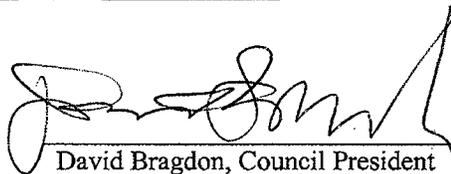
WHEREAS, the Director of Finance and Administrative Services ("Director") and Arrow, American, and Waste Connections, Inc. have agreed to the terms of a settlement under which payment of \$44,500.00 will be paid to Metro; and

WHEREAS, Metro Code Section 2.03.090 requires the Council to approve any settlement of unpaid civil penalties executed by the Director; and

WHEREAS, the Deputy Chief Operating Officer ("DCOO") recommends that Metro fully settle NOV-227-09, NOV-227A-09, and NOV-228-09; now therefore

BE IT RESOLVED that the Metro Council approves the proposed settlement and authorizes the DCOO to enter into a settlement agreement substantially similar to the document attached as Exhibit A.

ADOPTED by the Metro Council this 10 day of DECEMBER 2009.


David Bragdon, Council President

Approved as to Form:

Daniel B. Cooper, Metro Attorney



SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is made and entered into as of the last date of signature indicated below, by and between Metro, a metropolitan service district and municipal corporation of the State of Oregon, organized under Oregon Revised Statutes Chapter 268 and the Metro Charter, located at 600 NE Grand Avenue, Portland, Oregon 97232 ("Metro") and Waste Connections of Oregon, Inc., an Oregon corporation d/b/a Arrow Sanitary Service ("Arrow"), located at 12820 NE Marx, Portland, Oregon 97230, American Sanitary Service, Inc. ("American"), an Oregon corporation, and Waste Connections, Inc., a Delaware corporation (collectively the "Parties").

RECITALS

- A. On August 3, 2009, Scott Robinson, Metro Deputy Chief Operating Officer ("DCOO"), issued Notice of Violation No. 227-09 ("NOV-227-09") to Arrow. Based on an investigation conducted by Metro, the DCOO found that Arrow violated its Non-System License No. N-029-09A and issued a penalty of \$36,891.74.
- B. Arrow admitted that it violated Non-System License No. N-029-09A by exceeding the tonnage limitation. Arrow disputed the DCOO's imposition of a penalty of \$36,891.74.
- C. On August 3, 2009, the DCOO issued Notice of Violation No. 228-09 ("NOV-228-09") to American. Based on an investigation conducted by Metro, the DCOO found that American violated its Non-System License No. N-020-09A and issued a penalty of \$888.38.
- D. American admitted that it violated Non-System License No. N-020-09A by exceeding the tonnage limitation. American disputed the DCOO's imposition of a penalty of \$888.38.
- E. On November 2, 2009, the DCOO issued Notice of Violation No. 227A-09 ("NOV-227A-09") to Arrow. Based on an investigation conducted by Metro, the DCOO found that Arrow violated its Non-System License No. N-029-09B and issued a penalty of \$36,851.86.
- F. The Parties enter into this Agreement to fully settle and compromise this dispute.

NOW, THEREFORE, in reliance on the above recitals and in consideration of the mutual promises described below, the adequacy of which the Parties hereby acknowledge, the Parties agree as follows:

1. Metro's Release of Further Enforcement Action. Metro hereby releases, acquits, and forever discharges its authority to pursue further enforcement action against Arrow and American for the violations alleged in NOV-227-09, NOV 227A-09, and NOV-228-09. The Parties do not intend that the release, acquittal, and discharge provided for in this paragraph shall release, acquit, or discharge any other claim, right, or cause of action or any claim, right, or cause of action for violation of the terms of this Agreement.

2. Arrow, American, and Waste Connections' Release and Covenant Not to Sue. In consideration for the provisions of this Agreement, Arrow, American, and Waste Connections and their executors, administrators, successors and assigns, fully and forever release, acquit and discharge Metro and Metro's administrators, successors, agents, employees, and assigns from any and all claims, demands, damages, causes of action, and any and all known and unknown personal injuries, property damages and claims accruing on or before December 31, 2009. Arrow, American, and Waste Connections agree not to lodge, file or bring any suit, charge, complaint, contested case request, or any other form of action against Metro for any injury accruing on or before December 31, 2009 and relating in any way whatsoever to any matters released herein. This release and covenant not to sue includes without limitation any challenge to the design and issuance of the Arrow and American's 2010 non-system licenses (NSL 029-10 and NSL 020-10), as proposed by Metro staff on November 13, 2009, so long as Metro enforces the NSLs in accordance with the terms contained therein. This release and covenant not to sue assumes that Metro will not amend N-029-09C and N-020-09C.
3. Metro's Use of NOV-227-09, NOV 227A-09, and NOV-228-09. Metro may use NOV-227-09, NOV 227A-09, and NOV-228-09 in any formal or informal evaluation or proceeding conducted by Metro and related to the parties.
4. Payment to Metro and Agreement to Comply with NSL. In return for the releases described herein and for other valuable consideration that Arrow, American, and Waste Connections hereby acknowledge, Arrow, American, and Waste Connections shall pay to Metro the sum of \$44,500.00. This amount is a debt owed to Metro and shall be made in full by January 10, 2010. If the payment is not made, Metro may initiate suit for the collection of this debt and shall be entitled to simple interest at the rate of six percent (6%) per year calculated from January 10, 2010, until the debt is paid in full. If Metro must initiate suit for the collection of this debt, the prevailing party in such suit shall be entitled to reasonable attorney fees incurred in such an action, through and including attorney fees incurred on appeal. In addition, Arrow and American agree to comply with the terms of N-029-09C and N-020-09C.
5. Modification and Waiver. This Agreement shall not be modified unless such modification is in writing and signed by all of the Parties. No provision of this Agreement shall be considered waived by any Party unless such a waiver is made in writing signed by the Party making the waiver. Waiver of any provision of this Agreement shall not affect the enforceability of any other provision of this Agreement.
6. Attorney Fees. If any suit or action is brought to enforce or interpret this Agreement, the prevailing Party shall be entitled to recover from the other Party reasonable attorney fees and other costs incurred by the prevailing Party at trial or on appeal.
7. Choice of Law. This Agreement shall be construed, applied, and enforced in accordance with the laws of the State of Oregon.

8. Severability. If any provision of this Agreement is held to be invalid, illegal, or unenforceable in any respect, the validity of the remaining provisions contained in this Agreement shall not be affected.
9. Entire Agreement. This Agreement is the entire agreement between the Parties.
10. Voluntary Agreement. Each Party hereby declares and represents that it fully understands the terms of this Agreement, that it has had ample opportunity to review this Agreement and solicit and receive the advice of its own legal counsel, and that it voluntarily enters into this Agreement.
11. Authority to Enter Into This Agreement and Signatory Authority. Each Party hereby declares and represents that it has the legal power, right, and authority to enter into this Agreement. The individuals signing below warrant that they have full authority to execute this Agreement on behalf of the Party for which they sign.
12. Execution in Counterparts. This Agreement may be executed in counterparts, each of which constitutes an original and all of which together are deemed a single document.

**Waste Connections of Oregon, Inc. d/b/a
Arrow Sanitary Services, Inc.
American Sanitary Service, Inc.
Waste Connections, Inc.**

Metro

By: _____
Rob Nielsen

By: _____
Scott Robinson

Regional Vice President,
Waste Connections, Inc.

Deputy Chief Operating Officer

Date: _____

Date: _____

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STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 09-4097 APPROVING A SETTLEMENT AGREEMENT WITH WASTE CONNECTIONS, INC. REGARDING METRO NOTICES OF VIOLATION NO. NOV-227-09 AND NOV-227A-09 ISSUED TO ARROW SANITARY SERVICE, INC. AND NOV-228-09 ISSUED TO AMERICAN SANITARY SERVICE, INC.

November 30, 2009

Prepared by: Steve Kraten

Arrow Sanitary Service, Inc. ("Arrow") and American Sanitary Service, Inc. ("American") are Waste Connections, Inc. ("WCI") - owned hauling companies with Metro Non-System Licenses ("NSLs") authorizing them to deliver solid waste to their affiliated transfer stations located in Clark County, Washington. During the first three quarters of 2009, Arrow violated its tonnage limit twice and American violated its tonnage limit once. Metro subsequently issued Notices of Violations and imposed monetary penalties. This proposed resolution approves a settlement to resolve these issues.

BACKGROUND

NSLs are the main vehicles by which Metro manages its contractual obligation to deliver a minimum of 90 percent of the region's putrescible waste that is delivered to general purpose landfills during the calendar year, to landfills owned by Waste Management.

System of allotting 2009 NSL tonnage authorizations

On December 11, 2008, the Metro Council adopted a series of resolutions that established an approach for evaluating applications and determining tonnage authorizations for certain NSLs pertaining to putrescible waste during 2009. This approach was established to manage Metro's contractual obligations, especially when regional tonnage remained low and uncertain during the current economic downturn. Each of the following elements of the approach contributed toward the goal of managing the ten percent of waste not obligated under Metro's disposal contract:

- Each non-system licensee received a maximum tonnage limit for the calendar year which, summed across all licenses, did not exceed 9.5 percent of the total tonnage subject to the flow guarantee based on Metro's tonnage forecast for 2009.
- Upon issuance of the NSLs, each licensee immediately received 50 percent of the total tonnage authorized under the license for use during the first six months of 2009. The Chief Operating Officer ("COO") then released additional tonnage, as available, to each licensee for use during the third and fourth quarters of 2009, thereby establishing intermediate tonnage limitations.
- In letters dated May 21, 2009, WCI requested NSL tonnage increases for Arrow and American. In a response dated June 24, 2009, Metro denied the requests, citing a declining trend in regional tonnage and a concern that granting the request could

potentially conflict with Metro's obligation to deliver 90 percent of the region's putrescible waste to landfills owned by Waste Management.

Arrow and American 2009 NSL Tonnage Limit Violations

Arrow and American violated their quarterly tonnage allocations as follows:

- For the first and second quarters of 2009, Arrow's NSL authorized it to deliver up to 16,510 tons of solid waste to its own transfer stations. However, by the end of the second quarter of 2009, Arrow reported delivering a total of 19,779.16 tons of Metro area waste to the Clark County transfer stations, thus exceeding its NSL limit by 3,269.16 tons.
- For the first and second quarters of 2009, American's NSL authorized it to deliver up to 2,421 tons of solid waste to its own transfer stations. However, by the end of the second quarter of 2009, American reported delivering a total of 2,463.53 tons of Metro area waste to the Clark County transfer stations, thus exceeding its NSL limit by 42.53 tons.
- For the third quarter of 2009, Arrow's NSL authorized it to deliver up to 4,986 tons of solid waste to its own transfer stations. However, by the end of the third quarter of 2009, Arrow reported delivering a total of 9,805.34 tons of Metro area waste to the Clark County transfer stations, thus exceeding its third quarter NSL limit by 4,819.34 tons.

Notices of Violations Issued to Arrow and American by Metro

The Notices of Violations Metro issued to Arrow and American for their NSL tonnage limit violations during the first three-quarters of 2009 are summarized below:

- Metro issued Notice of Violation No. NOV-227-09 to Arrow and Notice of Violation No. NOV-228-09 to American for the above mentioned tonnage limit violations, imposing a penalty of \$36,891.74 against Arrow and \$888.38 against American. Also, as a result of these violations, Arrow's limit for the third quarter was reduced by 3,269 tons and American's was reduced by 43 tons.
- Metro issued Notice of Violation No. NOV-227A-09 to Arrow for the third quarter tonnage limit violations, imposing a penalty of \$36,851.86. Metro also reduced the tonnage limit for the fourth quarter by 4,875 tons prior to issuing the NOV. American did not exceed its NSL tonnage limit during the third quarter of 2009.

In a hearing held by Metro's contract Hearings Officer on September 28, 2009, regarding NOV-227-09 and NOV-228-09, WCI contested the penalties based on its assertion that Metro acted unreasonably in denying written requests that WCI made on May 21, 2009 to increase the tonnage limits on Arrow's and American's NSLs. In a proposed Final Order issued October 26, 2009, the Hearings Officer found in favor of Metro. WCI then sought to negotiate a settlement with Metro, regarding these two NOVs and NOV No. NOV-227A-09. Contingent upon Council approval, Metro and WCI agrees to settle the matter of the three Notices of Violation for the sum of \$44,500.00. In addition, this agreement resolves other pending issues, including WCI

granting Metro full release for any injury through December 31, 2009. In the agreement, WCI agrees to abide by the terms of the 2009 NSLs and forego any challenge to the design and issuance of the 2010 NSLs. In a meeting held on October 20, 2009 between WCI officials and Metro's Deputy COO, Scott Robinson, WCI's Regional Vice President Rob Nielson agreed to honor the yearly tonnage limit stipulated in the Arrow and American NSLs by diverting loads to facilities authorized to accept such waste.

ANALYSIS/INFORMATION

1. Known Opposition

There is no known opposition to the proposed settlement.

2. Legal Antecedents

Metro Code Section 2.03.090 provides that, after the COO (or his designee) issues a Notice of Violation assessing a civil penalty, any settlement that compromises or settles the assessed civil penalty must be approved by the Metro Council.

3. Anticipated Effects

The effect of Resolution No. 09-4097 will be to approve a settlement wherein Metro agrees not to pursue enforcement on the NOV's issued by Metro in 2009 in exchange for WCI paying Metro the sum of \$44,500.00. In the settlement agreement, WCI grants Metro a full release for any injury, known or unknown, through December 31, 2009; agrees to abide by the terms of the 2009 NSLs; and forgoes any challenge to the design and issuance of the 2010 NSLs.

The 2010 WCI NSLs are being presented to the Council for consideration under Resolutions 09-4089 and 09-4087, which authorize putrescible waste tonnage in 2010.

4. Budget Impacts

This settlement will result in an additional \$44,500 to the solid waste fund that was not anticipated when the FY 2009-10 budget was adopted. The settlement funds will be deposited in the Solid Waste Revenue Fund account and can be made available for expenditure in the current fiscal year or future fiscal years.

RECOMMENDED ACTION

The COO recommends approval of Resolution No. 09-4097, approving a Settlement Agreement with WCI substantially similar to the Settlement Agreement attached to the resolution as Exhibit A.