BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF OBTAINING A JUDICIAL DECLARATION OF THE VALIDITY OF AMENDMENT NO. 4 TO THE CONTRACT BETWEEN OREGON WASTE SYSTEMS, INC. AND METRO	)))))	RESOLUTION NO. 94-1973 Introduced by Councilor Van Bergen

WHEREAS, the voters of the Metropolitan Service District (Metro) adopted a charter on November 3, 1992 which became effective on January 1, 1993 and which established the form of government for Metro; and

WHEREAS, under the Metro Charter, the Council retains all powers of the District that are not expressly assigned elsewhere and, under the Metro Charter, the primary duty of the Executive is to enforce Metro ordinances and otherwise to execute the policies of the Council; and

WHEREAS, the Metro Code expressly provides that amendments to Metro's agreement with designated facilities, including Oregon Waste Systems, Inc., shall be approved by the Council prior to execution by the Executive; and

WHEREAS, the Metro Executive requested a recommendation from the Council on Contract Amendment No. 4 to the contract between Metro and Oregon Waste Systems, Inc., at the January 4, 1994 Council Solid Waste Committee meeting and the Executive Officer prepared and introduced Resolution No. 94-1904 requesting authority from the Council to execute Contract Amendment No. 4 at the March 1, 1994 Council Solid Waste Committee meeting; and

WHEREAS, the Metro Executive executed Contract Amendment No. 4 to the contract between Metro and Oregon Waste Systems, Inc. on March 16, 1994 without prior approval of the Metro Council; and

WHEREAS, the Metro Council approved Resolution No. 94-1939 on March 24, 1994 authorizing the General Counsel to employ outside legal counsel to advise the Council regarding its authority under the 1992 Metro Charter to control the approval of contracts and contract amendments; and

WHEREAS, there is a dispute concerning the validity of Amendment No. 4 to the contract between Metro and Oregon Waste Systems, Inc. in that the Council asserts that the amendment is not valid and not binding on Metro without its approval or ratification by the Metro Council; and Oregon Waste Systems, Inc., asserts the amendment is valid and binding on Metro without Council approval or ratification; and

WHEREAS, it is in the best interests of Metro and the Citizens of the District to obtain a judicial determination of the validity of Amendment No. 4 to the contract between Oregon Waste Systems, Inc. and Metro; now therefore,

BE IT RESOLVED,

1. That the Metro Council directs special legal counsel to initiate litigation to obtain a judicial declaration as to the validity of Amendment No. 4 to the contract between Metro and Oregon Waste Systems, Inc. executed by the Metro Executive Officer on March 16, 1994.

Adopted by the Metro Council this 9th day of June, 1994

Judy Wyers, Presiding Officer

M E M O R A N D U M

METRO

Date: June 3, 1994

To: Metro Council

From: JW/DLC
Judy Wyers, Presiding Officer

Re: Council Consideration of Non-Referred Resolutions on Contracting Authority and Amendment No. 4 to the Oregon Waste Systems Contract

Please find attached copies of two resolutions introduced as a result of the special Council meeting held on May 31, 1994. These resolutions will be placed on the agenda as a single item. The following procedure will be used for consideration of the resolutions:

1. A motion to suspend the rules to consider the non-referred resolutions will be entertained and acted upon;

2. Each proposer of a resolution will briefly explain the purpose and effect of the resolution;

3. Special outside legal counsel will provide information on the basis of Council consideration of the resolutions;

4. A public hearing will be held on the agenda item. Interested persons and members of the public may testify on either or both resolutions;

5. The Council will consider and decide on either or both resolutions.

This procedure should enable the Council to consider all aspects of this important matter when it makes its decision. If you have any questions about the meeting, please let me know.

JW ConAuth.memo

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TO: **Judy Wyers, Council Presiding Officer**

For: **The Metro Council**

FROM: **William F. Gary, Attorney at Law**
James E. Mountain, Jr., Attorney at Law

DATE: **May 31, 1994**

RE: **Powers and Duties of Metro Council and Metro Executive; Authority to Approve Amendments to Solid Waste Facility Contracts**

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED DOCUMENT AND INFORMATION
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You asked that we, as special legal counsel to the Metro Council, present a written summary of our initial findings and conclusions regarding the powers and prerogatives of the Council. You asked that we share our findings with the full Council as soon as possible. This memorandum summarizes our initial findings and conclusions.

Under the Metro Charter effective January 1, 1993, the Metro Council retains all powers of the District not expressly granted to the Metro Executive. The Council retains the power to shape and reshape ordinances and policy resolutions for implementation and enforcement by the Metro Executive.

More specifically, the Metro Code expressly provides that amendments of Metro's contracts regarding solid waste facilities shall be approved by the Council prior to execution by the Metro Executive. We conclude that this Code provision is controlling; that it is consistent with the Charter; and that under it, Metro is not bound by a contract amendment to a solid waste facility contract unless that amendment has been approved by

the Council. Accordingly, we conclude that amendment No. 4 to the contract between Metro and Oregon Waste Systems, Inc., executed by the Executive on March 16, 1994, and never approved by the Metro Council, is not valid. The contract amendment is not binding on Metro.

General Powers of the Council

The powers of the Metro Council are described in Section 16(1) of the Metro Charter (See Figure 1, attached). The terms of the Charter vest all powers of the district in the Council, except for powers and duties expressly conferred by the Charter on the Metro Executive. The terms of the Charter supersede the state statutes that previously described a narrower role for the Council. The state statutes outlined a particular "separation of powers" form of government that specifically cast the Metro Council in the role of a legislative body, and left other functions to be performed by the Metro Executive as administrative functions. The superseding terms of the Charter are a modification, if not an express rejection, of the so-called "separation of powers" format.

The language of the Charter, adopted by the voters and generally conferring all district power on the Council, stands in stark contrast to the terms of the state statutes that would otherwise impose a stricter "separation of powers" form of government on the District. The Legislature had amended the terms of the statutes in 1987, at the express request of the Metro Executive to clarify the role of the Council vis-a-vis the Executive and to define (and confine) the Council as a legislative body. However, the Metro Charter Committee which drafted and proposed the Charter in 1991 and 1992, did not propose the so-called "separation of powers" terms of the state statute; and the voters, of course, did not adopt separation of powers language for their Charter.

Similarly, despite the fact that the Metro Executive (and the Council) specifically asked the Metro Charter Committee to propose "separation of powers" language for the Charter, the Charter Committee did not do so. Prompted by concerns that the voters be presented with a reform charter and a proposal for a strong Council, the Charter Committee proposed (and the voters approved) language that did not limit the Council's role to classic legislative functions. In fact, the Charter adopted by the voters gives the Council not only budgetary controls on the Executive, but also the power to define and to redefine District policy and procedures in ordinances and

resolutions which the Metro Executive is then bound to carry out and enforce.

In sum, the Metro Charter establishes a strong Council by adopting a form of municipal government characterized by a residual allocation of power to an elected collegial body. The Charter assigns plenary power to the Council, subject to specific assignments of power with respect to specified matters. The Council is the ultimate repository of District power.

Amendment of Solid Waste Facility Contract

Consistent with the Metro Charter and the powers the Charter vests in the Council, the Metro Code specifically retains for the Council, and assigns to the Executive, certain roles in the process of contracting for solid waste disposal. (See Figure 2, attached). Section 5.05.030(c) quite succinctly provides that an agreement or amendment to an agreement between Metro and a designated facility, such as Oregon Waste Systems' Columbia Ridge Landfill, shall be:

- Subject to approval by the Metro Council
- Prior to execution by the Executive Officer

A court most probably would find that this section of the Code resolves any question about the respective roles of the Council and the Executive in the District's solid waste contracting process.

When an ordinance or charter puts an act of an agent of a municipality beyond the agent's authority, the municipality will not be bound by the agent's act. Thus, a Metro Executive's execution of an amendment to a solid waste facility contract, without the prior approval of the Metro Council, will not necessarily bind the District. The Council could ratify the contract amendment; or declare that the District and the facility are bound only by the unamended agreement. The Council could also attempt to renegotiate an amendment to the agreement. Regardless of what course the Council chooses, litigation is likely to ensue and the Council should chart its course with this prospect in mind. (See Figure 3, attached).

CONCLUSION

Regarding the District's solid waste contracting process, the Council has plenary power under the Metro Charter and final authority under the Metro Code.

METRO COUNCIL

STATE STATUTE	CHARTER
A. "Council" means the governing body of a [metropolitan service] district - ORS 268.020(1)	A. The Metro Council is created as the governing body of Metro - Section 16(1)
B. Except as this chapter provides to the contrary, the powers of the district shall be vested in the governing body of the district - ORS 268.300(3)	B. Except as this charter provides otherwise . . . all Metro powers are vested in the council - Section 16(1)
C. The council is responsible for the legislative functions of the district, and such other duties as the law prescribes - ORS 268.190	C. *****

METRO EXECUTIVE

STATE STATUTE	CHARTER
A. "Executive officer" means the official responsible for the executive and administrative functions of the district - ORS 268.020	A. The office of Metro executive officer is created - Section 17(1)
B. District business shall be administered, and district rules shall be enforced by an executive officer; the executive officer shall administer the district and enforce the ordinances enacted by the council - ORS 268.180(1); ORS 268.190(3)	B. The primary duty of the executive is to enforce Metro ordinances and otherwise to execute the policies of the council; the executive officer shall also . . . administer Metro except for the council and the auditor . . . - Section 17(2)
C. Any legislative enactment of the council may be vetoed by the executive officer within five working days after its enactment - ORS 268.190(5) (veto may be overridden by 2/3 vote of council)	C. . . . The executive officer may veto the following legislative acts of the council within five business days after enactment: (1) any annual or supplemental Metro budget, (2) any ordinance imposing, or providing an exception from, a tax, and (3) any ordinance imposing a charge for provision of goods, services or property by Metro, franchise fees or any assessment - Section 17(4) (council may override by 2/3 vote)

Figure 1

METRO CODE

Chapter 5.05 - SOLID WASTE FLOW CONTROL

5.05.020

Application: This Chapter 5.05 shall govern the transportation, transfer, disposal and other processing of all solid waste generated within the service area as authorized by State law . . .

5.05.030(a)(8)

(a) Designated Facilities. The following described facilities shall constitute the designated facilities to which Metro may direct solid waste pursuant to a Required Use Order:

(8) Columbia Ridge Landfill. The Columbia Ridge Landfill owned and operated by Oregon Waste Systems, Inc. subject to the terms of the agreements in existence on November 14, 1989 between Metro and Oregon Waste Systems and between Metro and Jack Gray Transport, Inc. In addition, Columbia Ridge Landfill may accept special waste generated within the service area:

(A) As specified in an agreement entered into between Metro and Oregon Waste Systems authorizing receipt of such waste; or

(B) Subject to a non-system license issued to a person transporting to the facility special waste not specified in the agreement.

5.05.030(c)

AN AGREEMENT, OR AMENDMENT TO AN AGREEMENT BETWEEN METRO AND A DESIGNATED FACILITY, SHALL BE **SUBJECT TO APPROVAL BY THE METRO COUNCIL PRIOR TO EXECUTION BY THE EXECUTIVE OFFICER.** (Emphasis added)

Figure 2

M E M O R A N D U M

METRO

To: Metro Councilors

From: John Houser, Senior Council Analyst

Date: June 8, 1994

Re: Historical Background Related to Council and Solid Waste Committee Consideration of Contract Amendment #4 to the Oregon Waste Systems Contract For Disposal Services at Columbia Ridge Landfill

You requested that I prepare a document outlining the history of the Council's consideration of Contract Amendment #4 to the Oregon Waste Systems (OWS) contract to provide disposal services at the Columbia Ridge Landfill. The following memo is divided into several sections: 1) a description of the original proposed amendment, 2) principal issues addressed during committee consideration of the amendment, 3) changes in the amendment considered by the committee, 4) events related to the amendment that have occurred since the Executive Officer's signing of the amendment, and 5) estimated savings since the signing of the amendment.

Original Amendment

The Executive Officer initiated discussion of the proposed amendment in a meeting with the Presiding Officer and the Finance Committee Chair held in early December 1993. The Executive Officer indicated that the contract changes had been negotiated and Bob Martin outlined the nature of amendment. The Executive Officer explained that she had been advised by the Office of General Counsel that she had the administrative authority to sign the amendment without referring it to the Council. However, she indicated that she felt it was appropriate to consult with the Council concerning the amendment, particularly because of its potentially large fiscal impact. The Executive Officer agreed to submit the amendment for Council review and recommendation. The amendment was placed on the January 4 Solid Waste Committee Agenda as an informational item.

Beginning with the January 4 meeting, the Solid Waste Committee heard considerable testimony on the issue of the amendment at each of its next six meetings through March 15. The original contract amendment submitted by the Executive Officer for Council consideration made five significant changes in the existing contract. These include:

1) **Repeal of the "most favored rate" (MFR) provision.** The existing contract contained language which provides that if OWS disposes of waste from another jurisdiction at a disposal rate that is less than the rate paid by Metro, OWS must pay Metro an amount equal to this rate differential for all Metro tons sent to the Columbia Ridge Landfill. Under the amendment, this provision would be placed by the following system of per ton credits:

1) If waste under an existing OWS contract with the city of Seattle continues to come to Columbia Ridge after January 1, 1995, Metro would receive a $1.00/ton credit and an additional $.50/ton after January 1, 1996.

2) For other contracts for over 75,000 tons/year Metro would receive a $1.00/ton credit beginning of the effective date of the amendment and an additional $.50/ton beginning January 1, 1996. New contractsalso would be subject to these same credits.

3) For contracts smaller than 75,000 tons/yr., Metro would receive a $.50/ton credit.

Each of these credits would be subject to an annual inflationary adjustment.

2) Disposition of Waste From the Forest Grove Transfer Station. The amendment provides that should Metro exercise its authority under the Forest Grove franchise agreement and agree to send the Forest Grove waste to Columbia Ridge, Metro would receive an additional $.65/ton credit on all tonnage sent to Columbia Ridge and this credit would increase to $1.00/ton on January 1, 1995.

3) Calculation of the Annual Inflation Factor. Under the existing contract, OWS receives an annual rate adjustment equal to 100% of the Consumer Price Index (CPI). Under the original amendment, OWS would continue to receive 100% of the CPI up to 3%, 85% of the CPI between 3% and 9%, and 90% of the CPI over 9%.

4) Waiver of Claims. Under the amendment, OWS agreed to waive any claims that Metro had failed to send 90% of all acceptable waste that Metro delivered to a general purpose landfill during calendar years 1991, 1992 and 1993.

5) Elimination of Bond Requirement. Metro agreed to eliminate the OWS bond requirements established under Contract Amendment #2, but the corporate guarantee provided by Waste Management of North America would remain in effect.

Metro staff initially estimated that savings for Metro under the proposed amendment would range from $26 to $52 million over the remaining sixteen years of the contract. Actual savings would be dependent on the inflation rate, the number of new customers using Columbia Ridge and whether the Seattle wastestream continues to come to Columbia Ridge.

Principal Issues Related to the Amendment

During the six Solid Waste Committee hearings on the proposed amendment many issues were raised by the proponents and opponents. The following discussion summarizes the eight principal issues that were discussed and presents the views of the proponents and opponents concerning these issues. These include: 1) the most favored rate provision of the existing contract, 2) the potential, cost and effect of Waste Managment building another landfill in Adams County, Washington, 3) issues related to the potential continued use of Columbia Ridge by the city of Seattle, 4) disposal of waste from the Forest Grove Transfer Station, 5) differing interpretations of amendment language, 6) Metro's disposal rates versus the rates of other large

jurisdictions in the Northwest, and 7) the relative value of delaying action on the amendment in an effort to obtain a better deal.

Proponents of the amendment included Metro Solid Waste Staff, the Executive Officer, Waste Management, Gilliam County and the City of Arlington. Opponents included many of Waste Management's competitors such as Sanifill, Rabanco and Columbia Resources. Much of the committee debate and discussion centered on differing data and conclusions presented in a series of economic and financial analyses prepared by Metro staff (and Public Financial Management at Metro's request) and the accounting firm of Deliotte and Touche (D&T) on behalf of it's client, Sanifill.

The Most Favored Rate Provision

Issue: Under the proposed amendment Metro would give up the most favored rate provision of the existing contract. The original intent of this contract provision was to insure that Metro would benefit if future Columbia Ridge customers obtained disposal rates that were lower than the Metro rate. Basically, the MFR provides that OWS would pay Metro the difference between the Metro rate and any lower rate on all Metro tonnage for any contract under which Columbia Ridge would receive more than 75,000 tons annually. For contracts under 75,000 tons Metro would receive the rate differential on a comparable number of tons. The issue raised during committee discussion focused on determining the present and future economic value of the MFR and whether this value exceeded the estimated savings under the proposed amendment.

Pro: Solid Waste Department staff testified that one of the principal reasons for adopting the amendment is that Metro has not, and likely will not receive any economic benefit from the MFR. Staff noted that during the first four years of the existing contract that Metro had received less than $100,000 in MFR-related revenue from a single small contract between OWS and Whitman County in Washington. OWS had obtained the contract for the city of Seattle, but the disposal and transportation components of the contract are structured such that the disposal rate is currently actually higher than the Metro rate. Staff noted that having to pay Metro under the MFR when its competitors had no such burden clearly put OWS at a competitive disadvantage.

Staff contended that the lack of MFR benefits will likely continue into the future because the potential magnitude of MFR-related payments to Metro is so large that OWS cannot economically compete for new disposal contracts that would trigger such payments. Staff argued that the difference between the current rate of $26.96/ton and the market rate of $21/ton would require OWS to pay Metro about $4 million annually if OWS obtained a contract that triggered the MFR. As a result, staff contended that the total disposal costs for such a new contract would cause OWS to operate at a loss.

Con: The D&T economic analysis also examined MFR-related issues and came to a set a conclusions that were in all cases the opposite of the conclusions drawn by Metro staff. The D&T conclusions included:

1) OWS' competitiveness had not and would not be affected by the MFR. They noted that OWS had obtained the Seattle contract and had only narrowly missed obtaining another major Puget Sound area contract since the MFR has been in effect.

2) OWS makes a substantial profit from the Metro contract based on D&T's assumption that operating costs at Columbia Ridge were about $12/ton. D&T argued that this profit would allow OWS to make the MFR payments required under the existing contract and make a profit on new contracts bid at the current market rate. OWS responded that D&T had no reliable source concerning Columbia Ridge's actual operating costs and that they had underestimated labor and equipment costs, closure costs, costs related to road maintenance, and the impact of the payment of DEQ fees.

3) As volumes at Columbia Ridge increased the total OWS profits at the facility would increase, even with the MFR payments to Metro.

4) The MFR may have significant value in the future. Their initial analysis estimated that, if OWS obtained all future contracts in region on which they could make a profit, Metro would receive about $132 million in benefits from the MFR. This analysis was subsequently revised and the estimate reduced to $114 million. D&T concluded that Metro may be"leaving $60 million on the negotiating table," due to the potential value of the MFR.

Opponents noted that there are several disposal contracts from major Northwest metropolitan areas that will be rebid during the next five years including: Snohomish, Pierce and King Counties in Washington. The total wastestream from these three jurisdictions has been estimated at about 450,000 tons annually. Opponents argued that if Waste Management successfully bid for any of these contracts and the waste came to Columbia Ridge, this would trigger significant MFR-related payments to Metro.

Other amendment opponents contended that the elimination of the MFR could give OWS a significant edge in bidding on future contracts which could ultimately reduce competitiveness among large and small landfills in the Northwest.

Adams County Landfill

Issue: Another MFR-related issue is the potential that Waste Management may build a new regional landfill in Adams County, Washington. Waste Management has invested about $3 million in the siting and development of this landfill. It has obtained the necessary local permits to proceed and it awaiting action on the required state permits. Local opponents have filed a lawsuit seeking to block development of the facility and have applied to have the landfill site receive federal designation as a sole-source aquifer. Timelines for these permitting and designation processes are uncertain.

Two factors appear to be driving the development of this new landfill: 1) provisions in the OWS contract with the city of Seattle that require OWS to pay damages if Seattle waste is disposed of at an out-of-state landfill, such as Columbia Ridge, after January 1, 1995 (these damages would escalate in January 1996.); and 2) the potential of MFR-related payments to Metro for

other waste coming to Columbia Ridge.

Pro: Metro staff testified that construction of the Adams County site would virtually eliminate any potential for payments to Metro under the MFR. The argued that construction and operation costs at the Adams County site would be between $18 and $30 million. They questioned that if the D&T estimate of the future value of the MFR ($114 million) is correct, why would Waste Management not build the Adams County facility and save having to pay MFR payments to Metro. They also questioned why a company would spend more than $3 million in development costs if they did not intend to build the facility.

Con: The D&T analysis estimated that Waste Management revenue through the year 2009 would be about $316 million if the amendment was passed, $237 million if the existing contract were maintained and only $120 million if the Adams County facility is built. D&T contended that the $117 to $196 million lost revenue differential would make contruction of the new landfill unlikely. They contended that their estimate of costs associated with the Adams County site was significant higher than the Metro staff because of the real potential of additional environmental, closure and transportation costs associated with the site.

Amendment opponents asked why would Waste Management build a new facility when it already has one large facility serving the region (Columbia Ridge) and has two major competitors bidding on the same disposal contracts. They contended that the addition of another OWS would cause both facilities to operate at far less than optimum levels. They argued that OWS was using the potential of another landfill to coerce Metro into giving up the MFR when it made no economic sense to build a new facility.

Seattle

Issue: OWS has a contract for disposal of waste from the city of Seattle through the year 2001. This waste currently is disposed of at Columbia Ridge. The contract was structured in such a manner as to make the disposal cost component higher than the current Metro disposal rate. Though it is difficult to brake out the specific per ton disposal cost in the contract, it was estimated to currently be about $.50/ton higher than the Metro rate of $26.96/ton. As a result, this contract has never triggered payments under the MFR. But, the contract does contain language that provides that if Seattle waste is still being sent to an out-of-state landfill on January 1, 1995, OWS must pay damages to Seattle equal to 50% of the difference between the Columbia Ridge disposal rate and the projected disposal rate at a Washington-based landfill. In January 1996, these damages would increase to 100% of this differential. In addition, the contract provides that, if Seattle annually disposes of more than 450,000 tons of waste, it will receive an additional rate reduction of more than $2/ton.

Committee discussion of the Seattle contract centered on two questions: 1) to what extent would Metro receive payments under the MFR if the Seattle waste continued to go to Columbia Ridge and the rate declined during both 1995 and 1996 under the contract damage clauses described above, and 2) how would the future Seattle disposal rates compare both under the existing contract and under the proposed amendment.

Pro: The Metro staff analysis concluded that savings under the proposed would be approximately equal to any MFR-related payments in 1995. In 1996, under the amendment, the Seattle disposal rate would be $.38/ton below the Metro rate. But, the analysis concluded that beyond 1996, the Seattle rate would escalate at a higher rate due to the historically higher inflation rates in Seattle and that by the year 2000, the Metro rate would be $.31/ton lower than the Seattle rate. The analysis concludes that the differential in the two rates would continue to grow through the year 2009, at which time the Metro rate would be $2.24/ton less than the Seattle rate.

Opponents criticized the Metro analysis, arguing that it failed to account for the potential reduction in the Seattle rate due to tonnages in excess of 450,000 tons and that it failed to recognize that Seattle could rebid its waste in 2001 which could result in a rate reduction to the prevailing market rate. D&T estimated the size of this reduction to be about $2.40/ton. Metro staff responded that it had not included a tonnage-related rate reduction because the city of Seattle does not currently project that its tonnage levels will exceed 450,000 tons/yr.

Con. The D&T analysis of Seattle vs. Metro rates yielded significantly different results. D&T estimated that the reduction in the Seattle rate in 1995 would result in MFR-related payments to Metro totalling $822,000 which they contended far exceeded Metro's estimated $400,000 in savings under the proposed amendment. They also contended that as additional reductions in the Seattle rate occured in 1996, in 1998 when tonnages exceeded 450,000 tons and in 2001 when Seattle rebid its waste, that by the year 2001 the Seattle disposal rate would be about $8.50/ton less than the current contract and about $4/ton less than under the proposed amendment. Thus, they contended that under the current contract any rate differential would be equalized through MFR-related payments while under the amendment there would be a significant difference between the Metro and Seattle that would increase in subsequent years.

Metro staff criticized the D&T analysis, contending that it had improperly inflated certain portions of the Metro rate and used an inflation rate for the Seattle rate that was less than the historic trend.

Forest Grove Wastestream

Issue: The Forest Grove Transfer Station franchise agreement approved by the Council in January gives Metro permissive authority to send the station's wastestream to a specific disposal site. The proposed OWS contract amendment provided that, if Metro choose to send the waste to Columbia Ridge, Metro would receive an initial credit of $.65/ton on all tonnage sent to Columbia Ridge and an additional $.35/ton beginning January 1, 1995.

Pro: Metro staff testified that, while the amendment simply gives Metro the option of sending the Forest Grove waste to Columbia Ridge, the rate reduction proposed in the amendment would effectively reduce the cost of disposing of the Forest Grove waste to about $14/ton. They contended that this effective rate would be well below the current market rate of $21/ton and the $25.83/ton disposal rate at the Riverbend landfill, which currently receives this waste. Staff indicated that it would be unlikely that any competitor could match the OWS offer.

Con: Opponents raised two principal concerns regarding sending the Forest Grove waste to Columbia Ridge. First, they complained that Metro should not arbitrarily choose to send the waste to Columbia Ridge without giving OWS's competitors an opportunity to compete for the waste. They noted that, while the OWS proposal was a good one, Metro should not automatically assume that a competitor could not present a better offer. For example, representatives of the Riverbend Landfill suggested that they could make an offer that would be competitive with the OWS proposal. Opponents recommended that conduct an open competitive bidding for the Forest Grove waste, noting that such a process would allow the free enterprise system to work and provide fairness to all potential vendors.

Bob Martin raised several concerns about using a bidding process. He noted that a bid process would be costly and time-consuming while offering no guarantees that anyone could meet or beat the OWS offer. He also contended that in a bidding process contained an element of risk, in that the winning bid could actually be less financially lucrative than the proposal contained in the amendment. OWS also noted that they would be at a disadvantage in any bidding process they in effect had already put their best offer on the table and that their competitors were aware of the details of that offer.

Opponents contended that sending the Forest Grove waste to Columbia Ridge would give OWS a monopoly on putrescible waste from the Metro region. They noted that this would reduce Metro's flexibility in addressing disposal cost issues for the remaining 16 years of the OWS contract. They also argued that such an action would be harmful to OWS's competitors, particularly Riverbend Landfill and Yamhill County garbage ratepayers, and that it would reduce competitiveness in the disposal marketplace now and well into the future.

Metro Disposal vs. Market Disposal Rates

Issue: It is generally agreed that the current Metro disposal rate of $26.96 is significantly higher than the average market rate of $21/ton paid by most other jurisdictions. At the time Metro signed its contract with OWS, Metro had little flexibility because there were no major competitors to the Columbia Ridge Landfill. The current marketplace has three major landfills bidding for disposal contracts resulting in very competitive disposal rates.

Pro: Metro staff contended that, while the proposed amendment would not completely eliminate the current gap between the Metro and market rates, it would provide a certain reduction in the gap of up to $2.50/ton. They also emphasized that obtaining this benefit was far less risky than waiting to see if OWS would obtain additional contracts that would trigger payments under the MFR.

Con: Opponents argued that adoption of the amendment would create a permanent gap of at least $5.44/ton between the Metro rate and the market rate. They noted that at any time that a new larger contract triggered payments under the MFR, this rate gap could be eliminated. They contended that the risk factors related to potential savings under the amendment were as great as those associated with the triggering of MFR payments. They contended that savings under either scenario were based on the assumption that the Seattle waste would continue to go to Columbia Ridge and that the facility would new larger customers in the future.

Amendment Language

Issue: Attorneys representing amendment opponents raised several issues concerning the interpretation of language in the amendment. Among these were:

1) whether the definition of "general purpose landfill" would apply to the Hillsboro Landfill and therefore require waste now going to Hillsboro to be sent to Columbia Ridge,

2) whether the definition of "putrescible waste" would include yard debris and therefore require this wastestream to go to Columbia Ridge,

3) the potential for continuing claims under the "90% clause" in the existing contract because the definition of the terms "Metro delivers" and "acceptable waste" are unclear,

4) the scope and definition of the amendment provision which provides that Metro can only receive the rate credits for the Forest Grove waste if it sends "100 percent of all acceptable waste generated in the Metro region" to Columbia Ridge, and

5) the effect of the amendment on language in the existing franchise agreement with Wastech that appears to permit the facility to take putrescible waste.

Issues #1 and #2 noted above were addressed in language changes to the proposed amendments described later in this memo. Problems with the definition of terms related to the "90% clause" was not addressed in the amendment. These issues have been a subject of negotiation between Metro and OWS for several years. To date, the parties have been unable to develop mutually acceptable revised language. Both parties have expressed a continuing interest in addressing and resolving these issues. Metro legal staff advised the committee that the amendment language clearly provides that the phrase "100% of all acceptable waste generated in the Metro region" applies only to transfer station waste and that it was not intended to apply to commercial or industrial wastestreams to use other disposal options. Legal staff also advised that issues related to the acceptance of putrescible waste at Wastech could be better addressed through a review of the specific provisions in the Wastech franchise agreement.

Better Deal

Issue: Throughout the committee debate concerning the amendment, the opponents argued that it would be in Metro's best interest to defeat or delay action on the amendment for up to 18 months to two years. They contended that such a delay would generate a much better financial deal from OWS.

Pro: Proponents contended that delaying action on the amendment would pose significant risks to any potential future savings from the existing contract. These risks include:

1) If OWS proceeds to build the Adams County Landfill, it will send waste from its other disposal contracts to avoid making MFR payments to Metro,

2) OWS has claimed that it has made its best and final offer to Metro. OWS could simply reject any negotiations at a future date if it is no longer in their financial interest to do so,

3) Delay would result in loss of revenue from the guaranteed savings provided in the proposed amendment,

4) Only one major Northwest disposal contract will be rebid before 1997. If OWS does not obtain this contract, the MFR would not be triggered before 1997,

5) The opponents are asking Metro to gamble with its ratepayers revenue, not their own money.

Con: Opponents contended that a delay could result in substantial financial benefits to Metro. Their arguments included:

1) Delay would allow Metro to determine if OWS will seriously pursue the Adams County Landfill,

2) Delay would allow Metro to begin to receive MFR payments in 1995 under the Seattle contract and cause OWS to return to the negotiating table with a better offer the fiscal impact of these payments, and

3) Delay would permit the potential resolution of outstanding legal issues such as flow control and the validity of Oregon's out-of-state waste surcharge.

Committee Amendments

At the March 1 meeting, Resolution 94-1904 was introduced. The resolution called for Council adoption of an amended version of the original proposed amendment. These amendments had resulted from earlier committee discussion, issues related to interpreting the original proposed language, suggestions from individual Councilors and direct negotiation between Councilors and OWS. These amendments included:

1) replacing the proposed language relating the annual inflation adjustment calculation with language which provides that the inflation factor shall be equal to the CPI, less 1/2 of one percent. Under this language, Metro would receive a greater benefit than under the original proposed amendment at all inflation rates less than about 6.3%.

2) The proposed rate adjustment for sending the Forest Grove waste to Columbia Ridge would be revised to provide that Metro would receive the full $1/ton credit, if this waste began to go to Columbia Ridge prior to July 1, 1994.

3) The definition of "general purpose landfill" was modified to clarify to the term did not apply to the Hillsboro or Lakeside (Grabhorn) Landfills.

4) The definition of "putrescible waste" was changed to exclude yard debris.

5) Other technical amendments included: a) correctly identifying Waste Management as a Delaware corporation, b) repealing special language dealing with waste from Whitman County, Washington due to OWS' decision to send this waste to another facility, and c) modifying the exemption of eastern Oregon waste from applicability of the rate credits to exclude Deschutes County from the exemption.

At the March 15 meeting, additional amendments were offered by Councilors McLain and Wyers which dealt with the structure of the rate credits, the CPI adjustment, non-competition agreements, the DEQ out-of-state surcharge, bidding out the Forest Grove wastestream, and the clarification of contract terms.

The committee voted 3-2 against sending Resolution 94-1904 with to the full Council with a "do pass" recommendation.

On March 16, the Executive Officer signed the amendment as it had been amended in Resolution 94-1904.

Recent Events

The following events related to the amendment have occurred since the Executive Officer's signing of the amendment:

Court Decisions. Two recent U.S. Supreme Court decisions may effect the OWS contract amendment. First, the court held in Oregon Waste Systems, Inc v. Department of Environmental Quality of the State of Oregon, that the state surcharge on out-of-state waste was unconstitutional. The decision will remove a significant implement to the competitiveness of OWS when bidding on out-of-state disposal contracts, particularly when bidding against the Roosevelt Landfill for contracts in Washington. This could impact the potential for MFR payments under the original contract or additional waste that would provide greater revenue from the per ton credits in the contract amendment.

In C&A Carbone, Inc. v. Town of Clarkston, the Court struck down a local flow control ordinance. The effect on Metro's ability to direct flow to specific facilities is uncertain, though the Office of General Counsel has concluded that Metro's authority would be held to be constitutional. If Metro were to lose the ability to direct its waste flow, our ability to comply with the provisions of either the original or amended OWS contract could be questioned.

Budget Action. The approved budget recognizes and includes an estimated $727,000 in savings from the OWS amendment for fiscal year 94-95. These savings have not been appropriated to any specific expenditures, but have been allocated to the general account in the unappropriated balance. If the savings did not occur, the balance in this account would be reduced by this amount.

Adams County Landfill. A spokesperson for the principal opposition groups indicates

that its lawsuit to stop the facility will likely be heard in two separate trials beginning as early as late June. The first trial would deal with alleged violations of open meetings requirements and due process while the second trial would address issues related to the draft environmental impact statement for the facility.

The group's filing to seek federal designation of the landfill site as a sole source aquifer is being reviewed at the regional level with a final decision anticipated by the end of the year.

Forest Grove Wastestream. Metro staff has solicited two proposals for the interim disposal of the waste from the Forest Grove Transfer Station. These proposals were received from A.C. Trucking, the station operator, and Riverbend Landfill, which currently receives the waste from the station. The A.C. Trucking proposal would use Columbia Ridge for final disposal, while the Riverbend proposal would continue to direct the waste to Riverbend. Bob Martin indicates that the staff is reviewing the proposals and that he hopes to resolve this issue by the end of June. Staff is continuing to explore long-term disposal options for Forest Grove that could include competitive bidding or directing the waste to a specific facility.

Savings From the Signed Contract Amendment. Data are available on savings under the signed amended contract only for April (the amendment was signed on March 16). These data show that Metro saved a total of $9,113.51. Of these total, $7,330 resulted from the impact of the CPI inflation factor with became effective on April 1. The remaining $1,783 in savings resulted from tonnage credits from three small Washington and Idaho jurisdictions that use Columbia Ridge. It should be noted that the significant savings anticipated under the contract amendment will not occur unless the Forest Grove waste is directed to Columbia River or Seattle continues to use the facility after January 1, 1995.