BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AMENDING THE METRO CODE TO IMPOSE METRO USER FEES ON FACILITIES THAT CLEAN PETROLEUM CONTAMINATED SOIL	)))))	ORDINANCE NO. 93-498 Introduced by Councilor Rod Monroe

Whereas, Metro does not currently collect per ton user fees on soils that are processed to remove petroleum contamination; and

Whereas, The Council has determined that it is appropriate to collect per ton user fees on such soils; now, therefore,

THE METRO COUNCIL ORDAINS AS FOLLOWS:

Metro Code Section 5.01.150 is amended to read:

5.01.150 User Fees:

(a) Notwithstanding Section 5.01.040(a)(2) of this chapter, the Council will set User Fees annually, and more frequently if necessary, which fees shall apply to processing facilities, transfer stations, resource recovery facilities or disposal sites which are owned, operated, or franchised by the District or which are liable for payment of User Fees pursuant to a special agreement with the District. User Fees shall not apply to wastes received at franchised facilities that accomplish materials recovery and recycling as a primary operation. ~~User fees shall not apply to wastes received at franchised facilities that treat petroleum contaminated soil to applicable DEQ standards.~~ Notwithstanding any other provision of this Code, user fees shall apply to petroleum contaminated soils processed at franchised facilities or disposed of by landfilling.

(b) User Fees shall be in addition to any other fee, tax or charge imposed upon a processing facility, transfer station, resource recovery facility or disposal site.

(c) User Fees shall be separately stated upon records of the processing facility, transfer station, resource recovery facility or disposal site.

(d) User Fees shall be paid to the District on or before the 20th day of each month following each preceding month of operation.

(e) There is no liability for User Fees on charge accounts that are worthless and charged off as uncollectible provided that an affidavit is filed with the District stating the name and amount of each uncollectible charge account. If the fees have previously been paid, a deduction may be taken from the next payment due to the District for the amount

found worthless and charged off. If any such account is thereafter collected, in whole or in part, the amount so collected shall be included in the first return filed after such collection, and the fees shall be paid with the return.

(f) All User Fees shall be paid in the form of a remittance payable to the District. All User Fees received by the District shall be deposited in the Solid Waste Operating Fund and used only for the administration, implementation, operation and enforcement of the Solid Waste Management Plan.

ADOPTED by the Metro Council this _____ day of _____, 1993.

_____
Judy Wyers, Presiding Officer

ATTEST:

_____
Clerk of the Council

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METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

Memorandum

Date: April 8, 1993

To: Councilor Rod Monroe

From: Todd Sadlo, Senior Assistant Counsel

Regarding: EXEMPTING PETROLEUM CONTAMINATED SOIL FACILITIES FROM USER FEES
Our file: 9.§13.B

On behalf of Roosevelt Regional Landfill, Diana Godwin has requested that you initiate reconsideration of the exemption from payment of solid waste user fees for facilities that process petroleum contaminated soil (PCS). As a justification for imposing user fees on PCS processors, she has claimed that by exempting such facilities from payment of the fees, Metro violates the commerce clause of the U.S. Constitution. For the reasons given in this memorandum, I disagree with Ms. Godwin's conclusion.

Metro PCS Policy

In 1991 Metro became aware that large quantities of PCS were being generated due to the Oregon Department of Environmental Quality's program for remediation of leaking underground storage tanks.[1] At that time, DEQ was vigorously pursuing its program to identify leaking underground petroleum tanks and require their removal. DEQ was devoting less time and energy to disposal of contaminated soil removed with the tanks, and DEQ's Portland office was concerned that large quantities of soil were being improperly stockpiled or "aerated" (simply spread out so the petroleum will evaporate) in a manner negatively impacting surface water quality.[2]

Metro adopted Ordinance No. 91-422B in an effort to fill a regulatory gap and promote proper disposal of PCS. The Ordinance made clear what may not have been clear at the time: PCS is solid waste, and must be properly treated or disposed of. The Ordinance also

[1]In the metro region, the number of reported leaking tank sites increased from 131 in 1988 to 429 in 1990. During the first half of 1991, 284 new sites were reported to DEQ. Jim Goddard, staff report for Ordinance No. 91-422, August 27, 1991.

[2]Meeting with Laurie McCulloch, Michael Fernandez, and Ernie Schmidt of DEQ, August 14, 1991.

banned off-site aeration of PCS, requiring greater amounts of PCS to be delivered to landfills and processors, because many remediation sites for leaking underground storage tanks are too small or are otherwise inappropriate for on-site aeration.

In developing its approach, Metro followed the principles of the Regional Solid Waste Management Plan and the state solid waste hierarchy, both of which promote reduction, recycling and reuse, with landfilling as a last resort.[3] Metro's longstanding policy has been to exempt "resource recovery" facilities from payment of user fees, to promote recycling and reuse and discourage land disposal.[4] Because PCS processing facilities turn solid waste into a useful product, they are "resource recovery facilities," and were logical beneficiaries of the exemption from user fees.[5] To my understanding, there will be no processing of PCS if soil processors are required to pay the user fee, because cleaning the soil is much more expensive than landfilling it.[6] This, in essence, is the public policy rationale for Metro's decision to exempt PCS processors from payment of user fees.

Commerce Clause Analysis

The "commerce clause" of the U.S. Constitution gives Congress (as opposed to state or local governments) the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[7] Ms. Godwin cites a recent U.S. Supreme Court case in support of her position that it is unconstitutional for Metro to exempt PCS

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[3]Solid Waste Management Policy 1.0 states: "The Solid Waste Management System shall achieve, in an environmentally safe manner, the maximum feasible reduction of solid waste being landfilled, in accord with the state hierarchy under ORS 459.015, and through the cooperative efforts of Metro, the cities and counties, and the community." (Emphasis added.) Landfilling is the least desirable method of disposal under the state hierarchy.

[4]Metro Code section 5.01.150.

[5]Metro Code Section 5.01.010(r). At a landfill, although PCS may often be used as "cover" material, it is in fact being disposed of as solid waste. At a processor, the contamination is removed from the soil and destroyed. The soil can then be put to numerous beneficial uses.

[6]In the same manner, a facility like East County Recycling, which is also exempt from user fees on waste received, could not compete with a landfill if required to pay full user fees.

[7]Art. I, Section 8.

METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

Memorandum

Date: April 8, 1993

To: John Houser, Council Analyst

From: Todd Sadlo, Senior Assistant Counsel

Regarding: ORDINANCE TO IMPOSE USER FEES ON PROCESSORS OF PETROLEUM CONTAMINATED SOIL
Our file: 9.§13.B

Attached is a draft ordinance that you requested on behalf of Councilor Monroe, imposing solid waste user fees on processors of Petroleum Contaminated Soil (PCS). I have also attached a memorandum refuting a claim made by Diana Godwin on behalf of Rabanco, that exempting PCS processors from user fees is unconstitutional.

The ordinance cannot include an emergency clause, because it imposes a charge. (Metro Charter, Section 39(1)). The earliest it could take effect is 90 days after passage.

It appears that Metro's franchisee, Oregon Hydrocarbons, Inc. (OHI), is the only operating PCS processor. If this ordinance goes forward, please provide OHI with adequate notice. Additional legal research may be necessary if it appears that adoption of the ordinance will put OHI out of business, as they have indicated it will.

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Attachments

cc: Bob Martin, Jim Goddard

processors from a fee that must be paid by landfills.[8] She states that in deciding the case, "the Court cited a long line of Interstate Commerce Clause decisions protecting commodities moving in interstate commerce from discriminatory state (or local government) taxing policies."[9]

Chemical Waste was brought by Waste Management against the state of Alabama, which had imposed an "additional fee" of $72.00 per ton on hazardous waste generated in other states that was disposed of at a Waste Management hazardous waste facility in Alabama.[10] The facility had been accepting 788,000 tons of hazardous waste per year, 90 percent of it generated in other states.[11]

The court found that, on its face, as well as in practical effect, the statute imposing the additional fee discriminated against out-of-state commerce.[12] Because the statute was facially discriminatory, the state had the burden of justifying the additional fee "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[13]

The initial question, therefore, is whether Metro's exemption for PCS processors discriminates on its face against interstate commerce, requiring heightened scrutiny of Metro's justification. Clearly, it does not. All processors are treated the same, and all landfills are treated the same, regardless of location. If Rabanco's landfill was located within the district, Metro would still collect its user fees for disposal of PCS. Likewise, if Oregon Hydrocarbons had located its PCS processing facility outside of the district or in another state, Metro would still exempt it from payment of user fees on soil decontamination. The Ordinance treats similar facilities in an identical manner, without regard to their location, and

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[8]Chemical Waste Management, Inc. v. Hunt, 1992 U.S. LEXIS 3253.

[9]Godwin memo, p. 3.

[10]1992 U.S. LEXIS 3253, 8. The base fee collected at the facility by the state of Alabama was $25.60 per ton.

[11]Id., at 6.

[12]Id., at 14.

[13]Id. at 14, quoting Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977).

does not therefore facially discriminate against interstate commerce. The Chemical Waste case is inapplicable.[14]

Any effect of the Ordinance on interstate commerce is, at most, incidental. Metro's intent, and the function of the Ordinance, is to promote processing of PCS into a reusable resource, without regard to the location of a processor. Rabanco is impacted only because its Klickitat County, Washington facility is not a resource recovery facility--it is a landfill. Under the Ordinance, it would be treated the same way regardless of its location.

The appropriate constitutional test to apply in this circumstance was enunciated by the U.S. Supreme Court in Pike v. Bruce Church, Inc., as follows:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[15]

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[14]I have also reviewed the "long line" of cases cited in the Chemical Waste case and referenced by Ms. Godwin in her memorandum. The cases cited uniformly deal with taxes that facially discriminated against out of state business, because they were out of state, and for the purpose of promoting local businesses or interests. See, for example, Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S.Ct. 2080, 1986 LEXIS 85, 90 L.Ed.2d 552 (1986), Armaco Inc. v. Hardesty, 467 U.S. 638, 104 S.Ct. 2620, 1984 U.S. LEXIS 110, 81 L.Ed.2d 540 (1984).

[15]397 U.S. 137, 142, 90 S.Ct. 844, 1970 U.S. LEXIS 63, 25 L.Ed.2d 174 (1970). See, also, Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S.Ct. 2080, 1986 LEXIS 85, 90 L.Ed.2d 552 (1986): "This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. (citations omitted) When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and

Metro's purpose, to promote recycling and reuse over landfilling, is clearly legitimate. The Ordinance is evenhanded in requiring payment of user fees for land disposal of PCS, and exempting resource recovery facilities. The "impact" on interstate commerce is indirect and incidental. If Rabanco is impacted at all, the impact stems from the fact that Rabanco is operating a landfill, not from its location in a neighboring state. The impact would be identical if its landfill were located within the district. For these reasons, a court is unlikely to scrutinize or second guess Metro's user fee exemption for processors of PCS. The Ordinance does not violate the commerce clause.

Please contact me if you have further questions or concerns.

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whether the burden on interstate commerce clearly exceeds the local benefits."