



OREGON PROPERTY OWNERS ASSOCIATION

March 29, 2019

House Natural Resources Committee
Oregon State Capitol
Salem, OR 97301

VIA EMAIL – hnr.exhibits@oregonlegislature.gov

RE: HB 3084 – Metro Testimony

Chair Witt and Committee Members:

You recently received written testimony from Randy Tucker of Metro on HB 3084 in which Mr. Tucker asserts that my testimony and that of Terrell Garrett, owner of Greenway Recycling, LLC, and the primary proponent of HB 3084, was “misleading”. With all due respect, both Mr. Garrett and I disagree completely with Mr. Tucker’s claim as to our testimony, and, as Mr. Garrett’s attached memorandum demonstrates, we stand by what we said to the committee.

Setting aside our dispute on Metro’s intentions, which we believe are clear and supported by Mr. Garrett’s testimony and attached memorandum, the policy for HB 3084 is sound. The use of waste materials that would otherwise be deposited into a landfill as alternative daily cover (ADC) prevents the use of clean dirt (which would otherwise not be deposited into a landfill) from being introduced into the landfill. This saves landfill space, creates a recycling market for what would otherwise be considered debris, and creates jobs and economic activity that would otherwise not occur. In other words, a win-win for both the environment and the economy.

Moreover, the legislature has already weighed in on the state policy of encouraging the use of ADC, through the passage of ORS 459.235, the statute we are seeking to amend with HB 3084. The legislature limited the use of fees “to encourage the use of suitable material other than virgin material for daily cover at a disposal site”. Labeling a “fee” as a “tax” and arguing that it is not subject to the prohibitions contained in the current statute defeats the purpose of the statute. Whatever Metro’s intentions are, they are irrelevant – as both Mr. Garrett and I testified, imposing a “tax” acts as a disincentive to the creation and use of ADC, contrary to existing state policy. HB 3084 does nothing more than further existing state policy.

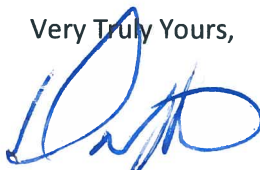
PO Box 230637 Tigard, OR 97281

Email: oia@oia.org

Finally, although Mr. Tucker argues that Metro has a policy of opposing pre-emption of its authority, if Metro has no plans to tax ADC, then this legislation does not pre-empt Metro authority. So what is Metro complaining about? The pre-emption would only occur if Metro plans to impose a tax, which is what Mr. Garrett believes they are planning to do, notwithstanding their claim to the contrary.

The state retains authority for the regulation and permitting of disposal sites, including landfills, in Oregon, and Oregon law provides that the siting and regulation of disposal sites is a matter of statewide concern. ORS 459.015, 459.065, 459.095, 459.205 etc. As stated above, the legislature has already declared the use of ADC as opposed to clean dirt to be the preferred cover material. HB 3084 encourages the use of ADC, furthers existing state policy, and creates both environmental and economic benefits. It deserves your support.

Very Truly Yours,



David J. Hunnicutt
President

PO Box 230637 Tigard, OR 97281

Email: ويا@ويا.ورگ

To: Rep. Brad Witt and Members of the House Committee on Natural Resources
From: Terrell Garrett, GreenWay Recycling, LLC, (503) 793-9238
Re: House Bill 3084
Date: 28 March 2019

The original intent of 459.235 was to limit fees and taxes on ADC. In late 2017 I spoke with Ms. Leslie Lewis, the original bill sponsor. She said to her best recollection the purpose of the bill was to protect ADC from taxation and to allow only a small fee for the supervision of the specific program. The purpose of House Bill 3084 is first to clarify legislative intent and second to insure a recycling investment environment wherein companies may invest in new recycling technology with reasonable certainty of success.

Metro has actually taxed ADC. In 2009 Metro unilaterally adopted a rule limiting usage of ADC in landfills to 15% of tonnage received. As operations at Waste Connection's Finley Buttes Landfill utilized more than the 15% Metro imposed cap, Metro charged Finley Buttes Landfill \$142,595.11 in fees and taxes on ASR from Schnitzer that was used as ADC.

Metro has raised the possibility of taxing ADC "every two years."

2009 As stated above, Metro charged taxes of \$142,595.11 on ADC used at Finley Buttes Landfill in compliance with DEQ rules and regulations.

2011 Metro attempted to charge fees and taxes on ADC generated by GreenWay Recycling and used under DEQ supervision and approval at Finley Buttes Landfill. Rather than file suit, GreenWay finally accepted a settlement from Metro whereby fees and taxes were paid and then refunded a year later.

2015 Metro Staff proposed a set of Metro Code changes, one of which would have re-defined ADC from a Beneficial Use Material receiving tax and fee exemption to being categorized as Solid Waste, removing the fee and tax exemption. Due to industry pressure this attempt was finally abandoned.

2016 - 2017 Metro appointed a fee and tax subcommittee which reviewed fees and taxes on all exempt materials as well as reduced tax materials such as petroleum contaminated soils. I was a member of that subcommittee. Due to recommendation of the consultant, Metro Staff attempted to remove the fee and tax exemption from a single type of the multiple types of materials approved by DEQ for use as ADC. Staff related to me at the time that the plan was to remove MRF ADC first and later use that as a precedent to remove all ADC materials from exemption. After the subcommittee disbanded, the lead consultant Juri Freeman admitted to me that he was pressured by Metro Staff into recommending disallowance of the MRF Fines ADC fee and tax exemption. Eventually this plan was dissolved and the subcommittee was told by Metro Staff that no review or change related to ADC would happen for five years.

Metro has plans to revisit this question in the foreseeable future.

2018 On December 4th during the Solid Waste Road Map Update to Metro Council by Paul Slyman, Director of Property and Environmental Services, Mr. Slyman reported plans to adopt Administrative Rules in 2019 limiting ADC usage at landfills, thus causing any ADC over the unilateral limit utilized lawfully under DEQ supervision to be taxed.

2019 The plan to limit ADC usage at landfills has been pushed to 2020. Instead, the plan is to clarify the ADC exemptions and identify what materials used as ADC qualify for exemption. It appears once again Metro will try to re-classify in order to tax.

Metro does plan to tax ADC. By the planned act of limiting ADC usage at landfills located outside Metro's jurisdiction, Metro will be taxing legitimately used ADC approved by DEQ which is in excess of the capricious limits set by Metro.

Metro's intentions and policies. Metro has never explained its intentions and policies to me as presented by their representative. What Metro Staff has explained to me is their "bath tub" theory of taxation.

The "Bath Tub" theory of landfill taxation. It is opinion and policy of many Metro Staff that anything placed in the "bath tub" of a landfill should be taxed. Their position is that any materials originating in Metro's boundaries which are placed in the landfill for any purpose should be subject to full fees and taxes. In other words, re-claimed concrete or roofing used for roadways and landings should be taxed. Any Alternative Daily Cover originating within Metro's boundary should be taxed. Any crushed glass used for liner drainage should be taxed. Regardless of net environmental benefits captured by using these materials rather than virgin rock or virgin soil, the policy is to tax the material anyways. This reduces or removes the incentive to follow the recycling hierarchy and is an environmentally unsound policy.

The "small fee and tax package" was an attempt at avoiding litigation. I was the one who proposed the \$3 - 4 per ton package during the Fee and Tax Subcommittee negotiations. MRF ADC is the product my company produces and was under fire from Metro to be the first material to lose exemption. Rather than spend hundreds of thousands of dollars litigating the matter, I proposed to the group a small fee. This was not accepted by the subcommittee and finally I was successful in temporarily defeating the exemption loss.

DEQ does not allow the "manufacture" of ADC. Regardless of the intimation that parties may "manufacture" ADC, DEQ requires that all approved ADC undergo a year long testing regimen and only allows materials used as ADC to be in their natural state or as an adjunct to a legitimate recycling process (i.e. – screenings). Under no circumstances does DEQ allow ADC to be "manufactured".

These rules will alter Metro Code under which useful materials such as ADC are exempted from fees and taxes. Mr. Tucker's claim that ADC usage at landfills residing outside Metro's jurisdiction are a matter of local and regional concern is incorrect. ADC usage is part of landfill operations. ORS 459.017 pre-empts Metro as "operation of landfills is a matter statewide concern". ORS 268 limits Metro's solid waste authority as "subject to" ORS 459.017, ORS 459.235 and other statutes.

Blanket opposition of opposing pre-emptions makes no sense. Having a policy that refuses to give a fair chance to logic and the overall good of the State of Oregon is self-explanatory in its lack of credibility. If Metro truly has no intention whatsoever of taxing ADC it should either issue a written guarantee that industry may rely upon or should at least be ambivalent to House Bill 3084. Metro's documented behavior and inflammatory attempt to discredit testimony suggests otherwise.

Business needs an environment of certainty in order to invest in new recycling technology. The recycling industry is undergoing massive change. Markets are tough at best and quality specifications are much tighter. New computer driven equipment, much of it with robot technology, is required to economically produce recycled and beneficial use materials that meet the new standards. This equipment is very expensive and relies on knowing that there is a supportive environment for this

investment and recycling effort. With the new innovative construction/demolition and industrial waste recycling equipment, ADC is a significant product derived from the process. Without the benefits of fee and tax exemption, purchase of this equipment is not viable.

Use of alternative materials in landfill operations is environmentally sound. Everyone can easily agree that anything placed into a landfill is ruined forever. It is poor environmental stewardship to use virgin materials such as mined rock and virgin soil when suitable alternatives exist. It is exemplary environmental stewardship when one can take a material that otherwise would be garbage in the landfill and use it in place of valuable virgin materials.

Summary. Nurturing our fragile recycling and beneficial use markets and protecting our environment should be an easy choice to make. I urge that you support House Bill 3084.

STAFF REPORT

IN CONSIDERATION OF ORDINANCE NO. 15-1363 FOR THE PURPOSE OF AMENDING METRO CODE CHAPTERS 5.00, 5.02, AND 7.01

September 1, 2015

Prepared by: Warren Johnson
503-797-1836

Adoption of Ordinance No. 15-1363 will amend Metro Code Chapters 5.00 (Definitions), 5.02 (Disposal Charges and User Fees) and 7.01 (Excise Taxes). The proposed revisions include: clarifying and expanding the types of wastes that qualify for Metro's reduced regional system fee and excise tax rate, clarifying and narrowing the types of waste that qualify for a fee and tax exemption when delivered to a landfill, adding administrative procedure provisions and various other technical corrections that will make the Metro Code easier to use and provide greater transparency for fee and tax determinations.

As the agency tasked with management of the region's solid waste system, Metro has an obligation to the public to maintain a consistent, predictable and transparent framework for the assessment of fees and taxes on solid waste. Over the years, certain solid wastes have been subject to Metro's reduced fee and tax rate or otherwise exempted based on various circumstantial factors such as the generator intent, type of contaminant, or whether the waste is ultimately "used" at a disposal site. This has created different rules for similar types of wastes and prevented Metro from fulfilling its responsibilities to ensure consistent and transparent application of its fee and tax determinations.

The purpose of these proposed changes is to further achieve the public benefits of: 1) protecting human health and the environment, 2) providing good value in the solid waste system, and 3) being adaptive and responsive to a dynamic solid waste system. In addition, these changes further the objectives of making the Code more relevant and simpler to use so that all users of the solid waste system are subject to the same rules.

BACKGROUND

The regional solid waste system is dynamic and changing. Industry consolidation, technological innovation, improved efficiency, and the public's desire to see more sustainable solid waste practices all contribute to this dynamism. Metro continues to play a major role in shaping the region's solid waste system through implementation of its solid waste contracts (operations, transport, and disposal)¹ and its various other efforts to plan and provide direction for the future. In an effort to shape the future solid waste system to better attain public benefits and improved sustainability, Metro has undertaken a major planning effort (known as the "Solid Waste Roadmap") to set the future of the regional solid waste system for the next several years. In 2016, Metro will begin to consider its decennial plan, known as the Regional Solid Waste Management Plan, which will address material management strategies and waste prevention, reuse, and recycling opportunities for the region. In addition to the above-mentioned planning efforts, staff seeks to provide a clearer, more concise, and more equitable regulatory framework for the regional solid waste system.

Oregon statutes² give Metro broad authority to establish, maintain and amend solid waste fees and taxes to support solid waste and other important services. Metro levies a regional system fee and an excise tax on each ton of solid waste that is generated inside the region and ultimately disposed to help pay for the

¹ Metro's transfer station operations contracts expire in March 2017. Metro's transport and disposal contracts expire at the end of 2019.
² ORS 268.300

solid waste services that benefit the entire region.³ The fees and taxes are collected and remitted to Metro by either the disposal sites (through designated facility agreements) or directly by the haulers and generators of the waste (through non-system licenses).

Revenue from the regional system fee is deposited in Metro's solid waste fund and is used only for solid waste programs such as household hazardous waste collection, latex paint recovery, waste reduction and recycling programs, and cleanups of illegal disposal sites. Excise tax revenue is deposited in Metro's general fund and is used for general government activities.

Waste generated inside the Metro region is generally subject to the full regional system fee and excise tax rate (currently \$29.87 per ton combined) when delivered to a disposal site. However, current Code provides an exemption for certain wastes when deemed to be "useful materials" that are used productively in the operation of a disposal site and accepted at no charge (such as for use as alternative daily cover and road base).⁴ Additionally, Metro levies a reduced fee and tax rate (\$3.50 per ton)⁵ on certain wastes resulting from the cleanup of hazardous substances released into the environment whether they are simply disposed or used for beneficial purposes at a disposal site.

The Chief Operating Officer (COO) recommends that the Metro Council approve various changes to Metro Code Chapters 5.00, 5.02, and 7.01 to provide for more consistent application of fees and taxes, and clarify rate determinations for certain wastes as described in this staff report. This ordinance is intended to further improve the consistency, access, and usability of the Code.

I. Changes to Chapter 5.02 (Disposal Charges and User Fees)

Metro Code Chapter 5.02 (Disposal Charges and User Fees) governs the establishment and administration of appropriate fees and charges on solid waste generated within Metro or delivered to solid waste facilities regulated by or contracting with Metro. The COO recommends the proposed changes to Chapter 5.02 as described below (Exhibit A to Ordinance No. 15-1363).

I. Regional System Fees (Section 5.02.045):

Under current Code,⁶ regional system fees do not apply to "useful material" that is used productively in the operation of a disposal site and accepted at no charge. Over time, implementation of the useful material exemption has caused inequities among the solid waste industry, costing the ratepayers more, without increasing regional recovery and without a clear sustainability benefit.

The useful material exemption is primarily sought after for wastes that are delivered to a landfill and applied as "alternative daily cover" (ADC)⁷ over the exposed solid waste at a disposal area. The Oregon Department of Environmental Quality (DEQ) has regulatory authority of the use of ADC at landfill's in Oregon. Although the use of ADC and other cover materials minimize the need for clean fill such as soil at landfills, the use of waste as cover is not considered to be recycling. The use of wastes as ADC is considered the same as disposal for the purpose of calculating the region's recovery rate. "Shaker screen fines" is an example of waste that has been claimed as ADC. Such

³ Metro Code Sections 5.02.045 (Regional System Fees) and 7.01.020 (Tax Imposed). Effective July 1, 2015, the regional system fee rate is \$18.39 per ton and the excise tax rate is \$11.48 per ton.

⁴ Metro Code Sections 5.02.045(e) (Regional System Fee) and 7.01.050(a)(1) (Exemptions).

⁵ Metro Code Sections 5.02.047 (Regional System Fees on Cleanup Material Contaminated by Hazardous Substances) and 7.01.020(e)(2) (Tax Imposed). The reduced regional system fee rate for cleanup material is \$2.50 per ton and the reduced excise tax rate for cleanup material is \$1.00 per ton.

⁶ Metro Code Section 5.02.045(e)(3) (Regional System Fees).

⁷ Alternative daily cover (ADC) is material used for cover over the exposed solid waste at a landfill that provides the performance equivalent to six inches of earthen soil and that is approved for long-term use by the state environmental protection agency.

“fines” are small-sized pieces of waste that fall through screening equipment at material recovery facilities – it is simply miniature-sized solid waste that is small enough to be shifted out from larger pieces of waste debris when shaken across a conveyor. Shaker screen fines are often required to be mixed with soil before being useable as approved cover material.

It is inappropriate to base Metro’s fee and tax exemptions on how a material is used at disposal sites or when based on approvals by another unaffiliated agency. In the case of the agency that approves the use of alternative cover, DEQ, it relies primarily on whether the waste functions in a similar manner to soil and does not impact human health or the environment. Additionally, Metro does not have the regulatory jurisdiction to effectively monitor or verify the actual application of ADC at landfills that are located outside of the region. The COO recommends that the Council remove the fee exemption based on use of waste at a disposal site as described in this report. The proposed changes under Ordinance 15-1363 would remove the exemption for ADC, however, it would not limit the ability of a landfill to continue using waste as cover (as approved by the DEQ) or limit DEQ’s ability to approve such uses.

The COO recommends retaining a fee exemption for three materials, regardless of whether they are used or disposed at a landfill: tire processing residual, automobile shredder residual, and dredge materials. There are special considerations for each that warrants further evaluation from a fee and tax policy perspective which is outside the scope of this Code change package. This evaluation is more appropriate under Project 6 of the Solid Waste Roadmap that will consider the larger issues of solid waste fee and tax policy in the region.

The proposed changes to this section of Code provide clarification as to which materials qualify for a fee exemption when delivered to a disposal site. Staff has also developed administrative procedures that establish the terms and conditions under which solid waste may qualify for an exemption or the reduced regional system fee and excise tax rate. Adoption of this proposed ordinance would establish administrative procedures as provided in Exhibit C.

2. Regional System Fees on Cleanup Material (Section 5.02.047):

The proposed changes are non-substantive technical amendments that include moving a paragraph in one section⁸ of Chapter 5.02 to new section.⁹ As mentioned above, staff has developed administrative procedures that establish the terms and conditions under which solid waste may qualify for an exemption or the reduced regional system fee and excise tax rate. Adoption of this proposed ordinance would establish administrative procedures as provided in Exhibit C.

The COO recommends that the Council broaden the reduced fee and tax rate to include other types of contaminated soil and natural media as established in the administrative procedures. For instance, under the proposed administrative procedures, the following are examples of wastes that would qualify for the reduced fee and tax rate when delivered to disposal site:

- Soil from construction and excavation projects;
- Street sweepings;
- Dredge material;
- Natural filter media from stormwater catch basins;
- Natural media from the clean out of ponds, bioswales, catch basins, and other similar sources.

⁸ Metro Code Section 5.02.047 (Regional System Fees on Cleanup Material)
⁹ New Metro Code Section 5.02.099 (Adoption and Amendment of Administrative Procedures and Performance Standards)

3. Adoption of administrative procedures (proposed Section 5.02.090):

The proposed changes to this section of Code provide clarification that the COO may adopt and issue administrative procedures and performance standards to implement all provisions of Chapter 5.02. In addition, the proposed change requires that the COO provide public notice and the opportunity to comment on any substantial amendments to such administrative procedures.

II. Changes to Chapter 7.01 (Excise Tax)

Chapter 7.01 (Excise Tax) governs the establishment and administration of a tax for the privilege of the use of the facilities, equipment, system, functions, services, or improvements, owned, operated, licensed, franchised, or provided by Metro. The COO recommends the proposed changes to Chapter 7.01 as described below (Exhibit B to Ordinance No. 15-1363).

1. Exemptions (Section 7.01.050):

Under current Code,¹⁰ excise taxes do not apply to useful material that is used productively in the operation of a disposal site and accepted at no charge. This proposed change is a companion piece to the proposed regional system fee changes described above in Section I.1. of this staff report,

Specifically, the COO recommends that the Council remove the tax exemption based on use of waste at a disposal site as described in this report. The proposed changes under Ordinance 15-1363 would remove the exemption for ADC; however, it would not limit the ability of a landfill to continue using waste as cover (as approved by the DEQ).

The COO recommends retaining a tax exemption for three materials when delivered to a landfill: tire processing residual, automobile shredder residual, and dredge materials. There are special considerations for each that warrants further evaluation from a fee and tax perspective which is outside the scope of this Code change package.

As mentioned above, staff has developed administrative procedures that establish the terms and conditions under which solid waste may qualify for an exemption or the reduced regional system fee and excise tax rate. Adoption of this proposed ordinance would establish administrative procedures as provided in Exhibit C.

2. Due Date: Returns and Payments (Section 7.01.070):

The proposed change is a non-substantive technical amendment.

3. Adoption of administrative procedures (proposed Section 7.01.200):

The proposed changes to this section of Code provide clarification that the COO may adopt and issue administrative procedures and performance standards to implement all provisions of Chapter 7.01. In addition, the proposed change requires that the COO provide public notice and the opportunity to comment on any substantial amendments to such administrative procedures.

III. Changes to Chapter 5.00 (Solid Waste Definitions)

¹⁰ Metro Code Section 7.01.050(a) (Exemptions)

In 2014, the Council adopted changes to the Code that consolidated all of the solid waste-related definitions from Title V (Solid Waste Facility Regulation) into a new chapter. At that time, there were various redundant and duplicative defined terms. The number of definitions was subsequently reduced from 155 to 95 upon the adoption of Chapter 5.00. This ordinance proposes a number of additional changes to Chapter 5.00 which include term additions and amendments as detailed in Exhibit D. This is a further effort to ensure that Title V definitions provide appropriate clarity and purpose.

A. The COO recommends the following substantive changes to these terms:

1. **Cleanup material.** This term has been broadened to include excavated material as well as cleanup material. Additional materials are proposed to be included in the definition, such as street sweepings, non-hazardous contaminated soils not qualifying as clean fill, and contaminated debris resulting from cleanup or releases of chemical spills. Further clarification is made by adding a definition for "clean fill."
2. **Useful material.** The definition is edited to account for other amended and new definitions.

B. The COO recommends that the following terms be added to Chapter 5.00 as specified below:

1. **Automotive shredder residual.** This is a new term to describe the processing residual that remains after recyclable metals have been removed from shredded automobiles and household appliances. This material has commonly been referred to as "auto fluff" in the past.
2. **Beneficial use.** This definition for establishing exemptions from solid waste fees and taxes. Same as DEQs definition in OAR 340-093-0030(13).
3. **Dismantler.** Clarifies reference used in proposed "used material" definition. Based on ORS 822.100. DEQ does not define.

ANALYSIS / INFORMATION

1. Known Opposition

There is known opposition from parties currently enjoying the useful material exemption.

2. Legal Antecedents

Any change to the Metro Code requires a legislative action of the Metro Council. Metro Code Section 2.01.070 stipulates that the legislative action of Metro shall be by ordinance.

3. Anticipated Effects

Approval of this ordinance would amend Metro Code Chapters 5.02 and 7.01 as provided in Exhibits A and B. Approval of this ordinance would also establish administrative procedures which define the terms and conditions under which solid waste may qualify for an exemption or the reduced regional system fee and excise tax rate as provided in Exhibit C.

4. Budget Impacts

Recommended Action:

The COO recommends adoption of Ordinance No. 15-1363.