

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of the Petition of:

CLARK COUNTY, WASHINGTON

For an Order Approving Execution of
Second Amendment to Disposal and
Settlement Agreement

DOCKET TG-120331

PETITION FOR APPROVAL OF
EXECUTION OF SECOND
AMENDMENT TO DISPOSAL AND
SETTLEMENT AGREEMENT

I. INTRODUCTION

1 In accordance with WAC 480- 70-370(b), Clark County (“County”), a municipal
corporation of the State of Washington, respectively petitions the Washington
Utilities and Transportation Commission (“WUTC”) to execute a Second
Amendment to Leichner Landfill Disposal and Settlement Agreement (“Second
Amendment”), as described herein.

2 This petition is prompted by the pending sale of the Leichner landfill properties to
the County. The Second Amendment to the Disposal and Settlement Agreement
will form the basis for joint management of landfill post-closure activities by the
County and City of Vancouver, Washington (“City”).

3 Signatories to the Second Amendment are the County, City, Leichner Brothers
Land Reclamation Corporation (“LBLRC” or “Company”), Waste Connections of
Washington, Inc. (“WCW”) and WUTC. Signatories to the agreement are
included as interested parties to the petition.

II. PETITIONER AND OTHER INTERESTED PARTIES IN THIS REQUEST

4 Clark County is a municipal corporation of the State of Washington, and is not subject to the regulatory authority of the WUTC as to its retail rates, service, facilities and practices. The full name and mailing address of the Petitioner is:
Clark County, Washington:

Lawrence Watters
Civil Deputy Prosecuting Attorney
Prosecuting Attorney's Office – Civil Division
PO Box 5000
Vancouver WA 98666-5000

Interested Parties to this petition include:

City of Vancouver, Washington:

Ted Gathe, City Attorney
City Attorney's Office
PO Box 1995
Vancouver WA 98668-1995

Leichner Brothers Land Reclamation Corporation:

Craig Leichner, President
Leichner Bros. Land Reclamation Corp.
PO Box 820588
Vancouver, WA 98682-0013

Waste Connections of Washington, Inc.:

Jason Hudson
Southern Washington District Vice-President
Waste Connections of WA
12115 NE 99th Street, Suite 1830
Vancouver, WA 98682

and:

David Wiley
Legal Counsel for Waste Connections of Washington, Inc.
Williams Kastner
601 Union St #4100

- 5 The County certifies the interested parties were provided copies of the petition for review and comment.

III. QUESTION PRESENTED BY THIS PETITION

- 6 Upon review of the facts surrounding this Petition, should the Commission, consistent with the public interest, conclude its involvement in the LBLRC closure fund so that it and the affected solid waste collection company's participation in overseeing any potential refund of any excess environmental remediation funds to ratepayers, following all necessary closure actions and issuance of a consent order, is terminated, and that responsibility for any further fund administration, oversight and financial disposition is transferred to Clark County?

IV. STATUTES AND RULES RAISED BY THIS PETITION

- 7 Statutes and rules that may be brought at issue in this petition include RCW 36.58, RCW 35.21, RCW 81.77 and WAC 480-07-370(b).

V. BACKGROUND LANDFILL HISTORY, AGREEMENTS AND LANDFILL FINANCIAL ASSURANCE

- 8 The Leichner Landfill, located at 9411 N.E. 94th Avenue, was Clark County's primary disposal site for solid waste for more than 50 years. The landfill was closed at the end of 1991. Solid waste disposal areas were capped with a top membrane liner, soil and native grasses. A gas collection system was installed to capture and burn methane gas from the decomposing waste.
- 9 The 120.4 acre site is comprised of multiple parcels. The closed landfill area encompasses 74.04 acres of the site. The parcels, referred to as the Koski Properties ("Koski"), total 35.03 acres. A map of the site is set forth in Exhibit B.
- 10 The properties are managed under agreements with Washington State Department of Ecology ("WDOE"), WUTC, City, County and Company dating back to 1987. A summary of landfill agreements is set forth in Exhibit C.
- 11 After groundwater contamination was discovered at the landfill in 1981, WDOE began more intensive study of the site that culminated in issuance of the first of a series Consent Orders and Agreements in 1987. WDOE required extensive testing and monitoring of the site through these Orders and Agreements, including the requirements for closure of the site. In 1996, Ecology and LBLRC entered into a Consent Decree that detailed the legal requirements for managing the long-term post-closure maintenance and monitoring of the site and placed restrictive covenants on the landfill properties.
- 12 WUTC's involvement in the landfill is limited to financial assurance of closure and post-closure activities for Leichner Landfill, as described in the Settlement Agreement, WUTC No. TG-2325; TG-2326; TG-2327, executed on June 1, 1990,

and the First Amendment to the Disposal and Settlement Agreement (“First Amendment”) executed on July 9, 1996. The Settlement Agreement and First Amendment to the Disposal and Settlement Agreement are set forth as Exhibit D and Exhibit E.

13 The WUTC, Company and City entered into the Settlement Agreement to ensure the collection of funds for the closure, environmental remediation, post-closure maintenance and potential environmental liability. In Section 3 Tip Fee and Section 5 Revised Rates for Regulated Ratepayers, the WUTC agrees to pass through increased rates at the landfill to WUTC regulated garbage customers in unincorporated Clark County. City agrees, Section 9 City Contribution, to contribute funds to landfill Financial Assurance Reserve Fund (“FARF”). In Section 8 \$3.2 Million Contribution, the WUTC requires the affiliated collection companies, Clark County Disposal Group (“CCDG”), operated by Company, to assume debt for closure costs previously contributed by WUTC rate payers. Parties to the agreement limit the use of any remaining funds held in the FARF generated for the purposes of closure, post-closure and the reduction of future tip fees.

14 The First Amendment was executed by the parties prior to the sale of Company-owned affiliated collection companies to Browning-Ferris Industries. Company agreed to transfer funds from sale of Company and insurance proceeds to FARF to satisfy remaining debts related to landfill closure and post-closure. The agreement established the Landfill Oversight Committee (“Committee”) and clarified the process of County and City administration of expenditures from the

FARF. The agreement describes the terms of the early release of excess funds in FARF and the release of funds remaining after issuance of post-closure permit.

A methodology for refunding excess funds is established by the agreement.

15 In 1992, the County, through a rate resolution, imposed a \$3.00 per ton Leichner Landfill Remediation fee at the County designated transfer stations to provide funding for a proposed groundwater treatment facility. These funds were deposited in FARF in a separate sub-fund not subject to the terms and conditions of prior settlements, amendments or agreements.

16 The FARF is held in trust by County in accordance with the terms and conditions of the First Amendment. The most recent balance sheet of the FARF is set forth as Exhibit F. As of June 30, 2012, the balance in the FARF is \$12,330,630.

VI. KEY PROVISIONS TO THE FIRST AMENDMENT RELATING TO THIS PETITION

17 Section 7 Payment of Expenditures and Management of FARF, First Amendment, establishes the Revised Environmental Compliance Budget (“RECB”) attached hereto as Exhibit “A” and incorporated herein, and as it may be revised from time to time by the City and County. RECB also serves as the annual post-closure financial assurance document for 1996 Consent Decree, and is referred to as Exhibit E in the Decree.

18 Section 7.0.6 Oversight Committee Established, First Amendment, allows the WUTC to designate a representative to the Committee. The WUTC has never opted to designate a representative and no WUTC representative has ever attended a meeting of the Oversight Committee.

19 Section 7.0.6(C)(c) Functions and Responsibilities of the Oversight Committee,
First Amendment, provides the Committee authority to authorize partial release of
excess funds fifteen years from the execution of the agreement. The First
Amendment was executed on July 9, 1996. The fifteen-year timeline was
complete on July 9, 2011. The partial release of excess funds is subject to the
terms and conditions of the first Amendment.

20 Section 9 "Excess Funds", in the First Amendment, provides for a WUTC role in
the distribution of pass-through credits to regulated rate payers of excess funds
remaining in the FARF after compliance with the Consent Decree. Under the
agreement, pass-through credit is to be distributed through the Company
affiliates' transferees or its successor to the then existing regulated ratepayers.
The certificated collection companies, at the time of the execution of the First
Amendment were formerly referred to as the Clark County Disposal Group
(“CCDG”).

21 Certificates held by Buchman Sanitary G-79 and G-65, and The Disposal Group
were transferred to Browning-Ferris Industries of Washington in 1996. In 1997,
Waste Connections of Washington, Inc., acquired the stock of Browning-Ferris
Industries of Washington and with it, the regulated operations of the Clark County
Disposal Group, as a successor in interest once removed. Waste Connections of
Washington, Inc., has no affiliated interest in any of the subject landfill
agreements past or present, and is merely a successor to the historic regulated
operations of the Company's prior collection companies. Under the First
Amendment, to Disposal and Settlement Agreement of 1996, the Financial

Assurance Reserve Fund “FARF” was subject to a plan of distribution if excess funds remained in the FARF after compliance with actions pursuant to the Consent Decree were completed. Under that limited provision only, WCW is a successor to the regulated operations of the “Affiliates” and Section 9 of the Amendment directs certain actions by any successor solid waste collection company for distribution of those excess funds to the then current rate payers of the successor G-certificated operator. That provision also expressly stipulates that the requisite distribution of any refund have no affect on the successor’s costs of operation or revenue margin and that those funds should not constitute income to the affiliates’ successor for any purpose and that the refund be effectuated by a simple one-page tariff supplement outlining the amount and duration of the refund and refund distribution interval.

VII. BACKGROUND TO PURCHASE AND SALE AGREEMENT

- 22 County and Company executed a purchase and sale agreement (“PSA”) on May 10, 2011. The PSA requires the parties to amend the First Amendment to Settlement and Disposal Agreement and Consent Decree to reflect change in ownership and administration of site.
- 23 The County and City have indentified a number of goals regarding the acquisition of the properties, which include:
- A. Establish clear title to the properties to allow for planning and future development.
 - B. Acquire properties for 99th Street extension.

- C. Clarify and bring up to date the agreements between WUTC, WDOE, Company, City and County.
- D. Extinguish WUTC involvement in agreements.
- E. Reduce LBLRC involvement in agreements and landfill administration.
- F. Maintain County and City control of properties for the purposes of environmental compliance and master planning.
- G. Master plan the site with the City and WDOE to determine potential future uses.

24 The landfill and adjacent properties are encumbered by an option for the County to purchase the properties for \$1.00 once the property is declared stabilized in accordance with WAC 173-304-467. It is difficult to determine when the landfill will be stabilized and will no longer require post-closure care. To date, WDOE has not declared any landfill in the State stabilized.

25 An appraisal determined the value of the properties with the option in place and without the option. The value of the properties with the option removed is approximately \$5.4 million. The value with the option in place is approximately \$2 million. The parties agreed on a negotiated sale price of \$1.5 million.

26 The purchase of the property will be funded through a combination of County Road Funds and funds held in FARF. County Road Fund will fund the acquisition of right-of-way associated with the 99th Street extension. The Committee has agreed to release funds collected at the designated County transfer stations held in FARF that are not subject to the terms and conditions of the proposed amendment, prior settlements, amendments or agreements. The remaining balance, approximately \$61,000, is proposed for release as Excess Funds from FARF pending execution of the Second Amendment

VIII. PROPOSED AMENDMENTS TO AGREEMENT

- 27 Leichner Landfill is the only landfill in the State of Washington in which the
WUTC has a quasi-regulatory role in administration of landfill financial assurance
reserve funds.
- 28 The execution of the proposed Second Amendment by the City, County,
Company, WCW and WUTC completes all requirements of the WUTC in the
Settlement Agreement and terminates the participation of the WUTC. If approved,
the WUTC would not take part in any further proceedings arising from the terms
of this Agreement.
- 29 The proposed Second Amendment establishes a management strategy for
activities at the site including post-closure care, master planning and potential
future uses. The Second Amendment also forms the basis for joint administration
of landfill post-closure activities by County Department of Environmental
Services, County Public Health and City Public Works Department in
coordination with WDOE.
- 30 Upon close of sale of the properties, Company interest in the site is limited to an
advisory role to the Committee as defined in the Second Amendment.
- 31 The terms and conditions of the PSA required the County bind an environmental
pollution liability policy to provide financial assurance for pollution liability. The
policy limits are \$20,000,000 per occurrence and \$40,000,000 in aggregate with a
10-year term. The County, City and Company are named insureds to the policy.
- 32 The release of FARF funds to purchase property will leave approximately
\$11,000,000 in the FARF for post-closure care and liability at the end of 2012.

33 In the event that there are insufficient funds, the proposed amendment to
Section 9, Insufficient Funds commits the County to utilize rate authority under
RCW 36.58 to cover any revenue shortfalls for post-closure care.

34 The release of Excess Funds is highly improbable due to the indeterminate nature
of the timeline for concluding post closure care. However, the County and City
have proposed substantial amendments to First Amendment Section 9 Excess
Funds to address concerns related to current refund methodology and exclusions.

35 County proposes to remove language regarding 70%/30% split of excess funds
involving G-Certificate, City contracted haulers and transfer station rates. Given
the elapsed time and changes to the solid waste system, evolving population
demographics through annexation and growth, the County, City and Waste
Connections of Washington, Inc. have determined the language is essentially
impractical to implement.

36 The County operates a regional solid waste transfer system under contract with
CRC through interlocal agreements with all the cities within the County. The
regional system is operated to the benefit of all rate payers (regulated collection,
contracted collection and self-haul). The exclusionary language of the First
Amendment was based on ratepayer contribution from primarily County-
regulated collection customers and City of Vancouver contracted customers.

37 Alternatively, implementation of any proposed tip fee decrease at the transfer
station to refund excess funds, as described in the First Amendment, would
theoretically require extensive tracking of the generation of the waste by Waste
Connections of Washington, Inc., and Columbia Resource Company (“CRC”).

These tracking requirements would impose a significant, impractical and imprecise burden on both companies. Given the fluctuation in tonnage accepted at transfer facilities and exclusionary language envisioned by such alternative, the County would also have difficulty establishing an accurate tipping fee to facilitate the rebate as described.

38 The First Amendment exclusion of the Cities of Camas and Washougal is specifically related to the County solid waste system. The County and City of Washougal agreed through Contract and interlocal agreement to construct a transfer station in the Port of Washougal. The facility was opened in 2007. The interlocal agreements direct waste from the Cities of Camas and Washougal to County designated transfer facilities. The City of Washougal Collection Contract with Waste Connections of Washington, Inc. and the County Transfer, Transportation and Disposal Contract with CRC, a wholly owned subsidiary of Waste Connections, Inc., have elements regarding tip fees that are in conflict with the language of the First Amendment.

39 The First Amendment's exclusion of self-haul from refund is impractical and does not fit within the current County rate structure which already penalizes the practice of self-hauling through a transaction fee.

40 The First Amendment provides limited guidance for determining Excess Funds. The agreement assumes that post-closure activities are mostly complete after the required twenty (20) year monitoring period after final closure which is on or about July, 2011. At that point, the First Amendment allows partial early release of funds and establishes the criteria for a rebate to customers.

- 41 The Second Amendment proposes to, on an annual basis in accordance with
WAC 173-304-468(2)(c) and Consent Decree Article XXIV(B), require the
County Financial Analyst to update post-closure cost estimate for the estimated
remaining post-closure phase of the landfill. Committee shall review post-closure
cost estimate to determine adequacy of financial assurance provided by FARF.
- 42 County and City propose to utilize the post-closure cost estimate as a basis for
determining availability of excess funds. Leichner Landfill was closed in 1991
under post-closure monitoring requirement of WAC 173-304 which required 20
years of post-closure monitoring.
- 43 For the purposes of the proposed Second Amendment, the annual post-closure
cost estimate and RECB are synonymous. The 2012 RECB indicates financial
assurance requirements can be met through at least the year 2025. The 2012
RECB is set forth as Exhibit A.
- 44 The County and City have proposed language that includes a hierarchy for release
of funds that provides local control and includes language to allow use of excess
funds to purchase site, master plan and redevelop site for a public use, to off-set
future capital costs of solid waste infrastructure, to fund projects identified in the
County solid waste management plan.

IX. SUMMARY OF PROPOSED AMENDMENTS TO AGREEMENT

45 The majority of the proposed amendments to the Agreement establish the basis
for joint administration of landfill post-closure activities by the Committee and do
not have relationship to this petition. Key Provisions to the Second Amendment
as they relate to this petition include:

46 **New Section:** Section 2. **Washington Utilities and Transportation**

Commission Role. The execution of this Agreement by the City, County,
Company and WUTC acknowledge that all requirements of the WUTC in the
Settlement Agreement are fulfilled and terminates the participation of the WUTC
in any further proceedings arising from the terms of this Agreement.

47 **New Section:** Section (4) **Environmental Pollution Liability Policy:** Purpose of
new section is to memorialize purchase of liability policy for financial assurance
includes language describing term and limits.

48 **Revised Section:** Section 8.5(M). **Functions and Responsibilities of**
Oversight Committee. The Oversight Committee shall have responsibility for
all activity regarding the Site. Functions and responsibilities of Committee
include an annual update of post-closure cost estimate, Exhibit A. RECB, per the
terms and conditions of the Consent Decree.

49 **Revised Section:** Section 9. **In event of Insufficient Funds.** Updates language
from Section 8 of First Amendment to remove references to Company and inserts
language regarding County rate authority under RCW 36.58 to provide funding in
event of insufficient funding. The proposed language commits County to utilize
rate authority to fully fund project if in the event of insufficient funds.

50 **Revised Section:** Section 10. **Excess Funds.** Updates and revises language from
Section 9 of First Amendment. Inserts language from Consent Decree regarding
annual calculation of estimated present worth of FARF, Exhibit A. RECB. The
present worth calculation indicates ability to fund post-closure requirements.
County and City propose to utilize this calculation as a basis for determining
availability of excess funds.

51 County and City propose that the Committee may only release Excess Funds for
the following purposes:

- A. Fund purchase of Site from Company;
- B. Fund master planning or redevelopment of the Site for a public use;
- C. Off-set future capital costs associated with the regional County transfer
system; or
- D. Support the implementation of County Comprehensive Solid Waste
Management Plan.

52 **New Section:** Section 11. **Authorize Release of FARF Funds For Purchase of
Site.** Insert language memorializing release \$1,151,000 from FARF. Funds will
be released from CRC Long-Term Maintenance Sub-fund and County Liability
Sub-Fund for purchase of site.

X. REQUESTED ACTION/PRAAYER FOR RELIEF

53 For the reasons set forth above, County, joined by the City, respectively request the Commission execute the Second Amendment to the Disposal and Settlement Agreement as set forth as Exhibit G, which would have the effect of the following:


1. By executing the Second Amendment, the City, County, Company, WCW and WUTC will acknowledge that all requirements of the WUTC and WCW in the Settlement Agreement are fulfilled, and the Second Amendment will eliminate the application of Section 9 of the First Amendment of 1996, which would have required the Affiliates' G certificate operators' successor, WCW, to distribute any excess FARF closure funds to then current rate payers, and further will terminate the participation of the WUTC and WCW in the administration of the closure and post-closure activities for the Leichner Landfill Site and its financial reserve funds and confirm the WUTC shall not take part in any further proceedings arising from the terms of this Agreement.
2. Commits the County to utilize rate authority granted by RCW 36.58 to fund post-closure activities in the event of Insufficient Funds.
3. Updates and revises Excess Funds language from Section 9 of First Amendment to remove language regarding 70%/30% split of excess funds involving regulated collection companies, city contracted haulers and transfer station rates.
4. Establishes a process and hierarchy for release of excess funds that includes language to allow use of excess funds to purchase site, master plan and redevelop site for a public use, or to off-set future capital costs of solid waste infrastructure, support projects identified in County solid waste management plan.
5. Memorializes release of \$1,151,000 from FARF for purchase of site.

54 WHEREFORE, Petitioner finally asks that the Commission grant the above Petition and issue an Order granting the relief sought herein which will terminate any further role of the WUTC and the present solid waste provider Waste Connections of Washington, Inc. in any administrative oversight of funds or

future distribution role in the subject Landfill Disposal Agreement and Financial Assurance Reserve Fund.

Respectfully submitted,

Clark County, Washington, Petitioner

By 
Lawrence Watters
Clark County Deputy Prosecuting Attorney