

Agenda Date: September 27, 2012
Item Number: B8

Docket: TG-120331

Petitioner: Clark County

Staff: David Gomez, Assistant Power Supply Manager, Energy Regulation

Recommendation

Staff recommends that the commission issue an order approving and adopting in its entirety the Second Amendment to the Disposal Agreement and Settlement Agreement, conditional and effective upon approval by Clark County Superior Court and the parties; Washington Department of Ecology, Clark County, City of Vancouver, Washington, and Leichner Brothers Land Reclamation Company (LBRLC) of the Second Amendment to the Consent Decree 96-2-03081-7.

Executive Summary

For over fifty years, the Leichner Landfill (landfill) was Clark County's (county) primary disposal site for solid waste. The landfill had been in continuous operation from 1939 until December 31, 1991, the date specified for closure by the Washington Department of Ecology (Ecology).

In May 2011, the Vancouver City Council and Clark County Board of County Commissioners executed a purchase and sale agreement with LBRLC for the city and county to buy the landfill properties. Because the new ownership will remove LBRLC from responsibility from the Consent Decree and the Settlement Agreement, the parties to the sale need approvals from Ecology and the commission.¹

Chronology

December 27, 1988: The county, the city and LBRLC executed a "Disposal Agreement" which set forth obligations and responsibilities relative to the operation and future closure of the landfill. The county became the trustee responsible for the landfill reserve funds created for self-insurance (liability) and post closure monitoring and maintenance. The commission was not a signatory to this document.

At the time, LBRLC had two affiliates which were regulated by the commission:²

- The Clark County Disposal Group, d/b/a Twin City Sanitary Service, Inc., Vancouver Sanitary Service, Inc. and Clark County Disposal (G-65); and
- Buchmann Sanitary Service, Inc. (G-79).

¹ Consent Decree 96-2-03081-7 was signed by the Clark County Superior Court and filed on July 17, 1996. Clark County has drafted a Second Amendment to the Consent Decree which requires approval from the court and the parties to the Consent Decree; LBRLC, county, Washington State Attorney General's Office and Ecology.

² The Settlement Agreement defines "Affiliated haulers" as Clark County Disposal, Inc., d/b/a Vancouver Sanitary Service or Twin City Sanitary Service and Buchmann Sanitary Service, Inc. For the purposes of this analysis, staff concludes that the reference to Clark County Disposal, in context to all of the orders issued in the consolidated docket, reference the same companies holding, at the time, Certificates G-65 and G-79.

Over time, disputes arose over the extent to which ratepayers have paid for landfill closure and remediation.

July 16, 1990: The commission issued its Third Supplemental Order (Order) in consolidated Dockets TG-2325, 2326 and 2327, which were rate filings by the above two certificated haulers. The county and city were interveners in these dockets.

The Order approved a “Settlement Agreement” that was signed by all parties, and which establishes a mechanism for funding the closure and remediation of the landfill. Staff was a signatory to the Settlement Agreement. The county, city, LBLRC and the commission agreed that LBLRC would increase landfill disposal rates to help pay for the landfill’s closure (from \$13.47 to \$21.00 per yard). The Settlement Agreement also gave the county an option to purchase the landfill and adjacent properties once Clark County Public Health and Ecology determine the landfill has “stabilized” and no longer required post-closure monitoring and maintenance for gas emissions and groundwater contamination.

December 31, 1991: The landfill closed. The waste disposal areas were capped with a top membrane liner, soil and native grasses and a gas collection system was installed to capture and burn methane gas generated from the decomposing waste.

April 21, 1995: The Clark County Disposal Group, d/b/a Twin City Sanitary Service, Inc., Vancouver Sanitary Service, Inc. (G-65), filed for Chapter 11 bankruptcy in the United States Bankruptcy Court of Western Washington; Cause No. 95-31806-PBS.

January 22, 1996: Buchmann Sanitary Service, Inc. (G-79), filed for Chapter 11 bankruptcy in the United States Bankruptcy Court of Western Washington; Cause No. 96-30375-PBS.

March 5, 1996: The commission transferred Certificates G-79G-65 to Browning-Ferris Industries of Washington, Inc. (BFI) (G-253). Order M.V.G. No. 1772 acknowledges the pending bankruptcies for the transferors (Hearing Nos. 78443 and 78444).

July 17, 1996: LBLRC signed Consent Decree No. 96-2-03081-7 with Ecology regarding the landfill. (See <https://fortress.wa.gov/ecy/gsp/CleanupSiteDocuments.aspx?csid=3019>).

July 31, 1996: The commission issued its Fourth Supplemental Order in Dockets TG-2325, 2326 and 2327 approving a “First Amendment to Disposal Agreement and Settlement Agreement” (July 9, 1996) (First Amendment).³

The First Amendment addressed the situation of the parties and the landfill, post-bankruptcy. It also re-established the funding mechanisms for the remediation of the landfill. The landfill reserve fund is now called the Financial Assurance Reserve Fund (FARF).

Among the terms of the First Amendment is Section 9: “Excess Funds.” Under this section, if there is any excess money in the FARF “after compliance with the Consent Decree,” plus additional Ecology requirements, and after closure and “post-closure” costs, that excess money is split whereby seventy percent goes to reduce tipping fees and thirty percent goes to support the Clark County Solid Waste

³ The Fourth Supplemental Order refers to Twin City Sanitary Service, Buchmann Sanitary Service, and Vancouver Sanitary Service, rather than their successor, BFI, per the transfer order issued by the UTC four months prior. Staff believes this was an oversight.

Management Plan. If it not practical to reduce tipping fees, then the seventy percent share is to be given to the Commission-regulated carriers to be directly passed through as a rate credit to customers.

October 1, 1997: The commission issued Order in Application GA-78677, changing the name on the certificate G-253 from BFI to Waste Connections of Washington, Inc. (the current certificate holder).

PROSPECTIVE COUNTY PLANS TO PURCHASE THE LANDFILL

The county has agreed to purchase the closed landfill and adjacent properties for \$1.5 million. In the coming months, the county will work with the public to determine how the landfill and nearby properties could be reused. The agreed upon price appears to be reasonable, considering the property is valued at \$5.45 million without the encumbrance of the county’s option to buy.

The county likely will start a master planning process for the 120-acre purchase area, which includes the 74-acre landfill and adjacent properties to the north and south. No use of the site can interfere with the landfill’s post-closure maintenance and monitoring nor can the purchase of the landfill site close without approval from the commission (Disposal Agreement and Settlement Agreement) and Ecology (Consent Decree).

About \$349,000 of the \$1.5 million purchase price will come from Clark County Public Works, which is for 11-acres that would be used to extend Northeast 99th Street along the northern boundary of the closed landfill. The remaining \$1.2 million would come from the portion of the FARF funded by a county surcharge and from the county’s portion of the liability self-insurance account, which is also part of the FARF.

THE COUNTY AND CITY PROPOSE A “SECOND AMENDMENT”

The county has proposed a “Second Amendment to the Disposal Agreement and Settlement Agreement” (Second Amendment) under which the commission’s role under the Settlement Agreement would terminate. In this regard, the Second Amendment calls for the parties (including the commission) to agree that the portion of the commission’s requirements in the Settlement Agreement are “fulfilled” and the commission would not participate any further in “any proceedings arising from the terms of this Agreement.” (Section 2, page 3; see also Section P, page 2).

Section 11 (page 10) takes approximately \$1.15 million from the FARF and applies it to the purchase of the landfill by the county. The FARF CRC Maintenance Sub-Fund’s balance of \$1,085,929 is used in its entirety as is approximately \$65,000 from the County Liability Sub-Fund (highlighted in green in Table 1 below) for purchase of site.

Table 1, FARF Fund Balance Year End 2011

Fund	Original Source	2011
Landfill Post-Close - City 6310.03	City	\$ 1,763,658
Landfill Insurance - City 6310.04	City	\$ 1,419,636
Landfill Post-Close - County 6310.13	UTC Regulated Customers	\$ 3,960,562
Landfill Insurance - County 6310.14	UTC Regulated Customers	\$ 4,436,593
Landfill Post Close - LT Maintenance	County Surcharge	\$ 1,085,929
Investable Balance		\$ 12,668,388

According to the county, the CRC Maintenance Sub-Fund (highlighted in yellow) is not subject to the requirements set forth in the Settlement Agreement or any subsequent amendments approved by the commission, because the county collected these monies pursuant to the county's rate setting authority under RCW 36.58 for the purposes of funding a system to pump and treat contaminated groundwater at the site.⁴ This system was deemed unnecessary by Ecology many years ago, thus these funds have remained unspent in the FARF.

The county's position is that using \$140,000 from the County Liability Sub-Fund is appropriate because the county addresses pollution liability issues by purchasing a \$40,000,000 environmental pollution liability policy with a 10-year term. The county states that the release of these funds for the purchase of the site still leaves approximately \$11,000,000 in the FARF for post-closure care and liability, which the county projects will provide funding at least to the year 2025.

In the unlikely event there are insufficient funds in the FARF to accomplish required remediation, Section 9 of the Second Amendment, entitled "In Event of Insufficient Funds"; states that the county will use its rate authority under RCW 36.58, presumably to increase tipping fees at county transfer stations.

In the event there are any "excess funds" in the FARF at the end of the required remediation, the proposed Second Amendment, Section 10 (page 10) states it is "not practical" to reduce tipping fees, and then sets forth four uses of excess funds, none of which include ratepayer credits:

- Purchase of the landfill site from LBLRC;
- Master planning and redevelopment of the landfill site for a public use;
- Off-setting future capital costs associated with the regional county transfer system; and
- Support implementation of County Comprehensive Solid Waste Management Plan.

In a county/city-prepared "Summary of Proposed Amendments" (page 2, Item 16), the county and city acknowledge that the Second Amendment would eliminate the 70/30 split use of excess funds created in Section 9 of the First Amendment. They explain: "Given the time passed and changes to the solid waste system, the county and city find the [Section 9 remedy under the First Amendment] is impractical to implement." They go on to argue that the above-listed four proposed uses of the excess would benefit "all classes of ratepayers".⁵ As an additional requirement regarding the use of excess funds, staff requested and the county included in Section 10 of the Second Amendment, a stipulation that the section shall not be modified or amended without prior notification and approval of the Commission.

Thus, one consequence of the Second Amendment, if approved by the commission, would be to eliminate the (potential) ratepayer credit described in Section 9 of the First Amendment.

STAFF ANALYSIS AND RECOMMENDATION

The commission's role in the Settlement Agreement and the First Amendment is to protect ratepayer interests, particularly in the funds the ratepayers paid to fund landfill closure and remediation, and the

⁴ According to staff's workpapers, the surcharge amount charged by the county was \$2.47 per yard.

⁵ By "all classes of ratepayers," staff assumes the city and county are referring to all residents of the city and county, whether or not they are customers of the commission-regulated solid waste collection company; Waste Connections of Washington, Inc.

prospect of a rate rebate in the future, if certain conditions are met. The commission's role has also been to assure the commission-regulated solid waste collection company complies with applicable environmental laws.

Staff believes these roles are satisfied under the Second Amendment.

As to protecting ratepayers interests, as we explained above, Section 9 of the First Amendment provides for a rate credit only "after compliance with the Consent Decree," plus compliance with any additional Ecology requirements, and after closure and "post-closure" requirements are completed. The likelihood of a rate credit is extremely remote, because to date, Ecology has not released any municipal solid waste landfill in this state from post-closure maintenance and monitoring.⁶ Moreover, due to annexation and population growth over the last twenty years, the base of customers served by commission-regulated companies has changed significantly. Finally, the four new uses of excess FARF funds under the Second Amendment will benefit all ratepayers.

Staff therefore recommends the commission approve the Second Amendment which extinguishes the commission's participation in the management of the landfill site and the FARF, but still protects ratepayer's contributions to the FARF.

Conclusion

Issue an order approving and adopting in its entirety the Second Amendment to the Disposal Agreement and Settlement Agreement, conditional and effective upon approval by Clark County Superior Court and the parties; Washington Department of Ecology, Clark County, City of Vancouver, Washington, and Leichner Brothers Land Reclamation Company of the Second Amendment to the Consent Decree 96-2-03081-7.

⁶ <http://www.clark.wa.gov/recycle/leichnerFAQ.html> @ #10