

# CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

## Policy Session Worksheet

**Presentation Date:** March 9, 2021 **Approx. Start Time:** 2:00 **Approx. Length:** 30 minutes

**Presentation Title:** Proposed Ordinance to Amend County Code Chapter 10.03.340, *Determination of Waste Management Fees*

**Departments:** Transportation and Development; County Counsel

**Presenters:** Dan Johnson, DTD Director; Stephen Madkour, County Counsel

**Other Invitees:** Rick Winterhalter, Senior Sustainability Analyst; Eben Polk, Sustainability Supervisor; Cheryl Bell, DTD-Assistant Director

### WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?

This is an informational policy session, as requested by the Board as they consider moving forward with adoption of an Ordinance to amend County Code Chapter 10.03.340, *Determination of Waste Management Fees*.

### EXECUTIVE SUMMARY:

On Tuesday February 22, 2021 Mr. John DiLorenzo made a presentation to the Board of Commissioners proposing an Ordinance amending County Code Chapter 10.03.340, *Determination of Waste Management Fees*. On February 25<sup>th</sup> Mr. DiLorenzo sent a revised version of the proposed Ordinance. This version was submitted to the Solid Waste Commission for consideration in their meeting and is included as an attachment to this worksheet.

In response to Mr. DiLorenzo's presentation, the Board posed several questions and requested that staff convene the Solid Waste Commission for them to review and comment on the proposed Ordinance, and for staff to come back in a policy session for the Board to consider whether to move the Ordinance forward for a first reading at a Business meeting.

The purpose of today's policy session is to provide the Board with background information and the Solid Waste Commission's recommendation.

### **Background**

#### *Current Fee Review Process*

The Sustainability & Solid Waste Program of the Department of Transportation and Development (DTD) is responsible for managing the County's Integrated Solid Waste Collection System. This includes an annual review of the production records of the County's nine franchised solid waste collection companies. The purpose of the review is to ensure that solid waste collection services are provided to residents and businesses safely, cost-effectively, efficiently, and in a manner that supports the benefits of recovering materials from the system. The review is used to establish the fees charged for the variety of services required by the County, to ensure a fair return to the collectors, and to ensure reasonable collection rates for the residents of Clackamas County. The review process is assisted by a contracted certified public accountant who reviews franchisee financial records, creates summaries, and provides analysis.

The County undertakes an annual fee review, coupled with annual adjustments as necessary, to keep fees and real costs aligned. The adjustments may come in the form of fee increases, maintaining or lowering fees, adding additional collection services, or a combination of these options. In this process if there is a decrease in disposal costs (which account for approximately 20% of the cost of collection) the decrease is included and considered alongside other known and measurable increases in costs (e.g.: labor, equipment, trucks). Using this model these decreases have served to offset other cost increases that would have resulted in a rate increase, and accounts for how cost decreases are passed along to customers. Using the annual review model also prevents large and unexpected increases that can result from a less frequent review.

#### *Proposed Ordinance*

The proposed Ordinance would require the Board to directly adjust fees to reflect any Metro proposed, or a court required, reduction in Metro's tip fee. This adjustment does not go into effect for increases in Metro's tip fees, and would not be as expansive as the annual rate review process which considers other elements such as the cost of labor, equipment, fuel, new services, or rate of return to collectors. Under this ordinance, the annual fee review process would continue.

In the February 22, 2021 presentation, the Board asked some clarifying questions. Some were answered by Counsel, or by Mr. DiLorenzo. Other questions, and the answers from staff, are provided below.

#### **Question: Has the Ordinance been discussed with the franchise holders?**

**Staff response:** *The collectors have representation on the Solid Waste Commission, and they were present at the March 1, 2021 Solid Waste Commission meeting. Staff also notified the collectors, who will have an opportunity to provide public comment if the Ordinance is moved to a public hearing.*

#### **Questions: Does this duplicate the existing annual review process? How will approving the Ordinance affect the Board's ability to review fees?**

**Staff response:** *Under the ordinance if Metro enacts any reduction in the tip fee, the Board would be required to directly adjust fees to reflect the reduction. This reduction would occur at the time the tip fee is reduced. The annual fee review, as outlined above, would continue under this ordinance, and would also include consideration of the mid-cycle reduction when looking at the fee model.*

#### **Question: What is the Solid Waste Commission's view of the proposed Ordinance?**

**Staff response:** *In response to this question being raised at the February 22<sup>nd</sup> Issues session, the Solid Waste Commission was convened on March 1, 2021. The staff report for the meeting is attached. The Board's discussion in its Issues session was included for the Solid Waste Commissioners to observe. Additionally, in the meeting both Mr. DiLorenzo, and Shane Abma, Senior Attorney for Metro, were in the audience and were provided the opportunity to comment. In public testimony one member of the audience provided comment via chat on Zoom. After deliberation, the Solid Waste Commission voted unanimously 6-0-1 (with one abstention) not to recommend adoption of the Ordinance. In their deliberation, the Solid Waste Commission expressed a general consensus that:*

- *The County's code currently provides the Board full authority and discretion to increase or decrease fees and pass on reductions or increased costs.*
- *The County's fee review process is extensive, and per code it considers and passes on the benefits of reductions in costs, to customers.*

**Question: Has the County ever enacted a rate reduction?**

**Staff response:** *Following the annual fee review process, which considers the full costs and saving within the system, the Board has held fees flat when Metro has decreased fees. In 2017 Metro reduced tip fees by \$1.30. In 2014 Metro reduced the tip fee by \$1.00. These reductions were considered by the Board along with other increasing expenses. In each case the Board held the fee at previously approved levels.*

**FINANCIAL IMPLICATIONS (current year and ongoing):**

**Is this item in your current budget?**       YES       NO

- **What is the cost?** There are limited direct financial implications as a result of adopting or rejecting the proposed code amendment as presented in the Ordinance. If adopted, there would be staff time related to outreach when the fees are adjusted under the Ordinance, and costs related to using the contracted accounting firm to review the fee reduction at implementation.
- **What is the funding source?** Additional costs would be funded by solid waste franchise fees. No general funds would be used for these costs.

**STRATEGIC PLAN ALIGNMENT:**

- **How does this item align with your Department’s Strategic Business Plan goals?** Solid waste fees reviews are part of oversight of the County’s solid waste system to ensure the ability to provide safe, efficient and timely garbage and recycling services to customers.
- **How does this item align with the County’s Performance Clackamas goals?** Access to safe, convenient garbage and recycling services helps promote community health, livability, and responsible stewardship of natural resources. Fee reviews provide assurance that customers are provided fair value and charged a fair fee for the services they receive.

**LEGAL/POLICY REQUIREMENTS:**

ORS 459 and 459A authorize the County to franchise solid waste collection services. County Code Chapter 10.03 requires a review of the solid waste collection system to ensure the public receives the services required, and the County’s franchisees are able to provide those services safely, efficiently, and with a reasonable return.

**PUBLIC/GOVERNMENTAL PARTICIPATION:**

The Solid Waste Commission meeting held on March 1, 2021 was open to the public. Aside from Solid Waste Commissioners and staff, there were twelve people in attendance, with one person providing comment. This comment, and the presentations by Mr. DiLorenzo and Mr. Adma were considered by the Commission in making their decision.

If the Board moves to bring the Ordinance forward to a first and second reading, the public will be provided the opportunity to comment to the Board of County Commissioners.

**OPTIONS:**

N/A; this policy session is informational.

**RECOMMENDATION:**

N/A; this policy session is informational.

**ATTACHMENTS:**

1. Proposed Ordinance to amend County Code Chapter 10.03.340 (revised February 25, 2021)
2. Staff report for March 1, 2021 Solid Waste Commission Meeting
3. Email response submitted by Metro Senior Attorney, Shane Abma

**SUBMITTED BY:**

Division Director/Head Approval \_\_\_\_\_

Department Director/Head Approval *Dan Johnson*

County Administrator Approval \_\_\_\_\_

For information on this issue or copies of attachments, please contact: Cheryl Bell @ 503-260-7124
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ORDINANCE NO. \_\_\_\_\_

**An Ordinance Amending  
Clackamas County Code Chapter 10.03, *Solid Waste and Wastes  
Management*, and Declaring an Emergency**

WHEREAS, Clackamas County is responsible for governing the collection, storage, transportation, and disposal of all solid waste and wastes with unincorporated Clackamas County and, with intergovernmental agreements, select cities; and

WHEREAS, Clackamas County grants franchises to Collection Service Franchisees granting the right and responsibility to provide Collection Services (including the collection, transportation, storage, or disposal, of solid waste or wastes for compensation), and Collection Service Franchisees provide Collection Services to consumers in Clackamas County; and

WHEREAS, the Board of County Commissioners for Clackamas County establishes the Waste Management Fees (WMF) that Collection Service Franchisees may charge to consumers in Clackamas County for Collection Services; and

WHEREAS, Clackamas County Code Section 10.03.340 requires the Board of County Commissioners for Clackamas County to give due consideration to a variety of factors, including the cost of disposal, when determining the WMF Collection Service Franchisees may charge to consumers in Clackamas County for Collection Services; and

WHEREAS, Clackamas County Code Section 10.03.340 further requires the Board of County Commissioners for Clackamas County, in considering WMF increases or decreases, to find that the WMF will be just, fair, reasonable, and sufficient to provide required service to the public; and

WHEREAS, Metropolitan Service District (Metro) operates two waste transfer stations within Metro's jurisdiction, including one in Clackamas County, at which Metro charges a per ton solid waste rate or "tip fee" for the transfer of solid waste at its transfer facilities; and

WHEREAS, Collection Service Franchisees utilize one or more Metro transfer facilities for the disposal of waste collected in Clackamas County in the course of providing Collection Services to consumers in Clackamas County, where Collection Service Franchisees pay Metro's per ton solid waste rate or "tip fee"; and

Ordinance No. \_\_\_\_\_

**Attachment 1: Proposed Ordinance to Amend County Code  
Chapter 10.03.340 (revised February 25, 2021)**

WHEREAS, the Metro per ton solid waste rate or “tip fee” Collection Service Franchisees pay to Metro in the course of providing Collection Services to consumers in Clackamas County is a significant factor in determining the WMF Collection Service Franchisees may charge for Collection Services, and

WHEREAS, the Board of County Commissioners for Clackamas County finds that a just, fair, reasonable, and sufficient WMF requires that consumers in Clackamas County directly receive the benefit of any reduction in the per ton solid waste rate or “tip fee” Metro is permitted to charge to Collection Service Franchisees,

Now, therefore, the Board of Commissioners of Clackamas County ordains as follows:

**Section 1:** Chapter 10.03 of the Clackamas County Code is hereby amended by adding the following:

A. Notwithstanding any other provision of the Clackamas County Code, in the event that Metro reduces or is required by a court or otherwise to reduce its per ton solid waste rate, “tip fee,” or any similar charge charged by Metro on a per ton basis and paid by any Collection Service Franchisee providing Collection Services to consumers in Clackamas County, the Waste Management Fee for Collection Services set by the Board shall be reduced commensurately so that one hundred percent of the reduction in fees paid to Metro as a result of Metro’s reduction inures to the benefit of residents paying for Collection Services in the form of a reduced Waste Management Fee paid by those residents.

B. The requirements of Section A apply to any reduction of Metro’s fees described therein that will last more than 30 days in duration. If the reduction of Metro’s fees described in Section A is the result of a court order, and the commensurate reduction in the Waste Management Fee for Collection Services a Collection Service Franchisee may charge to residents described in Section A shall be implemented as soon as reasonably practicable without the need to pass through the process for Determination of Waste Management Fees set forth in Clackamas County Code Section 10.03.340. Otherwise, the process for Determination of Waste Management Fees set forth in Clackamas County Code Section 10.03.340 shall apply to the implementation of the requirements of Section A, provided, however, that the Board shall complete its process for Determination of Waste Management Fees as soon as reasonably practicable after receiving notice of any reduction in Metro’s fees and that if, in setting the new Waste Management Fee, the Board finds that the Waste Management Fee must cover any unrelated increase in costs, the Board may implement the reduction in the Waste Management Fee required under Section A as an offset to those unrelated increases in costs and that offset shall be deemed to inure to the benefit of residents paying for Collection Services as an effective reduction of the Waste Management Fee those residents otherwise would be paying.

Ordinance No. \_\_\_\_\_

**Attachment 1: Proposed Ordinance to Amend County Code  
Chapter 10.03.340 (revised February 25, 2021)**

**Section 2:** Emergency Clause. The Board of Commissioners hereby finds and declares that an emergency exists inasmuch as the immediate effect of the ordinance is necessary to ease the economic impact on residents of Clackamas County of the cost of solid waste Collection Services should a reduction in the per ton solid waste rate, "tip fee," or any similar charge charged by Metro on a per ton basis occur. Accordingly, this Ordinance shall be effective upon its adoption.

ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2021.

BOARD OF COUNTY COMMISSIONERS

\_\_\_\_\_  
Chair

\_\_\_\_\_  
Recording Secretary



**DAN JOHNSON**  
DIRECTOR

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT  
DEVELOPMENT SERVICES BUILDING  
150 BEAVERCREEK ROAD OREGON CITY, OR 97045

March 1, 2021

Solid Waste Commissioners Clackamas County

Members of the Commission:

**EXECUTIVE SUMMARY:**

On Tuesday February 22<sup>nd</sup> Mr. John DiLorenzo made a presentation to the County's Board of Commissioners proposing an Ordinance to amend County Code Chapter 10.03. Specifically the ordinance will affect Chapter 10.03.340, *Determination of Waste Management Fees*. The presentation can be viewed here (beginning at 35:35).

<https://www.youtube.com/watch?v=EF590fqSNIs&feature=youtu.be>

On February 25<sup>th</sup> Mr. DiLorenzo sent an amended version of the proposed Ordinance. Both versions of the proposed Ordinance are included with this staff report.

The Board has set a policy session for Tuesday, March 9th to review the proposed Ordinance. In advanced of the policy session, the Board requested the Commission review the ordinance and provide their recommendation.

The purpose of today's meeting is to review the code amendment proposed in the Ordinance in the context of the affect it would have on the County's management of the solid waste collection system.

**BACKGROUND:**

*Current Fee Review Process*

The Sustainability & Solid Waste Program of the Department of Transportation and Development (DTD) is responsible for managing the County's Integrated Solid Waste Collection System. This includes an annual review of the production records of the County's nine franchised solid waste collection companies. The purpose of the review is to ensure that solid waste collection services are provided to residents and businesses safely, cost-effectively, efficiently, and in a manner that supports the benefits of recovering materials from the system. The review is used to establish the fees charged for the variety of services required by the County, and to ensure a fair return to the collectors. The review process is assisted by a contracted certified public accountant who reviews franchisee financial records, create summaries, and provide analysis.

Historically the County has undertaken an annual review, coupled with annual adjustments as necessary to keep fees and real costs aligned. The adjustments may come in the form of fee increases, maintaining or lowering fees, adding additional collection services, or a combination of these options. In this process if there is a decrease in disposal costs (which account for approximately 20% of the cost of collection) the decrease can be used to offset other known and



measurable increases in costs (e.g.: labor, equipment, trucks). This review model prevents large and unexpected increases that can result from a less frequent review.

The Solid Waste Commission last recommended increasing fees in 2020. The Clackamas County Board of Commissioners adopted and made effective new fees on July 1, 2020. Based upon this fee increase the adjusted returns to revenue for franchise holders in the Urban zone fell within the established range of 8-12%. The combined Rural zone returns were below the lower limit of the range, and the total County composite returns also fell below the range.

*Proposed Ordinance*

In the February 22<sup>nd</sup> Issues session with the Board, Mr. DiLorenzo presented to the Board an Ordinance which makes amendments to County Code Chapter 10.03.340, *Determination of Waste Management Fees*. To provide the Commission with full context of this session the link to the meeting is provided above.

The amendment requires the Board to directly adjust fees to reflect any Metro proposed, or a court required, reduction in Metro's tip fee. This adjustment does not go into effect for increases in Metro's tip fees, and would not be as expansive as the annual rate review process which considers other elements like increased costs, adding new services or rate of return to collectors.

In response to the presentation, the Board asked some clarifying questions. These questions, and the answers from staff, are provided below.

**Question: Have you discussed this with the franchise holders?**

**Staff response:** *Staff was made aware of the proposed Ordinance in the February 22<sup>nd</sup> Issues meeting and then took action to notify the collectors. Additionally, collectors have representation on the Solid Waste Commission.*

**Questions: Does this duplicate the fee review process? How will approving the Ordinance effect the Board's ability to review rates?**

**Staff response:** *Under the ordinance if Metro enacts any reduction in the tip fee, the Board would be required to directly adjust fees to reflect the reduction. This reduction would occur at the time the tip fee is reduced. The annual fee review, as outlined above, would continue under this ordinance, and would also include consideration of the mid-cycle reduction when looking at the fee model.*

**Question: What is the Solid Waste Commission's view of the proposed Ordinance?**

**Staff response:** *This meeting has been called to provide this feedback to the Board of County Commissioners.*

**Question: Has the County ever enacted a rate reduction?**

**Staff response:** *Following the annual fee review process, which considers the full costs and saving within the system, the Board has held fees flat when Metro has decreased fees. In 2017 Metro reduced tip fees by \$1.30. In 2014 Metro reduced the tip fee by \$1.00. These reductions were considered by the Board along with other increasing expenses. In each case the Board held the fee at previously approved levels.*

**FINANCIAL IMPLICATIONS:**

There are limited direct financial implications as a result of adopting or rejecting the proposed code amendment as presented in the Ordinance. If adopted, there would be staff time related to outreach when the fees are adjusted under the Ordinance, and costs related to using the contracted accounting firm to review the fee reduction at implementation.

**LEGAL/POLICY REQUIREMENTS:**

ORS 459 and 459A authorize the County to franchise solid waste collection services. County Code Chapter 10.03 requires a review of the solid waste collection system to ensure the public receives the services required, and the County's franchisees are able to provide those services safely, efficiently, and with a reasonable return.

**STAFF PARTICIPATION:**

Staff has assembled Commission packets and scheduled this meeting.

**OPTIONS:**

1. Recommend approval of the amendment as written within the proposed Ordinance.
2. Recommend approval of the amendment as written within the proposed Ordinance with revisions as determined in this meeting.
3. Do not recommend approval of the amendment as written within the proposed Ordinance.

**RECOMMENDATION:**

Staff respectfully requests the Solid Waste Commission to consider this report and submit its recommendation to the Board of County Commissioners for their consideration.

Respectfully submitted,

*Rick Winterhalter*

Senior Sustainability Analyst  
Department of Transportation and Development

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**From:** Shane Abma <[Shane.Abma@oregonmetro.gov](mailto:Shane.Abma@oregonmetro.gov)>  
**Sent:** Monday, March 1, 2021 12:53 PM  
**To:** Madkour, Stephen <[SMadkour@clackamas.us](mailto:SMadkour@clackamas.us)>; Ciecko, Scott <[SCiecko@clackamas.us](mailto:SCiecko@clackamas.us)>; Polk, Eben <[EPolk@clackamas.us](mailto:EPolk@clackamas.us)>  
**Cc:** Roy Brower <[Roy.Brower@oregonmetro.gov](mailto:Roy.Brower@oregonmetro.gov)>  
**Subject:** Reilly v. Metro; Draft County ordinance

Warning: External email. Be cautious opening attachments and links.

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Stephen, Scott and Eben,

Thank you for the invite to today's special Solid Waste Commission meeting. I had meant to get an email to you earlier, but I was on vacation the latter part of last week and I was out this morning as well. Please let me know if you need anything from me today.

First, Metro is very confident that it is not violating its Charter with respect to its costs for solid waste disposal services. Metro's Charter states that it cannot charge more for a service it provides than the cost to provide that service. That is a fairly unremarkable statement and we have always adhered to it. As you may know, Metro has been providing "solid waste disposal" services for nearly 40 years. This is the term used in our charter, it is the term used in ORS chapter 268, and it is also the term used in our landfill disposal contract, solid waste transportation contract, and our Metro station operations contracts. Metro has charged a single rate for "solid waste" disposal per ton since long before it even had a Charter. Despite this, Plaintiffs claim that Metro provides distinct "wet" and "dry" waste disposal services in reality, and that by charging one "blended" rate, Metro is using "wet waste" services to subsidize the more expensive "dry waste" services. We completely disagree.

In any event, I did want to clear up a few statements that John made at the Board meeting that were incorrect. (BTW, John and I worked together at Davis Wright Tremaine, and we have a good working relationship). He referenced some statements by the "Metro Attorney." That was not me; it was our outside counsel at Stoll Berne who did the hearing. Regardless, it is completely incorrect when John stated that Metro had asserted that "no one has standing" to sue Metro regarding this provision of its charter. In fact, we argued to the court that while these plaintiffs did not have standing because they did not pay the bill directly to Metro, the franchised haulers had standing, as does a dry waste facility (MRF), for example, who could claim that Metro's rates are artificially low for "dry waste." One such facility has been making that claim for years in fact.

Second, John said that Metro "changed course" after almost a year and began making this "standing" argument. In fact, it was one of our affirmative defenses in the initial answer back in April 2020, and it has been discussed repeatedly with plaintiffs' attorneys. This argument was not new, nor unexpected.

Third, Metro does not “admit” that it overcharges for wet waste disposal as John alluded to. Plaintiffs repeatedly refer to Metro’s transfer system configuration policy that Metro passed in 2016. As part of that policy, Metro said that it would “estimate” its costs as if it *did* provide wet waste and dry waste disposal separately, in order to better compare to private transfer stations. This was done at the behest of local governments, who have complained for years that some private transfer stations charge more than they should. Because Metro agreed to provide these estimates, and because Metro did make these estimates, plaintiffs continually allege that Metro has admitted that it both provides separate wet and dry waste disposal services, and that it overcharges for wet waste disposal services. This is incorrect.

I also have one last legal issue that you should be aware of. In addition to the motion to dismiss for lack of standing, Metro also asserted that under the declaratory judgment act all “necessary parties” had to be joined. Metro asserted that the franchised haulers and the local governments -- including Clackamas County and Happy Valley -- must be joined as necessary parties for jurisdictional purposes. This protects both their interests and Metro’s interests, and avoids a future ruling that is in conflict with any ruling this court would make. The court did not have to reach a decision on “necessary party” motion because Judge Norby dismissed for lack of standing. However, if this ordinance does pass, I believe it would only strengthen the alternative motion that all necessary parties must be joined in this lawsuit. Again, that would include Clackamas County, Happy Valley and all franchised haulers in the County because this ordinance would tie Metro's rate directly to the actions of the County, the city, and the haulers. I’d note that Judge Norby has a hearing scheduled on March 11 regarding the wording of the final Judgment (plaintiffs objected to Metro’s wording).

Finally, there are some policy, administrative and operational issues related to this proposed ordinance that would seem to need further clarification. For example, how this ordinance would affect the rate of return that the haulers received based on the franchise, or how often the franchisees would need to change their websites and billing procedures to reflect changes to Metro's rate. I’m also not sure how it will be administered given that the franchises also do not distinguish between wet and dry waste. Further, this ordinance would seem to apply County-wide, even though no hauler is *required* by its franchise to go to a Metro station, and in fact some in the County do not use Metro stations. Even those that do, they may not go to a Metro station for every route, so it's difficult to see how this would be administered. What is the “commensurate” cost reduction in these situations? How would it affect other waste streams besides just wet and dry waste? Obviously, these aren’t Metro’s issues to decide, but we would want to make sure we understand the process that would occur should this pass.

If there is anything that I can do to help with this issue, please just let me know.

Thanks,

Shane

**Shane Abma**  
**Senior Attorney**  
**Metro Regional Government**  
*he/him/his*

600 NE Grand Avenue | Portland, Oregon 97232-2736 | 971-209-2262 (mobile)  
[shane.abma@oregonmetro.gov](mailto:shane.abma@oregonmetro.gov)

