



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: September 10, 2012 REPORT NO: 12-104

ATTENTION: Natural Resources and Culture Committee

SUBJECT: Environmental Services Department's Enterprise Funds 5-Year Financial Outlook and Proposed Fee Adjustments, New Fees, and Elimination of Fee Exemptions

REFERENCE: 1) Report Presented to NR&C on March 25, 2009, Item 5b
2) Manager's Report No. 07-170, October 19, 2007
3) Manager's Report No. 03-067, April 24, 2003
4) Manager's Report No. 02-141, June 12, 2002

REQUESTED ACTION:

In order to ensure the health of the two enterprise funds associated with solid waste management in the City of San Diego, adopt resolutions approving the following:

- 1) An increase of \$3.00 per ton in the standard disposal fee for all weighed loads delivered to the Miramar Landfill (Landfill), effective July 1, 2014 (FY 2015);
- 2) An automatic annual rate adjustment for all weighed loads delivered to the Landfill based on the Consumer Price Index (CPI) rounded up to the nearest \$1.00, effective July 1, 2015 (FY 2016);
- 3) Authorization for the Chief Financial Officer to reduce the Capital Improvement Budget by de-appropriating \$5M in fund 700040, Refuse Disposal CIP Fund, S01088, Future Waste Management Disposal and Processing Facility CIP for the purpose of returning \$5M to the Refuse Disposal Enterprise operating fund balance (Fund 700039) in FY 2013;
- 4) Adoption of a fee of \$20 per load for acceptance of clean fill dirt and \$20 per ton for acceptance of Construction and Demolition Inert (CDI) residue at the Landfill and delegation of authority to the Mayor or designee to adjust the fees based on approved criteria effective July 1, 2013 (FY 2014);
- 5) Adjustments to greenery disposal fees to more fully recover the costs of processing materials as follows: (i) an increase of \$6 per ton for Businesses-City and \$3 per ton for Non-City Customers on Clean Green Material; (ii) a decrease of \$7 per ton for Businesses-City and \$10 per ton for Non-City Customers on Clean Wood Scrap; (iii) an increase of \$6 per ton for Businesses-City and \$3 per ton for Non-City Customers on Single Generator Food Waste; (iv) an increase of \$10 per ton for Businesses-City and \$7 per ton on Non-City Customers on Multi-Generator Food Waste and; (v) an increase of \$10 per ton for Businesses-City and \$7 per ton for Non-City Customers on Automated Green Waste (Multi Generator) effective July 1, 2013 (FY 2014);
- 6) Elimination of the disposal and/or processing fee exemption (including applicable special handling and administrative fees) and AB 939 fee exemption for non-profit organizations, effective July 1, 2013 (FY 2014);
- 7) An automatic annual rate adjustment for the AB 939 Fee based on the Consumer Price Index (CPI) rounded up to the nearest \$1.00 to become effective July 1, 2015 (FY 2016);

- 8) Modification of the AB 939 fee to apply it to all solid waste collected in the City that is disposed, regardless of the location of the disposal site, and to all solid waste disposed at the Miramar Landfill regardless of the origin of the solid waste, effective July 1, 2013 (FY 2014);
- 9) Establishment of a cost recovery user fee in the amount of \$70 per container for replacement and additional automated recycling and greenery containers effective July 1, 2013 (FY 2014).

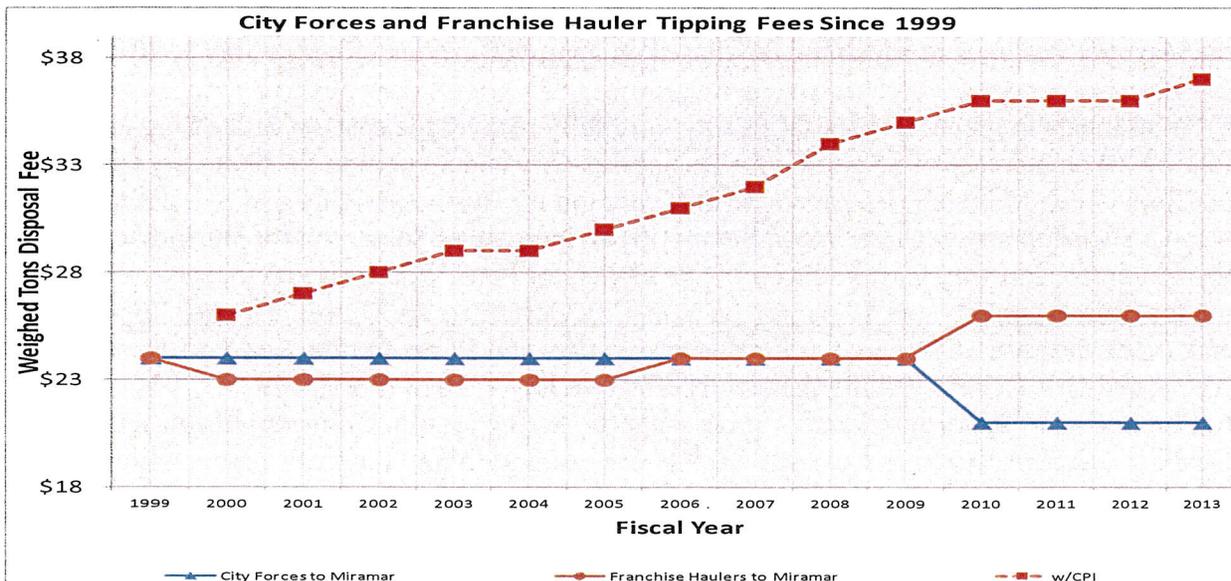
STAFF RECOMMENDATION:

Approve the requested actions.

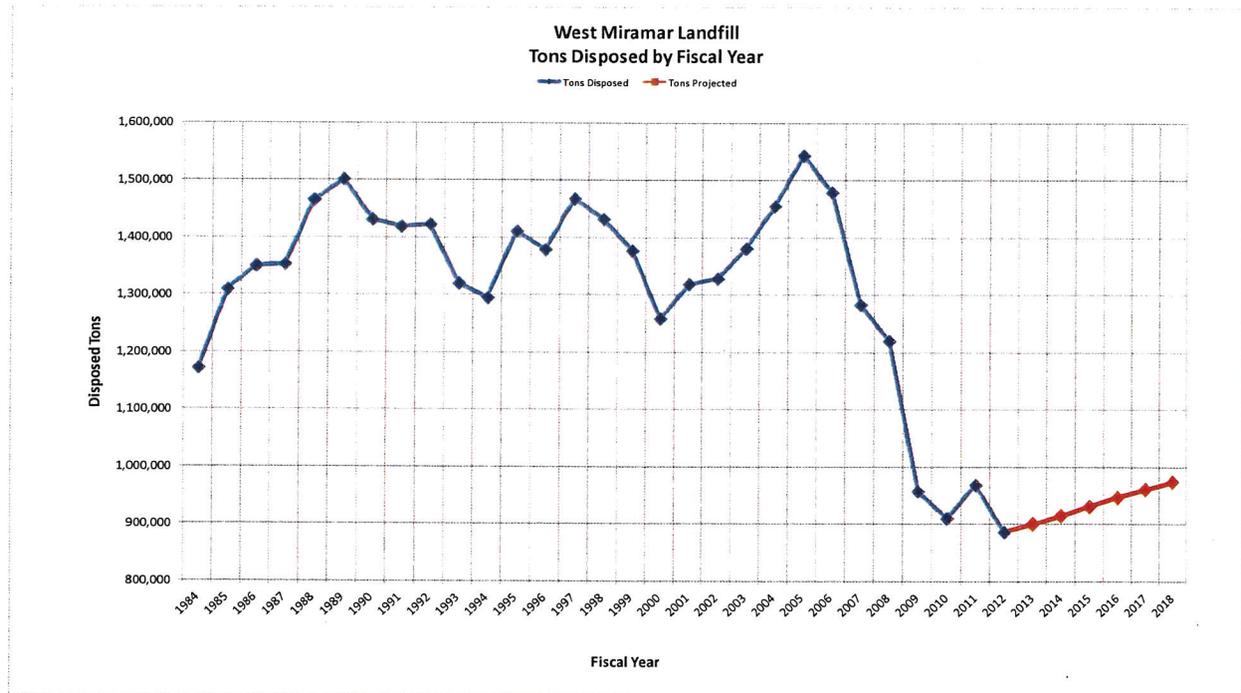
SUMMARY OF ITEM BACKGROUND:

The Environmental Services Department manages the Refuse Disposal Enterprise and Recycling Enterprise Funds. This report outlines the Five-Year Financial Outlook of the two funds, proposed program changes and required fee increases to keep the funds solvent through FY 2018. The fee increases outlined in this report affect all weighed transactions and exclude self-haul flat rate transactions that currently have a Council approved automatic annual CPI adjustment. The customers that are impacted by the proposed fee increases in the Disposal Tipping Fee (Tipping Fee) and the AB 939 Fee include the City’s General Fund, Franchised Haulers and those Miramar Landfill (Landfill) customers whose vehicle type requires a weighed transaction.

Refuse Disposal Enterprise Fund-The Refuse Disposal Enterprise Fund was established in 1989 to separate Disposal Tipping Fee revenues from the General Fund. Tipping fees support active and inactive landfill operations and are levied on landfill users, including the City of San Diego. San Diego Municipal Code §66.0129(d) provides that the Mayor shall periodically establish a schedule of refuse disposal fees for the types of vehicles that use City waste management facilities which will be ratified by resolution of the City Council. The current fee schedule was approved by the City Council in April 2009, effective July 1, 2009. The graph below outlines the history of tipping fees since FY 1999 for the Landfill’s two major customers (City Forces and Franchised Haulers which together comprise 80% of Landfill tonnage). The dashed red line illustrates what the tipping fee would be on City Forces and Franchised Haulers if an annual Consumer Price Index (CPI) inflator had been implemented beginning in FY 2000.



Currently, the Refuse Disposal Enterprise Fund has a structural budget imbalance with expenditures exceeding revenues. In FY 2012 the fund received \$26.9M in revenues while incurring \$31.2M in expenditures. The deficiency in revenue is primarily due to decreased tonnage on which the tipping fees are assessed. In FY 2012 the Miramar Landfill received and processed 886,000 tons of refuse while in FY 2011 it received 969,000 tons, a decrease of 8%. The table below illustrates tonnage brought to the Landfill since FY 1984 and projected tons from FY 2013 through FY 2018.



Due to the successful implementation of diversion efforts such as the Construction and Demolition (C&D) Ordinance, the City Recycling Ordinance (CRO), and outreach and education programs, tonnages to the Landfill are projected to remain at historically low levels.

ESD has taken internal steps to cut costs and mitigate the structural deficit. The mitigation efforts included Business Process Reengineering (BPR) in FY 2007, an evaluation of the Department’s capital projects that returned \$7M to fund balance in FY 2012, and the Landfill Managed Competition in 2012 that is expected to yield at least \$2.7M in savings annually. Additionally, ESD is planning on deferring funding to its Future Waste Processing Facility CIP beginning in FY 2014 saving \$1.75M annually until the health of the fund warrants resumed funding of the CIP.

With the mitigation efforts discussed above implemented, the Refuse Disposal Enterprise Fund would have a positive fund balance through FY 2013 and go into deficit during FY 2014. To further enhance the health of the fund and minimize fee increases, ESD is seeking approval for the following revenue enhancements:

De-appropriate Capital Improvement Program (CIP) Funding-After a review of ESD’s short-term capital improvement needs, it was determined that \$5M in CIP S01088, *Future Waste Management Disposal and Processing Facility*, could be de-appropriated in FY 2013 to cover

operational activities in FY 2014. This CIP was established to fund the eventual replacement of the Landfill upon closure; however, increased diversion efforts (C&D Ordinance, CRO, and outreach and education programs), reduced tons disposed, and the height increase approved in 2008 have pushed the estimated closure of the Landfill out to 2021. Additional efforts currently being evaluated through the Long Term Resource Management and Strategic Plan (Strategic Plan) are expected to further delay the closure of the Landfill. Once the health of the Refuse Disposal Enterprise Fund stabilizes (FY 2017/2018), ESD could once again be in a position to contribute to this CIP annually to partially fund the selected Strategic Plan configuration.

Charging Variable Market Rates for Clean Fill and Construction and Demolition Inert Non-recyclable Residue-To meet on-going regulatory driven landfill cover requirement needs, the City imports soil for cover materials and other construction functions at the landfill. There is a demand by the construction industry for convenient locations to dispose of clean fill at low cost. Until now, the City has accepted this material for free, as long as it meets specifications. This program has served the City well and saved the cost of purchasing needed materials.

A May 2012 market survey of three other large clean fill destinations in the immediate area determined that pricing ranged from \$20 to \$125 per truck load and up to \$215 for semi-end dumps with trailers. ESD currently receives up to 800 loads per week and, given the declining financial health of the Refuse Disposal Enterprise Fund, this program could be a substantial revenue source. Using an average of 100 loads per day, less periods of wet weather when the Landfill can't accept clean fill, ESD estimates receiving 25,000 loads of clean fill per year. If a fee were assessed based on the low end of the current market price range (\$20/load), the potential exists for \$500,000 in additional annual revenues. Assuming that we may at times not be able to charge the going market rate, a more conservative estimate was used of \$400,000 for inclusion in the 5-Year Financial Outlook.

ESD recommends that a fee of \$20 per 10-wheeled dump truck be implemented effective July 1, 2013 (FY 2014), and that Council delegate to the Mayor or designee the authority to adjust the fee based on the following factors:

1. The supply of clean fill matches the actual need at the Landfill ensuring there is an adequate flow of material without excess; and
2. The fee at the Landfill is consistent with the disposal fees charged for acceptance of clean fill dirt at other regional clean fill disposal sites based on a price survey conducted annually or on an as-needed basis.

As noted, there is significant value in receiving this clean fill at the precise location needed on a daily basis, and the Miramar Landfill would not want to be in a position of not being a competitive end market for the material.

In addition to clean fill, ESD believes that Construction and Demolition Inert (CDI) non recyclable residue (dirt-like material generated by Construction and Demolition recycling facilities) might be an appropriate substitute for a portion of the clean fill in some applications. ESD recommends accepting this material to meet market demands and that the initial tipping fee be set at \$20 per ton. Because of the nature of the market, ESD requests that Council delegate authority to the Mayor or designee to adjust this fee, based on the following factors:

1. The supply of CDI residue matches the actual need at the Landfill ensuring there is an adequate flow of material without excess;
2. The fee charged at the Landfill is consistent with regional market rates based on a price survey conducted annually or on an as-needed basis; and
3. The need to create new sustainable markets for CDI residue.

Adjusting Greenery Disposal Fees to Recover the Cost of Processing-The current tipping fees for incoming clean green material and clean wood scraps at the Miramar Landfill Greenery are insufficient to recover the operating costs to process the material, resulting in an annual operating deficit for this function of \$880K. Greenery tipping fees should be based on recovering the cost of the operation, with revenues received from the sale of commodities designated for equipment replacement costs. The types of feedstock received largely determine the processing costs. Food waste routes and automated green waste routes have higher contamination levels, require more expense to turn into high quality products, and are usually only fit for products that go through a final screening process, such as compost. Conversely, wood waste has little to no contamination and can be quickly turned into valuable, highly desirable wood chip products. As a result, ESD recommends the following fee adjustments to become effective July 1, 2013 (FY 2014):

| Clean Green Material* | \$/Ton | |
|--|---------|----------|
| | Current | Proposed |
| Residents | \$0 | \$0 |
| Businesses-City | \$22 | \$28 |
| Non-City | \$25 | \$28 |
| Clean Wood Scrap | | |
| Residents | \$0 | \$0 |
| Businesses-City | \$22 | \$15 |
| Non-City | \$25 | \$15 |
| Food Waste (Single Generator) | | |
| Residents | N/A | N/A |
| Businesses-City | \$22 | \$28 |
| Non-City | \$25 | \$28 |
| Food Waste (Multi-Generator) | | |
| Residents | N/A | N/A |
| Businesses-City | \$22 | \$32 |
| Non-City | \$25 | \$32 |
| Automated Green Waste (Multi-Generator) | | |
| Residents | N/A | N/A |
| Businesses-City | \$22 | \$32 |
| Non-City | \$25 | \$32 |

*Includes Christmas Trees

Market analyses completed in July of 2012 verify that the proposed rates are still below those posted gate rates of other regional landfills and transfer stations.

Assessing Tipping and AB 939 Fees on Non-Profit Tonnage-San Diego Municipal Code Section 66.0129(e) authorizes the Mayor to establish or eliminate discounts or exemptions from the payment of standard disposal and other fees for certain City waste, with Council approval. The approved fee schedule for the Miramar Landfill includes fee exemptions that apply to nine non-profit organizations including: The Alliance for African Assistance, Amvets, The ARC of San Diego, Baras Foundation, Goodwill Industries of San Diego, Salvation Army, St. Vincent de Paul, Veteran's Village of San Diego, and United Cerebral Palsy. The exemption applies only to waste that is generated within the City limits. Currently, this exemption costs the Refuse Disposal Fund \$200K annually, with 87% of this attributed to two organizations: Goodwill and Salvation Army. This exemption is not common in other jurisdictions where these entities

operate and, given the deteriorating financial condition of the Refuse Disposal Enterprise Fund, ESD proposes that the non-profit exemption be eliminated and beginning July 1, 2013 (FY 2014) the standard tipping and AB 939 fees be assessed on all non-profit organizations. Elimination of this exemption would also positively impact the Recycling Fund by \$65K annually based on FY 2012 Non-Profit Fee Exempt tonnage levels.

Recycling Enterprise Fund (AB 939 Fund)-The California Integrated Waste Management Act of 1989 (AB 939) required all cities to divert 50% of the waste disposed in landfills by 2000 and to maintain that diversion rate on an ongoing basis. AB 939 also required cities to prepare, adopt and implement an integrated waste management plan (Plan) to achieve the 50% diversion rate and authorized cities to impose fees to pay the costs of preparing, adopting, and implementing that Plan (Cal. Pub. Res. Code §§ 41000, 41500, 41730, 41750, 41901). Pursuant to AB 939 and the City's Plan, ESD has implemented a variety of recycling programs including curbside recyclables and green waste collection for single family residences, mandatory recycling ordinances, community recycling programs, the household hazardous waste program, and education and technical assistance in schools and the community to ensure the City remains in compliance with this state mandate. Failure to remain in compliance with AB 939 requirements could result in fines of up to \$10,000 per day.

In 1998, the City Council adopted SDMC §66.0134 which authorized the establishment and assessment of an AB 939 fee to cover the cost of preparing, adopting, and implementing the City's Plan. Per Council resolution, the fee was initially assessed at \$7 on each ton of solid waste generated in the City or disposed of at the Miramar Landfill (Resolution No R-290385 adopted June 29, 1998) to cover a portion of the costs of the City's Plan. The fee has been collected through the City's franchised haulers on waste they collect within City limits and on non-City waste they dispose of at the Miramar Landfill, from non-franchisees who dispose of waste at the Miramar Landfill, and on waste collected by City forces. The AB 939 fee was increased to \$10 per ton effective July 1, 2010 (Resolution No R-304849 adopted May 4, 2009) and was intended to be a short term fix of the fund's structural budget deficit until ESD could develop and present a long term financial outlook on the status of its two major enterprise funds to the City Council as discussed previously.

The Recycling Enterprise Fund also has a structural budget imbalance with budgeted expenditures exceeding budgeted revenues by \$3M for FY 2013. Current projections indicate the fund will be solvent through FY 2017 and go into deficit during FY 2018. This is due to 1) an increase in services provided including a 212% increase in the number of households provided with curbside recycling since 1997 and 2) the decrease in trash tonnage subject to the AB 939 fee.

As with the Refuse Disposal Enterprise Fund, ESD has implemented cost savings measures in the Recycling Enterprise Fund including BPR in 2007, conversion to the 4/10/5 work schedule in the Collection Services Division in FY 2010 yielding \$2.5M in annual savings, and a planned efficiency analysis (excluding Collection Services Division) for FY 2014 which could yield up to \$300K in savings annually. ESD is seeking approval for the following program enhancements in order to incentivize recycling and maintain sufficient revenues to stabilize the fund:

Applying AB939 Fee to Waste Disposed vs. Waste Collected- In an effort to maximize the life of the Landfill, reduce potential barriers to waste diversion, and support ESD's strategic plan and

recently adopted State legislation including AB 32 and AB 341, ESD proposes changing the manner by which the City's AB 939 Fee is charged to the City's non-exclusive franchise waste haulers. Currently, Resolution No R-304849 adopted May 4, 2009, applies the AB 939 fee to City origin solid waste collected by franchised haulers, and all waste disposed at the Miramar Landfill, regardless of who hauls it. ESD proposes to modify the solid waste subject to the AB 939 Fee by applying it only to waste that is disposed. Therefore, if waste is collected by a Franchise Hauler and delivered to a transfer station or mixed construction and demolition (C&D) debris processing facility, where the material is separated for recycling, only the portion of the load that would be disposed would be subject to the AB 939 Fee. This would provide additional incentive to haulers to maximize recycling. It is estimated that 80,000 tons currently subject to the AB 939 Fee would be exempted, resulting in a negative impact to the Recycling Fund of \$800K per year, based upon the current \$10/ton AB 939 Fee; however it is anticipated that changing the way this fee is applied will incentivize recycling amongst the franchised haulers, thereby decreasing the amount of waste disposed to regional landfills including Miramar. ESD recommends implementing this change effective July 1, 2013 (FY 2014).

Charging for Recycling Containers-The City does not currently charge residents for the replacement of recycling and greenery (blue or green) containers or for additional recycling containers, as it does for replacement or additional refuse (black) containers, costing the Recycling Fund approximately \$400K annually. The automated refuse container replacement fee became effective January 1, 2008 and was developed to address the General Fund's inability to fund the purchase of replacement and additional refuse containers for residents as the container inventory began to reach the end of its useful life. There are approximately 580,000 automated containers (refuse and recycling) deployed throughout the City, of which 400,000 are older than the 10-year anticipated useful life cycle. Continuing to provide replacement and additional blue and green containers without a fee will significantly contribute to the decline of the Recycling Enterprise Fund's balance if a fee similar to that for automated refuse containers is not implemented.

Currently, the fee for a replacement or additional refuse container is \$70 (or pro-rated based on age if less than 10 years old) per container and delivery is \$25; however, citizens may pick up the container at the Environmental Services Operations Station (8353 Miramar Place) to avoid the delivery charge or, alternatively, customers may purchase approved automated containers at various home improvement stores. ESD proposes imposing the same fee structure for recycling and greenery containers as the current automated refuse container fee to 1) recover the costs imposed on the Recycling Fund, and 2) create a consistent fee schedule for all automated containers, regardless of color or waste commodity. Implementing this fee structure effective July 1, 2013 (FY 2014) would provide on average an additional \$400K in revenues annually over the next five years. The proposed fee schedule for recycling containers is as follows:

| Automated Recycling Container Fee Schedule | | |
|---|---------|----------|
| | Current | Proposed |
| 1. Initial Automated Recycling/Greenery Container (new construct) | \$0.00 | \$0.00 |
| 2. All Replacement Automated Recycling/Greenery Containers | \$0.00 | \$70.00 |
| 3. Additional Recycling/Greenery Containers | \$0.00 | \$70.00 |
| 4. Container Delivery | \$25.00 | \$25.00 |

Assessing Tipping and AB 939 Fees on Non-Profit Tonnage-As stated under the same category for the Refuse Disposal Enterprise Fund, eliminating the exemption for non-profits positively impacts the Recycling Fund by approximately \$65K annually based on FY 2012 Non-Profit Fee Exempt tonnage levels.

Automatic Annual Rate Adjustment and Annual Update to the 5-year Outlook-ESD

proposes bringing forward to Council annually a 5-Year Financial Outlook for both the Refuse Disposal Enterprise Fund and Recycling Enterprise Fund similar to and in conjunction with the City's General Fund 5-Year Financial Outlook presented by Financial Management. ESD recommends adopting an automatic, annual rate adjustment to Weighed Load Disposal Fees (applied consistently like the automatic rate adjustment adopted by Council in 2007 for Flat Rate Tipping Fees) and the AB 939 Fee, based on the annual change in the CPI rounded up to the next \$1.00, to be applied each July 1 commencing July 1, 2015 (FY 2016) in accordance with the following formula:

Weighed Load Disposal Fee x Consumer Price Index Change = New Weighed Load Disposal Fee

Consumer Price Index refers to the index for all Urban Consumers, Los Angeles/Riverside/Orange County as published by the United States Department of Labor Statistics in the publication *Consumer Price Indices*. For purposes of the above formula, the CPI change will be based on the change in the CPI from February of the prior year to February of the year the adjustment is being made. For the purposes of the above formula, the CPI will be expressed as a percentage. For example, a 2% increase in the CPI from February of the prior year to February of the current year will be stated as 102%. If the CPI is no longer published, or is otherwise unavailable, then a new index or appropriate benchmark will be applied upon Council approval.

FISCAL CONSIDERATIONS:

ESD is proposing a combination of efficiencies, program adjustments and enhancements to stabilize the health of its two enterprise funds. The tables below summarize the projected fund balances of each of the two funds. The first row provides a "Do Nothing" scenario which demonstrates what the projected fund balances would be if none of the program adjustments outlined in this report are approved and when the Funds are projected to go into deficit. The second row "Adjustments with NO Fee Increase" shows what the impacts are to the fund balances with all the program adjustments discussed in this report approved and when the funds are projected to go into deficit. The third row "Adjustments with Fee Increase and/or CPI" shows what the fund balance would look like with the requested fee increases approved.

The Refuse Disposal Enterprise Fund, with all the program adjustments outlined in this report approved (De-appropriate CIP funding, charging for disposal of clean fill, adjusting greenery tipping fees, and eliminating the exemption of disposal fees for non-profits), would require a \$3.00 per ton increase for all weighed loads effective FY 2015 coupled with a CPI increase rounded up to the nearest \$1.00 (estimated at \$1.00 per ton) effective FY 2016 and FY 2017 in order to remain solvent.

Refuse Disposal Enterprise Fund - Fund Balance

| | FY 2012 ACTUAL | FY 2013 BUDGET | FY 2014 PROJECTED | FY 2015 PROJECTED | FY 2016 PROJECTED | FY 2017 PROJECTED | FY 2018 PROJECTED |
|---|-------------------|-------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| Do Nothing | 11,795,709 | 3,234,441 | (4,097,000) | (11,747,000) | (17,425,000) | (23,058,000) | (28,773,000) |
| Adjustments with NO Fee Increase | 11,795,709 | 3,234,441 | 3,485,000 | (1,380,000) | (4,266,000) | (7,100,000) | (10,010,000) |
| Adjustments with Fee Increase and/or CPI | 11,795,709 | 3,234,441 | 3,485,000 | 1,389,000 | 2,271,000 | 4,231,000 | 6,179,000 |
| Tipping Fee/CPI Increases | \$ - | \$ 3.00 | \$ 1.00 | \$ 1.00 | \$ - | \$ - | \$ - |
| General Fund Impact | - | (1,160,000) | (393,000) | (399,000) | - | - | - |

The Recycling Enterprise Fund, with all the program adjustments outlined in this report approved (Modification of the AB 939 fee to apply it to all solid waste collected in the City that is disposed, charging for recycling containers, and elimination of the AB 939 fee exemption on non-profits), would require no initial per ton fee increase but would require a CPI increase rounded up to the nearest \$1.00 (estimated at \$1.00 per ton) effective FY 2016 in order to remain solvent. It is expected that, during this five-year time frame, the Recycling Fund will achieve some savings as a result of the Collection Services Managed Competition correcting the downward projection in the fund balance.

Recycling Enterprise Fund - Fund Balance

| | FY 2012 ACTUAL | FY 2013 PROJECTED | FY 2014 PROJECTED | FY 2015 PROJECTED | FY 2016 PROJECTED | FY 2017 PROJECTED | FY 2018 PROJECTED |
|---|-------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| Do Nothing | 14,799,738 | 11,346,967 | 8,440,000 | 5,602,000 | 3,295,000 | 1,034,000 | (1,216,000) |
| Adjustments with NO Fee Increase | 14,799,738 | 11,346,967 | 8,104,000 | 5,050,000 | 2,595,000 | 303,000 | (1,846,000) |
| Adjustments with Fee Increase and/or CPI | 14,799,738 | 11,346,967 | 8,104,000 | 5,050,000 | 3,850,000 | 2,829,000 | 1,968,000 |
| AB 939 Increases | \$ - | \$ - | \$ 1.00 | \$ - | \$ - | \$ - | \$ - |
| General Fund Impact | - | - | (380,000) | - | - | - | - |

The package presented stabilizes the health of ESD's Refuse Disposal and Recycling Enterprise funds through 2018 and provides for minimal impacts to the General Fund. Further delaying required fee increases or not adopting the proposed program changes outlined in this report results in additional per ton tipping and AB 939 fees and increases the impact to the General Fund in future years.

EQUAL OPPORTUNITY CONTRACTING INFORMATION (if applicable)

N/A

PREVIOUS COUNCIL and/or COMMITTEE ACTIONS:

- 1) Report Presented to NR&C on March 25, 2009, Item 5b
- 2) Manager's Report No. 07-170, October 19, 2007
- 3) Manager's Report No. 03-067, April 24, 2003
- 4) Manager's Report No. 02-141, June 12, 2002

COMMUNITY PARTICIPATION AND OUTREACH EFFORTS:

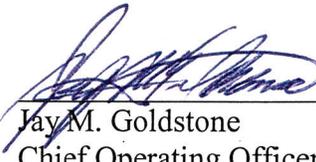
Notice of the proposed fee increases was given and discussed at the Refuse Franchise Hauler Meetings on June 28, 2012 and August 29, 2012 and will be mailed to appropriate stakeholders at least 14 days in advance of the City Council Hearing. Notice of the proposed fee increases including date, time, and location of the City Council hearing on the matter will be published in the City's official newspaper at least 10 days in advance of the hearing. Notices of the changes to the Miramar Landfill Fee Schedule and Regulations will be distributed to all applicable customers and stakeholders. Information regarding all changes will also be available on the Environmental Services Department's web page.

KEY STAKEHOLDERS AND PROJECTED IMPACTS

The key stakeholders associated with this item include City and Non-City Residents and Businesses; Franchised Haulers; and General, Refuse Disposal and Recycling Enterprise Funds.



Chris Gonaver, Director
Originating Department



Jay M. Goldstone
Chief Operating Officer

Attachments(s): Proposition 26 Analysis of Proposed Adjustments to Various Existing Fees and Establishment of New Fees Charged by the Environmental Services Department

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: September 7, 2012

TO: Chris Gonaver, Environmental Services Department Director

FROM: City Attorney

SUBJECT: Proposition 26 Analysis of Proposed Adjustments to Various Existing Fees and Establishment of New Fees Charged by the Environmental Services Department

INTRODUCTION

The Environmental Services Department (ESD) is proposing increasing certain fees, establishing some new fees, and eliminating certain fee exemptions associated with Miramar Landfill (Landfill) operations and City residential refuse collection operations. These proposals are aimed at more fully recovering the costs of City services and the use of City property. Our Office has been asked to analyze the Proposition 26 (Prop 26) implications of these proposals.

QUESTIONS PRESENTED

1. Would increasing, or adding a CPI escalator to, "Weighed Load" disposal fees trigger Prop 26?
2. Would adjusting "Clean Green/Clean Wood" disposal fees up and/or down trigger Prop 26?
3. Would establishing a fee for depositing clean fill dirt at Miramar Landfill trigger Prop 26?
4. Would eliminating the exemption from all Landfill fees for waste delivered by nonprofit organizations to Miramar Landfill for disposal trigger Prop 26?
5. Would establishing a fee for the use of City-owned recycling and greenery waste containers and associated services trigger Prop 26?

SHORT ANSWERS

1. It is likely that “Weighed Load” disposal fees, including the application of a Consumer Price Index (CPI) inflator, are either outside the scope of Prop 26’s definition of a “tax,” because they are not “imposed” by local government, or fall within one or more exceptions to the definition of a “tax.” While Prop 26 probably would not limit these fees to cost-recovery amounts, the People’s Ordinance still operates to restrict disposal fees on non-residential refuse to the full ascertainable cost of disposal. SDMC § 66.0127(c)(4). Thus, any increase in disposal fees, including applying a CPI escalator, would need to bear that restriction in mind.

2. Likewise, fees charged at the Landfill for acceptance of clean green wastes and clean wood scraps are probably not restricted by Prop 26 for the reasons set forth above. Because these wastes are not “disposed,” it is arguable these fees are not limited by the cost-recovery restrictions in the People’s Ordinance either.

3. Charging market rate based fees for the acceptance of clean fill dirt at the Landfill would not run afoul of Prop 26 or the People’s Ordinance for the same reasons stated in answer no. 2 above.

4. Eliminating the disposal fee and AB 939 recycling fee exemptions for nonprofit organizations that dispose of waste to the Landfill probably does not trigger Prop 26 for the reasons stated in answer no.1 above. However, nonprofit charitable organizations meeting certain criteria are not subject to the Refuse Collector Business Tax.

5. It is likely that fees for the use of City containers and associated container services are either outside the scope of Prop 26’s definition of a “tax,” because they are not “imposed” by local government, or fall within one or more exceptions to the definition of a “tax.” If approved containers are readily available from the private sector, they are probably not “imposed,” in which case the fees would not be limited to cost-recovery. If they are not readily available elsewhere, then they might be “imposed.” But, so long as the fees do not exceed the reasonable costs to the City of providing the containers and associated services, the fees are probably not taxes under Prop 26.

ANALYSIS

I. FEES CHARGED TO CUSTOMERS AT THE MIRAMAR LANDFILL

Given that the first four questions presented all relate to fees charged to customers of the Miramar Landfill, we begin with a brief overview of those fees. The City owns and operates the Miramar Landfill under a 50-year lease with the Department of the Navy. The Landfill provides capacity and associated services for the disposal, recycling, and/or processing of solid waste delivered by residents, businesses and the military both from within and outside of the City. The City charges a variety of fees to customers who deliver waste to the Landfill for disposal, recycling, or processing. Disposal fees are fees charged to accept and bury solid waste at the Landfill. In addition to disposal fees, the City also charges fees on green wastes accepted for

processing, special handling fees for hard to handle wastes, administrative fees for special customer support, and fees for greenery commodities produced at the Landfill, such as wood chips, mulch, and compost.

Landfill fees are charged pursuant to San Diego Municipal Code (SDMC) section 66.0129, as limited by section 66.0127(c)(4) of the People's Ordinance, and in accordance with the Fee Schedule and Regulations for the Miramar Landfill (Landfill Fee Schedule) adopted periodically by City Council resolution. SDMC § 66.0129(d). Disposal fees are based on the actual weight of waste delivered to the Landfill for disposal (Weighed Load Disposal Fees), except for waste delivered in passenger vehicles and the like, which are charged flat rates based on the measured average net tonnage for each class of vehicle. Weighed Load Disposal Fees were last increased in July 2009 and, unlike other Landfill fees, are not currently subject to a periodic, automatic adjustment based on changes in the Consumer Price Index. The Landfill Fee Schedule also provides for certain exemptions and discounts from fees, such as discounts for clean green wastes, yard wastes and wood scraps, and exemptions for waste generated in the City by nonprofit charitable organizations. Like the establishment of fees, exemptions and discounts also are subject to City Council authorization. SDMC § 66.0129(d), (e).

II. PROPOSITION 26

Prop 26 was adopted by the voters in November 2010. As of the date of this memorandum, there is only one published appellate court case interpreting Prop 26, and it provides little guidance regarding the proposed fees. However, Prop 26 is a constitutional amendment which expands the revenue-raising restrictions placed on state and local governments by the constitutional amendments adopted by Propositions 13, 62, and 218. Cases interpreting those propositions and the state statutes implementing them¹ are instructive in analyzing Prop 26.

Since the enactment of Proposition 218, all "taxes" imposed by local government are either general taxes or special taxes. Cal. Const. art. XIII C, § 2(a). Special taxes are taxes imposed for a specific purpose, as distinguished from general taxes which are imposed for general governmental purposes. Cal. Const. art. XIII C, § 1(a), (d). Given that the various fees under consideration here are assessed for specific purposes and are not to be used for general governmental purposes, each would be analyzed as a special tax.

Local governments may not "impose, extend, or increase" any special tax without a two-thirds vote of the electorate. Cal. Const. art. XIII C, § 2(d). Prop 26 added a broad definition of "tax" to the State Constitution. *Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982, 995-996 (2012). A tax is "any levy, charge, or exaction of any kind *imposed* by a local government," unless it falls within one of the following seven exceptions:

¹ Proposition 218 Omnibus Implementation Act, Gov't Code §§ 53750, *et seq.*

- (1) A fee² for a benefit or privilege provided directly to the fee payer that is not provided to those not charged and that does not exceed the reasonable cost of providing the benefit or privilege;
- (2) A fee for a service or product provided directly to the fee payer that is not provided to those not charged and that does not exceed the reasonable cost of providing the service or product;
- (3) A fee for reasonable regulatory costs for issuing licenses and permits, performing investigations, inspections, audits, and administrative enforcement and adjudication;
- (4) A fee for entrance to or use of government property or the purchase, rental, or lease of property;
- (5) A fine or penalty imposed by the judiciary for a violation of law;
- (6) A charge imposed as a condition of property development; and
- (7) Assessments and property-related fees imposed pursuant to proposition 218.

Cal. Const. art. XIII C § 1(e)(emphasis added).

Under Prop 26, the City bears the burden of proving that the fee is not a “tax,” that the amount charged is no more than necessary to cover reasonable costs, and that the allocation of those costs among fee payers bears a fair or reasonable relationship to the fee payer’s burdens on, or benefits received from, the local government activity.³ *Id.*

² For purposes of this memo, “fee” is used to describe all manner of levies, charges or fees.

³ A reasonable relationship is shown where a fee is designed to distribute the financial burden of the system in proportion to the contribution of each user to the problem. *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 284 (1993). But, “[t]he question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.” *California Farm Bureau Federation v. State Water Resources Control Board*, 51 Cal. 4th 421, 438 (2011); *Griffith*, 207 Cal. App. 4th at 997. In determining the existence of a reasonable relationship, the courts have recognized that different classes of users may contribute more or less to the problem or impact the system in different ways. *SDG&E v. San Diego Air Pollution Control District*, 203 Cal. App. 3d 1132, 1146-47 (1988). Hence different fees may be appropriate for different classes of users. Mathematical precision is not required in allocating costs, and the allocation method chosen need not be the best method, but it must reflect a fair or reasonable basis for distributing costs among the users. What is fair or reasonable may include consideration of the overall goals and purposes of the public agency in operating the system. *Id.* at 1147-48; *Griffith*, 207 Cal. App. 4th at 997. So long as fees restricted by cost-recovery rules follow these guidelines and revenues, including any surpluses which may accrue, are not used for general governmental purposes, the fee would not constitute a tax. *California Farm Bureau Federation*, 51 Cal. 4th at 438; *Griffith*, 207 Cal. App. 4th at 997.

The first three exceptions are limited to cost-recovery fees. Other exceptions, such as (4) above, do not contain language limiting the fee to cost recovery. Based on the rules of statutory interpretation and the fact that entrance to or use of government property is typically voluntary, we believe it is reasonable to conclude that Prop 26 is not intended to limit fees under exception (4) to cost recovery. City Att’y MOL No. 2011-3, p. 9 (Mar. 4, 2011); *Valley Vista Services, Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 888-89 (2004) (“If the language of a statute is clear, we should not add to or alter it to accomplish a purpose which does not appear on the face of the statute or from its legislative history.”).

We also believe that Prop 26 does not apply retroactively to existing local fees and charges. See Proposition 26 § 1 Findings and Declaration of Purpose; *Strauss v. Horton*, 46 Cal. 4th 364, 470 (2009); Ballot Pamphlet, General Elec. (Nov. 2, 2010) Legislative Analyst’s Analysis pp. 58-59; City Att’y MOL No. 2011-3, p. 1 (Mar. 4, 2011). Thus, absent an adjustment, a pre-existing fee would not be impacted by Prop 26.

Considering that a fee must be “imposed” in order to constitute a tax under Prop 26, it is useful to examine the meaning of that term first. In a previous memo, we explained that “impose” implies “an exertion of force by government action,” such as a tax levied by local ordinance.⁴ In contrast, it is arguable that a charge incurred voluntarily as part of a negotiated agreement with a public agency or for the voluntary use of a government service readily available from the private sector would not be imposed so long as the payment is meaningfully voluntary. City Att’y MOL 2011-3, p. 2 (Mar. 4, 2011); see also League of California Cities Proposition 26 Implementation Guide April 2011, p. 22. For example,

Where a private market co-exists with the provision of the same services by local government, it is arguable that charges for the services provided by local government are not “imposed.” Although these charges may be established by the governing body of the local agency, the services are not provided pursuant to a statutory obligation. In these circumstances, if they are provided in competition with the same or similar services provided by others, and if the recipients of the service have a choice to receive the service or not, then rate-payers are protected from excessive rates by market forces, or their own power to meet their needs in other ways.

League of California Cities Proposition 26 Implementation Guide, April 2011, p. 22.

⁴ A tax is a monetary charge “imposed upon individuals who will enjoy no peculiar benefit from its expenditure and who are not responsible for the condition to be corrected.” *Dublin*, 14 Cal. App. 4th at 281.

III. INCREASING “WEIGHED LOAD” DISPOSAL FEES AND ADDING A CPI ESCALATOR

Fees charged for disposal of solid waste at the Landfill arguably are not a tax because they are not “imposed.” The Landfill is one of two landfills within City limits and one of four landfills within the County of San Diego (County) which are open to the public for the disposal of solid waste. All these other landfills, as well as a number of transfer stations within the County which also accept solid waste from the public for disposal, are privately owned and operated. Further, the City is not required either by State law or its Charter to own or operate a municipal landfill. *See* Cal. Pub. Res. Code §§ 40059(a), 49300, 49400. Therefore, the City is under no statutory obligation to provide landfill services, these services are provided in competition with private sector landfill services and transfer station services available to the public, and customers have the choice to use the Landfill or not. Thus, it is arguable that fees charged to Landfill customers for the disposal of solid waste are not “imposed” and do not fall within the scope of Prop 26.

Even if disposal fees charged at the Landfill are deemed “imposed” so as to bring them within Prop 26, a credible argument can be made that such fees fall within the 4th exception. That exemption applies to a fee for entrance to or use of government property. It goes without saying that customers who dispose of their waste at the City’s Landfill are using government property, since disposed waste is permanently buried. Note that Prop 26 does not limit fees for use of government property to the recovery of reasonable costs.⁵

In addition, disposal fees charged to Landfill users might fall within Prop 26 exception number (2). That exemption applies to (i) a fee for a service or product provided directly to the fee payer (ii) that is not provided to those not charged and (iii) that does not exceed the reasonable cost of providing the service or product. Part (i) is satisfied because disposal services are provided directly to Landfill users who choose to dispose of their solid waste at the Landfill. As to part (ii), some disposal services are provided to certain Landfill customers who do not pay disposal fees,⁶ primarily nonprofit charitable organizations and community clean-up groups granted fee exemptions by the City Manager (Mayor) under SDMC section 66.0129(e). The annual waste tonnage delivered by these non-paying customers is negligible, having averaged about 8,000 tons per year out of the total average waste disposed of about 1,000,000 tons per year for the five fiscal years from FY06 - FY11. As long as these subsidies are not funded from higher fees charged to other customers (aside from the General Fund), we believe part (ii) could be satisfied. *See* League of California Cities Proposition 26 Implementation Guide, April 2011, pp. 15-16. Finally, part (iii)

⁵ Even though Prop 26 may not limit disposal fees at the Landfill to cost recovery, the People’s Ordinance does. It provides that fees for the “disposal of Nonresidential Refuse shall not exceed the full ascertainable cost to the City for such disposal. SDMC § 66.0127(c)(4). Nonresidential Refuse is all privately generated refuse other than residential refuse collected under the People’s Ordinance. SDMC § 66.0127(a)(3). Were it not for the cost recovery restrictions in the People’s Ordinance, a credible argument could be made that Landfill disposal fees could be set at market rates under Prop 26. *See* League of California Cities Proposition 26 Implementation Guide, April 2011, p. 22.

⁶ Note that non-paying customers do not include the Navy because, although eligible Navy waste receives free disposal, the disposal fee waiver is in lieu of rent payments under the Landfill Lease.

requires a showing of the estimated costs of service⁷ and that the allocation of those costs among fee payers bears a fair or reasonable relationship to the payer's burdens on, or benefits from, the service activity.⁸ *California Farm Bureau Federation v. State Water Resources Control Board*, 51 Cal. 4th 421, 438 (2011); *Griffith*, 207 Cal. App. 4th at 996. So long as disposal fees are structured accordingly, part (iii) would be satisfied.

Finally, Prop 26 does not expressly address scheduled fee adjustments made to account for inflation, such as by the application of a formula based on changes in the CPI. However, the statutes implementing Proposition 218, which are useful in interpreting Prop 26, do not prohibit the use of scheduled fee escalators. *See* Cal. Gov't Code § 53750(h). Because Landfill disposal fees are most likely outside the scope of Prop 26, i.e., they are not "imposed," or fit within exception (4), i.e., use of government property, the application of a CPI escalator probably would not run afoul of Prop 26.

In sum, Landfill disposal fees probably are not restricted by Prop 26. Nevertheless, the People's Ordinance still operates to limit disposal fees on non-residential refuse to the full ascertainable cost of disposal. SDMC § 66.0127(c)(4). Thus, any increase in disposal fees, including the application of a CPI escalator, would need to bear that restriction in mind.

IV. MAKING UPWARD OR DOWNWARD ADJUSTMENTS TO "CLEAN GREEN/CLEAN WOOD" FEES CHARGED AT MIRAMAR LANDFILL

Fees are also charged on clean green materials/yard wastes and clean wood scrap wastes separated from trash that is destined for disposal ("Clean Greens"). Clean Greens qualify for discounted rates in order to encourage the separation of these wastes from trash so they can be recycled into products such as mulch, wood chips, and compost and then sold for re-use. *See* Fee Schedule and Regulations for the Miramar Landfill section II.G.

Revenues from Clean Greens fees historically have been significantly less than the costs of recycling these wastes into usable products. Plus, even though the same fee is charged for all clean green wastes and clean wood scraps, wood scraps are less costly to process. Proposed upward and downward adjustments to these fees would more accurately reflect processing costs and more fully recover those costs.

The analysis applicable to Landfill disposal fees discussed above is equally applicable to these proposed fee adjustments. In other words, increases and decreases in these fees likely are not restricted by Prop 26 for the reasons set forth in section III above⁹ and, because these wastes are not "disposed," it is arguable they are not limited by the cost-recovery restrictions in the People's Ordinance either.

⁷ The estimated costs of service include not only all the direct costs, but also all the indirect costs of providing the service. *United Business Com. v. City of San Diego*, 91 Cal. App. 3d 156, 165-66 (1979).

⁸ See footnote no. 3 for a discussion of the reasonable relationship standard.

⁹ Note that the second exception to Prop 26 is probably less likely to be applicable to fees for clean greens and clean wood because City residents are not charged any fees to deliver these wastes to the Landfill.

V. ESTABLISHING A NEW FEE FOR ACCEPTANCE OF CLEAN FILL DIRT AT THE LANDFILL

The Landfill requires clean fill dirt for use as daily cover and for resurfacing of the tipping decks. Not all the clean fill dirt needed is available from Landfill operations. Thus, the City accepts clean fill dirt, which meets the City's requirements, on an as-needed basis from private construction sites with excess fill. Currently, the City does not charge to accept clean fill. SDMC § 66.0129(e)(2)(C); *see* Fee Schedule and Regulations for the Miramar Landfill section II.G. At least five private companies within the County of San Diego (County) also accept clean fill dirt. They all charge to accept it, with fees ranging from around \$3 per ton to around \$19 per ton.¹⁰

The analysis applicable to Landfill disposal fees, set forth in section III above, is equally applicable to fees for acceptance of clean fill dirt at the Landfill. In other words, it is arguable these fees would be outside the scope of Prop 26 on the ground they are not "imposed" because the City has no obligation to take clean fill dirt at the Landfill, accepts it only on an as-needed and if-suitable basis, and customers can choose among several private sector operations in the County which accept clean fill dirt. Even if deemed "imposed," these fees probably would fall within the 4th exception to a tax under Prop 26 because they would be fees for use of government property. That exception does not include a cost-recovery limitation to the amount of the fees.¹¹

Further, it is arguable clean fill dirt fees would not be limited by the cost-recovery restrictions in the People's Ordinance. The People's Ordinance provides that fees "for disposal of Nonresidential Refuse shall not exceed the full ascertainable cost to the City for such disposal." SDMC § 66.0127(c)(4). Nonresidential Refuse is all refuse that is not residential refuse collected under the People's Ordinance. SDMC § 66.0127(a)(3). Refuse is:

[A]ny mixture of putrescible and nonputrescible solid and semi-solid wastes, including garbage, trash, residential refuse as defined herein and in Section 66.0127 of this Code, industrial and commercial solid and semi-solid wastes, vegetable or animal solid and semi-solid wastes, and other solid and semi-solid wastes destined for disposal sites.

SDMC § 66.0102. Clean fill dirt is defined as "clean earthen material" and "clean, sandy/clayey soils" which do not contain large rocks, concrete, asphalt, shot rock, organic debris, trash, or other specified contaminants such as VOCs, pesticides, and PCBs. Clean fill dirt is simply clean soil. So, it does not appear to fall within the definition of "refuse" under the People's Ordinance.

In sum, charging market rate based fees for the acceptance of clean fill dirt at the Landfill would likely not run afoul of Prop 26 or the People's Ordinance.

¹⁰ Data supplied by ESD staff via email dated August 8, 2012.

¹¹ Clean fill fees conceivably could fall within the 2nd exception for a fee for service, which is limited to cost-recovery. But, since clean fill is sometimes accepted for free and ESD may want flexibility to charge nothing if the Landfill is in need of clean fill, we would not recommend relying on the 2nd exception. Nor do we believe it would be necessary, given the first two bases upon which these fees could be justified as true fees and not taxes.

VI. ELIMINATING THE FEE EXEMPTION FOR NONPROFIT ORGANIZATIONS

Pursuant to SDMC section 66.0129(e)(2) and the Landfill Fee Schedule, nonprofit organizations engaged in recycling or resource recovery operations that significantly reduce waste disposed at the Landfill are exempt from payment of Landfill fees (disposal or processing fees, AB 939 recycling fees, and the Refuse Collector Business Tax) on solid waste, generated from their operations within the City, that they dispose of at the Landfill. Presently, twelve such organizations are approved for fee exemptions.¹²

The elimination of this subsidy would increase the fees paid by these nonprofits from \$0 per ton to the aggregate of (i) the applicable disposal or processing fee and any special handling or administrative fees, and (ii) the AB 939 recycling fee, plus if applicable, (iii) the \$8 per ton Refuse Collector Business Tax (RCBT) imposed pursuant to SDMC section 31.0306.

We believe the analysis in section III above on increases to Weighed Load disposal fees is equally applicable to the elimination of the disposal/processing fee subsidy (including any special handling or administrative fees) and the elimination of the AB 939 fee subsidy. Eliminating those subsidies essentially operates as a fee increase to the nonprofit organizations. However, the subsidy elimination for those fees is most likely outside the scope of Prop 26 because the fees are not “imposed,” i.e., nonprofits can avoid the fees by taking their waste to private facilities in the City or County. Alternatively, the subsidy elimination fits within at least one exception to the definition of a tax, e.g., use of government property.

However, ESD may not begin charging nonprofit charitable organizations the RCBT. Pursuant to SDMC section 31.0201, no business tax may be levied on any charitable organization which is organized and conducted exclusively for charitable purposes and not for private gain or profit. SDMC § 31.0201(a). The RCBT is a business tax. SDMC §§ 31.0301(c); 31.0306(b), (e), (g). So, organizations that satisfy the above criteria would remain exempt from the RCBT, even if the exemption from disposal/processing fees and AB 939 recycling fees were eliminated.

VII. ESTABLISHING NEW FEES FOR CITY RECYCLING AND GREENERY CONTAINERS AND ASSOCIATED SERVICES

Effective January 1, 2008, the City established a cost recovery, user fee for City-owned replacement trash containers (black bins). The City purchases trash, recycling, and greenery containers from a private vendor under a long-term contract, which are made available for use by City refuse collection customers. City-provided containers remain City property. The City provides the first black bin at no charge to each newly constructed residential unit eligible for City refuse collection services. Thereafter, customers are responsible for providing additional

¹² Data supplied by ESD.

and replacement trash containers at their own expense. Customers have the option to obtain trash containers from the City or from other sources, such as home improvement stores, so long as the container is one of the City-approved models.¹³ Only customers who choose to obtain additional or replacement trash containers from the City are charged the fee.¹⁴

In contrast, the City provides multiple recycling containers (blue bins) all at no charge to customers and one greenery container (green bin) at no charge to those customers who receive greenery collection services on (pilot) automated yard waste collection routes. A new fee for recycling and greenery containers to match the fee for trash containers would likely fall outside the scope of Prop 26.

As we explained in prior opinions, the City is not obligated to furnish automated containers to its customers for storage of their refuse pending collection.¹⁵ So, provided that approved recycling and greenery containers are readily available from private sector sources, it is arguable that the proposed fees for recycling and greenery containers are not “imposed” under Prop 26 and thus are outside its scope altogether because customers can acquire approved containers elsewhere and not pay the fee.

Even if these fees are deemed imposed, they probably fall within exception (2) to Prop 26. That exception excludes from the definition of tax a fee for a service or product provided directly to the fee payer that is not provided to those not charged and that does not exceed the reasonable cost of providing the service or product. Cal. Const. Art. XIII C § 1(e)(2). Replacement and additional recycling and greenery containers would not be provided to those not charged. Thus, so long as the container fee does not exceed the reasonable costs to the City of providing the containers, those fees are likely not taxes under Prop 26.

CONCLUSION

Fees charged for disposal of solid waste, for processing of clean green wastes and wood wastes, and for acceptance of clean fill dirt at the Miramar Landfill are probably outside the scope of Prop 26 because those fees arguably are not “imposed” by local government. The City has no statutory obligation to operate a landfill and customers have readily available private sector alternatives to dispose of their trash. In other words, customers can choose to use the Landfill and pay the City fees or use any of a number of alternative options and avoid the fees.

Even if these fees are deemed “imposed,” a credible argument can be made that they fall within one or more of the exceptions to the definition of a tax. For example, these fees arguably all constitute fees for the use of government property, which are expressly not taxes under Prop 26.

¹³ San Diego Resolution No. 303202 (Dec. 5, 2007); Waste Management Regulation No. ESD-001 Revised effective Jan. 1, 2008.

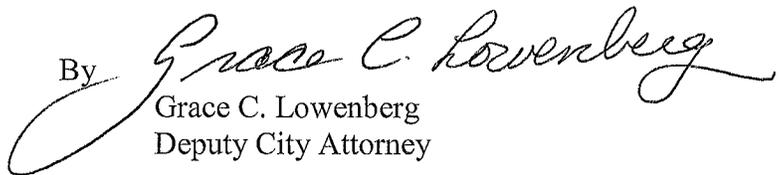
¹⁴ The City also provides delivery services upon request and non-warranty container repair services to customers who obtain containers from the City, for which it charges cost-recovery fees as well.

¹⁵ City Att’y MOL No. 2007-17 (Oct. 16, 2007) p.2; City Att’y Report 2005-13 (June 13, 2005) p. 5.

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As another example, these fees arguably are fees for government services. Although characterization solely as a fee for service would limit all the fees to cost recovery, the other characterizations above would not. Regardless, fees for *disposal* of non-residential refuse are limited by the People's Ordinance to the full ascertainable cost of disposal. Likewise, based on the same rationale, fees for the use of City automated containers are probably not taxes under Prop 26.

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