

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 17-4834 FOR THE PURPOSE OF AUTHORIZING THE CHIEF OPERATING OFFICER TO ISSUE A NEW NON-SYSTEM LICENSE TO ALBERTSONS COMPANIES LLC FOR TRANSPORT OF COMMERCIAL FOOD WASTE FOR PROCESSING AT THE DIVERT, INC. FACILITY LOCATED IN ALBANY, OREGON

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Approval of Resolution No. 17-4834 will authorize the Chief Operating Officer (COO) to issue a new non-system license (NSL), similar to the proposed license attached to this resolution as Exhibit A, to Albertsons Companies LLC. (Albertsons) to transport commercial food waste for processing at the Divert, Inc. (Divert) facility located in Albany, Oregon. The proposed NSL becomes effective October 30, 2017, and expires on June 30, 2019. This is one of two similar NSLs that Metro Council will consider at its meeting on October 26, 2017.¹

Background

Divert accepts packaged and unpackaged food waste from grocery stores for the purpose of performing data analysis on product waste, referred to as “shrink” in the grocery industry. The analysis is to help stores in identifying more effective inventory management practices. Divert uses camera equipment and data analysis software to analyze the components of the grocery store waste that it receives. Divert then mechanically processes the waste into a liquid slurry which is transported to an anaerobic digestion facility to produce biogas, such as JC Biomethane in Junction City and Stahlbush Island Farms near Corvallis. Divert reports that its residual waste is approximately 25 percent by weight of the incoming material and is comprised of packaging pieces, fibrous materials, and other residual solids. The residual waste is generally transported to Riverbend and Coffin Butte Landfills for disposal.

Albertsons is the waste generator in this instance, therefore Albertsons must apply for and obtain a Metro NSL to transport waste to Divert. The primary purposes of an NSL are to ensure that waste leaving the region is properly managed and tracked, and that the required regional system fees and excise taxes are remitted to Metro.

Dayton Facility

In February 2017, Metro learned that Albertsons and Safeway² grocery stores in the region were transporting unsold, packaged food products to Divert’s processing facility located in Dayton, Oregon (Yamhill County) without Metro authorization. At the time that Albertsons was transporting waste to Divert’s Dayton facility, the facility was operating without the required land use approval from Yamhill County, and without a solid waste permit from the Oregon Department of Environmental Quality (DEQ). Metro subsequently notified Albertsons that it must apply for and obtain a Metro non-system license to transport food waste outside of the region. Albertsons initially submitted an NSL application to Metro to transport food waste to the Dayton facility, however it later withdrew that application as explained below.

¹ Resolution No. 17-4835 for Fred Meyer to transport food waste to Divert

² Safeway merged with Albertsons in 2014 and Safeway is now a subsidiary of Albertsons. References to “Albertsons” includes Safeway stores.

In March 2017, DEQ issued a Warning Letter with Opportunity to Correct³ to Divert which required it to submit an application for a permit for the Dayton facility. DEQ allowed Divert to continue operating at the Dayton site during the permitting process. In July 2017, Yamhill County denied land use⁴ for the Dayton facility and subsequently DEQ did not approve a solid waste permit for the facility. The County determined that the food waste processing activity did not comply with the zoning designation for the site. Divert appealed the County's decision, which is still pending as of the date of this report.

Albany Facility

In July, Divert acquired a new property located at 950 SE Jackson Street in Albany, Oregon, to perform the same function as its Dayton facility. Since that time, Divert has received land use approval from the city of Albany⁵ and obtained a DEQ solid waste permit⁶ to operate the Albany facility. Divert has relocated its operations entirely from the Dayton facility to the Albany facility.

A narrative and timeline of Albertsons' applications to Metro are described later in this staff report under "The Applicant." Divert participated in an informational meeting with Metro staff on April 5, 2017 and hosted Metro and DEQ staff for an informational tour of the Dayton site on May 16, 2017.

If Council adopts Resolution No. 17-4834, it would authorize the COO to issue a new NSL to Albertsons to transport up to 5,000 tons per calendar year of Metro-area commercial food waste to Divert's Albany facility.

The Applicant

Albertsons stores located in the Metro region consolidate all of their unsold products, primarily food waste, at a central distribution center located at 17505 NE San Rafael Street in Portland, Oregon. In 2016, Albertsons began transporting its consolidated food waste to Divert's Dayton facility for data analysis, processing and disposal. In January 2017, Divert became the primary processing facility for food waste generated at these grocery stores. Divert is not a Metro designated solid waste facility and Albertsons had not obtained the required NSL to transport this waste to Divert.

On April 19, 2017, Metro issued a Noncompliance Advisory Letter⁷ to Albertsons explaining that it must cease transporting waste to Divert until such time as it had applied for and obtained an NSL. Subsequently, Albertsons submitted an NSL application on July 13, 2017, seeking authorization to transport waste to the Dayton facility. On July 18, Metro notified Albertsons that the Dayton facility could not obtain the required local and state authorizations because Yamhill County had denied its land use and had not obtained a DEQ permit. Given that Divert had not obtained the required authorizations, Metro staff notified Albertsons that it would recommend denial of its Dayton NSL application as submitted. Albertsons subsequently withdrew that application and instead submitted a new application to transport food waste to Divert's Albany facility.

Albertsons submitted a complete NSL application to Metro to transport food waste to Divert's Albany facility on July 26, 2017. In the application, Albertsons stated that food waste was currently being transported to Divert in Dayton for disposal. Metro staff contacted Albertsons to verify this information

³ 2017-WLOTC-2290

⁴ Yamhill County Department of Planning and Development Docket No. SU-01-17/SDR-13-17

⁵ City of Albany Land Use Compatibility Statement, signed on July 13, 2017

⁶ DEQ Solid Waste Disposal Site/Material Recovery Facility Permit No. 1594, issued on September 12, 2017

⁷ Noncompliance Advisory Letter No. NAL-402-17

given that Metro had previously notified Albertsons via the Noncompliance Advisory Letter in April that it must cease sending waste to Divert until such time as it had obtained Metro authorization to do so. Albertsons confirmed that it had continued sending waste to Divert in Dayton because it understood that applying for the NSL was a sufficient good faith effort. In an email dated August 11, Metro staff again notified Albertsons that Divert is not a designated facility of Metro's solid waste system and it is a violation of Metro Code to transport waste to that facility without obtaining an NSL. On August 15, Albertsons notified Metro via email that it had ceased further transport of Metro-area waste to Divert.

Analysis & Information

1. Known Opposition

There is no known opposition to the issuance of an NSL authorizing the delivery of waste to Divert in Albany. However, several local government solid waste directors have expressed some concern about the implications of Metro granting a short-term authorization that would allow the region's food waste stream to go to facilities like Divert when Metro is considering implementing long-term food waste policies, including establishing a nearby food waste processing facility. A more detailed discussion of these concerns is provided below in subsection 7 of the "Legal Antecedents."

2. Legal Antecedents

Metro Code Section 5.05.040 prohibits any person from utilizing a non-system facility without an appropriate license from Metro. Additionally, Metro Code Section 5.05.140 provides that, when determining whether or not to approve an NSL application, the Metro Council will consider the following factors to the extent relevant to such determination.

- (1) *The degree to which prior users of the non-system facility and waste types accepted at the non-system facility are known and the degree to which such wastes pose a future risk of environmental contamination;*

The proposed NSL authorizes the transport of food waste to Divert, a food waste processing facility located in Albany. The environmental risk from the use of this facility is presumed to be minimal because it is fully regulated and monitored by the appropriate local and state authorities. It has been Metro's practice to rely on the local land use authority and the state environmental agency to determine whether environmental or human health risks posed are known, reasonable and appropriate.

- (2) *The non-system facility owner's and operator's regulatory compliance record with federal, state and local requirements including but not limited to public health, safety and environmental rules and regulations;*

Divert's Albany facility is permitted by DEQ and has land use approval by the city of Albany. DEQ has indicated the facility is in compliance with its permit requirements.

DEQ issued a Warning Letter with Opportunity to Correct⁸ to Divert's Dayton site on March 15, 2017, because it was operating without having obtained the necessary permits. Divert has since opened its Albany facility which has obtained the necessary DEQ permit. The waste covered under the proposed NSL will be transported to the Albany facility.

⁸ Warning Letter with Opportunity to Correct 2017-WLOTC-2290

- (3) *The adequacy of the non-system facility's operational practices and management controls;*

DEQ regulates Divert. DEQ staff considers the operational practices and controls in place at this facility to be appropriate for the proper management of food waste processing and adequate for the protection of health and the environment.

- (4) *The expected impact on the region's recycling and waste reduction efforts;*

The proposed license authorizes Albertsons to transport food waste to Divert's Albany facility for processing into a liquid slurry. Divert will transport the slurry to anaerobic digestion facilities to produce biogas rather than to a disposal site. Thus, approval of the proposed NSL will support Metro's current recycling and waste reduction efforts. Metro will monitor whether the diversion of food waste to Divert has an impact on the availability of food intended for donation.

- (5) *The proposed non-system license's effect with Metro's existing contractual arrangements;*

Through 2019, Metro has a contractual agreement to deliver a minimum of 90 percent of the region's putrescible waste that is delivered to general purpose landfills during the calendar year, to landfills owned by Waste Management. The waste subject to the proposed license will be transported to a food waste processing facility rather than a general purpose landfill. Therefore, approval of the proposed license will not conflict with Metro's disposal contract.

It is likely that Metro may enter into a contract with an organics processing facility that would accept a significant portion of the region's food waste. Metro has issued a request for proposals (RFP) seeking an organics processing facility for the region and is currently evaluating the proposals with the intent to select a processor in 2017. If that selection process results in a contract, Metro may limit the amount of food waste that may be transported to other facilities under NSLs.

Divert, partnered with Recology, is one of the proposers to Metro's RFP seeking an organics processing facility for the region. If selected, Metro would work with Divert and Recology to establish a service contract. If they are not selected or if other legislation is adopted which affects how food waste is managed in the Metro region, Metro may amend or terminate this proposed NSL if it is in the public's interest.

- (6) *The applicant's record regarding compliance with Metro ordinances and agreements or assistance to Metro in Metro ordinance enforcement and with federal, state and local requirements including but not limited to public health, safety and environmental rules and regulations; and*

Metro issued a Noncompliance Advisory Letter to Albertsons on April 19, 2017, for transporting food waste to Divert's Dayton facility without Metro authorization. Albertsons continued to send its waste to Divert until mid-August when Metro again informed it to cease further transport of waste to the facility. Albertsons stated that it had continued the activity because it assumed that its initial NSL application had been an adequate good faith effort to demonstrate compliance. Albertsons ceased transporting Metro-area waste to Divert's Dayton facility on August 15. The issue has been resolved.

(7) *Any other factor the Chief Operating Officer considers appropriate.*

As mentioned above, the Metro Council will consider adoption of a Business Food Waste Requirement policy at the end of 2017 that may impact how food waste generated in the Metro region is managed. Several local government solid waste directors have expressed some concern about the implications of short-term authorizations that would allow energy-rich portions of the food waste stream to go to facilities like Divert when Metro is considering long-term policy and regional infrastructure options such as the selection of a processor to handle a large portion of the region's food waste. This will also include requiring local jurisdictions within the region to adopt companion policies no later than July 2018 with implementation at the business level beginning in March 2019. Therefore, Metro staff recommends issuing a 20-month NSL to allow Albertsons to transport this food waste to Divert's Albany facility until such time as Metro has adopted a commercial food scraps policy.

Although approval of Resolution No. 17-4834 would authorize Albertsons to transport waste to Divert, the proposed NSL does not obligate Divert to accept Metro-area waste. Additionally, adoption of the proposed resolution does not limit Metro's ability to terminate the NSL if Divert is unable or unwilling to accept this waste in the future or more proximate food waste processing capacity is available earlier in 2018 or 2019.

3. Anticipated Effects

Resolution No. 17-4834 will authorize Albertsons to transport up to 5,000 tons per calendar year of packaged and unpackaged commercial food waste to Divert's Albany facility for processing and disposal. The proposed NSL would take effect October 30, 2017 and expire June 30, 2019.

4. Special Provision of the NSL Unique to Divert Processing Facility

Because Divert accepts packaged food waste, Divert reports that its process results in about 25 percent residual waste that requires disposal in a landfill. The proposed NSL includes a condition that requires Albertsons to submit monthly reports to Metro showing the amount of residual waste that results from processing at the facility. Divert will conduct a waste residual study each month and provide the data to Albertsons to report to Metro each month. Metro will track this information and use it to inform future licensing conditions. Based on information received from the facility and staff's evaluation, staff recommends that the NSL include a condition requiring Albertsons to remit fees and taxes on 25 percent of the food waste tonnage that it transports to Divert each month under the NSL. This percentage corresponds to the approximate percentage of residual waste that results from processing the waste at Divert.

The proposed NSL includes a condition which allows the COO to amend the license in July 2018 to adjust the regional system fee and excise tax percentages owed to Metro. The COO will determine whether Albertsons's payment of fees and taxes on 25 percent of the food waste tonnage (representing the residual amount) is accurate and then amend the rate as appropriate utilizing the monthly residual data remitted to Metro by Albertsons.

Staff recommends issuing a 20-month NSL to allow Albertsons to transport this food waste to Divert until such time as Metro adopts a commercial food scraps policy, and implementation of the policy has begun. Metro has issued an RFP seeking a food waste processing facility for the region and is currently evaluating the proposals with the intent to select a processor in 2017. Metro intends to implement its food waste requirements in March 2019. Accordingly, the license expiration date of June 30, 2019

allows Albertsons to transport food waste to Divert until such time as the policy and selected processing facility are in place.

The COO may amend or terminate this proposed NSL if other legislation is adopted, such as the Business Food Waste Requirement policy, which affects how food waste is managed in the Metro region.

5. Budget Impacts

It is Metro's policy to manage the region's waste according to the waste management hierarchy. Metro's regional system fee and excise tax rates are based on the amount of waste that is anticipated to be disposed, in conjunction with Metro's budget for the next fiscal year. Anytime waste is diverted from Metro transfer stations, and further diverted from disposal, there will be some impact in the current fiscal year to Metro's tonnage charge, enhancement fee, and the solid waste fee and tax revenues. In the case of Albertsons, much of the commercial food waste that will be delivered to Divert under authority of this proposed NSL will be exempt from the fee and tax because it will be recovered for biogas production instead of disposal at a landfill. The residual waste resulting from the processing of this material (about 25 percent of the total) will be disposed and is subject to remitting the fee and tax. Currently, all of this commercial food waste is being sent to landfills for disposal. Any waste that is diverted from the disposal stream, will decrease current year revenues collected under the fee and tax. The rates charged next year will be adjusted during Metro's annual rate making process. Waste diversion will also affect other disposal prices (i.e., tonnage charges) at Metro transfer stations and other private solid waste facilities due to fixed and capital costs being spread over fewer tons. The effects of these individual price changes will depend on facility-specific factors. However, the effect on the fee and tax is universal across all ratepayers and waste disposed.

Recommended Action

Staff recommends that Council approve Resolution No. 17-4834, finding that the license application satisfies the requirements of Metro Code Chapter 5.05. Resolution No. 17-4834 will authorize the COO to issue a new NSL, similar to the one attached to the resolution as Exhibit A, to Albertsons for a 20-month period commencing October 30, 2017 and expiring on June 30, 2019.

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