

Public comment report

Attachment 2 to Staff Report for Resolution No. 19-5025



October 17, 2019

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Background

Adoption of Resolution No. 19-5025 will authorize the Chief Operating Officer to issue a renewed solid waste facility franchise to Waste Management of Oregon Inc. to operate Troutdale Transfer Station (TTS) for a term of five years.

On July 23, 2019, the applicant submitted to Metro a complete solid waste facility franchise application accompanied by payment of the appropriate application fee of \$500. The applicant requested an increase in its tonnage authorization in the renewal application, but did not request any other significant change in authorization or activities at this facility.

Public notice and opportunity to comment

Metro posted notice and provided an opportunity for the public to review and submit comments on the renewal application. The public notice was posted on Metro's website, mailed to 75 property owners and residents within one-quarter mile of the facility and emailed to local community groups, neighborhood associations and various other parties that are generally interested in solid waste issues. The 30-day public comment period began on August 1, 2019, and closed on August 30, 2019.

Summary of written public comments on application

Metro received one comment during the public comment period. The Senior Legal Counsel of Waste Management submitted a written comment on behalf of Troutdale Transfer Station outlining questions and concerns with the proposed franchise language that was provided to the applicant on July 30, 2019. This was the only comment received during the public comment period.

The letter includes 10 comments which are summarized below, and are included in full at the end of this document.

Metro response to comments:

Below is a summary of the 10 comments received from Waste Management. Metro's response follows each comment summary.

1. The franchise should not impose an obligation on TTS to accept source-separated food waste if Metro decides to amend the franchise. (Section 3.9)

- Waste Management is not aware of Metro's authority to unilaterally impose an obligation on a transfer station to accept a specific waste stream.
- There may be legitimate health, safety, environmental, financial and practical reasons why a transfer station would not willingly agree to accept source-separated food waste.
- Metro should work cooperatively with the transfer stations to determine whether accepting source-separated food waste makes sense for any particular transfer station.

Metro Response #1 – Food waste

As described in detail in the staff report, Metro is looking to address the need for an adequate transfer system to allow growth in the collection of commercial food waste in the region and provide equitable access to transfer services. Metro acknowledges the importance of the health, safety, environmental and financial factors that may impact the operation of a transfer station. Metro also has broad legal authority to regulate solid waste facilities generally. This authority is derived from the Oregon Constitution, Metro's home rule Charter and explicit statutory powers in ORS Chapters 268, 459 and 459A.

Metro will continue to use an informed decision making process when imposing new requirements.

- 2. Insofar as Metro is now characterizing the franchise as a permit rather than an “agreement”, the franchise should establish and define the rights of a franchise holder to appeal any Metro decisions made concerning the franchise, including enforcement, amendments, suspension, revocation, denial of approvals, etc.**

Metro Response #2 – Rights of franchise holders

Metro has never considered franchises as agreements in practice. A Metro Solid Waste Facility Franchise is a grant of authority that the Metro Council may amend at any time by means of a duly adopted ordinance or resolution. During such adoption procedures, the Metro Council will provide due process by providing a public review period and an opportunity for a public hearing on the proposed amendments. Additionally, under Metro Code Chapter 5.01, franchisees have the right to request a contested case hearing regarding solid waste facility decisions made by Metro.

- 3. By replacing “COO” with “Metro” throughout, the franchise is ambiguous as to when something has been formally approved by Metro.**

Metro Response #3 – Chief Operating Officer vs. Metro

The majority of references to the Chief Operating Officer (COO) in the franchise have been changed to Metro, though the authority to amend, suspend or revoke a franchise remains with the COO and the Metro Council (Section 12.0). This change from COO to Metro is being made across all classes of Metro authorizations. When a franchisee receives written correspondence from a Metro employee, the franchisee should assume the sender has the authority over the content of the correspondence.

- 4. Metro should clarify its prohibition against mixing wastes in Section 4.4.**

Metro Response #4– Mixing of Waste

Metro revised this section of the franchise for increased clarity. Any mixing of waste types must be described in an operating plan and approved in writing by Metro so that Metro can ensure waste is going to the appropriate facility and that it is tracked and reported properly (Section 7.5).

5. Some of the proposed changes allowing for future amendments to the franchise are too open-ended and vague.

- Waste Management has concerns about Metro amending the franchise in the future to achieve future goals without allowances for parties to appeal such changes, specifically referencing future changes related to the implementation of the Regional Waste Plan (Section 5.0).

Metro Response #5 – Vague language

Metro added Section 5.0 Regional Waste Plan as a signal to solid waste facility operators that there will be future changes to the franchise resulting from the implementation of the 2030 Regional Waste Plan. The goals and actions of the [2030 Regional Waste Plan](#) are available to review for facility operators to gain a better understanding of the types of requirements that may be included in the franchise in the future. The 2030 Regional Waste Plan is the vision for the Metro Region's solid waste system and the blueprint for achieving that vision. Metro has the responsibility to ensure that all solid waste generated in the region is managed in a manner that protects public health and safety and safeguards the environment. All programs, services and facilities related to solid waste management and disposal are addressed by the plan, including waste reduction, collection, transfer and disposal. This plan is designed to address the changes and challenges we face and to provide opportunities to innovate, invest and continue our efforts to protect people and quality of life in the region.

As outlined in Metro's response to comment No. 1, Metro has broad legal authority over the Metro region's solid waste system. Under Metro Code Chapter 5.01, franchisees have the right to request a contested case hearing regarding any decision made by the Chief Operating Officer.

6. Rather than set different standards, the franchise should incorporate Oregon DEQ's stormwater best management practices for minimizing stormwater exposure.

- Waste Management proposed including DEQs best management practices from the Oregon DEQ's 1200-Z stormwater permit.

Metro Response #6 – Stormwater

The current franchise language states that "watertight covered *or tarped* containers" are acceptable storage for putrescible waste and non-putrescible waste processing residual. Metro removed the words "or tarped" because a tarped container is also watertight and covered. The phrase now reads "watertight, covered containers" with the expectation the containers should be covered and watertight so that rain does not enter the container and that the container does not leak. Metro relies on DEQ to monitor and enforce ground water, storm water and air quality requirements at the site. Metro generally inspects Troutdale Transfer Station more frequently than DEQ, and will continue to refer applicable matters to other agencies when appropriate.

7. As the proposed revisions do not as yet specify the amount of waste TTS will be authorized to accept, WMO should be allowed to comment or challenge its allocation in the future when the waste allocation is announced. (Section 4.1)

Metro Response #7 – Franchisee right to contest a Metro decision

As mentioned in previous comment responses, Metro has broad legal authority to regulate solid waste facilities, including the types and amounts of waste a facility may receive. Additionally, under

Metro Code Chapter 5.01, franchisees have the right to request a contested case hearing regarding solid waste decisions made by Metro.

8. The franchise should not include reference to the “ban the box” law in Section 9.10.

Metro Response #8 – Ban the Box

Guidance for new language in the proposed franchises comes from the 2030 Regional Waste Plan that the Metro Council adopted earlier in 2019 and the Property and Environmental Services Diversity, Racial Equity and Inclusion Work Plan. The 2030 Regional Waste Plan provides direction for Metro’s regulation of the solid waste industry, including franchise provisions. By focusing on Oregon’s “ban the box” law, proposed Section 6.16 advances progress on Metro’s goals for the solid waste system. All the goals and actions that inform future franchise amendments can be found in the 2030 Regional Waste Plan. Please note that the provision that includes “ban the box” is now located in Section 6.16 of the proposed franchise.

9. The franchise cannot require WMO to list Metro as a certificate holder in Section 10.5.

Metro Response #9 – Insurance

Metro requires all Metro regulated solid waste facilities to name Metro as an insurance certificate holder. Standard certificate of insurance forms state at the top “This certificate is issued as a matter of information only and confers no rights upon the certificate holder.” Adding Metro as a certificate holder triggers the insurance company to issue the certificate of insurance to Metro upon renewal which cuts down on administrative burden on both parties as the issuance is automatic.

10. Metro’s right of inspection should be limited to “reasonable” times during business hours.

Metro Response #10 – Right of inspection

The word “reasonable” was removed from Section 13.3 because Metro considers it reasonable for any authorized Metro representative performing inspections of a franchised facility to access the site at any time during business hours. These inspections are necessary to ensure compliance with Metro Code, the franchise, administrative rules and performance standards.

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The Senior Legal Counsel of Waste Management submitted this letter to Metro on August 30, 2019 Metro as part of the public comment period.



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August 30, 2019

VIA E-MAIL ONLY

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600 NE Grand Avenue
Portland, OR 97232

SWICC@oregonmetro.gov

**RE: Transfer Station Franchise Renewal
Troutdale Transfer Station, 869 NW Eastwind Drive, Troutdale, OR**

Dear Metro:

As the owner and operator of the Troutdale Transfer Station ("TTS"), Waste Management of Oregon, Inc. ("WMO") is obviously very interested in the renewal of its franchise to continue operating TTS. While WMO very much appreciates Metro's willingness to renew the franchise agreement, WMO has a few suggestions and concerns. Our comments are below.

Comment 1. The franchise should not impose an obligation on TTS to accept source-separated food waste if Metro decides to amend the franchise.

In Section 3.9.2, Metro proposes to reserve for itself the right to amend the franchise to require TTS and other transfer stations to accept source-separated food waste. While WMO may agree to accept food waste in the future, WMO is not aware of Metro's authority to unilaterally impose an obligation on a transfer station to accept a specific waste stream. WMO recognizes that governments can often prohibit facilities from managing certain wastes streams; however, it would be surprising— and likely beyond its authority— for a government to require a franchisee to accept a specific waste stream that the business is not willing to accept.

Moreover, there may be legitimate health, safety, environmental, financial, and practical reasons why a transfer station would not willingly agree to accept source-separated food waste, even if Metro amended the franchise to require it. A facility's permits may not allow the transfer station to accept food wastes. Neighborhood or community opposition may make it difficult to do so. The design and configuration of the transfer station itself may make it impracticable to accept and manage food waste. There may not be enough room in the transfer station to handle food waste. And it might be financially unworkable to accept food waste.

Finally, Section 3.9.2 fails to provide any detail or information as to what the requirements would be if such an obligation were to be imposed.

While WMO understands and supports Metro's interest in better management and handling of food waste, WMO does not support Metro reserving to itself the unilateral right to impose the

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requirement to accept food waste on transfer stations. Rather, Metro should work cooperatively with the transfer stations to determine whether accepting source-separated food waste makes sense for any particular transfer station.

Comment 2. Insofar as Metro is now characterizing the franchise as a permit rather than an “agreement”, the franchise should establish and define the rights of a franchise holder to appeal any Metro decisions made concerning the franchise, including enforcement, amendments, suspension, revocation, denial of approvals, etc.

Metro has stated that the franchise is intended to function be “more as a permit rather than an agreement.” If the franchise is in effect a permit to operate, then Metro should clarify and state what due process rights a franchise holder has to appeal any such “permit” decisions. Specifically, what right of appeal does a franchise holder have were Metro to decide unilaterally to amend or revoke the permit?

Comment 3. By replacing “COO” with “Metro” throughout, the franchise is ambiguous as to when something has been formally approved by Metro.

Apparently for the sake of simplifying and uniformity, the proposed franchise replaces almost all references to Metro’s Chief Operating Officer (COO) with “Metro”. While it may make sense to eliminate the requirement that the COO sign every approval, the change could create uncertainty and confusion as to what constitutes an actual “approval” from Metro. WMO recommends that the franchise clarify who or what positions in Metro are authorized to make approvals, such as waivers (§ 2.7), operating plan approvals (*e.g.*, §§3.8, 3.9, 4.4).

Comment 4. Metro should clarify its prohibition against mixing wastes in Section 4.4.

The proposed revisions include in Section 4.4 a prohibition against mixing any waste, unless approved by Metro. This section is vague and confusing. If read literally, it could prohibit the mixing of one load of residential waste with another load of residential waste. Obviously, this cannot be the intent of the revision. It is a fundamental aspect of operating a transfer station that loads of wastes collected in garbage trucks are dumped and transferred into larger containers, in which the wastes are obviously commingled – *i.e.*, mixed. Also, how does this prohibition address loads of wastes that arrive mixed? For example, residential solid waste typically includes both putrescible and non-putrescible waste – *i.e.*, putrescible wastes are already a mixture of wastes. Even putrescible waste consisting of mainly food waste might contain other non-food waste putrescible wastes. If these are already “mixed”, does the prohibition apply?

At a minimum, this provision must be revised to clarify that transfer stations cannot mix certain different waste **types**, and not imply that the transfer station cannot mix loads of wastes of the same type. But this would not be enough. This provision needs further revision to clarify its purpose. For example, does this provision prohibit mixing one load containing mostly putrescible non-food waste with another load containing mostly putrescible food waste? What about mixing of food waste and yard waste that are destined for the same composter? What purpose is served by prohibiting mixing processing residual with putrescible solid waste if both are destined for disposal into the same cell at a landfill?

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Comment 5. Some of the proposed changes allowing for future amendments to the franchise are too open-ended and vague.

WMO is concerned with proposed yet open-ended language in the franchise agreement that contemplates Metro amending the franchises in the future to achieve future goals. For example, Section 5.2 states, “Metro may amend this franchise and establish new requirements for the franchisee to achieve the goals and actions of the 2030 Regional Waste plan.” Likewise, Section 12.2 allow Metro to “amend, suspend, or revoke this franchise in whole or in part” While WMO understands the need to reserve the right to amend the franchise in the future, such authority cannot be open-ended and must make allowances for parties to appeal such changes. See Comment 2 above.

Comment 6. Rather than set different standards, the franchise should incorporate Oregon DEQ’s stormwater best management practices for minimizing stormwater exposure.

Several sections (§§ 3.3 & 3.6) of the franchise include requirements that materials be placed within “watertight covered containers.” This language is ambiguous in that it could mean that the covers must be watertight or that the containers must be watertight. Since the purpose of these provisions is to minimize exposure of waste materials to stormwater or snowmelt, the franchise should incorporate the stormwater “best management practices” (BMPs) from the Oregon DEQ 1200-Z stormwater permit. Specifically, WMO recommends the following language instead:

Minimize exposure of waste materials to rain, snow, snowmelt and runoff. To the extent technologically available and economically practicable and achievable in light of best industry practice, locate waste materials or containers indoors or protect them with storm-resistant covers if stormwater from affected areas may discharge to surface waters. Acceptable covers include, storage of bins or dumpsters under roofed areas and use of lids or temporary covers such as tarps.

See DEQ Permit No. 1200-Z (Aug. 1, 2017), Schedule A, §§ 1.a & 1.c.

Comment 7. As the proposed revisions do not as yet specify the amount of waste TTS will be authorized to accept, WMO should be allowed to comment or challenge its allocation in the future when the waste allocation is announced.

Section 4.1 of the franchise includes language setting TTS’s 2020 waste allocation, but does not specify the actual amount allocated. Insofar as it is not possible for WMO to comment on its allocation, WMO must reserve its right to comment on the proposed allocation once the allocation is known.

Comment 8. The franchise should not include reference to the “ban the box” law in Section 9.10.

While WMO does not dispute its obligation to comply with ORS 659A.360, WMO disagrees with inserting this requirement into the franchise. A franchise serves a specific purpose and is not intended to be a document that lists every local, state, and federal statute and regulation with which a franchisee must comply. What is the purpose of inserting this one requirement into the franchise when there are hundreds of other requirements that apply to WMO’s operations that are not included? Please delete Section 9.10.

Comment 9. The franchise cannot require WMO to list Metro as a certificate holder in Section 10.5.

If, as Metro has stated, the franchise is now viewed as a permit rather than an agreement, WMO is not aware of Metro’s authority to require WMO to name Metro as an insurance certificate holder

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under its insurance. If Metro has the legal authority for this requirement, WMO would appreciate the opportunity to review it.

Comment 10. Metro's right of inspection should be limited to "reasonable" times during business hours.

Section 13.3.1 states that the franchisee must allow Metro to have access to the TTS "at any time during business hours, with or without advanced notice." There is no mention of "reasonable" times. Yet, Section 13.3.4 then states that the franchisee must permit access "at all **reasonable** times during business hours, with or without notice." These two sections are inconsistent. Section 13.3.1 should be amended to insert "reasonable" into the access requirement.

* * *

Thank you for the opportunity to comment on the TTS franchise and for your attention to our comments. WMO looks forward to its continued role in managing solid waste and recyclables for Metro and its residents and businesses.

Sincerely,

A handwritten signature in cursive script that reads "Andrew M. Kenefick".

image/signature

Andrew M. Kenefick

cc: Nicholas Godfrey – Waste Management