

ATTACHMENT 1 TO STAFF REPORT FOR ORDINANCE NO. 19-1438

Metro's Response to Comments on Proposed Changes to Metro Code Title V

October 24, 2019

Over the past few years and at the direction of the Metro Council, Metro staff has been working to update Metro's solid waste code and administrative rules to provide greater clarity and predictability for the public and for those directly involved in our region's solid waste system. To provide more clarity regarding the relationship between the regional system fee and Metro's own transfer station fees, Metro staff proposed a series of updates to four new or revised chapters of Metro Code.

On August 12, 2019, Metro opened a 30-day public review and comment period to solicit input on a series of proposed updates and housekeeping improvements to Metro Code Chapters 5.00, 5.02, 5.03 and 5.08. The public comment period was open from August 12 through September 13, 2019. Metro staff also held a public informational meeting on September 9, 2019, to present more information about the proposed code changes, answer questions, and solicit input. The comments received from the public during that time and Metro's responses are summarized below.

1) Terrell Garrett – Greenway Recycling (letter dated August 12, 2019):

- Mr. Garret's Comment #1: *Our primary comment is focused on the concept of bringing formal Administrative Rulemaking to Metro. This is a great idea and should have happened years ago. Well formed, it needs a couple of additions to make it workable for the public, industry, government, and Metro. There is no defined "Board" of decision makers to speak to. As presented, the Chief Operating Officer may have a "designee" oversee a hearing and then others not in attendance may make the decision. I want to talk to the decision maker(s). Anything short of that is just lip service and will denigrate the process. Next, there is no provision for oversight. No oversight board nor appeal to Council. This places too much power in the hands of one person and leaves room for capricious behavior and is not indicative of a proper participatory public process that balances the needs of local governments, the public, industry, and regional government.*

Metro's Response to Mr. Garrett's Comment #1: The addition of a new Chapter 5.08 (Administrative Rulemaking) simply moves Metro's *current* administrative rulemaking sections to a new chapter and does not alter Metro's current rulemaking process, which has been in effect for several years. Currently, Metro Code has chapter-specific administrative rulemaking procedures in Chapters 5.01, 5.02, 5.05, 5.06, 5.09, and 5.10. The proposed code updates are housekeeping measures that would standardize and consolidate Metro's current administrative rulemaking procedures for Metro Code Title V in a central location.

In practice, administrative rules do not create new “policy” but merely interprets and implements the Metro Council’s policy decisions as reflected in Code. Metro’s administrative rulemaking process is modeled after Oregon’s Administrative Procedures Act, but it has been tailored to better address the needs and practices of the regional government.

Although there is an opportunity for public comment before a proposed rule is adopted, there is generally not an “appeal” right if a particular individual or business is dissatisfied with the proposed rule, unless there is an allegation that the rule violates law or was adopted without following the proper process. The appropriate appeal venue for those types of allegations would be in circuit court because they are legal challenges and not simply policy disagreements. Metro’s current administrative rulemaking process provides that same opportunity in those situations. With the exception of a minor change to clarify the timing of when an oral hearing is to be held, the current administrative rulemaking process is completely unchanged from that which Metro has had for several years.

Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment. The proposed updates and housekeeping improvements are not intended to alter current policy or make substantive changes to the code unless the Metro Council directs otherwise.

- Mr. Garrett’s Comment #2: Solid Waste Fees at Metro Transfer Stations, proposed Chapter 5.03 continue to ignore the “discrete” services offered by Metro and Chapter III, Section 15 of the Metro Charter by providing a “blended” rate which is in violation of these parameters.

Metro’s Response to Garrett’s Comment #2: The fees that Metro charges for solid waste disposal services at its transfer stations comply with the Metro Charter.

Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment. The proposed updates and housekeeping improvements are not intended to alter current policy or make substantive changes to the code unless the Metro Council directs otherwise.

- Mr. Garrett’s Comment #3: Since this is an opportunity to clean up and change Code, we would like to comment on existing parts of the Code which have not been addressed by Staff. Within Definitions, term such as “Recoverable Solid Waste,” “Recyclable Material,” and “Recycling” seem to muddle together and wander somewhat from State law which requires Metro to utilize DEQ definitions. This needs to be cleaned up.

Metro’s Response to Mr. Garrett’s Comment #3: Metro is a home rule local government that has independent charter and statutory authority to manage the

region's solid waste system. Metro's definitions for solid waste, including recyclable materials, may differ from the state's definitions because of Metro's independent authority to regulate solid waste.

Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment. The proposed updates and housekeeping improvements are not intended to alter current policy or make substantive changes to the code unless the Metro Council directs otherwise.

- Mr. Garrett's Comment #4: *Second, 5.02.030(d)(2) utilizes the concept of a "zero" tip fee. We all know that curbside recycling markets today demand a negative revenue price, in fact, quite close to that of disposal. In today's Wall Street Journal, certain bonds have dipped into negative returns. In other words, even the bond market recognizes negative pricing. This Code section is archaic and out of date. Similar to curbside recycling, this Code section should be changed to reflect "accepted at the disposal site at a fee lesser than that of disposal." This mirrors concepts presented in ORS 459 and ORS 459a and recognizes the current state of markets.*

Metro's Response to Mr. Garrett's Comment #4: Metro is a home rule local government that has independent charter and statutory authority to manage the region's solid waste system. Metro's definition of source-separated recyclables does not completely align with the state's definition because of Metro's independent authority to regulate solid waste. Oregon's statutory definition differs from Metro's by inclusion of a criterion that essentially states that a recyclable material is only defined as recyclable if it costs less to recycle it than it does to landfill it. In effect that means that if it costs more to collect, process and sell a recyclable than it would to collect, transfer and dispose of that material in a landfill, it is no longer a recyclable.

Metro's definition reflects a belief that the statute is overly narrow because it does not take into account externalities associated with the value of recyclables and the costs associated with disposal. There are quantifiable values associated with the environmental benefits from recycling and quantifiable environmental costs associated with burying recyclables in a landfill that are not reflected in hauling, transfer, processing and landfilling fees and rates. Metro's definition allows for consideration of these factors when developing policies, programs and regulations related to recycling.

Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment. The proposed updates and housekeeping improvements are not intended to alter current policy or make substantive changes to the code unless the Metro Council directs otherwise.

- Mr. Garrett's Comment #5: ...final comment regarding changes that should be made to existing Code is both in the Definitions and 5.02.110 regarding the use of Regional System Fees. *McCann v. Rosenblum* stated "A tax is any contribution imposed by government upon individuals, for the use and service of the state. A fee, by contrast is imposed on persons who apply for and receive a government service that directly benefits them." Further, *Qwest Corp. v. City of Surprise* said "the distinction between a tax and a fee is whether the "charge is expended for general public purposes, or used for the regulation and benefit of the parties upon whom the assessment is imposed." *Rogue Valley Sewer Services v. City of Phoenix* stated "A fee, then, is imposed on particular parties and is used to regulate or benefit those parties rather than being used for general public purposes or to raise revenue for such purposes." This regional system fee is not due from the public, but rather from those who present the material for landfill disposal. Metro, as a governmental entity, collects and manages this fee and the regulation of those who pay it. Based upon the case law above, we fail to understand how our money paid for regional system fees benefits us when used to regulate or subsidize an unrelated entity such as a compost operation, clean MRF, or other entity that does not pay these fees. Further, we fail to understand how Metro's use of these fees to pay for its own facilities that compete against us is beneficial to us.

Granted, Metro is entitled to the benefit of these fees as Metro pays them just as we do. However, if Metro is to benefit from the fees for its own plant, property, and equipment, all others who pay the fees should receive their proportional share.

Metro's Response to Mr. Garrett's Comment #5: Metro agrees with the general concept regarding the distinction between a fee and a tax. However, Metro believes the commenter is interpreting the law too narrowly. The law does not require that only those that pay a fee may benefit from the fee, but rather that those funds be used to pay for program (or system) costs. As an example, a fishing permit fee may be used in part to fund fish conservation efforts or educational classes that benefit the environment and public at large, in addition to benefitting those paying the actual fishing permit fee.

Per state statute, Metro's regional system fee may be used to fund a broad array of services and activities related to solid waste management. ORS 459.335 provides that Metro may use its regional system fee for activities "related to solid waste, including activities of regional concern that are directly related to reducing the environmental impact from the generation, collection, transportation, processing and disposal of solid waste" as well as the "planning, administrative and overhead costs for activities related to solid waste." Thus, the legislature has provided explicit authority for Metro to use regional system fees for various solid waste related activities that benefit the public at large in addition to those paying the fee directly.

Contrary to the assertion that Metro uses regional system fees "to pay for its own facilities," Metro in fact uses its transfer station fees (and not regional system

fees) to primarily fund the direct costs of operations at Metro facilities. Regional system fees would only be used in a manner allowed by state statute. Finally, Metro disagrees with the underlying premise that the public transfer stations “compete” with private solid waste facilities. The public transfer stations serve all customers and the public stations provide an array of services to the public that are not provided by privately-owned solid waste facilities. Metro’s public facilities are not comparable to private facilities.

Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment.

2) Bruce Walker - City of Portland (email dated September 11, 2019):

- Mr. Walker’s Comment: *The City of Portland is supportive of changing the requirement that Metro fees and the regional system fee can be established by resolution:*

Remove the requirement that Metro fees and the regional system fee be set by ordinance. Council can now establish these amounts by resolution and they can take effect 30 days after adoption. This avoids the need to wait 90 days for rates to take effect and allows the Metro Council to be more responsive to changing market conditions that may require modified or new rates.

However, Portland does have concerns regarding the timing of Metro Council approval of the fees. Metro fees are an important component of the solid waste ratemaking process and Portland develops rates that haulers charge customers during March and April of each year. Portland City Council needs to approve rates in May for implementation on July 1st. Therefore, the current schedule where Metro approves fees in March works very well for our rate review. Delaying provision of Metro fees until late spring would pose significant problems for our process. Portland supports the change for Metro adopting fees by resolution and requests that Metro establish in administrative rules that notice of the new fee schedule be provided to local governments in March of each year.

Metro’s Response to Mr. Walker’s Comment: Metro understands that it is important for local governments to have timely disposal rate information to inform their annual solid waste rate review process. However, staff is not recommending any changes to the timing or process of Metro’s annual fee-setting that generally occurs in March. As it has always done, Metro will continue to provide its local government partners with the most complete and accurate fee information available by March 31 each year.

It should be noted that current code language does not require that the Metro Council set fees in March. The Metro Council can set fees at any time and the proposed code changes do not alter that. However, having fees adopted by resolution rather than by ordinance allows the Metro Council to be more flexible and responsive if fees need to be changed quickly to address rapidly changing

market conditions, system disruptions or the addition of a new waste stream. Again, the proposed changes do not affect the process or timing for setting fees; they merely provide flexibility for when those fees can legally become effective.

Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment.

3) Shannon Martin - City of Gresham (email dated September 11, 2019):

- Mr. Martin's Comment: *Thank you for the opportunity to comment on Metro's proposed solid waste code changes. Gresham is in support of Metro adopting fees by resolution. However, it is important for local governments to receive fee changes in advance of our rate review process. Having Metro commit to providing local governments with fee change information no later than March 31st is necessary for us to have in order to complete our rate review process.*

Gresham Council needs to approve rates by May in order for us to notify customers 30 days in advance before a July 1st adjustment.

Metro's Response to Mr. Martin's Comment: Refer to Metro's response to Mr. Walker's comment above.

4) Theresa Koppang - Washington County (email dated September 11, 2019):

- Ms. Koppang's Comment: *Thank you for sharing information regarding proposed changes to Metro's solid waste code at the last local government solid waste directors meeting. Washington County supports the changes you outlined regarding the requirement that Metro fees and the regional system fee be established by resolution.*

And while the timing of Metro Council approval of the fees is not as critical to Washington County's rate-making process, it is a concern to other jurisdictions. Therefore, I'm requesting that notice of the new fee schedule be made available to local governments by March 31 of each year.

Metro's Response to Ms. Koppang's Comment: Refer to Metro's response to Mr. Walker's comment above.

5) Rick Winterhalter - Clackamas County (email dated September 13, 2019):

- Mr. Winterhalter's Comment: *I believe you heard from Clackamas in the August 29th meeting regarding the importance of ensuring we have the disposal rate information from Metro early in our annual review process. This note is to support the comments provided by our regional partners. Please explicitly state in the Rules that Metro will provide the other local governments transfer station fee information no later than March 31 of each year.*

Metro's Response to Mr. Winterhalter's Comment: Refer to Metro's response to Mr. Walker's comment above.

6) Peter Brandom – City of Hillsboro (email dated September 13, 2019):

- Mr. Brandom's Comment #1: *Expanding on the comment below, the revised Administrative Rules are severely deficient without either a chapter dedicated to Solid Waste Rates at Private Transfer Stations or inclusion of specific rate setting rules for private stations in the proposed chapters (5.03, AR 5.03-1000 through 1080), and any needed adjustments to other chapters, Rules or Definitions. This should include specific descriptions and justifications for all fees charged at private stations (5.02 or separate chapter with the same scope for private facilities). The lack of a chapter to regulate rate setting at facilities that are authorized by Metro to operate within the regional system presents a big void in the system, and we've seen how the private operators have taken advantage of this void. Just like cities and counties regulate collection rates of private companies operating within the system, private facilities should be regulated just like the public facilities. There should be no distinction between public and private facilities in this regard.*

Metro's Response to Mr. Brandom's Comment #1: Metro does not currently exercise its authority to regulate rates at privately-owned transfer stations. However, Metro is taking steps to establish greater rate transparency and help its local government partners better understand the rates charged at transfer stations. As part of this effort, Metro has prepared estimates of the costs of service offered at publically and privately-owned facilities and shared that information with local governments. Later this year the Metro Council will consider whether to perform a more detailed rate review or implement other measures with respect to rates at privately-owned facilities.

Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment. The proposed updates and housekeeping improvements are not intended to alter current policy or make substantive changes to the code unless the Metro Council directs otherwise.

- Mr. Brandom's Comment #2: *Please explicitly state in the Rules that Metro will provide the other local governments transfer station fee information no later than March 31 of each year.*

Metro's Response to Mr. Brandom's Comment #2: Refer to Metro's response to Mr. Walker's comment above.

- Mr. Brandom's Comment #3: *Not seeing it explicitly in 5.03.060 or elsewhere, does Metro rate setting process include a review of "...all sources and uses of funds that affect the solid waste revenue fund budget..." for the prior calendar year? If not, and if that is part of the rate review process, that should be explicit. A clear and*

transparent picture of year-to-year budget requirements (i.e., specifically how revenues are used by Metro) has not been as apparent as it should be.

Metro's Response to Mr. Brandom's Comment #3: Metro already considers "...all sources and uses of funds that affect the solid waste revenue fund budget..." as part of its annual budget process. Metro's budget is developed through a public process and readily accessible on Metro's website. The Metro Council determines Metro's transfer station fees based on budget considerations.

Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment.

- Mr. Brandom's Comment #4: *Consider defining "Mixed Waste Loads" in 5.00 (reference in 5.02.050) to clarify meaning.*

Metro's Response to Mr. Brandom's Comment #4: Staff finds it unnecessary to add "mixed waste loads" as a defined term in Metro Code Chapter 5.00. Staff does not recommend any additional changes to the proposed code updates in response to the above-referenced comment.

- Mr. Brandom's Comment #5: *Note existing typo in 5.03.040(c).*

Metro's Response to Mr. Brandom's Comment #5: The typo has been corrected.

7) The following comment is an excerpt from a letter submitted by the Clackamas Refuse and Recycling Association, Portland Haulers' Association and Washington County Haulers' Association (letter dated September 13, 2019):

- Hauler Associations' Comment: *While we understand the need for Metro staff to have independent authority and flexibility to change Metro's fees, we do have concerns. Specifically we are concerned that:*
 - *Cutting two months off the public process –from the current 90 days to 30 days – provides less time and arguably less opportunity for full public input and participation and*
 - *Shortening the time may create added challenges to align Metro's fee increases so those added costs can be included as part of the local government rate setting process.*

As a result, the Clackamas Refuse and Recycling Association, Portland Haulers' Association and Washington County Haulers' Association ask that Metro continue to provide a required 90 day public process before adjusting Metro fees.

Metro's Response to Hauler Associations' Comment: The proposed code changes do not shorten the time or opportunity for public input and participation during Metro's fee-setting process. Metro is not proposing any change to the fee-setting process itself. Interested parties, local governments and regulated entities will

still have the same amount of time and a full opportunity for public input and participation before the Metro Council sets fees. The only change is that the effective date of those fees will no longer require a mandatory 90-day waiting period as is required when Metro Council takes action by ordinance rather than by resolution.

As previously explained in Metro's response to Mr. Walker above, staff is not recommending any changes to the timing or process of Metro's annual fee-setting that generally occurs in March. The proposed changes merely provide flexibility for when those fees can legally become effective.