

BEFORE THE METRO COUNCIL

APPROVING A SETTLEMENT AGREEMENT) RESOLUTION NO. 07-3805
WITH LOWELL E. PATTON AND PACIFIC)
WESTERN COMPANY REGARDING METRO) Introduced by Metro Chief Operating Officer
NOTICE OF VIOLATION NO. NOV-139-05) Michael Jordan, with the concurrence of
) Metro Council President David Bragdon

WHEREAS, during and possibly prior to 1996, Lowell E. Patton and/or Pacific Western Company accepted and accumulated approximately 900 tons of waste composition roofing from roofing contractors and other haulers at his property located at 16050 SE Highway 224 in Carver, Oregon, within the Metro region; and

WHEREAS, neither Mr. Patton nor Pacific Western Company had a Metro solid waste facility license at such time, nor did either have authority to operate a solid waste facility from either the Oregon Department of Environmental Quality or from Clackamas County; and

WHEREAS, by mutual agreement between Metro, Clackamas County and the DEQ, the DEQ acted as the lead enforcement agency in this matter until 2005; and

WHEREAS, on February 26, 2003 the Oregon Court of Appeals affirmed the final contested case order issued by the Oregon Environmental Quality Commission, which order assessed a \$9,400.00 civil penalty against Pacific Western Company for operating a solid waste facility without a DEQ permit; and

WHEREAS, as Pacific Western Company considered alternatives for reuse or disposal of the material, Metro solid waste staff offered to enter into a settlement agreement under which the waste roofing would be capped on-site, with DEQ approval, thereby rendering the property a disposal site and Pacific Western would pay Metro the regional system fee and excise tax rate applied to waste material derived from contaminated site cleanups, which would have been approximately \$3,600; and

WHEREAS, thereafter, and with DEQ's approval, Mr. Patton arranged for the waste roofing to be tested for asbestos and removed from the Carver property and allowed it to be used as feedstock for an asphalt batch plant operated by Rinker Materials for asphalt paving (and as recovered material, no Metro fees or taxes would be assessed and collected); and

WHEREAS, Mr. Patton, instead, on May 6, 2005 hauled and deposited the waste roofing on another property he owns located in Rhododendron, Oregon, without prior notice to DEQ or Metro regarding his change of plans; and

WHEREAS, on October 11, 2005, DEQ issued a notice of violation to both Mr. Patton and to Pacific Western Company, assessing civil penalties of \$55,261 against Mr. Patton for operating an illegal solid waste disposal facility on his property in Rhododendron, and of \$78,486 against Pacific Western Company for violating a prior EQC order regarding disposal of the waste roofing; and

WHEREAS, on December 15, 2005, Metro issued Notice of Violation NOV-139-05 which imposed a penalty of \$30,788.69 for delivery of solid waste generated from within the Metro boundary to an unauthorized disposal site in violation of Section 5.05.025 of the Metro Code and for failure to pay Metro excise taxes on such waste, in violation of Code Section 7.01.020(c); and

WHEREAS, on March 27, 2006, DEQ entered into a Mutual Agreement and Final Order with Mr. Patton and Pacific Western Company dismissing the civil penalty against Mr. Patton and reducing the civil penalty against Pacific Western Company to \$30,000, contingent on cleaning up the Rhododendron property and the disposal of the material in a fully permitted landfill; and

WHEREAS, Mr. Patton delivered the waste roofing to the Wasco County Landfill; and

WHEREAS, Metro has pursued this enforcement matter before a hearings officer for over a year and a half, including briefing two issues related to Metro's solid waste enforcement authority and after assurance that the roofing waste was properly disposed of in a landfill; and

WHEREAS, Metro and Mr. Patton and Pacific Western Company recently resumed negotiations regarding a settlement of this matter with respect to civil penalties owed to Metro; and

WHEREAS, Metro Code Section 2.03.090 requires the Council to approve any settlement of unpaid civil penalties assessed by the Director or the COO; and

WHEREAS, Metro and Mr. Patton and Pacific Western Company have agreed to terms of a settlement, contingent on Metro Council approval; and

WHEREAS, the COO recommends that Metro fully settle NOV-139-05 with respect to the civil penalties imposed in NOV-139-05; now therefore

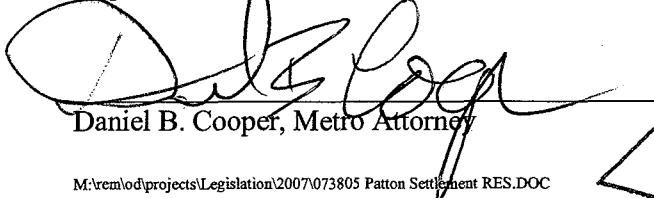
BE IT RESOLVED that the Metro Council approves settlement with Mr. Patton regarding NOV-139-05 and authorizes the Chief Operating Officer to enter into a settlement agreement substantially similar to the document attached as Exhibit A to this resolution.

ADOPTED by the Metro Council this 10th day of May, 2007



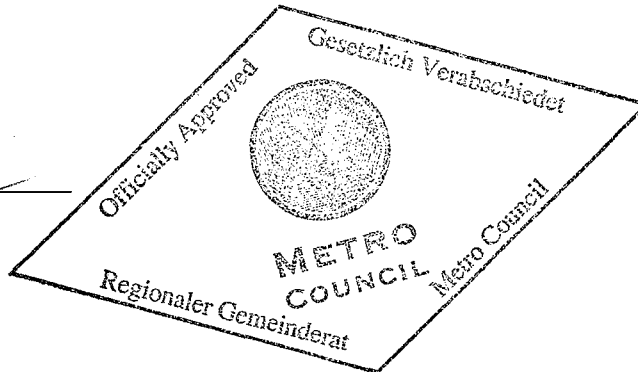
David Bragdon, Council President

Approved as to Form:



Daniel B. Cooper, Metro Attorney

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SETTLEMENT AGREEMENT

Metro, a municipal corporation organized under the Oregon Constitution, ORS Chapter 268, and the Metro Charter (“Metro”), Pacific Western Co., an Oregon corporation, (“Pacific Western”), and Lowell E. Patton, an Oregon resident and President of Pacific Western, enter this Settlement Agreement (“Agreement”) effective the date this Agreement is fully executed (the “Effective Date”). Metro, Pacific Western and Mr. Patton shall collectively be referred to herein as the “Parties” and each individually as a “Party.”

RECITALS

- A. The Metro Chief Operating Officer issued Notice of Violation No. 139-05 (NOV-139-05) to Pacific Western and Mr. Patton on December 15, 2005, finding that Pacific Western and Mr. Patton violated Metro Code Sections 5.05.025, 7.01.020(c) and 7.01.023 when they delivered approximately 907 tons of solid waste to an unauthorized disposal site. NOV-139-05 imposed a civil penalty of \$30,788.69 against Pacific Western and Mr. Patton.
- B. Metro received a timely request for a contested case hearing in this matter dated January 6, 2006, from James E. Mountain, Jr., an attorney representing Pacific Western and Mr. Patton.
- C. The Parties enter into this Settlement Agreement to fully settle and compromise contested NOV-139-05.

NOW THEREFORE, in reliance on the above recitals and in consideration of the mutual promises described below, the adequacy of which the Parties hereby acknowledge, the Parties agree as follows:

1. Promissory Note.

Mr. Patton shall sign the Promissory Note attached as Exhibit A to this Agreement and incorporated herein by reference, in which Mr. Patton promises to pay Metro the sum of \$13,500.00, on the schedule and with interest accruing as described in Exhibit A.

2. Metro Release.

As of the Effective Date of this Agreement, and except for an action to enforce the provisions of the promissory note attached as Exhibit A and described in Section 1 of this Agreement, Metro hereby releases, acquits, and forever discharges its authority to pursue further enforcement action against Pacific Western and/or Mr. Patton which may in any manner be related to the violation(s) alleged in NOV-139-05.

3. Modification and Waiver.

This Agreement shall not be modified unless such modification is in writing and is signed by all of the Parties. Waiver of any provision(s) of this Agreement shall not affect the enforceability of any other provision(s) of this Agreement.

4. Agreement Not Assignable or Transferable.

This Agreement may not be transferred or assigned without the prior written approval of Metro, Pacific Western and Mr. Patton.

5. Notice.

Any notice provided under the terms of this Agreement shall be sent via certified U.S. mail, return receipt requested, and addressed as follows:

If to Pacific Western and Mr. Patton:

Lowell E. Patton, individually and as
President and Registered Agent for
Pacific Western Co.
16050 SE Highway 224
P.O. Box 85
Clackamas, OR 97015

If to Metro:

Michael Jordan
Metro Chief Operating Officer
600 N.E. Grand Ave.
Portland, OR 97232
(503) 813-7544

Dan Cooper
Metro Attorney
600 NE Grand Ave.
Portland, OR 97232
Fax (503) 797-1792

6. Choice of Law.

This Agreement shall be construed, applied, and enforced in accordance with the laws of the State of Oregon.

7. Severability.

If any non-material provision of this Agreement is held to be invalid, illegal, or unenforceable in any respect, the validity of the remaining provisions contained in this Agreement shall not be affected.

8. Legal Fees.

If any suit or action arising out of or related to this Agreement is brought by any Party, the prevailing Party or Parties shall be entitled to recover the costs and fees incurred by such Party or Parties in such suit or action, including, without limitation, any post-trial or appellate proceeding, or in the collection or enforcement of any judgment or award entered or made in such suit or action. Such recoverable costs and fees shall include, without limitation, reasonable attorneys' fees, the fees and costs of experts and consultants, copying costs, courier and telecommunication costs, and deposition and all other costs of discovery.

9. Entire Agreement.

This Agreement is the entire agreement between the Parties.

10. Voluntary Agreement.

Each Party hereby declares and represents that it fully understands the terms of this Agreement, that it has had ample opportunity to review this Agreement and solicit and receive the advice of its own counsel, and that it voluntarily enters into this Agreement.

11. Authority to Enter Into This Agreement and Signatory Authority.

Each Party hereby declares and represents that it has the legal power, right, and authority to enter into this Agreement. The individuals signing below warrant that they have full authority to execute this Agreement on behalf of the Party for which they sign.

PACIFIC WESTERN COMPANY

METRO

Lowell E. Patton, President

Michael Jordan, Chief Operating Officer

Date: _____

Date: _____

LOWELL E. PATTON

Date: _____

Attachment: Exhibit A—Promissory Note

PROMISSORY NOTE

\$13,500

FOR VALUE RECEIVED, the undersigned Lowell E. Patton (hereinafter Patton), his heirs and assigns promises to pay to the order of Metro, a municipal corporation organized under the Oregon Constitution, ORS Chapter 268, and the Metro Charter (hereinafter METRO), at 600 NE Grand Ave., Portland, OR 97232, or such other place or address as METRO may designate, the principal sum of Thirteen Thousand Five Hundred Dollars (\$13,500) together with interest on the principal sum as provided below in this Note.

1. **INTEREST AND PAYMENT.**

(a) **Interest Rate.** Interest on the unpaid balance of this note shall begin accruing on January 10, 2008. Beginning January 10, 2008, Patton promises to pay interest on the unpaid principal balance of this Note until paid in full at a rate equal to six percent (6.0%) simple interest, per annum.

(b) **Payment Schedule and Maturity Date.** Commencing on January 10, 2008, and on or before the 10th day of each succeeding month until paid in full, Patton shall make principal and interest payments in the amount of Seven Hundred Eighty Six and 24/100 dollars (\$786.24). If not sooner paid, the entire unpaid balance of principal and interest owing under this Note shall be due and payable on or before 5:00 pm June 10, 2009 (the "Maturity Date").

(c) **Prepayment.** All or any part of the principal balance of this Note, and all accrued but unpaid interest thereon, may be prepaid by Patton at any time without penalty or prepayment charge.

(d) **Place and Time of Payment.** All payments specified in this Note shall be deemed made when actually received by METRO. All payments shall be made to METRO at its address set forth above or at such other address as METRO may designate in writing to Patton, and shall be made without offset and without prior notice or demand.

(e) **Form and Application of Payments.** Payments shall be in lawful money of the United States of America, and when received by METRO shall be applied: (1) to all amounts due under this Note other than principal or interest, (2) to accrued interest, (3) upon the portion of the principal balance then due (if any), and (4) as a principal payment.

2. **DEFAULT.** Time is of the essence of this Note. A default shall occur if:

(a) **Failure to Make Payment.** Patton fails to pay METRO either (1) a scheduled payment when due as provided in Section 1 above, or (b) the unpaid balance then owing hereunder on or before the Maturity Date.

3. **REMEDIES.** In the event of a default, METRO may take any one or more of the following steps:

(a) **Acceleration.** Declare the entire unpaid principal balance of the debt evidenced by this Note, and all interest on such debt and all other costs and expenses evidenced by this Note, to be immediately due and payable.

(b) **Other Remedies.** Pursue any other right or remedy provided in this Note or otherwise, allowed by law. METRO may pursue such rights or remedies singly, together or successively. Exercise of any such right or remedy shall not be deemed an election of remedies. Failure to exercise any right or remedy shall neither be deemed a waiver of any existing or subsequent default nor a waiver of any such right or remedy.

4. **ATTORNEY FEES AND COLLECTION COSTS.** Patton agrees to pay all costs of collection for sums due under this Note, including reasonable attorney fees. In the event that METRO is made party to any litigation because of the existence of the indebtedness evidenced by this Note, Patton shall reimburse METRO for its costs and attorney fees incurred with respect to such litigation. In the event litigation is commenced by a party to this Note to enforce or interpret any provision of this Note, or to collect any amount due hereunder, the prevailing party in such litigation shall be entitled to receive, in addition to all other sums and relief, its reasonable costs and attorney fees, incurred both at and in preparation for trial and any appeal or review, such amount to be set by the court(s) before which the matter is heard.

5. **GOVERNING LAW AND VENUE; SEVERABILITY.**

(a) **Governing Law and Venue.** This Note shall be governed by and construed in accordance with the laws of the State of Oregon. Any lawsuit commenced in connection with this Note shall be filed in the Circuit Court of Clackamas County, Oregon.

(b) **Severability.** If any provision of this Note is found by a court of competent jurisdiction to be invalid or unenforceable as written, then the parties intend and desire that (1) such provision be enforceable to the full extent permitted by law, and (2) the invalidity or unenforceability of such provision shall not affect the validity and enforceability of the remainder of this Note.

6. **NOTICES.** Any notice or other communication required to be given under this Note shall be in writing and shall be deemed given upon hand-delivery (accompanied by a written receipt therefore) or two (2) days after deposit in the U.S. mail, return receipt requested, postage prepaid, addressed to the parties at the following addresses:

To PATTON: Lowell E. Patton
16050 SE Highway 224
P.O. Box 85
Clackamas, OR 97015

To METRO: Office of the Metro Attorney
600 NE Grand Ave.
Portland, OR 97232

The addresses to which notices or other communications shall be mailed may be changed by a party from time to time by giving written notice to the other party as provided in this paragraph.

7. **AMENDMENT.** This Note may not be amended, modified or changed, nor shall any provision of this Note be deemed waived, except only by an instrument in writing signed by the party against whom enforcement of any such waiver, amendment, change, or modification is sought.

8. **WAIVERS.** Patton hereby (a) waives diligence, presentment, protest and demand, (b) waives notice of protest, or consent to any extension or alteration of the time or terms of payment of this Note, any release of all or any part of any security which may be given for the payment of this Note, any acceptance of additional security of any kind, and any release of or resort to any party liability for payment of this Note, any of which may be made without notice to any of such parties.

9. **BINDING AGREEMENT.** This Note shall be binding upon Patton, his heirs and successors, and shall inure to the benefit of METRO and assigns.

PATTON:

_____ Date: _____
Lowell E. Patton

State of Oregon }
 } SS
County of Clackamas }

I _____ a Notary Public for the State of Oregon certify that on the ____ day of _____, 2007 personally appeared before me **Lowell E. Patton** who, being first duly sworn, did say that he is the herein named Patton and hereby acknowledges said instrument to be his free and voluntary act.

_____ Notary Public
My Commission Expires: _____

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STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 07-3805 APPROVING A SETTLEMENT AGREEMENT WITH LOWELL E. PATTON AND PACIFIC WESTERN COMPANY REGARDING METRO NOTICE OF VIOLATION NO. NOV-139-05

May 10, 2007

Prepared by: Steve Kraten

BACKGROUND

Description of the Resolution

In 1996 Metro discovered that Pacific Western Company, a business owned and operated by Lowell Patton and located at 16050 SE Highway 224 near Carver in Clackamas County, was functioning as an unauthorized solid waste disposal site, accepting waste roofing tear-off debris from roofing contractors for a tip fee of \$13 per cubic yard. The site is within the Metro regional boundary. Metro ordered Mr. Patton and Pacific Western Company to cease such operations and also alerted the Department of Environmental Quality ("DEQ"). In a letter dated September 5, 1996, Mr. Patton notified his customers that he would cease accepting waste roofing after September 30, 1996. By mutual agreement, DEQ took the lead in enforcing against Pacific Western to have the roofing waste properly disposed. Mr. Patton contested DEQ's enforcement, ultimately leading in February 2003 to the Oregon Court of Appeals affirming the Environmental Quality Commission's ("EQC") imposition of a \$9,400 civil penalty and requiring Mr. Patton to dispose of the material appropriately. In February 2004 DEQ sampling revealed the presence of asbestos in the roofing pile, which limited the options available for reuse of this material.

Mr. Patton and Pacific Western proceeded to negotiate with DEQ and Metro regarding the reuse or disposal of the material. This included, in late 2004, Pacific Western Company considering to cap the material on-site, with DEQ approval, thereby rendering the property a disposal site. To facilitate such an approach, Metro staff offered a settlement agreement whereby Pacific Western would pay Metro the regional system fee and excise tax rate that applied to waste material derived from contaminated site cleanups, which would have been approximately \$3,600. Mr. Patton and Pacific Western Company ultimately decided not to pursue that approach.

Finally, after continuing negotiations that took more than two years since the Court of Appeals' decision, on April 7, 2005, DEQ approved a disposal plan for the roofing waste to be delivered to Rinker Materials for incorporation into an asphalt paving mix. On May 6, 2005, Metro made an unannounced visit to Mr. Patton's site to confirm that the material was being delivered to Rinker Materials and discovered that the roofing waste was, instead, being delivered to a rural property owned by Mr. Patton near Rhododendron, Oregon where it was placed on the ground in a small clearing in the forest. Such disposition of the roofing waste was being performed without Metro's or the DEQ's knowledge or authorization. As a result, in October 2005 the DEQ issued a Notice of Violation that imposed a civil penalty of \$78,486 against Pacific Western Company, for failing to comply with the EQC's order to dispose of the waste roofing at a permitted disposal facility, and a separate penalty of \$55,261 against Lowell Patton personally

for establishing a solid waste disposal site without a permit. In addition, the notice included an order to properly dispose of the roofing at a permitted solid waste disposal facility.

On December 15, 2005, Metro issued Notice of Violation NOV-139-05 imposing a penalty of \$30,788.69 for delivery of solid waste generated from within the Metro boundary to an unauthorized disposal site in violation of Section 5.05.025 of the Metro Code and for failure to pay Metro excise taxes in violation of Metro Code Section 7.01.020(c). Metro stayed pursuit of its enforcement action while DEQ and Mr. Patton and Pacific Western Company actively negotiated resolution of DEQ's enforcement action. Metro's goal at that time was to cooperate with DEQ as necessary to ensure, first, that the waste roofing material was appropriately disposed in a landfill.

On March 27, 2006, DEQ entered into a Mutual Agreement and Final Order with Mr. Patton and Pacific Western Company dismissing the civil penalty against Mr. Patton altogether and reducing the civil penalty against Pacific Western Company to \$30,000, contingent on cleaning up the Rhododendron property and the disposal of the material in a fully permitted landfill. Mr. Patton thereafter delivered the waste roofing to the Wasco County Landfill in compliance with his agreement with DEQ and, as of the date of this staff report, has paid \$21,575 in principal and interest on the penalty.

Metro staff then reinitiated this enforcement action before the Metro Hearings Officer. Such action has continued for the past year, including briefing two issues related to Metro's solid waste enforcement authority. Metro and Mr. Patton and Pacific Western Company recently resumed negotiations regarding a settlement of this matter with respect to civil penalties owed to Metro.

Resolution No. 07-3805 approves a settlement agreement regarding NOV-139-05 for the sum of \$13,500.00. The Chief Operating Officer recommends approval of this settlement for three reasons:

1. The waste roofing was ultimately disposed in an appropriate and permitted landfill;
2. Upon approval of this settlement agreement and upon compliance therewith, Pacific Western Company will have paid a total penalty of \$52,900 plus interest for its violations of State law and Metro Code, plus the costs incurred to cleanup, transport and dispose of the material in an appropriate landfill, which sums are sufficient to deter future violations; and
3. This matter has continued for over ten years and it is in all parties' interest to bring this matter to conclusion.

ANALYSIS/INFORMATION

1. Known Opposition

There is no known opposition to the proposed settlement.

2. Legal Antecedents

Metro Code Section 2.03.090 provides that, after the Chief Operating Officer (or his designee) issues an NOV assessing a civil penalty, any settlement that compromises or settles the assessed civil penalty must be approved by the Metro Council.

3. Anticipated Effects

The effects of Resolution No. 07-3805 will be to approve a settlement of a Notice of Violation that requires the violator, Lowell Patton, to pay METRO the sum of \$13,500.00 in 18 monthly installments at six percent interest commencing on January 1, 2008.

4. Budget Impacts

No budget impact is anticipated.

RECOMMENDED ACTION

The Chief Operating Officer recommends approval of Resolution No. 07-3805, approving a Settlement Agreement with Lowell E. Patton substantially similar to the Settlement Agreement attached to the resolution as Exhibit A.

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