

**BEFORE THE METRO COUNCIL**

FOR THE PURPOSE OF REVISING THE	)	RESOLUTION NO. 03-3330
HEARINGS OFFICER'S PROPOSED ORDER	)	
AND AUTHORIZING THE CHIEF OPERATING	)	
OFFICER TO ISSUE A FINAL ORDER	)	Introduced by Michael Jordan,
IMPOSING A CIVIL PENALTY ON PRIDE	)	Chief Operating Officer, with the
RECYCLING COMPANY FOR VIOLATION OF	)	concurrence of David Bragdon, Council
METRO FRANCHISE	)	President
NO. F-002-98	)	
	)	
	)	

WHEREAS, the Executive Officer issued Solid Waste Facility Franchise No. F-002-98 to Pride Recycling Company ("Pride"), on December 31, 1998; and

WHEREAS, Pride accepted 72,302 tons of putrescible waste in Metro fiscal year 2001-02; and

WHEREAS, section 4.2 of Franchise No. F-002-98 provides that Pride Recycling Company "shall accept no more than 68,250 tons of putrescible waste within each Metro fiscal year;" and

WHEREAS, on August 15, 2002, the Metro Executive Officer issued a "Finding of Violation and Notice of Imposition of Penalty" to Pride for exceeding the tonnage limitation in Franchise No. F-002-98 by more than 4,000 tons; and

WHEREAS, the Executive Officer imposed a civil penalty of \$20,000 against Pride; and

WHEREAS, Pride requested a contested case hearing, and

WHEREAS, Pride agreed to waive its right to formal hearing and Pride and the Executive Officer agreed to submit this matter to Metro Hearings Officer Robert J. Harris based upon written submittals; and

WHEREAS, on April 7, 2003, the Hearings Officer issued a proposed order upholding the Executive Officer's imposition of a civil penalty of \$20,000, a copy of which is Attachment A to this resolution; and

WHEREAS, Pride filed written exceptions to the Hearings Officer's proposed order, a copy of which is Attachment B to this resolution; and

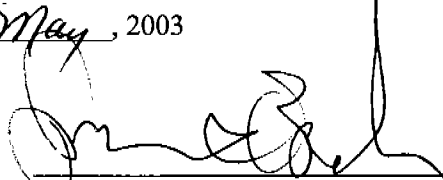
WHEREAS, the Chief Operating Officer filed written exceptions to the Hearings Officer's proposed order which include a recommendation to adopt a revised final order in this matter, a copy of which is Attachment C to this resolution; and

WHEREAS, Metro Code 2.05.045(b) provides that the Council shall adopt the Hearings Officer's proposed order or revise or replace the findings or conclusions in the order, or remand the order to the Hearings Officer; and

WHEREAS, the Council has considered the proposed order and the exceptions to the proposed order, and has provided the parties with an opportunity to comment orally on the revised final order proposed by the Chief Operating Officer, as required by the Metro Code; now therefore

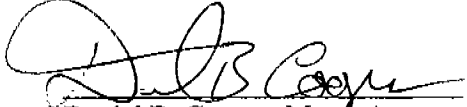
BE IT RESOLVED that the Council revises the Proposed Order issued by Hearings Officer Robert J. Harris in the Matter of Metro Citation M1254 for Violation of Metro Franchise No. F-002-98 by Pride Recycling Company, and directs the Chief Operating Officer to issue a Final Order substantially similar to Attachment D to this resolution.

ADOPTED by the Metro Council this 22nd day of May, 2003

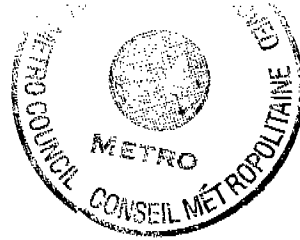


David Bragdon, Council President

Approved as to Form:



Daniel B. Cooper, Metro Attorney



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**METRO CONTESTED CASE:**

**BEFORE ROBERT J. HARRIS HEARINGS OFFICER**

<b>IN THE MATTER OF METRO CITATION )  M1254 FOR VIOLATION OF METRO )  FRANCHISE NO. F-002-98 BY PRIDE )  RECYCLING COMPANY )</b>	<b>COMPLAINT NO: M1254   PROPOSED ORDER</b>
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**BACKGROUND AND PROCEDURAL POSTURE**

On December 31, 1998, Metro issued a Solid Waste Facility Franchise to Pride Recycling Company, franchise license number F-002-98.

On August 15, 2002, Metro, through Executive Officer Mike Burton, issued to Pride Recycling Company a Finding of Violation and Notice of Penalty. Metro, Citation and Complaint M1254, along with an attached Findings of Fact and imposed a penalty of \$20,000 (per Metro Code, sections 5.01.180, 5.01.200, and 2.03.040).

Pride Recycling Company timely requested a contested case hearing under Metro Code 5.01.180(c).

Metro and Pride Recycling, through its attorney Wayne Palmer and Kell, Alterman & Runstein, L.L.P. agreed to submit the matter to the Hearings Officer through written submittals in lieu of hearing.

The Parties and Metro waived formal notification of Procedures and Rights at a Hearing. There were no ex-parte communications between the Hearings Officer and the Parties or Metro.

**RECORD AND EVIDENTIARY RULINGS**

The official record shall consists of the following:

**Exhibit #**

1. Finding of Violation and Notice of Imposition of Penalty. Dated August 15, 2002 and signed by Mike Burton, Executive Officer
2. Metro Citation and Complaint No. M 1254, along with attached Findings of Fact. Dated August 15, 2002.
3. Letter from Mr. Wayne Palmer, dated September 5, 2002 requesting a contested case hearing.
4. Letter from Hearings Officer to Mr. Mike Leichner, Pride Recycling, dated November 5, 2002 setting the Hearing for January 7, 2003.
5. Letter from Hearings Officer to Mr. Paul Garrahan, of Metro, and Mr. Wayne Palmer, dated December 20, 2002.
6. Document from Metro entitled "Memorandum in Support of Metro's Imposition of Penalty", including attachments, dated January 7, 2003.
7. Document from Wayne Palmer for Pride Recycling Company dated January 7, 2003, along with attachments.
8. Letter dated January 30, 2003, to Robert Harris from Far West Fibers, Inc., including attachments.
9. Cover letter dated January 31, 2003, and Document from Metro entitled, "Reply Memorandum in Support of Metro's Imposition of Penalty.
10. Letter from Wayne Palmer dated January 31, 2003.

No Further Evidence or Submittals having been received, I closed the record on March 7, 2003.

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**FINDINGS OF FACT**

- 1  
2 1. Pride Recycling Company (hereinafter Pride) has a valid Metro solid waste facility  
3 franchise, license number F-002-98. Said license was issued On December 31, 1998. Pride  
4 operates a franchise for disposal of solid waste within the Metro jurisdiction. Pride accepts  
5 solid waste that is generated within, and outside of, the urban growth boundary.
- 6 2. Said license originally allowed Pride to accept 50,000 tons of putrescible solid waste per  
7 Metro fiscal year, that cup was later increased to 65,000 tons. The year in question here is  
8 Metro fiscal year from July 1, 2001, until June 30, 2002.
- 9 3. For purposes of the tonnage limits contained in said license, and within the Metro Code  
10 itself, no distinction is made between solid waste generated inside, versus outside, the  
11 urban growth boundary. However, Metro staff regulators have historically made a  
12 distinction between waste generated inside, versus outside, the Metro region, and  
13 historically did not count the waste generated outside the region towards a licensees  
14 tonnage cap (see Exhibit 7, Attachment 5, page 4, and Exhibit 6, Attachment I).
- 15 4. On April 16, 2002, Roy Brewer, Metro Regional Environmental Management, Regulatory  
16 Affairs Division Manager, e-mailed Mike Leichner of Pride with a warning that Pride was  
17 on track to exceed its then limit of 65,000 tons of wet waste. Mr. Brewer suggested that  
18 Pride avail itself of the opportunity to increase its cap by 5%, to 68,250 tons. Mr. Brewer  
19 stated that Metro was serious about enforcing its cap on solid waste facilities (see Exhibit  
20 6, Attachment C). In this correspondence, no distinction was made between waste  
21 generated within versus outside, the Metro region. So at this point, Pride was on notice that  
22 all waste received could be counted towards its overall cap.
- 23 5. In a May 8, 2002, Finding and Decision, Mike Burton Metro Executive Officer authorized  
24 the 5% increase in Prides license so that it could accept 68,250 tons. That Finding and  
25 Decision also called Prides attention to the fact that Metro's analysis of Prides total solid

1 waste intake showed that Pride would still exceed the 68,250 tons allowed under their  
2 amended license. Mr. Burton's letter informs Pride that if Pride exceeded its tonnage limit,  
3 Metro would take formal enforcement action (Exhibit 6, Attachment D). Again, in this  
4 correspondence, no distinction was made between waste generated within, versus outside  
5 the Metro region.

6 6. On June 3, 2002, Terry Petersen, Metro Director, Regional Environmental Management  
7 (through Roy Brewer), sent a letter to Pride informing it that though the 5% increase was  
8 approved, they were still on track to exceed the tonnage limit. Enforcement of the franchise  
9 agreement, and civil penalties were again referenced (Exhibit 6, Attachment E). And again,  
10 no distinction was made for waste generated within, versus outside the Metro region.

11 7. On June 6, 2002, Mr. Warren Johnson, Metro Solid Waste Facility Inspector inspected the  
12 Pride facility. As part of the inspection, he talked to Mike Leichner, President of Pride  
13 Recycling Company. Mr. Leichner acknowledged that it was likely that Pride would  
14 exceed its tonnage cap, but that he intended to continue to accept waste, even if it meant  
15 exceeding Prides cap. His reasoning was that he didn't want to lose customers, and didn't  
16 want to reduce the recovery rate at the facility (Exhibit 6, Attachment F). There was no  
17 discussion regarding whether waste generated outside the Metro region would count  
18 towards the cap.

19 8. For the Metro Fiscal year July 1, 2001 until June 30, 2002, Pride accepted 72,302 tons of  
20 wet waste at its facility. Pride exceeded its tonnage cap contained in its license by 4,052  
21 tons. Of this amount 2120 was from outside the Urban Growth.

22 9. Pride knowingly accepted solid waste in excess of the tonnage cap set by its Metro solid  
23 waste facility franchise, license number F-002-98, as amended. Pride exceeded its tonnage  
24 cap on about June 10, 2002. After said date Pride accepted 610 loads of wet waste.

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1 10. As Metro Alleged the violation could not be corrected, On August 15, 2002, Executive  
2 Officer Mike Burton issued a Finding of Violation and Notice of Penalty, a Findings of  
3 Fact and Violation and Complaint No. M 1254 to Pride (exhibits 1 and 2). The Executive  
4 Officer considered the following items in assessing the Civil Penalty.

- 5 i. Pride knowingly and willfully violated the franchise agreement.
- 6 ii. Pride had been warned several times prior to the date of violation that it needed  
7 to do something to avoid going over the cap.
- 8 iii. Pride violated the integrity of the system and gained an unfair competitive  
9 advantage over its competitors.
- 10 iv. Metro looked at the economic benefit gained by acceptance of the excess waste,  
11 and attempted to tailor the civil penalty to deter future violations.

12 11. Executive Officer Mike Burton also had before him a memorandum by Terry Petersen,  
13 regional Environmental Management Director, (exhibit 6, attachment H), who in turn had  
14 the benefit of an historical account and analysis from a memorandum by Roy Brower  
15 (exhibit 6, attachment I). This memorandum, in addition to giving additional information  
16 regarding the aggravating factors set forth in paragraph 10 above, also cited the following  
17 mitigation factors

- 18 i. This is the first incident of non-compliance by Pride.
- 19 ii. The staff analysis that was adopted as part of Ordinance No. 01-916A, which  
20 established tonnage limitations specifically excluded out of district waste.  
21 However, even excluding out of district waste Pride still exceeded its tonnage  
22 limitation by approximately 2,224 tons (later changed to 1,932 tons).
- 23 iii. Most of the tonnage accepted by Pride was generated within the service area of  
24 the facility. However, more that 2000 tons of waste accepted at Pride was  
25 generated and collected in the Metro region but outside the Pride service area.

1 12. Pride requested a Contested Case Hearing, and Pride and the Agency agreed to submit  
2 written documentation in lieu of a formal hearing.

3 13. Other mitigating factors found based on submittals by Pride:

- 4 i. Pride has a good operating history and is considered innovative in the material  
5 recovery field.

6  
7 **ULTIMATE FINDINGS OF FACT  
REASONING AND CONCLUSIONS OF LAW**

- 8 1. Metro is the Portland Oregon area metropolitan government entity legally charged with  
9 regulating solid waste disposal sites and solid waste facilities within its jurisdictional area.  
10 Said regulatory authority extends to the disposal of all solid waste generated or disposed of  
11 within the district (Metro Code 5.01.025, ORS Chapter 268, 1992 Metro Charter, Oregon  
12 Constitution).
- 13 2. Metro code, chapter 5.01.045 requires all solid waste facilities within Metro jurisdiction to  
14 obtain a Metro license or franchise.
- 15 3. Pride Recycling Company (hereinafter Pride) has a valid Metro solid waste facility  
16 franchise, license number F-002-98. Said license was issued on December 31, 1998. Pride  
17 operates a franchise for disposal of solid waste within the Metro jurisdiction. Pride accepts  
18 solid waste that is generated within, and outside of, the urban growth boundary. As  
19 amended, said license allowed Pride to accept 68,250 tons of putrescible solid waste per  
20 Metro fiscal year. The year in question here is Metro fiscal year July 1, 2001, through June  
21 30, 2002.
- 22 4. During the relevant time period, Pride knowingly collected 72,302 tons of putrescible solid  
23 waste at its facility within the Urban Growth Boundary. Pride exceeded its tonnage cap  
24 contained in its license by 4,052 tons, and violated the terms of its Metro Franchise  
25 License, No. F-002-98, as amended.



- 1 5. Metro
- 2 6. Pride exceeded its licensed tonnage cap on Monday June 10, 2002. On and after that date,  
3 Pride accepted 610 loads of solid waste at its facility.
- 4 7. Each load that was accepted after Pride exceeded its tonnage cap, from June 10, 2002 until  
5 June 30, 2002, constitutes a separate violation, and is subject to a separate penalty (Gage v.  
6 City of Portland, 319 Or. 308, 317. 877 P.2d 1187 (1994) Deference is given to local  
7 governing body's interpretation of its own ordinance...).
- 8 8. The maximum penalty for each separate violation is \$500 (Metro Code, 5.01.200).
- 9 9. The Executive properly considered mitigating and aggravating factors in determining the  
10 appropriate civil penalty, pursuant to Metro Code 2.03.050(a), and additional factors  
11 pursuant to Metro Code 2.03.050(b).

12 **DISCUSSION**

13 There are two matters that merit discussion. First, what constitutes a separate violation,  
14 and second whether the executive appropriately considered all factors as required under Metro  
15 code.

16 The agency contends that each time Pride accepted a load of waste after it exceeded its  
17 tonnage cap, that a separate violation occurred. Pride argues that the maximum violation is  
18 \$500 per day for every day after its tonnage cap was exceeded and points to Metro Code  
19 5.01.200, as well as a prior order in Metro case number MSD 00-0553, *Metro v. Willamette*  
20 *Resources Inc.*

21 In the *Willamette* case Metro's position was that there was a maximum daily penalty of  
22 \$500 for a similar violation. The Agency's interpretation of what constitutes a separate  
23 violation has changed in this case, and in reviewing the possible scenarios, its current  
24 interpretation makes much more sense.

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1 As pointed out in Metro's written arguments, if two facilities had exceeded their caps  
2 on June 10, 2002. And one facility had thereafter accepted one load per day and the other  
3 facility accepted twenty loads per day, it would be illogical for both facilities to have the same  
4 maximum penalty, since the scope of the violations was so different. Yet to accept Pride's  
5 interpretation that's exactly what would happen.

6 I also agree with Metro that the "per day" language contained in the code, is more  
7 accurately referring to a violation that has an occurrence date, but that particular violation  
8 continues unabated for more than one day. This per day language should not be used in  
9 situations where there are multiple acts constituting violations on a single day, such as  
10 accepting multiple loads of waste, to limit Metro's ability to issue just a single \$500 daily  
11 penalty.

12 Metro could take the position that since a ton is the relevant unit of measurement in the  
13 franchise agreement that any extra ton accepted was a separate violation. That, in fact, could be  
14 a better measurement of scope of violation than a single load, since a load can vary in size.

15 However, deference must be given to an Agency's interpretation of its own rules,  
16 (*Gage v. City of Portland, Infra*). I therefore adopt Metro's interpretation that when a facility  
17 allows a truck to unload waste at its facility, knowing that it is over the tonnage cap limitation  
18 in its franchise agreement, that facility commits a separate violation. Since Pride accepted 610  
19 loads after it reached its tonnage cap, Pride committed 610 separate violations, and the  
20 maximum civil penalty that would be imposed in this case is \$305,000.

21 I recognize that this is a different standard than was applied in the Willamette case.  
22 However, simply because there may have been an error in an earlier interpretation of a rule,  
23 does not mean that we must live with that error. If Pride did not know of the earlier  
24 interpretation, then there was no detrimental reliance. And if Pride reviewed that earlier Order

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1 and determined that it could profitably continue to violate its franchise agreement, then while it  
2 may be able to argue detrimental reliance, I would have little sympathy for that argument.

3       The second contested matter is whether the out of region waste accepted at the Pride  
4 facility should count towards its tonnage cap. In one sense this is a moot point, since the  
5 \$20,000 penalty imposed by the Executive Officer was still less than the maximum penalty that  
6 could be imposed for the in region excess waste alone (Assuming about 6.7 tons per load,  
7 1,932 tons would come to about 288 loads. 288 times \$500 is \$144,000). In addition, Even  
8 though the Executive did not reference in his Findings an acknowledgment that Metro staff had  
9 not historically counted out of region waste towards the tonnage cap, the Executive certainly  
10 knew that fact. He had before him the Memorandum of Terry Peterson who specifically  
11 pointed that fact out as a mitigating factor. So I believe that the Executive did consider the in  
12 region versus out of region waste issue in determining the appropriate civil penalty.

13       One factor the Executive did not have before when the penalty was imposed was the  
14 fact that ultimately the excess tonnage amounted to 4,052 tons rather than the original 4,343  
15 tons. As the Executive pointed out in his original Findings and imposition of penalty that the  
16 penalty he imposed amounted to \$4.60/ton. A 291 ton reduction could have resulted in a  
17 reduction in the penalty by \$1,338.60. However, given all the other factors weighed by the  
18 Executive, and the scope of this violation compared to reduced tonnage in question I cannot  
19 say that this new information would have made a difference in the penalty assessed by the  
20 Executive Officer.

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**ORDER**

Based upon the above findings of fact, ultimate findings of fact, reasoning and conclusions of law, It is hereby ORDERED THAT: The Executive Officers imposition of a \$20,000 civil penalty is upheld.



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Robert J. Harris  
Hearing Officer

Dated: April 7, 2003

**THIS ORDER MAY BE REVIEWED PURSUANT TO THOSE PROVISIONS AS SET FORTH IN METRO CODE SECTION 2.05**

METRO CONTESTED CASE:

BEFORE ROBERT J. HARRIS HEARINGS OFFICER

IN THE MATTER OF METRO CITATION )  
M1254 FOR VIOLATION OF METRO )  
FRANCHISE NO. F-002-98 BY PRIDE )  
RECYCLING COMPANY )

CITATION NO: M1254

PRIDE'S WRITTEN  
EXCEPTIONS TO  
PROPOSED ORDER

Pride Recycling Company (hereinafter "Pride") hereby files the following exceptions to the Hearings Officer Robert J. Harris' proposed April 7, 2003 order:

1. **THE PROPOSED ORDER PROVIDES FOR A PENALTY FOR THIS VIOLATION THAT IS AT LEAST TWO AND ONE-HALF TIMES GREATER THAN THAT ALLOWED BY THE METRO CODE (5.01.200).**

As set forth in Pride's January 7, 2003, written submission (which is incorporated in these exceptions) the maximum penalty for this violation is a fine of no more than \$500 per day. Metro Code 5.01.200(a). Metro incorrectly assesses that the maximum fine in this matter is calculated on the basis of each individual load that Pride accepted over its allowed tonnage. Metro has never issued a fine on this basis. Previously, Metro followed its Code and assessed fines according to the per day basis set forth in the Code.

The Metro Code does not provide that each individual load constitutes a separate violation. Metro's asserted position and the proposed order incorrectly concludes that Metro can change its interpretation of its rules. This is not supportable by Metro's Code, Metro's past practices, and the prior orders of this administrative judge.

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1 Robert J. Harris' findings of facts, reasoning and conclusions of law in  
 2 Metro Citation No. M1008 issued to Willamette Resources , Inc. (MSD No. 00-  
 3 0553) found that each day Willamette Resources continued to accept waste in  
 4 excess of the code, subjected Willamette Resources to a maximum fine of \$500  
 5 per day. See Pride's January 7, 2003 submission, p. 3-4 and Exhibit 2 (p. 7, lines  
 6 1-4 and p. 8, lines 10-15).. It is clear that Metro's former interpretation of its code  
 7 limited it to a fine of no more than \$500 per day for continuing to accept waste in  
 8 excess of the cap.

9 The proposed order discusses this issue at Pride's insistence by concluding  
 10 that Metro's interpretations of its own regulations has changed:

11 "I recognize that this is a different standard than was applied in the  
 12 Willamette case. However, simply because there may have been an error in  
 13 an earlier interpretation of a rule, does not mean that we must live with that  
 14 error. If Pride did not know of the earlier interpretation, then there was no  
 15 detrimental reliance. And if Pride reviewed that earlier Order, and  
 16 determined that it could profitably continue to violate its franchise  
 17 agreement, then while it may be able to argue detrimental reliance, I would  
 18 have little sympathy for that argument." (Emphasis added).

19 The hearings officer relies on the axiom that deference must be given to an  
 20 agency's interpretation of its own rules, citing Gage v. City of Portland, 319 Or  
 21 308, 317, 877 P2d 1187 (1994), but ignores that same rule as it relates to Metro's  
 22 past interpretations and practices. Pride relied on past interpretations.

23 **2. METRO REPEATEDLY ENCOURAGED PRIDE TO**  
 24 **CONSIDER WILLAMETTE RESOURCES' SANCTION IN THE EVENT**  
 25 **IT EXCEEDED THE CAP.**

26 Pride could not have helped being aware of the Willamette Resources'  
 violation. On numerous occasions, Metro staff members encouraged Pride to

1 consider Willamette Resources' experience in exceeding the cap. Willamette  
2 Resources was and is the only precedence Pride is aware of.

3 As Mike Burton put it in his May 8, 2002 letter to Pride's president:

4 ". . . By way of comparison, another franchised solid waste facility violated  
5 its tonnage authorization approximately two years ago. At that time, Metro  
6 took formal enforcement action, including monetary penalties. I encourage  
7 you to manage your waste flow over the coming weeks to avoid putting  
8 Pride in a similar situation."

9 (Page 2 of Exhibit 10 to Pride's January 7, 2003 submission).

10 Roy Brower also wrote to Pride indicating that it should expect to receive  
11 similar treatment as Willamette Resources. As he put it:

12 "In 2000, when WRI exceeded its cap in 1999, they were fined by Metro  
13 each day they received waste in excess of their cap. It would be difficult to  
14 say what Metro's precise response would be should Pride violate its  
15 franchise, but precedent should give you some clues." (Emphasis added).

16 (See Exhibit 9 to Pride's January 7, 2003 submission).

17 Several Metro staff members also led Pride to believe that it would receive a  
18 fine similar to Willamette Resources in the event it violated the tonnage cap. No  
19 one from Metro ever suggested that it would seek to fine Pride on a per load basis  
20 or that it would seek to enforce a penalty that is approximately ten times that  
21 which Willamette Resources received.

22 There is nothing in the record in this case to suggest that Metro notified  
23 Pride or other licensees that Metro had changed its interpretation of an otherwise  
24 clear rule by seeking to impose penalties on a per load, as opposed to a daily basis.  
25 As set forth above, instead Metro repeatedly encouraged Pride to look to its past  
26 practices, interpretations and penalties.

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1           3.     IT IS NOT EQUITABLE TO FINE PRIDE APPROXIMATELY  
 2     TEN TIMES MORE THAN WILLAMETTE RESOURCES RECEIVED  
 3     FOR A REMARKABLY SIMILAR CASE.

4           The proposed order doesn't attempt to reconcile the Willamette Resources  
 5     fine and the proposed fine to Pride. Instead, it adopts an entirely different basis  
 6     (and not supportable by the Metro Code) for calculating the fine. Willamette  
 7     Resources received a \$2,219 fine for 19 days it remained in violation of the cap.  
 8     The fine was less than \$117 per day.

9           There was no attempt in the record in the Willamette Resources case to  
 10    calculate the number of loads that it received during the relevant time period. The  
 11    Willamette Resources' order finds that a civil penalty of \$1 per ton for the excess  
 12    waste was reasonable (page 8, Final Order, lines 7-8).

13          It was on this basis that Willamette Resources received a \$2,219 fine.  
 14    Metro found that it accepted 2,219 tons of solid waste in excess of its cap. As set  
 15    forth in Pride's January 7, 2003 submission, Metro acknowledges that Pride  
 16    actually exceeded the cap by only 1,932 tons in the subject year. (See page 5-6 of  
 17    Pride's January 7, 2003 submission). Accordingly, if Pride is to be treated as  
 18    others, it should receive a fine in the \$2,000 range, or some \$18,000 less than  
 19    Metro proposes.

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 21           4.     PRIDE HAD A GOOD FAITH BELIEF THAT IT DID NOT  
 22     ACTUALLY EXCEED THE TONNAGE CAP BECAUSE OF METRO'S  
 23     INCORRECT CLASSIFICATION OF CERTAIN APARTMENT LOADS.

24          The proposed order ignores Pride's testimony concerning the controversy  
 25    that exists over the classification of a number of its apartment loads as  
 26



1 "putrescible" when those loads fail to meet Metro Code's definition of putrescible  
2 waste. As set forth in Pride's January 7, 2003 submission (pages 7-8) DEQ's  
3 random 2002 sample tests of waste processed by Pride confirm that three-fourths  
4 of those loads were non-putrescible. If those loads were excluded from the  
5 putrescible waste cap limitation Pride would have been well underneath the cap.  
6

7 **5. PRIDE DID NOT INTENTIONALLY VIOLATE THE**  
8 **PUTRESCIBLE WASTE CAP LIMITATION.**

9 In addition to the putrescible waste controversy, Pride anticipated the sale of  
10 West Beaverton and Beaverton Sanitary to Waste Management. Pride was aware  
11 that the sales agreement with Waste Management was signed in April 2001. Due  
12 to unforeseen circumstances, the closing was delayed until November 1, 2002.  
13 Accordingly, with the resulting loss of West Beaverton and Beaverton Sanitary to  
14 Waste Management, the issue of Pride exceeding the cap in the future became  
15 moot. That sale was anticipated to close at any time and immediately reduced  
16 Pride's waste figures by at least 2,000 tons a month.

17 Furthermore, in good faith, Pride followed Metro Enforcement Officer Roy  
18 Brower's April 16, 2002 suggestion to increase its level of recycling to reduce the  
19 risk of going over the cap limitation. Roy Brower's April 16, 2002 e-mail to Pride  
20 is attached to Pride's January 7, 2003 submission as Exhibit 9. As Mr. Brower put  
21 it:

22 "... or perhaps you could achieve even greater levels of recovery?!?"

23 Following Mr. Brower's suggestion, during the two and one-half month  
24 balance of the fiscal year, Pride assigned additional labor force (at an additional  
25 25% labor cost) to its recycling recovery belt and increased recycling during that  
26

1 time period by nearly one-third. This is one of the reasons why the outbound  
2 waste is considerably less than the tonnage cap limitation.

3 Mr. Brower encouraged additional recycling efforts by Pride which  
4 enhanced Pride's already strong commitment to recycling. Mr. Brower reversed  
5 this advice in May/June 2002 informing Pride that he was wrong and that Metro  
6 would be reviewing inbound as opposed to outbound figures. Pride continually  
7 received inconsistent instructions and advice from Metro staff members. Metro's  
8 sudden unannounced attempt to fine Pride on a per load as opposed to a fine on a  
9 daily basis is the latest inconsistent action by Metro.

10  
11 **6. THE PROPOSED ORDER FAILS TO TAKE INTO ACCOUNT**  
12 **METRO'S AND PRIDE'S COMMITMENT TO RECYCLING.**

13 If Pride had diverted material to another facility, it would have gone straight  
14 to a landfill without recycling. The disputed loads identified above are collected  
15 only from high grade loads of apartment and office buildings. These high grade  
16 customers do not have cafeterias, restaurants or other significant sources of food  
17 waste.

18 Pride's commitment to recycling was one of the reasons it decided to  
19 continue to accept waste after it knew that Metro was probably not going to accept  
20 Pride's calculations.

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1           7.    **THE PROPOSED ORDER FAILS TO TAKE INTO**  
2                   **CONSIDERATION THE MITIGATING FACTORS SET FORTH IN**  
3                   **PRIDE'S JANUARY 7, 2003 SUBMISSION AND THE PROPOSED FINE**  
4                   **SHOULD BE SUBSTANTIALLY REDUCED OR ELIMINATED.**

5           Pride will not repeat the numerous additional mitigating circumstances set  
6           forth in its January 7, 2003 submission (see pps. 5-14 and the accompanying  
7           exhibits). Pride hereby incorporates those mitigating circumstances in its  
8           exceptions.

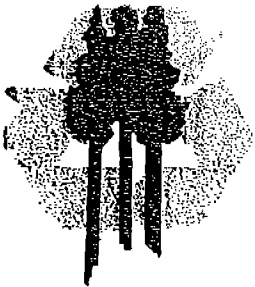
9           Pride respectfully requests that the Metro Council consider the above and its  
10          submission and render a penalty in this case that it believes is fair and consistent  
11          with Metro's Code and past practices.

12          Respectfully submitted this 1<sup>st</sup> day of May, 2003.

13   KELL, ALTERMAN & RUNSTEIN, L.L.P.

14   By \_\_\_\_\_  
15   Lee Davis Kell, OSB 67063  
16   Wayne D. Palmer, OSB 81331  
17   Of Attorneys for Pride Recycling Company

KELL, ALTERMAN & RUNSTEIN, L.L.P.  
ATTORNEYS AT LAW  
520 SW YAMHILL SUITE 600  
PORTLAND, OR 97204  
TELEPHONE (503) 222-3531  
FACSIMILE (503) 227-2980



**FAR WEST FIBER**  
**HILLSBORO FACIL**

Attachment B to Resolution 03-3330

6440 S.E. Alexander Street  
Hillsboro, OR 97123

Mailing Address:  
P.O. Box 1139  
Hillsboro, OR 97123-1139  
Phone: 503-643-9944  
Fax: 503-646-2975

January 30, 2003

Robert J. Harris  
Metro Hearings Officer  
600 NE Grand Avenue  
Portland, OR 97232-2736

Dear Mr. Harris,

I am writing this letter in support of the innovated material recovery efforts performed during the past several years at Pride Recycling's material recovery facility located in Sherwood, Oregon. I ask that you submit this letter as evidence supporting Pride's position in Metro's contested case hearing Citation No. M1254.

My name is Jeff Murray and I am the Vice-President of Market Development for Far West Fibers, Inc. I have been actively involved in the solid waste and recycling industry for over 25 years, fifteen years in the collection of solid waste and recycling and 10 years as projects manager, business development manager for Far West Fibers. During the past 17 years I have and continue to serve on various solid waste and recycling advisory boards throughout the metro region as well as at the state level.

Far West Fibers opened its doors in 1980 as a privately owned Oregon Corporation. Far West operates four source-separated recycling facilities in the metro region. Far West receives clean, source-separated recyclable materials from communities throughout Oregon and southwest Washington.

Far West Fibers Hillsboro Facility receives, sorts, and markets over 5,500 tons of the source-separated commercial and residential recyclables collected by franchised haulers throughout Washington County.

In addition to the recyclables received from Washington County haulers, Far West Fibers Hillsboro Facility also receives recyclables from various other haulers throughout the Metro region and other parts of Oregon.

Mike and Cindy Leichner, their employees, and their company have been stalwart supporters of a clean environment and the recycling industry since the inception of their company in 1986.

Pride Disposal and Pride Recycling have been major collectors, haulers and suppliers of clean and marketable recyclables to our company for over sixteen (16) years. Regardless of periodic poor market prices, and weak to nonexistent demand for recyclables, Pride has consistently promoted and provided important recycling services to their customers and to our community. Furthermore, because of the nature of the franchise system, Pride has at times been under-reimbursed for their costs to provide recycling services to the public.

Pride delivers superior quality products to Far West Fibers for recycling. Far West periodically analyzes the various grades of recyclable materials delivered by each supplier in Washington County. Through the year 2000 Far West found that less than ½ of 1% of the material delivered by Washington County haulers is not marketable as a recyclable. Recently we performed an analysis of the materials received and found that the residual level had increased to less than 1%. The ½ of 1% increase was due to the advent of commingled collection of recyclables. We found no increase in the prohibitive materials in the loads of OCC and Mixed Scrap Paper received from Pride Recycling's MRF.

Pride Disposal is considered by many in the refuse recycling industry and by government officials throughout Oregon as an innovative leader in the promotion, collection, and recovery of recyclables. Further, Mike Leichner is recognized by this same group as an honest, innovative, methodical business man. Mike Leichner is a man of his word.

Pride has consistently adhered to all of the city, local, regional and state permitting and operating requirements to provide recycling services to their many customers. For the past 16 years Mike Leichner has been a leader and key person in the important task of providing recycling and solid waste planning for the Metro Region. He has been instrumental shaping public policy. Mike Leichner has skillfully, honestly, and faithfully represented the best interests of the refuse and recycling haulers in Washington County. In doing so, Pride has provided valuable public service to all of us who reside to the west of the City of Portland.

I have had first hand experience for the past ten years working with the owners and operators of Pride Disposal on several recycling collection and recovery pilot projects in Washington County. These pilot programs are often established in response to requests by government recycling coordinators who wish to expand recovery efforts in their local jurisdiction. Other times they are initiated by Mike Leichner because he sees a need or an opportunity for more recovery or the chance to improve efficiencies. A number of these pilot projects have been implemented throughout the county and some have spread throughout the state. Regardless of who initiates the pilot program, Mike has always shared the successes and failures of the pilots with the refuse and recycling industry as well as local regulators.

**As to the issue of Pride Recycling exceeding the cap for wet waste at its MRF in Sherwood.**

I have attached to this letter a detailed summary of the development of Pride's dry load routes in Washington County seen through the eyes of Far West Fibers (Attachment B).

Far West has been involved with Mike Leichner and several employees of Pride for the past eight years developing this program. The customer base of these dry routes have been added and subtracted from these routes through constant monitoring and feedback from the Pride route drivers to the Pride MRF "spotters" and supervisors, to the spotters, supervisors and management of Far West Fibers that receive the paper products removed from these loads. Pride has offered a financial incentive to other Washington County haulers that are willing to duplicate this effort to isolate "dry" accounts from "wet" accounts. This same process has been duplicated with the other Washington County haulers that deliver these dry loads to the Pride MRF.

I have participated in the Metro SWAC subcommittees during the past ten years that have worked with Metro staff to establish the MRF / local transfer station rule recommendations for Metro Council. The development of MRFs throughout the Metro Region was done to allow a second level of recovery for the material that is not recovered through source separation. Rules were established to ensure that this would happen.

There were a number of reasons for establishing the cap on wet waste that could be handled at a local transfer station and or dirty MRF. The primary reason was to keep a substantial volume of the wet waste directed to the three regional transfer stations. Another reason was that it was felt by most that little if any material could be recovered from wet loads. This reasoning was based on the past experience at the Reidel Compost Facility operated in NE Portland for 18 months (1989 -1990). Wet household and commercial solid waste was delivered to the facility and loaded onto a sort belt. Recyclables and other non-compostable materials were removed and the remaining organics were composted. The general quality of the recyclables was very poor. The program was not successful and the facility was abruptly closed.

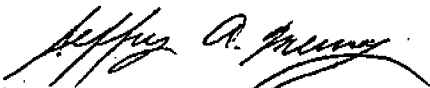
I would once again like to emphasize that the loads in question at the Pride MRF are select dry routes with a select customer base and that the quality of the recovered paper from the Pride MRF is as good if not better than recyclable material received by Far West from other source-separated suppliers.

The material accumulated in the dry loads delivered to the Pride MRF are very similar in content to that found in dry compactor loads of material delivered to other Metro regulated MRFs from various high rise buildings in downtown Portland. These loads from dry compactors at high rise buildings in Portland are categorized by Metro as "dry loads" though they contain limited volumes of food waste. It is accepted by Metro staff that the majority of the material in the compactor loads is not putrescible waste; this should also be the case with the select multi-family, multi-tenant loads processed at Pride's MRF in Sherwood.

In conclusion, we at Far West Fibers support and applaud the innovative efforts shown again and again by Pride Disposal and Pride Recycling. We hope that actions are not taken that may discourage Pride and others from implementing new programs to further waste reduction and recycling throughout the Metro Region.

Respectfully Submitted,

FAR WEST FIBERS, INC.



Jeffrey A. Murray

Vice-President, Business Development

Cc Paul Garrahan, Metro Counsel

Marvin Fjordbeck, Metro Counsel

✓ Wayne D. Palmer, Counsel for Pride Disposal

John G. Drew, President, Far West Fibers, Inc.

## Attachment B

**Support Information for Pride Disposal's Dry Waste Recovery**

I present the following detailed information with the hope that it may better clarify the efforts that have gone into developing the innovative, dry load recovery that Pride Disposal has implemented in Washington County while continuing to maintain and grow the various source-separated programs they provide to all the single family, multi-family and commercial accounts within their franchise.

The following are tonnage statistics comparing Pride's commercial / multi-family paper recycling programs the year previous to the opening of the Pride MRF in Sherwood and the year 2002.

**Collected From Commercial / Multi-Family (Source-Separated)**

<b>OCC 1993 –</b>	<b>1,140 Tons / yr</b>	<b>OCC 2002 –</b>	<b>2,228 Tons / yr</b>
<b>MOP 1993 –</b>	<b>3 Tons / yr</b>	<b>MOP 2002 –</b>	<b>913 Tons / yr</b>
<b>Multi-Family</b>	<b>Not Available</b>	<b>Multi-Family --</b>	<b>315 Tons / yr</b>
<b>Totals:</b>	<b>1,143 Tons / yr</b>		<b>3,456 Tons / yr</b>

**Recovered Paper Through Sorting of Dry Loads at Pride MRF**

<b>OCC 1993 –</b>	<b>0 Tons / yr</b>	<b>OCC 2002 –</b>	<b>981 Tons / yr</b>
<b>MSP 1993 –</b>	<b>0 Tons / yr</b>	<b>MSP 2002 –</b>	<b>1,897 Tons / yr</b>
<b>Totals:</b>	<b>0 Tons / yr</b>		<b>*2,878 Tons / yr</b>

**Notes:**\*The above numbers do not include the non-paper recyclables recovered by Pride Recycling at the Sherwood MRF.  
The numbers do not include the residential recyclables Pride collects.

**Dry Load Program Development**

Pride Disposal opened its reload / material recovery facility during the first quarter of 1994. The initial operation of the facility was simple and straight forward. Loads brought in that contained wet waste from residential garbage routes, commercial garbage routes, roll-off boxes containing from department stores were dumped in another area of the building and recoverable materials were floor sorted from the loads by "pickers."

Within the year, Pride Recycling contacted Far West Fibers with a plan to install an elevated sort belt to provide a safer and more effective system to recover recyclables from the loads processed within the facility. Initially, Pride installed a compactor under the sort line to recover cardboard (OCC) that was pulled off the line. A fair amount of OCC was recovered, particularly from the dry loads. A lesser amount of the OCC that was contained

in the wet loads was recovered due to food, food juice and other types of contamination found in wet loads.

During the next eight years Pride Recycling identified several commercial and multifamily customers within its franchise that continue to place substantial volumes of recoverable materials into their solid waste containers. Pride repeatedly approached these customers to remind them of the source-separated recycling collection services that are available to them through the refuse franchise. Pride continues to provide this service to the customers within its refuse / recycling franchise at no addition charge. The majority of businesses and multi-family complexes serviced by Pride have taken advantage of these programs. A number of the stand-alone businesses have significantly reduced the garbage that they generated.

However, it didn't take long to discover that even with the added recycling services, the multi-tenant businesses and multi-family complexes continued to generate substantial volumes of recoverable material in their solid waste containers. The realization came when the commercial garbage loads were dumped at Pride's facility for reloading to the landfill. The facility operators made Mike aware that with the exception of the material collected from restaurants, there seemed to be as much recoverable materials in the loads as garbage.

The steady turnover in multi-tenant complexes, both residential and commercial, creates challenges for source separated recycling programs. Mike Leichner made a decision to try a new approach to recovering the recyclable material that was left in these refuse containers. Mike set up collection routes of all the businesses and multi-family customers that continued to throw away large volumes of recyclables. He had the route drivers bring the loads back to his MRF and dump the material in an isolated corner of the building. The material was then run across the sort line and the sorters picked out the materials that were identified as recyclable. Pride Recycling then shipped sample loads of the sorted mixed scrap paper (MSP) and cardboard (OCC) to Far West Fibers. Far West examined the loads and found that some of the paper was contaminated with food waste or other substances that made it non-recyclable.

Far West then provided Pride Recycling with a list of material specifications for MSP and OCC. This list was taken from the "ISRI Scrap Specifications Circular."<sup>1</sup> The circular specifies that whether sold to a domestic mill or an export mill the level of prohibitives in Mixed Paper and OCC may not exceed ½ of 1%. Among other things, food waste and paper that has been stained by food waste are considered prohibitives. Pride Recycling has continued to identify accounts that generate recoverable volumes of paper that are not contaminated with food-waste, motor oil or any other prohibitive material and added them to the dry routes.

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<sup>1</sup> This list was taken from the Institute of Scrap Recycling Industries, Inc., Scrap Specifications Circular. This circular is updated every two years and provides the guidelines followed by the majority of mills throughout the Americas, Asia and Europe for buying and selling scrap metals, glass cullet, paper stock and plastic scrap. I have included a copy of the most recent version: Scrap Specification Circular 2002 with this letter. The quality specifications for Mixed Scrap Paper and OCC have not changed for several years. Please refer to pages 19 through 23 for domestic specifications and pages 26 through 29 for export specifications. The specific materials that Pride Recycling is marketing to Far West are listed as "(2) Mixed Paper" and "(12) Double Sorted Corrugated."



During the first two years of the program there were no reportable quality issues with the OCC and only occasional problems with the MSP. Far West provided Pride with immediate, specific feedback when there were quality issues with the paper. Pride would then rectify the problem by either improving sorting methods or removing accounts that generated excessive contaminates. Far West has not had an issue with the recyclable paper from the Pride MRF for nearly three years.

During this same period of time, Pride worked with other Washington County haulers to set up similar programs. Pride has and continues to offer these haulers a reduced tipping fee at the Pride MRF to encourage them to deliver these select loads.

**CERTIFICATE OF SERVICE**

I hereby certify that I served the following document Pride's Written  
Exceptions to Proposed Order on:

Metro Chief Operating Officer  
600 N.E. Grand Avenue  
Portland, OR 97232-2736

Office of the Metro Attorney  
600 N.E. Grand Avenue  
Portland, OR 97232-2736

Metro Hearings Officer Robert J. Harris  
Harris Law Firm  
247 S.E. Washington Street  
Suite 100  
Hillsboro, OR 97123

by mailing a true copy of the above document to the individuals listed above by  
United States Mail at their addresses.

DATED this 1<sup>st</sup> day of May, 2003.

KELL, ALTERMAN & RUNSTEIN, L.L.P.



Lee Davis Kell, OSB 67063  
Of Attorneys for Pride Recycling Company

KELL, ALTERMAN & RUNSTEIN, L.L.P.  
ATTORNEYS AT LAW  
620 SW YAMHILL SUITE 600  
PORTLAND, OR 97204  
TELEPHONE (503) 222-3531  
FACSIMILE (503) 227-2980

BEFORE THE METRO REGIONAL GOVERNMENT

IN THE MATTER OF METRO  
CITATION M1254 FOR VIOLATION OF  
METRO FRANCHISE NO. F-002-98 BY  
PRIDE RECYCLING COMPANY

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METRO CHIEF OPERATING  
OFFICER'S WRITTEN EXCEPTIONS  
TO THE HEARINGS OFFICER'S  
PROPOSED ORDER

TO: THE METRO COUNCIL, 600 NE Grand Ave., Portland, OR 97232-2736, and  
PRIDE RECYCLING COMPANY, 13980 SW Tualatin-Sherwood Rd., Sherwood, OR  
97140;

WITH COPIES TO: Office of the Metro Attorney, 600 NE Grand Ave., Portland, OR  
97232-2736, and to Metro Hearings Officer Robert J. Harris, Harris Law Firm, 247 SE  
Washington St., Suite 100, Hillsboro, OR 97123.

Pursuant to Metro Code section 2.05.035, exceptions are hereby made to the  
Hearings Officer's Proposed Order in this matter. While Metro staff supports the  
Hearings Officer's recommendation that the Metro Executive Officer's imposition of a  
\$20,000 civil penalty against Pride Recycling Company ("Pride") be upheld, these  
exceptions are submitted only to recommend some substantive corrections and  
clarifications, and some other edits, to improve Metro's Final Order in this matter.

The Metro staff recommends that the Hearings Officer's Proposed Order be  
amended as provided in Attachment 1 to these exceptions. Many of the edits described in  
Attachment 1 are minor changes in the nature of typographical or technical corrections.  
For example, the Hearings Officer repeatedly refers to Pride's "license," when the  
authorizing document which Pride holds is a franchise. Three types of recommended  
changes, however, are more substantive. The first of these is a substantive correction.

The Proposed Order repeatedly refers to the distinction between waste generated inside, versus outside, the “urban growth boundary.” The relevant boundary at issue here is the Metro jurisdictional boundary, not the urban growth boundary. Thus, Attachment 1 replaces the Proposed Order’s references to the “urban growth boundary” with references to the “Metro region.”

The second group of changes is more of a substantive clarification. Paragraphs 2 and 5 of the Proposed Order’s “Findings of Fact” (specifically, page 2, lines 6, 7, and 24 of the Proposed Order) refer to the prior and existing franchise tonnage caps that were applicable to Pride’s facility. The changes recommended in Attachment 1 (found on page 3, lines 10 through 13, and page 4, lines 7 and 8) clarify that the prior tonnage cap was a limit on the total amount of *all* solid waste that the facility could *dispose* in a *calendar year*, and that the present tonnage cap is a limit on the total amount of *putrescible* solid waste that the facility is authorized to *accept* in a *Metro fiscal year*.

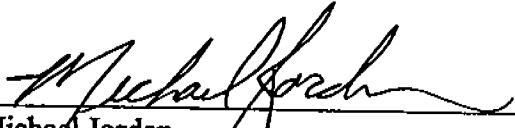
Finally, the third substantive recommended change is a language edit to lines 22 and 23 on page 8 of the Proposed Order. This section of the order addresses the issue of what individual act constitutes a separate violation under the Metro Code. This issue is important because each separate act may be punished with a civil penalty of up to \$500. The Metro Executive Officer concluded that each load of solid waste delivered to Pride after it had exceeded its tonnage cap constituted a separate violation. Pride took exception to this interpretation because two years ago, in the *Willamette Resources* case, Metro had counted the number of violations based on the number of days on which that facility had accepted additional waste after it had exceeded its cap, even if the facility had accepted multiple loads of waste each day. The Proposed Order notes that Metro’s use of

a per-day violation standard in the *Willamette Resources* case of two years ago “may have been an error.” Specifically, the Proposed Order states, “. . . simply because there may have been an error in an earlier interpretation of a rule, does not mean that we must live with that error.” Proposed Order, page 8, lines 22-23.

I assert that Metro has broad discretion to interpret the Metro Code, that the interpretation that Metro used in the *Willamette Resources* case was not in error, and that the interpretation that the Metro Executive Officer used and applied in this matter is equally, if not more, rational than the prior interpretation, and fully within Metro’s discretion. For those reasons, the above-quoted language in the Proposed Order ought to be replaced with language that provides, “. . . simply because a different standard may have been used in an earlier interpretation of a rule, does not mean that we must apply that standard in all future cases, especially if there exists another equally or more rational standard.” Attachment 1, lines 19-20.

For the reasons stated herein, I therefore urge the Metro Council to revise the Proposed Order to make the substantive edits and corrections noted herein, and to adopt a Final Order in this matter substantially similar to Attachment 1.

DATED: May 5, 2003.

  
Michael Jordan  
Metro Chief Operating Officer

**CERTIFICATE OF MAILING**

I hereby certify that I served the foregoing METRO CHIEF OPERATING OFFICER'S WRITTEN EXCEPTIONS TO THE HEARINGS OFFICER'S PROPOSED ORDER by:

- (1) Submitting a copy to the Metro Chief Operating Officer to be placed in the file in this matter and forwarded to the Metro Council along with any other written exceptions received and the Proposed Order;
- (2) Hand-delivering a copy to the Office of the Metro Attorney, 600 NE Grand Ave., Portland, OR 97232-2736; and
- (3) Depositing in the regular U. S. mail in Portland, Oregon, on the date stated below, a complete and correct copy thereof contained in a sealed envelope, with postage prepaid, and addressed to:

Mike Leichner, President  
Pride Recycling Company  
13980 SW Tualatin-Sherwood Rd.  
Sherwood, OR 97140

Wayne D. Palmer, Of Attorneys for Pride Recycling Company  
Kell, Alterman & Runstein L.L.P.  
520 SW Yamhill St., Suite 600  
Portland, OR 97204

and

Metro Hearings Officer Robert J. Harris  
Harris Law Firm  
247 SE Washington St., Suite 100  
Hillsboro, OR 97123

DATED: May 5, 2003.



Roy Brower  
Metro Solid Waste and Recycling Department

BEFORE THE METRO REGIONAL GOVERNMENT

~~METRO CONTESTED CASE:~~

~~BEFORE ROBERT J. HARRIS HEARINGS OFFICER~~

IN THE MATTER OF METRO CITATION ) COMPLAINT NO: ~~M1254~~  
M1254 FOR VIOLATION OF METRO )  
FRANCHISE NO. F-002-98 BY PRIDE )  
RECYCLING COMPANY ) PROPOSED FINAL ORDER  
)  
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**BACKGROUND AND PROCEDURAL POSTURE**

On December 31, 1998, Metro issued a Solid Waste Facility Franchise to Pride Recycling Company, #~~Franchise license number No.~~ F-002-98.

On August 15, 2002, Metro, through Executive Officer Mike Burton, issued to Pride Recycling Company a *Finding of Violation and Notice of Imposition of Penalty*, Metro, Citation and Complaint M1254, along with an attached Findings of Fact, and imposed a penalty of \$20,000 (per Metro Code, sections 5.01.180, 5.01.200, and 2.03.040).

Pride Recycling Company timely requested a contested case hearing under Metro Code section 5.01.180(c).

Metro and Pride Recycling, through its attorney Wayne Palmer and Kell, Alterman & Runstein, L.L.P., agreed to submit the matter to the Hearings Officer through written submittals in lieu of hearing.

The Parties and Metro waived formal notification of Procedures and Rights at a Hearing. There were no ex-parte communications between the Hearings Officer and the Parties or Metro.

### RECORD AND EVIDENTIARY RULINGS

The official record shall consist of the following:

Exhibit #

1. Finding of Violation and Notice of Imposition of Penalty, Dated August 15, 2002, and signed by Mike Burton, Executive Officer.
2. Metro Citation and Complaint No. M 1254, along with attached Findings of Fact, Dated August 15, 2002.
3. Letter from Mr. Wayne Palmer, dated September 5, 2002, requesting a contested case hearing.
4. Letter from Hearings Officer to Mr. Mike Leichner, Pride Recycling, dated November 5, 2002, setting the Hhearing for January 7, 2003.
5. Letter from Hearings Officer to Mr. Paul Garrahan, of Metro, and Mr. Wayne Palmer, dated December 20, 2002.
6. Document from Metro entitled "Memorandum in Support of Metro's Imposition of Penalty", including attachments, dated January 7, 2003.
7. Document from Wayne Palmer for Pride Recycling Company dated January 7, 2003, along with attachments.
8. Letter dated January 30, 2003, to Robert Harris from Far West Fibers, Inc., including attachments.
9. Cover letter dated January 31, 2003, and Ddocument from Metro entitled, "Reply Memorandum in Support of Metro's Imposition of Penalty."
10. Letter from Wayne Palmer dated January 31, 2003.



No ~~F~~urther ~~E~~evidence or ~~S~~ubmittals having been received, ~~t~~he Hearings Officer closed the record on March 7, 2003.

////

### FINDINGS OF FACT

1. Pride Recycling Company (hereinafter "Pride") has a valid Metro solid waste facility franchise, license number F-002-98. Said ~~license~~ franchise was issued ~~On~~ December 31, 1998. ~~Pride's operates a franchise~~ authorizes it to operate a solid waste local transfer station within the Metro jurisdiction. Pride accepts solid waste that is generated within, and outside of, the ~~urban growth boundary~~ Metro region.
2. Said ~~license~~ franchise originally allowed Pride to ~~accept~~ dispose of no more than 50,000 tons of putrescible solid waste per ~~calendar~~ Metro fiscal year. ~~That cap~~ was later increased to a 65,000 tons cap on the amount of putrescible solid waste that Pride was authorized to accept in a Metro fiscal year. The year in question here is the Metro fiscal year from July 1, 2001, until June 30, 2002.
3. For purposes of the tonnage limits contained in said ~~license~~ Pride's franchise, and within the ~~Metro Code itself~~, no distinction is made between solid waste generated inside, versus outside, the ~~urban growth boundary~~ Metro region. However, Metro staff ~~regulators~~ have historically made a distinction between waste generated inside, versus outside, the Metro region, and historically did not count the waste generated outside the region towards a ~~licensee~~ franchisee's tonnage cap (see Exhibit 7, Attachment 5, page 4, and Exhibit 6, Attachment I).
4. On April 16, 2002, Roy ~~Brewer~~ Brower, Metro Regional Environmental Management Department (hereinafter "REM"), Regulatory Affairs Division Manager, e-mailed Mike Leichner of Pride with a warning that Pride was on track to exceed its then limit of 65,000 tons of wet waste. Mr. ~~Brewer~~ Brower suggested that Pride avail itself of the opportunity to

increase its cap by 5%, to 68,250 tons. Mr. ~~Brewer~~Brower stated that Metro was serious about enforcing its cap on solid waste facilities (see Exhibit 6, Attachment C). In this correspondence, no distinction was made between waste generated within, versus outside, the Metro region. So at this point, Pride was on notice that all waste received could be counted towards its overall cap.

5. In a May 8, 2002, Finding and Decision, Mike Burton, Metro Executive Officer, authorized ~~the a~~ 5% increase in Pride's ~~license~~franchise tonnage limit so that it could accept 68,250 tons of putrescible solid waste. That Finding and Decision also called Pride's attention to the fact that Metro's analysis of Pride's total solid waste intake showed that Pride would still exceed the 68,250 tons allowed under ~~their~~its amended ~~license~~franchise. ~~Mr. Burton's~~The Executive Officer's letter informs Pride that if Pride exceeded its tonnage limit, Metro would take formal enforcement action (Exhibit 6, Attachment D). Again, in this correspondence, no distinction was made between waste generated within, versus outside, the Metro region.
6. On June 3, 2002, Terry Petersen, Metro REM Director, ~~Regional Environmental Management~~ (through Roy ~~Brewer~~Brower), sent a letter to Pride informing it that though the 5% increase was approved, ~~they were~~Pride was still on track to exceed the tonnage limit. Enforcement of the franchise agreement, and civil penalties were again referenced (Exhibit 6, Attachment E). And again, no distinction was made for waste generated within, versus outside, the Metro region.
7. On June 6, 2002, Mr. Warren Johnson, Metro Solid Waste Facility Inspector, inspected the Pride facility. As part of the inspection, ~~he~~Mr. Johnson talked to Mike Leichner, President of Pride Recycling Company. Mr. Leichner acknowledged that it was likely that Pride would exceed its tonnage cap, but that he intended to continue to accept waste, even if it meant exceeding Pride's cap. His reasoning was that he didn't want to lose customers, and

didn't want to reduce the recovery rate at the facility (Exhibit 6, Attachment F). There was no discussion regarding whether waste generated outside the Metro region would count towards the cap.

8. For the Metro ~~F~~fiscal year from July 1, 2001, until June 30, 2002, Pride accepted 72,302 tons of ~~wet-putrescible~~ waste at its facility. Pride exceeded its tonnage cap contained in its ~~licensefranchise~~ by 4,052 tons. Of this amount, 2,120 ~~tons was were~~ from outside the ~~Urban Growth~~Metro region.
9. Pride knowingly accepted solid waste in excess of the tonnage cap set by its Metro solid waste facility franchise, ~~license number~~Franchise No. F-002-98, as amended. Pride exceeded its tonnage cap on about June 10, 2002. After said date, Pride accepted 610 loads of ~~wet-putrescible~~ waste.

////

10. As Metro ~~A~~alleged, the violation could not be corrected. On August 15, 2002, Executive Officer Mike Burton issued a Finding of Violation and Notice of Imposition of Penalty, a Findings of Fact, and ~~Violation Citation~~ and Complaint No. M 1254 to Pride (exhibits 1 and 2). The Executive Officer considered the following items in assessing the ~~C~~civil ~~P~~penalty:
  - i. Pride knowingly and willfully violated the franchise agreement.
  - ii. Pride had been warned several times prior to the date of violation that it needed to do something to avoid going over the cap.
  - iii. Pride violated the integrity of the system and gained an unfair competitive advantage over its competitors.
  - iv. Metro looked at the economic benefit gained by acceptance of the excess waste, and attempted to tailor the civil penalty to deter future violations.

11. Executive Officer Mike Burton also had before him a memorandum by Terry Petersen, ~~regional Environmental Management~~ REM Director, (exhibit 6, attachment H), who in turn had the benefit of an historical account and analysis from a memorandum by Roy Brower (exhibit 6, attachment I). This memorandum, in addition to giving additional information regarding the aggravating factors set forth in paragraph 10 above, also cited the following mitigating factors:

- i. This is the first incident of non-compliance by Pride.
- ii. The staff analysis that was adopted as part of Ordinance No. 01-916A, which established local transfer station tonnage limitations, specifically excluded out of district waste. However, even excluding out of district waste, Pride still exceeded its tonnage limitation by approximately 2,224 tons (later changed to 1,932 tons).
- iii. Most of the tonnage accepted by Pride was generated within the service area of the facility. However, more than 2,000 tons of waste accepted at Pride was generated and collected in the Metro region but outside the Pride service area.

12. Pride requested a ~~Contested Case Hearing~~, and Pride and the ~~Agency Metro~~ agreed to submit written documentation in lieu of a formal hearing.

~~13. Other mitigating factors found based on submittals by Pride:~~

- ~~i. — Pride has a good operating history and is considered innovative in the material recovery field.~~

ULTIMATE FINDINGS OF FACT  
REASONING AND CONCLUSIONS OF LAW

1. Metro is the Portland, Oregon, area-regional metropolitan government entity legally charged with regulating solid waste disposal sites and solid waste facilities within its jurisdictional area. Said Metro's regulatory authority extends to the disposal of all solid

waste generated or disposed of within the district (Metro Code section 5.01.025, ORS Chapter 268, 1992 Metro Charter, Oregon Constitution).

2. Metro ~~eCode, chapter~~ section 5.01.045 requires all-solid waste facilities within the Metro jurisdiction to obtain a Metro license or franchise.
3. Pride Recycling Company (hereinafter Pride) has a valid Metro solid waste facility franchise, ~~license number~~ Franchise No. F-002-98. Said ~~license~~ franchise was issued on December 31, 1998. Pride operates a local transfer station and material recovery franchise ~~for disposal of solid waste within~~ the Metro jurisdiction. Pride accepts solid waste that is generated within, and outside of, the ~~urban-growth boundary~~ Metro region. As amended, said ~~license~~ franchise allowed Pride to accept 68,250 tons of putrescible solid waste per Metro fiscal year. The year in question here is Metro fiscal year July 1, 2001, through June 30, 2002.
4. During the relevant time period, Pride knowingly ~~collected~~ accepted 72,302 tons of putrescible solid waste at its facility ~~within the Urban Growth Boundary~~. Pride exceeded its tonnage cap contained in its ~~license~~ franchise by 4,052 tons, and ~~thereby violating~~ the terms of its Metro Franchise ~~License, No. F-002-98, as amended~~.

~~5. Metro~~

~~6.5.~~ Pride exceeded its ~~licensed~~ franchise tonnage cap on Monday June 10, 2002. On and after that date, Pride accepted 610 loads of solid waste at its facility in the remainder of Metro fiscal year 2001-02.

~~7.6.~~ Each load that was accepted after Pride exceeded its tonnage cap, from June 10, 2002, until June 30, 2002, constitutes a separate violation, and is subject to a separate penalty (Gage v. City of Portland, 319 Or. 308, 317. 877 P.2d 1187 (1994) (Deference is given to local governing body's interpretation of its own ordinance...)).

~~8.7.~~ The maximum penalty for each separate violation is \$500 (Metro Code, section 5.01.200).

9.8. The Executive Officer properly considered mitigating and aggravating factors in determining the appropriate civil penalty, pursuant to Metro Code section 2.03.050(a), and additional factors pursuant to Metro Code section 2.03.050(b).

#### DISCUSSION

There are two matters that merit discussion. First, what constitutes a separate violation, and second whether the Executive Officer appropriately considered all factors as required under Metro Code.

The Agency Chief Operating Officer contends that each time Pride accepted a load of waste after it exceeded its tonnage cap, that a separate violation occurred. Pride argues that the maximum violation is \$500 per day for every day after its tonnage cap was exceeded and points to Metro Code section 5.01.200, as well as a prior order in Metro case number MSD 00-0553, *Metro v. Willamette Resources Inc.*

In the *Willamette Resources* case Metro's position was that there was a maximum daily penalty of \$500 for a similar violation. The Agency's Chief Operating Officer's interpretation of what constitutes a separate violation has changed in this case, and in reviewing the possible scenarios, its the current interpretation makes much more sense.

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As pointed out in Metro's the Chief Operating Officer's written arguments, if two facilities had exceeded their caps on June 10, 2002, and one facility had thereafter accepted one load per day and the other facility accepted twenty loads per day, it would be illogical for both facilities to have the same maximum penalty, since the scope of the violations was so different. Yet to accept under Pride's interpretation that's exactly what would happen.

I also agree with Metro that The "per day" language contained in the code, is more accurately referring to a violation that has an occurrence date, but that particular violation continues unabated for more than one day. This per day language should not be used in

situations where there are multiple acts constituting violations on a single day, such as accepting multiple loads of waste, to limit Metro's ability to issue just a single \$500 daily penalty.

Metro could have taken the position that since a ton is the relevant unit of measurement in the franchise agreement that any extra ton accepted was a separate violation. That, in fact, could be a better measurement of scope of violation than a single load, since a load can vary in size.

However, deference must be given to an Agency's interpretation of its own rules, (*Gage v. City of Portland, Infra*). ~~Metro~~ therefore adopts ~~Metro's~~ the Chief Operating Officer's interpretation that when a facility allows a truck to unload waste at its facility, knowing that it is over the tonnage cap limitation in its franchise agreement, that facility commits a separate violation. Since Pride accepted 610 loads after it reached its tonnage cap, Pride committed 610 separate violations, and the maximum civil penalty that ~~would~~ be imposed in this case is \$305,000.

~~Metro~~ recognizes that this is a different standard than was applied in the *Willamette Resources* case. However, simply because ~~there may have been an error a different standard may have been used~~ in an earlier interpretation of a rule, does not mean that we must ~~live with that error~~ apply that standard in all future cases, especially if there exists another equally or more rational standard. If Pride did not know of the earlier interpretation, then there was no detrimental reliance. And if Pride reviewed that earlier Order

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and determined that it could profitably continue to violate its franchise agreement, then while it may be able to argue detrimental reliance, ~~I would have~~ Metro has little sympathy for that argument.

The second contested matter is whether the out of region waste accepted at the Pride facility should count towards its tonnage cap. In one sense this is a moot point, since the \$20,000 penalty imposed by the Executive Officer was still less than the maximum penalty that could be imposed for the in region excess waste alone (Assuming about 6.7 tons per load, 1,932 tons would come to about 288 loads, and 288 times \$500 is \$144,000). In addition, Even though the Executive Officer did not reference in his Findings an acknowledgment that Metro staff had not historically counted out of region waste towards the tonnage cap, the Executive Officer certainly knew that fact. He had before him the Memorandum of Terry Peterson who specifically pointed that fact out as a mitigating factor. ~~So I believe that~~ Thus, the Executive Officer did consider the in region versus out of region waste issue in determining the appropriate civil penalty.

One factor the Executive Officer did not have before him when the penalty was imposed was the fact that ultimately the excess tonnage amounted to 4,052 tons rather than the original 4,343 tons. As the Executive Officer pointed out in his original Findings and imposition of penalty, that the penalty he imposed amounted to \$4.60/ton. A 291 ton reduction could have resulted in a reduction in the penalty by \$1,338.60. However, given all the other factors weighed by the Executive Officer, and the scope of this violation compared to reduced tonnage in question, ~~I cannot say that~~ this new information would not have made a difference in the penalty assessed by the Executive Officer.

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**ORDER**

Based upon the above findings of fact, ultimate findings of fact, reasoning and conclusions of law, it is hereby ORDERED THAT: The Executive Officer's imposition of a \$20,000 civil penalty is upheld.

Pursuant to ORS 34.010 to 34.102, appeal of this Final Order may be initiated by filing a petition for a writ of review with the Circuit Court of the State of Oregon for Multnomah County within 60 days of this date.

\_\_\_\_\_  
\_\_\_\_\_  
Robert J. Harris  
Hearing Officer

Dated: April 7 May \_\_\_\_\_, 2003

\_\_\_\_\_  
\_\_\_\_\_  
Michael Jordan  
Metro Chief Operating Officer

~~THIS ORDER MAY BE REVIEWED PURSUANT TO THOSE PROVISIONS AS SET FORTH IN METRO CODE SECTION 2.05~~

BEFORE THE METRO REGIONAL GOVERNMENT

IN THE MATTER OF METRO CITATION )  
M1254 FOR VIOLATION OF METRO )  
FRANCHISE NO. F-002-98 BY PRIDE )  
RECYCLING COMPANY )  
\_\_\_\_\_ )

FINAL ORDER

**BACKGROUND AND PROCEDURAL POSTURE**

On December 31, 1998, Metro issued a Solid Waste Facility Franchise to Pride Recycling Company, Franchise No. F-002-98.

On August 15, 2002, Metro, through Executive Officer Mike Burton, issued to Pride Recycling Company a *Finding of Violation and Notice of Imposition of Penalty*, Metro Citation and Complaint M1254, along with an attached Findings of Fact, and imposed a penalty of \$20,000 (per Metro Code sections 5.01.180, 5.01.200, and 2.03.040).

Pride Recycling Company timely requested a contested case hearing under Metro Code section 5.01.180(c).

Metro and Pride Recycling, through its attorney Wayne Palmer and Kell, Alterman & Runstein, L.L.P., agreed to submit the matter to the Hearings Officer through written submittals in lieu of hearing.

The Parties and Metro waived formal notification of Procedures and Rights at a Hearing. There were no ex-parte communications between the Hearings Officer and the Parties or Metro.

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## RECORD AND EVIDENTIARY RULINGS

The official record shall consist of the following:

### Exhibit #

1. Finding of Violation and Notice of Imposition of Penalty, dated August 15, 2002, signed by Mike Burton, Executive Officer.
2. Metro Citation and Complaint No. M 1254, along with attached Findings of Fact, dated August 15, 2002.
3. Letter from Mr. Wayne Palmer, dated September 5, 2002, requesting a contested case hearing.
4. Letter from Hearings Officer to Mr. Mike Leichner, Pride Recycling, dated November 5, 2002, setting the hearing for January 7, 2003.
5. Letter from Hearings Officer to Mr. Paul Garrahan, of Metro, and Mr. Wayne Palmer, dated December 20, 2002.
6. Document from Metro entitled "Memorandum in Support of Metro's Imposition of Penalty", including attachments, dated January 7, 2003.
7. Document from Wayne Palmer for Pride Recycling Company dated January 7, 2003, along with attachments.
8. Letter dated January 30, 2003, to Robert Harris from Far West Fibers, Inc., including attachments.
9. Cover letter dated January 31, 2003, and document from Metro entitled, "Reply Memorandum in Support of Metro's Imposition of Penalty."
10. Letter from Wayne Palmer dated January 31, 2003.

No further evidence or submittals having been received, the Hearings Officer closed the record on March 7, 2003.

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**FINDINGS OF FACT**

1. Pride Recycling Company (hereinafter "Pride") has a valid Metro solid waste facility franchise, number F-002-98. Said franchise was issued on December 31, 1998. Pride's franchise authorizes it to operate a solid waste local transfer station within the Metro jurisdiction. Pride accepts solid waste that is generated within, and outside of, the Metro region.
2. Said franchise originally allowed Pride to dispose of no more than 50,000 tons of solid waste per calendar year. That cap was later increased to a 65,000 ton cap on the amount of *putrescible* solid waste that Pride was authorized to *accept* in a Metro *fiscal year*. The year in question here is the Metro fiscal year from July 1, 2001, until June 30, 2002.
3. For purposes of the tonnage limits contained in Pride's franchise no distinction is made between solid waste generated inside, versus outside, the Metro region. However, Metro staff have historically made a distinction between waste generated inside, versus outside, the Metro region, and historically did not count the waste generated outside the region towards a franchisee's tonnage cap (see Exhibit 7, Attachment 5, page 4, and Exhibit 6, Attachment I).
4. On April 16, 2002, Roy Brower, Metro Regional Environmental Management Department (hereinafter "REM"), Regulatory Affairs Division Manager, e-mailed Mike Leichner of Pride with a warning that Pride was on track to exceed its then limit of 65,000 tons of wet waste. Mr. Brower suggested that Pride avail itself of the opportunity to increase its cap by 5%, to 68,250 tons. Mr. Brower stated that Metro was serious about enforcing its cap on solid waste facilities (see Exhibit 6, Attachment C). In this correspondence, no distinction was made between waste generated within, versus outside the Metro region. So at this point, Pride was on notice that all waste received could be counted towards its overall cap.

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5. In a May 8, 2002, Finding and Decision, Mike Burton, Metro Executive Officer, authorized a 5% increase in Pride's franchise tonnage limit so that it could accept 68,250 tons of putrescible solid waste. That Finding and Decision also called Pride's attention to the fact that Metro's analysis of Pride's total solid waste intake showed that Pride would still exceed the 68,250 tons allowed under its amended franchise. The Executive Officer's letter informs Pride that if Pride exceeded its tonnage limit, Metro would take formal enforcement action (Exhibit 6, Attachment D). Again, in this correspondence, no distinction was made between waste generated within, versus outside, the Metro region.
6. On June 3, 2002, Terry Petersen, Metro REM Director (through Roy Brower), sent a letter to Pride informing it that though the 5% increase was approved, Pride was still on track to exceed the tonnage limit. Enforcement of the franchise agreement and civil penalties were again referenced (Exhibit 6, Attachment E). And again, no distinction was made for waste generated within, versus outside, the Metro region.
7. On June 6, 2002, Mr. Warren Johnson, Metro Solid Waste Facility Inspector, inspected the Pride facility. As part of the inspection, Mr. Johnson talked to Mike Leichner, President of Pride Recycling Company. Mr. Leichner acknowledged that it was likely that Pride would exceed its tonnage cap, but that he intended to continue to accept waste, even if it meant exceeding Pride's cap. His reasoning was that he didn't want to lose customers, and didn't want to reduce the recovery rate at the facility (Exhibit 6, Attachment F). There was no discussion regarding whether waste generated outside the Metro region would count towards the cap.
8. For the Metro fiscal year from July 1, 2001, until June 30, 2002, Pride accepted 72,302 tons of putrescible waste at its facility. Pride exceeded its tonnage cap contained in its franchise by 4,052 tons. Of this amount, 2,120 tons were from outside the Metro region.

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9. Pride knowingly accepted solid waste in excess of the tonnage cap set by its Metro solid waste facility franchise, Franchise No. F-002-98, as amended. Pride exceeded its tonnage cap on about June 10, 2002. After said date, Pride accepted 610 loads of putrescible waste.

10. As Metro alleged, the violation could not be corrected. On August 15, 2002, Executive Officer Mike Burton issued a Finding of Violation and Notice of Imposition of Penalty, a Findings of Fact, and Citation and Complaint No. M 1254 to Pride (exhibits 1 and 2). The Executive Officer considered the following items in assessing the civil penalty:

- i. Pride knowingly and willfully violated the franchise agreement.
- ii. Pride had been warned several times prior to the date of violation that it needed to do something to avoid going over the cap.
- iii. Pride violated the integrity of the system and gained an unfair competitive advantage over its competitors.
- iv. Metro looked at the economic benefit gained by acceptance of the excess waste, and attempted to tailor the civil penalty to deter future violations.

11. Executive Officer Mike Burton also had before him a memorandum by Terry Petersen, REM Director, (exhibit 6, attachment H), who in turn had the benefit of an historical account and analysis from a memorandum by Roy Brower (exhibit 6, attachment I). This memorandum, in addition to giving additional information regarding the aggravating factors set forth in paragraph 10 above, also cited the following mitigating factors:

- i. This is the first incident of non-compliance by Pride.
- ii. The staff analysis that was adopted as part of Ordinance No. 01-916A, which established local transfer station tonnage limitations, specifically excluded out of district waste. However, even excluding out of district waste, Pride still exceeded its tonnage limitation by approximately 2,224 tons (later changed to 1,932 tons).

- iii. Most of the tonnage accepted by Pride was generated within the service area of the facility. However, more than 2,000 tons of waste accepted at Pride was generated and collected in the Metro region but outside the Pride service area.

12. Pride requested a contested case hearing, and Pride and Metro agreed to submit written documentation in lieu of a formal hearing.

Other mitigating factors found based on submittals by Pride: Pride has a good operating history and is considered innovative in the material recovery field.

ULTIMATE FINDINGS OF FACT  
REASONING AND CONCLUSIONS OF LAW

1. Metro is the Portland, Oregon, regional metropolitan government legally charged with regulating solid waste disposal sites and solid waste facilities within its jurisdictional area. Metro's regulatory authority extends to the disposal of all solid waste generated or disposed of within the district (Metro Code section 5.01.025, ORS Chapter 268, 1992 Metro Charter, Oregon Constitution).
2. Metro Code section 5.01.045 requires solid waste facilities within the Metro jurisdiction to obtain a Metro license or franchise.
3. Pride Recycling Company (hereinafter Pride) has a valid Metro solid waste facility franchise, Franchise No. F-002-98. Said franchise was issued on December 31, 1998. Pride operates a local transfer station and material recovery franchise within the Metro jurisdiction. Pride accepts solid waste that is generated within, and outside of, the Metro region. As amended, said franchise allowed Pride to accept 68,250 tons of putrescible solid waste per Metro fiscal year. The year in question here is Metro fiscal year July 1, 2001, through June 30, 2002.

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4. During the relevant time period, Pride knowingly accepted 72,302 tons of putrescible solid waste at its facility. Pride exceeded its tonnage cap contained in its franchise by 4,052 tons, thereby violating the terms of its Metro Franchise, No. F-002-98, as amended.
5. Pride exceeded its franchise tonnage cap on Monday June 10, 2002. On and after that date, Pride accepted 610 loads of solid waste at its facility in the remainder of Metro fiscal year 2001-02.
6. Each load that was accepted after Pride exceeded its tonnage cap, from June 10, 2002, until June 30, 2002, constitutes a separate violation, and is subject to a separate penalty (Gage v. City of Portland; 319 Or. 308, 317. 877 P.2d 1187 (1994) (Deference is given to local governing body's interpretation of its own ordinance...)).
7. The maximum penalty for each separate violation is \$500 (Metro Code section 5.01.200).
8. The Executive Officer properly considered mitigating and aggravating factors in determining the appropriate civil penalty, pursuant to Metro Code section 2.03.050(a), and additional factors pursuant to Metro Code section 2.03.050(b).

#### DISCUSSION

There are two matters that merit discussion. First, what constitutes a separate violation, and second whether the Executive Officer appropriately considered all factors as required under Metro Code.

The Chief Operating Officer contends that each time Pride accepted a load of waste after it exceeded its tonnage cap, that a separate violation occurred. Pride argues that the maximum violation is \$500 per day for every day after its tonnage cap was exceeded and points to Metro Code section 5.01.200, as well as a prior order in Metro case number MSD 00-0553, *Metro v. Willamette Resources Inc.*

In the *Willamette Resources* case Metro's position was that there was a maximum daily penalty of \$500 for a similar violation. The Chief Operating Officer's interpretation of what



constitutes a separate violation has changed in this case, and in reviewing the possible scenarios, the current interpretation makes much more sense.

As pointed out in the Chief Operating Officer's written arguments, if two facilities had exceeded their caps on June 10, 2002, and one facility had thereafter accepted one load per day and the other facility accepted twenty loads per day, it would be illogical for both facilities to have the same maximum penalty, since the scope of the violations was so different. Yet under Pride's interpretation that's exactly what would happen.

The "per day" language contained in the code more accurately refers to a violation that has an occurrence date, but that continues unabated for more than one day. This per day language should not be used in situations where there are multiple acts constituting violations on a single day, such as accepting multiple loads of waste, to limit Metro to issue just a single \$500 daily penalty.

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However, deference must be given to an agency's interpretation of its own rules, (*Gage v. City of Portland, Infra*). Metro therefore adopts the Chief Operating Officer's interpretation that when a facility allows a truck to unload waste at its facility, knowing that it is over the tonnage cap limitation in its franchise agreement, that facility commits a separate violation. Since Pride accepted 610 loads after it reached its tonnage cap, Pride committed 610 separate violations, and the maximum civil penalty that could be imposed in this case is \$305,000. Metro recognizes that this is a different standard than was applied in the *Willamette Resources* case. However, simply because a different standard may have been used in an earlier interpretation of a rule, does not mean that we must apply that standard in all future cases,

especially if there exists another equally or more rational standard. If Pride did not know of the earlier interpretation, then there was no detrimental reliance. And if Pride reviewed that earlier Order and determined that it could profitably continue to violate its franchise agreement, then while it may be able to argue detrimental reliance, Metro has little sympathy for that argument.

The second contested matter is whether the out of region waste accepted at the Pride facility should count towards its tonnage cap. In one sense this is a moot point, since the \$20,000 penalty imposed by the Executive Officer was still less than the maximum penalty that could be imposed for the in region excess waste alone (assuming about 6.7 tons per load, 1,932 tons would come to about 288 loads, and 288 times \$500 is \$144,000). In addition, even though the Executive Officer did not reference in his Findings an acknowledgment that Metro staff had not historically counted out of region waste towards the tonnage cap, the Executive Officer certainly knew that fact. He had before him the memorandum of Terry Peterson who specifically pointed that fact out as a mitigating factor. Thus, the Executive Officer did consider the in region versus out of region waste issue in determining the appropriate civil penalty.

One factor the Executive Officer did not have before him when the penalty was imposed was the fact that ultimately the excess tonnage amounted to 4,052 tons rather than the original 4,343 tons. As the Executive Officer pointed out in his original Findings and imposition of penalty, the penalty he imposed amounted to \$4.60/ton. A 291 ton reduction could have resulted in a reduction in the penalty by \$1,338.60. However, given all the other factors weighed by the Executive Officer, and the scope of this violation compared to reduced tonnage in question, this new information would not have made a difference in the penalty assessed by the Executive Officer.

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**ORDER**

Based upon the above findings of fact, ultimate findings of fact, reasoning and conclusions of law, it is hereby ORDERED THAT: The Executive Officer's imposition of a \$20,000 civil penalty is upheld.

Pursuant to ORS 34.010 to 34.102, appeal of this Final Order may be initiated by filing a petition for a writ of review with the Circuit Court of the State of Oregon for Multnomah County within 60 days of this date.

Dated: May \_\_\_\_\_, 2003

\_\_\_\_\_  
Michael Jordan  
Metro Chief Operating Officer