

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ADOPTING THE) RESOLUTION NO. 11-4248
HEARINGS OFFICER'S PROPOSED ORDER)
REGARDING METRO'S NOTICE OF VIOLATION) Introduced by the Chief Operating Officer
NOV-257C-10 ISSUED TO GREENWAY) Daniel B. Cooper with the concurrence of
RECYCLING, LLC AND AUTHORIZING THE) Council President Tom Hughes
CHIEF OPERATING OFFICER TO ISSUE A)
FINAL ORDER)

WHEREAS, on October 15, 2010, the Finance and Regulatory Services Director ("the Director") issued Notice of Violation NOV-257C-10 to GreenWay Recycling, LLC, ("Greenway"); and

WHEREAS, in NOV-257C-10 the Director found that Greenway violated Section 3.4.2 of its Solid Waste Facility License and imposed a penalty of \$5,750.00; and

WHEREAS, Greenway submitted a timely request for a contested case hearing; and

WHEREAS, a hearing on the matter was held on February 3, 2011, before Metro Hearings Officer Joe Turner; and

WHEREAS, pursuant to Metro Code 2.05.035(a), on March 7, 2011, the Hearings Officer issued a proposed order (attached as Exhibit A) finding that Metro did not meet its burden of proof and dismissing NOV-257C-10 and the \$5750.00 penalty; and

WHEREAS, in accordance with Metro Code 2.05.035(b), the Director mailed copies of the proposed order to Greenway and informed Metro and Greenway of the deadline for filing written exception to the proposed order; and

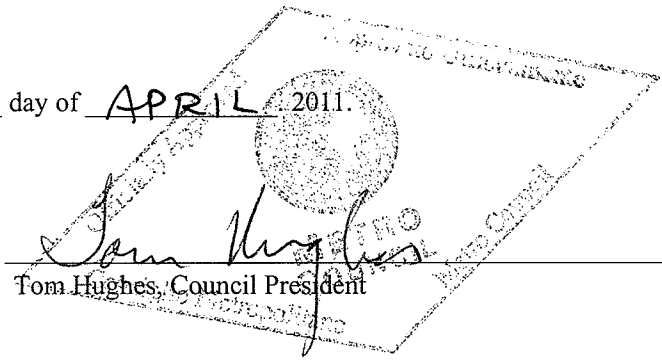
WHEREAS, the parties did not file written exceptions to the Hearings Officer's proposed order; and

WHEREAS, Metro Code 2.05.045(b) provides that the Metro Council shall (1) adopt the Hearings Officer's proposed order; (2) revise or replace the findings of fact or conclusions of law in the order, or (3) remand the matter to the Hearings Officer; and

WHEREAS, the Metro Council has considered the proposed order as required by the Metro Code, now therefore

BE IT RESOLVED that the Metro Council adopts the proposed order from Hearing issued by Hearings Officer Joe Turner in the Metro contested case: Notice of Violation NOV-257C-10 issued to Greenway and directs the Chief Operating Officer to issue a final order substantially similar to Exhibit B to this resolution.

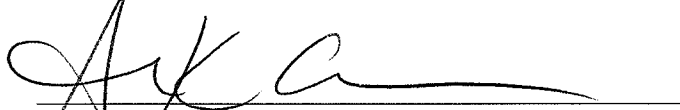
ADOPTED by the Metro Council this 14 day of APRIL, 2011.



Tom Hughes

Tom Hughes, Council President

Approved as to form:



Alison Kean Campbell

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MAR 08 2011

IN THE MATTER OF THE CONTESTED CASE HEARING OF OFFICE OF METRO ATTORNEY

GREENWAY RECYCLING, LLC,
Appellant

Case No:

NOV-257C-10

COPY

v.

PROPOSED FINAL ORDER

METRO,

Respondent

I. STATEMENT OF THE CASE

1. This proposed final order concerns an appeal of Notice of Violation and Order No. NOV-257C-10 (the "NOV") filed by Greenway Recycling, LLC (the "Appellant"). The NOV concerns operation of the Appellant's solid waste facility. The NOV alleges that the Appellant violated Section 3.4.2 of its solid waste facility license by storing mixed non-putrescible waste¹ outside of a roofed building that is enclosed on at least three sides during the fifteen day period between September 21 and October 5, 2010. The NOV imposed a civil penalty of \$5,750.00.
2. Hearings Officer Joe Turner (the "hearings officer") received testimony at the public hearing about this appeal on February 3, 2011, at approximately 10:00 a.m. at Metro's offices, located at 600 NE Grand Avenue, Portland, Oregon. At the beginning of the hearing, the hearings officer made a statement describing the hearing procedure and disclaiming any *ex parte* contacts, bias or conflicts of interest. All witnesses testified under oath or affirmation. Metro made an audio recording of the hearing. Metro maintains the record of the proceedings.

II. EVIDENTIARY MATTERS

1. Respondent provided a list of witnesses and exhibits, "Respondent Metro's Witness and Exhibit List" dated December 8, 2010 (Metro Exhibit 17), a packet of Exhibits (Metro Exhibits 1 through 12), a Hearing Memorandum dated February 1, 2011, (Metro Exhibit 13), enlarged (8x10) photos of the solid waste pile at the facility (Exhibits 14 through 16) and oral testimony by Steve Kraten, Metro Solid

¹ Metro Code ("MC") Section 5.01(aa) provides:

"Non-putrescible waste" means any Waste that contains no more than trivial amounts of Putrescible materials or minor amounts of Putrescible materials contained in such a way that they can be easily separated from the remainder of the load without causing contamination of the load. This category includes construction waste and demolition waste but excludes Cleanup Materials Contaminated by Hazardous Substances, Source-Separated Recyclable Material, special waste, land clearing debris and yard debris.

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Waste Enforcement Coordinator and Will Ennis, Metro Solid Waste Facility Inspector.

Terrell Garrett, managing member of Greenway Recycling, LLC, testified on behalf of the Appellant and introduced Greenway Exhibits 1 through 30. All offered exhibits and testimony were admitted without objection.

3. Respondent requested that the hearings officer hold open the record of the proceedings after the hearing to allow submission and consideration of a Post-Hearing Memorandum. The Appellant agreed to Respondent's request, provided that the hearings officer allow the Appellant an opportunity to respond to Respondent's post-hearing submittal. Both parties submitted Post-Hearing Memoranda: Metro Exhibit 18 and Greenway Exhibit 31. The hearings officer closed the record in this case at 5:00 p.m., February 11, 2011.

III. ISSUES PRESENTED

1. Whether Respondent sustained its burden of proof that the Appellant violated Section 3.4.2 of the solid waste facility license by storing mixed solid waste outside of a roofed building that is enclosed on at least three sides during the fifteen day period between September 21 and October 5, 2010; and
2. Whether Respondent's action in assessing a \$5,750.00 civil penalty against the Appellant is appropriate.

IV. BACKGROUND

1. Respondent, Metro, is a regional government created by the State of Oregon with voter approval. The Metro Council, a political body elected by voters within the Metro region, governs Metro. Among other things, Metro regulates the transportation, processing and disposal of waste generated within the Metro region. Metro manages the whole waste stream within the region, implementing environmental, health, safety and public welfare mandates and mandates for recycling and reduction of waste. Metro has developed and implemented a Regional Solid Waste Management Plan, a management system for regional waste disposal and resource recovery. Pursuant to this authority, Metro requires any person who establishes, operates, maintains, or expands a solid waste facility² in the Metro region to secure the appropriate license or franchise. Metro Code Section 5.01.030.
2. The Appellant operates a solid waste facility at 4135 NW St. Helens Road, Portland; also known as tax lots 191N1E0L, Section 19, Township 1N, Range

² MC 5.01(uu) provides:

"Solid waste facility" means the land and buildings at which Solid Waste is received for Transfer and/or Processing but excludes disposal.

1E, City of Portland, Multnomah County, State of Oregon (the “facility”). The facility is located within Metro’s jurisdictional boundaries. Therefore the Appellant was required to obtain a license from Metro to operate the facility. Operation of the facility is regulated by solid waste facility license No. L-109-07B (the “License”). See Metro Exhibit 1. Metro issued the License to the Appellant on July 1, 2009. The License authorizes the Appellant “[t]o accept loads of mixed non-putrescible solid wastes for the purpose of conducting material recovery.” Section 3.4.1 of the License.

3. Section 3.4.2 of the License provides:

All mixed non-putrescible waste tipping, storage, sorting and reloading activities must occur on an impervious surface (e.g. asphalt or concrete) and inside a roofed building that is enclosed on at least three sides. Unusually large vehicles (i.e., 30-foot tippers) may tip waste outside, provided the tipped wastes are moved under cover prior to processing within 12 hours of receipt, or by the end of the business day, whichever is earlier.

III. FINDINGS OF FACT

1. In March 2010, Metro issued “Metro Regulatory Guidance Bulletin GB 1” (the “Metro Bulletin”). Greenway Exhibit 29. The stated purpose of the Metro Bulletin was to establish a quantitative general standard for determining “trivial amounts” of putrescible waste that may be contained in loads of mixed non-putrescible waste received at Material Recovery Facilities (“MRFs”). The Metro Bulletin provides, “Metro has developed a per-load quantitative general standard for determining ‘trivial amounts.’ A load of non-putrescible waste may not contain more than five percent (5%) by weight, and not exceed a maximum of 300 pounds of putrescible waste.” p. 3 of Metro Exhibit 29. The Metro Bulletin goes on to provide that:

This trivial standard also applies to other types of waste received at specialized MRFs. Specialized MRFs, such as those that exclusively accept and process roofing or dry wall debris, may be prohibited from accepting loads that contain more than trivial amounts of unauthorized waste that is not closely related to its specific authorization (e.g., a roofing debris processing facility must not accept more than trivial amounts of non-roofing related waste).

Id. at p. 4.

2. On February 23, 2010, Margo Norton, Metro Director of Finance and Regulatory Services, sent the Appellant an email in response to the Appellant’s request for “[f]urther clarification on Metro’s standard for clean and source separated.” Ms.

Norton referred to the definition of “trivial amounts” of contamination set out in the Metro Bulletin as “[t]he bright line standard you [the Appellant] were seeking...”

3. On August 3, 2010, the Appellant allowed a customer to tip a load of solid waste (demolition debris) outside of the buildings at the facility. In addition, the Appellant tipped a load of partially processed solid waste outside of the buildings to await further processing.
4. On August 9, 2010, Respondent issued Notice of Violation No. NOV-257-10 alleging that the solid waste tipped outside at the facility on August 3, 2010, constituted mixed non-putrescible waste, which Section 3.4.2 of the License requires that the Appellant tip, store and process inside a building. See Metro Exhibit 2. Respondent documented the alleged violations in inspection notes and photographs. See Metro Exhibit 3. NOV-257-10 did not impose a civil penalty. The Appellant did not appeal NOV-257-10.
5. On August 12, 2010, the Appellant continued to process solid waste outdoors at the facility. On August 18, 2010, Respondent issued Notice of Violation No. NOV-257A-10 alleging that the solid waste the Appellant was processing outdoors constituted mixed non-putrescible waste, which Section 3.4.2 of the License requires that the Appellant process inside a building. See Metro Exhibit 4. Respondent documented the alleged violations in inspection notes and photographs. See Metro Exhibit 5. NOV-257A-10 imposed a civil penalty of \$100. The Appellant did not appeal NOV-257A-10.
6. On September 7, 2010, the Appellant continued to store and process solid waste outdoors at the facility. On September 13, 2010, two dump trucks tipped loads of solid waste outside of the buildings at the facility. On September 17, 2010, Respondent issued Notice of Violation No. NOV-257B-10 alleging that the solid waste tipped, stored and processed on September 7 and 13, 2010, constituted mixed non-putrescible waste. Therefore tipping, storing and processing of the material outdoors was a violation of Section 3.4.2 of the License. See Metro Exhibit 6. Respondent documented the alleged violations in inspection notes and photographs. See Metro Exhibits 7 and 8. NOV-257B-10 imposed a civil penalty of \$925³ for three separate violations of Section 3.4.2 of the License.
7. NOV-257B-10 also alleged that the Appellant violated License Sections 3.6.1 (managing and processing residual outside of a building and uncontained) and 4.3 (mixing unprocessed waste with source-separated wood). The Appellant did not appeal NOV-257B-10.
8. The Appellant continued to store solid waste outdoors at the facility between September 21 and October 5, 2010. On October 15, 2010, Respondent issued

³ \$225 per violation per day, plus a \$250 flat fee penalty component.

Notice of Violation No. NOV-257C-10 alleging that this solid waste constituted mixed non-putrescible waste, the outdoor storage of which constitutes a violation of Section 3.4.2 of the License. See Metro Exhibit 9. Respondent documented the alleged violations in inspection notes and photographs. See Metro Exhibits 10 and 11. NOV-257C-10 imposed a civil penalty of \$5,75.00⁴ for 15 separate violations of Section 3.4.2 of the License.

9. The Appellant filed a written appeal of NOV-257C-10 on November 9, 2010. See Metro Exhibit 12.
10. There is no dispute that the Appellant was storing solid waste as defined by MC 5.01(tt) at the facility outside of an enclosed building between September 21 and October 5, 2010. See Metro Exhibits 10, 11 and 14 thorough 16. The Appellant was receiving materials from two separate construction projects, a composition roofing tear-off and replacement project (the "roofing materials") and two building demolition projects, at Portland State University and Burger King (collectively the "PSU materials"). The Appellant was storing the roofing materials separately from the PSU materials. The roofing materials stockpile is shown in photos 15 through 22 of Metro Exhibit 10, Photos 8 through 12 of Metro Exhibit 11 and Greenway Exhibit 7. The PSU materials are shown in photos 27 through 29 of Metro Exhibit 10, Photos 1, 2 and 7 of Metro Exhibit 11, and in Metro Exhibits 14 through 16. The violations of License Section 3.4.2 alleged in NOV-257C-10 are limited to the PSU materials. Respondent did not allege that the roofing materials constituted a violation of License Section 3.4.2.
11. The Appellant sorted the roofing materials outdoors on the site, using a bucket loader to remove any non-roofing material. The Appellant weighed the roofing material and non-roofing material and determined that the stockpile shown in Greenway Exhibit 7 contained 3.22-percent non-roofing materials, by weight. See Greenway Exhibits 8 and 9.
12. The Appellant processed the PSU materials on a conveyor belt where laborers picked out the insulation and other non-wood components prior to the wood being ground up for use as fuel. The piles of metal, paper, plastic and insulation shown in Greenway Exhibit 10 was removed from 50 tons of the PSU materials.

IV. CONCLUSIONS OF LAW

1. Respondent failed to meet its burden of proof that the Appellant violated Section 3.4.2 of the solid waste facility license by storing mixed solid waste outside of a roofed building, that is enclosed on at least three sides during the fifteen day period between September 21 and October 5, 2010.

⁴ \$350 per violation per day, plus a \$500 flat fee penalty component.

2. Therefore the \$5,750.00 civil penalty assessed against the Appellant is inappropriate.

V. OPINION

1. This appeal hearing is limited to review of NOV-257C-10. The Appellant did not appeal NOV-257-10, NOV-257A-10, or NOV-257B-10. Therefore the hearings officer has no jurisdiction to consider any violations alleged in those NOVs.
2. There is no dispute that the Appellant was storing solid waste as defined by MC 5.01(tt) at the facility outside of an enclosed building between September 21 and October 5, 2010. See Metro Exhibits 10, 11 and 14 thorough 16. The issue is whether the material stored outside of the buildings constitutes "mixed non-putrescible waste" that License Section 3.4.2 requires must be stored inside a building or "source-separated recyclables" that the Appellant can store and process outdoors.
3. The pile of material stored outside of a building on the site does not meet the strict definition of "source-separated recyclables" in MC 5.01(ww):

"Source-separated recyclable material" or "Source-separated recyclables" means solid waste that has been Source Separated by the waste generator for the purpose of Reuse, Recycling, or Composting. This term includes (1) all homogenous loads of Recyclable Materials that have been Source Separated by material type for the purpose of recycling (i.e., source-sorted) and (2) residential and commercial commingled Recyclable Materials, which include only those recyclable material types that the local jurisdiction, where the materials were collected, permits to be mixed together in a single container as part of its residential curbside recyclable material collection program. This term does not include any other commingled recyclable materials.

The Code does not define the term "homogeneous." Therefore the hearings officer relies on the dictionary definition of the term.⁵ Webster's New World College Dictionary (2010) defines "homogeneous" as (1) "the same in structure, quality, etc.; similar or identical, (2) composed of similar or identical elements or parts; uniform." Based on these definitions, a load of source-separated recyclables must consist of a single type of recyclable material, without containing any contaminants. Loads of recyclable material that contain more than one type of

⁵ "In examining the text of a statute, we ordinarily assume that the legislature intended that terms be given their plain, ordinary meanings....Ordinary meaning can be determined by reference to a dictionary of common usage." *Edwards v. Riverdale School District*, 220 Or. App. 509, 513, 188 P.3d 317 (2008) (Internal citations omitted).

material would exceed the definition of "source-separated materials" and therefore constitute "mixed non-putrescible waste."⁶

4. The photographs in the record clearly show that the pile of material stored out of doors at the facility is not homogeneous. It comprises a mixture of materials, including wood, metal, insulation, ceiling tiles, carpet, etc. See, e.g., Exhibits 14 through 16. Even if all of the materials in the pile were recyclable, the pile would not qualify as "source-separated recyclables." MC 5.01(ww) excludes "commingled⁷ recyclable materials," other than residential curbside recyclable material, from the definition of "source-separated recyclables." Therefore, the fact that the Appellant recovered and recycled 97 to 98% of the PSU material is not determinative. If the PSU material contained a mixture of recyclable materials, it is not "homogenous" and therefore does not meet the definition of "source-separated recyclables" in MC 5.01(ww). Based on a strict reading of the Code, the PSU material would constitute mixed non-putrescible waste that the Appellant is required to tip, store and process inside a building, pursuant to Section 3.4.2 of the License.
5. However Respondent does not follow this strict interpretation of its Code. Respondent concedes that the definition of "source-separated materials" must be interpreted in a reasonable manner to allow some minor contamination. Respondent stated that "source-separated wood may contain an occasional odd bit of other non-wood waste that the generator overlooked or accidentally introduced during the source-separation process." p. 4 of Metro Exhibit 18.
6. The Metro Code does not provide a specific standard or maximum amount of contamination that a load can contain without exceeding the definition of "source-separated materials." The Metro Bulletin, as clarified by Ms. Norton's email, does provide a clear, bright line, standard. Ms. Norton issued her email (Greenway Exhibit 28) in response to the Appellant's request for clarification of the standard for "[c]lean and source separated." Ms. Norton referred the Appellant to the "trivial amount" (five-percent/300lbs per load) standard in the Metro Bulletin as a "bright line standard" that would resolve the issue. *Id.* Ms. Norton is the Director

⁶ The Metro Code does not define the terms "mixed non-putrescible waste" or "mixed." MC 5.01(aa) provides:

"Non-putrescible waste" means any Waste that contains no more than trivial amounts of Putrescible materials or minor amounts of Putrescible materials contained in such a way that they can be easily separated from the remainder of the load without causing contamination of the load. This category includes construction waste and demolition waste but excludes Cleanup Materials Contaminated by Hazardous Substances, Source-Separated Recyclable Material, special waste, land clearing debris and yard debris.

The American Heritage Dictionary of the English Language (4th Ed., 2010) defines "mixed" as "Blended together into one unit or mass; intermingled." Based on these definitions, the hearings officer finds that the term "mixed non-putrescible waste" means a mixture of more than one type of non-putrescible waste, including commingled recyclables other than residential curbside recyclable material.

⁷ The Metro Code does not define the term "commingled." Webster's New World College Dictionary (2010) defines "commingled" as "to mingle together; intermix; blend."

of Finance and Regulatory Services and has apparent authority to interpret the Metro Code in this way. The Appellant relied on that interpretation in distinguishing between loads of source-separated recyclables and non-putrescible waste.

7. The hearings officer finds that the PSU material stockpile shown in Metro Exhibits 7, 8, 14, 15 and 16 meets the "standard for "source-separated recyclables" (wood), as clarified by the Metro Bulletin and Ms. Norton's email. The demolition contractor sorted the demolition debris from the PSU and Burger King demolition projects to separate the wood from the majority of the non-wood material prior to delivering it to the Appellant's facility. Although the loads of material delivered to the Appellant contain a mix of materials, the majority of the material is wood debris. Provided the non-wood material constitutes less than five-percent, by weight, of the total, the stockpile of PSU material will constitute "source-separated recyclables" as defined by the MC 5.01(ww) as clarified by the Metro Bulletin and Ms. Norton's email. The Appellant processed 50 tons of the PSU material through its sort line, removing the non-wood material. Greenway Exhibit 10 shows the amount of non-wood material removed. Provided the non-wood material weighs less than 5,000 pounds (five-percent of 50 tons), the material will comply with the trivial standard established in the Metro Bulletin and Ms. Norton's email.
8. The Appellant demonstrated that a roughly similar amount of solid waste removed from the roofing material stockpile shown in Greenway Exhibit 7 weighed 2,300 pounds. Therefore the hearings officer finds that it is more likely than not that the PSU material stockpile shown in Metro Exhibits 7, 8, 14, 15 and 16 meets the trivial standard for non-wood material. There is no substantial evidence in the record to the contrary.
9. Respondent argues that the PSU material stockpile does not meet the standard for "source-separated recyclables" because the material needs additional sorting on a belt or tipping floor at the solid waste facility.⁸ However the Metro Code definitions of "Source Separated" and "Source-separated recyclables," as clarified by the Metro Bulletin and Ms. Norton's email, does not include that requirement. In addition, the Appellant testified that the PSU material did not "need" additional sorting. The Appellant chose to process the material on its sorting belt in order to maximize the amount of recyclable materials recovered from the PSU materials. There is no substantial evidence in the record to the contrary.

⁸ Metro argued:

Source-separated wood may contain an occasional odd bit of other non-wood waste that the generator overlooked or accidentally introduced during the source-separation process. The solid waste facility operator may pull out such items when they are noticed but, in order to fit the definition of "source-separated," the material must not be contaminated to the point where the entire stream must go through a sorting process to be marketable.

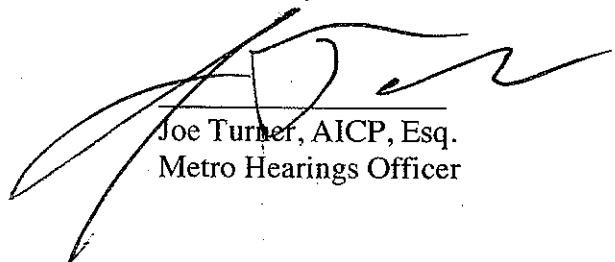
p. 4 of Metro Exhibit 18.

10. NOV 257C-10 did not allege any violations of License Sections 3.6.1 and 4.3. Therefore it is unnecessary to address those issues.

VI. PROPOSED ORDER

1. Respondent failed to bear the burden of proving that the Appellant violated License Section 3.4.2 by storing and/or processing mixed non-putrescible waste outside of an enclosed building between September 21 and October 5, 2010.
2. NOV-257C-10 and the associated \$5,750.00 civil penalty is dismissed.

Respectfully Submitted:



Joe Turner, AICP, Esq.
Metro Hearings Officer

DATED: March 7, 2011

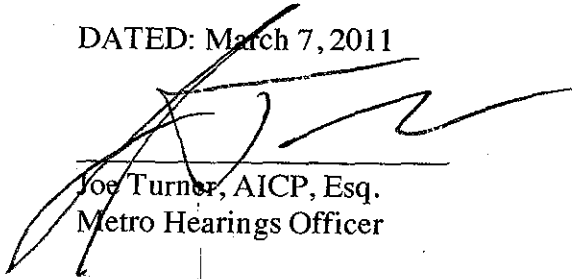
CERTIFICATE OF SERVICE

I, Joe Turner, certify that on this day I submitted the original PROPOSD FINAL ORDER to the Metro Council, Attention Steve Kraten at 600 Northeast Grand Avenue, Portland, Oregon 97232-2736, and sent an original copy of the foregoing PROPOSD FINAL ORDER by US Mail, first class postage pre-paid, in a properly addressed and sealed envelope, to the following person(s) at the address(es) shown, and via electronic transmission to the following person(s) at the email address(es) shown:

Metro
Steve Kraten
600 Northeast Grand Avenue
Portland, Oregon 97232-2736
Steve.Kraten@oregonmetro.gov

Greenway Recycling, LLC
Terrell Garrett
PO Box 4483
Portland, OR 97208-4483
greenwaybusiness@gmail.com

DATED: March 7, 2011



Joe Turner, AICP, Esq.
Metro Hearings Officer

LIST OF EXHIBITS

Metro Exhibits:

1. Solid Waste Facility License No. L-109-07B;
2. Notice of Violation No. NOV-257-10;
3. Metro Facility Inspection Summary dated August 3, 2010;
4. Notice of Violation No. NOV-257A-10;
5. Metro Facility Inspection Summary dated August 12, 2010;
6. Notice of Violation No. NOV-257B-10;
7. Metro Facility Inspection Summary dated September 7, 2010;
8. Metro Facility Inspection Summary dated September 13, 2010;
9. Notice of Violation No. NOV-257C- 10;
10. Metro Facility Inspection Summary dated September 21, 2010;
11. Metro Facility Inspection Summary dated October 5, 2010;
12. November 9, 2010 letter from Terrell Garrett to Roy Brower Requesting a Contested Case Hearing;
13. Metro Hearing Memorandum dated February 1, 2011;
14. 8x10 photo of solid waste stored at the facility;
15. 8x10 photo of solid waste stored at the facility;
16. 8x10 photo of solid waste stored at the facility;
17. Respondent Metro's Witness and Exhibit List" dated December 8, 2010;
18. Respondent Metro's Post-Hearing Memoranda dated February 8, 2010.

Greenway Exhibits:

1. Photo #16 of the September 21, 2010 Metro Facility Inspection Summary;
2. Photo #17 of the September 21, 2010 Metro Facility Inspection Summary;
3. Photo #9 of the October 5, 2010 Metro Facility Inspection Summary;
4. Photo #10 of the October 5, 2010 Metro Facility Inspection Summary;
5. Photo #11 of the October 5, 2010 Metro Facility Inspection Summary;
6. Photo #12 of the October 5, 2010 Metro Facility Inspection Summary;
7. Photo of roofing material stockpile;
8. Photo of material removed from roofing material stockpile;
9. Summary of weights of roofing and garbage contained in roofing material stockpile;
10. Photo #27 of the September 7, 2010 Metro Facility Inspection Summary;
11. Photo #28 of the September 7, 2010 Metro Facility Inspection Summary;
12. Photo #30 of the September 21, 2010 Metro Facility Inspection Summary;
13. Photo #3 of the October 5, 2010 Metro Facility Inspection Summary;
14. Photo #6 of the October 5, 2010 Metro Facility Inspection Summary;
15. Photo #5 of the October 5, 2010 Metro Facility Inspection Summary;
16. Photo #4 of the October 5, 2010 Metro Facility Inspection Summary;
17. Photo #16 of the September 7, 2010 Metro Facility Inspection Summary;
18. Photo #17 of the September 7, 2010 Metro Facility Inspection Summary;
19. Photo #18 of the September 7, 2010 Metro Facility Inspection Summary;
20. No Exhibit. Skipped number.
21. Photo #28 of the September 21, 2010 Metro Facility Inspection Summary;

22. Photo #29 of the September 21, 2010 Metro Facility Inspection Summary;
23. Photo #1 of the September 21, 2010 Metro Facility Inspection Summary;
24. No Exhibit. Skipped number.
25. Photo #1 of the October 5, 2010 Metro Facility Inspection Summary;
26. Photo #2 of the October 5, 2010 Metro Facility Inspection Summary;
27. Photo #7 of the October 5, 2010 Metro Facility Inspection Summary;
28. Email from Margo Norton, Metro Director of Finance and Regulatory Services, dated February 23, 2011;
29. "Metro Regulatory Guidance Bulletin GB 1" dated March 2010;
30. Appellant's hearing memo/written testimony, undated.
31. "Appellant's response to METRO Memorandum of February 8, 2011" received, undated, by the hearings officer February 11, 2011.

BEFORE THE METRO COUNCIL

| | | |
|--|---|-------------|
| In the Matter of Notice of Violation and |) | |
| Imposition of Civil Penalty NOV-257C-10 |) | |
| |) | |
| Issued to |) | FINAL ORDER |
| |) | |
| GREENWAY RECYCLING, LLC, |) | |
| |) | |
| Respondent |) | |
| |) | |

I. STATEMENT OF THE CASE

1. This final order concerns an appeal of Notice of Violation and Order No. NOV-257C-10 (the "NOV") filed by Greenway Recycling, LLC (the "Appellant"). The NOV concerns operation of the Appellant's solid waste facility. The NOV alleges that the Appellant violated Section 3.4.2 of its solid waste facility license by storing mixed non-putrescible waste¹ outside of a roofed building that is enclosed on at least three sides during the fifteen day period between September 21 and October 5, 2010. The NOV imposed a civil penalty of \$5,750.00.
2. Hearings Officer Joe Turner (the "Hearings Officer") received testimony at the public hearing about this appeal on February 3, 2011, at approximately 10:00 a.m. at Metro's offices, located at 600 NE Grand Avenue, Portland, Oregon. At the beginning of the hearing, the hearings officer made a statement describing the hearing procedure and disclaiming any *ex parte* contacts, bias or conflicts of interest. All witnesses testified under oath or affirmation. Metro made an audio recording of the hearing. Metro maintains the record of the proceedings.

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12), a Hearing Memorandum dated February 1, 2011, (Metro Exhibit 13), enlarged (8x10) photos of the solid waste pile at the facility (Exhibits 14 through 16) and oral testimony by Steve Kraten, Metro Solid Waste Enforcement Coordinator and Will Ennis, Metro Solid Waste Facility Inspector.

2. Terrell Garrett, managing member of Greenway Recycling, LLC, testified on behalf of the Appellant and introduced Greenway Exhibits 1 through 30. All offered exhibits and testimony were admitted without objection.
3. Respondent requested that the Hearings Officer hold open the record of the proceedings after the hearing to allow submission and consideration of a Post-Hearing Memorandum. The Appellant agreed to Respondent's request, provided that the Hearings Officer allow the Appellant an opportunity to respond to Respondent's post-hearing submittal. Both parties submitted Post-Hearing Memoranda: Metro Exhibit 18 and Greenway Exhibit 31. The Hearings Officer closed the record in this case at 5:00 p.m., February 11, 2011.

III. ISSUES PRESENTED

1. Whether Respondent sustained its burden of proof that the Appellant violated Section 3.4.2 of the solid waste facility license by storing mixed solid waste outside of a roofed building that is enclosed on at least three sides during the fifteen day period between September 21 and October 5, 2010; and
2. Whether Respondent's action in assessing a \$5,750.00 civil penalty against the Appellant is appropriate.

IV. BACKGROUND

1. Respondent, Metro, is a regional government created by the State of Oregon with voter approval. The Metro Council, a political body elected by voters within the Metro region, governs Metro. Among other things, Metro regulates the transportation, processing and disposal of waste generated within the Metro region. Metro manages the whole waste stream within the region, implementing environmental, health, safety and public welfare mandates and mandates for recycling and reduction of waste. Metro has developed and implemented a Regional Solid Waste Management Plan, a management system for regional waste disposal and resource recovery.

Pursuant to this authority, Metro requires any person who establishes, operates, maintains, or expands a solid waste facility² in the Metro region to secure the appropriate license or franchise. Metro Code Section 5.01.030.

2. The Appellant operates a solid waste facility at 4135 NW St. Helens Road, Portland; also known as tax lots 191N1E0L, Section 19, Township 1N, Range 1E, City of Portland, Multnomah County, State of Oregon (the “facility”). The facility is located within Metro’s jurisdictional boundaries. Therefore the Appellant was required to obtain a license from Metro to operate the facility. Operation of the facility is regulated by solid waste facility license No. L-109-07B (the “License”). See Metro Exhibit 1. Metro issued the License to the Appellant on July 1, 2009. The License authorizes the Appellant “[t]o accept loads of mixed non-putrescible solid wastes for the purpose of conducting material recovery.” Section 3.4.1 of the License.
3. Section 3.4.2 of the License provides:

All mixed non-putrescible waste tipping, storage, sorting and reloading activities must occur on an impervious surface (e.g. asphalt or concrete) and inside a roofed building that is enclosed on at least three sides. Unusually large vehicles (i.e., 30-foot tippers) may tip waste outside, provided the tipped wastes are moved under cover prior to processing within 12 hours of receipt, or by the end of the business day, whichever is earlier.

V. FINDINGS OF FACT

1. In March 2010, Metro issued “Metro Regulatory Guidance Bulletin GB 1” (the “Metro Bulletin”). Greenway Exhibit 29. The stated purpose of the Metro Bulletin was to establish a quantitative general standard for determining “trivial amounts” of putrescible waste that may be contained in loads of mixed non-putrescible waste received at Material Recovery Facilities (“MRFs”). The Metro Bulletin provides, “Metro has developed a per-load quantitative general standard for determining ‘trivial amounts.’ A load of non-putrescible waste may not contain more than five percent (5%) by weight, and not exceed a maximum of 300 pounds of putrescible waste.” p. 3 of Greenway Exhibit 29. The Metro Bulletin goes on to provide that:

² MC 5.01(uu) provides:

"Solid waste facility" means the land and buildings at which Solid Waste is received for Transfer and/or Processing but excludes disposal.

This trivial standard also applies to other types of waste received at specialized MRFs. Specialized MRFs, such as those that exclusively accept and process roofing or dry wall debris, may be prohibited from accepting loads that contain more than trivial amounts of unauthorized waste that is not closely related to its specific authorization (e.g., a roofing debris processing facility must not accept more than trivial amounts of non-roofing related waste).

Id. at p. 4.

2. On February 23, 2010, Margo Norton, Metro Director of Finance and Regulatory Services, sent the Appellant an email in response to the Appellant's request for "[f]urther clarification on Metro's standard for clean and source separated." Ms. Norton referred to the definition of "trivial amounts" of contamination set out in the Metro Bulletin as "[t]he bright line standard you [the Appellant] were seeking..."
3. On August 3, 2010, the Appellant allowed a customer to tip a load of solid waste (demolition debris) outside of the buildings at the facility. In addition, the Appellant tipped a load of partially processed solid waste outside of the buildings to await further processing.
4. On August 9, 2010, Respondent issued Notice of Violation No. NOV-257-10 alleging that the solid waste tipped outside at the facility on August 3, 2010, constituted mixed non-putrescible waste, which Section 3.4.2 of the License requires that the Appellant tip, store and process inside a building. Respondent documented the alleged violations in inspection notes and photographs. NOV-257-10 did not impose a civil penalty. The Appellant did not appeal NOV-257-10.
5. On August 12, 2010, the Appellant continued to process solid waste outdoors at the facility. On August 18, 2010, Respondent issued Notice of Violation No. NOV-257A-10 alleging that the solid waste the Appellant was processing outdoors constituted mixed non-putrescible waste, which Section 3.4.2 of the License requires that the Appellant process inside a building. See Metro Exhibit 4. Respondent documented the alleged violations in inspection notes and photographs. See Metro Exhibit 5. NOV-257A-10 imposed a civil penalty of \$100. The Appellant did not appeal NOV-257A-10 and paid the penalty.

6. On September 7, 2010, the Appellant continued to store and process solid waste outdoors at the facility. On September 13, 2010, two dump trucks tipped loads of solid waste outside of the buildings at the facility. On September 17, 2010, Respondent issued Notice of Violation No. NOV-257B-10 alleging that the solid waste tipped, stored and processed on September 7 and 13, 2010, constituted mixed non-putrescible waste. Therefore tipping, storing and processing of the material outdoors was a violation of Section 3.4.2 of the License. Respondent documented the alleged violations in inspection notes and photographs. NOV-257B-10 imposed a civil penalty of \$925³ for three separate violations of Section 3.4.2 of the License.
7. NOV-257B-10 also alleged that the Appellant violated License Sections 3.6.1 (managing and processing residual outside of a building and uncontained) and 4.3 (mixing unprocessed waste with source-separated wood). The Appellant did not appeal NOV-257B-10 and paid the penalty.
8. The Appellant continued to store solid waste outdoors at the facility between September 21 and October 5, 2010. On October 15, 2010, Respondent issued Notice of Violation No. NOV-257C-10 alleging that this solid waste constituted mixed non-putrescible waste, the outdoor storage of which constitutes a violation of Section 3.4.2 of the License. Respondent documented the alleged violations in inspection notes and photographs. NOV-257C-10 imposed a civil penalty of \$5,75.00⁴ for 15 separate violations of Section 3.4.2 of the License.
9. The Appellant filed a written appeal of NOV-257C-10 on November 9, 2010.
10. There is no dispute that the Appellant was storing solid waste as defined by MC 5.01(tt) at the facility outside of an enclosed building between September 21 and October 5, 2010. See Metro Exhibits 10, 11 and 14 thorough 16. The Appellant was receiving materials from two separate construction projects, a composition roofing tear-off and replacement project (the “roofing materials”) and two building demolition projects, at Portland State University and Burger King (collectively the “PSU materials”). The Appellant was storing the roofing materials separately from the PSU materials. The roofing materials stockpile is shown in photos 15 through 22 of Metro Exhibit 10, Photos 8 through 12 of Metro Exhibit 11 and Greenway Exhibit 7. The PSU materials are shown in photos 27 through 29 of Metro Exhibit 10, Photos 1, 2 and 7 of Metro Exhibit 11, and in Metro Exhibits 14 through 16. The violations of License Section 3.4.2 alleged

³ \$225 per violation per day, plus a \$250 flat fee penalty component.

⁴ \$350 per violation per day, plus a \$500 flat fee penalty component.

in NOV-257C-10 are limited to the PSU materials. Respondent did not allege that the roofing materials constituted a violation of License Section 3.4.2.

11. The Appellant sorted the roofing materials outdoors on the site, using a bucket loader to remove any non-roofing material. The Appellant weighed the roofing material and non-roofing material and determined that the stockpile shown in Greenway Exhibit 7 contained 3.22-percent non-roofing materials, by weight.
12. The Appellant processed the PSU materials on a conveyor belt where laborers picked out the insulation and other non-wood components prior to the wood being ground up for use as fuel. The piles of metal, paper, plastic and insulation shown in Greenway Exhibit 10 was removed from 50 tons of the PSU materials.

VI. CONCLUSIONS OF LAW

1. Respondent failed to meet its burden of proof that the Appellant violated Section 3.4.2 of the solid waste facility license by storing mixed solid waste outside of a roofed building, that is enclosed on at least three sides during the fifteen day period between September 21 and October 5, 2010.
2. Therefore the \$5,750.00 civil penalty assessed against the Appellant is inappropriate.

VII. OPINION

1. This appeal hearing is limited to review of NOV-257C-10. The Appellant did not appeal NOV-257-10, NOV-257A-10, or NOV-257B-10. Therefore the hearings officer has no jurisdiction to consider any violations alleged in those NOVs.
2. There is no dispute that the Appellant was storing solid waste as defined by MC 5.01(tt) at the facility outside of an enclosed building between September 21 and October 5, 2010. The issue is whether the material stored outside of the buildings constitutes “mixed non-putrescible waste” that License Section 3.4.2 requires must be stored inside a building or “source-separated recyclables” that the Appellant can store and process outdoors.

3. The pile of material stored outside of a building on the site does not meet the strict definition of "source-separated recyclables" in MC 5.01(w):

"Source-separated recyclable material" or "Source-separated recyclables" means solid waste that has been Source Separated by the waste generator for the purpose of Reuse, Recycling, or Composting. This term includes (1) all homogenous loads of Recyclable Materials that have been Source Separated by material type for the purpose of recycling (i.e., source-sorted) and (2) residential and commercial commingled Recyclable Materials, which include only those recyclable material types that the local jurisdiction, where the materials were collected, permits to be mixed together in a single container as part of its residential curbside recyclable material collection program. This term does not include any other commingled recyclable materials.

The Code does not define the term "homogeneous." Therefore the hearings officer relies on the dictionary definition of the term.⁵ Webster's New World College Dictionary (2010) defines "homogeneous" as (1) "the same in structure, quality, etc.; similar or identical, (2) composed of similar or identical elements or parts; uniform." Based on these definitions, a load of source-separated recyclables must consist of a single type of recyclable material, without containing any contaminants. Loads of recyclable material that contain more than one type of material would exceed the definition of "source-separated materials" and therefore constitute "mixed non-putrescible waste."⁶

4. The photographs in the record clearly show that the pile of material stored out of doors at the facility is not homogeneous. It comprises a mixture of materials, including wood, metal,

⁵ "In examining the text of a statute, we ordinarily assume that the legislature intended that terms be given their plain, ordinary meanings....Ordinary meaning can be determined by reference to a dictionary of common usage." *Edwards v. Riverdale School District*, 220 Or. App. 509, 513, 188 P.3d 317 (2008) (Internal citations omitted).

⁶ The Metro Code does not define the terms "mixed non-putrescible waste" or "mixed." MC 5.01(aa) provides:

"Non-putrescible waste" means any Waste that contains no more than trivial amounts of Putrescible materials or minor amounts of Putrescible materials contained in such a way that they can be easily separated from the remainder of the load without causing contamination of the load. This category includes construction waste and demolition waste but excludes Cleanup Materials Contaminated by Hazardous Substances, Source-Separated Recyclable Material, special waste, land clearing debris and yard debris. The American Heritage Dictionary of the English Language (4th Ed., 2010) defines "mixed" as "Blended together into one unit or mass; intermingled." Based on these definitions, the hearings officer finds that the term "mixed non-putrescible waste" means a mixture of more than one type of non-putrescible waste, including commingled recyclables other than residential curbside recyclable material.

insulation, ceiling tiles, carpet, etc. Even if all of the materials in the pile were recyclable, the pile would not qualify as “source-separated recyclables.” MC 5.01(w) excludes “commingled⁷ recyclable materials,” other than residential curbside recyclable material, from the definition of “source-separated recyclables.” Therefore, the fact that the Appellant recovered and recycled 97 to 98% of the PSU material is not determinative. If the PSU material contained a mixture of recyclable materials, it is not “homogenous” and therefore does not meet the definition of “source-separated recyclables” in MC 5.01(w). Based on a strict reading of the Code, the PSU material would constitute mixed non-putrescible waste that the Appellant is required to tip, store and process inside a building, pursuant to Section 3.4.2 of the License.

5. However Respondent does not follow this strict interpretation of its Code. Respondent concedes that the definition of “source-separated materials” must be interpreted in a reasonable manner to allow some minor contamination. Respondent stated that “source-separated wood may contain an occasional odd bit of other non-wood waste that the generator overlooked or accidentally introduced during the source-separation process.” p. 4 of Metro Exhibit 18.

6. The Metro Code does not provide a specific standard or maximum amount of contamination that a load can contain without exceeding the definition of “source-separated materials.” The Metro Bulletin, as clarified by Ms. Norton’s email, does provide a clear, bright line, standard. Ms. Norton issued her email (Greenway Exhibit 28) in response to the Appellant’s request for clarification of the standard for “[c]lean and source separated.” Ms. Norton referred the Appellant to the “trivial amount” (five-percent/300lbs per load) standard in the Metro Bulletin as a “bright line standard” that would resolve the issue. *Id.* Ms. Norton is the Director of Finance and Regulatory Services and has authority to interpret the Metro Code in this way. The Appellant relied on that interpretation in distinguishing between loads of source-separated recyclables and non-putrescible waste.

7. The hearings officer finds that the PSU material stockpile shown in Metro Exhibits 7, 8, 14, 15 and 16 meets the “standard for “source-separated recyclables” (wood), as clarified by the Metro Bulletin and Ms. Norton’s email. The demolition contractor sorted the demolition debris from the PSU and Burger King demolition projects to separate the wood from the majority of the non-wood material prior to delivering it to the Appellant’s facility. Although the loads of material

⁷ The Metro Code does not define the term “commingled.” Webster’s New World College Dictionary (2010) defines “commingled” as “to mingle together; intermix; blend.”

delivered to the Appellant contain a mix of materials, the majority of the material is wood debris. Provided the non-wood material constitutes less than five-percent, by weight, of the total, the stockpile of PSU material will constitute “source-separated recyclables” as defined by the MC 5.01(ww) as clarified by the Metro Bulletin and Ms. Norton’s email. The Appellant processed 50 tons of the PSU material through its sort line, removing the non-wood material. Greenway Exhibit 10 shows the amount of non-wood material removed. Provided the non-wood material weighs less than 5,000 pounds (five-percent of 50 tons), the material will comply with the trivial standard established in the Metro Bulletin and Ms. Norton’s email.

8. The Appellant demonstrated that a roughly similar amount of solid waste removed from the roofing material stockpile shown in Greenway Exhibit 7 weighed 2,300 pounds. Therefore the hearings officer finds that it is more likely than not that the PSU material stockpile shown in Metro Exhibits 7, 8, 14, 15 and 16 meets the trivial standard for non-wood material. There is no substantial evidence in the record to the contrary.
9. Respondent argues that the PSU material stockpile does not meet the standard for “source-separated recyclables” because the material needs additional sorting on a belt or tipping floor at the solid waste facility.⁸ However the Metro Code definitions of "Source Separated" and "Source-separated recyclables," as clarified by the Metro Bulletin and Ms. Norton’s email, does not include that requirement. In addition, the Appellant testified that the PSU material did not “need” additional sorting. The Appellant chose to process the material on its sorting belt in order to maximize the amount of recyclable materials recovered from the PSU materials. There is no substantial evidence in the record to the contrary.
10. NOV 257C-10 did not allege any violations of License Sections 3.6.1 and 4.3. Therefore it is unnecessary to address those issues.

⁸ Metro argued:

Source-separated wood may contain an occasional odd bit of other non-wood waste that the generator overlooked or accidentally introduced during the source-separation process. The solid waste facility operator may pull out such items when they are noticed but, in order to fit the definition of "source-separated," the material must not be contaminated to the point where the entire stream must go through a sorting process to be marketable.

VIII. ORDER

1. Respondent failed to bear the burden of proving that the Appellant violated License Section 3.4.2 by storing and/or processing mixed non-putrescible waste outside of an enclosed building between September 21 and October 5, 2010.

2. NOV-257C-10 and the associated \$5,750.00 civil penalty is dismissed.

METRO REGIONAL GOVERNMENT

DATED: April _____, 2011

Daniel B. Cooper,
Chief Operating Officer

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