BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ADOPTING THE HEARINGS OFFICER'S PROPOSED ORDER REGARDING METRO CONTRACT NO. 928937 AND AUTHORIZING THE CHIEF OPERATING OFFICER TO ISSUE A FINAL ORDER	)))))))	RESOLUTION NO. 11-4269 Introduced by Acting Chief Operating Officer Daniel B. Cooper, with the concurrence of Council President Tom Hughes

WHEREAS, Metro and Waste Connections, Inc., dba Finley Buttes Limited Partnership, dba Finley Buttes Landfill Company ("Finley Buttes") are parties to a Designated Facility Agreement, Metro Contract No. 928937; and

WHEREAS, on October 21, 2010, Finley Buttes requested a contested case hearing pursuant to the Designated Facility Agreement related to a decision by Metro regarding a refund of Regional System Fee and Excise Tax to Finley Buttes; and

WHEREAS, a hearing on the matter was held on March 14, 2011, before Metro Hearings Officer Joe Turner; and

WHEREAS, on April 26, 2011, the Hearings Officer issued a proposed order (attached as Exhibit A) in which the hearings officer (1) found that Finley Buttes did not satisfy its burden to prove that Metro violated the Designated Facility Agreement; and (2) affirmed the amount of the refund issued by Metro to Finley Buttes; and

WHEREAS, pursuant to Metro Code 2.05.035(a), the Hearings Officer prepared and submitted a proposed order, together with the record compiled in the hearing, to the Metro Council; 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 issued by Hearings Officer Joe Turner and directs the Chief Operating Officer to issue a final order substantially similar to Exhibit B.

ADOPTED by the Metro Council this 16 day of JUNE, 2011.

Tom Hughes, Council President

Approved as to Form:

Alison Kean Campbell, Acting Metro Attorney

IN THE MATTER OF THE CONTESTED CASE HEARING OF

WASTE CONNECTIONS, INC., dba FINLEY BUTTES LIMITED PARTNERSHIP, dba FINLEY BUTTES LANDFILL **Appellant** **v.** **METRO,** **Respondent**	**Metro Contract. No. 928937** **PROPOSED FINAL ORDER**

I. STATEMENT OF THE CASE

1. Appellant Waste Connections Inc., dba Finley Buttes Limited Partnership, dba Finley Buttes Landfill ("Finley Buttes" or "Appellant"), requested a hearing to contest the decision by Respondent Metropolitan Service District ("Respondent" or "Metro") denying a portion of Appellant's request for a refund of taxes and fees paid for Auto Shredder Residue ("ASR")[1] received at the Finley Buttes Landfill and used as alternative daily cover ("ADC") during a trial period required by the Oregon Department of Environmental Quality ("DEQ").

2. Hearings Officer Joe Turner (the "Hearings Officer") received testimony at the public hearing about this appeal on March 14, 2011, at approximately 1:00 p.m. at Metro's offices, located at 600 NE Grand Avenue, Portland, Oregon. Attorney Marc Carlton represented Appellant. Attorney Michelle Bellia represented Respondent. 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. Appellant provided a pre-hearing memorandum, ("Appellant's Pre-Hearing Memorandum") dated March 9, 2011, a list of witnesses and exhibits, a packet of exhibits (Appellant Exhibits 101 through 108), witness testimony by Mr. Large, sales manager for Finley Buttes and Wasco County landfills, and Ms. Norton, Metro Director of Finance and Regulatory Services, a post-hearing memorandum, ("Appellant's Post-Hearing Memorandum") dated March 24, 2011, a post-hearing reply memorandum, ("Appellant's Post-Hearing Reply Memorandum") dated

[1] Also referred to in the record as Scrap Metal Recycling Residue or Sheet Metal Recycling Residue ("SMRR").

April 4, 2011 and oral argument in support of Appellant's request for refund of all taxes and fees paid to Respondent for ASR received and used as ADC at Finley Buttes Landfill during the DEQ required trial period.

2. Respondent provided a pre-hearing memorandum, ("Respondent Metro's Pre-Hearing Memorandum") dated March 9, 2011, a list of witnesses and exhibits, a packet of exhibits (Metro Exhibits 1 through 24), witness testimony by Ms. Norton and Roy Brower, Solid Waste Compliance and Cleanup Manager, a post-hearing memorandum, ("Respondent Metro's Post-Hearing Memorandum") dated March 24, 2011, a post-hearing reply memorandum, ("Respondent Metro's Response to Appellant's Post-Hearing Memorandum") dated April 4, 2011 and oral argument in support of Respondent's request to uphold Respondent's decision to deny a portion of Appellant's refund request.

3. The parties stipulated to the admissibility of the offered exhibits. Appellant objected to Mr. Brower's testimony, arguing that it was inadmissible hearsay. The Hearings Officer allowed Mr. Brower's testimony, noting that the rules of evidence are inapplicable. MC § 2.05.030(a) allows "Evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs…" The Hearings Officer find that reasonably prudent persons rely on hearsay in the conduct of their serious affairs, although it may be given less weight than direct testimony. Respondent also objected to Mr. Brower's presence in the hearing room during testimony by other witnesses. The Hearings Officer overruled the objection. Mr. Brower was included in Respondent's witness list as a potential witness. At the beginning of the hearing Mr. Carlton and Ms. Bellia agreed that there was no need to exclude witnesses.

4. 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. Appellant agreed to Respondent's request, provided that the Hearings Officer allow both parties the same opportunity and that both parties be allowed to submit additional briefing in response to the post hearing memoranda. Both parties submitted Post-Hearing Memoranda and Post Hearing Reply Memoranda. The Hearings Officer closed the record in this case at 5:00 p.m., April 4, 2011.

III. ISSUES PRESENTED

Whether Appellant is entitled to a full refund of taxes and fees paid to Respondent for ASR received and used as ADC at the Finley Buttes Landfill during the one-year trial period authorized by DEQ.

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, Respondent regulates the transportation, processing and disposal of waste generated within the Metro region. Respondent has developed and implemented a Regional Solid Waste Management Plan, a management system for regional waste disposal and resource recovery. Pursuant to this authority, Respondent regulates the transportation, transfer, disposal and other processing of all solid waste generated within Metro. MC § 5.05.020(b). Respondent requires that all solid waste generated within the Metro region must be processed or disposed of at a solid waste facility[2] or disposal site[3] with an appropriate license from Respondent. MC § 5.05.025(a).

2. Appellant operates a solid waste disposal site, the Finley Buttes Regional Landfill, located in Morrow County, Oregon (the "Finley Buttes Landfill"). The Finley Buttes Landfill is located outside of the Metro region. Therefore Respondent has no authority over the operation of the Finley Buttes Landfill. DEQ regulates the operation of the landfill.

3. Finley Buttes Landfill may only accept solid waste generated within Metro:

    (A) As specified in an agreement entered into between Metro and Finley Buttes Landfill Company authorizing receipt of such waste; or

    (B) Subject to a non-system license issued to a person transporting to the facility solid waste not specified in the agreement.

    MC § 5.05.030(a)(8).

    Therefore, pursuant to MC § 5.05.030(a)(8)(A) Appellant entered into a Designated Facility Agreement with Respondent, Metro Contract No. 928937 (the "DFA"). (Metro Exhibit 1). The parties signed the DFA in November 2008.

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[2] MC 5.01.010(uu) provides:

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

[3] MC 5.05.010(f) provides:

> "Disposal site" means the land and facilities determined from time to time by Metro as constituting part of the system, whether owned by Metro or another person and whether or not open to the public, used for the disposal of solid wastes, but does not include transfer stations or processing facilities.

4. Section 3 of the DFA requires that Appellant collect Regional System Fees as set out in MC § 5.02 and Excise Taxes as set out in MC § 7.01 on every ton of Metro area waste received at Appellant's landfill and remit those fees and taxes to Respondent on a monthly basis. ORS 268.507 authorizes Respondent to impose excise taxes by ordinance.

5. The Metro Code exempts certain materials from fees and taxes, including, "useful material"[4] that is (A) intended to be used, and is in fact used, productively in the operation of the Disposal Site such as for roadbeds or alternative daily cover; and (B) is accepted at the Disposal Site at no charge. MC § 5.01.150(b)(3) and 7.01.050(a)(10). However Section 8 of the DFA provides:

   a. Except as provided below in Section 8b, the Landfill shall not allow a customer to claim a Useful Material exemption from the Regional System Fee under Metro Code Section 5.01.150(b)(3) and from Excise Tax under Metro Code Section 7.01.050(a)(10) until the landfill submits a written request for the exemption, including a Useful Material management plan, to Respondent for review and written approval. The Landfill must receive Respondent's approval before allowing an exemption under Section 8 of this Agreement.

   b. The Landfill may allow a customer to claim an exemption under Section 8 of this Agreement without Respondent's prior approval, provided that the Landfill accepted and used such Useful Materials before January 1, 2009, and complies with Section 8c below.

   c. The Landfill shall submit a Useful Material management plan that incorporates the following information:

      (1) A description of the Useful Material and where it was generated;

      (2) Documentation demonstrating that the Landfill intends to use and will use the Useful Material productively in the operation of the Landfill;

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[4] MC § 5.01.010(aaa) defines "useful material" as:

> "Useful material" means material that still has or retains useful physical, chemical, or biological properties after serving its original purpose(s) or function(s), and which, when separated from Solid Waste, is suitable for use in the same or other purpose(s). Types of Useful Materials are: material that can be Reused; Recyclable Material; organic material(s) suitable for controlled biological decomposition such as for making Compost; material used in the preparation of fuel; material intended to be used, and which is in fact used, for construction or land reclamation such as Inert material for fill; and material intended to be used, and which is in fact used, productively in the operation of landfills such as roadbeds or alternative daily cover. For purposes of this Code, Cleanup Material Contaminated By Hazardous Substances are not Useful Materials.

(3) Documentation demonstrating that the Landfill will accept the Useful Material at no charge;

(4) If the Landfill intends to use the Useful Material as Alternative Daily Cover, documentation demonstrating that the DEQ has approved the use of the material as Alternative Daily Cover at the Landfill;

(5) A description of how the Landfill will manage the Useful Material, including without limitation an explanation, if applicable, of how the Landfill will store the Useful Material before use; and

(6) An estimate of the proposed tons of Useful Material the Landfill expects to accept.

d. The Landfill's failure to manage Useful Material in compliance with its Useful Material management plan shall constitute a breach of this Agreement.

6. Section 17.e of the DFA provides:

> A waiver of any term or condition of this Agreement must be in writing, signed by either the COO, if Metro is making the waiver, or by an authorized representative of the Landfill, if the Landfill is making the waiver. Waiver of a term or condition of this Agreement by either party shall neither waive nor prejudice that other party's right otherwise to require performance of the same term or condition or any other term or condition.

III. FINDINGS OF FACT

1. DEQ regulates the operation of the Finley Buttes landfill. DEQ regulations require that Appellant apply a suitable cover material over any exposed waste at the end of each operating day to protect the environment and public health. Daily cover must consist of at least six-inches of earthen material or an alternative material, ADC, that provides equivalent performance and has been approved by DEQ. (Metro Exhibit 24). DEQ approves ADC materials on a case-by-case basis. "All request for ADCM[5] approval will require a trial period of ADCM use and evaluation to demonstrate the ADCM is as protective as earthen daily cover material... During the trial period, solid waste used as ADCM is subject to all applicable Department fees as described in OAR Chapter 340, Division 097, including the per-ton solid waste disposal fee in OAR 340-097-0120(5)." (p. 2, Metro Exhibit 24).

[5] "Alternative Daily Cover Material."

2. Schnitzer Steel Industries, Inc. ("Schnitzer") is a metal recycler that operates a 7,000 horsepower electric "Mega Shredder" at its facility at 12005 N. Burgard Road in Portland, Oregon. Schnitzer's shredding system recycles automobile bodies, appliances, pipes, metal roofing, motor blocks, and other metal goods. Schnitzer recovers and recycles ferrous and non-ferrous metals from the shredded material. ASR consists of shredded plastic, rubber, wood, upholstery and other non-metal residual materials remaining after the metals have been removed from the shredder output. (Metro Exhibit 4 and Testimony of Mr. Large). Schnitzer sends the ASR to landfills for disposal.

3. Schnitzer ASR has been used, with DEQ approval, as ADC at the Columbia Ridge landfill in Oregon since approximately 1994. Appellant has used Schnitzer ASR as ADC at its Wasco County landfill, with DEQ approval, since 2009. (Metro Exhibit 2 and testimony of Mr. Large). Schnitzer ASR is also used as ADC at the Weyerhaeuser landfill. (Metro Exhibit 2). Schnitzer ASR used as ADC at the Columbia Ridge, Weyerhaeuser, and Wasco County landfills is exempt from Respondent's taxes and fees. (Metro Exhibit 5).

4. Appellant requested DEQ approval of the use of ASR as ADC at the Finley Buttes Landfill. By letter dated October 1, 2008, DEQ denied Appellant's request for long-term approval of ASR as ADC and required that Appellant conduct a trial use of ASR as ADC at Finley Buttes. (Metro Exhibit 2).

5. Neither the DFA nor the Metro Code define the phrase "DEQ approval." DEQ's "Guidelines for Alternative Daily Cover Material Application" (Metro Exhibit 24) states, "All request for ADCM approval will require a trial period of ADCM use…" DEQ continues to charge fees for ADC materials used during the trial period. DEQ only allows a fee exemption for ADC material after DEQ approves the particular material for long-term use as ADC. The purpose of the trial period is to evaluate the use of ASR as ADC. (p. 14 of Metro Exhibit 7).

6. Respondent waived taxes and fees during a DEQ trial period use of ASR as ADC at the Columbia Ridge landfill in 1995. (Metro Exhibit 3). However Respondent has required payment of taxes and fees for materials used as ADC during DEQ required trial periods since at least 2005, when DEQ changed its procedures for the conduct of performance trials. (Testimony of Ms. Norton).

7. On January 23, 2009, Appellant sent a letter to Respondent requesting waiver of excise taxes and system fees for ASR used as ADC at the Finley Buttes Landfill during the DEQ approved trial period. (Metro Exhibit 3).

8. Appellant's January 23, 2009 letter included the statement, "As required by Section 8 of the DFA, please find enclosed a copy of materials constituting WCI's 'Useful Material management plan' as submitted to DEQ for the Schnitzer ASR at FBL." (p. 2 of Metro Exhibit 3). Appellant's Useful Material management plan is

dated December 10, 2008. (pp. 20-21 of Metro Exhibit 21). Respondent searched for copies of the referenced attachment in its paper and electronic records but did not find a copy of the referenced attachment in its records, other than a copy included with Respondent's July 23, 2009 submittal. (Testimony of Mr. Brower). Respondent did not notify Appellant that the management plan was not included in the January 23, 2009 submittal. (Testimony of Mr. Large and Mr. Brower). By email dated July 22, 2009, Respondent informed Appellant that Respondent had not received a useful material management plan from Appellant. (p. 2 of Metro Exhibit 7).

9. By letter dated February 13, 2009, Schnitzer also submitted a separate request that Respondent grant an exemption from excise taxes and system fees for the disposal of ASR generated by Schnitzer and used as ADC during the DEQ approved trial period at Finley Buttes and at the Coffin Butte landfill near Corvallis, Oregon, operated by Appellant's competitor, Allied Waste Services. (Metro Exhibit 4 and testimony of Mr. Large).

10. Respondent replied to Schnitzer's request for exemption by letter dated April 3, 2009. (Metro Exhibit 5).

    a. The letter refers to Schnitzer's request to use ASR generated by Schnitzer as ADC at the Coffin Butte and Finley Buttes landfills. (¶1, p.1 of Metro Exhibit 5). The letter noted that the Metro Code exempts useful material from taxes and fees, provided that the useful material is intended to be used and is in fact used productively in the operation of the landfill and the material is accepted at no charge.

    b. The letter further notes that landfills that are subject to a designated facility agreement with Respondent are required to submit a useful material management plan to Respondent for its approval prior to allowing an exemption from fees and taxes. The letter notes that the Columbia Ridge, Wasco County and Weyerhaeuser landfills received Respondent's approval to use ASR as ADC, exempt from fees and taxes. "All of the other designated landfills must first obtain Respondent's approval prior to allowing such an exemption for [Schnitzer's] ASR."(¶2, p.1 of Metro Exhibit 5).

    c. The letter notes that since 2005, Respondent has not allowed an exemption from fees and taxes for material used as ADC unless DEQ granted final approval for the landfill to use the material as ADC. Respondent agreed to, "[c]onsider a different approach in this specific instance." (¶3, p.1 of Metro Exhibit 5). Respondent required that Schnitzer continue to pay fees and taxes for ASR delivered to landfills during the DEQ required trial period, but Respondent agreed to refund fees and taxes paid:

        [W]hen all of the following conditions are met:

1. The landfill must submit to Metro a written request for an exemption and a useful material management plan in accordance with the terms provided in its designated facility agreement;
2. The landfill must accept at no disposal charge and use the ASR material as ADC in accordance with the performance trial criteria approved by the DEQ;
3. The landfill must complete its performance trial and obtain DEQ approval to use ASR as ADC by no later than June 30, 2010; and
4. SSI[6] Must submit to Metro a written request for a refund of the Fees and Taxes that it paid for the ASR that was used during the ADC performance trials no later than September 1, 2010.

The landfill is solely responsible for submitting an acceptable plan and for conducting its ADC performance trials in accordance with applicable DEQ requirements. The landfill's plan must include an acceptable method for recording the material received and the material used. The landfill's records will be the exclusive source by which Metro determines any eligible refund.

(p.2 of Metro Exhibit 5).

d. Respondent sent courtesy copies ("cc") of the letter to 13 persons, including Appellant, Allied Waste, Waste Management and DEQ.

11. Appellant submitted an application to DEQ on December 12, 2008, to perform a 12-month trial for the use of ASR as ADC at Finley Buttes landfill. (p. 16 of Metro Exhibit 7). DEQ staff recommended approval of the trial on April 21, 2009. (*Id*). By letter dated May 20, 2009, DEQ accepted Appellant's application to conduct the trial use of ASR generated by Schnitzer as ADC during a 12-month trial period at Finley Buttes landfill.[7] (p. 14 of Metro Exhibit 7). On June 16, 2009, Appellant began receiving ASR and using it as ADC at Finley Buttes landfill. (p. 2 of Metro Exhibit 7 and Metro Exhibit 14). Appellant reported to Respondent that it received 1,475.34 tons of ASR at Finley Buttes Landfill between June 16 and 30, 2009. (Appellant Exhibit 109 and p. 2 of Metro Exhibit 7).

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[6] Schnitzer Steel Industries
[7] The January 23, 2009 letter from David Wiley to Steve Kraten (Metro Exhibit 3) states "WCI received notice from DEQ on January 13, 2009 that the ASR trial period at FBL may commence immediately." However there is no further evidence to that effect. The statement in Metro Exhibit 3 conflicts with the April 21 and May 20, 2009 DEQ letters. (pp 14 and 18 of Metro Exhibit 7).

12. Respondent was aware that Appellant intended to pay taxes and fees on behalf of Schnitzer for ASR received at Finley Buttes during the trial period. (Testimony of Ms. Norton). On June 24, 2009 Appellant entered in to an agreement with Schnitzer, whereby Appellant agreed to pay to Respondent all fees and taxes for ASR received and used as ADC during the DEQ required trial period and Schnitzer assigned to Appellant Schnitzer's rights to receive a refund of taxes and fees paid to Respondent. (Metro Exhibit 6 and Appellant Exhibit 102). Respondent required evidence of such an agreement before it would allow Respondent to request a refund of taxes and fees paid for Schnitzer's ASR delivered to Finley Buttes Landfill during the trial period. (p. 2 of Metro Exhibit 10 and testimony of Ms. Norton). Respondent was aware that Appellant expected a full refund of all taxes and fees paid during the DEQ trial period. (p.2 of Metro Exhibit 7).

13. By letter dated July 23, 2009, Appellant provided Respondent with some of the information required by Section 8 of the DFA. (Metro Exhibit 7). The information submitted by Appellant did not include an estimate of the amount of ASR Appellant intended to receive at Finley Buttes landfill, as required by Section 8.c(6) of the DFA. (Metro Exhibit 8). By email dated August 12, 2009, Respondent requested Appellant provide such an estimate as required by Section 8.c(6) of the DFA. (*Id.*). On August 13, 2009 Appellant responded that it expected to send "[a]pproximately 300 tons per week…" of ASR to Finley Buttes landfill. (Metro Exhibit 9). Appellant stated that the amount of ASR generated at Schnitzer's Portland facility "[i]s down significantly in 2009 and is not expected to rebound to prior levels until 2010 or later." (*Id*). By letter dated September 23, 2009, Appellant stated that, "There is currently no excess amount of ASR available to begin our test…" (p. 18 of Metro Exhibit 7). Appellant diverted a portion of the ASR Schnitzer shipped to Wasco County landfill to Finley Buttes Landfill in order to ensure a sufficient supply of ASR to complete the DEQ trial. (p. 18 of Metro Exhibit 7, Metro Exhibit 11 and testimony of Mr. Large). Finley Buttes Landfill expected to receive all of the ASR generated at Schnitzer's Portland operation after the DEQ trial period. (Metro Exhibit 9).

14. Appellant reported to Respondent that it received an average of 4,100 tons of ASR per month at its Wasco County landfill between December 2008 and June 2009. (Appellant Exhibit 101). Beginning in July 2009, Appellant submitted monthly reports to Respondent identifying the total tons of solid waste and ASR received at Finley Buttes landfill.

15. On August 25, 2009, Respondent approved Appellant's useful material management plan, based on the packet of information dated July 23, 2009 and the "supplemental tonnage estimate, dated August 13, 2009…" (Metro Exhibit 10). Respondent agreed to refund up to a maximum $420,000 of the fees and taxes paid to Respondent for Schnitzer's ASR that was received and used as ADC during the trial period. The $420,000 maximum was based on Appellant's August

13, 2009 estimate of the tonnage of ASR Appellant expected to receive at Finley Buttes during the trial period. (*Id).*

16. By letter dated September 23, 2009, Appellant objected to the $420,000 cap on the refund amount established by Respondent. (Metro Exhibit 11). Appellant stated that the tonnage estimate in the August 13, 2009 letter was the minimum amount of ASR that DEQ required Finley Buttes receive in order to conduct the ADC trial. Appellant informed Respondent that Schnitzer expects the amount of ASR produced to increase throughout the remainder of 2009 and 2010 and Appellant intends "[t]o receive as much [ADC] as Schnitzer can tender at [Finley Buttes landfill], but again, at least 300 tons per week." *Id.* Appellant requested that Respondent confirm that Respondent will refund 100-percent of the fees and taxes paid for ASR received and used as ADC during the 12-month trial period. *Id.* The federal "Cash for Clunkers" program substantially increased the number of cars that were sent to Schnitzer for recycling, increasing the amount of ASR generated by Schnitzer. (Testimony of Mr. Large).

17. On October 23, 2009, Respondent informed Appellant that it would agree to a limited increase in the refund cap established in Respondent's August 25, 2009 letter. Respondent agreed to refund taxes and fees paid for ASR used as ADC, up to 15-percent of the total waste tonnage disposed at Finley Buttes Landfill during the trial period, less all other ADC materials received and used at the landfill during the trial period. (Metro Exhibit 12). Respondent applied the 15-percent cap over the entire 12-month trial period. (Testimony of Ms. Norton). By email dated October 28, 2009, Appellant acknowledged receipt of Respondent's letter and stated that Appellant "[u]nderstand[s] the position Metro is taking on the [ASR] trial at Finley." (Metro Exhibit 13).

18. On February 18, 2010, Respondent informed Appellant that 9,121.17 tons of the 15,812.41 tons of ASR received at Finley Buttes Landfill between June 22, 2009 and October 21, 2009, was eligible for a refund, based on the conditional refund approved in Respondent's October 23, 2009 letter to Appellant. (Metro Exhibit 15).

19. By letter dated February 25, 2010, Appellant objected to Respondent's limited refund calculation, arguing that a full refund of all taxes and fees paid for ASR received and used as ADC during the trial period at Finley Buttes Landfill is appropriate. (Metro Exhibit 16). Respondent denied Appellant's objection to the limited refund and reiterated the refund limitation set out in Respondent's October 23, 2009 letter. (Metro Exhibit 17). By letter dated March 18, 2010, Respondent noted that the 15-percent limit '[w]as based on the internal guidance used by the Oregon Department of Environmental Quality ("DEQ") for reviewing ADC usage at landfills." (p. 1 of Metro Exhibit 17). DEQ applies the 15-percent calculation as a trigger for investigation rather than an absolute enforcement standard. Respondent's use of the 15-percent limit is independent from DEQ's regulation. *Id.* On June 10, 2010, Respondent notified Appellant of the steps necessary to

claim a refund at the end of the trial period, repeating Respondent's prior determination that the refund amount is limited to 15-percent of the total waste disposed at Finley Buttes Landfill during the trial period. (Metro Exhibit 18).

20. Appellant completed the trial period on June 16, 2010. DEQ approved the use of ASR generated by Schnitzer as SDC at Finley Buttes on June 23, 2010. (p 4-5 of Metro Exhibit 19 and Appellant Exhibit 104). On July 2, 2010, Appellant requested a refund of all taxes and fees paid for ASR used as ADC during the 12-month trial period at Finley Buttes landfill. Appellant calculated a refund amount of $819,022.73, based on Appellant's receipt and use of 30,164.62 tons of ASR as ADC during the trial period. (Metro Exhibit 19). Appellant used all ASR received at Finley Buttes as ADC on the day it was received. (Appellant Exhibit 103).

21. Respondent refunded $676.427.62 to Appellant for taxes and fees paid for ASR received and used as ADC during the trial period. (Metro Exhibit 20). Respondent calculated the refund based on the formula set out in Respondent's October 23, 2009 letter:

    a. 15-percent of 525,741.22 tons of waste received during the trial period = 78,861.18 tons

    b. 78,861.18 tons – 53,908.27 tons of other ADC used during the trial = 24,952.91 tons of the 30,164.72 tons of ASR received and used during the trial period that is available for refund.

    c. 24,952.91 x the tax and fee rates in effect during relevant portions of the trial period[8] = $676,427.62.

    (Metro Exhibit 20).

22. Appellant objected to the refund amount and argued that all ASR received and used as ADC during the trial period should be subject to refund. (Metro Exhibit 21). Respondent denied Appellant's objection and referred Appellant to the dispute resolution procedures set out in Section 14 of the DFA. (Metro Exhibit 22). On October 21, 2010 Appellant filed a request for contested case hearing. (Metro Exhibit 23).

23. Respondent subsequently approved conditional refunds of fees and taxes paid for other types of materials used as ADC during DEQ approved trial periods at Finley Buttes and other landfills in the region. Respondent imposed the same 15-percent

[8] Between June 16, 2009 and August 5, 2009 Respondent's Fee rate was $16.04 per ton and Respondent's tax rate for $8.97 per ton. Between August 6, 2009 and the end of the trial, Respondent's Fee rate was $17.53 per ton and Respondent's tax rate for $9.83 per ton.

limit and required deduction of other ADC materials as it applied in this case. (Appellant Exhibits 105, 106 and 107). In two letters Respondent said:

> Metro will consider the Landfill's 15-percent limit to be controlling. For example, if the Landfill has reported other material as accepted and used as ADC during the same period, the Landfill may choose to apply these tons to its 15 percent limitation, which may reduce the amount of the refund available to Greenway. The Landfill's records will be the exclusive source by which Metro will determine any eligible refund.

(p. 2 of Appellant Exhibit 105 and p. 2 of Appellant Exhibit 106). In the third letter, Respondent said, "In addition, the amount of potential refund will be limited to a maximum of 15 percent of the total waste tonnage disposed at the landfill during the trial less all other ADC materials received and used at the landfill during the same period." (Underline in original. Appellant Exhibit 107).

IV. CONCLUSIONS OF LAW

1. Appellant failed to meet its burden of proof that it is entitled to a full refund of all taxes and fees paid for ASR received and used as ADC at Finley Buttes Landfill during the one-year DEQ approved trial period.

2. Section 8.c(4) of the DFA prohibits Appellant from allowing a useful material exemption from payment of fees and taxes until the DEQ has approved use of the material as ADC. Trial period approval is not sufficient to comply with Section 8.c(4) of the DFA. Therefore Respondent is not required to waive or refund taxes and fees paid during the DEQ trial period.

3. However Respondent agreed to a limited waiver of Section 8.c(4) of the DFA in this case. Respondent agreed to refund fees and taxes for ASR used as ADC during the trial period, up to a maximum 15-percent of the total tons of solid waste received at Finley Buttes landfill, minus the all other material received and used as ADC during the trial period.

4. The $676,427.62 in taxes and fees refunded to Appellant is consistent with the limited waiver approved by Respondent.

V. OPINION

1. The Hearings Officer finds that Respondent was not required to refund fees and taxes paid for ASR received and used as ADC during the 12-month trial period required by DEQ at the Finley Buttes landfill. Section 8.a of the DFA prohibits Appellant from allowing a useful material exemption from payment of fees and taxes without Respondent's written approval of a Useful Material management plan. Section 8.c(4) of the DFA requires that Appellant demonstrate that DEQ has approved use of the material as ADC at the landfill. The Hearings Officer finds that the term "DEQ approval" in Section 8.c(4) of the DFA requires long term DEQ approval. Trial period approval is not sufficient to comply with Section 8.c(4) of the DFA. Therefore, absent modification of the DFA, Respondent is not required to waive or refund taxes and fees paid during the DEQ trial period. DEQ did not "approve" the use of ASR as ADC at Finley Buttes until June 23, 2010, after Appellant completed the 12-month trial period.

    a. Neither the DFA nor the Metro Code define the phrase "DEQ approval." However Respondent has consistently construed the phrase to only apply to long term DEQ approval of ADC material. Respondent has not allowed an exemption from fees and taxes for ADC material during a DEQ required trial period since at least 2005, when DEQ changed its procedures for the conduct of performance trials. It appears, based on Appellant's actions, that Appellant agreed with Respondent's interpretation of the phrase "DEQ approval," as Appellant continued to seek Respondent's approval of a waiver of taxes and fees during the trial period, rather than pursuing the argument set out in Metro Exhibit 3, that, "[A]DC is not to be treated differently on the basis of pre- or post-trial period status." (p. 1 of Metro Exhibit 3).

    b. DEQ regulations clearly distinguish between "trial period" and "long term" approval of the use of ADC materials at landfills. DEQ's "Guidelines for Alternative Daily Cover Material Application" (Metro Exhibit 24) states that, "All requests for ADCM approval will require a trial period of ADCM use…" In addition, DEQ continues to charge fees for ADC materials used during the trial period. DEQ only allows a fee exemption for ADC material after DEQ approves the particular material for long-term use as ADC. The purpose of the trial period is to evaluate the use of ASR as ADC. The Hearings Officer finds that DEQ approval required by Section 8.c(4) of the DFA requires long-term approval, after a trial period, consistent with DEQ requirements.

    c. In this case, DEQ did not "approve" the use of ASR as ADC at Finley Buttes until June 23, 2010, after Appellant completed the 12-month trial period. DEQ expressly denied long-term use of ASR as ADC at Finley Buttes without a trial period. (p 2 of Metro Exhibit 2). In its May 20, 2009

letter DEQ stated that it, "[a]ccepts the application to conduct the trial use of SMRR waste at the Finley Buttes Landfill…"

d. Therefore, absent Respondent's approval of a modification of the DFA, Appellant could not comply with Section 8.c(4) of the DFA and Respondent was not required to refund or waive taxes and fees for ASM received and used as ADC at Finley Buttes Landfill during the trial period.

e. If the term "approved" in Section 8.c(4) of the DFA includes DEQ approval of a trial period, as Appellant alleges, then Respondent would be prohibited from collecting taxes and fees during any DEQ required trial period at any landfill. However, as noted above, Respondent has been collecting such taxes and fees since at least 2005.

2. As noted above, Section 8.a of the DFA prohibits Appellant from allowing a useful material exemption from payment of fees and taxes without Respondent's written approval of a Useful Material management plan. Appellant began receiving ASR and using it as ADC at the Finley Buttes Landfill on a trial basis beginning on June 16, 2009. However Appellant did not submit a complete useful material management plan, as required by Section 8.c of the DFA, until August 13, 2009.

a. Although Appellant's January 23, 2009 letter stated that it included a Useful Material management plan and Appellant's plan is dated December 10, 2008, Respondent did not find a copy of the Useful Material management plan in its records. There is no substantial evidence in the record that Appellant actually included a copy of the plan in its January 23, 2009 submittal to Respondent.

i. Even if Appellant had submitted a Useful Material management plan in January 2009, Respondent could not approve it, because it did not include an estimate of the tons of ASR Appellant expected to receive as required by Section 8.c(6) of the DFA.

b. Appellant submitted a Useful Material management plan that included the information required by Section 8.c(1) through (5) of the DFA on July 23, 2009. (Metro Exhibit 7). However the submittal did not include "An estimate of the proposed tons of Useful Material the Landfill expects to accept" as required by Section 8.c(6) of the DFA.

c. On August 13, 2009, Appellant provided the estimate required by Section 8.c(6) of the DFA, notifying Respondent that it expected to receive approximately 300 tons of ASR per week at the Finley Buttes Landfill during the 12-month trial period.

3. Based on its review of Appellant's Useful Material management plan, Respondent agreed to a limited waiver of compliance with Section 8 of the DFA during the DEQ trial period at Finley Buttes landfill. Respondent agreed to refund Schnitzer up to a maximum $420,000 in fees and taxes at the end of the trial period, if DEQ approved the long-term use of ASR as ADC. The $420,000 refund cap was based on Appellant's estimate that it would receive approximately 300 tons of ASR per week at the Finley Buttes landfill. Although Respondent knew that Appellant desired a full refund of all taxes and fees paid on ASR received and used as ADC at Finley Buttes Landfill during the trial period, Respondent never agreed to provide a full refund.

4. Appellant subsequently increased its estimate of the amount of ASR it expected to receive at Finley Buttes landfill, stating that the 300 tons per week stated in its August 13, 2009 letter is a minimum and Finley Buttes intends to receive as much ASR as Schnitzer can deliver during the trial period. Appellant's September 23, 2009 letter was the first time Appellant conveyed an intent to receive large amounts of ASR during the trial period at Finley Buttes, which would result in a large refund at the end of the trial period. All of Appellant's prior correspondence referred to the limited supply of ASR, with the majority going to Wasco County landfill. Appellant had to "divert" ASR loads from Wasco County to Finley Buttes in order to ensure sufficient supply of ASR to conduct the DEQ trial.

5. Respondent had no reason to believe that Appellant's initial estimate of 300 tons of ASR was inaccurate, or was only intended as a minimum amount.

   a. Appellant's August 13, 2009 letter was submitted in response to Respondent's August 12, 2009 request for "[a]n estimate of the proposed tons of Useful Material that the Landfill expects to accept." (Metro Exhibit 8). Appellant's letter states that, "During the 12-month trial, Schnitzer Steel Industries plans to ship approximately 300 tons per week to Finley Buttes." (Metro Exhibit 9). Appellant's letter did not indicate that this was a "minimum" amount of ASR.

   b. Prior to and during the initial portion of the trial period, Schnitzer's ASR production was significantly lower than in prior years and was not expected to increase until 2010 or later. Although Appellant's Wasco County landfill was receiving an average of 4,100 tons of ASR per month, there was "[n]o excess amount of ASR available to begin [the DEQ trial period at Finley Buttes landfill]." (p. 18 of Metro Exhibit 21). Appellant was diverting loads of ASR from its Wasco County landfill to Finley Buttes Landfill in order to ensure that a sufficient supply of ASR was available to conduct the DEQ trial at Finley Buttes landfill. "Without diverting [ASR] from Wasco County to Finley Buttes, the DEQ ADC test would have experienced little or no [ASR] for utilization." (Metro Exhibit 11).

c. Appellant reported to Respondent that it received 1,475.34 tons of ASR at Finley Buttes Landfill during the two week period between June 16 and June 30, 2009. Although this is more than the Appellant's estimate of 300 tons per week, it is not sufficient to cause Respondent to question Appellant's estimate. Appellant was only reporting on ASR received during the initial two-week period of the DEQ trial. Appellant's estimate was submitted in mid-August, after more than two months of experience with receiving ASR at Finley Buttes.

6. In response to Appellant's notice that it intended to receive potentially unlimited amounts of ASR during the trial period, Respondent agreed to modify its limited waiver of compliance with Section 8 of the DFA during the DEQ trial period. However Respondent was unwilling to allow an unlimited refund in this case, because this was an unusual case, the first time Respondent allowed a refund of fees and taxes during a DEQ trial. Respondent wanted to maintain some control over the amount of the refund in order to ensure fairness and equity for ratepayers.[9] Therefore Respondent imposed a cap on the amount of the refund it would allow during the trial period. Respondent agreed to refund taxes and fees paid on ASR received at Finley Buttes up to a maximum 15-percent of the total solid waste tonnage disposed at the landfill during the trial period, minus all other ADC material received and used at the landfill during the trial period.

a. Respondent chose the 15-percent limit as a convenient and readily identifiable standard by which to limit the amount of the refund that would be allowed for this unique variance from Respondent's standard practice of collecting taxes and fees during DEQ trials. The 15-percent limit was a standard the parties were familiar with. Although not codified in DEQ's regulations, it is DEQ's general practice to limit ADC to 15-percent of the total amount of solid waste disposed of at a landfill. The fact that DEQ does not rely on the 15-percent standard as an absolute limit is irrelevant. Respondent could have chosen some other method for imposing a cap on the maximum amount of refund it would allow during the trial period. Respondent relied on the 15-percent standard because it was familiar to the parties.

b. Whether Respondent approved different limits for other waste generators in Appellant Exhibits 105 and 106 is irrelevant. In this case Respondent limited its waiver to 15-percent of the total amount of solid waste disposed of at the landfill, minus all other materials received and used as ADC at

[9] In her pre-hearing brief, Ms. Bellia argued that the 15% refund cap was for "budgeting purposes." However this statement by Respondent's attorney is not evidence or testimony of a party. Ms. Bellia is Respondent's attorney. There is no evidence that Ms. Bellia has any superior knowledge about the basis for Respondent's actions. Ms. Norton clearly testified that the purpose of the cap was "to maintain some control over the amount of the refund and to ensure fairness and equity for ratepayers." Ms. Bellia's statement in her brief is an error.

the landfill during the trial period. Respondent applied an identical refund cap in at least one other DEQ ADC trial, Appellant Exhibit 107.

7. Appellant may have disagreed with the limited waiver allowed by Respondent, but Appellant clearly understood it.

8. Respondent did not modify the waiver after October 23, 2009. All subsequent correspondence from Respondent merely reiterates and provides examples of the 15-percent cap on the amount of refund that Respondent agreed to allow as a modification of the DFA in this case.

9. Appellant could have modified its practices to comply with the limited refund approved by Respondent, thereby ensuring the receipt of a full refund of all taxes and fees paid during the trial period. Appellant could have limited the amount of ASR shipped to Finley Buttes Landfill to comply with the cap imposed by Respondent, shipping the remainder to its Wasco County landfill. DEQ had already approved the long term use of ASR as ADC at the Wasco County landfill. Therefore all ASR received and used as ADC at Wasco County would have been exempt from fees and taxes. Appellant exceeded the 15-percent cap during the initial portion of the trial period. However Respondent agreed to apply the 15-percent cap over the entire 12-month trial period. Therefore Appellant could have ensured a full refund by reducing the amounts of ASR shipped to Finley Buttes during the remainder of the trial period, ensuring that the total amount of ASR received at Finley Buttes was less than 15-percent of the total amount of solid waste and other ADC received during the entire 12-month trial. Instead, Appellant chose to continue shipping large volumes of ASR to Finley Buttes throughout the entire trial period.

10. During the 12-month trial period Appellant received 30,164.62 tons of ASR, 53,908.27 tons of other ADC and 525,741.22 tons of solid waste at Finley Buttes Landfill during the 12-month trial period. Appellant utilized 100-percent of the ASR and other ADC material as ADC. Appellant requested a refund of $819,022.73 for 100-percent of the ASR material received and used as ADC during the trial period.

11. Respondent refunded $676.427.62 to Appellant for taxes and fees paid for ASR received and used as ADC during the trial period. Respondent calculated the refund based on the formula set out in Respondent's October 23, 2009 letter:

    a. 15-percent of 525,741.22 tons of waste received during the trial period = 78,861.18 tons.

    b. 78,861.18 tons – 53,908.27 tons of other ADC used during the trial = 24,952.91 tons. Therefore 24,952.91 tons of the 30,164.72 tons of ASR received and used during the trial period is eligible for refund.

c. 24,952.91 x the tax and fee rates in effect during relevant portions of the trial period[10] = $676,427.62.

12. The Hearings Officer finds that the refund amount is reasonable and consistent with Respondent's conditional waiver of the requirements of Section 8 of the DFA during the DEQ trial period.

13. The Hearings Officer finds that the only relationship between Appellant and Respondent is contractual, as set out in the DFA. Appellant's Finley Buttes Landfill is located outside of the Metro region. Therefore it is exempt from compliance with the Metro Code. With one exception that is not relevant to this case,[11] the Finley Buttes Landfill may only accept solid waste generated within Metro in accordance with the DFA. (MC § 5.05.030(8)(A)). Therefore this dispute is bounded by the terms of the DFA. The Metro Code is inapplicable.

14. The DFA does not incorporate by reference the Metro Code. To the contrary, Section 8 of the DFA creates an express exception to the Useful Material exemption otherwise allowed by MC § 5.01.150(b)(3) and § 7.01.050(a)(10).[12] Section 8 of the DFA prohibits Appellant from allowing customers to claim a Useful Material exemption until Appellant receives written approval from

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[10] Between June 16, 2009 and August 5, 2009, Respondent's Fee rate was $16.04 per ton and Respondent's tax rate for $8.97 per ton. Between August 6, 2009 and the end of the trial, Respondent's Fee rate was $17.53 per ton and Respondent's tax rate for $9.83 per ton.

[11] MC 5.05.030(8)(B) provides that the Finley Buttes Landfill may accept solid waste generated within Metro "subject to a non-system license issued to a person transporting to the facility solid waste not specified in the [DFA] agreement."

[12] MC § 5.01.150(b) provides, in relevant part:

> (b) User fees shall not apply to:
> …
> (3) Useful Material that is accepted at a Disposal Site that is listed as a Metro Designated Facility in Chapter 5.05 or accepted at a Disposal Site under authority of a Metro Non-System License issued pursuant to Chapter 5.05, provided that the Useful Material: (A) is intended to be used, and is in fact used, productively in the operation of the Disposal Site such as for roadbeds or alternative daily cover; and (B) is accepted at the Disposal Site at no charge.

MC § 7.01.050(a) provides, in relevant part:

> The following persons, users and operators are exempt from the requirements of this chapter:
> …
> (10) Persons who deliver useful material to disposal sites, provided that such sites are listed as a Metro Designated Facility under Metro Code Chapter 5.05 or are named in a Metro Non-System License and provided further that the Useful Material: (A) is intended to be used, and is in fact used, productively in the operation of such site for purposes including roadbeds and alternative daily cover; and (B) is accepted at such site at no charge.

Respondent allowing the exemption.[13] In order to obtain the required approval, Appellant must submit a Useful Material management plan that includes certain information, including, "If the Landfill intends to use the Useful Material as Alternative Daily Cover, documentation demonstrating that DEQ has approved use of the material as Alternative Daily Cover at the Landfill." Section 8.c(4) of the DFA.

15. The DFA is consistent with the authority granted to Respondent by ORS 268.507, which authorizes Respondent to, "[b]y ordinance impose excise taxes on any person using the facilities, equipment, systems, functions, services or improvements owned, operated, franchised or provided by the district." Respondent adopted an ordinance, the Metro Code, that establishes excise taxes, and exemptions therefrom. MC § 7.01.020 establishes excise taxes on the use of Metro facilities, equipment and services. MC § 7.01.050(a)(10) provides an exemption from excise taxes for Useful Material that is delivered to a site, "[l]isted as a Metro Designated Facility under Metro Code Chapter 5.05…" and used as alternative daily cover."

16. The same ordinance, the Metro Code, authorizes disposal of waste generated in the Metro area at Appellant's Finley Buttes landfill. However MC § 5.05.030(a)(8)(A) provides that Finley Buttes Landfill may only accept solid waste generated within Metro, "as specified in an agreement entered into between Metro and Finley Buttes Landfill Company authorizing receipt of such waste." The DFA is the "agreement" referred to in MC § 5.05.030(a)(8)(A). The DFA, which is required by the Metro Code, creates an exception to the excise tax exemption established by MC § 7.01.050(a)(10). The excise tax exemption in the DFA is consistent with ORS 268.507, because the Metro Code expressly requires the DFA before Finley Buttes Landfill may accept any solid waste generated within the Metro region.

17. ORS 268.507 only regulates Respondent's authority to impose excise taxes. It does not regulate the user fees authorized by MC § 5.01.150. ORS 268.317(5) appears to allow Respondent to impose user fees without limitation.[14]

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[13] Section 8.a of the DFA provides:

> Except as provided below in Section 8b, the Landfill shall not allow a customer to claim a Useful Material exemption from the Regional System Fee under Metro Code Section 5.01.150(b)(3) and from Excise Tax under Metro Code Section 7.01.050(a)(10) until the landfill submits a written request for the exemption, including a Useful Material management plan, to Metro for review and written approval. The Landfill must receive Metro approval before allowing an exemption under Section 8 of this Agreement.

[14] ORS 268.317(5) authorizes Metro to:

> Regulate, license, franchise and certify disposal, transfer and resource recovery sites or facilities; establish, maintain and amend rates charged by disposal, transfer and resource recovery sites or facilities; establish and collect license or franchise fees; and otherwise control and regulate the

18. Appellant had no right to rely on Respondent's April 3, 2009 letter to Schnitzer (Metro Exhibit 5). Appellant requested that Respondent allow a Useful Material exemption from fees and excise taxes for Schnitzer ASR used as ADC during the trial period. (Metro Exhibit 3). Schnitzer, in a separate letter, also requested a Useful Material exemption. (Metro Exhibit 4). Respondent replied to Schnitzer's exemption request on April 3, 2009. (Metro Exhibit 5). Respondent noted that it has not allowed an exemption from fees and taxes during a DEQ approved trial period since at least 2005. However Respondent agreed to, "[c]onsider a different approach in this specific instance." Respondent agreed that if DEQ approved the long term use of ASR as ADC, Respondent would refund fees and taxes paid during the trial period, subject to certain conditions, including a condition that, "the landfill must submit to Metro a written request for an exemption and a useful material management plan in accordance with the terms provided in its designated facility agreement." (p. 2 of Metro Exhibit 5). Respondent expressly noted that ASR received at the Columbia Ridge, Wasco County and Weyerhaeuser Regional landfills is already exempt from Metro taxes and fees. "All of the other designated landfills must first obtain Metro's approval prior to allowing such an exemption for [Schnitzer's] ASR." (p. 1 of Metro Exhibit 5).

19. Metro Exhibit 5 is not a contract or agreement between Appellant and Respondent and it was not intended to, and did not, modify the DFA, the existing agreement between Respondent and Appellant.

    a. Metro Exhibit 5 was addressed to Schnitzer Steel, not to Appellant. Appellant was sent a courtesy copy, as were 13 other persons, including Appellant's direct competitors: Allied Waste, operator of the Coffin Butte landfill, and Waste Management, operator of the Columbia Ridge landfill, both of which were mentioned in the letter to Schnitzer.

    b. The letter is not specific to Appellant's Finley Buttes landfill. The letter addresses Schnitzer's request to use ASR as ADC at two different, competing, landfills: the Finley Buttes Landfill owned by Appellant and the Coffin Butte landfill operated by Appellant's competitor, Allied Waste.

    c. The letter requires further action by the operators of the Finley Buttes and Coffin Butte landfills and approval by Respondent before Respondent will allow a refund of fees and taxes paid during the trial period. The letter states that, "[l]andfills that have designated facility agreements with Metro

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establishment and operation of all public or private disposal, transfer and resource recovery sites or facilities located within the district. Licenses or franchises granted by the district may be exclusive. Existing landfills authorized to accept food wastes which, on March 1, 1979, are either franchised by a county or owned by a city are exempt from the district's franchising and rate regulation.

are required to submit a useful material management plan to Metro for its approval prior to allowing an exemption from Fees and Taxes." (p 1 of Metro Exhibit 5). As mentioned in the letter, ASR shipped to the Columbia Ridge, Wasco County and Weyerhaeuser landfills was already exempt from Metro fees and taxes.

d. The letter makes no mention of, let alone modifies, the DFA between Respondent and Appellant.

20. Respondent could have been clearer in its correspondence. Respondent's letter to Schnitzer appears to imply that Respondent will allow a full refund of all taxes and fees paid during the DEQ trial subject to the specific conditions set out in the letter. The letter makes no mention of a cap or other limit on the amount of refund that Respondent will allow. But Appellant had no right to rely on that letter, since it was not addressed to Appellant, it addresses the use of ASR as ADC at two different landfills, and it conflicts with express terms of the DFA. Schnitzer did not assign its refund rights to Appellant until June 24, 2009, two months after Respondent issued its letter to Schnitzer. Appellant did not comply with the conditions in the Schnitzer letter until August 13, 2009, when Appellant submitted its useful material management plan and tonnage estimate.

VI. PROPOSED ORDER

1. Appellant failed to bear the burden of proving that Respondent violated the DFA or that Appellant is otherwise entitled to a full refund of all taxes and fees paid for ASR received at Finley Buttes Landfill during the DEQ trial period.

2. Respondent's refund of $676.427.62 to Appellant for taxes and fees paid for ASR received and used as ADC during the trial period is affirmed.

Respectfully Submitted:

__________________ DATED: April 26, 2011

Joe Turner, AICP, Esq.
Metro Hearings Officer

CERTIFICATE OF SERVICE

I, Joe Turner, certify that on this day I submitted the original PROPOSD FINAL ORDER to the Metro Council, Attention Michelle Bellia, and sent an original copy of the

foregoing PROPOSD FINAL ORDER to Respondent, Attention Marc Carlton. I sent both documents by US Mail, first class postage pre-paid, in properly addressed and sealed envelopes, to at the address(es) shown, and via electronic transmission to the at the email addresses shown:

Metro
Michelle Bellia
600 Northeast Grand Avenue
Portland, Oregon 97232-2736
Michelle.Bellia@oregonmetro.gov

Waste Connections, Inc.
c/o Marc Carlton
Williams, Kastner & Gibbs PLLC
888 SW Fifth Avenue, Suite 600
Portland, OR 97204-2025
mcarlton@williamskastner.com

DATED: April 26, 2011

____
Joe Turner, AICP, Esq.
Metro Hearings Officer

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BEFORE THE METRO REGIONAL GOVERNMENT

WASTE CONNECTIONS, INC., dba FINLEY BUTTES LIMITED PARTNERSHIP, dba FINLEY BUTTES LANDFILL **Appellant** **v.** **METRO,** **Respondent**	**Metro Contract. No. 928937** **FINAL ORDER**

I. STATEMENT OF THE CASE

1. Appellant Waste Connections Inc., dba Finley Buttes Limited Partnership, dba Finley Buttes Landfill ("Finley Buttes" or "Appellant"), requested a hearing to contest the decision by Respondent Metropolitan Service District ("Respondent" or "Metro") denying a portion of Appellant's request for a refund of taxes and fees paid for Auto Shredder Residue ("ASR")[1] received at the Finley Buttes Landfill and used as alternative daily cover ("ADC") during a trial period required by the Oregon Department of Environmental Quality ("DEQ").

2. Hearings Officer Joe Turner (the "Hearings Officer") received testimony at the public hearing about this appeal on March 14, 2011, at approximately 1:00 p.m. at Metro's offices, located at 600 NE Grand Avenue, Portland, Oregon. Attorney Marc Carlton represented Appellant. Attorney Michelle Bellia represented Respondent. 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.

[1] Also referred to in the record as Scrap Metal Recycling Residue or Sheet Metal Recycling Residue ("SMRR").

II. EVIDENTIARY MATTERS

1. Appellant provided a pre-hearing memorandum, ("Appellant's Pre-Hearing Memorandum") dated March 9, 2011, a list of witnesses and exhibits, a packet of exhibits (Appellant Exhibits 101 through 108), witness testimony by Mr. Large, sales manager for Finley Buttes and Wasco County landfills, and Ms. Norton, Metro Director of Finance and Regulatory Services, a post-hearing memorandum, ("Appellant's Post-Hearing Memorandum") dated March 24, 2011, a post-hearing reply memorandum, ("Appellant's Post-Hearing Reply Memorandum") dated April 4, 2011 and oral argument in support of Appellant's request for refund of all taxes and fees paid to Respondent for ASR received and used as ADC at Finley Buttes Landfill during the DEQ required trial period.

2. Respondent provided a pre-hearing memorandum, ("Respondent Metro's Pre-Hearing Memorandum") dated March 9, 2011, a list of witnesses and exhibits, a packet of exhibits (Metro Exhibits 1 through 24), witness testimony by Ms. Norton and Roy Brower, Solid Waste Compliance and Cleanup Manager, a post-hearing memorandum, ("Respondent Metro's Post-Hearing Memorandum") dated March 24, 2011, a post-hearing reply memorandum, ("Respondent Metro's Response to Appellant's Post-Hearing Memorandum") dated April 4, 2011 and oral argument in support of Respondent's request to uphold Respondent's decision to deny a portion of Appellant's refund request.

3. The parties stipulated to the admissibility of the offered exhibits. Appellant objected to Mr. Brower's testimony, arguing that it was inadmissible hearsay. The Hearings Officer allowed Mr. Brower's testimony, noting that the rules of evidence are inapplicable. MC § 2.05.030(a) allows "Evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs…" The Hearings Officer finds that reasonably prudent persons rely on hearsay in the conduct of their serious affairs, although it may be given less weight than direct testimony. Respondent also objected to Mr. Brower's presence in the hearing room during testimony by other witnesses. The Hearings Officer overruled the objection. Mr. Brower was included in Respondent's witness list as a potential witness. At the beginning of the hearing Mr. Carlton and Ms. Bellia agreed that there was no need to exclude witnesses.

4. 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. Appellant agreed to Respondent's request, provided that the Hearings Officer allow both parties the same opportunity and that both parties be allowed to submit additional briefing in response to the post hearing memoranda. Both parties submitted Post-Hearing Memoranda and Post Hearing Reply Memoranda. The Hearings Officer closed the record in this case at 5:00 p.m., April 4, 2011.

III. ISSUES PRESENTED

Whether Appellant is entitled to a full refund of taxes and fees paid to Respondent for ASR received and used as ADC at the Finley Buttes Landfill during the one-year trial period authorized by DEQ.

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, Respondent regulates the transportation, processing and disposal of waste generated within the Metro region. Respondent has developed and implemented a Regional Solid Waste Management Plan, a management system for regional waste disposal and resource recovery. Pursuant to this authority, Respondent regulates the transportation, transfer, disposal and other processing of all solid waste generated within Metro. MC § 5.05.020(b). Respondent requires that all solid waste generated within the Metro region must be processed or disposed of at a solid waste facility[2] or disposal site[3] with an appropriate license from Respondent. MC § 5.05.025(a).

2. Appellant operates a solid waste disposal site, the Finley Buttes Regional Landfill, located in Morrow County, Oregon (the "Finley Buttes Landfill"). The Finley Buttes Landfill is located outside of the Metro region. Therefore Respondent has no authority over the operation of the Finley Buttes Landfill. DEQ regulates the operation of the landfill.

3. Finley Buttes Landfill may only accept solid waste generated within Metro:

    (A) As specified in an agreement entered into between Metro and Finley Buttes Landfill Company authorizing receipt of such waste; or

    (B) Subject to a non-system license issued to a person transporting to the facility solid waste not specified in the agreement.

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[2] MC 5.01.010(uu) provides:

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

[3] MC 5.05.010(f) provides:

> "Disposal site" means the land and facilities determined from time to time by Metro as constituting part of the system, whether owned by Metro or another person and whether or not open to the public, used for the disposal of solid wastes, but does not include transfer stations or processing facilities.

MC § 5.05.030(a)(8).

Therefore, pursuant to MC § 5.05.030(a)(8)(A) Appellant entered into a Designated Facility Agreement with Respondent, Metro Contract No. 928937 (the "DFA"). (Metro Exhibit 1). The parties signed the DFA in November 2008.

4. Section 3 of the DFA requires that Appellant collect Regional System Fees as set out in MC § 5.02 and Excise Taxes as set out in MC § 7.01 on every ton of Metro area waste received at Appellant's landfill and remit those fees and taxes to Respondent on a monthly basis. ORS 268.507 authorizes Respondent to impose excise taxes by ordinance.

5. The Metro Code exempts certain materials from fees and taxes, including, "useful material"[4] that is (A) intended to be used, and is in fact used, productively in the operation of the Disposal Site such as for roadbeds or alternative daily cover; and (B) is accepted at the Disposal Site at no charge. MC § 5.01.150(b)(3) and 7.01.050(a)(10). However Section 8 of the DFA provides:

   a. Except as provided below in Section 8b, the Landfill shall not allow a customer to claim a Useful Material exemption from the Regional System Fee under Metro Code Section 5.01.150(b)(3) and from Excise Tax under Metro Code Section 7.01.050(a)(10) until the landfill submits a written request for the exemption, including a Useful Material management plan, to Respondent for review and written approval. The Landfill must receive Respondent's approval before allowing an exemption under Section 8 of this Agreement.

   b. The Landfill may allow a customer to claim an exemption under Section 8 of this Agreement without Respondent's prior approval, provided that the Landfill accepted and used such Useful Materials before January 1, 2009, and complies with Section 8c below.

   c. The Landfill shall submit a Useful Material management plan that incorporates the following information:

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[4] MC § 5.01.010(aaa) defines "useful material" as:

> "Useful material" means material that still has or retains useful physical, chemical, or biological properties after serving its original purpose(s) or function(s), and which, when separated from Solid Waste, is suitable for use in the same or other purpose(s). Types of Useful Materials are: material that can be Reused; Recyclable Material; organic material(s) suitable for controlled biological decomposition such as for making Compost; material used in the preparation of fuel; material intended to be used, and which is in fact used, for construction or land reclamation such as Inert material for fill; and material intended to be used, and which is in fact used, productively in the operation of landfills such as roadbeds or alternative daily cover. For purposes of this Code, Cleanup Material Contaminated By Hazardous Substances are not Useful Materials.

(1) A description of the Useful Material and where it was generated;

(2) Documentation demonstrating that the Landfill intends to use and will use the Useful Material productively in the operation of the Landfill;

(3) Documentation demonstrating that the Landfill will accept the Useful Material at no charge;

(4) If the Landfill intends to use the Useful Material as Alternative Daily Cover, documentation demonstrating that the DEQ has approved the use of the material as Alternative Daily Cover at the Landfill;

(5) A description of how the Landfill will manage the Useful Material, including without limitation an explanation, if applicable, of how the Landfill will store the Useful Material before use; and

(6) An estimate of the proposed tons of Useful Material the Landfill expects to accept.

d. The Landfill's failure to manage Useful Material in compliance with its Useful Material management plan shall constitute a breach of this Agreement.

6. Section 17.e of the DFA provides:

> A waiver of any term or condition of this Agreement must be in writing, signed by either the COO, if Metro is making the waiver, or by an authorized representative of the Landfill, if the Landfill is making the waiver. Waiver of a term or condition of this Agreement by either party shall neither waive nor prejudice that other party's right otherwise to require performance of the same term or condition or any other term or condition.

III. FINDINGS OF FACT

1. DEQ regulates the operation of the Finley Buttes landfill. DEQ regulations require that Appellant apply a suitable cover material over any exposed waste at the end of each operating day to protect the environment and public health. Daily cover must consist of at least six-inches of earthen material or an alternative material, ADC, that provides equivalent performance and has been approved by DEQ. (Metro Exhibit 24). DEQ approves ADC materials on a case-by-case basis. "All request for ADCM[5] approval will require a trial period of ADCM use and

[5] "Alternative Daily Cover Material."

evaluation to demonstrate the ADCM is as protective as earthen daily cover material... During the trial period, solid waste used as ADCM is subject to all applicable Department fees as described in OAR Chapter 340, Division 097, including the per-ton solid waste disposal fee in OAR 340-097-0120(5)." (p. 2, Metro Exhibit 24).

2. Schnitzer Steel Industries, Inc. ("Schnitzer") is a metal recycler that operates a 7,000 horsepower electric "Mega Shredder" at its facility at 12005 N. Burgard Road in Portland, Oregon. Schnitzer's shredding system recycles automobile bodies, appliances, pipes, metal roofing, motor blocks, and other metal goods. Schnitzer recovers and recycles ferrous and non-ferrous metals from the shredded material. ASR consists of shredded plastic, rubber, wood, upholstery and other non-metal residual materials remaining after the metals have been removed from the shredder output. (Metro Exhibit 4 and Testimony of Mr. Large). Schnitzer sends the ASR to landfills for disposal.

3. Schnitzer ASR has been used, with DEQ approval, as ADC at the Columbia Ridge landfill in Oregon since approximately 1994. Appellant has used Schnitzer ASR as ADC at its Wasco County landfill, with DEQ approval, since 2009. (Metro Exhibit 2 and testimony of Mr. Large). Schnitzer ASR is also used as ADC at the Weyerhaeuser landfill. (Metro Exhibit 2). Schnitzer ASR used as ADC at the Columbia Ridge, Weyerhaeuser, and Wasco County landfills is exempt from Respondent's taxes and fees. (Metro Exhibit 5).

4. Appellant requested DEQ approval of the use of ASR as ADC at the Finley Buttes Landfill. By letter dated October 1, 2008, DEQ denied Appellant's request for long-term approval of ASR as ADC and required that Appellant conduct a trial use of ASR as ADC at Finley Buttes. (Metro Exhibit 2).

5. Neither the DFA nor the Metro Code define the phrase "DEQ approval." DEQ's "Guidelines for Alternative Daily Cover Material Application" (Metro Exhibit 24) states, "All request for ADCM approval will require a trial period of ADCM use…" DEQ continues to charge fees for ADC materials used during the trial period. DEQ only allows a fee exemption for ADC material after DEQ approves the particular material for long-term use as ADC. The purpose of the trial period is to evaluate the use of ASR as ADC. (p. 14 of Metro Exhibit 7).

6. Respondent waived taxes and fees during a DEQ trial period use of ASR as ADC at the Columbia Ridge landfill in 1995. (Metro Exhibit 3). However Respondent has required payment of taxes and fees for materials used as ADC during DEQ required trial periods since at least 2005, when DEQ changed its procedures for the conduct of performance trials. (Testimony of Ms. Norton).

7. On January 23, 2009, Appellant sent a letter to Respondent requesting waiver of excise taxes and system fees for ASR used as ADC at the Finley Buttes Landfill during the DEQ approved trial period. (Metro Exhibit 3).

8. Appellant's January 23, 2009 letter included the statement, "As required by Section 8 of the DFA, please find enclosed a copy of materials constituting WCI's 'Useful Material management plan' as submitted to DEQ for the Schnitzer ASR at FBL." (p. 2 of Metro Exhibit 3). Appellant's Useful Material management plan is dated December 10, 2008. (pp. 20-21 of Metro Exhibit 21). Respondent searched for copies of the referenced attachment in its paper and electronic records but did not find a copy of the referenced attachment in its records, other than a copy included with Respondent's July 23, 2009 submittal. (Testimony of Mr. Brower). Respondent did not notify Appellant that the management plan was not included in the January 23, 2009 submittal. (Testimony of Mr. Large and Mr. Brower). By email dated July 22, 2009, Respondent informed Appellant that Respondent had not received a useful material management plan from Appellant. (p. 2 of Metro Exhibit 7).

9. By letter dated February 13, 2009, Schnitzer also submitted a separate request that Respondent grant an exemption from excise taxes and system fees for the disposal of ASR generated by Schnitzer and used as ADC during the DEQ approved trial period at Finley Buttes and at the Coffin Butte landfill near Corvallis, Oregon, operated by Appellant's competitor, Allied Waste Services. (Metro Exhibit 4 and testimony of Mr. Large).

10. Respondent replied to Schnitzer's request for exemption by letter dated April 3, 2009. (Metro Exhibit 5).

    a. The letter refers to Schnitzer's request to use ASR generated by Schnitzer as ADC at the Coffin Butte and Finley Buttes landfills. (¶1, p.1 of Metro Exhibit 5). The letter noted that the Metro Code exempts useful material from taxes and fees, provided that the useful material is intended to be used and is in fact used productively in the operation of the landfill and the material is accepted at no charge.

    b. The letter further notes that landfills that are subject to a designated facility agreement with Respondent are required to submit a useful material management plan to Respondent for its approval prior to allowing an exemption from fees and taxes. The letter notes that the Columbia Ridge, Wasco County and Weyerhaeuser landfills received Respondent's approval to use ASR as ADC, exempt from fees and taxes. "All of the other designated landfills must first obtain Respondent's approval prior to allowing such an exemption for [Schnitzer's] ASR."(¶2, p.1 of Metro Exhibit 5).

c. The letter notes that since 2005, Respondent has not allowed an exemption from fees and taxes for material used as ADC unless DEQ granted final approval for the landfill to use the material as ADC. Respondent agreed to, "[c]onsider a different approach in this specific instance." (¶3, p.1 of Metro Exhibit 5). Respondent required that Schnitzer continue to pay fees and taxes for ASR delivered to landfills during the DEQ required trial period, but Respondent agreed to refund fees and taxes paid:

> [W]hen all of the following conditions are met:
>
> 1. The landfill must submit to Metro a written request for an exemption and a useful material management plan in accordance with the terms provided in its designated facility agreement;
> 2. The landfill must accept at no disposal charge and use the ASR material as ADC in accordance with the performance trial criteria approved by the DEQ;
> 3. The landfill must complete its performance trial and obtain DEQ approval to use ASR as ADC by no later than June 30, 2010; and
> 4. SSI[6] Must submit to Metro a written request for a refund of the Fees and Taxes that it paid for the ASR that was used during the ADC performance trials no later than September 1, 2010.
>
> The landfill is solely responsible for submitting an acceptable plan and for conducting its ADC performance trials in accordance with applicable DEQ requirements. The landfill's plan must include an acceptable method for recording the material received and the material used. The landfill's records will be the exclusive source by which Metro determines any eligible refund.

(p.2 of Metro Exhibit 5).

d. Respondent sent courtesy copies ("cc") of the letter to 13 persons, including Appellant, Allied Waste, Waste Management and DEQ.

11. Appellant submitted an application to DEQ on December 12, 2008, to perform a 12-month trial for the use of ASR as ADC at Finley Buttes landfill. (p. 16 of Metro Exhibit 7). DEQ staff recommended approval of the trial on April 21, 2009. (*Id*). By letter dated May 20, 2009, DEQ accepted Appellant's application to conduct the trial use of ASR generated by Schnitzer as ADC during a 12-month

[6] Schnitzer Steel Industries

trial period at Finley Buttes landfill.[7] (p. 14 of Metro Exhibit 7). On June 16, 2009, Appellant began receiving ASR and using it as ADC at Finley Buttes landfill. (p. 2 of Metro Exhibit 7 and Metro Exhibit 14). Appellant reported to Respondent that it received 1,475.34 tons of ASR at Finley Buttes Landfill between June 16 and 30, 2009. (Appellant Exhibit 109 and p. 2 of Metro Exhibit 7).

12. Respondent was aware that Appellant intended to pay taxes and fees on behalf of Schnitzer for ASR received at Finley Buttes during the trial period. (Testimony of Ms. Norton). On June 24, 2009 Appellant entered in to an agreement with Schnitzer, whereby Appellant agreed to pay to Respondent all fees and taxes for ASR received and used as ADC during the DEQ required trial period and Schnitzer assigned to Appellant Schnitzer's rights to receive a refund of taxes and fees paid to Respondent. (Metro Exhibit 6 and Appellant Exhibit 102). Respondent required evidence of such an agreement before it would allow Respondent to request a refund of taxes and fees paid for Schnitzer's ASR delivered to Finley Buttes Landfill during the trial period. (p. 2 of Metro Exhibit 10 and testimony of Ms. Norton). Respondent was aware that Appellant expected a full refund of all taxes and fees paid during the DEQ trial period. (p.2 of Metro Exhibit 7).

13. By letter dated July 23, 2009, Appellant provided Respondent with some of the information required by Section 8 of the DFA. (Metro Exhibit 7). The information submitted by Appellant did not include an estimate of the amount of ASR Appellant intended to receive at Finley Buttes landfill, as required by Section 8.c(6) of the DFA. (Metro Exhibit 8). By email dated August 12, 2009, Respondent requested Appellant provide such an estimate as required by Section 8.c(6) of the DFA. (*Id.*). On August 13, 2009 Appellant responded that it expected to send "[a]pproximately 300 tons per week…" of ASR to Finley Buttes landfill. (Metro Exhibit 9). Appellant stated that the amount of ASR generated at Schnitzer's Portland facility "[i]s down significantly in 2009 and is not expected to rebound to prior levels until 2010 or later." (*Id*). By letter dated September 23, 2009, Appellant stated that, "There is currently no excess amount of ASR available to begin our test…" (p. 18 of Metro Exhibit 7). Appellant diverted a portion of the ASR Schnitzer shipped to Wasco County landfill to Finley Buttes Landfill in order to ensure a sufficient supply of ASR to complete the DEQ trial. (p. 18 of Metro Exhibit 7, Metro Exhibit 11 and testimony of Mr. Large). Finley Buttes Landfill expected to receive all of the ASR generated at Schnitzer's Portland operation after the DEQ trial period. (Metro Exhibit 9).

[7] The January 23, 2009 letter from David Wiley to Steve Kraten (Metro Exhibit 3) states "WCI received notice from DEQ on January 13, 2009 that the ASR trial period at FBL may commence immediately." However there is no further evidence to that effect. The statement in Metro Exhibit 3 conflicts with the April 21 and May 20, 2009 DEQ letters. (pp 14 and 18 of Metro Exhibit 7).

14. Appellant reported to Respondent that it received an average of 4,100 tons of ASR per month at its Wasco County landfill between December 2008 and June 2009. (Appellant Exhibit 101). Beginning in July 2009, Appellant submitted monthly reports to Respondent identifying the total tons of solid waste and ASR received at Finley Buttes landfill.

15. On August 25, 2009, Respondent approved Appellant's useful material management plan, based on the packet of information dated July 23, 2009 and the "supplemental tonnage estimate, dated August 13, 2009…" (Metro Exhibit 10). Respondent agreed to refund up to a maximum $420,000 of the fees and taxes paid to Respondent for Schnitzer's ASR that was received and used as ADC during the trial period. The $420,000 maximum was based on Appellant's August 13, 2009 estimate of the tonnage of ASR Appellant expected to receive at Finley Buttes during the trial period. (*Id).*

16. By letter dated September 23, 2009, Appellant objected to the $420,000 cap on the refund amount established by Respondent. (Metro Exhibit 11). Appellant stated that the tonnage estimate in the August 13, 2009 letter was the minimum amount of ASR that DEQ required Finley Buttes receive in order to conduct the ADC trial. Appellant informed Respondent that Schnitzer expects the amount of ASR produced to increase throughout the remainder of 2009 and 2010 and Appellant intends "[t]o receive as much [ADC] as Schnitzer can tender at [Finley Buttes landfill], but again, at least 300 tons per week." *Id.* Appellant requested that Respondent confirm that Respondent will refund 100-percent of the fees and taxes paid for ASR received and used as ADC during the 12-month trial period. *Id.* The federal "Cash for Clunkers" program substantially increased the number of cars that were sent to Schnitzer for recycling, increasing the amount of ASR generated by Schnitzer. (Testimony of Mr. Large).

17. On October 23, 2009, Respondent informed Appellant that it would agree to a limited increase in the refund cap established in Respondent's August 25, 2009 letter. Respondent agreed to refund taxes and fees paid for ASR used as ADC, up to 15-percent of the total waste tonnage disposed at Finley Buttes Landfill during the trial period, less all other ADC materials received and used at the landfill during the trial period. (Metro Exhibit 12). Respondent applied the 15-percent cap over the entire 12-month trial period. (Testimony of Ms. Norton). By email dated October 28, 2009, Appellant acknowledged receipt of Respondent's letter and stated that Appellant "[u]nderstand[s] the position Metro is taking on the [ASR] trial at Finley." (Metro Exhibit 13).

18. On February 18, 2010, Respondent informed Appellant that 9,121.17 tons of the 15,812.41 tons of ASR received at Finley Buttes Landfill between June 22, 2009 and October 21, 2009, was eligible for a refund, based on the conditional refund approved in Respondent's October 23, 2009 letter to Appellant. (Metro Exhibit 15).

19. By letter dated February 25, 2010, Appellant objected to Respondent's limited refund calculation, arguing that a full refund of all taxes and fees paid for ASR received and used as ADC during the trial period at Finley Buttes Landfill is appropriate. (Metro Exhibit 16). Respondent denied Appellant's objection to the limited refund and reiterated the refund limitation set out in Respondent's October 23, 2009 letter. (Metro Exhibit 17). By letter dated March 18, 2010, Respondent noted that the 15-percent limit '[w]as based on the internal guidance used by the Oregon Department of Environmental Quality ("DEQ") for reviewing ADC usage at landfills." (p. 1 of Metro Exhibit 17). DEQ applies the 15-percent calculation as a trigger for investigation rather than an absolute enforcement standard. Respondent's use of the 15-percent limit is independent from DEQ's regulation. *Id.* On June 10, 2010, Respondent notified Appellant of the steps necessary to claim a refund at the end of the trial period, repeating Respondent's prior determination that the refund amount is limited to 15-percent of the total waste disposed at Finley Buttes Landfill during the trial period. (Metro Exhibit 18).

20. Appellant completed the trial period on June 16, 2010. DEQ approved the use of ASR generated by Schnitzer as SDC at Finley Buttes on June 23, 2010. (p 4-5 of Metro Exhibit 19 and Appellant Exhibit 104). On July 2, 2010, Appellant requested a refund of all taxes and fees paid for ASR used as ADC during the 12-month trial period at Finley Buttes landfill. Appellant calculated a refund amount of $819,022.73, based on Appellant's receipt and use of 30,164.62 tons of ASR as ADC during the trial period. (Metro Exhibit 19). Appellant used all ASR received at Finley Buttes as ADC on the day it was received. (Appellant Exhibit 103).

21. Respondent refunded $676.427.62 to Appellant for taxes and fees paid for ASR received and used as ADC during the trial period. (Metro Exhibit 20). Respondent calculated the refund based on the formula set out in Respondent's October 23, 2009 letter:

    a. 15-percent of 525,741.22 tons of waste received during the trial period = 78,861.18 tons

    b. 78,861.18 tons – 53,908.27 tons of other ADC used during the trial = 24,952.91 tons of the 30,164.72 tons of ASR received and used during the trial period that is available for refund.

    c. 24,952.91 x the tax and fee rates in effect during relevant portions of the trial period[8] = $676,427.62.

    (Metro Exhibit 20).

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[8] Between June 16, 2009 and August 5, 2009 Respondent's Fee rate was $16.04 per ton and Respondent's tax rate for $8.97 per ton. Between August 6, 2009 and the end of the trial, Respondent's Fee rate was $17.53 per ton and Respondent's tax rate for $9.83 per ton.

22. Appellant objected to the refund amount and argued that all ASR received and used as ADC during the trial period should be subject to refund. (Metro Exhibit 21). Respondent denied Appellant's objection and referred Appellant to the dispute resolution procedures set out in Section 14 of the DFA. (Metro Exhibit 22). On October 21, 2010 Appellant filed a request for contested case hearing. (Metro Exhibit 23).

23. Respondent subsequently approved conditional refunds of fees and taxes paid for other types of materials used as ADC during DEQ approved trial periods at Finley Buttes and other landfills in the region. Respondent imposed the same 15-percent limit and required deduction of other ADC materials as it applied in this case. (Appellant Exhibits 105, 106 and 107). In two letters Respondent said:

> Metro will consider the Landfill's 15-percent limit to be controlling. For example, if the Landfill has reported other material as accepted and used as ADC during the same period, the Landfill may choose to apply these tons to its 15 percent limitation, which may reduce the amount of the refund available to Greenway. The Landfill's records will be the exclusive source by which Metro will determine any eligible refund.

(p. 2 of Appellant Exhibit 105 and p. 2 of Appellant Exhibit 106). In the third letter, Respondent said, "In addition, the amount of potential refund will be limited to a maximum of 15 percent of the total waste tonnage disposed at the landfill during the trial <u>less all other ADC materials received and used</u> at the landfill during the same period." (Underline in original. Appellant Exhibit 107).

IV. CONCLUSIONS OF LAW

1. Appellant failed to meet its burden of proof that it is entitled to a full refund of all taxes and fees paid for ASR received and used as ADC at Finley Buttes Landfill during the one-year DEQ approved trial period.

2. Section 8.c(4) of the DFA prohibits Appellant from allowing a useful material exemption from payment of fees and taxes until the DEQ has approved use of the material as ADC. Trial period approval is not sufficient to comply with Section 8.c(4) of the DFA. Therefore Respondent is not required to waive or refund taxes and fees paid during the DEQ trial period.

3. However Respondent agreed to a limited waiver of Section 8.c(4) of the DFA in this case. Respondent agreed to refund fees and taxes for ASR used as ADC during the trial period, up to a maximum 15-percent of the total tons of solid waste received at Finley Buttes landfill, minus the all other material received and used as ADC during the trial period.

4. The $676,427.62 in taxes and fees refunded to Appellant is consistent with the limited waiver approved by Respondent.

V. OPINION

1. The Hearings Officer finds that Respondent was not required to refund fees and taxes paid for ASR received and used as ADC during the 12-month trial period required by DEQ at the Finley Buttes landfill. Section 8.a of the DFA prohibits Appellant from allowing a useful material exemption from payment of fees and taxes without Respondent's written approval of a Useful Material management plan. Section 8.c(4) of the DFA requires that Appellant demonstrate that DEQ has approved use of the material as ADC at the landfill. The Hearings Officer finds that the term "DEQ approval" in Section 8.c(4) of the DFA requires long term DEQ approval. Trial period approval is not sufficient to comply with Section 8.c(4) of the DFA. Therefore, absent modification of the DFA, Respondent is not required to waive or refund taxes and fees paid during the DEQ trial period. DEQ did not "approve" the use of ASR as ADC at Finley Buttes until June 23, 2010, after Appellant completed the 12-month trial period.

   a. Neither the DFA nor the Metro Code define the phrase "DEQ approval." However Respondent has consistently construed the phrase to only apply to long term DEQ approval of ADC material. Respondent has not allowed an exemption from fees and taxes for ADC material during a DEQ required trial period since at least 2005, when DEQ changed its procedures for the conduct of performance trials. It appears, based on Appellant's actions, that Appellant agreed with Respondent's interpretation of the phrase "DEQ approval," as Appellant continued to seek Respondent's approval of a waiver of taxes and fees during the trial period, rather than pursuing the argument set out in Metro Exhibit 3, that, "[A]DC is not to be treated differently on the basis of pre- or post-trial period status." (p. 1 of Metro Exhibit 3).

   b. DEQ regulations clearly distinguish between "trial period" and "long term" approval of the use of ADC materials at landfills. DEQ's "Guidelines for Alternative Daily Cover Material Application" (Metro Exhibit 24) states that, "All requests for ADCM approval will require a trial period of ADCM use…" In addition, DEQ continues to charge fees for ADC materials used during the trial period. DEQ only allows a fee exemption for ADC material after DEQ approves the particular material for long-term use as ADC. The purpose of the trial period is to evaluate the use of ASR as ADC. The Hearings Officer finds that DEQ approval required by Section 8.c(4) of the DFA requires long-term approval, after a trial period, consistent with DEQ requirements.

   c. In this case, DEQ did not "approve" the use of ASR as ADC at Finley Buttes until June 23, 2010, after Appellant completed the 12-month trial

period. DEQ expressly denied long-term use of ASR as ADC at Finley Buttes without a trial period. (p 2 of Metro Exhibit 2). In its May 20, 2009 letter DEQ stated that it, "[a]ccepts the application to conduct the trial use of SMRR waste at the Finley Buttes Landfill…"

d. Therefore, absent Respondent's approval of a modification of the DFA, Appellant could not comply with Section 8.c(4) of the DFA and Respondent was not required to refund or waive taxes and fees for ASM received and used as ADC at Finley Buttes Landfill during the trial period.

e. If the term "approved" in Section 8.c(4) of the DFA includes DEQ approval of a trial period, as Appellant alleges, then Respondent would be prohibited from collecting taxes and fees during any DEQ required trial period at any landfill. However, as noted above, Respondent has been collecting such taxes and fees since at least 2005.

2. As noted above, Section 8.a of the DFA prohibits Appellant from allowing a useful material exemption from payment of fees and taxes without Respondent's written approval of a Useful Material management plan. Appellant began receiving ASR and using it as ADC at the Finley Buttes Landfill on a trial basis beginning on June 16, 2009. However Appellant did not submit a complete useful material management plan, as required by Section 8.c of the DFA, until August 13, 2009.

a. Although Appellant's January 23, 2009 letter stated that it included a Useful Material management plan and Appellant's plan is dated December 10, 2008, Respondent did not find a copy of the Useful Material management plan in its records. There is no substantial evidence in the record that Appellant actually included a copy of the plan in its January 23, 2009 submittal to Respondent.

i. Even if Appellant had submitted a Useful Material management plan in January 2009, Respondent could not approve it, because it did not include an estimate of the tons of ASR Appellant expected to receive as required by Section 8.c(6) of the DFA.

b. Appellant submitted a Useful Material management plan that included the information required by Section 8.c(1) through (5) of the DFA on July 23, 2009. (Metro Exhibit 7). However the submittal did not include "An estimate of the proposed tons of Useful Material the Landfill expects to accept" as required by Section 8.c(6) of the DFA.

c. On August 13, 2009, Appellant provided the estimate required by Section 8.c(6) of the DFA, notifying Respondent that it expected to receive approximately 300 tons of ASR per week at the Finley Buttes Landfill during the 12-month trial period.

3. Based on its review of Appellant's Useful Material management plan, Respondent agreed to a limited waiver of compliance with Section 8 of the DFA during the DEQ trial period at Finley Buttes landfill. Respondent agreed to refund Schnitzer up to a maximum $420,000 in fees and taxes at the end of the trial period, if DEQ approved the long-term use of ASR as ADC. The $420,000 refund cap was based on Appellant's estimate that it would receive approximately 300 tons of ASR per week at the Finley Buttes landfill. Although Respondent knew that Appellant desired a full refund of all taxes and fees paid on ASR received and used as ADC at Finley Buttes Landfill during the trial period, Respondent never agreed to provide a full refund.

4. Appellant subsequently increased its estimate of the amount of ASR it expected to receive at Finley Buttes landfill, stating that the 300 tons per week stated in its August 13, 2009 letter is a minimum and Finley Buttes intends to receive as much ASR as Schnitzer can deliver during the trial period. Appellant's September 23, 2009 letter was the first time Appellant conveyed an intent to receive large amounts of ASR during the trial period at Finley Buttes, which would result in a large refund at the end of the trial period. All of Appellant's prior correspondence referred to the limited supply of ASR, with the majority going to Wasco County landfill. Appellant had to "divert" ASR loads from Wasco County to Finley Buttes in order to ensure sufficient supply of ASR to conduct the DEQ trial.

5. Respondent had no reason to believe that Appellant's initial estimate of 300 tons of ASR was inaccurate, or was only intended as a minimum amount.

    a. Appellant's August 13, 2009 letter was submitted in response to Respondent's August 12, 2009 request for "[a]n estimate of the proposed tons of Useful Material that the Landfill expects to accept." (Metro Exhibit 8). Appellant's letter states that, "During the 12-month trial, Schnitzer Steel Industries plans to ship approximately 300 tons per week to Finley Buttes." (Metro Exhibit 9). Appellant's letter did not indicate that this was a "minimum" amount of ASR.

    b. Prior to and during the initial portion of the trial period, Schnitzer's ASR production was significantly lower than in prior years and was not expected to increase until 2010 or later. Although Appellant's Wasco County landfill was receiving an average of 4,100 tons of ASR per month, there was "[n]o excess amount of ASR available to begin [the DEQ trial period at Finley Buttes landfill]." (p. 18 of Metro Exhibit 21). Appellant was diverting loads of ASR from its Wasco County landfill to Finley Buttes Landfill in order to ensure that a sufficient supply of ASR was available to conduct the DEQ trial at Finley Buttes landfill. "Without diverting [ASR] from Wasco County to Finley Buttes, the DEQ ADC test would have experienced little or no [ASR] for utilization." (Metro Exhibit 11).

c. Appellant reported to Respondent that it received 1,475.34 tons of ASR at Finley Buttes Landfill during the two week period between June 16 and June 30, 2009. Although this is more than the Appellant's estimate of 300 tons per week, it is not sufficient to cause Respondent to question Appellant's estimate. Appellant was only reporting on ASR received during the initial two-week period of the DEQ trial. Appellant's estimate was submitted in mid-August, after more than two months of experience with receiving ASR at Finley Buttes.

6. In response to Appellant's notice that it intended to receive potentially unlimited amounts of ASR during the trial period, Respondent agreed to modify its limited waiver of compliance with Section 8 of the DFA during the DEQ trial period. However Respondent was unwilling to allow an unlimited refund in this case, because this was an unusual case, the first time Respondent allowed a refund of fees and taxes during a DEQ trial. Respondent wanted to maintain some control over the amount of the refund in order to ensure fairness and equity for ratepayers.[9] Therefore Respondent imposed a cap on the amount of the refund it would allow during the trial period. Respondent agreed to refund taxes and fees paid on ASR received at Finley Buttes up to a maximum 15-percent of the total solid waste tonnage disposed at the landfill during the trial period, minus all other ADC material received and used at the landfill during the trial period.

a. Respondent chose the 15-percent limit as a convenient and readily identifiable standard by which to limit the amount of the refund that would be allowed for this unique variance from Respondent's standard practice of collecting taxes and fees during DEQ trials. The 15-percent limit was a standard the parties were familiar with. Although not codified in DEQ's regulations, it is DEQ's general practice to limit ADC to 15-percent of the total amount of solid waste disposed of at a landfill. The fact that DEQ does not rely on the 15-percent standard as an absolute limit is irrelevant. Respondent could have chosen some other method for imposing a cap on the maximum amount of refund it would allow during the trial period. Respondent relied on the 15-percent standard because it was familiar to the parties.

b. Whether Respondent approved different limits for other waste generators in Appellant Exhibits 105 and 106 is irrelevant. In this case Respondent limited its waiver to 15-percent of the total amount of solid waste disposed of at the landfill, minus all other materials received and used as ADC at

[9] In her pre-hearing brief, Ms. Bellia argued that the 15% refund cap was for "budgeting purposes." However this statement by Respondent's attorney is not evidence or testimony of a party. Ms. Bellia is Respondent's attorney. There is no evidence that Ms. Bellia has any superior knowledge about the basis for Respondent's actions. Ms. Norton clearly testified that the purpose of the cap was "to maintain some control over the amount of the refund and to ensure fairness and equity for ratepayers." Ms. Bellia's statement in her brief is an error.

the landfill during the trial period. Respondent applied an identical refund cap in at least one other DEQ ADC trial, Appellant Exhibit 107.

7. Appellant may have disagreed with the limited waiver allowed by Respondent, but Appellant clearly understood it.

8. Respondent did not modify the waiver after October 23, 2009. All subsequent correspondence from Respondent merely reiterates and provides examples of the 15-percent cap on the amount of refund that Respondent agreed to allow as a modification of the DFA in this case.

9. Appellant could have modified its practices to comply with the limited refund approved by Respondent, thereby ensuring the receipt of a full refund of all taxes and fees paid during the trial period. Appellant could have limited the amount of ASR shipped to Finley Buttes Landfill to comply with the cap imposed by Respondent, shipping the remainder to its Wasco County landfill. DEQ had already approved the long term use of ASR as ADC at the Wasco County landfill. Therefore all ASR received and used as ADC at Wasco County would have been exempt from fees and taxes. Appellant exceeded the 15-percent cap during the initial portion of the trial period. However Respondent agreed to apply the 15-percent cap over the entire 12-month trial period. Therefore Appellant could have ensured a full refund by reducing the amounts of ASR shipped to Finley Buttes during the remainder of the trial period, ensuring that the total amount of ASR received at Finley Buttes was less than 15-percent of the total amount of solid waste and other ADC received during the entire 12-month trial. Instead, Appellant chose to continue shipping large volumes of ASR to Finley Buttes throughout the entire trial period.

10. During the 12-month trial period Appellant received 30,164.62 tons of ASR, 53,908.27 tons of other ADC and 525,741.22 tons of solid waste at Finley Buttes Landfill during the 12-month trial period. Appellant utilized 100-percent of the ASR and other ADC material as ADC. Appellant requested a refund of $819,022.73 for 100-percent of the ASR material received and used as ADC during the trial period.

11. Respondent refunded $676.427.62 to Appellant for taxes and fees paid for ASR received and used as ADC during the trial period. Respondent calculated the refund based on the formula set out in Respondent's October 23, 2009 letter:

    a. 15-percent of 525,741.22 tons of waste received during the trial period = 78,861.18 tons.

    b. 78,861.18 tons – 53,908.27 tons of other ADC used during the trial = 24,952.91 tons. Therefore 24,952.91 tons of the 30,164.72 tons of ASR received and used during the trial period is eligible for refund.

c. 24,952.91 x the tax and fee rates in effect during relevant portions of the trial period[10] = $676,427.62.

12. The Hearings Officer finds that the refund amount is reasonable and consistent with Respondent's conditional waiver of the requirements of Section 8 of the DFA during the DEQ trial period.

13. The Hearings Officer finds that the only relationship between Appellant and Respondent is contractual, as set out in the DFA. Appellant's Finley Buttes Landfill is located outside of the Metro region. Therefore it is exempt from compliance with the Metro Code. With one exception that is not relevant to this case,[11] the Finley Buttes Landfill may only accept solid waste generated within Metro in accordance with the DFA. (MC § 5.05.030(8)(A)). Therefore this dispute is bounded by the terms of the DFA. The Metro Code is inapplicable.

14. The DFA does not incorporate by reference the Metro Code. To the contrary, Section 8 of the DFA creates an express exception to the Useful Material exemption otherwise allowed by MC § 5.01.150(b)(3) and § 7.01.050(a)(10).[12] Section 8 of the DFA prohibits Appellant from allowing customers to claim a Useful Material exemption until Appellant receives written approval from

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[10] Between June 16, 2009 and August 5, 2009, Respondent's Fee rate was $16.04 per ton and Respondent's tax rate for $8.97 per ton. Between August 6, 2009 and the end of the trial, Respondent's Fee rate was $17.53 per ton and Respondent's tax rate for $9.83 per ton.

[11] MC 5.05.030(8)(B) provides that the Finley Buttes Landfill may accept solid waste generated within Metro "subject to a non-system license issued to a person transporting to the facility solid waste not specified in the [DFA] agreement."

[12] MC § 5.01.150(b) provides, in relevant part:

> (b) User fees shall not apply to:
> …
> (3) Useful Material that is accepted at a Disposal Site that is listed as a Metro Designated Facility in Chapter 5.05 or accepted at a Disposal Site under authority of a Metro Non-System License issued pursuant to Chapter 5.05, provided that the Useful Material: (A) is intended to be used, and is in fact used, productively in the operation of the Disposal Site such as for roadbeds or alternative daily cover; and (B) is accepted at the Disposal Site at no charge.

MC § 7.01.050(a) provides, in relevant part:

> The following persons, users and operators are exempt from the requirements of this chapter:
> …
> (10) Persons who deliver useful material to disposal sites, provided that such sites are listed as a Metro Designated Facility under Metro Code Chapter 5.05 or are named in a Metro Non-System License and provided further that the Useful Material: (A) is intended to be used, and is in fact used, productively in the operation of such site for purposes including roadbeds and alternative daily cover; and (B) is accepted at such site at no charge.

Respondent allowing the exemption.[13] In order to obtain the required approval, Appellant must submit a Useful Material management plan that includes certain information, including, "If the Landfill intends to use the Useful Material as Alternative Daily Cover, documentation demonstrating that DEQ has approved use of the material as Alternative Daily Cover at the Landfill." Section 8.c(4) of the DFA.

15. The DFA is consistent with the authority granted to Respondent by ORS 268.507, which authorizes Respondent to, "[b]y ordinance impose excise taxes on any person using the facilities, equipment, systems, functions, services or improvements owned, operated, franchised or provided by the district." Respondent adopted an ordinance, the Metro Code, that establishes excise taxes, and exemptions there from. MC § 7.01.020 establishes excise taxes on the use of Metro facilities, equipment and services. MC § 7.01.050(a)(10) provides an exemption from excise taxes for Useful Material that is delivered to a site, "[l]isted as a Metro Designated Facility under Metro Code Chapter 5.05…" and used as alternative daily cover."

16. The same ordinance, the Metro Code, authorizes disposal of waste generated in the Metro area at Appellant's Finley Buttes landfill. However MC § 5.05.030(a)(8)(A) provides that Finley Buttes Landfill may only accept solid waste generated within Metro, "as specified in an agreement entered into between Metro and Finley Buttes Landfill Company authorizing receipt of such waste." The DFA is the "agreement" referred to in MC § 5.05.030(a)(8)(A). The DFA, which is required by the Metro Code, creates an exception to the excise tax exemption established by MC § 7.01.050(a)(10). The excise tax exemption in the DFA is consistent with ORS 268.507, because the Metro Code expressly requires the DFA before Finley Buttes Landfill may accept any solid waste generated within the Metro region.

17. ORS 268.507 only regulates Respondent's authority to impose excise taxes. It does not regulate the user fees authorized by MC § 5.01.150. ORS 268.317(5) appears to allow Respondent to impose user fees without limitation.[14]

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[13] Section 8.a of the DFA provides:

> Except as provided below in Section 8b, the Landfill shall not allow a customer to claim a Useful Material exemption from the Regional System Fee under Metro Code Section 5.01.150(b)(3) and from Excise Tax under Metro Code Section 7.01.050(a)(10) until the landfill submits a written request for the exemption, including a Useful Material management plan, to Metro for review and written approval. The Landfill must receive Metro approval before allowing an exemption under Section 8 of this Agreement.

[14] ORS 268.317(5) authorizes Metro to:

> Regulate, license, franchise and certify disposal, transfer and resource recovery sites or facilities; establish, maintain and amend rates charged by disposal, transfer and resource recovery sites or facilities; establish and collect license or franchise fees; and otherwise control and regulate the

18. Appellant had no right to rely on Respondent's April 3, 2009 letter to Schnitzer (Metro Exhibit 5). Appellant requested that Respondent allow a Useful Material exemption from fees and excise taxes for Schnitzer ASR used as ADC during the trial period. (Metro Exhibit 3). Schnitzer, in a separate letter, also requested a Useful Material exemption. (Metro Exhibit 4). Respondent replied to Schnitzer's exemption request on April 3, 2009. (Metro Exhibit 5). Respondent noted that it has not allowed an exemption from fees and taxes during a DEQ approved trial period since at least 2005. However Respondent agreed to, "[c]onsider a different approach in this specific instance." Respondent agreed that if DEQ approved the long term use of ASR as ADC, Respondent would refund fees and taxes paid during the trial period, subject to certain conditions, including a condition that, "the landfill must submit to Metro a written request for an exemption and a useful material management plan in accordance with the terms provided in its designated facility agreement." (p. 2 of Metro Exhibit 5). Respondent expressly noted that ASR received at the Columbia Ridge, Wasco County and Weyerhaeuser Regional landfills is already exempt from Metro taxes and fees. "All of the other designated landfills must first obtain Metro's approval prior to allowing such an exemption for [Schnitzer's] ASR." (p. 1 of Metro Exhibit 5).

19. Metro Exhibit 5 is not a contract or agreement between Appellant and Respondent and it was not intended to, and did not, modify the DFA, the existing agreement between Respondent and Appellant.

    a. Metro Exhibit 5 was addressed to Schnitzer Steel, not to Appellant. Appellant was sent a courtesy copy, as were 13 other persons, including Appellant's direct competitors: Allied Waste, operator of the Coffin Butte landfill, and Waste Management, operator of the Columbia Ridge landfill, both of which were mentioned in the letter to Schnitzer.

    b. The letter is not specific to Appellant's Finley Buttes landfill. The letter addresses Schnitzer's request to use ASR as ADC at two different, competing, landfills: the Finley Buttes Landfill owned by Appellant and the Coffin Butte landfill operated by Appellant's competitor, Allied Waste.

    c. The letter requires further action by the operators of the Finley Buttes and Coffin Butte landfills and approval by Respondent before Respondent will allow a refund of fees and taxes paid during the trial period. The letter states that, "[l]and fills that have designated facility agreements with

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establishment and operation of all public or private disposal, transfer and resource recovery sites or facilities located within the district. Licenses or franchises granted by the district may be exclusive. Existing landfills authorized to accept food wastes which, on March 1, 1979, are either franchised by a county or owned by a city are exempt from the district's franchising and rate regulation.

Metro are required to submit a useful material management plan to Metro for its approval prior to allowing an exemption from Fees and Taxes." (p 1 of Metro Exhibit 5). As mentioned in the letter, ASR shipped to the Columbia Ridge, Wasco County and Weyerhaeuser landfills was already exempt from Metro fees and taxes.

d. The letter makes no mention of, let alone modifies, the DFA between Respondent and Appellant.

20. Respondent could have been clearer in its correspondence. Respondent's letter to Schnitzer appears to imply that Respondent will allow a full refund of all taxes and fees paid during the DEQ trial subject to the specific conditions set out in the letter. The letter makes no mention of a cap or other limit on the amount of refund that Respondent will allow. But Appellant had no right to rely on that letter, since it was not addressed to Appellant, it addresses the use of ASR as ADC at two different landfills, and it conflicts with express terms of the DFA. Schnitzer did not assign its refund rights to Appellant until June 24, 2009, two months after Respondent issued its letter to Schnitzer. Appellant did not comply with the conditions in the Schnitzer letter until August 13, 2009, when Appellant submitted its useful material management plan and tonnage estimate.

VI. FINAL ORDER

1. Appellant failed to bear the burden of proving that Respondent violated the DFA or that Appellant is otherwise entitled to a full refund of all taxes and fees paid for ASR received at Finley Buttes Landfill during the DEQ trial period.

2. Respondent's refund of $676.427.62 to Appellant for taxes and fees paid for ASR received and used as ADC during the trial period is affirmed.

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

METRO REGIONAL GOVERNMENT

Dated: June 22, 2011

Daniel B. Cooper
Acting Chief Operating Officer

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CERTIFICATE OF SERVICE

1 I hereby certify that I served the foregoing **FINAL ORDER,** to the following:

2

3 M. Joseph Turner
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14 by mailing via first class mail and by email to those persons a true and correct copy thereof, certified by me as
15 such, placed in a sealed envelope addressed to them at the addresses set forth, and deposited in the United States
16 Post Office at Portland, Oregon, on June 22, 2011, with the postage prepaid.

17

18 Lisa M. Hefty [signature]

19 Lisa M. Hefty
Legal Secretary

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23

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25

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METRO
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