BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF APPROVING A) RESOLUTION NO. 04	-J T UI
SETTLEMENT OF CONTESTED CASE NO. M0394,	
AND AUTHORIZING THE CHIEF OPERATING) Introduced by Michael	Jordan,
OFFICER TO ENTER INTO A SETTLEMENT) Chief Operating Office	r, with the
AGREEMENT WITH AMERICAN COMPOST AND) concurrence of David E	Bragdon,
RECYCLING, LLC.) Council President	

WHEREAS, on April 5, 2001, Metro Council adopted Resolution No. 01-3042, For the purpose of authorizing the Executive Officer to grant a Metro Solid Waste Facility License to American Compost and Recycling, LLC; and,

WHEREAS, Section 3.0 of its Solid Waste Facility License stipulates that American Compost and Recycling, LLC ("ACR") is authorized to accept only yard debris and clean wood waste and that "No other wastes shall be accepted at the Facility unless specifically authorized in writing by Metro"; and,

WHEREAS, Metro has not granted ACR authority to accept organic waste other than yard debris; and,

WHEREAS, between the 14th and the 23rd of April 2003, ACR received a total of 3,444 tons (126 truck loads) of putrescible waste consisting of spoiled lentils; and,

WHEREAS, ACR's receipt of putrescible waste violated its Solid Waste Facility License and the Metro Code; and,

WHEREAS, on April 29, 2003, Metro issued ACR a Finding of Violation and Notice to Impose a Monetary Penalty (NON-119-03). The Finding of Violation outlined ACR's violations of its solid waste facility license and the Metro Code through its acceptance of 126 separate loads of prohibited putrescible waste, totaling 3,444.23 tons and that a citation would be forthcoming; and,

WHEREAS, on May 16, 2003, Metro issued ACR a Notice of Imposition of Penalty (Citation M0394) imposing a penalty of \$28,000; and,

WHEREAS, on May 29, 2003, ACR requested a contested case hearing to dispute the penalty, whereby a contested case hearing (Citation M0394) was scheduled for October 1 2003; and,

WHEREAS, ACR cooperated with Metro in developing a plan to remove the lentil contaminated compost and abate the associated odors, and by September 5, 2003, ACR had removed approximately 6,500 cubic yards (154 loads) of lentil contaminated compost from its site at its own expense; and,

WHEREAS, Metro Code Section 2.03.090 provides that the Director is authorized to seek to compromise or settle any unpaid civil penalty which he deems appropriate, and any compromise or settlement by the Director shall not be final until approved by the Council; and,

WHEREAS, ACR has reviewed and approved the proposed Settlement Agreement attached as Exhibit A to this resolution, which provides for ACR to make a \$16,000 civil penalty payment to Metro in return for Metro agreeing not to further pursue Citation M0394; and,

WHEREAS, based on ACR's level of cooperation with Metro to remedy its violations, the Chief Operating Officer believes that the proposed settlement is a fair and equitable resolution of this matter: and,

WHEREAS, the Chief Operating Officer has reviewed the proposed settlement and recommends its approval by the Council; and,

WHEREAS, if the Council approves of the proposed settlement agreement, the Chief Operating Officer will coordinate with the Council to recommend a plan that describes how Metro will direct a portion of the funds received pursuant to the settlement to the local businesses, residences or schools in the area that was most affected by the malodors from decomposing lentils at ACR; now therefore,

BE IT RESOLVED that the Metro Council approves the settlement of contested case Citation M0394, and authorizes the Chief Operating Officer to enter into a Settlement Agreement substantially similar to the one attached as Exhibit A.

ADOPTED by the Metro Council this 15th day of

id Bragdon, Council President

Approved as to Form:

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SETTLEMENT AGREEMENT

Metro, a metropolitan service district organized under the Oregon Constitution, Oregon Revised Statutes Chapter 268, and the 1992 Metro Charter, ("Metro") and American Compost and Recycling LLC, ("ACR") enter this Settlement Agreement ("Agreement") effective the date that this Agreement is fully executed (the "Effective Date"). Metro and ACR shall collectively be referred to herein as the "Parties" and each individually as a "Party."

RECITALS

- A. On May 16, 2003, Metro issued Citation No. M0394 (attached as Attachment 1) to American Compost and Recycling LLC, ("ACR") and made Findings of Fact (attached as Attachment 2) that ACR had violated the terms of its solid waste facility license and the Metro Code by accepting food waste at its facility. Specifically, Metro's Findings of Fact stated that ACR had accepted 3,444.23 tons of food waste consisting of spoiled lentils. Metro imposed a \$28,000 civil penalty against ACR for its violations.
- B. On May 16, 2003, Metro issued a Contested Case Notice to ACR regarding Citation No. M0394. ACR requested a Contested Case Hearing in a letter dated May 29, 2003.
- C. The Parties enter into this Settlement Agreement to fully settle and compromise this dispute.

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

- 1. Release of Further Enforcement Action. Except as otherwise permitted by the terms of this Agreement, as of the Effective Date of this Agreement, Metro hereby releases, acquits, and forever discharges its authority to pursue further enforcement action against ACR for the violation alleged in Citation M0394 and the Findings of Fact that accompanied Citation M0394 (the "Findings"). The Parties do not intend that the release, acquittal, and discharge provided for in this paragraph shall release, acquit, or discharge any other claim, right, or cause of action or any claim, right, or cause of action for violation of the terms of this Agreement.
- 2. <u>Statement of Non-Contesting Citation M0394</u>. ACR enters this Agreement for the purpose of resolving Citation M0394, and hereby withdraws its request for a contested case hearing and agrees not to contest the allegations made in Citation M0394 or the Findings. ACR agrees that Metro may consider and use this statement of non-contesting Citation M0394 by

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ACR as the equivalent of a violation of the Metro Code in any formal or informal evaluation or proceeding conducted by Metro.

- 3. Payment to Metro. In return for the releases described herein and for other valuable consideration that the Parties hereby acknowledge, ACR shall pay to Metro the sum of \$16,000. Such payment shall constitute a debt owed to Metro and shall be made in full within 30 days of the Effective Date of this Agreement. In the event that such payment is not made within 30 days, Metro may initiate suit for the collection of this debt and shall be entitled to simple interest at the rate of nine percent (9%) per year calculated from the Effective Date until the debt is paid in full. In addition, if Metro must initiate suit for the collection of this debt, the prevailing party in such suit shall be entitled to reasonable attorneys fees incurred in such an action, through and including attorneys fees incurred on appeal.
- 4. <u>Acknowledgement By Metro</u>. Metro agrees that, if Metro directs any portion of the payment Metro receives under Paragraph 3 of this Agreement to any person or entity that was adversely affected by the violations described in Citation M0394, Metro will inform the recipient(s) that Metro received such funds from ACR pursuant to this Agreement.
- 5. <u>Modification and Waiver</u>. This Agreement shall not be modified unless such modification is in writing and signed by all of the Parties. No provision of this Agreement shall be considered waived by any Party unless such a waiver is made in writing signed by the Party making the waiver. Waiver of any provision(s) of this Agreement shall not affect the enforceability of any other provision(s) of this Agreement.
- 6. <u>Agreement Not Assignable or Transferable</u>. This Agreement may not be transferred or assigned without the prior written approval of Metro and ACR.
- 7. <u>Choice of Law</u>. This Agreement shall be construed, applied, and enforced in accordance with the laws of the State of Oregon.
- 8. <u>Severability</u>. If any non-material provision of this Agreement is held to be invalid, illegal, or unenforceable in any respect, the validity of the remaining provisions contained in this Agreement shall not be affected.
- 9. Entire Agreement. This Agreement is the entire agreement between the Parties.
- 10. <u>Voluntary Agreement</u>. Each Party hereby declares and represents that it fully understands the terms of this Agreement, that is has had ample opportunity to review this Agreement and solicit and receive the advice of its own counsel, and that it voluntarily enters into this Agreement.

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- 11. <u>Authority to Enter Into This Agreement and Signatory Authority</u>. Each Party hereby declares and represents that it has the legal power, right, and authority to enter into this Agreement. The individuals signing below warrant that they have full authority to execute this Agreement on behalf of the Party for which they sign.
- 12. <u>Execution in Counterparts</u>. This Agreement may be executed in counterparts, each of which constitutes an original and all of which together are deemed a single document.

AMERICAN COMPOST AND RECYCLING LLC	METRO
Ву:	By:
Print name and title	Print name and title
Date:	Date:
	APPROVED AS TO FORM:
	Daniel B. Cooper, Metro Attorney
	Date:

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Metro Solid Waste Regulatory Affairs

CITATION

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MSD file number: YI	D-037-01		_		
On or about	April 14 through Ap	ril 23	, 2003		
Name: America	an Compost & Recycling, LLC				
Address: 97					
City, State, Zip:	Portland, Or 97062				
Telephone number:	(503) 280-0886				
Did violate: Se	ction 3.0 of license No. YD-037-0	1			
Description of violations (see attached Findings of Fact) 126 individual violations (126 truckloads of prohibited waste accepted totaling of 3,444 tons)					
of prohibited pu	utrescible food waste (See attach	ed Findir	ng of Facts)		
Citation issued by:	Michael Jordan	Date:	May16, 2003		
I certify under penalty of ORS 153.990, that I have reasonable grounds to believe, and do believe that the person cited committed an infraction enforceable under Metro Code, Chapter 5.01 Signed:					
If you do not wish to request a contested case hearing (see enclosed Contested Case Notice), submit penalty amount on or before					
to Metro , Accounting Services Division, 600 NE Grand Ave., Portland, OR 97232. Make check payable to Metro .					
Penalty: \$ 28,0	000.00 Method of service RECIEPT	e: US M	IAIL, RETURN		

The Complaint will be filed with the Metro Hearings Officer.

Working together for a clean environment



Attachment 2 to Metro Contact No.

FINDINGS OF FACT

(Attachment to Metro Citation M0394) May 16, 2003

- 1. On April 13, 2001, Metro issued a Solid Waste Facility License to American Compost & Recycling, LLC (YD-037-01).
- 2. Section 3.0 of solid waste facility license stipulated that ACR is to accept only yard debris and clean wood waste and that "No other wastes shall be accepted at the Facility unless specifically authorized in writing by Metro."
- 3. Metro has not granted ACR authority to accept food wastes.
- 4. The City of Portland has not granted land use authority for ACR to accept food wastes.
- 5. An investigation of American Compost & Recycling, LLC ("ACR") was conducted through site visits and by conducting interviews of the operators of ACR
- 6. Between the 14th and the 23rd of April ACR received a total of 3,444.23 tons (126 truckloads) of food waste consisting of spoiled lentils.
- 7. ACR's receipt of food waste violated its Solid Waste Facility License and the Metro Code.
- 8. Metro received several complaints of malodors emanating from ACR in the days immediately following ACR's receipt of the lentils.
- 9. The City of Portland discovered stormwater pollution resulting from the presence of such a large amount of food waste on the site.
- 10. Because of the nature of the violation, ACR is unable to cure the violation.
- 11. ACR benefitted financially from receiving and processing the lentils.

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 04-3401 FOR THE PURPOSE OF APPROVING A SETTLEMENT OF CONTESTED CASE NO. M0394, AND AUTHORIZING THE CHIEF OPERATING OFFICER TO ENTER INTO A SETTLEMENT AGREEMENT WITH AMERICAN COMPOST AND RECYCLING, LLC

Date: December 1, 2003 Prepared by Bill Metzler

BACKGROUND

A. Introduction

This staff report is in support of a proposed settlement of Contested Case No. M0394 negotiated with American Compost and Recycling, LLC ("ACR"). ACR is a Metro licensed yard debris composting facility, located at 9707 N. Columbia Blvd., in Portland (Metro Council District 5). The contested case was requested by ACR in response to a civil penalty assessed against ACR for violating the terms of its solid waste facility license and the Metro Code. The following is a summary of the key facts regarding the proposed settlement:

- Metro has not granted ACR authority to accept organic wastes other than yard debris. On May 16, 2003, Metro issued a Citation No. M0394 to ACR for violating the terms of its solid waste facility license and the Metro Code by accepting 3,444.23 tons (126 loads) of putrescible waste consisting of spoiled lentils. Metro imposed a \$28,000 civil penalty against ACR for its violation.
- □ On May 29, 2003, ACR requested a contested case hearing to dispute the penalty, whereby a contested case hearing was scheduled (Case No. M0394).
- □ By September 5, 2003, working cooperatively with Metro, ACR had completed the removal of virtually all lentil-containing compost from its facility at its own expense (154 loads totaling 6,500 cubic yards). ACR used odor neutralizers during all phases of the lentil removal process, which helped to significantly suppress odors.
- On September 29, 2003, the contested case hearing was indefinitely postponed based on progress made with settlement discussions between ACR and the COO.
- □ ACR has approved the proposed Settlement Agreement, which provides for ACR to make a \$16,000 civil penalty payment to Metro in return for Metro agreeing not to further pursue Citation M0394.
- □ Based on ACR's cooperation with Metro to remedy its violations, the COO believes that the proposed settlement is a fair and equitable resolution of this matter.

B. Timeline and Factual Summary

On April 5, 2001, Metro Council adopted Resolution No. 01-3042 for the purpose of authorizing the Executive Officer to grant a Metro Solid Waste Facility License to American Compost and Recycling, LLC. On April 13, 2001, Metro issued the solid waste facility license to American Compost &

Recycling, LLC (facility license number YD-037-01). Casey Stroupe and Rick Franklin operate ACR. Prior to April 2001, the facility was franchised by Metro under its previous operator, Don Chappell.

ACR is authorized to operate a yard debris composting facility and to also produce hogged fuel from clean waste wood. The license authorizes ACR to accept only source-separated yard debris, leaves from municipal collection programs, landscape waste, and clean wood wastes. The license stipulates that no other wastes may be accepted unless specifically authorized in writing by Metro (License Section 3.4).

On April 24, 2003, Metro's Solid Waste Facility Inspector conducted a site visit at ACR's yard debris composting facility located at 9707 N. Columbia Blvd., Portland, Oregon. The visit was prompted by information provided by the City of Portland that ACR appeared to be accepting large volumes of unauthorized putrescible waste, causing odors and possible contamination of stormwater. During the course of his visit, the Inspector observed large piles of decaying malodorous lentils being incorporated into the yard debris as it was ground in preparation for the formation of windrow piles for composting.

Metro's inspector interviewed Mr. Rick Franklin, a representative of ACR, who confirmed that the lentils on site were from an accident that occurred on March 28, 2002, when a barge on the Columbia River tipped over, spilling 100 shipping containers filled with lentils into the river. According to Mr. Franklin, the lentils within the containers needed to be disposed and were accepted by ACR for composting. According to Mr. Franklin, the facility received approximately 16 truckloads of lentils per day from the 14th through the 23rd of April and no more lentils remained to be delivered. Metro's inspector documented his observations in a written report and a series of 14 photographs. Later in the day on April 24, 2003, ACR faxed Metro information documenting that ACR received loads of lentils on April 14, 15, 16, 17, 18, 21, 22, and 23. The lentils that ACR received weighed a total of 3,444.23 tons.

On the afternoon of April 24, 2003, Roy Brower, Regulatory Affairs Manager, and Steve Kraten, Principal Solid Waste Planner, conducted a conference call with Mr. Franklin and Mr. Casey Stroupe, President of ACR. Mr. Franklin reconfirmed the information he had given to the Inspector.

C. Applicable License and Code Provisions and Finding of Violation

Section 5.01.030 of the Metro Code prohibits any licensee from receiving or processing any solid waste not authorized by its license. Section 3.0 of ACR's license stipulates that ACR is authorized to accept only yard debris and clean wood waste and that "No other wastes shall be accepted at the Facility unless specifically authorized in writing by Metro." Though the licensee has expressed an interest in accepting organic waste other than yard debris, to date, ACR has neither secured local land use approval nor submitted a complete application to Metro and no such authorization has been granted. The lentils accepted by ACR constitute a putrescible waste that ACR is prohibited by its license from accepting. Thus, ACR had violated its license and the Metro Code.

Metro Code Section 5.01.200 stipulates that each violation of the chapter shall be punishable by a fine of not more than \$500. The prohibited waste had been already accepted and, in large part, incorporated into ACR's compost feedstock.

On April 29, 2003, Metro issued ACR a Finding of Violation and Notice to Impose a Monetary Penalty (NON-118-03). The Finding of Violation outlined ACR's violations of its solid waste facility license and the Metro Code through its acceptance of 126 separate loads of prohibited waste, totaling 3,444.23 tons and that a citation and monetary penalty would be forthcoming.

D. Imposition of a Monetary Penalty

On May 16, 2003, Metro issued Citation No. M0394 to ACR and made Findings of Fact that ACR had violated the terms of its solid waste facility license. Based on the investigation and careful consideration of both aggravating and mitigating circumstances, Metro imposed a \$28,000 civil penalty against ACR for its violation. This amount is equivalent to approximately one third of the additional gross revenues that the operator was estimated to realize as a direct consequence of the violations. On a weight basis, the penalty equates to \$8.13 per ton, or about \$221 per load. Because this violation was intentional and was projected to result in significant economic benefit to the operator, it was important to send a clear message to deter future violations by this operator and to let other compost processors know how seriously Metro considers this type of violation.

E. Metro Makes an Additional Finding of Violation Related to Malodors at ACR

Shortly after ACR accepted the unauthorized lentil waste, Metro, the DEQ and local governments began receiving numerous odor complaints from residents and businesses in the proximity of ACR. The odors originated at ACR and were due to the large quantity of decomposing lentils at ACR. Odors were also generated from pools of leachate emanating from the composting piles that contained the rotting lentils. Odors may also have been the result of decomposing yard debris, which ACR was not processing with sufficient frequency to prevent odors. At Metro's direction, as specified in a letter dated June 4, 2003, ACR covered some of the lentil piles with finished compost and left them undisturbed in order to reduce the release of malodors. However, ACR did not take measures sufficient to adequately mitigate the odor problem and as a result, on June 19, 2003, Metro issued ACR another separate Finding of Violation (NON-119-03) for an ongoing violation of Section 5.10 of ACR's license which stipulates that the facility shall be operated in a manner that is not conducive to odors.

ACR was afforded an opportunity to cure the ongoing odor violation without the imposition of a monetary penalty. However, ACR had still not taken measures sufficient to adequately mitigate the odor problems. Starting on July 30, 2003, through August 5, 2003, Metro received a series of twelve odor complaints from residents in the proximity of ACR. The complaints were based on reports of intense malodors originating at ACR, and lingering in the neighborhood. Residents reported that they were unable to open their windows or enjoy the outdoors during the evenings or weekend during these recent odor events.

F. Metro Makes a Finding of Continuing Violation for Failure to Cure Malodors at ACR

Based on the continuing odor problems at ACR, on August 12, 2003, Metro issued ACR a Finding of Continuing Violation, Failure to Cure and Notice of Imposition of Penalty and License Suspension (NON-123-03). The NON detailed ACR's continuing violations of its solid waste facility license and the Metro Code through its failure to operate the facility in a manner not conducive to the generation of offensive odors. The civil monetary penalty imposed was \$3,500 (\$500 per day from July 30, 2003, through August 5, 2003). In addition, Metro notified ACR that its authority to engage in all on-site composting activities would be suspended unless the violation was cured. The NON offered an opportunity for ACR to cure the violation whereupon Metro would rescind the imposition of the civil penalty and the partial suspension of ACR's license.

G. ACR Takes Significant Action to Cure the Odor Violations

In August and early September 2003, ACR worked cooperatively with Metro in developing a plan to remove the lentil contaminated compost from the site, and abate the associated odors. In addition, on August 21, 2003, representatives of ACR participated with Metro in a community meeting in the St. Johns neighborhood to discuss the lentil removal plan and answer questions.

By September 5, 2003, ACR, working cooperatively with Metro, had completed the removal of virtually all lentil-containing compost from its facility at its own expense (154 loads totaling 6,500 cubic yards). ACR purchased and used odor neutralizers during all phases of the lentil removal process, which helped to significantly suppress odors. ACR also provided an odor neutralizer to end-users who received some of the malodorous lentil containing compost. With those tasks completed, Metro deemed the odor violations (NON-123-03) cured and rescinded the imposition of the \$3,500 penalty and the partial suspension of ACR's license.

H. ACR Seeks Settlement of Citation No. M0394

On September 29, 2003, the contested case hearing (Citation M0394) was indefinitely postponed based on progress made with settlement discussions between ACR and the Director of Metro's Solid Waste and Recycling Department. Metro Code Section 2.03.090 provides that at any time subsequent to service of the written notice of assessment of civil penalty, the Director is authorized to seek to compromise or settle any unpaid civil penalty that he deems appropriate. Further, the Code provides that any compromise or settlement executed by the Director shall not be final until approved by the Council.

On October 8, 2003, ACR submitted a proposed settlement offer to Metro for consideration. The proposed settlement offer from ACR was in the amount of \$5,000 and was proposed to be given to a nearby elementary school (Sitton Elementary School) by ACR as compensation for malodors resulting from decomposing lentils that negatively impacted the area.

On October 17, 2003, Metro issued ACR a settlement counter offer in the amount of a \$16,000 civil penalty. The counter offer stipulated that ACR would pay the penalty directly to Metro, upon approval by the Council, and that Metro would determine whether, and where, to direct funds to those most affected from the malodors from ACR associated with the decomposing lentils.

On October 28, 2003, ACR notified Metro that it accepted the proposed counter offer of a \$16,000 civil penalty, conditioned upon the Council's approval. ACR has reviewed and approved the proposed Settlement Agreement (attached as Exhibit A to Resolution No. 04-3401). Based on ACR's level of cooperation with Metro to remedy its violations, the Chief Operating Officer believes that the proposed settlement is a fair and equitable resolution of this matter.

ANALYSIS/INFORMATION

1. Known Opposition

There is no known opposition currently on record, however, there could be opposition to a settlement from some of the residents that live in the area and were adversely impacted by the malodors resulting from decomposing lentils at the ACR facility.

2. Legal Antecedents

Metro Code Chapters 2.03, 2.05 and 5.01.

3. Anticipated Effects

If the Council approves the proposed settlement agreement, ACR will pay a civil penalty of \$16,000 to Metro in return for Metro agreeing not to pursue Citation M0394. In addition, the Chief Operating Officer will coordinate with the Council to recommend a plan that describes how Metro will direct a portion of the funds received pursuant to the settlement to benefit the local businesses, residences and schools in the area that was most affected by the malodors from decomposing lentils at ACR.

4. Budget Impacts

There will be a slight increase in revenue commensurate with the portion of the funds received pursuant to the settlement and retained by Metro.

RECOMMENDED ACTION

The Chief Operating Officer recommends approval of Resolution No. 04-3401.

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