

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AMENDING METRO)	ORDINANCE NO. 23-1501
CODE CHAPTER 5.09 (ILLEGAL DISPOSAL))	
TO ALIGN IT WITH THE NEW METRO CODE)	Introduced by Chief Operating Officer
CHAPTER 2.05 (CONTESTED CASES) AND)	Marissa Madrigal in concurrence with
INCORPORATE PLAIN LANGUAGE BEST)	Council President Lynn Peterson
PRACTICES)	

WHEREAS, Metro Code Chapter 5.09 (Illegal Disposal) governs illegal disposal prohibitions in the Metro Area, sometimes colloquially referred to as “illegal dumping”; and

WHEREAS, Chapter 5.09 includes sections regarding enforcement of illegal disposal prohibitions, issuance of civil penalties for illegal disposal, and hearings procedures for individuals and entities that wish to contest illegal disposal citations; and

WHEREAS, Metro has observed a significant increase in illegal disposal activities within the region. This has led to heightened environmental concerns, public safety issues, and increased workload for Metro staff; and

WHEREAS, the rise in illegal disposal incidents has resulted in an increasing number of citations issued by Metro, along with a subsequent increase in requests for hearings to contest these citations, which strains the resources and efficiency of the citation enforcement process; and

WHEREAS, the proliferation of illegal disposal practices underscores the need for a comprehensive update to Metro's regulatory illegal disposal code chapter and the process for parties to challenge Metro’s enforcement actions; and

WHEREAS, current Chapter 5.09 language has references to certain criminal state statutes regarding discovery and proceedings for illegal disposal hearings that are not applicable to a local government civil administrative hearing, and, at worst, practically impossible to implement; and

WHEREAS, although staff and hearings officers have worked diligently to apply current code procedures whenever possible, these procedures are confusing and proving unworkable and, with an increase in citations, will only cause further administrative difficulties if current code language is not updated; and

WHEREAS, staff anticipates that Metro Council will, in companion with this Ordinance, adopt ordinances that likewise update Metro’s Contested Case Procedures and Civil Penalties code chapters to address similar state-law modeled shortcomings; and

WHEREAS, the proposed updates to Chapter 5.09 Illegal Disposal will now align with the expected updates to the Contested Case Procedures and Civil Penalties chapters, which includes incorporating the hearings procedures and civil penalty issuance procedures in those newly updated code chapters; and

WHEREAS, in December 2022 Council adopted Resolution No. 22-5293, which, among other things, required that Metro code chapters use plain and inclusive language best practices to improve readability, transparency, and understanding of Metro’s requirements and procedures; and

WHEREAS, Resolution No. 22-5293 also recognized that Metro’s regulatory code chapters demand a more frequent housekeeping update schedule to keep abreast of changes in state and federal law and to more quickly address Metro Code sections that are unclear or confusing to regulated individuals and entities; and

WHEREAS, in addition to removing unworkable references to state law and procedures and better aligning with Metro's new Contested Case Procedures and Civil Penalties code chapters, the updated Chapter 5.09 also incorporates plain and inclusive language best practices as required; and

WHEREAS, section 5.09.040(g) from the current Chapter 5.09 (regarding material sorting) should be moved to Chapter 5.05 (Solid Waste Flow Control) in a new section 5.05.040(d); and

WHEREAS, Metro is dedicated to upholding its role as a responsible and accountable local government agency by updating its code for increased clarity and alignment; now therefore,

THE METRO COUNCIL ORDAINS AS FOLLOWS:

1. Metro Code Chapter 5.09 (Illegal Disposal) is amended as set forth in Exhibit A, with inserted text underlined and deleted text in strikethrough.
2. Chapter 5.05 (Solid Waste Flow Control) is amended to add a new section 5.05.040(d) as set forth in Exhibit B.
3. Any illegal disposal citation issued before this ordinance takes effect will be governed by the code language in Chapter 5.09 that existed at the time Metro issued the citation.

ADOPTED by the Metro Council this 19th day of October 2023.



Lynn Peterson, Council President

Attest:



Connor Ayers, Recording Secretary

Approved as to Form:



Carrie MacLaren, Metro Attorney

EXHIBIT A
Ordinance No. 23-1501

CHAPTER 5.09
ILLEGAL DISPOSAL

5.09.005	Title
5.09.010	Purpose
5.09.020	Jurisdiction
5.09.030	Prohibition on Illegal Disposal of Solid Waste
5.09.040	Prohibition on Illegal Household Hazardous Waste Disposal
5.09.050	Exemption from Illegal Disposal Prohibitions
5.09.060	Illegal Disposal Declared a Nuisance
5.09.070	Civil Penalties and Costs
5.09.080	Persons Authorized to Issue a Citation
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5.09.120	Appearance by Cited Person; Request for Hearing
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5.09.140	Procedures Before Hearings Officer
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5.09.160	Evidentiary Rules During a Hearing
5.09.170	Representation at Hearing
5.09.180	Failure to Appear by Cited Person; Entry of Final Order
5.09.190	Failure to Pay Civil Penalties; Consequences
5.09.200	Collection of Civil Penalties and Costs; Other Legal Actions
5.09.210	Severability
5.09.220	Authority to Settle

Repealed

5.09.020	Definitions [Repealed Ord. 14-1331]
5.09.170	Administrative Policies and Procedures [Repealed Ord. 19-1441]

~~5.09.005 Title~~

~~This chapter may be cited as the "Metro Illegal Disposal Ordinance." [Ord. 94-557.]~~

5.09.010 Purpose

The purposes of this chapter are:

- (a) To ~~carry out~~effectuate Metro's responsibility to manage the flow of solid waste in the ~~Metro Area Portland metropolitan area~~;
- (b) To assist and coordinate with local governments in controlling illegal disposal throughout the Metro ~~region~~Area;
- (c) To ~~carry out~~effectuate the provisions related to illegal disposal in the Regional Waste Plan; and
- (d) To prevent fraudulent and unauthorized deliveries of ~~hazardous~~ waste to Metro transfer stations and Metro household hazardous waste facilities. [Ord. 94-557; Ord. 06-1107; Ord. 13-1311; Ord. 14-1331, Sec. 6; Ord. 19-1432.]

~~5.09.030-020~~ **Jurisdiction**

This chapter ~~shall apply~~applies to all territory within the jurisdictional boundaries of Metro, ~~as well as any additional area as may be established through an intergovernmental agreement.~~ [Ord. 94-557.]

~~5.09.040-030~~ **Prohibitions on Illegal Disposal of Solid Waste**

- (a) No person ~~shall~~may transport or carry, or direct another person to transport or carry, any solid waste, ~~including rubbish, trash, garbage, debris or other refuse, or recyclable material~~, in or on a motor vehicle or trailer, upon a public road right-of-way within the Metro Area, unless ~~such the~~ solid waste ~~or recyclable material~~ is:
 - (1) Completely covered on all sides and on the top and bottom and such cover is either a part of or securely fastened to the body of the motor vehicle or trailer; and
 - (2) Contained in the body of the motor vehicle or trailer in such a way as to prevent any part of the solid waste ~~or recyclable material~~ from being deposited upon any private or public property, road, right-of-way or driveway within Metro.
- (b) No person ~~shall~~may throw or place any solid waste, or direct another person to throw or place any solid waste, upon the private land or waters of another person, into a solid waste receptacle of another person without the owner's permission ~~of the owner~~, upon public lands or waters, or upon any public place other than at a solid waste facility authorized to accept such waste by Oregon law and the Metro Code.

- (c) No person who has generated or otherwise has possession or control of solid waste ~~shall may~~ direct or permit another person to dispose of ~~such the~~ solid waste if the person who has generated or otherwise has possession or control of ~~such the~~ solid waste knows, or has reason to know, that the person directed or permitted to dispose of such solid waste will not dispose of ~~such the~~ solid waste in compliance with all applicable local, state, and federal laws and regulations. ~~No person whose solid waste was collected by a hauler that is franchised or otherwise authorized by a local government to collect waste shall be held in violation of this chapter for illegal disposal of such waste.~~

5.09.040 Prohibition on Illegal Household Hazardous Waste Disposal

- (a) ~~Other than hazardous waste delivered to a Metro household hazardous waste facility, no~~ person ~~shall may~~ deliver to a Metro transfer station any hazardous waste, ~~other than hazardous waste delivered to a Metro household hazardous waste facility,~~ that is household hazardous waste or hazardous waste generated by a ~~very small quantity conditionally exempt~~ generator.
- (b) No person ~~shall may~~ deliver to a Metro household hazardous waste facility or collection event any hazardous waste other than household hazardous waste or hazardous waste generated by a ~~conditionally exempt very small quantity~~ generator.
- (c) No person ~~shall may~~ make a false statement to Metro certifying that hazardous waste ~~the person has they have~~ delivered to a Metro household hazardous waste facility or collection event for disposal or recovery is household hazardous waste or hazardous waste generated by a ~~conditionally exempt very small quantity~~ generator.
- ~~No person shall deliver non-putrescible solid waste generated within Metro that has not undergone material recovery, or direct another person to deliver such solid waste, to any facility other than a Metro authorized material recovery facility.~~[Ord. 94-557; Ord. 02-974, Sec. 1; Ord. 06-1107.]

5.09.050 Exemption from Illegal Disposal Prohibitions

~~A person does not violate the solid waste illegal disposal provisions of this chapter if a hauler that is franchised or otherwise authorized by a local government to collect solid waste collected the solid waste at issue.~~

5.09.060 Illegal Disposal Declared a Nuisance

~~A violation of Section 5.09.030 or Section 5.09.040 is a nuisance and is subject to abatement or injunction as any other nuisance, in addition to other penalties as described in this chapter.~~

5.09.050-070 Civil Fines Penalties and Costs

- (a) ~~Any A~~ person ~~violating that violates~~ any provision of this chapter ~~is shall be~~ subject to:

- (1) A civil fine-penalty of not more than \$500 for each violation; and
- (2) An award of costs to reimburse Metro for the following actual expenses:
 - (A) administrative costs of investigation and collection; and
 - (B) cleanup, management, and disposal costs incurred.

~~The fines and costs shall be included in the citation and a hearings officer shall not assess additional fines or costs except the hearings officer may assess an additional fee, not to exceed \$50, if a party fails to appear at a hearing that he or she requested, unless for good cause shown.~~

- (b) An illegal disposal violator is not relieved of responsibility to remedy the violation by virtue of paying Payment of a civil fine-penalty imposed by a citation issued under this chapter ~~does not relieve a violator of responsibility to remedy the violation.~~
- ~~(c) Nothing in this chapter is intended to prevent other legal action against a person alleged to have violated a provision enforceable under this chapter. Metro, or any person or governmental entity whose interest is or may be affected by violation of a provision enforceable under this chapter, may take whatever legal or equitable action necessary to abate a nuisance, impose criminal sanctions or collect damages, regardless of whether an action has been commenced under this chapter. Violation of Metro Code 5.09.040 is hereby declared to be a nuisance and subject to abatement or injunction as any other nuisance. [Ord. 94-557; Ord. 94-581, Sec. 1; Ord. 06-1107; and Ord. 13-1311.]~~

5.09.060-080 Persons Authorized to Issue a Citations

The following persons are authorized to issue a citations under this chapter:

- (a) The Chief Operating Officer or designee; and
- (b) A police officer, deputy sheriff, or other designated enforcement agent operating under cooperative arrangement or contract with Metro. [Ord. 94-557; Ord. 06-1107; and Ord. 13-1311.]

5.09.070-090 Procedure for Service of Citation

- (a) An authorized official ~~shall~~may serve a citation on a cited person by any method or combination of methods which, under the circumstances, is reasonably likely to apprise the alleged violator of the citation. The following notice methods satisfy the notice requirements of this section in at least one of the following ways:
 - (1) Personal delivery;
 - (2) Mailing the notice by United States Postal Service mail, postage prepaid, and addressed to the residence or business address of the party or parties;
 - (3) Any method authorized by the Oregon Rules of Civil Procedure for the service of summons; or

~~(1)(4) Electronic mail to the last known electronic mail address on file if Metro is giving notice to a person or entity currently regulated, licensed, franchised, or otherwise permitted by Metro.~~

~~(1) Personally;~~

~~(2) By delivery to a person over 14 years of age residing at the cited person's abode, if the cited person is not available at the abode for service;~~

~~(3) If the person to be issued a citation is a firm, corporation, or other organization other than an individual, by delivery to any employee, agent or representative thereof, including such cited person's registered agent; or~~

~~(4) By certified or registered mail, return receipt requested. If the cited person is an individual, then such service shall be addressed to the person's abode. If the cited person is a corporation, firm, or other business entity, then such service shall be addressed to the person's registered agent or to any officer, director, general partner, or managing agent of such person.~~

(b) An authorized official may not arrest any person for violation of this chapter. An authorized official may detain any person reasonably believed to have committed a violation of this chapter, but only so long as is necessary to determine, for the purposes of issuing a citation, the identity of the violator and such additional information as is appropriate for law enforcement agencies in the state. [Ord. 94-557; and Ord. 06-1107.]

5.09.080 Issuance of Warnings

~~(a) A person authorized to issue a citation under this chapter may issue a warning of an alleged violation under this chapter.~~

~~(b) If issued, a warning notice shall be in writing and shall be delivered to the person alleged to have committed the violation in person or in any other manner reasonably calculated to give notice of the violation, including posting or regular mail. [Ord. 94-557; Ord. 94-581, Sec. 2; Ord. 06-1107; and Ord. 13-1311.]~~

5.09.090-100 Citation Content

~~For all violations enforceable under this chapter, Metro will use a A-citation substantially conforming to the requirements of this section and approved by the Chief Operating Officer and the Metro Attorney shall be used for all violations enforceable under this chapter. Each A citation shall must contain the following information:~~

(1) Identification of Metro, as the public body in whose name the action is brought;

~~(2) Hearings officer file number;~~

~~(3)(2) Name of the cited person;~~

~~(4)(3) The Metro Code section violated;~~

~~(5)~~(4) The date and time at which the violation is alleged to have occurred, or the date that a complainant or the authorized official issuing the citation first observed the violation ~~was first observed by the authorized official issuing the citation or a complainant;~~

~~(6)~~(5) A short and plain statement of the violation of which the person is charged;

~~(7)~~(6) The place at which the violation is alleged to have occurred;

~~(8)~~(7) The date on which the citation was issued;

~~(9)~~(8) The name of the authorized official issuing the citation;

~~(10)~~(9) _____
The ~~amount of the~~ civil ~~fin~~es-penalties and costs imposed for the violation;

~~(11)~~(10) _____ A
~~n explanation statement informing the cited person~~ that paying the civil ~~fine penalty~~ assessed in the citation does not relieve the cited person of the responsibility to remedy the violation, and that failure to remedy the violation may result in additional citations;

~~(12)~~(11) _____ T
he time by which the cited person must respond to the citation by either:
(a) requesting a hearing, (b) admitting responsibility and paying the civil ~~fine penalty~~ and costs, or (c) ~~paying the civil fine and costs and~~ submitting a written explanation of why Metro should not find the cited person ~~should not be found~~ in violation of the Metro Code or of any mitigating circumstances related to the violation, ~~and requesting that a hearings officer reduce and refund all or part of the civil fine and costs paid;~~

~~(13)~~(12) _____ T
he place where the cited person must direct ~~the person's his or her~~ response;

~~(14)~~(13) _____ A
notice statement informing the cited person that failure to respond to the citation could result in the entry of a default order against the cited person, including the imposition of a civil ~~fine penalty~~ of up to \$500 per violation plus additional costs ~~(incurred to investigate costs; the violation; costs to cleanup, manage, and dispose of solid waste that is at issue the subject of the violation; and collection to collect all civil fines and costs)~~. The notice ~~shall~~ must further inform the cited person that the failure to pay civil ~~fin~~es penalties and costs imposed by order of a hearings officer could result in (i) entry of a judgment against the cited person for the unpaid civil ~~fin~~es penalties and costs, (ii) the county clerk recording the person's name and the amount of the ~~fin~~es penalties and costs in the county clerk lien record, and (iii) Metro seeking other legal or equitable relief as provided by law; and

~~(15)~~(14) _____ A
certification by the authorized official issuing the citation, under penalty of perjury ~~ORS 153.990~~, that the authorized official issuing the citation has

reasonable grounds to believe, and does believe, that the cited person committed a violation enforceable under this chapter. A certificate conforming to this subsection ~~shall be is~~ deemed equivalent to a sworn citation. ~~;~~ ~~and~~

~~(16) The method of service and certification that service has been made. If service is made by certified or registered mail, return receipt requested, it shall be so stated on the citation and the required certification of service may be made upon receipt of the "return receipt." Service by certified or registered mail shall be as specified in Section 5.09.070(a)(4).~~

5.09.110 Citation Error

- (a) ~~If an~~An error in transcribing information into a citation, ~~when determined by the hearings officer to be is~~ non-prejudicial to the defense of the cited person, Metro or the hearings officer may correct the error may be corrected at the time of hearing or prior to time of before the hearing with notice to the cited person, or it may be corrected at the time of the hearing if allowed by the hearings officer.
- (b) Except as provided in this subsection, the hearings officer must set aside a citation that does not conform to the requirements of ~~this S~~section 5.09.100 shall be set aside by the hearings officer upon motion of the cited person before any other proceedings at the hearing. Minor variations in the form of citation ~~shall not beare~~ not a basis for setting aside a citation.
- (c) Nothing prohibits the hearings officer from amending a citation in the hearings officer's discretion. [Ord. 94-557; Ord. 94-581, Sec. 3; Ord. 06-1107; Ord. 13-1311.]

5.09.100 Representation at Hearing

- ~~(a) A cited person may retain an attorney, at the person's own expense, for representation at the hearing provided that written notice of such representation is received by the Metro Attorney five working days in advance of the hearing. The hearings officer may waive this notice requirement in individual cases or reset the hearing for a later date.~~
- ~~(b) When a cited person is not represented by legal counsel at the hearing, then Metro shall not be represented by legal counsel at the hearing. In such case, Metro legal counsel may advise Metro staff in preparation of the case, be present at the hearing for the purpose of consulting with and advising Metro staff, and answer procedural questions posed by the hearings officer. Nothing prevents the unrepresented party from consenting to legal counsel representing Metro at the hearing. [Ord. 94-557; Ord. 06-1107; and Ord. 13-1311.]~~

5.09. ~~110-120~~ Appearance by Cited Person; Request for Hearing

(a) The cited person ~~shall~~must either (i) appear as specified in the citation by admitting responsibility on or before the close of business on the date indicated in the citation, or ~~prior to~~ (ii) before such time deliver to the address noted in the citation:

- (1) A request for a hearing;
- (2) A statement of responsibility and ~~a check, cash or money order~~payment in the amount of the civil ~~fine~~penalty set forth in the citation; or
- (3) ~~A statement of~~An explanation in mitigation of the ~~violation~~offense charged with a request ~~that Metro reduce the for a reduction in fines penalties~~ and costs, ~~and a check, cash, or money order in the amount of the civil fine set forth in the citation, which~~ The explanation and payment combined ~~shall~~ constitute a waiver of hearing and consent to judgment by the hearings officer. The hearings officer will base judgment upon the explanation provided by the cited person and the citation case information provided by Metro.

(b) If the cited person requests a hearing, the request must be in writing and contain a statement of grounds upon which the party contends that citation is invalid, unauthorized, or otherwise improper. The request must include a current address and contact information for the requesting party, including a phone number and, if applicable, an electronic email address for future correspondence.

~~(b)(c)~~ The hearings officer ~~will set~~shall fix a date and time for a hearing and. ~~Unless notice is waived, the hearings officer shall notify~~mail to the cited person ~~a notice~~ of the ~~date and time of the~~ hearing schedule at least 30 five working business days ~~prior to~~before the hearing. The notice ~~shall~~must:

- (1) Be in the form of a "Notice to Appear" and contain a warning that if the cited person fails to appear, the hearings officer will enter a finding of responsibility ~~will be entered~~ against that person; and
- (2) Be sent to the cited person at the person's last known address by regular mail or such other communication means as requested by the cited person or which, under the circumstances, is reasonably likely to apprise the cited person of the hearing schedule.

~~By agreement of all parties, the hearing may be conducted using technology such as the telephone or video conferencing equipment. If setting a hearing by telephone or video conference, the hearings officer shall set the date and time by which the parties must exchange documents, exhibits, and witness lists.~~ [Ord. 94-557; Ord. 94-581, Sec. 4; Ord. 06-1107; and Ord. 13-1311.]

5.09. ~~120-130~~ Prehearing Discovery

Metro must provide the following prehearing discovery to the cited person at least 30 days before the scheduled hearing:

- (a) Issued citation or enforcement action;

- ~~(b) Solid waste enforcement incident report;~~
- ~~(c) Initial complainant report to Metro of illegally disposed waste (if any);~~
- ~~(d) Copies of any correspondence between Metro staff and the cited person.~~

~~The pretrial discovery rules in ORS 135.805 to 135.873 shall apply to violation cases under this chapter. As used in ORS 135.805 to 135.873, "district attorney" shall refer to a Metro attorney or authorized official, and "defendant" shall refer to a cited person under this chapter. [Ord. 94-557; Ord. 06-1107; and Ord. 13-1311.]~~

5.09.130-140 Procedures Before Hearings Officer

~~Any hearing requested under this chapter will be conducted as set forth in Metro Code Section 2.05.110 (Contested Case Procedures).~~

- ~~(a) An allegation of violation of any provision of this chapter shall, if not admitted by the cited person or settled by the department prior to or during the hearing, be resolved by a hearings officer.~~
- ~~(b) The hearings officer shall be independent of all Metro departments although, for administrative purposes, such officer or officers may be established as part of the Finance and Regulatory Services Department, Office of the Metro Attorney, or Office of the Auditor.~~
- ~~(c) Metro shall have the burden of proving the alleged violation by a preponderance of the evidence.~~
- ~~(d) The hearings officer shall apply the following rules of evidence:
 - ~~(1) All evidence, including hearsay evidence, of a type commonly relied upon by reasonably prudent persons in conducting their serious affairs shall be admissible.~~
 - ~~(2) Evidence objected to may be admitted at the hearing officer's discretion and all evidence offered but not objected to shall be received. All evidence is subject to the hearings officer's discretion to exclude irrelevant, prejudicial, untimely or unduly repetitious evidence and to weigh all evidence received.
 - ~~(A) Relevant evidence. Relevant evidence means evidence having any tendency to make the existence of any material fact more or less probable than it would be without the evidence.—~~
 - ~~(B) Prejudicial evidence. Prejudicial evidence means evidence whose probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or considerations of undue delay, waste of time or needless presentation of cumulative evidence.~~~~~~

- ~~(3) Rulings on the admissibility or exclusion of evidence may be made at the hearing or at the time an order is issued.~~
- ~~(4) Upon reconsideration of an evidentiary ruling, a hearings officer shall preclude action only if the ruling was both erroneous and substantially prejudicial to the rights of a party.~~
- ~~(5) The hearings officer shall give effect to the rules of privilege recognized by law.~~
- ~~(e) A name of a person found on solid waste in such a way that it denotes ownership of the items constitutes rebuttable evidence that the person has violated Metro Code 5.09.040(b) or 5.09.040(c). The hearings officer shall determine at the hearing whether the evidence in question is sufficient to give rise to a rebuttable presumption of responsibility against the cited person, and shall so notify the cited person following presentation of Metro's case.~~
- ~~(f) The hearings officer shall place on the record a statement of the substance of any written or oral ex parte communication made to the hearings officer on a fact in issue during the pendency of the proceedings. The hearings officer shall notify the parties of the communication and of their right to rebut such communication. The hearings officer shall have the authority to administer oaths and take testimony of witnesses. In response to a request by Metro or the cited person, or upon the hearings officer's own motion, the hearings officer may issue subpoenas in accordance with the following provisions of this section, or if not addressed herein, with the Oregon Rules of Civil Procedure:~~
- ~~(1) Metro or the cited person shall request that the hearings officer order witnesses to appear by subpoena in writing at any time at least five days prior to the scheduled hearing.~~
- ~~(2) A \$15 deposit for each witness shall accompany each request for a subpoena by a cited person. The deposit will be refunded, as appropriate, if the witness cost is less than the amount deposited.~~
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- ~~(3) Witnesses ordered to appear by subpoena shall be allowed the same fees and mileage as allowed in civil cases.~~
- ~~(4) If a civil fine is imposed in the final order, the order shall include an order for payment of actual costs for any witness fees attributable to the hearing.~~
- ~~(g) The parties shall have the right to cross-examine witnesses who testify and shall have the right to submit evidence.~~
- ~~(h) The cited person may not be required to be a witness in the hearing of any violation under this chapter.~~

- ~~(i) Proof of a culpable mental state is not an element of a violation under this chapter.~~
- ~~(j) After due consideration of the evidence and arguments, the hearings officer shall determine whether the violation alleged in the citation has been proven and enter an order as follows:~~
- ~~(1) If the hearings officer determines that the violation has not been proven, a final order dismissing the citation shall be entered.~~
 - ~~(2) If the hearings officer determines that the violation has been proven, the hearings officer shall enter an appropriate final order that sets forth both findings of fact and conclusions of law, the amount of the civil fine and costs imposed, instructions regarding payment, and the appeal rights of the cited person.~~
 - ~~(3) A copy of the final order shall be served on the cited person, or on the cited person's attorney(s) of record, by regular mail with certificate of service from the hearings officer.~~

~~An audio recording shall be made of the hearing unless waived by both parties. The recording or a written transcript shall be retained for at least 90 days following the hearing or final judgment on appeal, whichever is later. [Ord. 94-557; Ord. 94-581, Sec. 5; Ord. 02-974, Sec. 1; Ord. 06-1107; and Ord. 13-131~~

5.09.150 Burden of Proof

Metro has the burden of proving the alleged violation by a preponderance of the evidence.

5.09.160 Evidentiary Rules During a Hearing

- (a) The evidentiary rules established in Chapter 2.05 (Contested Case Procedures) apply to any hearing conducted under this chapter.
- (b) Notwithstanding subsection (a) above, proof of a culpable mental state is not an element of a violation under this chapter.
- (c) A name of a person found on solid waste in such a way that it denotes ownership of the items constitutes rebuttable evidence that the person has violated Metro Code 5.09.040(b) or 5.09.040(c). The hearings officer will determine at the hearing whether the evidence in question is sufficient to give rise to a rebuttable presumption of responsibility against the cited person, and will so notify the cited person following presentation of Metro's case.

5.09.170 Representation at Hearing

A cited person may, at the person's own expense, be represented by an attorney at the hearing provided that Metro receives written notice of the representation at least 10

business days before the hearing. The hearings officer may waive this notice requirement in individual cases or reset the hearing for a later date.

5.09.140-180 Failure to Appear by Cited Person; Entry of Final Order

- (a) A cited person fails to appear if ~~that person~~~~he or she~~ does not respond by the time specified on the citation or if ~~that person~~~~he or she~~ requests a hearing and does not appear at the time scheduled by the hearings officer.
- (b) If the cited person fails to appear, the hearings officer shall will review any evidence submitted to determine if Metro has established the violation by a preponderance of the evidence, and The hearings officer shall will enter an appropriate final order that includes instructions regarding payment and the process to appeal the decision.
~~Where a cited person requests a hearing and fails to appear, the hearings officer may assess an additional fee not to exceed \$50. A copy of the hearings officer's final order shall be served on the cited person using one of the methods of service described in Metro Code 5.09.070. [Ord. 94-557; Ord. 94-581, Sec. 6; Ord. 06-1107; and Ord. 13-1~~

5.09.190 Failure to Pay Civil Penalties; Consequences

A failure to pay civil penalties imposed by order of a hearings officer may result in (i) entry of a judgment against the cited person for the unpaid civil penalties, (ii) a county clerk recording the person's name and the amount of the penalties and costs in the county clerk lien record, and (iii) Metro seeking other legal or equitable relief as provided by law.

5.09.150 Review of Hearings Officer Decisions

- (a) ~~A motion to reconsider the final order of the hearings officer must be filed within 10 days of the original order. The hearings officer may reconsider the final order with or without further briefing or oral argument. If allowed, reconsideration shall result in reaffirmance, modification, or reversal. Filing a motion for reconsideration does not toll the period for filing an appeal in court.~~
- (b) ~~A cited person may appeal a final order by Writ of Review as provided in ORS 34.010 through 34.100. [Ord. 94-557; Ord. 06-1107; and Ord. 13-1311.]~~

5.09.160-200 Collection of Civil Fines Penalties and Costs; Other Legal Actions

- (a) Fines-Civil penalties and costs are payable upon receipt of citation or an invoice from Metro pursuant to a written settlement or final order imposing finer civil penalties and costs. Fines-Civil penalties and costs under this chapter are a debt owing to Metro and may be collected in the same manner as any other debt.
- (b) ~~The Chief Operating Officer or designee~~Metro may initiate appropriate legal action, in law or equity, in any court of competent jurisdiction to enforce the provisions of any written settlement or final order of the hearings officer.

- (c) ~~In addition to other remedies available in law or equity, when~~When an order assessing civil ~~fin~~es ~~penalties~~ and costs under this chapter becomes final by operation of law or on appeal and the ~~violater has not paid the penalties~~amount of ~~the fines~~ or costs ~~is not paid~~ within 10 days after the order becomes final, Metro may record and enforce the order ~~may be recorded and enforced~~ as provided in ORS 268.360~~(5)~~. [Ord. 94-557; Ord. 02-974, Sec. 1; Ord. 06-1107; and Ord. 13-1311.]
- (d) Nothing in this chapter prevents other legal action against a person alleged to have violated a provision enforceable under this chapter. Metro, or any person or governmental entity whose interest is or may be affected by violation of a provision enforceable under this chapter, may take whatever legal or equitable action necessary to abate a nuisance, impose criminal sanctions or collect damages, regardless of whether Metro has commenced an action under this chapter.

~~5.09.170 [Repealed Ord. 19-1441; Effective February 19, 2020]~~

5.09.180-210 Severability

If a court of competent jurisdiction finds any ~~section, subsection, paragraph, sentence, clause, phrase, or other~~ portion of this chapter ~~is found to be~~ invalid or unconstitutional ~~by a court of competent jurisdiction~~, that portion of the chapter ~~is~~shall be deemed separate and distinct, and the remainder of this chapter ~~shall~~continues in full force and effect. [Ord. 94-557.]

5.09.190-220 Authority to Settle

The Chief Operating Officer or designee may negotiate a settlement ~~is authorized to enter into negotiations with the parties or their legal representatives~~ involving any provision of this chapter for the collection of ~~fin~~es ~~civil penalties~~ and costs, ~~to negotiate a settlement, or both~~. [Ord. 13-1311.]

EXHIBIT B
Ordinance No. 23-1501

A new section 5.05.040(d) (Prohibited Activities) is added to Metro Code Chapter 5.05 as follows:

5.05.040 Prohibited Activities

(d) No person may transport or direct another person to transport non-putrescible solid waste generated within the Metro jurisdictional boundary that has not undergone material recovery to any facility other than a Metro-authorized material recovery facility as provided in this chapter.

IN CONSIDERATION OF

- ORDINANCE NO. 23-1499, FOR THE PURPOSE OF REPEALING METRO CODE CHAPTER 2.05 (PROCEDURE FOR CONTESTED CASES) AND REPLACING IT WITH A NEW, UPDATED METRO CODE CHAPTER 2.05 (CONTESTED CASES PROCEDURES)
- ORDINANCE NO. 23-1500, FOR THE PURPOSE OF REPEALING METRO CODE CHAPTER 2.03 (CIVIL PENALTIES) AND REPLACING IT WITH A NEW METRO CODE CHAPTER 2.03 (CIVIL PENALTIES), AND AMENDING CERTAIN METRO CODE CHAPTERS TO ALIGN WITH THE NEW CHAPTER 2.03
- ORDINANCE NO. 23-1501, FOR THE PURPOSE OF AMENDING METRO CODE CHAPTER 5.09 (ILLEGAL DISPOSAL) TO ALIGN IT WITH THE NEW METRO CODE CHAPTER 2.05 (CONTESTED CASES PROCEDURES) AND INCORPORATE PLAIN LANGUAGE BEST PRACTICES

Date: September 18, 2023
Department: Office of Metro Attorney
Meeting Date: October 5, 2023

Prepared by: Shane Abma
Presented by: Shane Abma
Length: 20 minutes

[NOTE: Ordinance Nos. 23-1499, 23-1500 and 23-1501 are companion ordinances governing code chapters that impose civil penalties, as well as the hearing procedures and requirements to appeal those penalties or illegal disposal citations in a contested case hearing. These ordinances will, collectively, align these code chapters so that they are consistent with one another. The staff reports for all three are identical.]

ISSUE STATEMENT

Certain Metro Code chapters established by the former Metropolitan Service District Board of Directors were modeled on existing state laws and procedures. In many cases, these chapters include processes and procedures that either are not applicable at the local government level, are ambiguous, are difficult to follow and understand, or—at worst—are nearly impossible to implement. This includes Metro’s *Procedures for Contested Cases* and *Civil Penalties* chapters (Chapters 2.05 and 2.03 respectively), which were originally adopted in 1977 and 1979 respectively and which have had minimal revisions in the last 45 years.

Metro should repeal these code chapters and replace them with new, updated code chapters that govern the same areas of law, but which:

- Better reflect best practices for local government processes;
- Reduce confusion for staff and those upon whom Metro has imposed civil penalties;

- Create a more streamlined, understandable, and workable hearing procedure for those seeking a contested case hearing or wishing to challenge an illegal disposal citation;
- Improve readability and implementation;
- Incorporate plain and inclusive language best practices.

In addition, Metro's "Illegal Disposal" chapter (5.09) should be updated to align with the new Civil Penalties and Contested Case Procedures chapters. Currently there is a separate hearings procedure for Illegal Disposal citations as opposed to any other kind of contested case hearing, which is confusing. Moreover, the Illegal Disposal hearing procedures reference certain state law criminal procedures that are not applicable to a local government administrative hearing.

ACTION REQUESTED

OMA requests that Metro Council adopt:

- Ordinance No. 23-1499 (establishing a new Contested Case Procedures chapter);
- Ordinance No. 23-1500 (establishing a new Civil Penalties chapter); and
- Ordinance No. 23-1501 (related to Illegal Disposal citations and appeals).

IDENTIFIED POLICY OUTCOMES

- 1) Apply best practices for imposing civil penalties related to violations of Metro Code, franchises, licenses, permits, orders, and other Metro regulations.
- 2) Remove procedures that are impractical and difficult to implement.
- 3) Ensure consistency and coordination among the various Metro code chapters that impose civil penalties and authorize appeals of those penalties.
- 4) Streamline and simplify the process for appealing civil penalties or other enforcement measures in contested case proceedings.
- 5) Improve the readability of these code chapters by applying plain language and inclusive language best practices as required by Resolution No. 22-5293.

POLICY OPTIONS FOR COUNCIL TO CONSIDER

Metro Council has several polity options to consider.

- Adopt this ordinance and its companion ordinances. This will remove impractical modeling of state law procedures, improve these code chapters for ease of readability, align these code chapters for consistency, and improve Metro's hearing processes and procedures.
- Do not adopt these ordinances. A failure to adopt these ordinances will continue to create uncertainty and a lack of clarity for Metro staff, as well as individuals and entities that seek to challenge Metro decisions that affect rights or impose civil penalties.
- Direct OMA to update only those sections of current code that are incorrect or impossible to implement, without repealing and replacing these code chapters in their entirety.
- Adopt only some of the ordinances to update certain code chapters but not all of them.

STAFF RECOMMENDATIONS

OMA recommends that Metro Council adopt Ordinance Nos. 23-1499, 23-1500, and 23-1501 to establish new Metro Code chapters relating to Contested Case Procedures and Civil Penalties and update the Illegal Disposal chapter to ensure consistency and coordination among the various Metro code chapters that both impose civil penalties and authorize appeals of those penalties.

STRATEGIC CONTEXT & FRAMING COUNCIL DISCUSSION

The Office of Metro Attorney seeks a Metro Code that is easy to read and understand and does not contain language that harms, excludes, or discriminates people. Moreover, regular code updates help ensure the Metro Code remains current with clear and concise language, that Metro's many code chapters are consistent and coordinated, and that Metro is employing best practices with respect to regulations, how to enforce them, and how best to provide due process to contest enforcement.

OMA recognizes that reviewing and updating the Metro Code is not an easy task. It can be cumbersome. It requires a great deal of staff time to draft new code language, ordinances, and staff reports, while also ensuring that proposed code changes are coordinated with other chapters and do not have unintended consequences. However, a failure to regularly update and review Metro Code carries several risks, including:

- Creating barriers to information people need.
 - Reducing the number of people that can understand the Code, and therefore follow it correctly.
 - Reducing Metro's efforts to be transparent.
 - Having code chapters that are inconsistent with one another.
 - Having code chapters that contain cross-reference errors, citation errors, outdated definitions, and sections that are no longer operative.
- *Known Opposition/Support/Community Feedback*
There is no known opposition. However, because of the administrative nature of these code chapters and because changes were not made to the right to contest violations related to solid waste franchises and licenses, OMA did not perform external outreach related to these changes.
 - *Legal Antecedents*
There are no specific legal antecedents other than current Metro Code language.
 - *Anticipated Effects*
The Metro Code will be easier to read and understand. These code chapters will allow for more streamlined, workable hearings and procedures, and these code chapters will be consistent with one another.
 - *Financial Implications (current year and ongoing)*
There are no *direct* financial implications, but code language that is easy to understand reduces the likelihood that individuals may need to consult Metro staff or third-party professionals (such as lawyers and accountants) to understand Metro Code, and that Metro staff may need to answer calls or correspond to further explain Metro Code. This *indirectly* reduces financial costs.

BACKGROUND

Metro Code Chapter 2.03 (Civil Penalties) authorizes Metro to impose civil penalties for violations of Metro Code, regulations, orders, or rules. This includes violations related to the Zoo, Parks and Nature, Ethics, Taxes, and Solid Waste. Metro Code Chapter 2.05 (Procedures for Contested Cases) establishes a hearings procedure (a “contested case”) for those that wish to challenge Metro’s imposition of civil penalties. Metro’s Contested Case code chapter also allows individuals and entities to challenge a Metro decision that affects the individual legal rights, duties, or privileges of specific parties, including a challenge to a Metro decision regarding a solid waste license or franchise.

These two chapters were originally adopted in the late 1970s by the former Metropolitan Service District Board, with only limited change or updating since those original adoptions nearly 45 years ago. Because Metro was at that time a somewhat new government entity unlike any other in the state, it was not uncommon for Metro staff to model new code language on analogous state statutory schemes. This had the advantage of having ready-made code language, and Metro could, if needed, rely on case law interpreting that state statutory language if there were questions regarding Metro’s similar code language. Such was the case with Metro’s Civil Penalties and Contested Case chapters, both of which were modeled after state statutory schemes (primarily ORS Chapter 183).

Unfortunately, procedures established for use by Oregon state government do not often easily transfer to local government practices. This can create a local government procedure that is unclear, cumbersome, or, in the worst instances, nearly impractical to implement. This is the case with Metro’s Civil Penalties and Contested Case Procedures chapters. For example, in ORS Chapter 183, “agency” is defined as a state board, commission, department or division thereof. In certain instances, Metro’s code language simply substitutes the words “state agency” for “Metro Council,” even though state “agencies” and “Metro Council” serve different purposes with different responsibilities and considerations.

While it may make sense to have a hearings officer serve a “proposed order” on a “state agency” for review given the state agency’s expertise, this would, for example, make no sense in the context of a hearings officer serving a proposed order for a Parks violation on the Metro Council for review. This example highlights the unworkable nature of simply substituting state law terms into Metro Code chapters because they are not always analogous to local government practices.

A similar issue exists with Metro’s Illegal Disposal code chapter 5.09. That chapter sets forth the process to issue citations for illegal disposal (sometimes called “illegal dumping”) and the hearings procedures that follow when individuals challenge those citations. Two problems arise with the Illegal Disposal chapter. First, it contains different evidentiary, discovery, and notice rules than those found in Metro’s Contested Case chapter, as well as a different hearings procedure generally. This creates confusion.

Second, it refers to certain state criminal statutes that are not applicable to a local government administrative hearing and which are, at times, nearly impractical to

implement. For example, current Metro Code Chapter 5.09 language for “prehearing discovery” disclosures references state criminal arraignment statutes, and it simply replaces the term “district attorney” with “Metro Attorney” and criminal “defendant” with “cited person.” This is impractical and, at times, impossible to implement.

Metro’s Civil Penalties and Contested Case Procedures chapters are rarely used by Metro staff (other than an occasional solid waste regulatory violation challenge). This has artificially suppressed the problems associated with these code chapters because they are infrequently on display. However, some Metro departments are considering increased enforcement of their regulations, which could lead to an increased use of these chapters.

In addition, Metro has observed a significant increase in illegal disposal activities within the region. This rise in illegal disposal incidents has resulted in an increasing number of illegal disposal citations and, not surprisingly, a subsequent increase in requests for hearings to contest these citations. The proliferation of illegal disposal practices underscores the need for a comprehensive update to Metro’s regulatory illegal disposal code chapter.

For these reasons—and because Metro Council requires that Metro Code be written in plain language and reviewed periodically for updates—it is both timely and necessary for Metro to update these three code chapters and ensure consistency among them.

[NOTE: Metro’s Supportive Housing Services Income Taxes are not governed by Metro’s civil penalties or contested case chapters. Assessed penalties and any appeals related to income taxes are administered by the City of Portland’s tax appeals board as Metro’s contracted income tax administrator.]

ATTACHMENTS

Attachment 1 summarizes the proposed changes to Metro Code chapters 2.03 (Civil Penalties), 2.05 (Contested Case Procedures), and 5.09 (Illegal Disposal).

ATTACHMENT 1
Ordinance Nos. 23-1499, 23-1500, and 23-1501

Summary of Changes to Code Chapters at Issue

A. Contested Case Procedures (Chapter 2.05)

Metro's Contested Case Procedures Chapter was originally adopted in 1977 and has changed little since that time. It is modeled on the State of Oregon's Contested Case Procedures (ORS 183), but several procedures are not best practices (or even practical) for a local government. Following is a summary of the proposed changes to current code language.

- General plain language review to remove "shalls," passive voice, nominalizations, lengthy sentences and paragraphs, etc.
- Removes Metro Council as a hearings body generally, and specifically as a review body from a hearings officer's determination. There are several reasons for this change.
 - The current Contested Case Procedures chapter was modeled after the state of Oregon's procedures found in ORS Chapter 183. In the case of the state's proceedings, an "agency" can review a proposed order. An "agency" is defined as a Commission, Board, or Department of the state. When drafting Metro's original procedures in 1977, the term "agency" was just replaced with "Metro Council." However, "state agencies" and "Metro Council" serve different roles, with different responsibilities and considerations, so simply substituting those terms does not make practical sense.
 - Current code language states that either Council *or* a hearings officer will conduct hearings, but it does not say who determines *which* entity should apply. The language is ambiguous and confusing.
 - Current code language states that a hearings officer will send a "Proposed Order" to the Council and authorizes the Council to consider this at its next meeting and to possibly allow new evidence. This practice places an unnecessary time burden on the Council, and it does not align with local government administrative hearing best practices. Other than land use decisions, elected local government bodies generally do not act as appeals bodies for code enforcement decisions. It is better practice to have an independent hearings officer review code enforcement decisions.
 - It is not practical to have Council adopt findings of fact and conclusions of law if Council is not the body that received evidence in the underling case.
- The proposed code update also removes the Chief Operating Officer from decision-making for contested cases and rests those decisions squarely with an independent hearings officer (for many of the same reasons as removing Council).

- Clarifies when a contested case exists. A broad reading of current code arguably allows for a contested case in decisions that do not necessarily affect a person's rights or privileges. The update makes clear that contested case opportunities do not exist for:
 - Breaches of contract
 - Denial of grant requests
 - Imposition of a condition, rule, law, or requirement of *general applicability* (as opposed to a decision affecting a single individual or business)
- Standardizes the number of days in which to request a contested case hearing (current Metro code has different timelines for different kinds of hearings).
- Streamlines, simplifies, and clarifies the procedures that a hearings officer will follow during the contested case hearing. This includes the order of testimony, evidentiary rules, discovery requests, etc.
- Removes repeated opportunities to request a reconsideration of a hearings officer's order. These are rarely requested and even more rarely granted. Current code language was also not clear regarding whom at Metro could grant a reconsideration petition. (There were a few instances in current code in which it is not clear who is responsible for making a particular decision.)
- Removes "proposed orders" being submitted to Metro Council prior to a "Final Order" adoption by the hearings officer. This process was modeled after state contested case hearings in which a proposed order is sent to a commission or board for review. However, as noted above, the Metro Council does act in the same manner as does a state commission or board, so this process has less value than at the state level and adds an unnecessary step.
- Removes *personnel discharges* from possible contested case hearings. Metro does not currently perform these by contested case hearings, and it is unclear why these were referenced in this chapter.
- Updates evidentiary rules to better reflect best practices, clarify what is allowed, and better align with generally followed local government administrative hearings.
- Updates notice requirements to better reflect modern practices (for example including email as an option if an email address is known).
- Changes the appointment of the hearings officer from a list of prospective hearings officers provided by Council to one provided by the Metro Attorney's Office. (OMA is unaware of the Metro Council having provided a list of prospective hearings officers in the past). Retains the authority of the COO to *appoint* the hearings officer from the prospective list of qualified officers.
- Creates a new section of "Hearings Officer Duties" to clarify and codify the hearings officer's role.

- Breaks lengthy code sections into shorter sections with better headings to improve ease of reading.
- Clarifies what kind of pre-hearing discovery is allowed.

B. Civil Penalties (Chapter 2.03)

Metro's Civil Penalties Chapter was originally adopted in 1977 and has changed little since that time. It is modeled on the State of Oregon's Civil Penalties chapter. Following are the proposed changes to current code practice.

- General plain language review to remove "shalls," passive voice, nominalizations, lengthy sentences and paragraphs, etc.
- Updated definitions section to reflect current meanings.
- Removed the specific references to penalty amounts for violations of Zoo, Solid Waste, and Parks and Nature regulations, and instead added them to the appropriate sections in those department code chapters.
- Updated the notice requirements when Metro assesses a civil penalty (included email for example, if applicable).

C. Illegal Disposal (Chapter 5.09)

- General plain language review to remove "shalls," passive voice, nominalizations, lengthy sentences and paragraphs, etc.
- Breaks lengthy code sections into smaller sections with more precise headings for ease of readability.
- Rearranges the order of some code sections to better reflect how the process works chronologically.
- Updates the procedures regarding "service of citation" to align with new Contested Case and Civil Penalty code chapters sections on service of notice.
 - For example, personal delivery, US Mail, electronic mail, etc.
- Updates terms to align with other Metro Code chapters.
- Removes cumbersome, unworkable hearings procedures. Instead, refers to Metro's new, updated Contested Case Chapter 2.05 for a more stream-lined, workable hearings procedure to contest illegal disposal citations.
- Updates the term "conditionally exempt generator" to "very small quantity generator" to reflect changes to that term in state and federal law with respect to hazardous waste.
- Moves one specific prohibition on delivering unsorted material from this code chapter to Metro's solid waste flow control chapter (5.05) where it better aligns.

- Changes the term civil “fines” to civil “penalties” throughout to better align with Metro’s Civil Penalties code chapter terminology and to avoid confusion as to these terms. (A “fine” is just one subset of a possible “penalty.”)
- Removes unnecessary up-front cost burdens on cited individuals pending resolution of their appeal.
- Slightly alters certain items required in the citation form to improve notice and reduce the burden on the cited individual.
- Removes the prohibition on Metro being represented by an attorney simply because the cited person chooses not to be represented by an attorney.
- Aligns the requirements necessary to request an illegal disposal citation hearing with those for contested case and civil penalties. (i.e. a written statement explaining why the citation is improper and on what grounds.)
- Removes references to state criminal law for prehearing discovery (which is impractical for a local government civil hearing), and instead creates an explicit list of prehearing discovery material that Metro will provide to the cited person.
- Aligns the evidentiary rules with those for Metro’s Contested Case Procedures chapter.
- Removes option to seek a reconsideration by the hearings officer of the officer’s determination after a final order. This was removed because it is rarely requested and even more rarely granted. It tends to simply slow down a final order from being issued. Absent new evidence, it has little value.