

Metro's Response to Comments on Proposed Changes to Metro Code Title V

July 6, 2016

On March 1, 2016, Metro opened a 60-day public review and comment period to solicit input on a series of proposed changes to Metro Code Chapters 5.00, 5.01, 5.02, and 5.05. The formal comment period was open from March 1 through April 29, 2016. The comments received from the public during that time and Metro's responses are summarized below.

I. Bell Comment (refer to attached email dated February 20, 2016):

- Bell Comment: *Metro Code Section 5.01.310 -The one area of interest for me and for my municipal clients is the rate charged by other disposal facilities. Section 310 – Determination of Rates, starts to address the issue, but is so weak you might as well forget the changes.*

Here is my proposed change: If the total rate varies within 5% of the current Metro tip, licensee must substantiate the cost of service. The cost of service includes the costs of transfer, transport, and disposal.*

** Total rate includes the posted tipping fee plus any scalehouse, environmental, or transaction fees.*

The key word is must. What I am finding is the transaction fee / environmental fee charged by some licensees is adding an additional \$2 to \$5 per ton to the total cost. This charge, combined with their tipping fee, puts some facilities higher than Metro by more than 5%.

Metro Response to Bell Comment: At this time, staff does not recommend any additional changes to this section other than non-substantive housekeeping changes to improve clarity, consistency, and ease of reading. This section has been renumbered and will remain as proposed.

II. Garrett Comments (refer to attached letter dated March 14, 2016):

- Garrett Comment #1: *Metro Code Chapter 5.00 – “Recoverable Solid Waste” attempts to define products based upon their acceptance or rejection by Metro's facilities without regard to the marketplace and competing facilities abilities to quite frankly “do a better job” than Metro's facilities. This definition should be expanded to include all system licensed or franchised facilities.*

Metro Response to Garrett Comment #1: Staff does not recommend any additional changes to this definition other than non-substantive housekeeping changes to improve clarity, consistency, and ease of reading. The term is internal to Metro's

operations and is used for the purpose of setting disposal charges at Metro's facilities. The definition does not apply to other solid waste facilities.

- Garrett Comment #2: *Metro Code Section 5.01.040 (a) (D) - Comment A16 "Remove licensing exemption for wood waste processing operations and facilities." Under Council guidance the SWAC [sic] has formed a subcommittee which is charged with recommending to Council whether or not "clean MRF's" and other source-separated recycling facilities should be regulated by Metro. It would seem that Staff is circumventing the process assigned by Council to the subcommittee. This subject should be reviewed by the SWAC subcommittee as part of their process.*

Metro Response to Garrett Comment #2: Staff recommends withdrawing the initial proposal and not changing the current licensing exemption for certain wood waste operations and electronic waste processing facilities at this time. Staff initially proposed to remove the exemption and require licensing of those types of facilities. Commenters raised concerns that the proposed change had not gone through the same evaluation process as that of other facilities that exclusively receive source-separated recyclable materials – which are currently being considered by a subcommittee of the Solid Waste Alternatives Advisory Committee (SWAAC). The proposed licensing change for certain wood waste processing operations and electronic waste processing facilities requires further evaluation by Metro through SWAAC. Refer to Revisions Nos. 7 through 10 in Exhibit A.

- Garrett Comment #3: *Metro Code Section 5.01.080 (e) - Comment A52 "Remove automatic granting of a license if the Chief Operating Officer does not act on the application within 120 days." This removal removes accountability and surety that the Chief Operating Officer will act reasonably and expeditiously on applications. Yes, there is appeal to the Council President, however that appeal at minimum adds substantive time to the application process and at maximum causes the application to "die in process" due to lack of Council President action. This creates a situation of uncertainty for businesses which is unacceptable and contrary to the concept of responsible, respondent government.*

Metro Response to Garrett Comment #3: Staff recommends withdrawing the initial proposal and not changing the current process of automatically granting a license if Metro fails to act within the required timeframe. Staff also recommends extending Metro's decision-making timeframe for new licenses and franchises to 180 days to ensure that Metro has adequate time to thoroughly evaluate applications and coordinate decision-making with other jurisdictions. Metro's decision-making timeframe for license and franchise renewals will remain at 120 days as currently provided in Metro Code. Refer to Revisions Nos. 11 and 13 in Exhibit A.

- Garrett Comment #4: Metro Code Section 5.01.280 - “Authority of Chief Operating Officer to Adopt Rules, Standards, Procedures, and Forms.” Conceptually, the movement of Metro toward the type of government with administrative rulemaking similar to that of State and Federal government is a good move. However, this process should be transparent. It is understood that certain administrative rules may not garner attention worthy of the cost and effort necessary for public hearing, but leaving the determination if a proposed rule is worth public hearing solely up to the Chief Operating Officer is outside the bounds of transparent government. The Chief Operating Officer is a person and subject to fault and error. There should be a “trigger” with which the public can force public hearings on proposed rulemaking, regardless of the opinion of the Chief Operating Officer. Further, there should be recognition that Metro is different than State Government, unique in the United States and elsewhere. Because of this uniqueness, Metro should adopt the good parts of Administrative Rulemaking and then look past to new levels of transparency and accountability. In doing so, Council should provide an appeal process through which decisions made by the human and therefore fallible Chief Operating Officer can be fully vetted and either affirmed or negated by the Council should adequate affected persons request such.

Metro Response to Garrett Comment #4: Staff recommends revising the proposed section to clarify that the Chief Operating Officer will hold a public hearing on any proposed rule or standard. Refer to Revision No. 21 in Exhibit A.

Staff does not recommended including a specified appeal process as part of the proposed section. Any rule or standard adopted under the proposed section would be considered a final decision; however, the public always has the opportunity to raise any issues of concern to the Metro Council as part of the standard public communication portion of each Council meeting.

- Garrett Comment #5: Metro Code Section 5.02.170 - “Authority of Chief Operating Officer to Adopt Rules, Standards, Procedures, and Forms.” Please refer to 5.01.280 above.

Metro Response to Garrett Comment #5: Refer to Metro’s response to Garrett Comment #4 above.

- Garrett Comment #6: Metro Code Section 5.05.200 - “Issuance of Required Use Orders.” The removal of the ability and right of waste haulers and other persons to choose a facility to patronize based upon cost, service, products offered, and convenience is not non-substantive as purported by Staff. What this does is it removes any surety that a business which is well run and provides a superior services [sic] can be assured of market success. This is a terrible idea which should be eliminated.

Metro Response to Garrett Comment #6: Staff does not recommend any additional changes to this section other than non-substantive housekeeping changes to improve clarity, consistency, and ease of reading. This section has been renumbered and broken up into shorter sentences as appropriate. None of the proposed revisions to this section change or add new requirements. The section will remain as proposed.

III. Wuest Comment – the following is an excerpt from the commenter’s letter (refer to attached letter dated April 27, 2016):

- Wuest Comment: *Metro Code Section 5.01.040 - I represent Mr. Jim Smith of Jim Smith Excavating and write this letter to express opposition to the proposed removal of the existing exemption in Metro Code 5.01.040(a)(5)(D) (the "Exemption"). The Exemption provides that Chapter 5.01 shall not apply to "Operations or facilities that chip or grind wood wastes, unless such wastes are processed for composting."*

Metro Response to Wuest Comment #1: As explained above in Metro’s response to Mr. Garrett’s comment #2, staff recommends withdrawing the initial proposal and not changing the current licensing exemption for certain wood waste operations and electronic waste processing facilities at this time.

IV. Cusma Comments (refer to attached letter dated April 28, 2016):

- Cusma Comment #1: *Metro Code Chapter 5.00 - Metro proposes adding “clean fill” as a new defined term. Metro’s rationale for adding this new definition is unclear, particularly given that Metro’s proposed changes to Chapter 5.00 are intended to “[d]elete . . . unnecessary or unused terms.” The only place Metro proposes to use the new term is in the revised definition of “cleanup material.” Metro could achieve the same result without adding “clean fill” as a new defined term.*

The issue with adding “clean fill” as a defined term is that it is unclear how clean fill would be regulated under the solid waste code. For example, it is unclear whether clean fill falls within the definition of “solid waste.” Relatedly, the definition of “non-putrescible waste” explicitly includes “construction and demolition waste” but explicitly excludes “cleanup material, source separated recyclable materials, special waste, land clearing debris or yard waste.” This definition leaves unclear whether clean fill is non-putrescible waste. Whether clean fill falls within the definition of “solid waste” and/or “non-putrescible waste” will affect how clean fill is treated under various provisions of the solid waste code.

Schnitzer Steel encourages Metro to reconsider its decision to add “clean fill” as a new defined term. If Metro decides to retain the proposed definition, Schnitzer

Steel encourages Metro to better explain how clean fill will be regulated under the solid waste code.

Metro Response to Cusma Comment #1: The new term “clean fill” was added to Chapter 5.00 to provide clarification for the Metro definition of “cleanup material” and to clarify the types of waste that qualify for Metro’s reduced regional system fee and excise tax. Clean fill is inert material and is regulated as such under Metro Code. Inert material that is used beneficially or disposed in an inert landfill is exempt from Metro’s regional system fee and excise tax. Furthermore, a facility that exclusively receives, processes, transfers, or disposes of inert waste is exempt from Metro’s licensing requirements.

- Cusma Comment #2: *Metro Code Chapter 5.00 - Metro proposes changes to the definitions of “designated facility” and “Metro designated facility.” The proposed definitions are:*
 - *“‘Designated facility’ means a facility that Metro designates as part of the system designated pursuant to Chapter 5.05.”*
 - *“‘Metro designated facility’ means a facility in the system of solid waste facilities and disposal sites that Metro authorizes under Chapter 5.05 to accept waste generated within the jurisdiction of Metro.”*

It is unclear whether Metro intends for these terms to have different meanings. If Metro intends for both terms to have the same meaning, Metro should consistently use one of the terms throughout the solid waste code and remove the other term. If Metro intends for the terms to have different meanings, Schnitzer Steel encourages Metro to better explain the difference between the two terms.

Metro Response to Cusma Comment #2: Staff recommends retaining the current term “designated facility” and deleting the term “Metro designated facility.” Metro intends for both terms to have the same meaning. Staff agrees that a consistent term should be used throughout Metro Code. Refer to Revision No. 2 in Exhibit A.

- Cusma Comment #3: *Metro Code Chapter 5.01 - In its proposed revisions to Chapter 5.01 of the Metro Code, Metro proposes to require facilities to obtain a solid waste license if they shred, mill, pulverize, or store outdoors any electronic waste. Chapter 5.00 does not define the term “electronic waste.” Schnitzer Steel urges Metro to replace references to “electronic waste” with “covered electronic device waste,” based on a term that is used in ORS chapters 459 and 459A. This would better align the solid waste code with ORS chapters 459 and 459A.*

Consistent with ORS 459A.305(4), Schnitzer Steel recommends that Metro define “covered electronic device” as follows:

“Covered electronic device” means (1) a computer monitor of any type having a viewable area greater than four inches measured diagonally; (2) a desktop computer or portable computer; (3) a television of any type having a viewable area greater than four inches measured diagonally; (4) a computer peripheral; or (5) a printer. This term does not include (a) any part of a motor vehicle; (b) any part of a larger piece of equipment designed and intended for use in an industrial, commercial or medical setting, such as diagnostic, monitoring or control equipment; (c) telephones or personal digital assistants of any type unless the telephone or personal digital assistant contains a viewable area greater than four inches measured diagonally; or (d) any part of a clothes washer, clothes dryer, refrigerator, freezer, microwave oven, conventional oven or range, dishwasher, room air conditioner, dehumidifier or air purifier.

Because the term “waste” is separately defined in Chapter 5.00, a separate definition of “covered electronic device waste” is unnecessary.

If Metro is unwilling to replace “electronic waste” with “covered electronic device waste,” Schnitzer Steel urges Metro to define “electronic waste” in Chapter 5.00. The definition should exclude at least those categories of material described in (a) through (d) of the definition of “covered electronic device waste” proposed above. These exclusions would limit the definition of “electronic waste” to include only those materials commonly understood to constitute electronic waste. This will provide certainty to regulated entities and avoid unintended consequences.

Metro Response to Cusma Comment #3: Staff recommends adding the new term “electronic device” to Chapter 5.00 using the definition for “covered electronic device” as defined in ORS 459A.305(4). Staff agrees that Metro should clearly define what constitutes electronic waste for purposes of the Metro Code. Refer to Revision No. 3 in Exhibit A.

In addition to the above, staff recommends not changing Metro’s current licensing exemption for certain facilities that process electronic waste pending further evaluation by Metro. Staff recommends changing Section 5.01.030 (Prohibited Activities) to include a new provision prohibiting the outdoor storage of “electronic devices” at solid waste facilities. Refer to Revisions Nos. 7 and 10 in Exhibit A.

- Cusma Comment #4: *Metro Code Chapter 5.00 - Metro proposes to delete the definitions of the terms “Metro disposal system” and “Metro waste management system.” However, these terms still appear in other portions of the solid waste code. Further, as currently defined, these two terms do not have the same meaning, nor are they synonymous with the proposed definition of “system.”*

As one example, the proposed definition of the term “regional transfer charge” is “a fee that pays the direct unit operating costs of the Metro transfer stations. This fee is imposed upon all solid waste deliveries to Metro disposal system facilities.” (Emphasis added.) Without a definition for “Metro disposal system”

or “disposal system,” it is unclear on which solid waste deliveries Metro would impose the regional transfer charge.

As another example, the proposed definition of the term “regional system fee” is “a fee that pays Metro waste management system costs.” (Emphasis added.) The term “waste management system” also appears in Section 5.02.120(a), which provides: “The regional system fee is the dollar amount per ton of solid waste adopted by Council ordinance for the purpose of paying for Metro waste management system costs.” (Emphasis added.) Without a definition for “Metro waste management system” or “waste management system,” it is unclear which costs would be paid by the regional system fee.

Metro Response to Cusma Comment #4: Staff finds the terms “Metro disposal system,” “regional transfer charge,” and “Metro waste management system,” to be unnecessary and recommends deleting the terms from Chapter 5.00 and removing the reference to “regional transfer charge” from proposed Section 5.02.060(a). The term “Metro disposal system” is currently used only in Chapter 5.00 in reference to the definition for “regional transfer charge.” The term “Metro disposal system” does not appear anywhere else in Title V. Similarly, the term “regional transfer charge” appears only once in current Metro Code Section 5.02.027(a) and is not used anywhere else throughout Title V. Regional transfer charges were repealed from Metro Code by Ordinance No. 94-531 in 1994 (repealed Section 5.02.050). Refer to Revision No. 16 in Exhibit A.

With respect to the term “Metro waste management system,” the term is currently used only in Chapter 5.00 for the definition for “regional system fee.” The term “Metro waste management system” does not appear anywhere else in current Title V. The term was mistakenly added as part of the proposed changes to Metro Code Section 5.02.120(a). Staff recommends deleting the unnecessary term “Metro waste management system” as proposed and subsequently combining its definition with that of the term “regional system fee” for further clarification. Staff also recommends similar revisions to proposed Section 5.02.120(a) for consistency purposes. Refer to Revisions Nos. 4 and 17 in Exhibit A.

- Cusma Comment #5: *Metro Code Chapter 5.00 - Metro proposes to delete the definition of the term “standard recyclable materials.” This definition is used elsewhere in the solid waste code (e.g., Secs. 5.10.080(a); 5.10.230(a)(2), (b), and (c); and 5.10.240(b)(1)) and should not be deleted.*

Metro Response to Cusma Comment #5: Staff agrees and recommends retaining the current term “standard recyclable materials.” Refer to Revision No. 5 in Exhibit A

- Cusma Comment #6: Metro Code Chapter 5.01.010 - Metro proposes to revise and expand the purposes of Chapter 5.01. Metro suggests that the changes are meant to incorporate the “six public benefits” from Metro’s Solid Waste Roadmap. Metro also proposes to revise and expand the purposes of Chapter 5.05 to incorporate the six public benefits (see Paragraph IV.A below). Metro frequently refers to the six public benefits during meetings related to the proposed changes to the solid waste code. Metro does not, however, consistently define or describe the six public benefits. As one example, the proposed description of the six public benefits in Section 5.01.010 is different than the proposed description of the six public benefits in Section 5.05.010. As another example, in a PowerPoint created by Metro for a September 2015 workshop, Metro explained that one of the six public benefits is to “[p]rovide good value.” However, “good value” does not appear in the Section 5.01.010 or Section 5.05.010.

If Metro is going to rely on a particular set of public benefits to guide solid waste regulation and interpretation of the solid waste code, Metro should clearly and consistently articulate those benefits. Schnitzer Steel understands Metro entertained significant stakeholder input to develop and define the six public benefits articulated in the Solid Waste Roadmap, and they should not be modified to support varying goals.

Metro Response to Cusma Comment #6: Staff recommends withdrawing the initial proposal and not making any substantive changes to the current purpose section at this time. Staff recommends non-substantive housekeeping changes to this section to improve clarity, consistency, and ease of reading. Refer to Revisions No. 6 and 18 in Exhibit A.

- Cusma Comment #7: Metro Code Section 5.01.040(a) - Schnitzer Steel believes strongly that scrap metal and similarly situated recyclable materials with intrinsic value, well-established markets, incoming material quality guidelines, and outgoing material specifications should be managed as commodities rather than subjected to regulation as “solid waste.” The Oregon Legislature defined “solid waste” to mean:

[A]ll useless or discarded putrescible and nonputrescible materials, including but not limited to garbage, rubbish, refuse, ashes, paper and cardboard, sewage sludge, septic tank and cesspool pumpings or other sludge, useless or discarded commercial, industrial, demolition and construction materials, discarded or abandoned vehicles or parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid materials, dead animals and infectious waste as defined in ORS 459.386.

ORS 459.005(24) (emphasis added). That means a material must be either useless or discarded before it is considered a solid waste under state law.

Schnitzer Steel receives recyclable materials—scrap metal in various forms—that are neither useless nor discarded by the end user. Rather, scrap metal items are typically kept out of the solid waste stream and sold to Schnitzer Steel or an intermediate scrap dealer. Schnitzer Steel, in turn, treats that material as a valuable commodity — collecting, sorting, and processing the scrap to meet specific, internationally-recognized specifications, and generally managing the material to maximize its value in the market.

Two of the specific types of solid waste listed in the state definition above are “discarded or abandoned vehicles or parts thereof” and “discarded home and industrial appliances.” ORS 459.005(24). Metro’s definition of “solid waste” includes identical categories. Because Metro’s solid waste definition uses the same language found in ORS 459.005(24), it is logical to interpret these categories in the Metro definition consistent with ORS 459.005(24).

Vehicles, vehicle parts, and appliances are primary types of materials received by Schnitzer Steel. These materials are not useless, discarded, or abandoned; rather, they are valuable materials that have been intentionally segregated from other materials that enter the solid waste stream. The legislature has specifically recognized that certain types of scrap metal, including end-of-life vehicles, vehicle parts, and appliances, do not routinely enter the solid waste stream. ORS 459A.010(3).

As a result of these and other considerations, Metro has long recognized single-stream recycling facilities, such as Schnitzer Steel, as a unique category of commercial recycling facility, and has considered them exempt from solid waste facility licensing requirements. Unfortunately, however, the unique character of single-stream recycling facilities is not recognized with a unique exemption that applies only to this type of recycling facility—that is, Subsection 5.01.040(a) does not include a specific exemption for single-stream recycling facilities. Instead, these facilities are subsumed within other, broader exemptions. Single-stream recycling facilities often fall within the exemption applicable to facilities that receive non-putrescible source-separated recyclable materials (Section 5.01.040(a)(3)) or various other exemptions contained in Section 5.01.040(a), but the materials sent to these facilities typically are not “separated” from the waste stream because they never enter the waste stream in the first place.

Schnitzer Steel encourages Metro to take this opportunity to clarify the exemption applicable to single-stream recycling facilities by adopting a single, narrowly tailored exemption that covers all such facilities. This is important because the rationale for exempting these single-stream recycling facilities is

specific to these types of facilities. Single-stream recycling facilities like Schnitzer Steel receive a single type of recyclable material (for Schnitzer Steel, scrap metal in various forms). Single-stream recyclable materials generally have intrinsic value, well-established markets, incoming material quality guidelines, and outgoing material specifications. As such, these types of recyclable materials are managed by both the recycling facility and end user as a commodity, not a solid waste.

Schnitzer Steel suggests the following description for the new exemption: "Facilities that (A) exclusively receive single-stream recyclable materials, and (B) reuse or recycle those materials, or transfer, transport or deliver those materials to a person or facility that will reuse or recycle them."

Metro would also need to add a new definition for "single-stream recyclable material" to Section 5.00.010. Schnitzer Steel suggests the following definition:

"Single-stream recyclable material" means recyclable material that (i) has been isolated as a single material type (e.g., a specific type of standard recyclable material) for the purpose of recycling, or (ii) is predominantly made up of a single material type for which mechanical processing is necessary to further separate component types of recyclable materials.

Metro Response to Cusma Comment #7: Staff does not recommend adding the suggested changes as part of the proposed updates at this time. Staff will consider the comment in conjunction with any recommendations that may result from the SWAAC subcommittee that is currently evaluating facilities that exclusively receive source-separated recyclable materials.

- Cusma Comment #8: Metro Code Section 5.01.050(a)(6) - Metro proposes to require a solid waste license for all facilities that shred, mill, pulverize, or store outdoors any electronic waste (see Section 5.01.050(a)(6)). Schnitzer Steel urges Metro to replace the term "electronic waste" with "covered electronic device waste" (see Paragraph I.C above).

As proposed, the licensing requirement would apply quite broadly to facilities that shred, mill, pulverize, or store outdoors any electronic waste, which could arguably include small circuit boards or other electronic components contained inside any appliance with digital controls or a potentially unidentified printer inside a large load of scrap, as examples. This could have the unintended consequence of requiring licenses for facilities that incidentally shred, mill, pulverize, or store outdoors small quantities of electronic waste (or covered electronic device waste). To avoid this unintended consequence, Schnitzer Steel encourages Metro to add the following exemption to Section 5.01.040(a): "Facilities that incidentally shred,

mill, pulverize, or store outdoors small quantities of electronic waste [or covered electronic device waste].”

Metro Response to Cusma Comment #8: Refer to Metro’s response to Cusma Comment #3 above. Staff does not recommend adding the suggested reference to “incidental quantity” as part of the proposed revision.

- Cusma Comment #9: *Metro Code Section 5.01.080(e) - Under the current solid waste code, if Metro’s Chief Operating Officer (“COO”) fails to grant or deny a license application within 120 days, the license is deemed granted. Metro proposes to eliminate this requirement and replace it with a process under which the applicant may request the Metro Council to direct the COO to act on the license if the COO fails to act within 120 days.*

Metro does not provide adequate justification for this change. The change would reduce the incentive for the COO to expeditiously review and act on license applications. Metro has not identified any instance in which the 120-day deadline has caused the COO to grant or deny a license application that otherwise would have been processed differently. Therefore, Schnitzer Steel opposes this proposed change.

Metro Response to Cusma Comment #9: Refer to Metro’s response to Mr. Garrett’s comment #3 above.

- Cusma Comment #10: *Metro Code Section 5.01.110 - The proposed revision to Subsection (a) is confusing when read together with Subsection (d). Proposed Subsection (a) reads: “The [COO] may approve or deny a license renewal of a solid waste facility.” As written, this provision suggests that the COO has complete discretion to approve or deny a license. However, proposed Subsection (d) reads: “The [COO] must approve a solid waste facility license renewal unless” Subsection (a) would be more clear if it read: “The [COO] will review a license renewal and approve or deny it consistent with this section.”*

Metro Response to Cusma Comment #10: Staff agrees that Metro should clarify the language of the proposed subsection. Staff recommends revising subsection (a) to clarify its intent that the Chief Operating Officer will approve or deny licenses as provided in Code. Refer to Revision No. 12 in Exhibit A.

- Cusma Comment #11: *Metro Code Section 5.01.180(g) - Similar to the proposed changes to Subsection 5.01.080(e) (discussed above), under the current solid waste code, if the Metro Council fails to grant or deny a franchise application within 120 days, the franchise is deemed granted. Metro proposes to eliminate the automatic grant of a franchise.*

Metro does not provide adequate justification for this change. The change would reduce the incentive for the Metro Council to expeditiously review and act on franchise applications. Subsection (h)(3) already allows for an extension of the 120-day deadline by mutual agreement of the applicant and the COO. This extension process is adequate to address situations in which the Metro Council is unable to act on a franchise application within 120 days. Metro has not identified any instance in which the 120-day deadline has caused the Metro Council to grant or deny a franchise application that otherwise would have been processed differently. Therefore, Schnitzer Steel opposes this proposed change.

Metro Response to Cusma Comment #11: Refer to Metro's response to Mr. Garrett's Comment #3 above. Staff recommends similar revisions to Section 5.01.180(g).

- Cusma Comment #12: *Metro Code Section 5.01.280 - Metro proposes to modify the COO's authority to adopt and amend rules, performance standards, procedures, and forms. The proposed title of Section 5.01.280 is: "Adoption and Amendment of Administrative Rules and Performance Standards." The title would more closely align with the substantive provisions of the section if it read: "Adoption and Amendment of Rules, Performance Standards, Procedures and Forms." Although the title of Section 5.01.280 makes clear that Metro intends the substantive provisions of the section to apply to both adoption and amendment of rules, performance standards, procedures, and forms, the section's substantive provisions refer to adoption but not amendment. To clarify the scope of Section 5.01.280, Metro should revise the section's substantive provisions to refer to both adoption and amendment.*

The proposed changes to the substantive provisions of Section 5.01.280 include new procedural protections. These proposed changes provide greater protection to licensees and franchisees, but some of the other proposed changes to the section would arguably expand Metro's rulemaking authority. The proposed changes are discussed in more detail below.

Metro Response to Cusma Comment #12: Staff recommends revising the titles for each of the administrative rulemaking sections in Metro Code Chapters 5.01, 5.02, and 5.05 to read "Authority of Chief Operating Officer to Adopt and Amend Rules, Standards, and Forms." Staff also recommends additional changes to the section to further clarify that the provisions apply to adoption and amendment of administrative rules and standards. Metro intends to have identical sections in each of the above-mentioned chapters for consistency. Refer to Revision No. 21 in Exhibit A

Staff does not recommend including the term "administrative procedures" in the proposed section. An "administrative procedure" is the process by which a rule is

adopted. Metro intends to use the term “administrative rule” going forward to reduce confusion and improve consistency. Using the term “rule” is more consistent with the practice of other governmental regulatory bodies such as Oregon Department of Environmental Quality.

- Cusma Comment #13: *Metro Code Section 5.01.280 - Under current Section 5.01.132, the COO’s rulemaking authority is limited to issuing “administrative procedures and performance standards governing the obligations of licensees and franchisees.” (Emphasis added.) In contrast, proposed Section 5.01.280 is ambiguous about whether the COO’s rulemaking authority extends to operators of exempt facilities. Subsection 5.01.280(a) provides: “The [COO] may adopt rules, performance standards, procedures and forms to implement any provision of this chapter. Any rule, performance standard, procedure and form adopted under this section has the same force and effect as any other chapter provision.”*

Schnitzer Steel encourages Metro to clarify that the rules, performance standards, procedures, and forms adopted by the COO apply only to licensees and franchisees.

Metro Response to Cusma Comment #13: Staff does not recommend making the suggested changes as part of the proposed updates. The Chief Operating Officer has authority to adopt any rule to implement the provisions of Chapters 5.01, 5.02, and 5.05. Therefore, the proposed rule making authority does not apply exclusively to a licensee or franchisee.

- Cusma Comment #14: *Metro Code Section 5.01.280 - Subsection 5.01.280(b) would require the COO to provide a 30-day public comment period before adopting any rules or performance standards. However, as proposed, this requirement does not explicitly extend to procedures and forms adopted under Section 5.01.280. Because these procedures and forms will have “the same force and effect as any other chapter provision,” the procedures and forms should also be subject to a 30-day public comment period.*

Subsection 5.01.280(b) is silent regarding the type of notice Metro must provide regarding the public comment period. Metro should revise the subsection to require notice in a manner reasonably calculated to reach interested parties. Metro could address these suggestions by replacing the first sentence of Subsection 5.01.280(b) with the following:

Before the Chief Operating Officer adopts or amends a rule, performance standard, procedure or form under this section, the Chief Operating Officer will provide an opportunity for public comment for a period of at least 30 days. Metro will provide notice of the public comment period in a manner reasonably calculated to reach interested parties. The notice will include a brief description

of the proposed rule, performance standard, procedure or form; the location at which a person may obtain copies of the full text of the proposed rule, performance standard, procedure or form; the method for submitting comments; and the deadline for submitting public comments.

Schnitzer Steel suggests that Metro make the same change to analogous provisions in Subsections 5.02.170(b) and 5.05.260(b).

Metro Response to Cusma Comment #14: Staff does not recommend including the terms “form” and “administrative procedures” as part of the public hearing section in the proposed updates. As stated in Metro’s response to Mr. Cusma’s Comment #12, Metro intends to replace the term “procedure” with “rule” to more accurately reflect that an “administrative procedure” describes the process by which a rule is adopted, including providing notice of and the opportunity to comment on a proposed rule. This change will reduce confusion and better align Metro’s rule making process and terminology with that of other regulatory agencies, including the DEQ.

With respect to “forms,” staff finds that it is unnecessary to hold a public hearing regarding the rather ministerial procedure of creating a form.

Staff agrees that Metro should clarify the language of the proposed subsection with respect to general notice procedures. Staff recommends revising the subsection to clarify the type of notice, submittal method, and deadline for comments. Refer to Revision No. 21 in Exhibit A.

- Cusma Comment #15: *Metro Code Section 5.01.280 - Subsections 5.01.280(b) and (c) include requirements related to public hearings. As proposed in Subsection 5.01.280(b), the COO “may...hold a public hearing on any proposed rule or performance standard if the [COO] determines that there is sufficient public interest in the proposed rule or performance standard.” (Emphases added.) This would vest complete discretion in whether to hold a public hearing with the COO and undermines the procedural protection that a public hearing would provide.*

Schnitzer Steel encourages Metro to strengthen this procedural protection by requiring public hearings under certain circumstances and expanding the scope of the public hearing provision to cover proposed procedures and forms. Schnitzer Steel suggests replacing the last sentence of Subsection 5.01.280(b) with the following:

The Chief Operating Officer may hold a public hearing on any proposed rule, performance standard, procedure or form if the Chief Operating Officer determines that there is sufficient public interest in the proposed rule, performance standard, procedure or form. The Chief Operating Officer will hold a public hearing if the Chief Operating Officer (i) determines or receives evidence

showing that the proposed rule, performance standard, procedure or form could have a material economic impact on a licensee or franchisee, or (ii) receives at least five written requests for a public hearing.

Schnitzer Steel suggests that Metro make the same change to analogous provisions in Subsections 5.02.170(b) and 5.05.260(b).

Metro Response to Cusma Comment #15: Staff does not recommend including the terms “form” and “administrative procedures” as part of the public hearing section in the proposed updates. As explained above in Metro’s response to Mr. Cusma’s comment #12, the term “procedures” is unnecessary because Metro intends to use the term “rule” going forward. Additionally, public hearings are not necessary for certain administrative matters such as creating and changing forms.

Staff recommends revising the subsection to clarify that Metro will always hold a public hearing for a new or amended rule or performance standard that is adopted under the proposed rulemaking procedures. Refer to Revision No. 21 in Exhibit A.

- Cusma Comment #16: *Metro Code Section 5.01.280 - Subsection 5.01.280(d) provides that, unless otherwise stated, all rules and performance standards take effect when the COO adopts them. This does not provide a sufficient opportunity to challenge the rules and performance standards before they become effective. Absent a serious danger to public health or safety, it is unnecessary for any proposed rule, performance standard, procedure or form to take effect sooner than 60 days following adoption.*

Schnitzer Steel suggests replacing Subsection 5.01.280(d) with the following:

All rules, performance standards, procedures and forms adopted or amended under this section will take effect 60 days after adoption or amendment by the Chief Operating Officer, unless (i) the Chief Operating Officer specifies an earlier effective date after determining that failure to immediately implement the rule, performance standard, procedure or form would create a serious danger to the public health or safety, or (ii) the Chief Operating Officer specifies a later effective date.

Schnitzer Steel suggests that Metro make the same change to analogous provisions in Subsections 5.02.170(b) and 5.05.260(b).

Metro Response to Cusma Comment #16: Staff recommends revising the subsection to establish a waiting period of at least 30 days after adoption before a rule or standard takes effect. Staff agrees that the public should have an opportunity to review and understand all newly adopted and amended rules and standards before they become effective. Refer to Revision No. 21 in Exhibit A.

- Cusma Comment #17: Metro Code Section 5.01.280 - Subsection 5.01.280(e) would allow the COO to circumvent the public notice and comment process when adopting interim rules and performance standards. To adopt an interim rule or performance standard, the COO must find that “failure to act promptly will result in serious prejudice to the public interest or the interest of an affected party.” This is a vague standard and arguably creates a lower threshold than the “serious danger” standard contained in other sections of Chapter 5.01.

Schnitzer Steel suggests replacing Subsection 5.01.280(e) with the following:

Notwithstanding subsections (b) and (d) of this section, the Chief Operating Officer may adopt an interim rule or performance standard without prior public notice or comment or opportunity for a public hearing only if the Chief Operating Officer finds that failure to act immediately will result in serious danger to the public health or safety. The Chief Operating Officer must explain, in writing, the basis for adopting the interim rule or performance standard. Any rule or performance standard adopted pursuant to this subsection takes effect upon adoption and expires no later than 180 days from its effective date.

Schnitzer Steel suggests that Metro make the same change to analogous provisions in Subsections 5.02.170(e) and 5.05.260(e).

Metro Response to Cusma Comment #17: Staff does not agree with the suggested revision and does not recommend replacing the phrase “serious prejudice to the public interest” with “serious danger to the public health and safety” in this section. However, staff agrees that Metro should provide a written explanation of any interim rule or standard that is adopted under the proposed provision. Staff recommends revising the subsection to clarify such requirement. Refer to Revision No. 21 in Exhibit A.

- Cusma Comment #18: Metro Code Section 5.01.290(a) - Subsection 5.01.040(c) provides that certain exempt activities and facilities are subject to Section 5.01.290, which relates to inspections and audits. This authority is intended to allow Metro to inspect and audit certain exempt activities and facilities for the limited purpose of confirming that those activities and facilities qualify for the claimed exemption. Schnitzer Steel recommends that Metro add the following sentence at the end of Subsection 5.01.290(a) to clarify the relationship between Subsection 5.01.040(c) and Subsection 5.01.290(a): “The Chief Operating Officer is authorized to inspect, audit, or otherwise investigate activities and facilities described in Subsections 5.01.040(a)(3) through (a)(9) only to confirm that such activity or facility is exempt under Section 5.01.040.”

Metro Response to Cusma Comment #18: Staff does not recommend making the suggested change. The Chief Operating Officer has authority to inspect and audit solid waste facilities as necessary to assure compliance with Metro Code, Chapter 5.01, and all rules and standards adopted in accordance with the chapter.

- Cusma Comment #19: *Metro Code Section 5.01.320(f) - This subsection relates to the effect of Metro’s revocation of, or refusal to renew, a franchise or license. As proposed by Metro, this subsection would read: “If Metro revokes or refuses to renew a franchise or license, all franchisee or licensee rights in the franchise or license become void.” The phrase “or refuses to renew” should be deleted from this subsection for at least two reasons. First, Section 5.01.320 relates to the suspension, modification, and revocation of licenses and franchises, not the refusal to renew a license or franchise. Second, as written, subsection (f) is inconsistent with subsection 5.01.340(b), which provides that the COO’s refusal to renew a license does not become effective until Metro affords the franchisee or licensee an opportunity for a contested case hearing (unless necessary to avoid serious danger to the public health or safety).*

Metro Response to Cusma Comment #19: Staff agrees that Metro should clarify the language of the proposed subsection. Staff recommends removing the phrase “or refuses to renew” as suggested. Refer to Revision No. 14 in Exhibit A.

- Cusma Comment #20: *Metro Code Section 5.02.050(a) - Metro proposes adding the following sentence to Subsection 5.02.050(a): “‘Source separated recyclable material’ has the same meaning as defined in ORS 459.005.” This statement is not correct because ORS 459.005 does not define “source separated recyclable material.” The term is, however, defined in Section 5.00.010.*

Metro Response to Cusma Comment #20: The draft proposal mistakenly included a reference to ORS 459.005 in the above-mentioned section. Staff recommends removing the reference to ORS 459.005, replacing the term “recyclable material” with “standard recyclable materials,” and other minor revisions to clarify which types of materials qualify for a disposal charge credit at Metro’s transfer stations. Refer to Revision No. 15 in Exhibit A.

- Cusma Comment #21: *Metro Code Section 5.02.060(a) and 5.0.080(f)(4) - References in these subsections to “enhancement fee” should be replaced with “community enhancement fee” to align these subsections with Metro’s proposed changes to definitions in Section 5.00.010.*

Metro Response to Cusma Comment #21: Staff recommends replacing all references to “enhancement fee” with the term “community enhancement fee” throughout Chapters 5.00, 5.01, 5.02, and 5.05. Additionally, staff recommends including the term “enhancement fee” as part of the definition of “community enhancement fee”

to clarify that both terms have the same meaning in case the terms are used interchangeably in other chapters of Title V. Refer to Revision No. 1 in Exhibit A.

- Cusma Comment #22: *Metro Code Section 5.02.170 - See proposed changes to this section in Paragraphs II.F.2 through II.F.5 above.*

Metro Response to Cusma Comment #22: Refer to Metro’s response to Cusma Comments #14 through #17 above. Staff recommends similar revisions to Chapter 5.02.

- Cusma Comment #23: *Metro Code Section 5.05.010 - Metro proposes to revise and expand the purposes of Chapter 5.05. Metro suggests that the changes merely incorporate the “six public benefits” from Metro’s Solid Waste Roadmap (similar to the proposed changes to Chapter 5.01). However, the six public benefits listed in Chapter 5.05 are not identical to the six public benefits listed in Chapter 5.01. (See Paragraph II.A above for further discussion regarding this issue.)*

Metro Response to Cusma Comment #23: Staff recommends withdrawing the initial proposal and not making any substantive changes to the current purpose section at this time. Staff recommends non-substantive housekeeping changes to this section to improve clarity, consistency, and ease of reading. Refer to Revisions No. 6 and 18 in Exhibit A.

- Cusma Comment #24: *Metro Code Section 5.05.020(c) - Metro proposes to revise the description of the authority under which it regulates under Chapter 5.05. The current solid waste code states that Metro is exercising its authority under ORS 268.317 and ORS 268.360. Metro proposes to replace the references to those specific statutory sections with a generic reference to ORS chapter 268. This is arguably a substantive change because ORS 268.317 is limited to solid and liquid waste disposal powers and ORS 268.360 relates to Metro’s authority to enact and enforce ordinances. In contrast, other sections of ORS chapter 268 would grant broader powers to Metro (e.g., ORS 268.310(6) authorizes Metro to “[e]xercise jurisdiction over other matters of metropolitan concern as authorized by [the Metro] charter”). If Metro intends to rely on statutory grants of authority beyond ORS 268.317 and ORS 268.360, Metro should do so explicitly and provide an adequate justification for the exercise of broader statutory authority.*

Metro Response to Cusma Comment #24: Staff does not agree with the commenter and recommends retaining the changes as initially proposed. Including a reference to ORS Chapter 268 in Section 5.05.020(c) does not “broaden” Metro’s authority. ORS Chapter 268 reflects the statutory authority that the legislature has conferred upon Metro. Referencing Metro’s statutory authority in Metro code does not “broaden” or otherwise expand that authority. Further, the proposed change better aligns this section with current section 5.05.030, which is entitled “Authority,

Jurisdiction and Application,” and which states in subsection (a) that “Metro’s solid waste flow control authority is derived from ORS chapter 268 for solid waste and the Metro Charter.”

- Cusma Comment #25: *Metro Code Section 5.05.050(a) - This subsection provides an exemption from the general requirement to obtain a non-system license in order to transport, or cause to be transported, solid waste generated within Metro to any solid waste facility or disposal site. The exemption applies to “non-putrescible source separated recyclable materials that are either: (i) reused or recycled, or (ii) transferred, transported or delivered to a person or facility that will reuse or recycle them.” As currently drafted, it is somewhat unclear at what point the exemption begins to apply. However, the clear intent of the exemption is that it applies to source separated recyclable materials from the point of source separation, provided the materials will be reused or recycled or transferred, transported, or delivered to a person or facility that will reuse or recycle them. Metro should revise this subsection to ensure it is implemented as intended.*

Metro could clarify the intent of the exemption by adding a sentence to the end of Subsection 5.05.050(a) that states: “This exemption applies from the point of source separation, provided the materials are ultimately: (i) reused or recycled, or (ii) transferred, transported or delivered to a person or facility that will reuse or recycle them.”

Metro Response to Cusma Comment #25: Staff does not recommend adding the suggested changes as part of the proposed updates at this time. Staff will consider the comment in conjunction with any recommendations that may result from the SWAAC subcommittee that is currently evaluating facilities that exclusively receive source-separated recyclable materials.

- Cusma Comment #26: *Metro Code Section 5.05.080(b)(6) - This subsection lists the factors the Metro Council may consider in deciding whether to remove a facility from Metro’s designated facilities list. Metro proposes to add a catchall factor: “Any other factor the Council considers appropriate.” This factor is broader than necessary to accomplish the purposes of Chapter 5.05. At a minimum, the catchall factor should be limited to “Any other factor necessary to accomplish the purposes of this chapter.” (Emphasis added.)*

Metro Response to Cusma Comment #26: Staff agrees that Metro should clarify the language of the proposed subsection. Staff recommends revising the subsection to better define the factors that the Metro Council will consider when deciding whether to remove a facility from Metro’s list of designated facilities. Refer to Revision No. 19 in Exhibit A.

- Cusma Comment #27: Metro Code Section 5.05.150(b) - *This subsection relates to the conditions the COO may impose on a new or renewed non-system license. Metro proposes to add language that would allow the COO to “impose conditions on the issuance of a new or renewed non-system license for non-putrescible waste as the [COO] considers necessary under the circumstances.” This grant of authority is more broad than necessary to accomplish the purposes of Chapter 5.05, and Metro has not provided sufficient justification for such a broad grant of authority. A more limited grant of authority would allow the COO to “impose conditions on the issuance of a new or renewed non-system license for non-putrescible waste as necessary to accomplish the purposes of this chapter.” (Emphasis added.)*

Metro Response to Cusma Comment #27: Staff agrees that Metro should clarify the language of the proposed subsection. Staff recommends revising the subsection to better define the factors the Chief Operating Officer will consider when determining non-system license conditions. Refer to Revision No. 19 in Exhibit A.

- Cusma Comment #28: Metro Code Section 5.05.260 - *See proposed changes to this section in Paragraphs II.F.2 through II.F.5 above.*

Metro Response to Cusma Comment #28: Refer to Metro’s response to Mr. Cusma’s comments #14 through #17 above. Staff recommends similar revisions to Chapter 5.05.

V. White Comment – the following is an excerpt from the commenter’s letter (refer to attached letter dated April 29, 2016):

- White Comment: Metro Code Chapter 5.00 - *Metro’s definition of Solid Waste should follow the state of Oregon’s definition by reinserting the words “useless and discarded” to clarify that the material is unwanted by the person last using it and deleting the words “commingled recyclable material” and “source-separated recyclable material” to clarify that the material has not been separated from solid waste for the purpose of recycling by the person last using it.*

Metro Response to White Comment: Staff does not recommend any additional changes to this section other than non-substantive housekeeping changes. The definition will remain as proposed.

VI. Jordan Comment (refer to attached letter dated April 29, 2016):

- Jordan Comment: Republic Services, Inc. *is unable at this time to provide constructive commentary regarding the proposed changes to Metro Code Chapters 5.00, 5.01 5.02 5.05 and 7.01. You have informed us that the “proposed changes seek greater consistency in how Metro reviews and authorizes solid waste facilities, great transparency in how Metro implements its requirements to protect the environment and the public health, and great adaptability to changing conditions, all while*

making the (Metro) Code easier to use and understand.” Our inability to comment at this time stems from the lack of a context upon which we can evaluate the ramifications resulting from a change in a provision of the Metro Code you are proposing.

David White, our representative with Oregon Refuse and Recycling Association (ORRA), recommended some time ago that the changes to the Metro Code proposed by you should be considered during the review of the Regional Solid Waste Management Plan. I believe this review will take place in next [sic] 12 to 18 months. Republic Services believes a more suitable process would be to adopt the evaluating of your proposed changes to Metro Code 5.00, 5.01 5.02 5.05 and 7.01 during the review of RSWMP which would provide the needed context.

Metro Response to Jordan Comment: The commenter did not provide comments on the content of the proposed changes. Staff recommends updating and revising Metro Code Chapters 5.00, 5.01, 5.02, and 5.05 as proposed.