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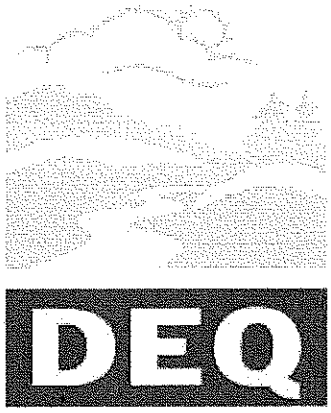
3/30/1979

OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS



State of Oregon
Department of Environmental Quality

ROBERT W. STRAUB
GOVERNOR

Environmental Quality Commission

522 S.W. 5th AVENUE, P.O. BOX 1760, PORTLAND, OREGON 97207 PHONE (503) 229-5696

MEMORANDUM

TO: Environmental Quality Commission

FROM: Hearing Officer

SUBJECT: Agenda Item J(1), March 30, 1979 EQC Meeting

Contested Case Review: DEQ v. Robert J. Wright
SS-MWR-77-99

Attached are the hearing officer's Proposed Findings, Conclusions, and Order in this matter. Following them are Respondent's Request For Commission Review accompanied by Exceptions and Argument and the Department's Answering Brief.

It is contemplated that, after entertaining brief oral argument, the Commission review this matter on its merits.

Respectfully submitted,

Peter W. McSwain

Peter W. McSwain
Hearing Officer

PWM:mg
Attachments
cc: Robert J. Wright
Robert Haskins, Department of Justice
Van Kollias, DEQ
John Borden, DEQ

ROBERT W. STRAUB
GOVERNOR

Department of Environmental Quality

522 SOUTHWEST 5TH AVE. PORTLAND, OREGON

MAILING ADDRESS: P.O. BOX 1760, PORTLAND, OREGON 97207

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Robert J. Wright
88838 Hale Road
Noti, Oregon

December 19, 1978

Re: DEQ v. Robert J. Wright
No. SS-MWR-77-99
Lane County

Dear Mr. Wright:

Enclosed are our Proposed Findings of Fact, Conclusions of Law and Final Order in this matter.

The parties are reminded that each has fourteen days from the date of this mailing in which to file with the Commission and serve upon the other parties a request that the Commission review the proposed order (Oregon Administrative Rule (OAR) 340-11-132(2)).

Unless a timely request for Commission review is filed with the Commission, or unless within the same time limit the Commission, upon the motion of its Chairman or a majority of the members, decides to review it, the proposed order of the presiding officer shall become the final order of the Commission (OAR 340-11-132(3)).

If Commission review is invoked, then the parties shall be given thirty days from the date of mailing or personal service of the presiding officer's proposed order, or such further time as the Director (of the Department of Environmental Quality) may allow or the Commission may allow, to file with the Commission and serve upon the other parties written exceptions and arguments to the proposed order. Such exceptions and arguments shall include proposed alternative findings of fact, conclusions of law, and order and shall include specific references to those portions of the record upon which the party relies (OAR 340-11-132(4) in pertinent part).

A request for desired review by the Commission will be considered filed with the Commission after being date stamped as received in the office of the Department of Environmental Quality at 522 S.W. Fifth Avenue, Portland, Oregon 97204.

Should Commission review be requested, failure to file the required exceptions and arguments in a timely fashion may be grounds for dismissal of the request and affirmation of the proposed final order.

Sincerely,

Hearings Officer

PWM:vh

Attachment

cc: Environmental Quality Commission
Robert Haskins
Fred Bolton
Van Rollins (Department Representative)
John Borden (Regional Manager)

No. 037 [illegible]

RECEIPT FOR CERTIFIED MAIL

SENT TO Robert J. Wright	POSTMARK OR DATE
STREET AND NO. 88838 Hale Road	
P.O., STATE AND ZIP CODE Noti, Oregon 97461	12/19/78
OPTIONAL SERVICES FOR ADDITIONAL FEES	
RETURN RECEIPT SERVICES: 1. Shows to whom and date delivered ..... With restricted delivery ..... 2. Shows to whom, date and where delivered With restricted delivery	CONSULT POSTMASTER FOR FEES
RESTRICTED DELIVERY	
SPECIAL DELIVERY (extra fee required)	

PS Form Jan. 1976 3800 NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL (See other side)

☆ GPO: 1975—O-591-452

DEQ v. Wright SS-MWR-77-99

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
☐ Show to whom and date delivered..... 15¢
☒ Show to whom, date, & address of delivery.. 35¢
☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
Robert J. Wright
88838 Hale Road
Noti, Oregon 97461

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 347457 | INSURED NO.

(Always obtain signature of addressee or agent)
I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY 12-22-78 POSTMARK DEC 22 1978

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-568-047

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department	)	PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER
v.	)	
ROBERT J. WRIGHT Respondent	)	No. SS-MWR-77-99

SUMMARY

On May 9, 1977, the Director assessed a civil penalty against Respondent Robert J. Wright in the sum of $250. Alleged were operation and use of an illegally constructed subsurface sewage disposal system without first obtaining a certificate of satisfactory completion. This was said to be in violation of ORS 454.665(3) and OAR Section 340-71-017(3).

Respondent demurred on the ground that another action was pending between the same parties for the same cause and for failure to state a cause of action. The demurrer was overruled but, in deference to the Lane County Circuit Court and Respondent, it was decided to leave the matter in imparlance and await the outcome of an action filed in the Circuit Court for Lane County. In that action Respondent alleged, inter alia , that the civil penalty assessment was improper.

In February Respondent informed us of his election to proceed in this matter.

In March Respondent's motion to dismiss was denied and he was given twenty days to plead further which he did on March 14, denying that he

had received prior notice of violation and that he had used an illegally constructed system.

ISSUES

Presently we have before us cross motions for summary judgment and Respondent's motion to Dismiss the matter for want of prosecution.

FINDINGS OF FACT

This matter commenced on May 9, 1977 and by official notice was preceded by proceedings regarding a Notice of Violation and Intent to Assess against Respondent (No. SS-MWR-76-231).

The Respondent contested the November 3, 1976 Notice which alleged that, on the same property here in issue, Respondent had unlawfully installed and then unlawfully used a subsurface sewage disposal system. The Notice warned of the Department's intention to assess a civil penalty if further use occurred.

The Respondent, on November 19, 1975, installed a subsurface sewage disposal system without a permit having been issued pursuant to ORS 454.655. The system was installed at 88838 Hale Road, Noti, Oregon (T7S,R6W, Sec.30, TL100).

On November 5, 1975, Respondent had applied for a Report of Evaluation of Site Suitability. He learned thereafter that a certain part of his property had soils and other natural characteristics suitable for the installation of a subsurface sewage disposal system.

On or before November 19, 1975, Respondent mailed the requisite fee and application for a construction permit and, without waiting for an answer to his application, commenced construction of a system, completing the job on November 19, 1975.

On November 18, 1975, the Department, inferrably by mail, issued a Report of Evaluation of Site Suitability indicating a limited area of Respondent's lot was suitable for placement of a system, if minor partitioning occurred.

On November 24, 1975, the Department denied Respondent's permit application on the ground that Respondent had not complied with the Lane County Code and, therefore, did not comply with OAR 340-71-015(4). There is no indication that Respondent was advised of his right to a hearing pursuant to ORS 454.655(7)(c). He never requested one until he was later advised of his right to one pertaining to a remedial action order as set forth below:

Upon completing construction, on November 19, the Respondent notifed the Department or its contract agent in Lane County that his system was ready for an inspection. More than seven days elapsed without such an inspection so Respondent covered the septic tank and drainfield and connected the septic tank to a mobile home.

On November 27, 1975, Respondent hooked the system to a mobile home on the property and his tenants moved into it.

The Department, on July 20, 1976, served upon the Respondent a Notice of Violation and Order Requiring Remedial Action requiring him to abandon the subsurface sewage disposal system and informing him of his right to a hearing. Respondent engaged in the hearings process by demurring to the Notice and, the demurrer having been overruled, filing an Answer on October 6, 1976. Prior to hearing, on November 2, 1976, the Department withdrew its order.

On November 3, 1976, Respondent was served by mail with a Notice

of Violation and Intent to Assess Civil Penalty which alleged unlawful installation and unlawful use of the disposal system. Respondent demurred to it and the demurrer was ruled inappropriate on the ground that such a Notice cannot be tested by demurrer.

CONCLUSIONS OF LAW

Respondent's motion for dismissal for want of prosecution should be denied.

Respondent has violated OAR 340-71-017(3) and ORS 454.665(3) in his use of a subsurface sewage disposal system installed after the effective date of ORS 454.655 and ORS 454.665 without having obtained a certificate of satisfactory completion therefor.

The violation set forth above entitles the Department to assess a civil penalty in such an amount as might appear reasonable in consideration of such aggravating or mitigating circumstances as were present.

The record supports summary judgment on both the issue of whether a violation occurred and the issue of what amount of civil penalty is appropriate.

The Respondent is liable in the sum of $75. for the violation here in issue.

OPINION

Want of Prosecution

The time it has taken and may yet take for Respondent to get this matter resolved is regrettable but not unreasonable. It can be officially noticed there are, at any given time, some fifty to sixty cases before the agency, some of them involving enormous complexity. The resources

in the Justice Department and in the hearings section simply do not allow the assignment of one person to one case at a time.

Moreover, this matter has involved, on Respondent's part, demurrer to the Notice of Violation which was appealed to the Commission, demurrer to the Notice of Assessment, a motion to Dismiss for failure to state a cause of action, and a motion to dismiss due to Respondent's election to seek resolution of the matter in the Circuit Court of Lane County. Respondent's motion to dismiss for want of prosecution follows upon his own time-consuming insistence upon testing his every procedural right. We do not question the propriety of his doing so but we do reserve unto ourselves the liberty of not dropping other unfinished tasks to immediately respond to each procedural overture that is made by Respondent. We feel the Justice Department is to be allowed the same latitude.

It is to be noted the due date for the filing of Department's motion for summary judgment was a target, not a limit. Had such been the case the Department should have been alerted and given an opportunity for a vigorous display of its reasons for needing additional time. Both Respondent and the Department have shown their genuine concern that the proceedings not be unduly protracted in moving for summary judgment.

The considerations set forth above are not uncommon in administrative law. See e.g. the testimony of Professor Bernard Schwartz Before the Committee on Administrative Tribunals and Inquiries, Minutes of Evidence 1034 (1956):

> "In our experience the rights which individuals have are not insisted upon in every case. If they were to insist upon their full rights in every case, administration would

become impossible, there is no doubt of this whatsoever, because some of our important agencies each render well over a million decisions each year. If you had more than a very small percentage of hearings in the first place and then appeals from the initial decision, and then the oral argument, these agencies would be spending all their time just hearing these cases and they would not be able to get any of their administration tasks done."

While it was felt appropriate to share with the parties what this writer feels are practical matters to be considered in dealing with the Respondent's Motion, we find no basis for granting the motion in law. It is noteworthy that the drafters of the Revised Model State Administrative Procedure Act did not include in Section 15(g) the mandate that the reviewing courts compel action unreasonably delayed. This occurred even though unreasonable delay was one of the ingredients which could trigger judicial review in the analogous section 10(e) of the Federal Act, an Act which was before the drafters of the Model Act.

The Oregon Administrative Procedure Act does not include "unreasonable delay" as a ground for reversal or remand. (ORS 183.482(8).

It does provide for judicial interruption based upon "unreasonable delay." ORS 183.490.

We are aware of no reported Oregon cases holding what amount of time, given the complexity of a given matter, would constitute unreasonable delay under ORS 183.490.

It would appear, however, that an order to proceed with greater alacrity would be more appropriate than dismissal. Bay River v.

Environmental Quality Comm. , 26 Or App 717, 554 Pad 620 (1976).

The interpretation of "unreasonable delay" given the Federal APA by Federal Courts shows a reluctance to set aside orders for delay in matters which, albeit more complex, took considerably longer in their resolution than has the matter at hand taken so far. NLRB v. Mastro Plastics Corp. , 354 F 2d 170 (2d Cir 1965), certiorari denied 384 U.S. 972, 86 S. Ct 1862, 16 L. Ed. 2d 682 (1966). Irish v. SEC , 367 F. 2d 637 (9th Cir 1966), certiorari denied 386 U.S. 911, 87 S. Ct. 860, 17 L. Ed. 2d 784 (1967).

We note the Supreme Court has gone out of its way to warn against the accumulation of a backlog of cases to the irreparable injury of the parties. FPC v. Hunt , 376 U.S. 515, 527, 84 S. Ct. 861, 11 L. Ed. 2d 878 (1964).

We've been made aware of no threat of irreparable injury here in play.

Analogizing with ORS 18.260 (though we make no conclusion that it applies to the present proceeding) we note that we are unaware of any one year period in the history of this case in which action due from the Department has not been forthcoming.

Moreover, a dismissal on similar grounds would require the Department be given opportunity to explain delay. We could do such with regard to Respondent's Motion but we are confident the net result would simply be more delay.

We do not close the door on the notion that it may one day, as a matter of equity, be appropriate to dismiss a pending matter for want of prosecution. It does not seem appropriate here.

Finally, we find the criminal matter of State v. Downey (4 OR App 269 (1970) upon which Respondent relies in support of his motion to be out of point in this civil matter.

Failure To Obtain A Certificate

The Department, in support of its motion for summary judgment, correctly points out that both ORS 454.665 and OAR 340-71-017(2) provide for issuance of a certificate by fiat if inspection of a newly installed system does not occur within seven days after notification by the permit holder . We have no permit holder here.

It could be argued with some force that the Department missed the mark in choosing use without a certificate as the object of a civil penalty when installation without a permit was the real sin. That is, the purpose of the certificate might well be confined to assurances as to how a system was installed, not where it was installed. This would give the Department little reason to allow the seven day period to elapse and then quibble about failure to obtain a certificate when failure to obtain a permit (where the system was installed) is the gravamen.

However, there are other, pursuasive factors involved. First, the public time should not be spent on inspecting installations where there is no assurance the system, no matter how adequately installed, was installed in a suitable location. Second, the use of a system that may be installed in an unsuitable location is conduct which completes the risk that environemntal hazard will occur.

The law and the Department's rules give ample warning in this regard. ORS 454.665(3) provides that, without the certificate, no person

shall use or operate a system installed pursuant to a permit. It would trifle with logic to say one may use an unpermitted system without the certificate. The Department's rule points this out. OAR 340-71-017(3) provides that no system (permitted or unpermitted) installed after January 1, 1974 can be operated or used without a certificate. While ORS 454.665(3) merely implies authority to adopt such a rule, ORS 454.615(2) gives explicit authorization for rules prescribing minimum requirements for the operation and maintenance of systems.

Receipt of Notice

The file in this matter indicates the Respondent demurred to a Notice of Assessment of Civil Penalty No. SS-MWR-76-231 and recited in his demurrer that it was dated November 3, 1976 and received November 8, 1976.

The file contains a copy of a Notice of Violation and Intent to Assess Civil Penalty No. SS-MWR-76-231 dated November 3, 1976, a copy of a Certificate of Service (by mail) dated November 3, 1976, and a copy of Post Office Return Receipt indicating delivery to one R. J. Wright at 88838 Hale Road, Noti, Oregon 97461. The inference is compelling that Respondent was notified more than five days prior to November 15, 1976.

Respondent was notified that his continued use of the disposal system here in issue would beget the civil penalty here in issue. ORS 468.125 was adequately served thereby. Fact finding has appropriately been offered in summary fashion on this issue. The sufficiency or insufficiency of the December 3, 1975 Notice to Abate Violation exhibited in Respondent's Response to Department's Motion for Summary Judgment is immaterial to this issue as is the manner of its service upon Respondent

with unofficial use of his mailbox.

Propriety of Permit Denial

Department's own Exhibits setting forth the denial of Respondent's application for a permit to install the system (apparently on a multi-use and multi-user format) have been scrutinized. No where have we been able to find a statement of Respondent's right to a hearing. We dwell on this here and will dwell on it again below. Suffice it to say we are not by this writing concluding that the Department acted correctly in denying Respondent's permit. We simply point out that, whatever remedy or remedies were available to the Respondent, to simply ignore the denial and commence to use the system was not a legitimate avenue of redress.

The Scope of This Proceeding

There is sufficient ambiguity in the Department's Notice of Violation and Intent to Assess and, to a lesser degree, in Respondent's Answer to it for hesitancy in concluding as the Department concludes, that the only remaining issues are with regard to whether Respondent was served with a Notice of Violation and Intent to Assess a Civil Penalty and whether a certificate of satisfactory completion was issued by operation of law.

OAR 340-11-107 provides, inter alia , with regard to the filing of an Answer that factual matters not controverted shall be deemed admitted.

Among the matters in the Notice of Violation and Assessment of Civil Penalty which was given over to Respondent to either "controvert" or admit was the "form letter" allegation of paragraph V wherein the Director recited his consideration of whether there were prior violations, whether the Respondent took appropriate steps to correct the violation,

the Respondent's financial conditions, the gravity of the violation, whether the violation was repeated or continuous, whether Respondent acted negligently or willfully, the degree of difficulty in correcting the violation, and the cost of correcting the violation to the Department.

ORS 468.130 provides the Commission shall consider the following factors:

(a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules, orders and permits pertaining to water or air pollution or air contamination or solid waste disposal and

(c) The economic and financial conditions of the person incurring the penalty.

The Commission was granted broad rulemaking powers to adopt a schedule or schedules establishing the amount of a civil penalty that may be imposed for a particular violation. ORS 468.130.

Added to the statutory list of circumstances to be considered were those alleged by the Director which are not listed in ORS 468.130. OAR 340-12-045.

While the Respondent did not deny paragraph V of the Notice, he is deemed, in some respects, to have controverted it.

First of all, it is understandable that the Department, faced with enforcement duties calling for hundreds of Notices of Assessment such as the one here in issue, most of which never go to hearing, would find it appropriate to plead aggravating or mitigating circumstances in a

general fashion in each case.

However, a Respondent, faced with such general allegations, is free to move to make them more definite and certain. The Grogg House , Inc. v. OLCC , 12 Or App 426, 507 Pad 419 (1973). If he does not, he operates at a disadvantage in deciding whether to deny the allegations.

Moreover, here, Respondent raised as an affirmative matter the factual allegations that farm use was to be accomplished with the property in issue, that fees for an inspection and permit were paid, that the system was installed in accord with the Department's specifications, and that the Department was asked to conduct a cover up inspection and declined.

We cannot rule that Respondent was required to elect to make such allegations either as a complete defense, or by way of mitigation. They can fairly be construed as a claim that, even if a technical infraction occurred, it was preceded by the Department's mistaken conviction that a permit should not issue. (The issue of whether partitioning of farm property could be required has been exhaustively dealt with both before and after the answer was filed and Respondent's answer kept it alive.)

Also implicit are the claims that what was done was done in the open with no intent to secretly avoid the requirements of the law, was accompanied by no environmental danger, and was done without knowledge that certificate had not issued by operation of law.

When the Department urges that the amount of civil penalty (if any) is not in issue, it urges us to grant partial summary judgment on paper evidence that an infraction occurred and to judge merely on the pleadings that $250 is the correct and uncontested amount that should be assessed for the infraction.

Judgment on Pleadings is not favored in the law. Cole v. Zidell Explorations, Inc. , 275 Or 317, 550 P. 2d 1194 (1976). It is not necessary to go as far as Professor Davis and conclude that "the most important characteristic of pleadings in the administrative process is their unimportance" in order to find it appropriate to question whether the record will support summary judgment as to the amount of the penalty here in issue. Davis, Administrative Law Text 196 (1972).

The question of law arises as to whether the penalty should be $250 even if the record supports the presence of each of the Respondent's contentions as mitigational factors. We do not believe so.

First of all, it is not before us to consider the equities to be drawn between the Department's alleged misconduct and the Respondent's alleged misconduct. The Respondent has not moved to make more definite and certain the Department's general allegations as to prior violations by the Respondent. They are properly in consideration. OAR 340-12-045. The record clearly supports the inference that between November 27, 1975 and November 14, 1976, Respondent had a dwelling hooked up to a subsurface sewage disposal system in violation of the law. It does not indicate that the Department informed him that each day's use was a violation of the infraction here charged until November 3, 1976. At that time the Respondent was notified of this and notified that he would incur a penalty if the violation continued for more than five days (after November 8, 1976). The infraction here complained of implicitly carrys with it five previous days of violation which can be weighed against the Respondent. OAR 340-12-060 sets as the minimum $25 per day that could be assessed in this matter if the Department sought a penalty for each day's violation.

To be considered in addition to the five days of violation is the act of installing a system without a permit. The record supports the inference that the Respondent installed the system in the expectation that a permit would be forthcoming in the mail. He did not intend to hide the system. To the contrary, he advised the Department of its installation, expecting a cover up inspection. We are unable to find in the Department's evidence that Respondent was offered a contested case hearing when the permit was denied.[1] Therefore, we do not assume that Respondent was unwilling to test, through the hearings process, his contention that the permit was wrongfully withheld or that he was unwilling to abide by whatever might be the final outcome. The record does support an inference that Respondent has steadfastly sought a forum in which to test his conviction and may well have disregarded the Notice of Intent to Assess in an effort to find a forum here.[1]

We are unaware of any case in which the Department, after having discovered a system was installed before its permit was mailed to the applicant, has assessed a civil penalty. The Department's evidence indicates such activity is contemplated on the part of some citizens because a form warning was used in which Respondent was cautioned that construction performed before the permit was issued would be at Respondent's own risk.

There is another aspect of Respondent's answer that goes to the gravity and magnitude of the violation. The record supports an inference that Respondent's system was installed in proper soils and that, but for the land use concern, the system posed no problem. There can be inferred in Respondent's activity no threat of pollution or danger to the public

health and safety.

Because of the circumstances set forth above, we cannot conclude that Respondent's use of the system was attended by particularly aggravating circumstances or that the Department is entitled to a civil penalty of more than $50 in excess or the $25 minimum set forth in OAR 340-12-060. In another circumstance, it might prove appropriate to allow the Department to present whatever evidence or additional argument it may have since our review of the record for aggravating circumstances has disclosed matters of concern not specifically brought to the Department's attention. However, to expedite matters and to minimize the amount of arduous procedure that follows upon an issue involving relatively little money, we leave it to the Parties to seek remand from the Commission should either of them wish to present additional evidence. Respondent has indicated that, shortly after the Notice of Violation and Assessment, he removed the system. We do not see what policy is to be served by belaboring this matter further.

Respondent's prayer for fees in costs, as is inherent herein, is not well taken.

Sincerely,

Peter W. McSwain

Peter W. McSwain

PWM:vh

[1]We are unable to ascertain that Respondent was initially offered a contested case hearing to test his contention that the denial of the permit was "improper." We do know that he sought to test this conviction when a remedial action order was sought. It was withdrawn. He sought to test it by demurring to the Notice of Violation and Intent and was told, in so many words, that the adequacy of that notice was not to be tested by a hearing process unless a civil penalty followed upon it. He sought to test it in Court and was told he had not exhausted his administrative remedy. He seeks to test it here and is being told the issue is not whether the denial was a mistake but whether use without a certificate is a mistake where there is no permit. It may be that Respondent left his system intact long enough to incur the civil penalty in another hapless attempt to find a forum in which to test his conviction that his subsurface sewage disposal permit could not be withheld to enforce "land use" provisions of the County Code. Respondent's contention is not frivolous. See e.g. Footnote [1] in Eagle Creek Rock Products, Inc. v. Clackamas County , 27 Or App. 371, 373_____ P 2d_____ (1976). See also the response of some courts to use of the exhaustion doctrine to exhaust petitioners. Cooper, State Administrative Law , Vol II, p 585 (1965). Suffice it to say that an arduous attempt to redress, through what are thought to be appropriate channels of litigation, what is sincerely felt to be an oversight of government, is not be categorized as a failure of cooperation in correcting a violation.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department	)	
vs.	)	ORDER NO. SS-MWR-77-99
ROBERT J. WRIGHT Respondent	)	

The Commission hereby orders, through its hearings officer, that Respondent, Robert J. Wright, is liable to the State of Oregon in the sum of $75.00 and that the State have judgment for and recover the same pursuant to hearing on a civil penalty assessment by the Director of the Department on May 9, 1977.

The Commission hereby further orders that if neither a party nor the Commission requests review of this Order within 14 days of its service upon them, this Order shall become a Final Order of the Environmental Quality Commission and shall have added to its caption the words, "NOW FINAL," and, if unsatisfied for more than 10 days after becoming final, may be filed with the clerk of any county and have executions issued upon it as provided by ORS 468.135.

Dated this 14th day of December, 1978.

Respectfully submitted,

Peter W McSwain

Peter W McSwain

Hearings Officer

CERTIFICATE OF SERVICE

(Mail)

STATE OF OREGON)
) ss
COUNTY OF Multnomah)

I, Carol A. Splettstaszer, being a competent person over the age of eighteen (18) years, do hereby certify that I served Robert J. Wright (Name of Party) by mailing by certified mail to Same (Name of Person to whom Document addressed)

(and if not the party, their relationship)

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER
(Identify Document Mailed)

I hereby further certify that said document was placed in a sealed envelope addressed to said person at 88838 Hale Road, Noti, Oregon 97461 his last known address, and deposited in the Post Office at Portland, Oregon, on the 19th day of December, 19 78, and that the postage thereon was prepaid.

Carol Splettstaszer
Signature

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

DEPT. ENV. QUALITY Department vs ROBERT J. WRIGHT Respondent	No. SS-MWR-77-99 REQUEST FOR COMMISSION REVIEW ACCOMPANIED BY EXCEPTIONS AND ARGUEMENT.

(1) Respondent takes exception to the following findings of fact. On page three (L. 17-18) of the proposed Order

" The system was installed at 88838 Hale Road Noti, Oregon"

ARGUEMENT

Such reference would lead the Appellate Court to possibly misunderstand that the installation was within a city or town street address rather than a rural farm route. For a clear understanding it is requested that the address be enlarged to indicate a farm of 62 acres as shown on the application. Different laws apply to farms and it is important to get a rural impression from the very begining of the review. The system was further installed pursuant to ORS 454.655(7) The reviewing court must know from the beginning that this was a farm of 10 acres or more.

11

Respondent takes exception to the terminology used in the proposed Order on page 3 line 17 to 18 as follows:

" On November 27, 1975, Respondent hooked the system to a mobile home on the property and his tenants moved into it"

The above language should be changed to reflect the truth which was as follows:

On November 27, 1975, Respondent hooked the system to a mobile home that Respondent purchased and his farm hands move into it.

ARGUEMENT

The record does not support the finding that Respondent had rent paying tenants or the implication that the mobile home was owned by others.

111

Respondent takes exception to the conclusion of law that Respondent has violated OAR 340-71-017(3) and ORS 454.665(3)

ARGUEMENT

ORS 454.665(3) No person shall operate or use any subsurface sewage disposal system, alternative sewage disposal system or part thereof unless a certificate of satisfactory completion has been issued for the construction for which a permit was issued under ORS 454.655

(4) Whenever the department refuses to issue a certificate of satisfactory completion pursuant to this section, the permit holder may appeal the decision in accordance with the provisions of ORS Chapter 183"

It is important for the reviewing tribunal to fully understand that ORS 454.655 governs the issuance of "PERMITS" and ORS 454.665 governs the issuance of "CERTIFICATES OF SATISFACTORY COMPLETION"

SUMMARY OF ARGUEMENT

The findings of ultimate facts do not support the conclusion that a violation occured. A better understanding of the case is had by review of the statutory requirements for a PERMIT and the steps taken by respondent to get one.

The evidence supports the general finding that on November 5, 1975, Respondent made application for a permit to construct a subsurface sewage disposal system on a parcel of 62 acres and the application clearly stated the purpose was for farm use and the $75.00 fee was paid.

The site was inspected and approved by the November 18, 1975 site suitablility report.

NEXT STEP

Since the site was approved and inspected for soil suitability the permit was issued by operation of the law.

> ORS 454.655(5) (b) if within 20 days of the date of of the application the department failes to issue or deny the permit or to give notice of conditions preventing such issuance or denial, the permit shall be considered to have been issued"
>
> [Emphasis s upplied]

What the legislature giveth, the department can not taketh away. The department clearly had 20 days to serve notice of hearing and state their reason for the denial or give notice of conditions preventing such issuance. The site suitability report indicated no conditions that would prevent construction. No Notice of hearing was ever served upon Respondent in the manner required by law and the hearing officer agrees. (P. 10 lines 2-11)

Since the permit was by law, deemed to have been issued, the evidence will not support the finding that no permit was issued. Without proper notice, Respondent was not under any restriction to not proceed with construction. Procedural due process falls within the 14th Amendment to the federal Constitution.

Vol 2 Am Jur 2d 1972 cumulative supplement July 72 to July 73

§ 398 Necesity for notice and hearing
Agency loses jurisdiction and orders a nullity.

§ 399 Administrative proceedings effecting a parties rights which do not afford an opportunity to be heard are arbitrary and thus within the Constitutional provision prohibiting the exercise of arbitrary power.

Title 5, U.S.C.A. § 554 (b)

Persons entitled to notice of an agency hearing shall be timely informed of:
(1) The time and place and nature of the hearing.
(2) The legal authority and jurisdiction under which the hearing is held; and
(3) The matter of fact and law asserted.

Oregon law (ORS 183.415) follows the federal law as to notice, hearing and record in contested cases.

Respondent's demurrer should have sustained. without proper notice or hearing with respect to the denial of the permit, the agency lost jurisdiction and the permit was granted by operation of the law.

NEXT STEP

Since the application for a permit indicated 62 acres and for farm use. ORS 454.655(7)(b) becomes operational.

" ORS 454.655(7)(b)

(7) With respect to an application for a permit for the construction and installation of a septic tank and necessary effluent sewer absorption facility for a single family residence or for a farm related activity on a parcel of 10 acres or more described in the application by the owner or contract purchaser of the parcel, the Department of Environmental Quality:

(b) In any notice of intent to deny an application, shall specify the reasons for the intended denial based upon the rules of the environmental Quality Commission for the construction and installation of a septic tank and necessary effluent sewer and absorption facility or based upon the factors included in paragraphs (a) to (j) of subsection (2) of ORS 454.685 "

[Emphasis supplied]

The construction permit was applied for and the $25.00 fee was paid. (p.2 lines 23-26) The construction permit was deemed to have been granted by operation of the law and conforms to the findings of fact on (p. 3- lines 5through 16)

ORS 454.665 (1) Upon completing the construction for which a permit has bee n issued under ORS 454.655, the permit holder shall notify the department of Environmental Quality. The Department shall inspect the construction to determine if it complies with the rules of the Environmental Quality Commission.

If the construction does comply with such rules, the department shall issue a certificate of satisfactory completion to the permit holder***"

(2) If the inspection required under subsection (1) of this section is not made within seven days after notification by the permit holder, a certificate of satisfactory completetion shall be considered to have been issued.

(4) Whenever the department refuses to issue a certificate of satisfactory completion pursuant to this section, the permit holder may appeal the decision in accordance with the provisions of ORS Chapter 183"

[Emphasis supplied]

IV

Respondent also takes exception to the conclusion of law as to Respondent;s motion for dismissal for want of prosecution, and the imposition of a fine of $75.00

ARGUEMENT

The findings of fact on page 3 of the proposed order clearly indicates that on November 27, 1975, Respondent hooked the system to a mobile home. (p.3, L. 17) The mobile home belonged to the Respondent and [his] farm hands moved into it. They paid no rent.

From November 27, 1975, to July 20, 1976 (eight months later) The Department issued a notice of violation and immediatly prior to a requested hearing, withdrew the Order and dismissed the action at their own request. (p.3, L. 19-25).

Knowing that a permit had been applied for and a construction permit had been applied for and the required fees paid, It would be unconscionable to wait eight months before prosecuting a known violation if a violation had in fact occured.

> ORS 183.490 The Court may, upon petition of as described in ORS 183.480, compel an agency to act where it has unlawfully refused to act, or unreasonably delayed action"
>
> ORS 183.495 Upon judicial review of a final order of an agency when the reviewing court reverses or remands the order it may, in its discretion, award costs, including reasonable attorneys fees, to the petitioner to be paid from funds appropriated to the agency"

Petitioner already has one judgment against the agency for costs awarded by the Court of Appeals and another one appears likely, should appeal become necessary. This was a farming operation and

and the warning issued by the Supreme Court in FPC v. Hunt, 376 U.S. 515, 527, 84 S.Ct. 861, 11 L. Ed. 2d 878 (1964) and refered to in the proposed Order at page 7 line 10 fits this case. The threat of irreparable injury is fully apparant on the face of the record. A farm can not operate without labor and when you undertake to run off the farmer's labor force resulting from agency action, you cause the farm to lie dormant until the dispute is resolved. The agency took eight months to bring the action, dismissed it and then renewed action wich still continues and the farm has lied dormant with no crops produced from November 3, 1976 when the department served notice of a violation and intent ot assess a civil penalty.

From November 1976 to December 1979 is a long time for a farmer's land to lay idle as a direct result of the departments failures.

When you finally consider that this whole episode started because the Department insisted that the farmer partition his land as if the department had the authority to order such partitioning, you begin to realize th absurdity of the whole proceeding.

Not wanting good agricultural ground to go unproductive, this Respondent gave in and requested partitioning of his farm land so he could get his farm labor back. (1978)

Gues what ? The County said in an FF20 zone, no partitioning would be allowed for anything less than 20 acres and you must have 20 acres remaining or you cant partition.

The Legislature in it's wisdom must have forseen the absurdity that this case presents and enacted the provisions of ORS 215.253. Read it. Agriculture is of state wide interest and rises above the

the department's demands for the partitioning a good farm land just because a farmer wants to provide housing for his farm hands.

It's assinine to demand the partitioning of farm land as a pre-requisite to the issuance of a permit or a prerequisite to the issuance of a certificate of satisfactory completion and then to impose a fine for somthing that the law forbids. How can you partition a 25 acre tract in a FF20 zone ? (a county road divides property.

The Department should have looked after their interest in regards to septic tanks and left the partitioning to the county to enforce. The County can not enforce partitioning of farm land either, because the County has no jurisdiction over agriculture.

To say that agriculture is of local concern or control is equaly assinine under the provisions of ORS 215.253 and further legislative intent is fully expressed in ORS 446.105 (4)

> ORS 446.105(4) Buildings, tents or mobile homes maintained or permitted to be maintained by persons on their own or leased premises and used exclusively to house their own or their contracted farm labor are not subject to ORS 446.002 to 446.200 and 446.220 to 446.280

The D.E.Q. had no jurisdiction to demand partitioning of farm land. The permit was issued by law and the certificate of satisfactory completion was issed by law whether the agency issued it or not. an eight months delay in filing the action was unreasonable and the continuance of the action was without probable cause. Respondent's demurrer to all of these activities should have been sustained and if the proposed Order is not revised, an appeal to the Court of Appeals is guaranteed.

Respectfully

Robert J. Wright

cc: Attorney General

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, vs. ROBERT J. WRIGHT, Respondent.	No. SS-MWR-77-99 DEPARTMENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE.

This case is before the Commission on Respondent's request that the Commission review Hearing Officer Peter McSwain's Proposed Findings of Fact, Conclusions of Law, and Final Order dated December 14, 1978, which assessed a $75 civil penalty upon Respondent for operating and using a subsurface sewage disposal system without first having obtained a certificate of satisfactory completion. ORS 454.665(3) and OAR 340-71-017(3).

Hearing Officer McSwain issued his decision in response to separate motions for summary judgment and supporting affidavits filed by the Respondent and the Department respectively. Therefore, no fact-finding hearing has been held. The underlying contested case arises out of the assessment of a $250 civil penalty by notice No. SS-MWR-77-99 against Respondent for the above referred to violations. This case has previously

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been before the Commission on Respondent's demurrer to the Department's Notice of Violation and Intent to Assess Civil Penalty No. SS-MWR-76-321. The Commission affirmed Hearing Officer McSwain's action overruling Respondent's demurrer.

II. FACTS.

Except for Respondent's insistence that Hearing Officer McSwain's proposed findings of fact include some minor additions, the facts are not in dispute and are well stated in the proposed findings.

III. ISSUES PRESENTED.

Although throughout the proceedings Respondent has raised various issues, he has limited himself in this appeal to raising only four exceptions to Hearing Officer McSwain's decision.

The first two exceptions involve Respondent's contentions that the findings of fact should also include references to (1) the property in which the system was installed as being "a farm of 62 acres" and (2) the mobile home which was served by the system as being purchased by Respondent and moved into by his farm hands. The Department has no objection to the Commission adding those references to Hearing Officer McSwain's proposed findings.

The remaining contentions raised by Respondent are

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those identified as III and IV in his Exceptions at pages 2 and 6. Those raise the following legal issues:

A. Whether Respondent was issued a certificate of satisfactory completion by operation of law; and

B. Whether the Department's Civil Penalty should be dismissed for want of prosecution.

IV. SUMMARY OF ARGUMENTS.

No certificate of satisfactory completion was issued, by operation of law or otherwise. The Department's civil penalty should not be dismissed for failure to prosecute.

V. ARGUMENT.

A. NO CERTIFICATE OF SATISFACTORY COMPLETION WAS ISSUED.

The Department has previously stated its argument on this matter in its Memorandum in Support of Department's Motion for Summary Judgment. Rather than repeat that argument here, I have attached a copy of the memorandum hereto and refer you to that argument at pages 7-12.

Hearing Officer McSwain found in favor of the Department on this issue.

In Respondent's Response to Department's Motion for Summary Judgment and in his own Motion for Summary Judgment and supporting affidavits, Respondent based his argument solely on the Department's failure to inspect his system within seven days of his request. At no point did he argue

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that he had obtained a permit by operation of law. However, now that Hearing Officer McSwain has ruled that the 7-day rule does not apply unless one holds a permit and that Respondent is not a permit holder, Respondent has manufactured two new arguments not previously raised or argued to attempt to show that he obtained a permit by operation of law.

Because these are new issues not previously raised before Hearing Officer McSwain, neither the Department nor Hearing Officer McSwain has had an opportunity to deal with these arguments prior to the issuance of the proposed decision. Therefore, Respondent's arguments are not timely raised. To consider them now would violate basic principles of orderly adjudication which require a litigant to raise all of his arguments before the trial judge or hearing officer prior to issuance of the initial decision. This requirement allows the opposing party a reasonable opportunity to present contrary evidence and arguments and allows the initial decision maker to make a reasoned initial decision based upon all the relevant evidence and arguments. Such an initial decision can also be of immeasurable assistance to the ultimate decision-making body, the Commission. It assures the Commission of the initial impartial analysis of its Hearing Officer based on all the evidence and arguments. The

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raising of a contention for the first time before the Commission rather than before its Hearing Officer can fairly be described as "sand bagging." Respondent had his chance to raise the issues before Hearing Officer McSwain and get a ruling on his contentions. Respondent failed to assert his contentions before Hearing Officer McSwain. Respondent waived his right to raise those issues.

However, even if the Commission deals with Respondent's contentions on the merits, the Commission should conclude that there is no merit in Respondent's contentions for the following reasons.

Respondent contends that he was issued a permit to construct a subsurface sewage disposal system by operation of law on two theories. First, he asserts that the Department failed to deny his application for a permit within 20 days, as required by ORS 454.655(5)(b), and therefore a permit is deemed to have been issued. Second, he contends that because the Department's notice of denial did not expressly indicate that Respondent had a right to request a hearing, the Department therefore "lost jurisdiction" to deny the permit and it was deemed to have been issued. Respondent's arguments fall short of the mark on both counts.

Regarding the 20-day rule, in the first place, it commences to run only once an application for a permit to construct a subsurface sewage disposal system is filed.

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ORS 454.655. It does not run from the filing of an application for a site suitability evaluation report under ORS 454.655(6)and 454.755. The latter statute provides an entirely different time schedule. Payment of the site suitability fee "shall entitle the applicant to as many site inspections as is necessary within 90 days. . . ." ORS 454.755(3). Of course, the 90-day requirement is entirely inconsistent with a requirement that such an application be denied within 20 days, as Respondent contends. Clearly, the 20-day requirement applies only when an application for a construction permit and the full fee have been filed.

The record indicates that Respondent's application for a permit to construct a subsurface sewage disposal system was not filed until November 20, 1975. Burns Affidavit, pp. 2-3. Hearing Officer McSwain found, and Respondent does not contest, that the Department denied Respondent's permit application on November 24, 1975, clearly within the 20-day limit. Furthermore, even if you should consider Respondent's application for a site suitability evaluation report as an application for a permit, the denial would still be timely. Hearing Officer McSwain found, and Respondent does not contest, that Respondent's application for a site suitability evaluation report and fee were filed on November 5, 1975. Of course, November 24, 1975, the date of permit denial, was only 19 days after November 5, 1975, and therefore it was a

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timely denial. ORS 174.120.

Finally, if Respondent truly thought that he was entitled to a permit by operation of the 20-day requirement, then when his permit application was denied on November 24, 1975, he had a remedy. Respondent at that point had the right to request that a contested case hearing before the Commission or one of its hearing officers be held on the sole issue of whether or not a permit should have been issued pursuant to his application. ORS 454.655(7)(c). That statute requires a request by the applicant: "(7) . . . the Department of Environmental Quality: . . . (c) Upon request of the applicant, shall conduct a hearing. . . ." (Emphasis added.) Respondent made no timely request; therefore, no hearing was held. If a hearing had been held, it would have been a contested case, subject to judicial review in the Court of Appeals. ORS 454.655(7)(c), 454.635(5), 183.482. Respondent failed to exhaust his administrative remedies to contest the denial of his permit application.

That conclusion is not affected by Hearing Officer McSwain's finding that the denial was not accompanied by an invitation to Respondent to request a hearing on the matter. The statute, ORS 454.655(7)(b), does not require such an invitation. All that subsection requires is as follows:

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"(7) . . . the Department. . .:

. . . .

"(b) In any notice of intent to deny an application, shall specify the reasons for the intended denial based upon the rules of the . . . Commission . . . or based upon . . . paragraphs (a) to (j) of subsection (2) of ORS 454.685."

It contains no requirement that the applicant be expressly informed of his right to request a hearing. The Department's notice of denial, which is in the record identified as Exhibit D to the Affidavit of Roy Burns, fully complied with ORS 454.655(7)(b) by specifying the reason for the denial and citing OAR 340-71-015(4) as its basis. If Respondent wanted a hearing on the denial, he could have requested one. The outcome of the hearing would have been subject to judicial review in the Court of Appeals. ORS 183.482.

Respondent complains that he was not given a contested case hearing, and therefore, the Department lost jurisdiction and the permit was issued by operation of law. Respondent cites no specific law which requires that result. In fact, there is none. To the contrary, the Department's action is presumed valid unless and until successfully challenged in the appropriate forum. The appropriate proceeding to advance a claim that an agency failed to provide a required contested case hearing is a petition for judicial review filed in an appropriate circuit court

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seeking an order from the court requiring the agency to hold a contested case hearing. ORS 183.484; Fadely v. Oregon Ethics Comm., 25 Or App 867, 869, 551 P2d 496 (1976); Fadely v. Ethics Comm., 30 Or App 795, 798, 568 P2d 687 (1977). Such a petition must be filed within 60 days. ORS 183.484(2). By failing to assert his rights in a timely fashion Respondent has waived those contentions.

As Hearing Officer McSwain pointed out at page 10 of his opinion, ". . . whatever remedy or remedies were available to the Respondent, to simply ignore the denial and commence to use the system was not a legitimate avenue of redress."

B. THE DEPARTMENT'S CIVIL PENALTY SHOULD NOT BE DISMISSED FOR WANT OF PROSECUTION

Respondent filed a Motion to Dismiss for Failure to Prosecute on or about September 21, 1978. In its motion Respondent did not set forth any facts showing that he had suffered any prejudice by the delayed resolution of this case.

Based on the absence of any prejudice and based also on long periods of delay directly attributable to Respondent, Hearing Officer McSwain proposes to deny the motion. Proposed Findings of Fact, etc., pp. 4-8.

Under the guise of making an argument in his Exceptions, etc., that Respondent was prejudiced by the delay, Res-

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pondent has attempted to interject new evidence into the record. Although Respondent could have supported his Motion to Dismiss for Failure to Prosecute with affidavits setting forth new facts (as he did regarding both his and the Department's motion for summary judgment), he did not do so. Instead, he chose to attempt to present new facts into the record for the first time in his brief on appeal.

Respondent's attempt to interject new facts into the case at the Commission review stage should be rejected for several reasons. First, to allow such a procedure would violate basic principles of orderly adjudication which require litigants to present all their evidence to the hearing officer before he makes his initial decision. This is necessary in order to provide the parties a meaningful opportunity to prepare cross-examination and present contrary evidence. ORS 183.415(3), 183.450(3). It also serves the important function of helping assure a reasoned initial discussion, as discussed above at pages 4-5. Second, Respondent's attempt to interject new evidence violates the Commission's rules of procedure on appeals. OAR 340-11-132 (8) provides as follows:

> "(8) In reviewing a proposed order prepared by a Presiding Officer, the Commission may take additional evidence. Requests to present additional evidence shall be submitted by motion and shall be supported by an affidavit specifying the reasons for the failure to present it at the hearing before the Presiding Officer. If the Commission grants the motion, or so decides of its own motion, it may hear the additional evidence itself or remand

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> to a Presiding Officer upon such conditions as it deems just."

Respondent has not requested to present his new evidence by motion supported by affidavit stating his reasons for failing to present it to Hearing Officer McSwain, as required by the rule. Instead, he has merely asserted new evidence in his argument. Therefore, that new evidence should be disregarded.

The matters of new evidence that Respondent now attempts to place in the record are those assertions found on pages 7 and 8 of Respondent's Exceptions, etc., regarding the alleged "running off" of Respondent's labor force, the alleged causing of the farm to lie dormant, and Respondent's attempts to partition his farm. Those matters should be disregarded. Respondent had an opportunity to present those allegations to Hearing Officer McSwain prior to entry of his proposed decision. Respondent failed to do so and thereby prevented the Department from cross-examining and countering that evidence and also denied Hearing Officer McSwain the opportunity of considering it and ruling upon it. Neither has Respondent given any reason why this material wasn't presented to Hearing Officer McSwain. Rather, he has merely made new factual allegations in his brief without leave of the Commission. Respondent's new allegations should be disregarded.

What remains of Respondent's Exception No. IV are

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(1) a contention that an eight-month delay between November 27, 1975 (the date Respondent's farm hands started using the system), and July 30, 1976, was "unconscionable,"; and (2) an allegation that ORS 215.253 prevents the DEQ from requiring Respondent from obtaining a certificate of satisfactory completion before using a system. Neither contention has any merit.

Regarding the eight-month delay, Respondent has not been assessed a civil penalty for any day during that period. Respondent has not been damaged by that delay. To the contrary, Respondent had free use of his illegal system during that period with no penalty attached. In other words, Respondent has received an unintended windfall benefit during that period.

Regarding ORS 215.253, that statute provides as follows:

> "215.253 Prohibition against restrictive local ordinances affecting farm use zones; exemption for exercise of governmental power to protect public health, safety and welfare. (1) No state agency, city county or political subdivision of this state may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 in a manner that would unreasonably restrict or regulate accepted farming practices because of noise, dust, odor or other materials carried in the air or other conditions arising therefrom if such conditions do not extend beyond the boundaries of the exclusive farm use zone within which they are created in such manner as to interfere with the use

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> of adjacent lands. 'Accepted farming practice' as used in this subsection shall have the meaning set out in ORS 215.203."
>
> "(2) Nothing in this section is intended to limit or restrict the lawful exercise by any state agency, city, county or political subdivision of its power to protect the health, safety and welfare of the citizens of this state." (Emphasis added.)

Even without analyzing the effect of subsection (2), it is clear that subsection (1) does not apply to Respondent's subsurface sewage disposal system. First, there is nothing in the record to indicate that Respondent's property is in an "exclusive farm use zone." Second, neither is there anything in the record to indicate that requiring a person to obtain a certificate of satisfactory completion before using a newly constructed subsurface sewage disposal system would have any affect on any farming practice. Third, "'farm use' . . . does not include . . . the construstion and use of dwellings customarily provided in conjunction with the farm use." ORS 215.203(2)(a). Therefore, the regulation of the construction and use of the subsurface sewage disposal system serving Respondent's farm hands' dwelling is not limited by ORS 215.253.

V. CONCLUSION

For all the above reasons, the Commission should affirm Hearing Officer McSwain's Proposed Findings of Fact, Con-

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clusions of Law, and Final Order and adopt them as the Commission's final ruling in this case.

Respectfully submitted,

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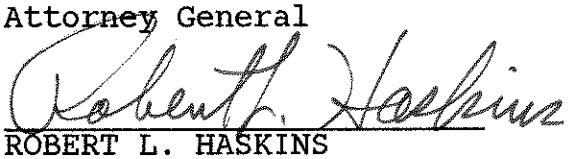
Attorney General



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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. ROBERT J. WRIGHT, Respondent.	)	No. SS-MWR-77-99 CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Department's Answering Brief upon Respondent Robert J. Wright by mailing to him a true and correct copy thereof. I further certify that said copy was placed in a sealed envelope addressed to said Respondent at 88838 Hale Road; Noti, Oregon 97461; his last known address, and deposited in the United States Post Office at Portland, Oregon, on the 19th day of January, 1979, and that the postage thereon was prepaid.

Kathleen T. Holton

KATHLEEN T. HOLTON, Secretary

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file

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

HEARINGS SECTION

DEPARTMENT OF ENVIRONMENTAL QUALITY, OF THE STATE OF OREGON Department, v. ROBERT J. WRIGHT, Respondent.	No. SS-MWR-77-99 MEMORANDUM IN SUPPORT OF DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF THE CASE

This matter is before the Hearings Section on the Department's and Respondent's cross-motions for summary judgment. The underlying contested case arises out of the assessment of a $250 civil penalty by notice no. SS-MWR-77-99 against Respondent for violation of Oregon subsurface sewage disposal laws and administrative rules. This case has previously been before the Commission on Respondent's demurrer to the Department's Notice of Violation and Intent to Assess Civil Penalty no. SS-MWR-76-231. The Commission affirmed Hearing Officer Peter McSwain's action overruling Respondent's demurrer.

II. FACTS

On or about November 5, 1975, Respondent, Robert J. Wright, filed an application with the Department, through its contract agent, Lane County, ORS 454.725, for a report of evaluation of site suitability for a subsurface sewage

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disposal system, pursuant to ORS 454.755. Burns, Aff. at pp 1-2. Respondent also paid the $75 fee therefor. Id.; ORS 454.745; OAR 340-72-010(1). On or about November 18, 1975, the Department, through its agent Lane County, issued a report of evaluation of site suitability for a subsurface sewage disposal system indicating that a limited area of Respondent's lot was suitable for placement of a subsurface sewage disposal system in Respondent's soils, but also indicating that a minor partitioning would be required, and advising Respondent to contact Lane County Planning Division. Respondent was also notified therein that a positive preliminary report did not ensure issuance of a future building permit and that any expenditures Respondent might make in reliance would be at Respondent's own risk. Information regarding the required application for and issuance of a building permit was also included in the report. Burns Aff. at p 2.
Respondent learned of the approval prior to that date. Haskins Aff. at p 2. On November 19, 1975 Respondent completed construction of a system on his lot without waiting to file an application for a DEQ system construction permit, ORS 454.655, OAR 340-71-013, or the required $25 application fee therefor, ORS 454.745, OAR 340-72-010, let alone waiting to obtain such a permit. Haskins Aff. at p 2.

On November 20, 1975, Lane County received Respondent's application for a DEQ system construction permit and the required $25 application fee. Burns Aff. at pp 2-3. On

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or about November 24 and 25, 1975, Lane County denied Respondent's application for a DEQ system construction permit. Burns Aff. at p 3. Respondent received notice of the denial on November 27, 1975. Haskins Aff. at p 3.

Only one construction permit application was made for the subject system. Respondent never filed an appeal of the denial of the permit application before the Environmental Quality Commission, the Department or its contract agent Lane County. Burns Aff. at p 3. Neither has a certificate of satisfactory completion, ORS 454.665, OAR 340-71-017, ever been issued for the construction. Burns Aff. at pp 3-4.

In spite of that, on November 27, 1975 Respondent covered the system, connected it to his mobile home and turned the mobile home over to his farm laborers who then commenced residing in the home and using the system. Haskins Aff. at p 2; Johnson Aff. at p 2.

On or about November 3, 1976, the Department filed with the Environmental Quality Commission and by mail served upon Respondent a Notice of Violation and Intent to Assess Civil Penalty, No. SS-MWR-76-231, which cited as violations Respondent's failure to obtain a permit and a certificate of satisfactory completion, and warning him that the Department would assess a civil penalty should the violations continue or recur five days after receipt of the notice. Respondent received the Notice on November 8, 1976. Respondent's Demurrer [to Department's five-day notice]. Department employee, Daryl Johnson, in-

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spected Respondent's property on November 15, 1976 and found that Respondent's mobile home continued to be resided in and the system continued to be utilized. Johnson Aff. at p 2. Respondent demurred to the Department's Notice of Violation. Hearing Officer McSwain overruled the demurrer and the Commission affirmed.

On or about May 9, 1977, the Department filed with the Commission and served upon Respondent a Notice of Assessment of Civil Penalty, No. SS-MWR-77-99, which incorporated by reference the violations cited in the above-mentioned Notice of Violation and further cited the continued operation on and after November 14, 1976 of Respondent's subsurface sewage disposal system without the acquisition of a valid certificate of satisfactory completion. A civil penalty of $250 was assessed. Respondent again filed a demurrer on May 31, 1977 on "the grounds that there is another action pending between the same parties for the same cause of action and that the complaint does not state facts sufficient to constitute a cause of action." In its Memorandum in support, Respondent cited his filing of case No. 77-2712 in Lane County Circuit Court. On June 2, 1977 Hearing Officer McSwain overruled Respondent's demurrer. Respondent answered denying receipt of the five-day notice, denying the alleged substantive violations and raising as an affirmative defense Respondent's allegation that he had obtained a certificate of satisfactory completion by oper-

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ation of law for DEQ's failure to make a timely precover inspection upon Respondent's request.

III. ISSUES RAISED BY THE PLEADINGS

The only material issues raised by Respondent's answer are:

(1) Whether service of the Notice of Violation and Intent to Assess Civil Penalty was perfected?

(2) Whether Respondent was issued a certificate of satisfactory completion by operation of law, or conversely, whether Respondent's system was operated and used without the benefit of a certificate of satisfactory completion?

No other material issues have been raised. In particular, it is to be noted that Respondent has previously attempted to raise arguments regarding the validity of the Department's denial of Respondent's application for a DEQ system construction permit. See [Respondent's] Request for Review of Proposed Final Order at pp 3-4. (regarding Respondent's Demurrer to five-day notice). However, Respondent has abandoned that claim. It is not raised in any of the pleadings.

IV. DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

A. Nature of the Motion

The purpose of the summary judgment procedure is to eliminate the necessity of hearing evidence when there are no issues of material fact and the only questions that remain are issues of law even though fact issues are formally raised by the pleadings. 6 Moore's Federal Practice 56-63 at ¶56.04[1]

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(2d ed 1976). As Justice Cardozo stated:

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial." Richard v. Credit Suisse, 242 NY 346, 347, 152 NE 110,111 (1926).

In aid of that purpose, each party is allowed to supplement the pleadings with depositions, affidavits, etc., in order to make a prima facie showing of his claim or defense. The party opposing the motion may not rest upon mere allegations or denials of specific facts but rather must submit counter-affidavits etc. to show that there is a genuine issue of material fact for determination at the hearing. ORS 18.105(4); Pelege v. Chrysler, 278 Or 223, 563 P2d 701 (1977); Transnational Insurance Company v. Rosenlund, 261 F Supp 12, 24 (D Or, 1966). If after the submission of affidavits, etc., and counter-affidavits, etc., there remain no issues of material fact, then the adjudicator shall apply the law to the material facts and issue the appropriate decision.

There are no material issues of fact in this case. The Department's allegations are supported by its affidavits. Respondent's allegations are dispelled by the Department's affidavits. Neither does Respondent's affidavit raise any genuine issue of material fact.

B. Respondent Was Served With Notice of Violation

Respondent alleges in its answer that he did not receive the Department's Notice of Violation and Intent to

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Assess Civil Penalty. However, Respondent in his Motion for Summary Judgment does not renew such an allegation and consequently offers no affidavit to support that allegation. Therefore Respondent has waived that allegation, or, in any event, has failed to support it by affidavit.

Furthermore, there appear to be several good reasons why Respondent waived that allegation. First, in Respondent's Demurrer to the Notice of Violation, Respondent expressly admitted that the Notice of Violation was "received by defendant [Respondent] on November 8, 1976 by certified mail." Second, the certificate of service and certified mail return receipt on file in this case confirm service and Respondent's receipt. Third, Respondent's demurrer, answer and motion for summary judgment each constitutes a general appearance and amounts to a waiver of any defect in the process or notice served upon him, and such appearance confers jurisdiction of his person, regardless of the fact that process may not have been served upon him. Smith v. Day, 39 Or 531, 65 P 1055 (1901). ORS 15.030 states, in part: A voluntary appearance of the defendant shall be equivalent to personal service of the summons against him."

C. No Certificate of Satisfactory Completion Was Issued

Respondent claims that he received a certificate of satisfactory completion by operation of law when the Department failed to inspect his system within seven days of his request.

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It is true that a certificate of satisfactory completion is deemed constructively issued if the Department fails to make inspection of a subsurface sewage installation within seven days after notification of completion by the permit holder. ORS 454.665(2); OAR 340-71-017(2). However, the necessary prerequisite of the operation of that statute is absent here. Respondent is not a "permit holder".

ORS 454.665 and OAR 340-71-017 provide the procedures by which a certificate is obtained. The statute and rule are similarly worded. Subsection (1) of the above rule provides, in part:

> "Upon completing the construction for which a permit has been issued, the permit holder shall notify the Department. The Department shall inspect the construction to see if it complies with the rules contained in this division . . .." (Emphasis added)

Under the above rule and statute, a prerequisite to notification and preliminary inspection is the permitted construction of the system. If a system is installed without a permit, no certificate of satisfactory completion may be issued. Subsection (2) of the rule and statute provide for the constructive issuance of a certificate "[i]f the inspection required under subsection (1) is not made within seven days after notification by the permit holder." Without a permit, a certificate cannot be considered under this subsection.

The construction permit procedure by which a system is lawfully installed envisions the applicant making applica-

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tion for a construction permit for which a nonrefundable fee is paid, the issuance of a construction permit by the Department and, following receipt of the permit, construction of the system by the applicant. ORS 454.655, 454.665; OAR 340-71-013, -017. The Department's affidavits establish that Respondent constructed his system before he made his application for a permit therefor. It fairly can be inferred therefrom that Respondent knew that although he had acceptable soils that he would be unable to obtain a permit without partitioning his property or contesting a permit denial based thereon and gaining a reversal thereof. Nevertheless, Respondent intentionally constructed his system before applying for a permit and therefore without following the due processes. Respondent covered the system on the same day that he received notice that his application was denied.

In his answer, Respondent admits to making application for a permit and installing a septic tank and drain field upon payment of the application fee. That Respondent constructed the system without permit is supported by Department's affidavits and is not controverted by Respondent's pleadings or affidavit. At first blush, verbage in Respondent's affidavit to the effect that he had installed the septic tank ". . . pursuant to . . . permit" would appear to raise an issue of material fact. However, law disallowing such conclusory statements in affidavits finds Respondent's averment insufficient to raise a genuine issue of fact.

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Oregon, like most states, has adopted Rule 56 of the Federal Rules of Civil Procedure. ORS 18.105; Pelege, supra, at 278 Or 227, n2. Under this rule, conclusory allegations are inappropriate in affidavits supporting or opposing a motion for summary judgment, and do not establish a genuine issue of fact. 6 Moore's Federal Practice 56-485, at ¶56.15[3], Pelege, supra, at 278 Or 227; Englehard Industries, Inc. Research v. Instrumental Corp., 324 F2d 347, 351 (9th Cir, 1963). Affidavits must set forth "specific" or "evidentiary" facts, not ultimate facts or conclusions of law. Oregon's summary judgment statute, ORS 18.105, requires in subsection (4) that supporting and opposing affidavits set forth "specific facts" as would be admissable in evidence. Respondent's allegation that he installed the septic tank "pursuant to. . . permit" does not set forth specific facts. It is instead a conclusion of law baldly stating ultimate facts going to the very issue to be determined, that is, whether or not the act was permitted. "Ultimate facts are the final facts required to establish plaintiff's cause of action or defendant's defense; and evidentiary facts are those subsidiary facts required to prove ultimate facts." Spooner's Creek Land Corp. v. Styron, 7 NC App 25, 171 SE2d 215, 218 (NC App, 1970); see, Maeder Steel Products Co.v. Zanello, 109 Or 562, 570, 573, 220 P 155, 158 (1924); Oregon Home Builders v. Montgomery Inv. Co., 94 Or 349, 355-357, 184 P 487, 489 (1919). To raise a genuine issue of material fact regarding the permitted nature of Respondent's septic tank installation, he would have to advance specific facts from which could be drawn the legal conclusion that

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a permit was issued, e.g., filing of a completed application, payment of the required fees, and issuance by an authorized person of a document which purports to be a permit, or the passage of the requisite amount of time without action by the DEQ so that a permit is deemed issued by operation of law. Indeed, the specific facts appearing in the Department's affidavits are that such an application was made and that the fees were paid but that the application was expressly denied and that Respondent received notice of denial. These specific facts have not been controverted, and reasonably cannot be.

Other states with statutes similar to Oregon have passed on this issue. In Schau v. Morgan, 241 Wis 334, 6 NW2d 212 (1942), a hospital was sued for injuries to a patient and moved for summary judgment on the ground that the hospital was a charitable institution. Plaintiff's affidavit contained the assertion that the hosptial was not a charitable organization, while defendant hospital supported its motion with documentary evidence of its charitable nature. The court held that the statement in plaintiff's affidavit that the hospital was not a charitable organization was a "conclusion of law" and not "evidentiary fact", as required by summary judgment statute, and therefore created no issue of material fact.

The Pelege, Englehard and Schau cases are applicable to this case. They demonstrate that respondent's averment here under consideration is insufficient to raise a genuine issue of material

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fact. The Department relies upon specific facts established prima facie by its affidavits. Such proof serves to force Respondent to come forth with an affidavit or other proof sufficient to raise a genuine issue with respect to the verity and conclusiveness of the Department's proof that Respondent's application was denied. Pelege, supra at 278 Or 227; Doff v. Brunswick Corp., 372 F2d 801, 805 (9th Cir, 1967). In view of the fact that the source of much of the Department's affidavits is admissions made by Respondent it would appear that counter-affidavits are highly improbable.

V. CONCLUSION

The Department has offered evidence in the form of affidavits which establishes that Respondent constructed a system without a permit, in violation of ORS 454.665(1) and OAR 340-71-013(1), and operated the system without a certificate of satisfactory completion, in violation of ORS 454.665(3) and OAR 340-71-017(3).

There being no genuine issues of material fact raised by Respondent's affidavit, the Department's motion for

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summary judgment should be granted and Respondent's motion denied.

Dated this 12th day of October, 1978.

JAMES A. REDDEN
Attorney General

Robert L. Haskins
Assistant Attorney General
Of Attorneys for Department

Attorney General
500 Pacific Building
Portland, Oregon 97204
Telephone 229-5725

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPT. ENV. QUALITY STATE OF OREGON	)	
	)	No. SS-MWR-77-99
Department	)	
vs	)	RESPONDENT'S REPLY BRIEF
ROBERT J. WRIGHT	)	
Respondent	)	

Respondent's Reply to the Department's Answer should simplify the entire issue. Jurisdiction is the ultimate fact that must be proven. without jurisdiction, the Department's activities are a complete and total nullity. The Department attempts to evade that question as they have evaded it from the very beinging.

(1). The Department has no statutory authority to deny a permit for a subsurface sewage disposal system upon the grounds that partitioning is required.

(2). The first action taken by the department was dismissed by their own motion. The department completely failed to notify the Respondent in the manner required by law that he was entitled to a contested case hearing. Without notice, Respondent was deprived of a federal guarantee. The Department then continued the harrassement by filing new charges. The Department's purpose and objective was to enforce Lane County Planning and Zonning laws. Where is the evidence

necessary to support the charges ? Respondent's activities did not endanger the public's health, safety or welfare. All applications required under the law were made and the necessary fees paid.

Respondent has 24 acres in the piece of ground where the mobile home was sitting for the purpose of housing farm labor. said 24 acres is agricultural ground planted to peppermint. It lies in an FF20 zone which means that the minimum partitioning allowed is 20 acres and you must have 20 acres remaining or the county won't grant partitioning. The Department was demanding partitioning at the same time that the county refused to allow partitioning

A man has a 24 acre lot which he is farming and they come along and demand he partition 20 acres of it just to house his farm labor and for that reason, they refuse to issue the permit and refuse to inspect the installation when it is completed. Fortunatly , the law deems both the permit and the inspection to have been made

This could all have been avoided if the Department stayed within their statutory duty pertaining to septic tank installations for the protection of public's health, safety and welfare, but when they went outside of the scope of their employment and attempted to enforce lane County planning and zoning laws against land under agriculture, they violated ORS Chapter 215.253 . This land was assesed as a farm during the year in question. Now that it is no longer being farmed because of the Department's activities, it is taxed ad-valorum. If such acts are in furtherance of state wide agricultural goals, then so be it. Your going to have to prove to the Court of Appeals that the Legislature gave the D.E.Q. partitioning powers over farm land.

Robert J. Wright
88838 Hale Road
Noti, Oregon 97461

STATE OF OREGON)
:ss
COUNTY OF _____)

I, _____ swear or affirm that I am the

_____ and I believe the foregoing

_____ to be true.

/s/_____

(seal)

SUBSCRIBED ON OATH OR AFFIRMATION BEFORE ME THIS _____
(date)

MY COMMISSION EXPIRES_____ _____
(date) NOTARY PUBLIC

I HEREBY CERTIFY that I served the foregoing REPLY
Upon the attorney of record for the DEPARTMENT

BY U.S. MAIL POSTAGE PREPAID #____)
BY PERSONAL DELIVERY _____) :: This date 23rd Jan - 79.
BY LEAVING IT WITH HIS _____)
SECRETARY IN HIS ABSENSE

ROBET L. HASKINS 520 S.W. YAMHILL, Portland, Oreogn 97204
Name and address of attorney served

/s/ Robert L. Haskins
In Propria Persona

I HEREBY CERTIFY THAT THE FOREGOING _____ IS A TRUE,

EXACT AND FULL COPY OF THE ORIGINAL FILED WITH THE CLERK ON _____
(date)

/s/_____
In Propria Persona

ROBERT W. STRAUB
GOVERNOR

Environmental Quality Commission

522 S.W. 5th AVENUE, P.O. BOX 1760, PORTLAND, OREGON 97207 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item No. J(2), March 30, 1979, EQC Meeting

Contested Case Review: DEQ v. George Suniga, Inc., (AQ-SNCR-77-143) Exceptions and Arguments

Attached are the Proposed Findings of Fact, Conclusions of Law and Order of Hearing Officer Franklin Lamb. Following are the Respondent's Exceptions and Arguments thereto, the Department's Arguments in support thereof, and a transcript of the proceedings (as requested by Respondent).

It is contemplated that, should they so desire, the parties be accorded opportunity for brief oral argument in this matter.

Respectfully submitted,

Peter W. McSwain

Peter W. McSwain
Hearing Officer

PWMS:jo
Attachment
cc: Mr. Terry Haenny
Mr. Robert Haskins
Mr. Fred Bolton
Mr. VAn Kollias
Mr. Douglas Fraley
Mr. John Borden

ROBERT W. STRAUB
GOVERNOR

Environmental Quality Commission

POST OFFICE BOX 1760, PORTLAND, OREGON 97207 PHONE (503) 229-5696

July 27, 1978

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Haenny and West
Attorneys-at-Law
206 Pacific Building
100 High Street, S.E.
Salem, Oregon 97308

Re: DEQ v. George Suniga, Inc.
No. AQ-SNCR-77-143
Marion County

Dear Mr. Haenny:

Enclosed are our Proposed Findings of Fact, Conclusions of Law and Final Order in this matter.

The parties are reminded that each has fourteen days from the date of this mailing in which to file with the Commission and serve upon the other parties a request that the Commission review the proposed order. (Oregon Administrative Rule (OAR) 340-11-132(2))

Unless a timely request for Commission review is filed with the Commission, or unless within the same time limit the Commission, upon the motion of its Chairman or a majority of the members, decides to review it, the proposed order of the presiding officer shall become the final order of the Commission. (OAR 340-11-132(3))

If Commission review is invoked, then the parties shall be given thirty days from the date of mailing or personal service of the presiding officer's proposed order, or such further time as the Director (of the Department of Environmental Quality) may allow or the Commission may allow, to file with the Commission and serve upon the other parties written exceptions and arguments to the proposed order. Such exceptions and arguments shall include proposed alternative findings of fact, conclusions of law, and order and shall include specific references to those portions of the record upon which the party relies. (OAR 340-11-132(4) in pertinent part.)

PS Form 3811, Jan. 1975

SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☒ Show to whom, date, & address of delivery.. 35¢
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  Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:

Haenny and West
100 High Street, S.E.
Salem, Oregon 97308

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	347375	

(Always obtain signature of addressee or agent)

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SIGNATURE ☐ Addressee ☐ Authorized agent

Shirley Yurancek

4. DATE OF DELIVERY

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5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

☆ GPO: 1975—O-568-047

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

No. 347375

(O/D - Debby)

RECEIPT FOR CERTIFIED MAIL

SENT TO
Haenny and West
STREET AND NO.
100 High Street, S.E.
P.O., STATE AND ZIP CODE
Salem, OR 97308

POSTMARK OR DATE
JUL 27 1978

CONSULT POSTMASTER FOR FEES

RETURN RECEIPT SERVICES
- 1. Shows to whom and date delivered
- 2. Shows to whom, date and where delivered

OPTIONAL SERVICES FOR ADDITIONAL FEES
With restricted delivery
With restricted delivery
RESTRICTED DELIVERY
SPECIAL DELIVERY (extra fee required)

PS Form 3800 Jan. 1976

NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL

(See other side)

☆ GPO: 1975—O-591-452

A request for desired review by the Commission will be considered filed with the Commission after being date stamped as received in the office of the Department of Environmental Quality at 522 S.W. Fifth Avenue, Portland, Oregon 97204.

Should Commission review be requested, failure to file the required exceptions and arguments in a timely fashion may be grounds for dismissal of the request and affirmation of the proposed final order.

Sincerely,

Peter W McSwain

Peter W. McSwain
for Franklin Lamb
Hearings Officer

PWM:eve
Attachment

cc: Environmental Quality Commission
Robert Haskins
Fred Bolton
Doug Fraley (Department Representative)
John Borden (Regional Manager)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY of the STATE OF OREGON, Department vs. GEORGE R. SUNIGA, INC. Respondent	)	PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER No. AQ-SNCR-77-143 Marion County

SUMMARY

This matter was heard on September 28, 1977, in Salem, Oregon by Franklin Lamb, Hearing Officer of the Environmental Quality Commission. It involves the alleged open burning of construction debris including carpeting and paint or glue cans on property owned and controlled by Respondent. The subject property is located on Lot 1, Block 4, Sprague Heights Subdivision at 1556 Kamela Drive South in Salem, Oregon.

The Department of Environmental Quality alleged that the open burning is violative of Oregon Administrative Rules Section 340-23-040(7) and OAR Section 340-23-045(5)(a). The Respondent denied responsibility.

ISSUES

At issue are:

1. Whether on the facts of this case at Hearing, Department's Representative should have been precluded from offering evidence of Respondent's ownership of subject property.

2. Whether Respondent is deprived of Due Process rights by the application of OAR Section 340-23-040(7), which holds responsible the owner or controller of real property for open burning which occurs on property during their ownership

or control, even though there has been no showing that Respondent set the fire or directly ordered the burning.

PROPOSED FINDINGS OF FACT

1. At all times herein material, the above named property described as Lot K, Block 4, Sprague Heights Subdivision at 1556 Kamela Drive South in Salem, Oregon, was owned and/or controlled by Respondent.

2. On June 2, 1977 open burning of construction debris, including carpeting and paint or glue cans, occurred on the above described property. Such open burning took place without the knowledge or permission of the Department of Environmental Quality and fell within the scope of Oregon Administrative Rules Section 340-23-040(7) and OAR Section 340-23-045(5)(a).

3. Although Respondent regularly employed individuals to clean up debris on his building sites, no compelling evidence was offered at the Hearing that Respondent set this particular fire or instructed another to do so.

4. Respondent testified at Hearing that his normal practice was to bury debris or to have the debris loaded into "drop boxes" and hauled to a dump. Respondent testified further that during the period in question no "drop boxes" were available for hire.

5. Respondent denied that he instructed any of his employees to set the fire.

6. Respondent offered evidence at the Hearing that a Mr. W. Barrett, whose house is located across the street from subject property, saw someone near the debris pile who appeared to dump the contents of an ashtray on the pile shortly before Mr. Barrett saw the flames appear.

7. At the Hearing, after eliciting testimonial evidence from his first two witnesses, Department's Representative, a non-lawyer, was asked by Respondent's

Attorney if Department's Representative "rested his case." Department's Representative replied, "Yes."

8. Respondent's Attorney then moved for dismissal of the proceedings, basing his motion on the ground that Department's Representative had not offered evidence of ownership of the subject property by Respondent.

9. Department's Representative explained that he had not intended to end his presentation of evidence but only to rest for the time being, and then to resume and cross-examine Respondent and his witness. Department's Representative also indicated that he intended to offer evidence of ownership of the subject property.

10. The Hearing Officer denied the Respondent's motion for dismissal and permitted entry of a deed into the record by the Department's Representative, which deed purported to show Respondent as owner of subject property.

11. At the Hearing, Respondent's Attorney argued that OAR Section 340-23-040(7) as applied was violative of the United States Constitution in that it held landowners responsible for burning activity on their land even though there had been no showing that the landowner had set the fire directly or indirectly.

CONCLUSIONS

1. The Department was not precluded from offering evidence of ownership of subject property by the statement of Department's Representative, a non-lawyer, answering "yes" to Respondent's lawyer's inquiry whether he had rested his case.

2. Respondent was not deprived of Due Process rights guaranteed by the 14th Amendment of the United States Constitution by Oregon Administrative Rules Section 340-23-040(7), which provision holds responsible the owner or controller of real property for open burning which occurs on said property during his ownership or control.

3. We conclude that on the facts of this contested case as presented at Hearing, Respondent is the responsible person to whom the Civil Penalty was properly assessed by the Department.

4. The $500 penalty assessed by the Department in this matter is appropriate.

OPINION

At the Hearing, Respondent moved for a dismissal of the proceedings on the ground that the Department's Representative had "rested his case" after his first two witnesses testified. Respondent's view is that as a result, Department's Representative ought not to be allowed to offer evidence, in his possession, of ownership of the subject property. The Hearing Officer denied Respondent's motion.

We interpret the statement by Department's Representative, a non-lawyer, which was given in response to a question from Respondent's attorney, to be that Department's Representative's intention was to rest his case only for the time being and not finally. He did have in his possession prepared questions for cross-examination as well as a Deed evidencing ownership of the subject property. It is our opinion that the Administrative Procedure Act contemplates sufficient flexibility in allowing available evidence into the Record that on these facts Department's Representative was rightly allowed to offer the evidence of ownership. The result might well be otherwise were there a showing by Respondent that he was unduly surprised or prejudiced by the admission of this evidence. No such showing was made at the Hearing. Nor did Respondent indicate that he in any way relied to his detriment on Department's Representative's omission to initially offer the evidence. While in a strict, formal legal proceeding, if the error was serious and prejudicial a different result might obtain, we find such error as was involved in the present matter to have been harmless error.

Both parties agree in this matter with respect to the existence of the open burning in violation of Oregon Administrative Rules Section 340-23-040(7) and Section 340-23-045(5)(a). However, Respondent has denied responsibility. He has argued that the United States Constitution does not allow, on the facts of this case, the imposition by Oregon's environmental laws, of liability on Respondent for any prohibited open burning on Respondent's land, absent a showing that Respondent himself was responsible or a showing that Respondent himself directed another to conduct the prohibited open burning. We disagree. We find that there exists a rational basis for the Oregon legislature to determine that in order to promote the public health and welfare by controlling air pollution, a necessary means toward accomplishment of this objective is the enactment of legislation which includes a presumption of liability on the part of the land-owner for prohibited open burning activity conducted on his own land. We find it reasonable for the legislature to have made the judgement that the legal owner of land is best able to control his own land and to prevent open burning which, absent such control, would result in a detriment to the health of the community.

The facts as presented to the record at the hearing of this contested case establish that Respondent owned the subject property. We find that the statutory enactments of Section 340 are not invidiously discriminatory inasmuch as they apply equally to all property owners. They are rationally based on society's right and obligation to curtail air pollution. We believe the burden to be on Respondent to take himself out of the purview of the Oregon Administrative Rules once he has been shown to be the legal owner of subject property. Respondent denied at Hearing that he set the fire or instructed anyone else to set the fire. To this end Respondent pleads ignorance of the prohibited open burning.

Ignorance alone is not sufficient to absolve Respondent of responsibility here. Nor is it sufficient on the facts of this case that Respondent's witness, Mr. W. Barrett, testified that he, Mr. Barrett, saw someone dump what looked to be an ashtray on the debris pile shortly before the fire began that particular morning. We find Mr. Barrett's testimony more confusing than elucidating. The exact distance of Mr. Barrett's house from the debris pile is not clear from the record but we are not persuaded by Mr. Barrett's testimony that while shaving he happened to peer from his window just at the instant an individual who Mr. Barrett is unable to identify dumped what appeared to be a lighted ashtray on the pile of damp debris and yet did not take time to investigate, contact his sometime employer who he knew owned the property, or inform the fire department.

Moreover, as a sometime real estate salesman for Respondent and one who was well aware that such open burning was contrary to the law and who knew Respondent owned the land, it is puzzling why Mr. Barrett chose to ignore the flames which were described by two witnesses as massive, rather than report the conflagration to the fire department which was his duty, or to make an attempt to extinguish the fire. Mr. Barrett's testimony does not in our opinion satisfy for Respondent the Respondent's duty with respect to removing himself from the scope of the Oregon Administrative Rules.

It is our opinion that whether one of Respondent's employees started the fire, making applicable the doctrine of Respondent/Superior, or whether a stranger set the debris afire, or whether or not "drop boxes" were available, Respondent himself is responsible to the community on the facts of this case for the prohibited burning on his land.

We find that Oregon Administrative Rules Section 340 does not constitute a violation of the 14th Amendment of the United States Constitution. The $500 penalty assessed by the Department in this matter is appropriate given Respondent's past record of open burning violations.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department	)	
v.	)	ORDER NO. AQ-SNCR-77-143
GEORGE R. SUNIGA, INC. Respondent	)	

The Commission hereby orders, through its hearings officer, that Respondent, George R. Suniga, Inc., is liable to the State of Oregon in the sum of $500 and that the State have judgement for and recover the same pursuant to hearing on a civil penalty assessment by the Director of the Department on June 27, 1977.

The Commission hereby further orders that if neither a party nor the Commission requests review of this Order within 14 days of its service upon them, this Order shall become a Final Order of the Environmental Quality Commission and shall have added to its caption the words "NOW FINAL," and, if unsatisfied for more than 10 days after becoming final, may be filed with the clerk of any county and have executions issued upon it as provided by ORS 468.135.

Dated this 25th day of July, 1978.

Respectfully submitted,

Franklin Lamb

Franklin Lamb
Hearings Officer

by Peter McSwain

McSwain

HAENNY & WEST
ATTORNEYS AT LAW
206 PACIFIC BUILDING 100 HIGH STREET, S. E.
POST OFFICE BOX 924
SALEM, OREGON 97308

TERRY K. HAENNY
C. GREGORY WEST

AREA CODE 503
TELEPHONE 399-1355

August 28, 1978

Director of Enviornmental Quality,
Enviornmental Quality Commission
P.O. Box 1760
Portland, Oregon 97207

Re: DEQ vs. George Suniga Inc.
No. AQ-SNCR-77-143
Marion County

Gentlemen:

Enclosed is the original of our exceptions and arguments to the proposed order, findings of fact and conclusions of law. This document also includes our proposed alternative findings of fact, conclusions of law, order, and reference to those portions of the record upon which we rely.

Thank you so much for your kind cooperation and I will anticipate hearing from you as to a date and time when we may appear on this case for further proceedings.

Very truly yours,

TERRY K. HAENNY

TKH:sy
Enclosure
cc: Doug Fraley Department Rep.
John Borden Regional Mgr.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

No. AQ-SNCR-77-143

DEPARTMENT OF ENVIRONMENTAL QUALITY of the STATE OF OREGON Department, vs. GEORGE R. SUNIGA, INC. Respondent.	)

EXCEPTION TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER PROPOSED ALTERNATIVE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

Comes Now the above named Respondent, and files this written exception to the proposed findings of fact, conclusions of law and final order as previously entered in this case.

EXCEPTIONS

The Respondent does object to the proposed order and findings of fact in the following particulars:

1. The Respondent was not proven to have been the owner of the subjects property prior to the case being rested on behalf of the Department of Environmental Quality.

2. The Respondent is deprived of his due process rights by his being held responsible as the owner or controller of a piece of real property when in fact there was no showing that the Respondent set the fire or directly or indirectly ordered any

HAENNY & WEST
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burning.

3. The hearing officer should have allowed the Respondent's motion for dismissal made following a resting of the case by the department's representative.

PROPOSED FINDINGS OF FACT

The proposed findings of fact as previously prepared by the department is agreeable with the Respondent excepting as to the following numbers: Number 1. Number 8. Number 9. Number 10. Number 11.

PROPOSED CONCLUSIONS

The Respondent alleges that conclusions as stated in the preposed findings of fact and conclusions of law by the department are not correct as to Numbers 1, 2, 3 and 4.

ALTERNATIVE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

The Respondent does propose as follows:

The findings of fact should be that the Respondent was not proven to have been the named property owner on the property in question.

The department should have been precluded from introducing further evidence after they rested their case.

The conclusions of law should be as follows:

The department was precluded from offering evidence of ownership after resting their case.

The Respondent has been deprived of his due processed

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rights in holding him responsible for burning which occured on property owned by him without any evidence of his being involved in the setting of a fire or fires.

The Respondent is not and was not the responsible person to whom the civil penalty should have been assessed by the department.

The $500.00 civil penalty assessed by the department was and is inappropriate and there should be no penalty assessed by the department.

PROPOSED ORDER

The commission hereby orders, through its hearings officer, that Respondent, GEORGE R. SUNIGA, INC., is not liable to the State of Oregon in the sum of $500.00 or in any amount and it is hereby entered as of record this order.

REFERENCES TO RECORD

The entire record is relied upon by the above named Respondent and it is requested that that record be and the same should be transcribed with a copy of such transcription being made available to the Respondent herein.

Terry K. Haenny

TERRY K. HAENNY
Attorney for Respondent

HAENNY & WEST
ATTORNEYS AT LAW
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VERIFICATION

STATE OF OREGON)
County of _____) *ss.*

I, _____, *being first duly sworn, say that I am* _____ *in the within entitled cause, and that the foregoing* _____ *is true as I verily believe.*

_____

Subscribed and sworn to before me this _____ *day of* _____, *19*____

_____
Notary Public for Oregon
My Commission Expires: _____

CERTIFICATE — TRUE COPY

I, one of the attorneys for _____ *herein, do hereby certify that the foregoing copy of* _____ *is a correct copy of the original.*

_____
Of Attorney(s) for _____

ACCEPTANCE OF SERVICE

Due service of the within _____ *is hereby accepted in* _____ *County, State of Oregon, this* _____ *day of* _____, *19*__, *by receiving a duly certified copy thereof.*

_____
Of Attorney(s) for _____

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing EXCEPTION TO PROPOSED FINDINGS OF FACT *on* Doug Fraley Dept. Rep. and John Borden Regional Mgr ~~of attorneys for~~ _____, *on the* 28th *day of* August, *19* 78 *by mailing to said attorneys a correct copy thereof, certified by me as such, contained in a sealed envelope, with postage prepaid, addressed to said attorneys at (his) (their) regular office address, to-wit,* Both addressed singly to Enviornmental Quality Commission P.O. Box 1760, Portland, Or 97207 *and deposited in the post office at Salem, Oregon, on said day. Between the said post office and the address to which said copy was mailed, there is a regular communication by U. S. Mail.*

Dated August 28, *19* 78

_____
Of Attorney(s) for Respondent

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JAMES A. REDDEN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND DIVISION
500 Pacific Building
520 S.W. Yamhill
Portland, Oregon 97204
Telephone: (503) 229-5725

October 13, 1978

Hearings Section
Department of Environmental Quality
522 S. W. 5th Avenue
Yeon Building
Portland, Oregon 97201

Re: DEQ v. George R. Suniga, Inc.
No. AQ-SNCR-77-143

Gentlemen:

Enclosed please find Arguments in Support of the Proposed Findings of Fact, Conclusions of Law, Opinion and Final Order with Certificate of Service attached.

Sincerely,

Robert L. Haskins (by NH)

Robert L. Haskins
Assistant Attorney General

hk
Enc.
cc: William H. Young, w/enc.
E. J. Weathersbee, w/enc.
John Borden, w/enc.
Fred Bolton, w/enc.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

HEARINGS SECTION

DEPARTMENT OF ENVIRONMENTAL QUALITY, OF THE STATE OF OREGON, Department, vs. GEORGE R. SUNIGA, INC., Respondent.	)	No. AQ-SNCR-77-143 ARGUMENTS IN SUPPORT OF HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND FINAL ORDER

I. STATEMENT OF THE CASE

This matter comes before the Environmental Quality Commission (hereinafter referred to as "Commission") following a contested case hearing which was held on September 28, 1977, in Salem, Oregon. The controversy arises from the assessment by the Department of Environmental Quality (hereinafter referred to as "Department") of a $500 civil penalty against Respondent corporation George R. Suniga, Inc. for violation of Oregon Administrative Rules (hereinafter referred to as "OAR") 340-23-040(7) and 340-23-045 (5)(a) by allowing open burning of waste materials on real property which was in Respondent's ownership and control. Respondent filed a general denial raising no affirmative defenses. The Hearing Officer found that Respondent had committed the alleged violation and affirmed the civil penalty. Respondent timely filed exceptions to the hearing officer's proposed findings

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of fact, conclusions of law and final order, which are now before the Commission for decision.

II. FACTS

As established at the hearing and found by the Hearing Officer, Respondent was at all times relevant to this case the owner of property described as 1556 Kamela Drive South in Salem, Marion County, Oregon. This land is in an open burning control area as described by OAR 340-23-030(11)(e).

George R. Suniga, Inc. is an Oregon corporation engaged in the construction business. As such, Respondent regularly employs individuals to clean up construction debris on its building sites. Respondent was assessed a civil penalty by the Department for a similar violation on March 1, 1977.

On June 2, 1977 open burning of construction debris, including carpeting and paint or glue cans was observed on the above described property. This open burning took place without the permission of the Department. There was no compelling evidence offered at the hearing that any of Respondent's authorized representatives set the fire or instructed anyone else to do so.

At the hearing, after examining two witnesses Respondent's attorney asked the Department's representa-

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tive Douglas Fraley, a non-lawyer, whether he "rested his case." Mr. Fraley replied "yes." Respondent's attorney then moved to dismiss the civil penalty for failure to prove that Respondent was the owner of the property. Mr. Fraley then explained to the hearing officer that he did not intend to end his presentation but only to rest for the time being. He stated that he intended to resume and cross examine Respondent's representative and its witnesses. He also indicated that he had proof of ownership which he intended to offer in evidence. The hearing officer denied the motion and allowed Mr. Fraley to prove Respondent's ownership by offering a deed to the record.

III. ISSUES

In this appeal Respondent contends only that:

> "1. The Respondent was not proven to have been the owner of the subject property prior to the case being rested on behalf of the Department of Environmental Quality.
> "2. The Respondent is deprived of his due process rights by his being held responsible as the owner or controller of a piece of property ***". Respondent's Exception etc. p.1.

Those are Respondent's only contentions of error in the Hearing Officer's proposed ruling. Respondent stated on page 2 of its Exception, etc., that it agrees with the Hearing Officer's proposed finding of fact no. 2 which reads as follows:

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"On June 2, 1977 open burning of construction debris, including carpeting and paint or glue cans, occurred on the above described property. Such open burning took place without the knowledge or permission of the Department of Environmental Quality and fell within the scope of Oregon Administrative Rules Section 340-23-040(7) and OAR Section 340-23-045(5)(a)."

In other words, Respondent admits that there was a violation but contends that it was not responsible therefor.

IV. ARGUMENT

A. THE HEARING OFFICER'S RULING THAT ALLOWED THE DEPARTMENT'S NON LAWYER REPRESENTATIVE TO OFFER THE DEED AFTER "RESTING" WAS A REASONABLE EXERCISE OF DISCRETION

At the hearing, attorney for Respondent moved for a dismissal of the proceedings on the ground that the Department's Representative, a non-lawyer, had "rested his case" before presenting the deed as evidence of ownership of the subject property. The Hearing Officer denied Respondent's motion and permitted entry of the deed into the record.

This decision was completely within the discretionary powers of the Hearing Officer, and Respondent shows no reason why it should be reversed on review. OAR 340-11-125(3) which is derived verbatim from Section 137-03-050(4) of The Attorney General's Model Rules of Procedure Under the Administrative Procedure Act which provides:

"Evidence objected to may be received by the presiding officer with rulings on its admissibility or exclusion to be made

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at the time a final order is issued."

Oregon case law also shows an overwhelming desire on the part of the judiciary to be flexible in its procedural rules for admitting evidence. In Parmentier v. Ransom, 179 Or 17, 21, 169 P2d 883 (1946), the Oregon Supreme Court stated that:

> "The court, however, in its discretion 'for good reasons and in furtherance of justice,' may permit a departure from strict order of proof, *** Its rulings in this respect will not be reviewed by any appellate court, except for abuse of discretion."

This decision has been repeatedly upheld. e.g. Hiestand v.Wolford, 272 Or 222, 224-225 536 P2d 520 (1975) (court allowed party to submit further evidence after the party rested and after the judge had issued a written opinion). Those decisions are backed up by the statutory authority of ORS 17.215 which states:

> "...the order of proof shall be regulated by the sound discretion of the court."

The Commission's rules do not set a strict method for conducting a contested case hearing, but rather provide a guideline for the Hearing Officer to follow at his discretion. OAR 340-11-120(3) provides that:

> "At the discretion of the presiding officer, the hearing shall be conducted in the following manner:"
> "(a) Statement and evidence of the party with

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the burden of coming forward with evidence in support of his proposed action;

"(b) Statement and evidence of defending party in support of his alleged position." (emphasis added)

OAR 340-11-120(9) further provides that:

"...the presiding officer, where appropriate and practicable, shall receive all physical and documentary evidence presented... ." (emphasis added)

In order for the Hearing Officer's decision to be reversed on review, Respondent must show that there was an abuse of the discretionary powers described, resulting in a prejudicial hearing. Respondent has failed to carry this burden. On the contrary, the record indicates that the initial ommission of the deed by a non-lawyer was a harmless error. Respondent could not have been unduly surprised by the fact a deed was offered in evidence, as ownership of the property was an integral aspect of the Department's notice of assessment of a civil penalty. Nor has Respondent shown that he relied to his detriment on Mr. Fraley's initial ommission of the deed.

As permitted by OAR 340-11-125(3), and for the reasons stated, the decision of the Hearing Officer should be upheld on review.

B. RESPONDENT FAILED TO PLEAD AND PROVE ITS AFFIRMATIVE DEFENSES

The Department and the Commission's hearing officer have imposed the civil penalty upon Respondent corporation for unlawful open burning which occurred upon Respondent's

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real property, even though the Department did not offer any compelling evidence that any of Respondent's representatives set the fire or instructed anyone else to do so. The Department imposed the penalty upon the owner based upon the Commission's rule OAR 340-23-040(3) which reads as follows:

> "(3) Any person who owns or controls *** property on which open burning occurs *** shall be the person considered responsible for the open burning."

The rule establishes a non-delegable duty on landowners to prevent prohibited open burning from occurring on their property. Respondent contended at the hearing and contends on this appeal that the rule is unconstitutional in violation of the due process clause. However, Respondent did not raise this defense in its answer to the Notice of Assessment, as it was required to do by OAR 340-11-107(2). That rule provides in pertinent part that

> "[i]n the answer the party *** shall affirmatively allege any and all affirmative claims or defenses the party may have and the reasoning in support thereof."

By failing to allege its affirmative defense in its answer Respondent should be held to have waived the defense. Going into the hearing the Department did not have notice that Respondent was going to raise that defense. Therefore the Department was unable to prepare its case to counter

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Respondent's surprise affirmative defense. It would be unfair to the Department to allow respondents to raise affirmative defenses at hearings without prior notice. Such is not allowed in court and should not be allowed here.

Should the Commission choose to consider Respondent's affirmative defense in spite of its tardiness, it will find the defense to be lacking. Respondent contends that because there was no showing that any of Respondent's authorized representative set the fire or ordered anyone else to do so, it would violate Respondent's right to due process. The United States Constitution due process clause reads as follows:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law ***." US Cons amend XIV, §1.

Respondent's argument is without merit. First, Respondent apparently assumes that the Commission's rule OAR 340-23-040(3) imposes strict liability upon Respondent without any defenses. That assumption is incorrect. The duty placed upon a landowner is not absolute, and is subject to a specific affirmative defense. ORS 468.300 provides that OAR 340-23-040(3):

> "...shall not be so construed as to include any violation which was caused by an act of God, war, strife, riot or other condition as to which any negligence or wilful misconduct on the part of such person was not the proximate cause."

///

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Here again, Respondent failed to allege such an affirmative defense in its answer. For the reasons stated above Respondent should be held to have waived that affirmative defense.

However, should the Commission consider such an affirmative defense it is clear that Respondent has failed to prove its defense. The Department concedes that if Respondent succeeded in showing by a preponderance of the evidence that, (1) the prohibited open burning was caused by a fire on its land which was an "act of God, ... or other condition", Id., and (2) as to which it was not negligent, Id, then it would not have been liable for a violation. Respondent landowner failed to discharge its burden under ORS 468.300. Respondent offereed testimony of a neighbor and sometime employee of Respondent's in an attempt to show that the fire was lit by someone else. However the Hearing Officer found the witness' testimony "more confusing than elucidating." Proposed Findings etc. at p. 6. Having undertaken the burden of showing the cause of the fire and Respondent's own reasonableness under the circumstances, it bears the burden of a party asserting a defense, Given v. Crawford, 164 Or 215, 100 P2d 1012, (1940); and further bears the burden carried by a party who has greater access to facts within its own knowledge, Weber v. Rothchild, 15 Or 385, 15 P 650 (1887). The record shows Respondent failed to discharge this burden.

Respondent offered no evidence as to the cause of the

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fire beyond unsubstantiated speculation that someone else caused the fire. The mere denial of liability does not meet the requirement of ORS 468.300 which demands proof of the condition which caused the fire by the civil standard of a preponderance of the evidence. Secondly, Respondent failed to establish that it was not negligent as to the existing condition regardless of its cause. Respondent failed to show that it was reasonable in attempts to prevent the actual cause of the fire. Respondent failed its burden.

Furthermore, the existence of the ORS 468.300 affirmative defense satisfies the due process clause. In other words, the availability of the affirmative defense is Respondent's due process. Although Respondent claims a denial of due process, its real complaint is that it was unable to prove its alleged defense under the process that was due him and was actually available to him.

Even if there were no ORS 468.300 defense available, the Commission's rule OAR 340-23-040(3) still would be a valid exercise of the police power. Respondent's basic complaint is that liability is being imposed upon it although its representatives did not set the fire or instruct other to do so, i.e. Respondent claims to be without fault.

Imposition of liability without regard to fault, otherwise known as "strict liability" has long been known in the law. The United States Supreme Court has dis-

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cussed with approval this

> "now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct - awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." United States v. Dotterweich, 320 US 277, 280-281, 64 S Ct 134, 135, 88 L Ed 48 (1943); quoted with approval in Morisette v. United States, 342 US 246, 259-260. 72 S Ct 240, 96 L Ed 288 (1952).

Strict liability regulations are particularly useful in enforcement of environmental quality standards. For example, in United States v. White Fuel Corp., 498 F2d 619, 6 ERC 1794 (1st Cir. 1974), an oil tank farm operator was held criminally strictly liable under the Refuse Act, 33 USC Sec. 407, et seq., for the discharge of oil into Boston Harbor which had seeped from a large accumulation on defendant's property. The applicable statutes and rules impose strict liability. No common law mens rea or scienter need be proved. Much of the Court's discussion in that case is directly applicable to this case and is set forth below:

> "...The offense falls within the category of public welfare offenses which are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty . . .. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably exact from one who, assumed his responsibilities. Morisette v.

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United States, 342 US 246, 255-56, 72 S Ct 240, 246 96 L Ed 288 (1952).

> "...The dominant purpose is to require people to exercise whatever diligence they must to keep refuse out of public waters. Given this aim, we are disinclined to invent defenses beyond those necessary to ensure a defendant constitutional due process. Specifically, we reject the existence of any generalized 'due care' defense that would allow a polluter to avoid conviction on the ground that he took precautions conforming to industry-wide or commonly accepted standards.
>
> Merely to attempt to formulate, let alone apply such standards would be to risk crippling the Refuse Act as an enforcement tool. The defendant, if a substantial business enterprise, would usually have exclusive control of both the expertise and the relevant facts; it would be difficult indeed, and to no purpose, for the government to have to take issue with elaborate factual and theoretical arguments concerning who, why and what went wrong. A municipality may require dog owners to keep their dogs off the public streets, and the court may enforce the ordinance by criminal sanctions without paying attention, except in mitigation to the owner's tales concerning his difficulty in getting Fido to stay home. In the present circumstances we see no unfairness in predicating liability on actual noncompliance rather than either intentions or best efforts. ***Whatever occassional harshness this could entail is offset by the moderateness of the permitted fine, the fact that the statute's command -- to keep refuse out of the public waters -- scarcely imposes an impossible burden, [footnote omitted] and the benefit to society of having an easily defined, enforceable standard which inspires performance rather than excuses." Id. at 622-3.

The foregoing is relevant to the rule at hand and the facts under consideration. There is unimpeachable authority that strict liability legally attaches, not subject to any defenses, for violation of police power regulations without

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any regard to fault. Environmental protection laws often include such regulations. White Fuel, supra, at 622, Ward v. Coleman, 423 F Supp 1357, 9, ERC 1945 (WD Okla 1976); United States v. Eureka Pipeline Co., 401 F Supp 934, 941, (ND W Va 1973); United States v. General Motors Corp., 403 F Supp 1151 1157, 8 ERC 1707, (D Conn 1975); United States v. Atlantic Richfield Corp., 429 F Supp 830, 838, 9 ERC 1993, (ED Pa 1977), aff'd 573 F2d 1303 (3d Cir 1978); United States v. United States Steel, 328 F Supp 354, 356, 2 ERC 1700, (ND Ind 1970).

In Ward v. Coleman, supra, the Court considered an argument that the imposition of a penalty under the Federal Water Pollution Control Act ("FWPCA") without regard to fault was a violation of due process. The court rejected this argument:

> "The essence of strict liability is the shifting of accidental loss, as between non-negligent parties, to the one most able to insure against the risk and bear the cost. In the FWPCA, Congress has chosen to shift the cost of damage done to the environment from the public to the owner or operator of the facility from which a harmful discharge emanated. Congress further saw fit to minimize defenses, in order to inspire 'performance rather than excuses.' This court agrees with the United States District Courts of Connecticut and the Northern District of West Virginia that the imposition of penalty after notice and hearing and after due regard given ability to pay and the gravity of the violation, withstands constitutional attack. General Motors, supra, at 1157; Eureke Pipeline, supra, at 942." Id. at 1357.

In fact, the duty which an owner of a facility bears under

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the Federal law is so absolute that even acts by vandals and third parties will not insulate him from the attachment of strict liability. Thus in United States v. General Motors Corp., supra, the court rejected the oil storage tanks owner's argument that the fact that intruders had penetrated several barbed wire fences and eluded its security patrol was a defense to liability for the vandalism caused oil discharges.

Respondent's contention that assessment of a civil penalty in this case is a violation of its due process rights, is not well founded. OAR 340-23-040(3) is a reasonable means of effecting the state policy of restoring and maintaining the quality of our air resources.

V. CONCLUSION

For the above reasons the Commission should adopt the hearing officers proposed findings of fact, conclusions of law, final order and opinion in this case.

DATED this 13th day of October, 1978.

JAMES A. REDDEN
Attorney General

Robert L. Haskins

ROBERT L. HASKINS
Assistant Attorney General
of Attorneys for Department

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Arguments in Support of Hearing Officer's Proposed Findings of Fact, Conclusions of Law, Opinion and Final Order on Respondent's attorney, Terry Haenny, by mailing to him a true and correct copy thereof. I further certify that said copy was placed in a sealed envelope addressed to said attorney at 206 Pacific Building, 100 High Street, S. E., P. O. Box 924, Salem, Oregon 97308, his last known address, and deposited in the Post Office at Portland, Oregon, on the 13th day of October, 1978, and that the postage thereon was prepaid.

Holly Ketter

HOLLY KETTER
Secretary

HEARING DATE REQUEST

Date: July 29, 1977

To: Pete McSwain, Hearing Officer, EQC

From: Fred C. Bolton, Administrator, Regional Operations, DEQ

Subject: GEORGE R. SUNIGA, INC.
AQ-SNCR-77-143

Enclosed, pertaining to the subject case are:

1. Notice of Assessment of Civil Penalty No. AQ-SNCR-77-143 dated June 27, 1977 with Certificate of Service and Return Receipt attached.

2. Respondent's Answer.

The above constitute the pleadings in the subject administrative hearing. Please inform me as soon as you have set the date, time and place of hearing.

DDF:gcd
cc: Salem-North Coast Region, DEQ
Raymond P. Underwood, Chief Counsel, Department of Justice

INVESTIGATION AND COMPLIANCE
DEFAULT ROUTE SLIP

Personnel	Action
	Case Assigned to:
~~Gloria~~	~~Step 1 Default Mailed~~ CM
~~DWO~~	Step 1 Default Filed with Director
DWO ~~EMS~~ DDF	Step 1 Default Logged
	Assignee
DWO	Step #2 Signed by Director
Gloria	Step #2 Default Mailed
DWO ~~EMS~~ DDF	Step #2 Default Logged
	Assignee
Gloria	Judgment Mailed to County Clerk
	Assignee
DWO ~~EMS~~ DDF	Card Returned - Log Completed

DDF

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, of the STATE OF OREGON, Department, v. GEORGE R. SUNIGA, INC., Respondent.	NO. AQ-SNCR-77-42 MOTION FOR DEFAULT ORDER AND JUDGMENT

The Investigation and Compliance Section of the Department of Environmental Quality ("DEQ") moves the Director of the DEQ to issue, not less than ten days from the date of filing of this Motion, a Default Order and Judgment on behalf of the Environmental Quality Commission against Respondent in the amount of the civil penalty assessed in this matter, pursuant to Oregon Administrative Rules, chapter 340, section 11-107(3).

In support of this Motion, the Section relies upon the Affidavit of David W. O'Guinn which is attached hereto and made a part hereof.

4-18-77
Date

David W. O'Guinn
David W. O'Guinn, Supervisor
Investigation and Compliance Section
Department of Environmental Quality

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
APR 19 1977
OFFICE OF THE DIRECTOR

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, of the STATE OF OREGON, Department, v. GEORGE R. SUNIGA, INC., Respondent.	NO. AQ-SNCR-77-42 AFFIDAVIT OF DAVID W. O'GUINN

STATE OF OREGON)
) ss.
County of Multnomah)

I, DAVID W. O'GUINN being first duly sworn say that:

1. I am the Supervisor of the Investigation and Compliance Section of the Department of Environmental Quality.

2. The basis for our Motion for a Default Order and Judgment are as follows:

(a) A Notice of Assessment of Civil Penalty (AQ-SNCR-77-42) dated March 1, 1977 from William H. Young to Respondent with Certificate of Service attached on file in this case.

(b) The records in this case which indicate that Respondent filed no written "Answer" or request for hearing; and

(c) The Commission's rule, section 11-107(2) and (3) of Chapter 340 of Oregon Administrative Rules, and Oregon Revised Statutes 183.415(4).

4-18-77
Date

David W. O'Guinn
David W. O'Guinn

SUBSCRIBED and SWORN to before me on the 18th day of April, 1977.

Notary Public for Oregon
My Commission Expires: August 27, 1979

DWO

dwo

RECEIPT FOR CERTIFIED MAIL

SENT TO GEORGE R. SUNIGA, INC.
c/o George R. Suniga, Reg. Agent

STREET AND NO.
1431 Liberty Street, S.E.

P.O., STATE AND ZIP CODE
Salem, Oregon 97302

POSTMARK OR DATE
Default Pkg 1
Marion Co.
4/19/77

No. 345755

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered .....
With restricted delivery .....
2. Shows to whom, date and where delivered
With restricted delivery .....

CONSULT POSTMASTER FOR FEES

RESTRICTED DELIVERY .....
SPECIAL DELIVERY (extra fee required) .....

PS Form Jan. 1976 3800 NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL (See other side)

☆ GPO: 1975—O-591-452

PS Form 3811, Jan. 1975

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☒ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
GEORGE R. SUNIGA, INC.
c/o George R. Suniga, Reg. Agent
1431 Liberty St.,S.E., Salem, Oregon

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	345755	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
Christine Elwood

4. DATE OF DELIVERY 4/21/77 POSTMARK

5. ADDRESS (Complete only if requested)
1431 Liberty St

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-508-047

CERTIFICATE OF SERVICE

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I hereby certify that I am a competent person over the age of 18 years, and that I served the foregoing Motion for Default Order and Judgment with Affidavit of David W. O'Guinn attached, on:

George R. Suniga, Inc.
c/o George R. Suniga, Registered Agent
1431 Liberty Street, S.E.
Salem, Oregon 97302

on the 19th day of April, 19 77 by mailing each of them true and correct copies thereof. I further certify that said copies were placed in sealed envelopes addressed to them at their respective addresses listed above and deposited in the Post Office at Portland, Oregon on the 19th day of April, 1977; that the postage thereon was prepaid, and that said service was made by certified mail.

Signature

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, of the STATE OF OREGON, Department, v. GEORGE R. SUNIGA, INC., Respondent.	NOTICE OF ASSESSMENT OF CIVIL PENALTY AQ-SNCR-77-42 MARION COUNTY

I.

GEORGE R. SUNIGA, INC., hereinafter will be referred to as "Respondent." The Department of Environmental Quality is hereinafter referred to as "Department." The Director of the Department is hereinafter referred to as "Director."

II.

On or about January 25, 1977, open burning of construction debris was observed on property owned or controlled by Respondent and located at 1175 Kamela Dr. S. in Salem, Oregon. The above-described act violates Oregon Administrative Rules (hereinafter referred to as "OAR") section 340-23-040(7).

III.

Pursuant to ORS 468.125 through 468.140, ORS chapter 183, and Oregon Administrative Rules (hereinafter referred to as "OAR") chapter 340, divisions 11 and 12, and in particular, section 340-12-050(2), the Director hereby imposes upon Respondent a civil penalty of $150.00 for the one or more violations cited in Paragraph II above.

IV.

In determining the precise amount of Respondent's penalty, the Director has considered OAR, section 340-12-045(1)(a) through (i) as follows:

A. Whether Respondent committed any prior violation,

regardless of whether or not any administrative, civil, or criminal proceeding was commenced therefor;

B. Respondent's history in taking all feasible steps or procedures necessary or appropriate to correct any violation;

C. Respondent's economic and financial condition;

D. The gravity and magnitude of the violation;

E. Whether the violation was repeated or continuous;

F. Whether the cause of the violation was an avoidable accident, or Respondent's negligence or intentional act;

G. The opportunity and degree of difficulty to correct the violation;

H. Respondent's cooperativeness and efforts to correct the violation; and

I. The cost to the Department of investigation and correction of the cited violation.

V.

This penalty is being imposed without prior notice pursuant to ORS 468.125(2) and OAR, section 340-12-040(3)(b) because the above-described pollution source would normally not be in existence for five (5) days.

VI.

This penalty is due and payable immediately upon receipt of this notice. Respondent's check in the above amount should be made out in the name of "State Treasurer, State of Oregon" and returned to the Director.

VII.

Respondent has the right, if Respondent so requests, to have a formal contested case hearing before the Environmental Quality Commission or its hearing officer regarding the matters set out above pursuant to ORS, chapter 183, ORS 468.135(2) and (3), and OAR, chapter 340, division 11, at which time Respondent may be represented by an attorney and subpoena and cross-examine witnesses. That request must be made in writing to the Director, must be received by the Director within twenty (20) days from the date of mailing of this notice (or if not mailed, the date of personal service), and must be accompanied by a written "Answer" to the charges contained in this notice. In the written "Answer," Respondent shall admit or deny each allegation of fact contained in this notice and Respondent shall affirmatively allege any and all affirmative defenses to the assessment of this civil penalty that Respondent may have and the reasoning in support thereof. Except for good cause shown:

A. Factual matters not controverted shall be presumed admitted;

B. Failure to raise a defense shall be presumed to be a waiver of such defense;

C. New matters alleged in the "Answer" shall be presumed to be denied; and

D. Evidence shall not be taken on any issue not raised in the notice and the "Answer."

If Respondent fails to file a timely "Answer" or request for hearing, or fails to appear at a scheduled hearing, the Director on behalf of the Environmental Quality Commission may issue a default order and judgment based upon a prima facie case made on the record, for the relief sought in this notice. Following receipt of a

request for hearing and an "Answer," Respondent will be notified of the date, time and place of the hearing.

March 1, 1977
Date

William H. Young
WILLIAM H. YOUNG, Director
Department of Environmental Quality

ddf

No. 345666

RECEIPT FOR CERTIFIED MAIL

SENT TO George R. Suniga, Inc.
c/o George R. Suniga, Reg. Agent
STREET AND NO.
1431 Liberty Street, S.E.
P.O., STATE AND ZIP CODE
Salem, Oregon 97302

POSTMARK OR DATE
NOA
Marion Co.
3/2/77

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered ..... With restricted delivery ..
2. Shows to whom, date and where delivered With restricted delivery ....

RESTRICTED DELIVERY
SPECIAL DELIVERY (extra fee required)

CONSULT POSTMASTER FOR FEES

PS Form Jan. 1976 3800 NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL (See other side)

☆ GPO: 1975—O-591-452

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☒ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
George R. Suniga, Inc.
c/o George R. Suniga, Reg. Agent
1431 Liberty St., SE, Salem, Oregon 97302

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	345666	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

R. Suniga

4. DATE OF DELIVERY 3/3/77 POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-568-047

CERTIFICATE OF SERVICE

(Mail)

STATE OF OREGON)
) ss
COUNTY OF Multnomah)

I, Gloria C. Davis, being a competent person over the age of eighteen (18) years, do hereby certify that I served George R./Suniga, Inc. by mailing by certified mail to co George R. Suniga Certified Mail # 345666

Name of Party

(Name of Person to whom Document addressed)

Registered Agent

(and if not the party, their relationship)

Notice of Assessment of Civil Penalty - AQ-SNCR-77-42 - Marion County

(Identify Document Mailed)

I hereby further certify that said document was placed in a sealed envelope addressed to said person at

1431 Liberty St., S.E., Salem, Oregon 97302

his last known address, and deposited in the Post Office at Portland, Oregon, on the 2nd day of March, 19 77, and that the postage thereon was prepaid.

Signature

STATE OF OREGON

ROUTE SLIP

Date 7-12

TO: P.W. McSwain

FROM: ~~Corley~~

CHECK

- ___ Approval
- ___ Necessary Action
- ___ Prepare Reply
- ___ For My Signature
- ___ Your Signature
- ___ Comment
- ___ Initial and Return
- ___ Investigate
- ___ Confer
- ___ Per Telephone Conversation
- ___ For Your Information
- ___ As Requested
- ___ Note and File
- ___ Return With More Details

COMMENTS:

DEPARTMENT OF ENVIRONMENTAL QUALITY

RECEIVED

JUL 12 1977

81-125-1569

HAENNY & WEST
ATTORNEYS AT LAW
206 PACIFIC BUILDING 100 HIGH STREET, S. E.
POST OFFICE BOX 924
SALEM, OREGON 97308

TERRY K. HAENNY
C. GREGORY WEST

AREA CODE 503
TELEPHONE 399-1355

July 11, 1977

Mr. William H. Young
Director
Department of Environmental Quality
1234 Southwest Morrison Street
Portland, Oregon 97205

Re: DEQ vs. Suniga
Civil Penalty

Dear Mr. Young:

Enclosed is the written answer to the charges contained in the notice previously sent to Mr. Suniga and referred to above. The purpose of this letter is to request a formal contested case hearing before the environmental quality commission or its hearing officer regarding the matters alleged in the notice of assessment as received by Mr. Suniga. I assume that I will notified of the date and time of a hearing.

Very truly yours,

TERRY K. HAENNY

TKH:rg
Enclosure
cc: Mr. George R. Suniga

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, of the STATE OF OREGON, Department, vs. GEORGE R. SUNIGA, INC., Respondent.	DENIAL AQ-SNCR-77-143 MARION COUNTY

COMES NOW George R. Suniga, Inc., the above named Respondent, by and through his attorney, Terry K. Haenny, and denies each and every allegation contained in the Notice of Assessment of Civil Penalty and the whole thereof.

DATED at Salem, Oregon, this 11th day of July, 1977.

HAENNY AND WEST

By: Terry K. Haenny
TERRY K. HAENNY
Of Attorneys for Respondent

HAENNY & WEST
ATTORNEYS AT LAW
205 PACIFIC BLDG. — 100 HIGH STREET, S.E.
P.O. BOX 924
SALEM, OREGON 97308
TELEPHONE (503) 399-1355

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, of the STATE OF OREGON, Department, v. GEORGE R. SUNIGA, INC., Respondent.	NOTICE OF ASSESSMENT OF CIVIL PENALTY AQ-SNCR-77-143 MARION COUNTY

I.

GEORGE R. SUNIGA, INC. (an Oregon Corporation), hereinafter will be referred to as "Respondent." The Department of Environmental Quality is hereinafter referred to as "Department." The Director of the Department is hereinafter referred to as "Director."

II.

On or about June 2, 1977, open burning of construction debris including carpeting and paint or glue cans was observed on property owned or controlled by Respondent and located on Lot 1, Block 4, Sprague Heights Subdivision at 1556 Kamela Drive S. in Salem, Oregon. The above described act violates Oregon Administrative Rules (hereinafter referred to as "OAR") Section 340-23-040(7) and OAR Section 340-23-045(5)(a).

III.

Pursuant to ORS 468.125 through 468.140, ORS chapter 183, and Oregon Administrative Rules (hereinafter referred to as "OAR") chapter 340, divisions 11 and 12, and in particular, section 340-12-050(2), the Director hereby imposes upon Respondent a civil penalty of $500.00 for the one or more violations cited in Paragraph II above.

IV.

In determining the precise amount of Respondent's penalty, the Director has

considered OAR, section 340-12-045(1)(a) through (i) as follows:

A. Whether Respondent committed any prior violation, regardless of whether or not any administrative, civil, or criminal proceeding was commenced therefor;

B. Respondent's history in taking all feasible steps or procedures necessary or appropriate to correct any violation;

C. Respondent's economic and financial condition;

D. The gravity and magnitude of the violation;

E. Whether the violation was repeated or continuous;

F. Whether the cause of the violation was an avoidable accident, or Respondent's negligence or intentional act;

G. The opportunity and degree of difficulty to correct the violation;

H. Respondent's cooperativeness and efforts to correct the violation; and

I. The cost to the Department of investigation and correction of the cited violation.

V.

This penalty is being imposed without prior notice pursuant to ORS 468.125(2) and OAR, section 340-12-040(3)(b) because the above-described pollution source would normally not be in existence for five (5) days.

VI.

This penalty is due and payable immediately upon receipt of this

notice. Respondent's check in the above amount should be made out in the name of "State Treasurer, State of Oregon" and returned to the Director.

VII.

Respondent has the right, if Respondent so requests, to have a formal contested case hearing before the Environmental Quality Commission or its hearing officer regarding the matters set out above pursuant to ORS, chapter 183, ORS 468.135(2) and (3), and OAR, chapter 340, division 11, at which time Respondent may be represented by an attorney and subpoena and cross-examine witnesses. That request must be made in writing to the Director, must be received by the Director within twenty (20) days from the date of mailing of this notice (or if not mailed, the date of personal service), and must be accompanied by a written "Answer" to the charges contained in this notice. In the written "Answer," Respondent shall admit or deny each allegation of fact contained in this notice and Respondent shall affirmatively allege any and all affirmative defenses to the assessment of this civil penalty that Respondent may have and the reasoning in support thereof. Except for good cause shown:

A. Factual matters not controverted shall be presumed admitted;

B. Failure to raise a defense shall be presumed to be a waiver of such defense;

C. New matters alleged in the "Answer" shall be presumed to be denied; and

D. Evidence shall not be taken on any issue not raised in the notice and the "Answer."

///

If Respondent fails to file a timely "Answer" or request for hearing, or fails to appear at a scheduled hearing, the Director on behalf of the Environmental Quality Commission may issue a default order and judgment based upon a prima facie case made on the record, for the relief sought in this notice. Following receipt of a request for hearing and an "Answer," Respondent will be notified of the date, time and place of the hearing.

June 27, 1977
Date

William H. Young
WILLIAM H. YOUNG, Director
Department of Environmental Quality

ddf

RECEIPT FOR CERTIFIED MAIL

No. 346257

SENT TO George R. Suniga, Inc.
c/o George R. Suniga, Reg. Agent

STREET AND NO.
1431 Liberty Street, S.E.

P.O., STATE AND ZIP CODE
Salem, Oregon 97302

POSTMARK OR DATE
NOA

Marion Co.

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered ..... With restricted delivery .....
2. Shows to whom, date and where delivered With restricted delivery .....

RESTRICTED DELIVERY .....

SPECIAL DELIVERY (extra fee required) .....

CONSULT POSTMASTER FOR FEES

PS Form 3800 Jan. 1976

NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL

(See other side)

☆ GPO: 1975—O-591-452

PS Form 3811, Jan. 1975

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☒ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
George R. Suniga, Inc.
c/o George R. Suniga, Reg. Agent
1431 Liberty St.,S.E., Salem, Oregon 97302

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	346257	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

D. Wallace

4. DATE OF DELIVERY 6/30/77

POSTMARK

5. ADDRESS (Complete only if requested)
1431 Liberty

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

☆ GPO: 1975—O-568-047

CERTIFICATE OF SERVICE

(Mail)

STATE OF OREGON)
) SS
COUNTY OF)

I, Ruth F. Weigel, being a competent person over the age of eighteen (18) years, do hereby certify that I served George R Suniga, Inc CN # 346257 by mailing by certified
Name of Party
mail to same c/o George R Suniga, Regist. Agent
(Name of Person to whom Document addressed)

same
(and if not the party, their relationship)

(identify document mailed)

I hereby further certify that said document was placed in a sealed envelope addressed to said person at 1431 Liberty Strut S.E. Salem, Oregon 97302 his last known address, and deposited in the Post Office at Portland, Oregon, on the 29 day of June, 1977, and that the postage thereon was prepaid.

Ruth F. Weigel
Signature

VOL. 783 PAGE 563

WARRANTY DEED (INDIVIDUAL)

RUTH C. FRANTZ, who took title as RUTH P. CHAPMAN and ED FRANTZ, hereinafter called grantor, convey(s) to

GEORGE E. SUNIGA all that real property situated in the County of Marion, State of Oregon, described as:

Beginning at a 2" x 36" iron pipe set on the Northerly boundary line of that tract of land described in Volume 346, page 566, Marion County Record of Deeds, said monument bears North 88°32'20" West 6.81 feet and South 1°27'40" West 1,319.58 feet and North 88°37'31" West 20.00 feet from the 1/4 corner between Sections 9 and 16, Township 8 South, Range 3 West of the Willamette Meridian, Marion County, Oregon and running thence North 88°37'31" West 1,340.00 feet along said Northerly boundary line to a 5/8 inch iron rod with an aluminum cap; thence South 1°27'40" West 439.74 feet parallel to a Westerly right of way line of Liberty Road to a 5/8 inch iron rod with an aluminum cap on the Southerly boundary line of said tract of land; thence South 88°38'54" East 1,358.80 feet along said Southerly boundary line to a 5/8 inch iron rod with an aluminum cap on said Westerly right of way line of Liberty Road; thence North 2°02'10" East 119.54 feet along said Westerly right of way line to a 5/8 inch iron rod with an aluminum cap; thence continuing along said Westerly right of way line North 1°27'40" East 319.65 feet to a 5/8 inch iron rod with an aluminum cap on said Northerly boundary line; thence North 88°37'31" West 20.00 feet along said Northerly boundary line to the point of beginning.

and covenant(s) that grantor is the owner of the above described property free of all encumbrances except the rights of the public in and to that portion of the herein described property lying within the limits of roads and roadways.
and will warrant and defend the same against all persons who may lawfully claim the same, except as shown above

The true and actual consideration for this transfer is $ 62,500.00---- *

Dated this 23rd day of June, 19 74

Ruth C Frantz

Ed Frantz

STATE OF OREGON, County of Marion) ss

June 28th, 19 74 personally appeared the above named Ruth Frantz and acknowledged the foregoing instrument to be her voluntary act and deed

OFFICIAL SEAL
VALETA BURKE
NOTARY PUBLIC CALIFORNIA
SACRAMENTO COUNTY
My Commission Expires Aug 22, 1975

2424 Fairoaks Dr., Sacramento, CA 95826

Before me:

Valeta Burke

Notary Public for Oregon California

My commission expires: Aug. 22, 1975

* The actual amount should include cash plus all encumbrances existing against the property to which the property remains subject or which the purchaser agrees to pay or assume

** If consideration includes other property or value, add the following: "However, the actual consideration consists of or includes other property or value given or promised which is part of the the whole consideration." (Indicate which)

WARRANTY DEED (INDIVIDUAL)

FRANTZ, Ruth C. - took title as
RUTH P. CHAPMAN & ED FRANTZ
TO
SUNIGA, George E.

After Recording Return to: and tax stmt to
3442 Commercial St SE
Salem, Oregon

5781

STATE OF OREGON,)
) ss.
County of MARION)

I certify that the within instrument was received for record on the ____ day of JUL 24 1974 19__ at 1:03 o'clock P M. and recorded in book 783 on page 563 Records of Deeds of said County.

Witness my hand and seal of County affixed.

T. HAROLD TOMLINSON, County Clerk

Title

By ____ Deputy

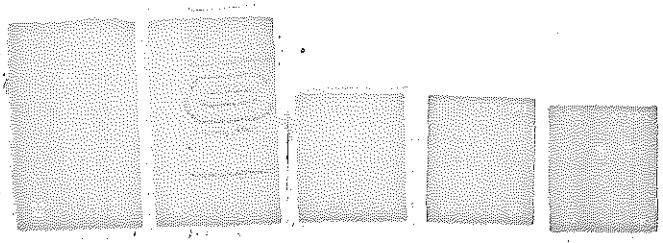
Form No. 9-1959
(Previous Form No. 7A 16)

VOL. 340 PAGE 350

THIS INDENTURE WITNESSETH, That Harold D. Jones and Ruth A. Jones, husband and wife and Robert R. Dent and Rachel A. Dent, husband and wife, hereinafter known as grantor s for and in consideration of the sum of - - Ten and no/100 - - - Dollars, to them paid, have bargained and sold, and by these presents do grant, bargain, sell and convey unto Ruth P. Chapman, her

heirs and assigns, the following described premises, to-wit:

Beginning at a point 20 chains South of the quarter section corner between sections 9 and 16, in Township 8 South, Range 3 West of the Willamette Meridian, Marion County, Oregon, running thence South 6.66 2/3 chains; thence North 89° 50' West 30 chains; thence North 10' East 6.66 2/3 chains; thence South 89° 39' East 30 chains to the place of beginning.



TO HAVE AND TO HOLD the said premises with their appurtenances unto the said grantee s, their heirs and assigns forever. And the said grantor s do hereby covenant to and with the said grantee s, their heirs and assigns, that they are the owners in fee simple of said premises; that they are free from all incumbrances, no exceptions,

and that they will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, we have hereunto set our hand s and seal this 15th day of May, 1946

Done in presence of

Harold D. Jones (SEAL)

Ruth A. Jones (SEAL)

Robt R. Dent (SEAL)

Rachel A. Dent (SEAL)

LAMB The time and place set for the contested case hearing in the matter of the Department of Environmental Quality versus George R. Suniga. My name is Franklin Lamb so that the, your hearing officer on behalf of the Environmental Quality Commission. For the record, this matter involves the alleged violation of OAR 340-23-040, subparagraph 7 and the alleged burning, open burning by the Respondent. The Respondent has denied that each and every allegation.
Mr. Fraley, on behalf of the Department, have you an opening statement to make?

FRALEY Yes, I would say that the Department will show that Respondent has burned construction debris, such as carpet trimmings and glue or paint cans in violation of OAR Section 23- or 340-23-040 number 7.

LAMB Thank you. Mr. Haney, have you an opening statement to make?

HANEY Yes, I do, Mr. Referee. As I understand the facts in this case, it will come out and show that Mr. Suniga, himself neither consented nor knew anything about the fire that took place. With that in mind it's my opinion that the Department of Environmental Quality cannot impose a civil penalty against him merely as being the owner of a piece of property on which a fire takes place, if in fact he has no knowledge or does not consent to the fire itself. Our witness will indicate and I'm sure that Mr. Fraley does not have any witnessess that can point to Mr. Suniga, himself having anything to do with this occurrence, other than the debris being on his property which was burned. I don't believe the laws of our Country go to the point that an individual can be civilly fined for merely being a property owner. Thank you.

LAMB Thank you, Mr. Haney. Mr. Fraley.

FRALEY No, not right now thank you. I'd like to call, as my first witness, Terri Axell, please.

LAMB Terri Axell. Ms. Axell, do you swear that the testimony you are about to give in this matter is the truth, the whole truth and nothing but the truth, so help you God?

AXELL Yes, sir.

LAMB Thank you.

FRALEY Would you give us your full name, please.

AXELL My full name is Terrell Ann Axell.

FRALEY Okay and where do you work?

AXELL For the Department of Environmental Quality Salem Northcoast Region.

FRALEY Okay. What did you do before that?

AXELL I was employed by the Mid-Willamette Valley Air Pollution Authority until the Authority was taken over by the Department in August of '75.

FRALEY Okay. Can you tell us what you observed on June 2, 1977?

AXELL On that morning I was travelling to work, approximately 7:25 a.m. on Liberty Road South and was coming into town. As I rounded a corner I noticed, immediately, huge flames shooting into the air. At first I thought it was a house fire, but as I got closer I could see that it was a house that was under construction or at least appeared to be under construction and I assumed that it was an open burning fire of construction debris.

FRALEY Okay. What did you do then?

AXELL When I arrived at work, it was at about quarter to eight. I--Harry was in the office and I told him what I had seen and also that I had considered contacting the fire department, however, I did not as I was not able to stop on my way into town. So he assured me that he would go out and investigate.

FRALEY Okay. I don't have any further questions of this witness.

HANEY No questions for me.

LAMB Thank you.

FRALEY Okay. I'd like to call as my next witness, Harry Demaray, please.

LAMB Fine. Mr. Demaray, do you solemnly swear that the testimony you are about give in this matter is the truth, the whole truth and nothing but the truth, so help you God?

DEMARAY I do.

LAMB Thank you.

FRALEY Okay. Mr. Demaray, would you give us your full name, please.

DEMARAY Harry Milton Demaray.

FRALEY When were you employed by the Department?

DEMARAY Well, I was with the Mid-Willamette Air Pollution Authority until it was taken over by the Department in August of '75.

FRALEY Okay. How long were you--when did you start with Mid-Willamette Air Pollution Authority?

DEMARAY March 1974.

FRALEY Okay. What's been the nature of your work with the Department and the Mid-Willamette Valley Air Pollution Authority?

DEMARAY Almost entirely in air pollution enforcement.

FRALEY Okay. You--can you tell us what you observed on June 2, 1977?

DEMARAY Yes. I responded to a report by Terri that you just heard about. And I went out on South Liberty looking for the fire and located it on--I forget the address--but it must be here somewhere. I had a little trouble finding it at first. I drove beyond the site and came back in northbound on Liberty and then it was obvious. It was on the skyline and looked like it was on a ridge top. It was a huge bon fire and--

AXELL It was Camellia, wasn't it?

DEMARAY Yeah, Camellia Drive South. It was at the extreme end of Camellia. It was an undeveloped lot that apparently had been used for accumulated waste material.

FRALEY Okay. What type of material did you observe being burned?

DEMARAY Well, most of the material that was making the blaze was consumed by the time I got close enough

to get a good look at it. There was some lumber pieces remaining. There was some scraps of green carpeting, some cans--gallon cans, that had paint or cement in them--I don't know what--some kind of material that was burning very rapidly.

FRALEY Okay. Was anyone with you at the time?

DEMARAY No. I went out there alone.

FRALEY Okay. Did you interview anyone at the scene of the fire?

DEMARAY Yes. I ran into Mr. Ketner, I think it was. Harve Ketner. He was in the vicinity when I got there and I asked him if it was his fire.

HANEY Excuse me. I'm going to object to statements made by a third party that is not present on the grounds that it violates the hearsay rule.

LAMB All right.

FRALEY I would offer this some of the rule.

LAMB I'll consider the objection, but I think we're going to allow the hearsay of the testimony.

DEMARAY Mr. Ketner said no and he hadn't started the fire but he'd help me put it out if I wanted to. And he got a shovel out of his pickup and threw some dirt on it and it was pretty well burned out by then. It extinguished the fire.

FRALEY Okay, did you discuss anything with him about the fire? Other than what you've already stated to us?

DEMARAY Well, during the conversation...

HANEY Same objection, Mr. Referee.

DEMARAY He mentioned that he had an arrangement with Mr. Suniga to clean up the debris around his site and regularly does this. Other than that that's about all I have to say.

FRALEY Okay. Did you observe anyone else at the scene?

DEMARAY No, no one else at the scene--I interviewed some people.

FRALEY Okay. Who did you interview?

DEMARAY Mrs. Wes Barrett who lives across the street.

FRALEY Okay. Did she have any knowledge of what happened?

HANEY Same objection, Mr. Referee.

DEMARAY No, she did not. She didn't have any different knowledge of it.

LAMB Excuse me. Let me ask, Mr. Fraley, have you made any effort to ask that these witnesses be present, Mr. Ketner and...

FRALEY No, I have not.

LAMB No contact with them?

FRALEY Okay. Do you have any idea how much material was being burned or what was there?

DEMARAY Well, Mrs. Barrett did say that there had been quite a pile-up of carpet but I think appliance carpeting.

FRALEY Okay.

DEMARAY Accumulated at that site. And later in the day her husband called and reported that he'd seen somebody light the fire.

FRALEY Okay. To the best of your knowledge is this the first enforcement action that's been taken against Mr. Suniga?

DEMARAY No, no there's quite a list dating back to 1969.

HANEY Excuse me, Mr. Referee, I'm going to object to any testimony along that line. It seems to me that first you must decide whether or not a penalty is to be imposed and if one is to be imposed then you should consider the past conduct of Mr. Suniga, but I don't believe any testimony should be given at this point as to past conduct as an indication of whether or not he violated this specific law.

LAMB I think that's well taken. Mr. Fraley, what's your purpose in gaining?

FRALEY It was to lay groundwork as to the penalty and why the penalty was issued against Mr. Suniga.

LAMB Why the amount of the penalty?

FRALEY Why the amount was what it was.

LAMB That's an issue in this case.

HANEY Well, first I think we must decide whether a penalty is to be imposed and if a penalty is to be imposed then we can talk about the amount.

FRALEY Okay, I'll withdraw that question for this time.

I don't think I have any further questions of this witness right now.

LAMB All right. Thank you.

HANEY I don't have any questions.

FRALEY Okay. I don't--at this time I don't believe I have any other witnesses.

LAMB All right. Do you have any evidence you wish to put into the record other than the testimony?

FRALEY At this time, no.

LAMB All right. Mr. Haney?

HANEY Do I understand that the Department rests their case then?

FRALEY Yes.

LAMB Yes, the Department is resting their case.

HANEY Mr. Referee, I would move for a dismissal of the civil penalty against Mr. Suniga on the grounds and for the reason that there's been no proof in this hearing that he owns the property on which the burning took place. And I certainly believe that that has got to be shown and that there is no proof that he himself or any of his employees participated in a fire which may have taken place. There simply has not been prima facie case proven by any stretch of the imagination under any rules that we can talk about.

FRALEY Okay. I would offer an evidence then. Certified copy of the deed showing the property in question being owned by Mr. Suniga.

HANEY Excuse me, Mr. Referee, the Department has rested their case and it's too late now to introduce documents.

LAMB ...why you didn't offer these earlier when I asked you if you had further witness, documentation and evidence to offer.

FRALEY My only defense is that I'm--well, I guess I'm not quite as well acquainted with the rules--the ground rules.

LAMB I'm going to note your motion. I'm not going to ground you this time. I'll preserve your objection, however. I that there is sufficient

flexibility under the Administrative Procedure Act to allow this evidence to come in at this time, but I will note your objection and your motion.

HANEY Are you denying the motion, Mr. Referee?

LAMB Yes.

HANEY And are you allowing those documents to be introduced after they've rested their case?

LAMB Yes, I am. Mr. Fraley, do you have additional--does the Department now rest its case?

FRALEY Well, in view of this I would like to call one additional witness then. Is that within the bounds or not?

HANEY I'm going to have to object. I do realize that Mr. Fraley is not an attorney and that does put him at some disadvantage but that certainly not the fault of Mr. Suniga or myself and I believe we are entitled to the same rules and procedures that would take place assuming that Mr. Fraley were an attorney. He should know how these hearings operate and it's unfair for him to call a witness, let alone offer a document after they have rested their case.

LAMB Yes. I understand your objection. I think I'll reserve ruling on that for this time, but our purpose here is to construct a record and as the Department is present and willing to give this evidence, I think that we should take it and I'll reserve for the time being your objection and will rule on that at a later time, Mr. Haney; but since we're all here I think we'll allow the Department to proceed.

FRALEY Okay. I would like to call Mr. Suniga, please.

LAMB Mr. Suniga, do you solemnly swear that the testimony that you are about to give in this matter is the truth, the whole truth and nothing but the truth, so help you God?

SUNIGA Yes.

LAMB Thank you.

FRALEY Okay. Mr. Suniga, would you give us your full

name, please.

SUNIGA George R. Suniga.

FRALEY Okay and what do you do for a living?

SUNIGA I'm a contractor, developer.

FRALEY Okay. On June 2, there was testimony that a fire occurred on a building construction site which presumed to be yours. Did you own or control the property in Lot 1, Block 4, Sprague Heights Subdivision, which is located at 1556 Camellia Drive South in Salem at that time.

SUNIGA Excuse me, what lot again?

FRALEY Lot 1, Block 4.

SUNIGA Yes, I did.

FRALEY To your knowledge is that the lot on which the fire occurred?

SUNIGA I wouldn't know. I didn't know anything about the fire.

FRALEY Okay. Is it customary to pile construction debris up a construction site?

SUNIGA Absolutely.

FRALEY It is? What is the--strike that. Have you ever thought about instead of piling this up, getting a container, like a drop box or something to put it in?

SUNIGA Those drop boxes are not that readily available. You have to--you do have to order those things in advance and they're not that readily available.

FRALEY Okay.

SUNIGA You can use them--I've got two or three of them contracted for at the present time, but those things are not that readily available.

FRALEY I see. How long had you been operating in this subdivision?

SUNIGA A year.

FRALEY And within that period of a year you had no opportunity to get a drop box?

SUNIGA We didn't. No, we didn't.

FRALEY Did you try?

SUNIGA Yes, we did.

FRALEY Did you?

SUNIGA Mmhm.

FRALEY I don't think I have any further questions of this witness.

HANEY I don't have any questions of Mr. Suniga right now.

LAMB Thank you, Mr. Suniga.

FRALEY Okay. I would also like to call Mr. Wes Barrett, please.

LAMB Mr. Barrett, do you solemnly swear that the testimony you are about to give in this matter is the truth, the whole truth and nothing but the truth, so help you God?

BARRETT Yes, sir.

HANEY Same objection to this witnesss as I had to Mr. Suniga, Mr. Referee. I don't believe it's fair to call any additional witness after they've rested.

LAMB Thank you. Mr. Haney, I'll note that too.

FRALEY Okay. Mr. Barrett, would you give us your full name, please.

BARRETT Wes D. Barrett.

FRALEY Okay and what is your operation?

BARRETT I'm a real estate broker.

FRALEY And what--where do you reside? Your residence.

BARRETT My residence is 5285 Parker Court South.

FRALEY Okay. Where is that with regard to the fire that occurred on June 2.

BARRETT Directly across the street.

FRALEY Okay. Can you tell us what you observed that day?

BARRETT Well, there's been a pile of rubbish there and many people moving in every month could set a couple more people moving into these houses. I'm not personally acquainted with everyone that moves into a house immediately and I believe that it's probably been the habit of some of these people, kind of irritated me, to pile the rubbish out there anyway, adding their own packing boxes and personal garbage and I had observed people dumping things there. Of course, I hadn't realized that ultimately a pile would disappear...On this

particular morning and I usually don't get out that early in the morning, but I did have some early appointments and I was in that little bathroom right off the utility room there. Normally, I'd be in the bathroom off the master bedroom. I didn't want to wake my wife up early and I was brushing my teeth at the time and kind of glancing out the window and there was a man came up here it looked to be the rubbish from on these car baskets and he was dumping his things on there and it looked like a cigarette ashtray out of the car also, dumping more paper on this huge pile. This was probably before seven o'clock cause I had an early appointment. And this continued and the next thing, I looked up and there's some flames coming and the guy's going--I don't know who he was. I know he was wearing a sport coat and slacks. Evidently, he was getting ready to go early in the morning and thought he'd get rid of his trash at one of the new houses on the street. I don't--maybe it was an afterthought he had the same feeling I had when he set the darn thing off. I think that's what it was.

FRALEY Okay. Do you have any knowledge as to whether he was an employee of Mr. Suniga?

BARRETT I would doubt that his employees wear business suits. No. I know most of the employees of George Suniga. Of course I'm in the real estate business and do become acquainted with...had been an old fellow that carried the trash away and lead owner and the framer. I'm well acquainted with these people. It was not one of his workers.

FRALEY Could it have been a--does he--do you have any knowledge, does he have any salesmen or any representatives like that that may have been dressed in a--.

BARRETT No. George--all of his property is listed through real estate brokers. He does no direct marketing of his houses himself. He is the builder and developer and the place is always...with real

estate brokerages.

FRALEY Okay, thank you.

LAMB Mr. Haney?

HANEY No questions of Mr. Barrett right now, Mr. Referee.

FRALEY All right. I think the Department will rest its case now.

LAMB All right, Mr. Fraley.

HANEY Mr. Referee, I have the same motion that I had prior. I don't believe that the Department has proven a prima facie case. I assume that they are attempting to hold Mr. Suniga responsible under rule 23-040(3), which in essence says that any person who owns or controls the property on which open burning occurs shall be considered the person responsible for the open burning. I don't believe that the Department intends that rule to be one which imposes strict liability on a property owner. The inference that they're attempting to draw from that rule is not correct in that they are assuming or presuming that the person who owns the property is the one that is responsible for the fire and that presumption is just not legally correct under our due process laws. There was a case just recently that went to our Court of Appeals, involving Marion County, the Mid-Willamette Valley Air Pollution Authority, and Lariette and Building Company. I was involved somewhat in that appeal. That decision from the Court of Appeals did not decide the question of a property owner being responsible, unfortunately, and I don't believe that it's been decided by our Court of Appeals. But certainly all the rules of law that I know anything about would indicate that to hold Mr. Suniga responsible under the proof that we have had so far is just totally not allowable under our laws and regulations, especially our Constitution.

LAMB Thank you. You rest your case.

HANEY No, I don't rest my case. I made my motion again,

I assumed following another...

LAMB Yes.

HANEY ...Resting by the Department.

LAMB Fine. All right. On that motion and your objection to the Department resting their case and then reopening it, when we deliberate and make Findings of Fact and Conclusions of Law I'm going to decide those questions. For the time being I've chosen to allow that evidence to come in and then a final decision on this will be made in our own findings and if then you object to that you have the option to appeal to the Commission. I note your motion. I'm going to deny it at this time.

HANEY I would call Mr. Suniga as a witness then, please, for myself.

LAMB Yes. Thank you. Mr. Suniga, do you swear that the testimony you are about to give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

SUNIGA Yeah.

LAMB Thank you.

HANEY Mr. Suniga, you do realize that at sometime there was a fire located in the subdivision that we're talking about. Is that true?

SUNIGA (unintelligible)

HANEY Did you light that fire?

SUNIGA No, I did not.

HANEY Do you know who did?

SUNIGA No, I do not.

HANEY Did you participate in instructing anyone to light that fire?

SUNIGA No, I did not.

HANEY Did you know that the fire was going to be lit?

SUNIGA No, I did not.

HANEY Do you know whether or not the fire was actually lit with regard to some debris of yours?

SUNIGA No, I didn't know anything about it until I got the citation in the mail.

HANEY Did you know anything about it prior to that time?

SUNIGA No, I did not.

HANEY Were you contacted by anyone from the Department of Environmental Quality prior to the time you received the notice?

SUNIGA I don't recall, frankly.

HANEY How many employees do you have that regularly work for you and that would have been in that area during that period of time?

SUNIGA Two, Mr. Haney.

HANEY Do any of those employees wear sport coats and suits?

SUNIGA Probably one.

HANEY Did you come to that property on June 2, 1977?

SUNIGA Not to the best of my knowledge.

HANEY Is it common practice, and I believe Mr. Fraley asked you, for you in the construction business to stack debris from the construction work on possibly a vacant lot?

SUNIGA Sure it is.

HANEY What do you do with that debris at some time in the future?

SUNIGA We haul it off a lot of times and bury it. If it's like cardboard, materials that would cause sediment at a later date. If we do substantial backfilling around buildings we'd bury it in the backyard.

HANEY What did you intend to do with this debris?

SUNIGA Bury it. We buried a lot of debris on that end--on the end lot on Camellia Street. We buried a lot of concrete and bricks, metal cans, debris from the building...

HANEY How many people were living in that subdivision at that time, Mr. Suniga, do you recall?

SUNIGA Well, I would estimate that probably 90% of the subdivision was building and just a minimum number of lots that were not building.

HANEY Did you build all of the homes in that subdivision?

SUNIGA Yes.

HANEY No one else built any spec homes in there?

SUNIGA There was one house that was built by another builder. I sold a lot out to him to be built and I would say at that time...Okay there was my son-in-law built one house at that time. Other than that I built...

HANEY How many homes are in the subdivision? How many lots?

SUNIGA Fifty-four.

HANEY So people moving in a regular basis.

SUNIGA Probably two people a week. Two families, excuse me, a week.

HANEY That's all I have.

LAMB Okay. Mr. Fraley, do you need to question?

FRALEY Looking back to June 2 or in that area, did you call in and talk to Mr. Demaray at all about that?

SUNIGA Yes, I did.

FRALEY Do you remember what the details of that discussion were?

SUNIGA I think essentially what we've discussed here that I didn't know anything about the fire and that I didn't feel that I should be responsible. I wasn't aware of apparently of what the statutes are at the time, which I am now. Basically, that's the discussion we had.

FRALEY Didn't you tell him that you'd gone out to the site a noon and talked with Mr. Kenton?

SUNIGA That could possibly, yes.

FRALEY So you were at the site during that day then?

HANEY I think he indicated that he doesn't recall. He's not trying to pull a fast one on us, but...

FRALEY Well, I just--I'm just trying to establish the facts. I don't think I have any further questions.

LAMB Thank you. Thank you, Mr. Fraley. Mr. Haney?

HANEY Yes, I call Wes Barrett again, if I might, please.

LAMB Mr. Barrett, you're still sworn and under oath.

HANEY Mr. Barrett, you've previously given testimony. There's just a couple of other questions I would like to ask you. Did you see this individual well enough, that you assumed lit the fire, to recognize

him?

BARRETT No, I couldn't say that I would recognize him. It was--at that time there was new neighbors moving in around there and I'm unfamiliar. I know it wasn't Fred...is a close friend of mine across the street. I know it wasn't Fred. The fella at that next house, it was unoccupied at that time. I really wouldn't know who it was. I know it wasn't Ron Britton from up the street.

HANEY If that person would have been Mr. Suniga, would you have been able to recognize him?

BARRETT Oh yes, I certainly would know George Suniga.

HANEY Is it a true statement that you don't have any idea who that individual was?

BARRETT That's true.

HANEY And is it a true statement that you observed a fire burning shortly after you saw that individual dump something on the pile of debris.

BARRETT That's true. What appeared to me at the time it was one of these basket things that hang in the car. I have one in my car and it looked full of that type of litter from a car and looked like he had an ashtray from a car and what--could well he accidentally got the fire going with that ashtray. That the next thing I knew there was--I was brushing my teeth and of course I wasn't looking out the window and I looked back up and the guy was going on over the hill. I don't know where his car was and there was small fire going and the first that you know it came up--there was a pile of debris there and it really made a big flame. I imagine it--I left along in there so there was--I imagine it burned out.

HANEY What time was it that you saw it?

BARRETT I don't...It probably burned out in half an hour or so.

HANEY That's all I have.

LAMB Thank you.

FRALEY I don't have anything.

LAMB All right. We'll close this hearing and you're

off the record.

ROBERT W. STRAUB
GOVERNOR

Environmental Quality Commission

POST OFFICE BOX 1760, PORTLAND, OREGON 97207 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item No. K, March 30, 1979, EQC Meeting

Indirect Source Rule Amendment - Status Report

Background

At the February 12, 1979 EQC Meeting, the EQC deferred authorizing a hearing on amendments to the Indirect Source Rule. This action was taken at the request of the Portland AQMA Advisory Committee to allow them time to study the recommendations and make a recommendation on the matter. The AQMA Committee has formed a subcommittee to study this matter and has met twice as of the time of this writing.

Evaluation

It appears the Advisory Committee will need until the April EQC meeting to come up with a firm recommendation on this matter. It is understood that they will present an interim report to the EQC at your March meeting.

Director's Recommendation

No action is needed at this time. It is acceptable to the Department to wait until the April meeting to make a final decision of the hearings authorization request.

Bill

WILLIAM H. YOUNG

John F. Kowalczyk:vh
229-6459
March 15, 1979

ENVIRONMENTAL QUALITY COMMISSION
Informal Meeting Agenda

7:30 PM, March 29, 1979
Harrison Conference Room, George Putnam University Center
Willamette University, Salem

1. Follow-up to EQC/DEQ Conference, February 24, 1979

   a. Proposed new staff report format and content guidelines

   b. EQC's groundrules for work sessions and informal meetings

   c. Director's role and staff presentations

   d. Communication groundrules between EQC and staff

   e. Necessity for minutes at informal meetings

2. Discussion of issues involved in "banking" of emission offsets

3. Discussion of issues involved in potential reduction of Federal sewerage works construction grant funds for FY 80 and beyond

4. Status of 1979-81 budget request

5. Status of field burning

6. Date and location of May and June EQC meetings

   May 25 Portland?

   June 29 Portland?

LEGISLATIVE COMMITTEE ON TRADE
AND ECONOMIC DEVELOPMENT
ROOM H-197, STATE CAPITOL
SALEM, OREGON 97310
(503) 378-8811

March 7, 1979

Mr. Joe Richards, Chairman
Environmental Quality Commission
P. O. Box 10747
Eugene, Oregon 97401

Dear Mr. Richards:

On February 28, 1979, the Senate members of the Legislative Committee on Trade and Economic Development adopted its final recommendations on the State Implementation Plan required by the federal Clean Air Act as Amended in 1977. The Committee members also voted its final recommendations for the proposed emission offset rule for the Medford/Ashland AQMA.

The recommendations are as follows:

The Legislative Committee on Trade and Economic Development recommends that the Environmental Quality Commission adopt the proposed emission offset rule for the Medford/Ashland AQMA, but that it not be included in the State Implementation Plan that is to be submitted to the Environmental Protection Agency on June 30, 1979.

Further, the Department of Environmental Quality should seek an 18-month delay from the Environmental Protection Agency before submitting the final State Implementation Plan.

Further, the Department of Environmental Quality should seek additional research funding to undertake an intensive air quality testing program for the Medford/Ashland AQNA. As part of that testing program, the Department should review the 5-ton per year limitation for new and expanding industry in the Medford/Ashland AQMA and determine if this is an accurate limitation.

Finally, the State Implementation Plan should be reviewed by the Legislative Committee on Trade and Economic Development, including the emission offset limitations, before final submission to the Environmental Protection Agency.

Recognizing that the state must submit some type of plan to the Environmental Protection Agency by June 30, 1979, the Legislative Committee recommends that the growth provisions for nonattainment areas (i.e., emission offset policy) be based on the federal guidelines rather than the more stringent standards being adopted for the Medford/Ashland AQMA. This would, in effect, give the Environmental Quality Commission more latitude to alter the emission offset limitations without having to obtain federal approval. The Committee is also sending a letter to the Ways and Means Committee lending our support for the air quality testing program funding for the Medford/Ashland AQMA so that the Department can proceed immediately.

Speaking on behalf of the Senate Committee members, I would like to express our appreciation to the Environmental Quality Commission for allowing this Committee to review the proposed administrative rule before adoption. It was never the intent of this Committee to interfer with the Commission's or Department's statutory or administrative rule making authority. However, the issue of emission offsets and "banking of offsets" does represent a major policy change. There still are issues left unresolved and the Committee is planning to continue its reveiw of the air quality program this forthcoming interim period. As to the immediate question of legal ownership of offsets, the Committee is considering introduction of legislation. We are waiting for the federal government to respond to a series of questions before we prepare any legislative measures. We will keep the Department director, Bill Young, fully apprised when the final decision is made. Again, thank you for the courtesy and cooperation extended by your Commission and the Department.

Sincerely,

Sen. Lenn Hannon
Co-Chairman

CC: Mr. Bill Young, Director
Dept. of Environmental Quality

F (2)

LEGISLATIVE COMMITTEE ON TRADE
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Sincerely,

Sen. Lenn Hannon
Co-Chairman

CC: Mr. Bill Young, Director
Dept. of Environmental Quality

Rec'd 3/26/79 DEQ

CHRONOLOGY: EVANS PRODUCTS COMPANY GLASS WOOL PLANT, CORVALLIS

5/12/78 Evans requests site preparation permit from Benton County.

5/17/78 Evans publicly announces intention to construct glass wool production plant -- excessive publicity in Gazette-Times.

6/12/78 Application for Building Permit filed with Benton County. Second announcement of construction of plant (Gazette-Times).

6/15/78 Correspondence between City fire marshall and County building department regarding aspects of Evans facility.

6/26/78 Building Permit issued by County.

7/27/78 City fire department corresponds with Evans regarding building code requirements.

8/30/78 Evans files Notice of Intent to Construct and Construction Approval Application with DEQ.

9/27/78 DEQ issues approval of construction.

10/7/78 Construction of 300' x 80' Glass Fiber Plant. Septic system, well, concrete work, erection of structure, purchase of equipment and materials.

Total costs:

$ 562,920.20	actually expended by Evans as of 3/26/79
1,195,477.06	additional expenditures contractually committed as of 3/26/79
$1,758,397.26	total expended and committed as of 3/26/79

10/13/78 Evans files Application for Air Contaminant Discharge Permit with DEQ.

12/22/78 DEQ staff tours the Evans glass wool pilot plant at Lewisburg (North of Corvallis).

12/26/78 DEQ's 45-day period to respond to Evans permit application expires.

12/27/78 County first notifies Evans of the request for a public hearing on the Glass Wool Plant.

12/30/78 Notice of DEQ hearing published in Gazette-Times.

1/2/79 Amended Notice of DEQ hearing published in Gazette-Times.

1/5/79 Draft permit noticed to public by DEQ.

1/10/79 Evans conducts tour of Lewisburg pilot plant for City and County public officials; three DEQ staff members present.

1/18/79 DEQ public hearing conducted in Corvallis (joined in by City and County).

1/18/79 DEQ announces extension of time for receiving public comments to 2/18/79.

1/22/79 City Council Special Meeting to discuss Evans plant.

1/26/79 City of Corvallis requests an appeal from Benton County's 6/26/78 issuance of building permit.

2/6/79 City of Corvallis submit comments to DEQ.

2/29/79 Benton County Planning Commission schedules public hearing on City's appeal for 3/13/79.

3/13/79 Planning Commission hearing continued until April 10.

3/30/79 EQC to rule on petition for further DEQ hearing.

ROBERT W. STRAUB
GOVERNOR

Department of Environmental Quality

522 SOUTHWEST 5TH AVE. PORTLAND, OREGON

MAILING ADDRESS: P.O. BOX 1760, PORTLAND, OREGON 97207

March 5, 1979

Ms. Carol Splettstaszer
Mr. Mike Downs
DEQ Management Services
P.O. Box 1760
Portland, OR 97217

RE: SW-Roche Road Demolition Site
Solid Waste Permit No. 301
Linn County
Willamette Valley Region

During the fall of 1978, the City of Corvallis, Benton County, Linn County and DEQ officials received numerous complaints regarding odors generated by the Roche Road Demolition Landfill. In response to these complaints, the site operator, Valley Landfills, Inc., earnestly began seeking solutions to the problem. As you know, one option was to divert the waste stream from the Coffin Butte Landfill to the Roche Road site to accommodate rapid filling and closure (see Attachment 2). To evaluate this, the operator met with our Department's Chief Solid Waste Chemist to determine if any adverse effects might result from this approach.

After taking groundwater samples and reviewing past monitoring data, it appears that groundwater problems would not occur; however, there remains an unknown variable regarding odor generation. The source of most organic substances now being introduced in the fill are of plant or wood origin and degradation goes through basically the same sequence.

By diverting the Coffin Butte flows into the Roche Road site, an entirely new form and source of organic substances would be available. As such, a variable factor exists which might significantly change the source and character of the odors produced. Since this would introduce an unknown, one possibility would be that odor production might be magnified or generated in a new form.

With this possibility in mind, Valley Landfills, Inc., formally notified us on March 2, 1979 that they are no longer considering the diversion of Coffin Butte wastes to the Roche Road site, and have requested our Department to stop any further permit considerations using this option (see Attachment 1).

The option that appears most environmentally sound follows the control procedures recently developed for the operation by CH2M/Hill Engineering (see Attachment 1 for details). Basically, it uses injections of hydrogen peroxide into the pond to complement the operation of the existing aeration system. As presented, this would supply sufficient volumes of dissolved oxygen in the ponded water to inhibit the formation of hydrogen sulfide gases by certain bacteria. It has been in use since mid-February, and to date has been effective; whereas previous odor control measures using other chemical additives have been ineffective.

Additionally, the operator estimates that the deep pond on the east side of the pit will be filled above low water level by October. To help prevent future odor generation when the water table rises again next winter, the entire pit floor will be provided with a blanket of compacted soils by October 1, 1979.

As a last resort, Valley Landfills has also agreed to fill in the ponded waters with the existing berms and mined soil if for some reason the hydrogen peroxide injection/aeration system does not satisfactorily control the odors.

Since the hydrogen peroxide odor control measures and contingency plans are presented in response to Schedule D, Condition 11 of the site's existing Solid Waste Disposal Permit, formal action by the Environmental Quality Commission will not be necessary.

If you have questions, please contact either Gary Messer of our Salem Office (378-8240), or Daryl Johnson of our Eugene Office (686-7601) for additional information.

Sincerely,

John E. Borden, P.E.
Regional Manager

JEB/wr
Attachments:
1. Valley Landfills, Inc. letter dated March 2, 1979.
2. Roche Road Demolition Landfill Status Report presented at the Feb. 23, 1979 EQC hearing.

Valley Landfills, Inc.

Design, Operate and Manage Sanitary Landfills

P.O. BOX 1 CORVALLIS, OR 97330 (503) 752-7315

March 2, 1979

Mr. John Borden
Regional Manager
Willamette Valley Region - Salem
Department of Environmental Quality
1095 25th St. S.E.
Salem, OR. 97310

Dear Mr. Borden:

As per our conversation of 3-1-79, we would like to withdraw our request for a permit addendum relative to our Roche Road Demolition Site. Your staff's idea of diverting municipal waste to the site to more rapidly close out the site was initially appealing. However, after receiving input from DEQ's chief chemist, we would like to offer another alternative. Our proposal is in four parts:

1. We will continue to utilize CH2M-Hill for direction regarding odor control for the duration of the site.

2. We will continue to use hydrogen peroxide plus aeration for total ordor control for the remaining life of the site.

3. Using only our traditional demolition waste as fill material, we propose to completely fill the summer ponded water by October 1, 1979. In addition, we will provide a compacted soil blanket of 18" to 24" thick as interim cover on the completed lower lift. This soil blanket will not only serve to diffuse and minimize gases passing through it, but it will also act as a barrier for fire control. We would expect to be out of the site by July 1, 1980.

4. If, for some unforeseen reason, the above described odor control techniques fail, and if DEQ determines them unworkable, we will fill in the remaining ponded water area with diking material and soil from surrounding farm land.

Essentially this proposal would allow us to continue the operation of the site as originally planned, and in addition to utilize disposal areas which would otherwise be lost to the community. We would also assure that odor problems would not reoccur for the life of the site.

If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,

Bill Webber

William Webber
General Manager

WW:jj

ROBERT W STRAUB
GOVERNOR

Department of Environmental Quality

522 S.W. 5th AVENUE, P.O. BOX 1760, PORTLAND, OREGON 97207

Willamette Valley
Region
1095 25th Street, SE
Salem, Oregon 97310

February 22, 1979

STATUS REPORT: Roche Road Demolition
Landfill, Linn County

Background

1. Valley Landfills, Inc. operates Roche Road Demolition Landfill located approximately one-half mile east of Corvallis in Linn County. The original site was an old gravel pit of about ten (10) acres. Throughout its history clearing debris, building demolition and large quantities of industrial waste have been received.

2. Wastes are deposited directly into ponded water but monitoring wells have not shown significant groundwater degradation to date.

3. The site was established in 1969 and put under regular permit in 1973. An operational plan was approved May 9, 1977. At its May 27, 1977 meeting, the Commission granted a variance from OAR Chapter 340, Section 61-040(3)(C) and approved a five (5) acre expansion (see Exhibit 1) at Roche Road. The current permit was issued on October 31, 1977 and expires June 30, 1982. The variance conditions are included in the current permit.

4. Permit conditions important to this discussion are:

   a. A-4 which prohibits nitrate or other chemical additions to lagoon water without Departmental approval.

   b. A-5 which prohibits burning and requires that accidental fires be extinguished.

   c. A-6 which requires certain controls for salvaging and recycling activities.

   d. D-7 which requires bulk tire baling, chipping or splitting.

   e. D-11 which requires site operational controls for odor generation.

For [illegible]

f. G-8 which requires certain activities in the event of equipment breakdown, flooding, fires or other emergencies.

g. G-10 which allows the Department to terminate the permit under certain conditions.

5. By June, 1978 nuisance odors had become noticeable enough that Valley Landfills had retained a consultant to propose improved odor control methods.

6. By October, 1978 more than 50 odor complaints had been filed with DEQ including a letter from the Mayor of Corvallis.

7. Numerous staff visitations to the site brought temporary odor abatement, but problems recurred. On October 31, 1978 staff concluded the odor problem is "characteristic to the site" and, therefore, that it should be closed before the June 30, 1982 expiration date. Valley Landfills agreed to an October, 1980 closure. The addendum changing the expiration date has been halted pending Commission action in the near future.

8. On November 24, 1978 approximately two (2) acres of tires stored at Roche Road caught fire. Although arson was suspected, the cause was not positively determined. The fire burned for seven (7) days, and was buried on December 1. No civil penalties were levied since Valley Landfills made extraordinary efforts to extinguish the fire. But the incident caused significant public alarm and complaints; and the fire pointed out problems regarding tire storage.

9. In a December 13, 1978 letter, DEQ required a tire management plan by January 15, 1979. The Department also prohibited use of nitrates to control odors.

10. Odors continued and the tire plan was not received. So a Notice of Violation was sent to Valley Landfills on January 29, 1979 (Exhibit 2).

11. On February 13, 1979 Valley Landfills proposed to close Roche Road by November, 1979 (Exhibit 3). The important elements of the accelerated closure proposal are:

a. Municipal refuse would be rerouted from Coffin Butte to Roche Road. Only packer truck and commercial hauler waste would be rerouted. Public disposal of domestic waste at Roche Road would not be permitted.

b. Closure could occur by no later than November, 1979 if permission to reroute the Coffin Butte wastes occurred immediately.

c. Hydrogen peroxide (H_2O_2) in conjunction with an existing aerator would be used to control odors from the lagoon. Adjustment of pH may also be needed. Nitrates would not be added.

d. A permit addendum is requested to reflect the above modifications.

Evaluation

1. Monitoring data has not yet shown significant groundwater pollution from activities at Roche Road.

2. The Department continues to receive local odor complaints which can be attributed to Roche Road. Odor control measures to date have been ineffective.

3. Data indicate that circumstances which cause odor production are becoming increasingly serious. These conditions in the lagoon are elevated BOD, depressed D. O. and low pH.

4. Other odor control methods may exist (Exhibit 3), but may be of questionable effectiveness, too costly, or environmentally unsound. And other site closure methods are possible, but may be subject to the same limitations as above if closure is to occur in 1979. Staff are currently evaluating the other options.

5. At this time, the following options to reduce or eliminate odor problems at Roche Road appear the most likely in priority order, but may be ruled out or changed depending upon staff evaluation:

   a. Discontinue disposal of any organic substances and fill the remaining pit as quickly as possible with inert substances (e.g., concrete blocks, road spoils, earth, etc.)

   b. Continue current demolition disposal activities and accelerate closure as much as possible with the above inert substances.

   c. Both the above coupled with rerouting of Coffin Butte municipal refuse to Roche Road.

   All of the above options require extensive odor control efforts while any water surface remains exposed. At this time, only aeration and hydrogen peroxide addition are considered acceptable.

6. The Corvallis, Linn County and Benton County Planning Departments have been notified that DEQ is reviewing Valley Landfill's proposal.

Recommendations

1. No action is recommended at this time.

2. Staff will continue evaluating the Valley Landfill's proposal (Exhibit 3) and prepare a report for the March 30, 1979 Commission meeting in Salem.

EQC Variance presentation Exhibit I

ENVIRONMENTAL QUALITY COMMISSION

1234 S.W. MORRISON STREET • PORTLAND, ORE. 97205 • Telephone (503) 229-5696

ROBERT W. STRAUB
GOVERNOR

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item No. F May 27, 1977 EQC Meeting

Variance Request:

Valley Landfills, Inc., Corvallis (Roche Road Landfill)

Background:

Valley Landfills, Inc. operates a solid waste disposal site known as the Roche Road Landfill, which is located approximately one-half mile east of Corvallis in Linn County. The site is an old gravel pit approximately 10 acres in size. It receives primarily land clearing debris, building demolition and selected industrial wastes.

The site was established in 1969, before the Department adopted solid waste regulations, and wastes are deposited directly into ponded water (shallow groundwater). In 1973 the facility was put under regular permit and groundwater monitoring wells were constructed to evaluate the impact of the facility. Results indicated that the effects on downgradient water quality were minimal and the company was permitted to continue the fill. Water quality monitoring has continued on a routine basis and shows very little change.

The Roche Road site has generally been well operated but there were some odor problems early in its history. The company was cooperative and took corrective actions to deal with the problem. It was eventually corrected by the installation of an aerator.

The site presently serves as the regional demolition waste landfill for Linn and Benton Counties, in accordance with the Chemeketa Region Solid Waste Management Plan. It is anticipated the site will be full in approximately one and one-half years. The company has now applied for a permit to expand the landfill by approximately 5 acres, coincident with the removal of gravel for construction, and requests a variance from Oregon Administrative Rule 340-61-040(3)(c) which prohibits depositing decomposable materials directly into the groundwater table.

DISCUSSION:

The existing fill operation has had minimal effects on water quality and has not impaired beneficial uses of the local groundwater or of the Willamette River. The expansion proposal includes provisions for improved landfill design and operation. There are three domestic wells located downgradient from the current fill and tests indicate that none of these has been adversely affected. This is a groundwater discharge area and the flow appears to swing away from these residences. The expansion would be upgradient from the current fill and is not expected to significantly increase the threat to these wells. The area is zoned agricultural and no new residential development is anticipated. Valley Landfills proposes to install 4 additional monitoring wells and there is a contingency plan for collecting and treating contaminated groundwater if necessary. The site is located within the floodplain of the Willamette River, but a dike protects the site from 100 year frequency floodwaters. The variance request is supported by the Department's Water Quality Division and the Department of Water Resources.

The regional solid waste management plan did not address the possible expansion of Roche Road site, since the proposal was only recently conceived. The plan suggests another very large gravel pit in the Corvallis area as a possible alternative. That site, however, is currently restricted to the owner's use only and there are significant questions concerning water quality which have not yet been answered. The only site currently available is not recommended for demolition waste in the regional plan and would involve a substantial hauling distance and costs. It is believed that the expansion of the Valley Landfills, Inc. site would be compatible with the regional plan, but the Department would require that the company obtain the formal approval of the Regional Solid Waste Committee before issuing a permit. The Company has already obtained the approval of the Linn County Board of Commissioners and Planning Commission after a public hearing.

It is predicted that a resource recovery facility will be available in the Corvallis area within 8 years when the proposed 5-acre expansion is to be completed. The proposed expansion is small enough so that its approval should not delay any such move to resource recovery.

A final consideration is that high grade gravel exists at the proposed site and it can be mined only if the land is properly restored. Filling with solid wastes is the most economical alternative and overburden from the gravel excavation would provide needed final cover material for the company's existing landfill.

Granting of a variance by the Environmental Quality Commission is authorized by ORS 459.225, if the Commission finds that:

(a) Conditions exist that are beyond the control of the applicant.

(b) Special conditions exist that render strict compliance unreasonable, burdensome or impracticable.

(c) Strict compliance would result in substantial curtailment or closing of the disposal site and no alternative method of solid waste management is available.

CONCLUSIONS:

1. The existing site is nearly full and an alternative landfill of moderate size is needed at least until a resource recovery facility is available.

2. There are no nearby alternative sites currently available. A possible alternative suggested in the regional solid waste management plan is a very large private site where the effects on water quality are not known.

3. It would seem unreasonable to prohibit the expansion on the basis of water quality when there is a substantial amount of test data to indicate that the effects of the current operation have been well within acceptable limits.

4. Strict compliance with the regulations would cause the landfill to close and would prevent the mining of needed sand and gravel at the site.

5. The Commission may grant a variance to the regulations.

DIRECTOR'S RECOMMENDATION:

It is recommended that a Variance from OAR Chapter 340, Section 61-040(3)(c) be granted to Valley Landfills, Inc. for the proposed 5-acre expansion of the Roche Road Landfill under the following conditions:

1. Wastes deposited shall be restricted to primarily land clearing debris, building demolition and construction wastes, and selected industrial wastes.

2. No food wastes, garbage, dead animals, sewage sludges, septic tank pumpings, hospital waste, chemicals, oils, liquids, explosives or other materials which may be hazardous or difficult to manage shall be deposited.

3. Landfill construction and operation shall be in accordance with plans approved in writing by the Department and in compliance with a Solid Waste Disposal Permit issued by the Department.

WILLIAM H. YOUNG
Director

5/9/77

Exhibit 2

ROBERT W. STRAUB
GOVERNOR

Department of Environmental Quality

522 SOUTHWEST 5TH AVE. PORTLAND, OREGON WILLAMETTE VALLEY REGION - Eugene

MAILING ADDRESS: P.O. BOX 1760, PORTLAND, OREGON 97207 16 Oakway Mall, Eugene, Or. 97401

January 29, 1979

Mr. William B. Webber, Jr.
Valley Landfills, Inc.
P.O. Box 1
Corvallis, Oregon 97330

RE: NOTICE OF VIOLATION
Permit # 301
Roche Road Demolition Landfill
SW-WVRE-79-11
Linn County

Dear Mr. Webber:

You are hereby notified that your current operation at the Roche Road site constitutes a violation for which penalties may be in order. Please be reminded that your permit, Schedule C(2,5) required that lagoon aerator must be installed for the control of odors. The intent of the permit condition is to utilize adequate aeration of the lagoon. It has been demonstarted that your current aeration scheme is not adequate and must be replaced with an adequate aeration device.

Also, you were requested to submit a plan for tire storage by January 15, 1979. To date, this office has received nothing in that regard. The practice of tire storage must be discontinued until tire storage plans are submitted.

Your cooperation will be appreciated. If I can be of any assistance please give me a call at 686-7601.

Sincerely,

Daryl S. Johnson
Supevising Sanitarian

DSJ/jnf
cc: DEQ/Solid Waste Division
WVRS

Exhibit 3

Valley Landfills, Inc.

Design, Operate and Manage Sanitary Landfills

P.O. BOX 1 CORVALLIS, OR 97330 (503) 752-7315

February 13, 1979

Mr. John Borden
Regional Manager
Willamette Valley Region - Salem
Department of Environmental Quality
1095 25th St. S.E.
Salem, OR. 97310

RE: Permit #301 - Permit Addendum for Roche Road Demolition Site

Dear Mr. Borden:

In recent months our Roche Road Disposal Site has created odor in the Corvallis area. Based on these odor problems, and in the best interest of the community, we would propose to close the site as soon as it is practical. We agree with the Department's staff that diverting waste from the Coffin Butte Landfill would better than double the speed to close the site. The life of the landfill, as operated today, would be approximately 16 to 18 months, or until mid-1980. By diverting waste from Coffin Butte, we could close in 7 to 9 months, or by November, 1979. Utilizing this diversion technique, we could fill the present ponded area in approximately two to three months, and then the remainder of the filling operation would be above water level.

We would propose to control potential odor problems through the addition of hydrogen peroxide in conjunction with our present aeration system. We could assure the Department that regardless of the amount of hydrogen peroxide required, there would be no odor problems for the duration of the site. A report from CH2M-Hill will be shortly forthcoming, which will outline the specific dosage levels, monitoring and rationale pertaining to the use of hydrogen peroxide for odor control.

We therefore request a permit addendum to divert municipal waste from the Coffin Butte Landfill to the Roche Road Landfill beginning March 1, 1979.

Very truly yours,

Bill Webber

William Webber
General Manager

WW:jm

CH2M HILL
engineers
planners
economists
scientists

18 February 1979
C12472.A0

Valley Landfills
P.O. Box 1
Corvallis, OR 97330

Attention: Mr. William B. Webber, Jr.

Gentlemen:

Subject: Corvallis Landfill Site Odor

This letter summarizes our findings to date on the odor that periodically emanates from the pond in your demolition landfill site east of the Willamette River near Corvallis. A recommended action plan, which has already been partially implemented, is included. When the laboratory tests now in progress on pond samples are complete, a separate report will be prepared for these results.

CAUSE OF THE PROBLEM

The odor that emanates from the pond is characteristic of hydrogen sulfide, the so-called "rotten egg" odor. As rainwater falls on the demolition site and runs into the pond, certain trace impurities are picked up from the material in the landfill. Included in these impurities are sulfate (non-odorous ion) and organic matter. Certain naturally occurring common bacteria (e.g., Desulfovibrio desulfuricans) will, in the absence of oxygen, take the organic matter as "food" and reduce sulfate in water to the sulfide form. At the neutral pH condition of the pond, the sulfide will exist as hydrogen sulfide, a very volatile gas, which will vent off the pond to surrounding areas.

The mechanism described is a very natural process, and is the reason why raw sewage, manmade or natural ponds, or certain home foodstuffs develop a "rotten-egg" odor when allowed to stand over a period of time.

Corvallis Office
1600 S.W. Western Blvd., P.O. Box 428, Corvallis, Oregon 97330 503/752-4271 Cable: CH2M CVO

BACKGROUND

In late 1971, an odor problem was experienced similar to the problem experienced at the site the fall season of last year. CH2M HILL was hired at that time to recommend a solution. Laboratory tests were made, and an aeration system for dissolving oxygen into the water was constructed (dissolved oxygen in the water inhibits the ability of the bacteria to reduce sulfate to sulfide). Concurrently, periodic addition of nitrates to the water (which also inhibits sulfate reduction) was implemented as a "stop gap" measure when noticeable odor was detected. These measures proved successful for a number of years. However, use of the landfill has increased during the past several years and the amount of material hauled to the site has increased dramatically.

Our recent sampling program, along with DEQ sample results on the pond from 1975 to 1977, shows an upward trend in the amount of organic matter in the water as measured by the chemical oxygen demand (COD) test. COD levels in the pond water are 3 to 5 times the 1971-1972 level, which is consistent with the increased filling rate at the site.

Another change from 1971-1972 is that the first gravel pit site was filled, so the pond under discussion here is actually a new pond in the second pit now being filled. No significance is attached to this factor from our own observations and discussions with Mr. Randy Sweet, consulting hydrogeologist. On a positive note, the observation is that no odors have emanated from the first gravel pit after it was completely filled, which suggests that odor abatement considerations will end when the present pit is filled.

Thus, our conclusion is that the increased concentration of organics (COD), and its associated impact on sulfide production in the pond water, is the primary cause of the odor problem of the recent past. During our sampling program and periodic visits to the site over the past month, no significant odor has been noted. However, as the pond water warms through the spring and bacterial activity increases, the potential for recurrence of increased odor exists. An action plan is required to respond to this possibility.

ALTERNATIVES CONSIDERED

Valley Landfills, DEQ staff, Mr. Randy Sweet and CH2M HILL have reviewed various alternatives for mitigating future odor problems. These are summarized below:

- Fill the pond. It was the mutual conclusion that filling the pond area is the most attractive permanent solution to the current problem. Practical limitations on the feasible filling rate include regulatory limits on what can be hauled to the site, company logistic problems on the rate that material can be hauled to the site, and some possibility that increased spring season water table may hinder the workability of the site for a short time. Although the practical filling rate is unknown at this time, it is clear that a short-term alternative for odor control must be deployed for a period of at least several months.

- Increased aeration. With the available power supply to the site, the aeration rate of the pond can be roughly tripled by installing additional mechanical or diffused aeration equipment. Our review of the laboratory data on pond samples indicates that this level would aid in reducing the odor potential, but may not toally be effective for the current conditions, particularly if the pond warms up rapidly this spring.

  A further complication with the "increased aeration" alternative is the time required to obtain and install the aeration hardware. Based on present equipment delivery estimates, installing additional aeration will require about two months. It follows, in this case, that an interim odor control program for the next two months will still be needed.

  The result of these factors is that an aeration system is not attractive in this particular case because:

  a. An additional short-term odor control program is still needed for the period during which the aeration system is being constructed, and

  b. The long-term objective is to fill the pond area as quickly as possible, which might occur in only a few months under ideal conditions.

The aeration system might, therefore, be used for only a couple of months. This situation, which is unique to the present pond, favors continuation of the selected short-term odor control program to avoid the almost immediate abandonment of the aeration system capital investment.

It is appropriate to note that these conclusions concerning aeration as a solution to the odor problem are a result of the particular time constraints of this situation. Under a different set of conditions, a well-designed aeration system would be an entirely satisfactory approach.

- Hydrogen peroxide addition. Injection of hydrogen peroxide into sewage to stop hydrogen sulfide odors is well documented and has proven to be successful. Since the mechanism of our odor formation is the same, this method should be very applicable to our system. Also, hydrogen peroxide reactions in water generate harmless end products and thus are very desirable from an environmental standpoint. Therefore, hydrogen peroxide appears to be the lead alternative for immediate action on the odor problem.

- Nitrate addition. Increased dosage of nitrates to the pond water would be of some assistance in stopping odor. However, the DEQ has expressed an objection to this method and would want precise documentation of the destiny of the nitrates in the pond water and surrounding waters before approving further nitrate addition.

- Raising pH of pond water. Increased pH (8-9) will suppress the volatility of hydrogen sulfide gas in water markedly, thus reducing the amount that can escape from the water. Since this method does not chemically destroy the sulfide, and the pond from natural reactions will eventually reduce back to neutral pH (7±), this procedure has the limitations of requiring repeat additions. However, when used in conjunction with a chemical oxidant such as hydrogen peroxide, the combined solution may prove to be very effective. This method is also environmentally safe.

- Sterilize pond. Chlorine or an organic biocide such as methylene bis thiocyanate could be added to the pond in a slug dose to kill the bacteria causing the odor. These methods were discarded because of the uncertainties associated with the end products which are of questionable environmental safety.

- Spray irrigation. This alternative was briefly considered based on the theory that the pond water containing organics would be replaced by ground water, thus reducing the "food" level in the pond. However, this method has high risk because under the condition that the pond water contains sulfides, the irrigation spray could emit significant levels of hydrogen sulfide to the air, thus aggravating rather than reducing the problem.

ACTION PLAN

Until the pond is filled, a program for eliminating significant odor is needed to supplement the continued operation of the existing aeration system.

Addition of hydrogen peroxide to the pond in periodic dosages is recommended. Based on data from sewage installations and our judgments drawn from pond chemical analyses, dosage rates of about 30 mg/l H_2O_2 based on the pond volume are recommended. We have a sample in the laboratory now that is aging under controlled temperature conditions. It will be titrated with hydrogen peroxide to refine our estimates of the peroxide dosage requirement. The frequency with which the pond should be dosed is not predictable because it is subject to factors such as rainfall, water table, and the rate that the water warms as we come out of winter. Detectable odor should be the criterion for determining when to dose. We also have a laboratory meter for measuring "oxidation-reduction potential" (ORP) with which we can periodically check the pond. ORP measurements can provide a general indication of trends toward odor-producing conditions.

The first shipment of hydrogen peroxide drums arrived last Friday; your people, with the assistance of Mr. Fred Khosravi of our firm, have already injected the first dose.

Raising the pH with caustic soda, lime and/or boiler ash is also being considered as a "second line of defense." Before making a firm recommendation on the justification for pH adjustment, we would like to see the results of the first few hydrogen peroxide dosage tests.

We are looking forward to the successful completion of this project.

Yours very truly,

Jay A Mackie

Jay A. Mackie
Project Manager

cmp

OREGON ENVIRONMENTAL COUNCIL

2637 S.W. WATER AVENUE, PORTLAND, OREGON 97201 / PHONE: 503/222-1963

March 22, 1979

Fred Bromfeld
DEQ
Hazardous Waste Section
PO Box 1760
Portland, OR 97207

EQC Hearing Section

MAR 29 1979

Dear Mr. Bromfeld:

The Oregon Environmental Council has briefly reviewed your proposed new rules for hazardous waste management (OAR 340, Division 63) and submits the following comments:

1) New Section 63-OXX should be added to indicate what reporting DEQ will do for the EQC and the public. We suggest a semi-annual compilation of data received from hazardous waste generators, transporters and treatment/collection/disposal facility operators. We suggest that public access to DEQ records be ensured by written rule.

2) Section 63-125 (3) (c) should be modified to call for submittal and approval of an on-site confinement plan for hazardous wastes associated with mining. Mining hazardous wastes shipped off-site should be subject to the rules of OAR 340, Division 63.

3) Section 63-011, - 125, et al should specify that the concentration limits which define treatment and disposal controls are to be applied at the source of generation - before any dilution or mixing with less hazardous wastes which might lead to weaker controls on the hazardous material.

4) Section 63-230 should require the manifest to specify the location of hazardous waste generation in addition to the address (office) of the hazardous waste generator.

5) Section 63-230 should prohibit the reuse of a manifest proper. Reuse of a hazardous waste description, etc. may be acceptable but individual shipments should each have a separate manifest to ensure cumulative data collection, to facilitate tracking of an improper shipment and to avoid mis-

ADDENDUM TO ATTACHMENT "A" OF AGENDA ITEM F(1), March 30, 1979 EQC Meeting

Amend 340-71-017(1) as follows:

(1) Upon completing the construction for which a permit has been issued, the permit holder shall notify the Department. The Department shall inspect the construction to determine if it complies with the rules contained in this Division. If the construction does comply with such rules, the Department shall issue a Certificate of Satisfactory Completion to the permit holder. If the construction does not comply with such rules, the Department shall notify the permit holder and shall require satisfactory completion before issuing the certificate. Neither the permit holder, the system installer, nor any other person may backfill (cover) a system that, upon inspection, has been found in violation of rules contained in this Division until the deficiencies have been corrected and a Certificate of Satisfactory Completion issued. Failure to meet the requirements for satisfactory completion within [a reasonable time] thirty (30) days after notification in writing constitutes a violation of ORS 454.605 to ORS 454.745 and this rule.

On Page 4 of ATTACHMENT "A" substitute the following for language proposed for 340-71-016(6).

Rescind 340-71-016(6) in its entirety and substitute the following:

(6) When upgrading disposal systems which approximate a pit privy and gray water discharge to the surface or to a pit, system repair rules, 340-71-030(7) shall apply, provided the following criteria can be met:

(a) The system serves an occupied dwelling, and

(b) The system was constructed prior to January 1, 1974.

Amend temporary rule, Geographic Region Rule "C", 340-71-030(10), by adding a new paragraph (D) to subsection (a) to read as follows:

(D) That when the ETA beds have been constructed in accordance with paragraph (B) of subsection (b) below and diagrams 7-C (A) & (B), a minimum of six (6) inches of fine textured soil shall underlie all portions of the ETA beds.

March 28, 1979

3/30/79

March 15, 1979

TO: Environmental Quality Commission

FROM: AQMA Advisory Sub-Committee on Indirect Source Rule

SUBJECT: Status Report on Indirect Source Rule Review

The Portland AQMA Advisory Committee has established a sub-committee to review the proposed changes in the Indirect Source Rule. At this time the direction the sub-committee is taking is to develop a recommendation for the full committee that will retain the indirect source review in some manner. This may be in the form of:

1. Source by source reviews; or

2. Parking and Traffic Circulation Plans with an interium plan for source by source review until such time as Parking and Traffic Circulation Plans are established.

Several issues that have been identified and discussed but are not yet resolved include:

1. In what geographic area should the Committee recommend that the rule apply? Both actual non-attainment areas or the entire AQMA have been discussed. If the oxidant non-attainment area remains the entire AQMA, these boundaries may be the same.

   This question really addresses the issue of whether the program is strictly to assist in meeting standards or if it should also be used as a maintenance program.

2. Would the Parking and Traffic Circulation Plan approach tie land-use planning in more closely with air quality planning and provide for better over-all project adopted?

3. If the Parking and Traffic Circulation Plan is the preferred mechanism, what should be done in the interium until such a plan or plans are developed and adopted?

4. If the source by source review is the preferred mechanism:

   a. Is the recommended TSP incremental concentration set at a justifiable level for indirect source?

   b. Are there additional "Indirect Source Emission Control Programs" which should be added to 340-20-110(16)(a)-(n)?

c. Should any conditions be placed on a project by EQC or should a request be approved or denied only thereby allowing the developer/designer (be it public or private) to be responsible for deciding what changes need to be made in the project?

The Indirect Source Sub-Committee will be mailing its recommendation to the full Committee prior to the Committee's April 10 meeting. The Committee will be asked to take action on the recommendation at that time. A recommendation will be included on the DEQ's mailing to the Commission for your April 27 meeting.

LINN COUNTY DEPARTMENT OF HEALTH SERVICES
COURTHOUSE ANNEX
P.O. Box 100, Albany, Oregon 97321

Michael McCracken, M.S.
Administrator

Benjamin Bonnlander, M.D., M.P.H.
Health Officer

John E. Johnson, M.S.W.
Mental Health Director

Susan Jewell-Larsen, R.N.
Public Health Director

Richard Swenson, R.S.
Environmental Health Director

Public Health 967-3888
Mental Health 967-3866
Environmental Health 967-3821
Administration 967-3905

March 29, 1979

Environmental Quality Commission
c/o Department of Environmental Quality
P. O. Box 1760
Portland, OR 97207

Re: Proposed Amendments to OAR Governing Subsurface and Alternative Sewage Disposal Minimum System Sizing for Single Family Dwellings

Dear Commission Members:

The proposal to change system sizing is not the only proposal that should have been considered in attempting to simplify and improve the methodology of sizing sewage disposal systems for single family dwellings. Attached is an additional method that I believe has some merit and should be considered.

Since the limited time we have had to review this extensive and complex rule change was entirely inadequate, I would hope that decisions regarding sizing of sewage disposal systems be delayed until other methods are considered. A rule change in this area would have immediate and drastic state-wide impact. There must be more input before a decision can be made.

I would be willing to work with you and your staff in providing additional information.

Sincerely,

Richard H. Swenson

Richard H. Swenson, R.S., Director
Environmental Health Services

cc: Mike McCracken
Jack Osborne

Attachment

March 29, 1979

SIZING OF SUBSURFACE SEWAGE DISPOSAL SYSTEMS
FOR SINGLE FAMILY RESIDENCES

Since there are numerous methods for sizing systems we feel the following criteria most important in developing a method.

1. The drainfield must be adequate to handle the expected maximum sewage flow in order to protect the public health.

2. The method must be simple and easily understandable by the public.

3. The method must be reasonable and easy to explain the justification of using this method to the public.

4. The method must be cost-effective (that is, not require unusual oversizing of systems when, realistically, it is not necessary).

5. Reduce the need for future additional permits when dwellings are expanded.

6. Maintain some flexibility to allow for unusual conditions that may face a sanitarian.

Any method of sizing that we can think of will be a compromise of the above considerations. We propose the following method of sizing in light of the above criteria.

Sizing of Subsurface Sewage Disposal Systems
for Single Family Residences

Dwelling Size	Sewage Flow
Less than 750 sq. ft. --	300 gallons per day
750 to 3000 sq. ft. --	450 gallons per day
More than 3000 sq. ft. --	based on number of bedrooms at 150 gallons per day per bedroom -- not to exceed 5 bedrooms.

Explanation of this Proposal -- Ninety-nine percent of single family dwellings fall within the 750-3000 square foot category. The system would be sized based on 450 gallons and therefore eliminate the need to use the bedroom method in ninety-nine percent of the cases. Unusually small dwellings or large dwellings should be designed around number of bedrooms, but in no case shall a system be sized for greater than 5 bedrooms or less than two. The two-bedroom requirement already exists within our rules. We are thus establishing a maximum requirement with this proposal.

Existing dwellings will be allowed to expand up to 3000 square feet if their septic tank and drainfield was designed based upon 450-gallon sewage flow. This should eliminate the need for alteration or expansion permits in most cases. Small dwellings with one or two bedrooms could expand until they reached 750 square feet. At that point they would have to add 150-gallon equivalency to the system and then would be allowed to expand up to 3000 square feet. In effect, we have three different sized systems. We think this method meets the criteria mentioned above and is the best compromise available.

ROBERT W. STRAUB
GOVERNOR

Environmental Quality Commission

POST OFFICE BOX 1760, PORTLAND, OREGON 97207 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item No. D, D3 and D6, March 30, 1979 EQC Meeting

Addendum

Background and Introduction to State Implementation Plan Revisions - p. 2

"Change in proposed hearing schedule"

* Eugene CO Plan - May 4 Salem to May 4, Eugene
* Portland CO and Ozone Plan - May 7 Portland to May 4, Portland

Item D-(3) Eugene-Springfield AQMA CO Plan

"Change Figure 3" from 28 km of roadway in violation in 1977 to 10.5 km

Item D-6 Special Permit Requirements

It has always been the Departments intent to exempt the Portland AQMA from this entire rule until such time as an attainment strategy exists. This approach would allow the Advisory Committee to custom design or amend the rule at the time of attainment plan development to best suit local needs.

Sections 34-20-190-195 contain this exemption. However, Sections 34-20-196-198 needs to be amended as follows to also include this exemption.

Section 340-20-196-198 add new paragraph in each Section as follows:

This Section shall not apply in the Portland AQMA until such time as a SIP Attainment strategy exists.

PPB:jl
229-6278
March 28, 1979

Read 3/30/79 (OEC)

oregon environmental health association

oeha

FOUNDED 1941 - AFFILIATED NEHA 1948

REPLY TO: 2405 SW Liberty Street, Albany, OR 97321

March 29, 1979

RESOLUTION ON PROPOSED SUBSURFACE AND ALTERNATIVE
SEWAGE DISPOSAL REGULATIONS DEALING WITH LARGE PARCELS

WHEREAS Oregon Environmental Health Association members evaluate the suitability and safeness of proposed sewage disposal systems, investigate complaints of failing sewage disposal systems, and design and approve sewage disposal systems that conform to rules and approve variances where, in their professional judgment, no health hazards would be created;

WHEREAS OEHA understands and has concern for the difficulties in allowing subsurface sewage disposal systems on large parcels;

WHEREAS OEHA's chief purpose is to see that the public's health is improved and protected and sanitarians are registered by statute to make certain that environmental decisions such as relating to sewage disposal are based upon sound scientific principles;

WHEREAS there is currently no scientific data to support this rule change amendment;

WHEREAS the proposed amendment to Chapter 340-71-030 through the addition of Subsection (11) will allow for the installation of a subsurface sewage disposal system which can be expected to malfunction and discharge raw or inadequately treated sewage to the ground surface or to ground water or to public waters;

WHEREAS a malfunctioning sewage disposal system under Chapter 340-71-012 Section (1) states that a malfunctioning sewage disposal system constitutes a public health hazard;

WHEREAS the present Department of Environmental Quality's administrative rules allow for viable alternatives through the state-wide variance, rural-area variance and regional rules A and C program, and that these alternatives have been tried to the best engineering practices and will operate satisfactorily by not creating a health hazard;

THEREFORE BE IT RESOLVED that the Oregon Environmental Health Association opposes the adoption of the proposed changes to Chapter 340-71-030 Subsection (11) and strongly recommends that the amendment not be accepted.

BE IT FURTHER RESOLVED that OEHA will make their experience, knowledge and assistance available to the EQC to help address the needs of the citizens of Oregon relating to on-site sewage disposal systems.

This resolution was adopted unanimously by the general membership of the Oregon Environmental Health Association on March 28, 1979 as witnessed by Richard H. Swenson, President.

Richard H. Swenson

Richard H. Swenson, President - OEHA

Item H

Letters received after March 9, 1979, relating to management options for the Sewerage Works Construction Grant Program.

Support for Clackamas County -Tri-City Project	Nick A. Fosses & Sons, Inc. Compass Corporation Wally's Dozing Imperial Development, Inc. Portland General Electric McCafferty Homes, Inc. Parrott Development, Inc. Tradewinds Investments, Inc. L. R. Harris Company Kirsch Construction Co., Inc. M. J. Realty Anderson-Ritter Realty Bell Heating, Inc. Acme Industries, Inc. Pine Ridge Development Bill M. Jones Const. Co. Edwards Building Supply, Inc. Farlow & Robinson Investments Keith L. Wilson Const. Co., Inc. Der-Hart Associates, Inc. J. H. Schenk Co., Realtor Betty Hart Realty, Inc.
Support for Bend Project	Deschutes County Board of Commissioners
Letter from Concerned Citizen About Options 1 & 2	Alan R. Libby Portland, Oregon

ALLAN H. COONS
BRUCE H. ANDERSON
DOUGLAS M. DuPRIEST
DeLORIS B. NARVASA WARD
OF COUNSEL

COONS & ANDERSON
ATTORNEYS AT LAW
SOUTH PARK BUILDING
101 E. BROADWAY, SUITE 303
EUGENE, OREGON 97401

AREA CODE 503
TELEPHONE 485-0203

March 12, 1979

John Beardsley, Chairman
Benton County Planning Commission
Benton County Courthouse
Corvallis, Oregon 97330

Re: (1) Identification of Specific Issues to be Asserted in Connection with Intervention in City of Corvallis Appeal;

(2) Separate Notice of Appeal of Building Permit Issued to Evans Products Company for Construction on Crystal Lake Drive of a Building for the Manufacture & Warehousing of Glass Fiber.

Dear Mr. Beardsley:

At the same time as I sent to you, on behalf of our clients, our notice of intent to participate in the appeal filed by the City of Corvallis from the issuance by Benton County of a building permit to Evans Products Company, I separately wrote to Mr. Al Couper, Planning Director of Benton County, and asked that he provide me as soon as possible with copies of certain documents relevant to the concerns of our clients in this matter. Last week I received in the mail from Mr. Couper the requested information; and, after receiving the same, and reviewing it, I met in Corvallis with our clients to go over their concerns in light of this information.

In light of the above, one of the primary purposes of this letter is to specify the actual issues that our clients wish to raise as intervenors in the City of Corvallis's appeal. Another purpose, for the reasons stated later in this letter, is to file a separate notice of appeal of the building permit issued to Evans Products.

With the above information in mind, our clients ask that

the planning Commission consider the following material as part of an appeal process of the building permit issued to Evans Products:

I. Identification of Clients and Their Standing in These Matters

(1) Mark and Linda Cook, 625 S.E. Vera, Corvallis, Oregon 97330

The Cooks own and reside on property within sight and sound of the proposed facility. They also use and enjoy several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the city limits, but all within sight and sound of the proposed facility.

(2) Billie Moore, 645 S. E. Vera, Corvallis, Oregon 97330

Ms. Moore owns and resides on property within sight and sound of the proposed facility. She also uses and enjoys several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the City limits, but all within sight and sound of the proposed facility.

(3) Paul and Corrine Converse, 505 S. E. Vera, Corvallis, Oregon 97330

Mr. and Mrs. Converse own and reside on property within sight and sound of the proposed facility. They also use and enjoy several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the City limits, but all within sight and sound of the proposed facility.

(4) Marvin and Bonnie Marcotte, 685 S. E. Vera, Corvallis, Oregon 97330

Mr. and Mrs. Marcotte own and reside on property within sight and sound of the proposed facility. They also use and enjoy several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park,

such facilities being located within the City of Corvallis, or within Benton County outside the city limits, but all within sight and sound of the proposed facility.

(5) Charles A. Boyle, Route 4, Box 389, Corvallis, Oregon 97330

Mr. Boyle is a property owner in and resident of Benton County, Oregon. He also uses and enjoys several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the city limits, but all within sight and sound of the proposed facility.

(6) William B. Snyder, 1360 S. E. Crystal Lake Drive, Corvallis, Oregon 97330.

Mr. Snyder owns property, on which he resides, within sight and sound of the proposed facility. He also uses and enjoys several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the City limits, but all within sight and sound of the proposed facility.

(7) Friends of Benton County, an Oregon nonprofit corporation, Charles A. Boyle, Registered Agent, Route 4, Box 389, Corvallis, Oregon 97330. Friends of Benton County is an organization of individual members, many of whom live and own property within the City of Corvallis, Oregon and many of whom live and own property within Benton County, Oregon. It is devoted to the proper interpretation and application of land use laws, ordinances and land use plans in Corvallis and Benton County. It is appearing on behalf of itself as well as its members. Members of Friends of Benton County use and enjoy several public facilities, including the Lower Pioneer Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the city limits, but all within sight and sound of the proposed facility.

All of our clients will be adversely affected by the additional noise and air pollution problems caused by or associated with the proposed facility, as well as by a land use decision

(issuing of the building permit) that tends to pre-commit the land to urban development without insuring that timely and adequate urban services are available to the property. In addition, those of our clients who live and own property within sight and sound of the proposed facility will have their property values adversely affected by the construction of the facility in close proximity to their homes. The additional truck traffic reasonably expected to be associated with the use of the proposed facility will adversely affect non-commercial traffic using Crytal Lake Drive, either for access to the residential areas that front on the street or for access to the public parks and other public facilities in the area. The proposed development will adversely affect our clients' use of the public recreational areas (parks, the Willamette River and the Greenway) located within the immediate area of the proposed facility. Finally, Friends of Benton County, as an organization, will be adversely affected by land use decisions that do not result in a proper interpretation and enforcement of the applicable land use laws and regulations.

II. Issues to Be Asserted as Intervening Parties in Appeal Filed by the City of Corvallis

Our clients incorporate and state as their own, the issues on appeal stated by the City of Corvallis in the letter to you from Rick Rodeman, Deputy City Attorney, dated January 26, 1979, as added to by the two separate letters from Mr. Rodeman to you dated February 28, 1979 and March 7, 1979.

III. Separate Notice of Appeal

The same clients as identified previously in this letter, based on the same allegations of standing and statement of interests adversely affected as set out under item I, above, separately appeal the issuance of a building permit by Benton County to Evans Products Company for the construction of a building on Crystal Lake Drive for the manufacture and warehousing of glass fiber. This separate appeal is timely for the same reasons that the Planning Commission found the City of Corvallis' appeal to be timely and for the further and separate reason that, from a legal standpoint, there could not be a building permit issued by Benton County for the presently proposed facility until on or shortly after January 18, 1979, when the applicable Benton County Public Works Department officials with authority to issue or reject a proposed building permit

application first learned of the change in the proposed manufacturing process over that which was announced when the original building permit application was filed and subsequently approved; and thereafter such officials approved a building permit for the modified proposal.

The grounds for the separate appeal are as follows:

(1) Reincorporation of the grounds stated by the City of Corvallis in its appeal, as referred to under Item II of this letter, above.

(2) The building permit is unlawful because the proposed use in the location authorized by the permit fails to comply with the applicable comprehensive plan (the 1978 Framework Comprehensive Plan of the City of Corvallis, hereinafter, the Plan) in and to the following extents:

(a) The building permit was issued without the review and recommendations of the City Council of the City of Corvallis which such action was necessary because the land in question is in the Urban Fringe. (Plan, page 8(a)).

(b) The permit authorizes a manufacturing process that will cause a diminution in the existing quality of life of residents in the adjacent areas due to noise and dust associated with that process. (Plan page 8(a)).

(c) Because a full range of necessary urban services, in particular city water, will not presently be made available to the proposed facility and there is no assurance that this deficit will be remedied in the future, thereby improperly and in an untimely manner committing urbanizable land to urban uses. (Plan, implementing plans and mechanism no. 4, page 11; public facilities and services policy nos. 3 and 7, page 28; land development and land use policies for the Urban Fringe, no. 2 and no. 7, page 50).

(d) Because the proposed facility will bring about urbanization in the Willamette River Greenway corridor in the absence of a necessary cooperative determination by the city and county that

such change in existing use of Greenway area is necessary and proper. (Plan, policies numbered 3 and 7, pages 16 and 17).

(e) The facility may cause a health and safety hazard (noise and dust) and there has been no showing that the city and the county cooperatively accepted the facility with knowledge of these problems. (Plan, policy no. 1, page 18).

(f) The proposed facility will tend to degrade, and therefore not insure the maintenance and improvement of, immediatley adjacent, established residential areas. In addition, there has been no review by the City of Corvallis for compatibility with such residential areas as well as to insure transportation and public facility planning in a manner that will not be detrimental to the residential areas. Under the circumstances it must be assumed that the industrial activity is incompatible with abutting land uses. (Plan, policy no. 1 and no. 4, page 54 and finding (e), page 56).

(3) The building permit was unlawful for failure to comply with the applicable Goals of the Oregon State Land Conservation and Development Commission in and to the following extents:

State Goals 6, 9, 11, 12, 14 and 15 are directly applicable to this proposal. There is nothing to demonstrate that the applicable County official recognized the application of these goals and in written form, prior to approving the permit, demonstrated how the proposed facility would comply with the applicable state goals. Failure to address the applicable goals prior to issuing the permit invalidates the permit.

(4) The building permit in question was unlawful, at the time it was originally issued because it could not then have been issued in accordance with the applicable provisions of the Uniform Building Code because the responsible official could not have then been satisfied that "the work described in the application for the permit and the plans filed therewith conform to the requirements of this Code, sanitation and health requirements as stipulated by the controlling agencies, and other pertinent laws and ordinances . . . ." Sec. 302(a), UBC.

(5) The proposed building permit is unlawful because its issuance was not preceded by the required coordination under existing agreements between the City of Corvallis and Benton County that are designed to ensure that development within the urban growth boundary, but outside the Corvallis City limits, is carried out in a manner that will assure compatible interpretation and implementation of identically worded land use regulations in a consistent manner, as well as ensure the timely, safe and healthy developments of urbanizable lands in a manner that will not adversely affect established, adjacent land uses.

(6) A portion of the proposed facility lies within the Floodplain, the County Floodplain-Agricultural zone (FP-A), or both; and therefore the proposed building permit, as issued, is unlawful.

Finally, our clients ask that their separate appeal, as stated in this letter, be consolidated with and heard as a part of the separate appeal process that resulted from the appeal filed by the City of Corvallis in this matter.

Very truly yours,

COONS & ANDERSON

Bruce H. Anderson

BHA/ea
cc: Todd Brown, County Counsel
Scott A. Fewel, City Attorney
Al Couper, Benton County Planning Director
Robert J. Miller, Attorney at Law
Peter L. Barnhisel, Attorney at law

FINAL RULE
Adopted September 15, 1978

ADMINISTRATIVE RULE ON STATE PERMIT CONSISTENCY	)	ESTABLISHES REQUIREMENTS FOR DETERMINING CONSISTENCY OF STATE PERMITS WITH STATE-WIDE PLANNING GOALS AND ACKNOWLEDGED LOCAL COM-PREHENSIVE PLANS

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
1175 Court Street N.E.
Salem, OR 97310

1.0 INTRODUCTION

1.1 Purpose

The purpose of this rule is to clarify state agency responsibilities to apply the Statewide Planning Goals or Acknowledged Comprehensive Plans during permit reviews (ORS 197.180(1)). The rule establishes procedures and standards which require consideration of Goals and Acknowledged Plans prior to approval of state permits. The rule also requires that affected state agencies develop and submit to LCDC procedures for consistency review.

1.2 Definitions

"Acknowledged Comprehensive Plan" means a comprehensive plan and implementing ordinances that have been adopted by a city or county and have been found by the Land Conservation and Development Commission to be in compliance with the Statewide Planning Goals pursuant to Chapter 664, Section 20(1) of Oregon Laws 1977.

"Affected Local Government" means the unit of general purpose local government that has comprehensive planning authority over the area where the proposed activity and use would occur.

"Class A Permits" are state permits affecting land use that require public notice and public hearing at the agency's discretion prior to permit approval, including those permits identified as Class A permits in Appendix A.

"Class B Permits" are those state permits affecting land use which do not require public notice or an opportunity for public hearing before permit issuance, including those permits identified as Class B permits in Appendix A.

2.0 CONSISTENCY REVIEW REQUIREMENTS

2.1 Identification of Class A and Class B Permits

Affected state agencies shall by January 1, 1979 submit a program for permit consistency listing their Class A and Class B permits affecting land use including those set forth in Appendix A. Upon submitting its program to the Commission, an agency may request a change in the designation of Class A and Class B permits.

2.2 Consistency Review Procedures

Programs shall describe the process the agency will use to assure that permit approvals are consistent with Statewide Planning Goals and Acknowledged Comprehensive Plans.

A. Class B Permits

For Class B permits, the review process shall assure either:

1. That the proposed activity and use are allowed by the applicable zoning classification where there is an acknowledged comprehensive plan, or,

2. that the applicant is informed that:

   (a) issuance of the permit is not a finding of compliance with the Statewide Planning Goals or the acknowledged comprehensive plan; and,
   (b) the applicant must receive a land use approval from the affected local government. The affected local government must include a determination of compliance with the Statewide Planning Goals when they are applicable, which may be stated in simple conclusory form without extensive findings.

B. Class A Permits

In their review of Class A permits state agencies shall:

(1) Include in the notice for the proposed permit a statement that the proposed activity and use are being reviewed for consistency with the Statewide Planning Goals or the Acknowledged Comprehensive Plan as part of the permit review.

(2) Insure that the notice for the proposed permit is distributed to the appropriate city or county citizen advisory committee.

(3) When there is a public hearing on a proposed permit, consider testimony on consistency of the proposed activity and use with the Statewide Planning Goals or the Acknowledged Comprehensive Plan.

(4) Based on comments received from the public and other agencies, determine whether or not the proposed permit is consistent with the Statewide Planning Goals or the Acknowledged Comprehensive Plan.

If a state agency's existing process for administration of major permits is substantially equivalent to the process required by this section, the agency may request LCDC approval of its existing process as described in its agency coordination program.

2.3 Review Criteria

Where the affected local government does not have an Acknowledged Comprehensive Plan, the state agency's review shall assess whether or not the proposed activity and use are consistent with the Statewide Planning Goals. Where the affected local government has an Acknowledged Comprehensive Plan, the state agency review shall only address consistency with the Acknowledged Local Comprehensive Plan. The Statewide Planning Goals shall not be a criteria for permit review after acknowledgment unless the state agency finds:

(1) The Acknowledged Comprehensive Plan and implementing ordinances do not address or control the activity under consideration; or,

(2) Substantial changes in conditions have occurred which render the comprehensive plan and implementing ordinances inapplicable to the proposed activity.

2.4 Effect of a Determination of Inconsistency

When a state agency determines that a proposed activity or use is inconsistent with an applicable Statewide Planning Goal or the Acknowledged Comprehensive Plan, it shall deny the state permit and cite the inconsistency as the basis for denial. State agencies may defer or conditionally approve a permit when compliance with a Statewide Planning Goal or the acknowledged comprehensive plan requires an action that can only be taken by the affected local government.

2.5 Reliance on the Local Government's Determination

State Agencies shall rely upon the affected local governments consistency determination in the following cases:

1. When the Agency finds the affected local government has determined that the proposed activity and use are consistent or inconsistent with its Acknowledged Comprehensive Plan and implementing ordinances.

2. Where the affected local government does not have an acknowledged plan or the state agency makes a finding in accordance with 2.3 (1) or (2) and, the state agency finds that:

   (a) the local review included consideration of the appropriate Statewide Planning Goals; and,
   (b) the local review provided notice and the opportunity for public and agency review and comment. If notice and the opportunity for public and agency review were not provided, the agency shall only rely on the local determination if no objections are raised during the agency's review. Where objections are raised, the agency shall make its own determination.

   In these cases, the agency's public notice or permit decision shall indicate that the affected local government has reviewed the proposed activity and use and determined that they are consistent with the Statewide Planning Goals and/or the comprehensive plan.

A consistency determination is not required if the proposed permit is a renewal of an existing permit except when the proposed permit would allow a modification or intensification of the proposed use.

APPENDIX A: LISTING OF CLASS A AND CLASS B
STATE AGENCY PERMITS AFFECTING LAND USE

CLASS A PERMITS:

Department of Energy (DOE)

-Energy Facility Site Certificates

Department of Fish and Wildlife (DFW)

-Salmon Hatchery Permit

Division of State Lands (DSL)

-Fill and Removal Permits

Department of Transportation (DOT)

-Ocean Shore Improvement Permit

Department of Geology and Mineral Industries (DOGMI)

-Permit to Drill -- Geothermal Well*
-Permit to Drill -- Oil or Gas Well*

*Agency's legislation does not provide for public hearing on permit review. Some other review process providing opportunity for public and agency comment is used.

CLASS B PERMITS:

Department of Environmental Quality

-Subsurface Sewage Disposal System Permit
-Air Contaminant Discharge Permit
-Waste Discharge Permit (National Pollution Discharge Elimination System - NPDES)
-Indirect Source Construction Permit
-Water Pollution Control Facility Permit
-Solid Waste Disposal Site Permit

Department of Geology and Mineral Industries

-Surface Mining Operation Permit

Protective Health Services Section, Health Division, Department of Human Resources

-Community Water Supply System Certification
-Organization Camp Sanitation Certificate
-Recreation Park Sanitation Certificate
-Recreational Vehicle Park Plan Review

Water Resources Department

-Appropriate Groundwater
-Appropriate Public Water
-Water Right Transfer

Public Utility Commissioner (PUC)

-Railroad Highway Crossing Project

Department of Transportation (DOT)

-Road Approach Permit
-Airport Site Approval

BC:krm/MC
9/22/78
304403/7135

STATE AGENCY PERMIT REVIEW PROCESS

(For Class A permits as addressed in the State Permit Consistency Rule)

	PRE-APPLICATION	REVIEW OF APPLICATION	PUBLIC NOTICE ON APPLICATION	DECISION ON APPLICATION
STATE AGENCY		- Contact local government to determine whether or not local action has been taken. - If no local action, make an initial assessment of whether plan or Goals apply.	- Prepare public notice stating whether or not there has been a local action *If Yes, Notice states consistency review satisfied by appropriate local action. *If No, Notice states that application is being reviewed for consistency with either Goals or Acknowledged Plan (See section 2.3 of Rule to determine review criteria). - Circulate notice to: * other agencies * local governments * local CAC, public (upon request)	- Compiles comments from agencies, local governments and the public. - Makes findings on: * Whether or not there has been a local action; (if no local action) * Whether Acknowledged Plan or Statewide Goals apply to the project; and * Whether or not the project complies with statewide goal requirements or comprehensive plan policies.
LOCAL GOVERNMENT	- Affected local government may determine consistency through local action if it includes: * notice to public and agencies * opportunity for comment		- Comments on: * Whether or not the application applies to Goals or Acknowledged Plan. (Section 2.3 of Rule) * Whether or not the application complies.	
	If at any time prior to the State Agency's decision on the application, the affected local government takes a land use action including a consistency decision, it should immediately inform the state agency of its decision.			
OTHER AGENCIES/ PUBLIC			- Comments on: * Whether or not the application applies to Goals or Acknowledged Plan. (Section 2.3 of Rule) * Whether or not the application complies.	Decision may be appealed to: - state agency (internal appeal) - LCDC (Goal violations) - Courts (Plan violations)

LEGISLATIVE COMMITTEE ON TRADE
AND ECONOMIC DEVELOPMENT
ROOM H-197, STATE CAPITOL
SALEM, OREGON 97310
(503) 378-8811

March 7, 1979

Mr. Joe Richards, Chairman
Environmental Quality Commission
P. O. Box 10747
Eugene, Oregon 97401

Dear Mr. Richards:

On February 28, 1979, the Senate members of the Legislative Committee on Trade and Economic Development adopted its final recommendations on the State Implementation Plan required by the federal Clean Air Act as Amended in 1977. The Committee members also voted its final recommendations for the proposed emission offset rule for the Medford/Ashland AQMA.

The recommendations are as follows:

The Legislative Committee on Trade and Economic Development recommends that the Environmental Quality Commission adopt the proposed emission offset rule for the Medford/Ashland AQMA, but that it not be included in the State Implementation Plan that is to be submitted to the Environmental Protection Agency on June 30, 1979.

Further, the Department of Environmental Quality should seek an 18-month delay from the Environmental Protection Agency before submitting the final State Implementation Plan.

Further, the Department of Environmental Quality should seek additional research funding to undertake an intensive air quality testing program for the Medford/Ashland AQNA. As part of that testing program, the Department should review the 5-ton per year limitation for new and expanding industry in the Medford/Ashland AQMA and determine if this is an accurate limitation.

Finally, the State Implementation Plan should be reviewed by the Legislative Committee on Trade and Economic Development, including the emission offset limitations, before final submission to the Environmental Protection Agency.

Recognizing that the state must submit some type of plan to the Environmental Protection Agency by June 30, 1979, the Legislative Committee recommends that the growth provisions for nonattainment areas (i.e., emission offset policy) be based on the federal guidelines rather than the more stringent standards being adopted for the Medford/Ashland AQMA. This would, in effect, give the Environmental Quality Commission more latitude to alter the emission offset limitations without having to obtain federal approval. The Committee is also sending a letter to the Ways and Means Committee lending our support for the air quality testing program funding for the Medford/Ashland AQMA so that the Department can proceed immediately.

Speaking on behalf of the Senate Committee members, I would like to express our appreciation to the Environmental Quality Commission for allowing this Committee to review the proposed administrative rule before adoption. It was never the intent of this Committee to interfer with the Commission's or Department's statutory or administrative rule making authority. However, the issue of emission offsets and "banking of offsets" does represent a major policy change. There still are issues left unresolved and the Committee is planning to continue its reveiw of the air quality program this forthcoming interim period. As to the immediate question of legal ownership of offsets, the Committee is considering introduction of legislation. We are waiting for the federal government to respond to a series of questions before we prepare any legislative measures. We will keep the Department director, Bill Young, fully apprised when the final decision is made. Again, thank you for the courtesy and cooperation extended by your Commission and the Department.

Sincerely,

Sen. Lenn Hannon
Co-Chairman

CC: Mr. Bill Young, Director
Dept. of Environmental Quality

Jackson County Oregon
COUNTY COURTHOUSE / MEDFORD, OREGON 97501

BOARD OF
COUNTY COMMISSIONERS
Commissioners Office 776-7231

March 28, 1979

Joe Richards, Chairman
Environmental Quality Commission
Post Office Box 1760
Portland, OR 97207

Dear Mr. Richards:

I am writing on behalf of the Board of Commissioners to address the application of the proposed offset policy in the Medford/Ashland Air Quality Maintenance area. Before the Joint Committee on Trade and Economic Development on February 5, the County stated its opposition to a partial application of the offset policy in this area. We believe the entire valley floor of 288 square miles currently has a widespread particulate problem; it is inappropriate, therefore, to apply the outdated 1975 Johnson/Odell dispersion model to the area. The County requests application of the rule to the entire air quality maintenance area until fine tuning of the data and an improved model is accomplished.

In addition, we believe when the State adopts air quality rules, those rules should be included in the State Implementation Plan. The major reason we support this is the need for out of state industries to clearly know the rules as a result of their contacts with EPA. To have EPA indicate no differences between federal rules and ours, and to place industries in a position of planning relocation and learing about the Medford/Ashland rule deviations later will negatively impact our area and the industries.

In closing, Jackson County supports a speedy adoption of the offset rule for the entire air quality maintenance area, and including the rule as part of the state plan.

Yours truly,

JACKSON COUNTY BOARD OF COMMISSIONERS

Carol N. Doty

Carol N. Doty
Chairwoman

CND/alb

ROBERT W. STRAUB
GOVERNOR

Department of Environmental Quality

522 SOUTHWEST 5TH AVE. PORTLAND, OREGON

MAILING ADDRESS: P.O. BOX 1760, PORTLAND, OREGON 97207

March 21, 1979

Honorable L. B. Day
Oregon State Senate
State Capitol
Salem, OR 97310

Dear Senator Day:

Several legislators have been particularly involved in matters relating to the Department of Environmental Quality and the Environmental Quality Commission during the session. The commission members will be holding a regular meeting in Salem on Friday, March 30th. They have asked me to invite you, as one of those legislators, to an informal lunch on that day.

The luncheon agenda has been held open for informal discussion of any matter any legislator may want to raise. We hope you will take time out of your hectic schedule to attend this opportunity for some frank discussion of issues of concern both to the commission and to the Legislative Assembly.

Lunch is at 12:00 noon at the Black Angus, 220 Commercial Street, S.E.

Please have someone call Tina Zinn, 229-5317, if you can attend.

Sincerely, Original Signed By
WILLIAM H. YOUNG

MAR 21 1979

WILLIAM H. YOUNG
Director

JS:vh

cc: EQC members:
Joe Richards
Dr. Grace Phinney
Jacklyn Hallock
Ron Somers
Al Densmore

Name

Boe, Jason.....
Brown, Walt .....
Bullock, Richard.....
Burbidge, Keith.....
Cook, Vern.....
Day, L.B.....
Fadeley, Ed .....
Gardner, Jim.....
Groener, Dick .....
Hallock, Ted.....
Hanlon, Charles.....
Hannon, Lenn .....
Hartung, Tom.....
Heard, Fred.....
Isham, Dell .....
Jernstedt, Ken.....
Kafoury, Stephen.....
Kulongoski, Ted .....
McCoy, Bill .....
Meeker, Anthony (Tony) .....
Potts, E.D. "Debbs" .....
Powell, John .....
Ragsdale, Mike.....
Ripper, Jack.....
Roberts, Frank .....
Smith, Bob .....
Thorne, Mike .....
Trow, Cliff .....
Wingard, George.....
Wyers, Jan.....

Democrats — 23
Republicans — 7

ALSO SENT TO:

No.	Name
391	Achilles, Ted
551	Bauman, Rick
742	Bellamy, Billy
	Brogoitti, Bob
747	Bugas, Ted
	Burrows, Mary
752	Byers, Bud
775	Campbell, Larry
	Cease, Jane
	Cherry, Howard
	Chrest, Jim
	Cohen, Joyce
	Davis, Drew
	Duff, Jack
	Edwards, Chick
	Fadeley, Nancie
	Fawbush, Wayne
	Ford, Mary Alice
	Frohnmayer, Dave
	Gardner, Mark
	Gilmour, Jeff
	Grannell, Bill
	Hanneman, Paul
32	Johnson, Cecil
33	Johnson, Eldon
4	Jones, Denny
8	Kafoury, Gretchen
	Katz, Vera
76	Kerans, Grattan
76	Kitzhaber, John
7	Klein, Clayton
1	Lindquist, Ed
7	Lombard, Kip
5	Magruder, Caroline
	Markham, Bill
5	Mason, Tom
	Monroe, Rod
5	Myers, Hardy
	Otto, Glenn
	Pisha, Sue
	Priestley, Wally
2	Richards, Sandy
3	Riebel, Al
	Rijken, Max
	Rogers, Bill
2	Rutherford, Bill
3	Ryles, Nancy
	Schoon, John
	Simpson, Josephine
	Simpson, Max
	Smith, Norm
	Starr, George
	Stevenson, Doc
	Throop, Tom
	Van Vliet, Tony
	Whallon, Glen
	Wilhelms, Gary
	Wolfer, Curt
	Yih, Mae
	Zajonc, Donna

Democrats — 34
Republicans — 26

ROBERT W. STRAUB
GOVERNOR

Department of Environmental Quality

522 SOUTHWEST 5TH AVE. PORTLAND, OREGON

MAILING ADDRESS: P.O. BOX 1760, PORTLAND, OREGON 97207

March 28, 1979

Mr. Robert W. Smith, Deputy Director
Executive Department
240 Cottage Street, S.E.
Salem, OR 97310

Dear Mr. Smith:

At the end of our budget hearings before the Joint Committee on Ways and Means Subcommittee No. 5, the Chairman gave me the opportunity to identify the Agency's own priority list of reductions to the Governor's recommended budget in order to bring the request within a generalized General Fund growth limitation of 14%.

A limitation of 14% applied to all General Fund requests on a statewide level does not allow for averaging so that agencies with increasing needs can be balanced with those with decreasing needs. On an agency level the 14% guideline fails to give recognition to valid increases at all beyond a modest inflationary level.

For the Department specifically, there are two programs which provide confirmation of our concerns about the even application of a growth limitation:

(1) The motor vehicle inspection program has taken efficiencies as far as they can go in operating the program over three biennia within the income generated by a fixed $5 fee. The program is not underfunded, only because of a decision to take much less than a full amount of indirect costs for Agency Management administrative overhead from fee revenues. To avoid crippling the operation or increasing public frustration over slow public service, there is a difference of $250,000 in the amount of indirect costs to be taken between two biennia during times of inflating costs. That dollar difference represents what can be demonstrated as an explainable increase over the 14% guideline.

(2) The subsurface sewage experimental systems effort contributed roughly $66,000 more to this distortion. The program was begun during the current biennium with startup costs heavy in General Funds. There was legislative acknowledgement of its limited duration but continued General Fund demand in the 1979-81 and 1981-83 biennia. Perhaps the distortion created by the additonal General Funds needed to maintain staff on the project full time throughout the 1979-81 biennium ought to be discounted in the final comparison of our budget to the guideline.

Responding to the subcommittee's invitation, we examined again every subprogram and every large scale activity. We assembled all information not known to us when this long process began over a year ago, and looked at fee revenues, their possible changes and the climate for such changes; Federal Funds, any possible grants or agreements and the likelihood of continued support once given; and expenditures, any rational reductions and the public service impact of those reductions.

That internal process resulted in an information paper and a prioritized list of agency suggestions for any legislative committee contemplation for cuts to the Governor's request. My budget staff and I met in a fruitful work session with Mike Greany during which we discussed and challenged all the suggestions brought forth by him and by us. That work session--that exchange of ideas--resulted in an incorporation of what I feel are the best suggestions from that session into a prioritized list of changes. That list is attached.

The entire list totals in net effect on the General Fund request to something in excess of the $835,000 target reduction necessary to meet the 14% guideline from the subcommittee. I have outlined items in excess of the amount needed, not necessarily for the subcommittee, but particularly for use in further discussions with the Governor's office on the nature of each item, their effect on the Agency's programs, and how much of our budget request as recommended by the Governor fairly represents the proper funding level for the state's environmental programs in an increasingly tight budget climate.

The list is divided into three sections. The first section lists Supplemental Budget items. The Federal Fund increases are primarily for Medford Air Quality Data Improvement and continuation of the staff to manage Air Implementation Plan revisions through a year's extension being sought from the federal government. Early startup has begun on the Medford portion of that work.

The second section represents those reductions to which I am not resistant if they must be made, and is my response to the subcommittee's invitation to suggest a list for their consideration.

The last section is displayed for discussion purposes and has my strongest recommendation that these possible reductions not be made at all.

I will rely on you to arrange the appropriate meetings with the Governor's office for any decision prior to our submission of a response by us to the subcommittee. Prior to that submission, the matter will be discussed in a budget briefing to the Environmental Quality Commission at their upcoming monthly meeting on March 29 and 30.

Sincerely,

WILLIAM H. YOUNG
Director

GGL:vh

DRAFT: 3/27/79

DEQ PRIORITY LIST FOR GENERAL FUND OFFSETS AND REDUCTIONS
(In order of proposed acceptance for budget cut.)

Title	General Fund	Other Fund	Federal Fund	Cum. Total	Description
Supplemental Budget Items					
A. Medford air data base improvement (Also, $152,241 in 77-79).			$ 62,435		Increased expenditures to conduct a project for improved data on Medford strategy; see March 7 letter and supplemental table 3/12/79.
B. SIP revision process extension (Also, $13,200 in 77-79).		14,005	102,052		Continued 4 limited duration positions for additional year; extension requested of EPA. (FF for AQ; OF for AM clerical specialist.)
C. Monitoring network improvements (Also, $53,000 in 77-79).			10,000		
D. Other data base improvements (Also, $35,000 in 77-79).			13,000		
Prioritized Offsets and Reductions					
1. AQ Offset DP's 35,38,43 and Lab Capital Outlay with FF	$(108,716)	$	$ 108,716	$ 108,716	Request to EPA for new FF changed to request this offset to General Funds. Capital Outlay offset is 2 ozone and 2 CO monitors
2. AM Indirect cost new Air FF	(39,312)	39,312		148,028	Indirect cost assessed on new Federal Funds in air quality. ($53,317).
3. WQ/AM Increased subsurface fees	(60,700)	60,700		208,728	Changes in DEQ proposed fee structure will add this amt. $51,440 to WQ; $9,260 to AM in IC.
4. SW/AM Increase hazardous waste FF	(89,090)	13,590	75,500	297,818	Fund regional and lab HW costs with new FF. $57,000 to SW Reg.; $18,500 to Lab; $13,590 AM.
5. Tax credit fees	(156,383)	156,383		454,201	New fee program to cover costs of processing applications for tax credits.
6. AQ/AM Increase air permit fees	(84,000)	84,000		538,201	Increase air permit fees by 14%. $71,186 to AQ; $12,814 to AM for IC.
7. WQ Delete existing subsurface position for Columbia County	(48,293)			586,494	Delete existing position due to Columbia County re-assuming responsibility for subsurface program.

	Title	General Fund	Other Fund	Federal Fund	Cum. Total	Description
8.	AQ Reduce LRAPA State Air grant	$ (24,000)	$	$	$ 610,494	Hold State grant increase to LRAPA to 14% incr.
9.	AM Delete economist/rules writer	(116,334)			726,828	Eliminate program improvements.
10.	AM Increase indirect cost from VIP	(25,000)	25,000		751,828	Assume VIP revenues will increase to allow more but not proportionate indirect costs.
	Other General Fund Reductions Not Recommended					
11.	NC Reduce regional noise effort	(89,974)			841,802	Cut 1.4 FTE from regional noise effort.
12.	NC Increase Noise FF	(43,850)		43,850	885,652	Assume EPA will fund noise equipment.
13.	NC Increase Noise FF	(25,504)		25,504	911,156	Assume EPA will fund pos. # 5648.
14.	WQ Reduce water monitoring effort	(37,975)			949,131	Reduce amount of increased water quality data collection proposed.
15.	SW Cut recycling by 0.5 FTE	(19,250)			968,381	Deletes proposed expansion of recycling program technical assistance from current 0.5 to 1.0
16.	AM Delete land use improvement	(45,502)			1,013,883	Delete .75 FTE improvement in land use coordination program.
17.	WQ Reduce experimental systems	(10,000)			1,023,883	Reduce special payments for experimental systems from $15,000 to $5,000.
18.	SW Reduce solid waste regional effort	(40,608)			1,064,491	Reduce field service and enforcement by 0.7 FTE on solid waste management.

5914 S.W. Gunther Lane
Portland, Oregon 97219

March 15, 1979

Enviornmental Quality Commission
State Office Building
1400 S.W. 5th Avenue
Portland, Oregon 97204

Dear Commission Members:

I am a residence owner in the southwest corner of Multnomah County in the Lesser Road area. We are not now, nor ever have been served by a sewer system.

In the early 1970's - 1971 or 1972 - several of us in the neighborhood circulated petitions and obtained many more that the signatures required, requesting Multnomah County to be designated as, or annexed to a service district as a preliminary step to installing a sewer system in our area. A modest portion of the area is undeveloped, and since 1965 there have been no building permits issued for new home construction.

Our formerly paved streets have almost entirely deteriorated; we are without street lighting; blackberries have almost entirely taken over the vacant building lots, etc.

To digress, in reponse to our petition, we were annexed to the Tuality Heights Service District, by the County, and the appropriate steps taken by them to commence the planning for a sewer system. Sometime in the 1974-1975 period their findings were submitted to the County Health Department, and a health hazard situation was certified by Dr. Tillson. He prepared documentation to transmit these findings to the State Department of Health.

Unfortunately, at that point in time, all of the documentation disappeared, and no follow-up was initiated by the County.

I discovered this fact in August 1978, and have since been working with the county and State Health Department to restore our area to a more current position for sewer planning.

In November 1978 the Multnomah County Commission submitted a resolution to the State Health Department directing them to conduct the health-hazard survey.

Due to the cold winter this has not yet been conducted, but we are advised that the survey is scheduled for the later part of April. We have no doubt that a health-hazard will be determined, and that we will be annexed to the City with the City being directed to develop sewer plans.

I'm sure that you will recognize that these are the classic steps to qualify the sewer construction project for federal assistance funding.

We have now received some very disquieting information relating to the allocation of these assistance funds.

Both the City Planning Department and the County Department of Enviornmental Services have indicated that your Commission has made a preliminary decision to allocate ALL of the federal assistance funds for 1980 and possibly 1981 for large construction projects in Bend and in Eugene.

I would join with all others in the State that have been developing their case for sewer construction in an orderly manner, following the letter of the law and administrative regulations, to qualify for funding assistance, to submit my remonstration.

We ask you to reconsider this decision and recognize that other areas such as ours are as entitled to have their application for funding accepted on merit, need, and priority, and that we not be excluded from a fair and impartial allocation of the federal funds available.

Sincerely,

Alan R. Libby
5914 S.W. Gunther Lane
Portland, Oregon 97219

Transport of Antibiotic-resistant *Escherichia coli* Through Western Oregon Hillslope Soils Under Conditions of Saturated Flow

T. M. RAHE, C. HAGEDORN, E. L. McCOY, AND G. F. KLING

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677 South Segoe Rd., Madison, WI 53711 USA

Transport of Antibiotic-resistant *Escherichia coli* Through Western Oregon Hillslope Soils Under Conditions of Saturated Flow[1]

T. M. RAHE, C. HAGEDORN, E. L. McCOY, AND G. F. KLING[2]

ABSTRACT

Field experiments using strains of antibiotic resistant *Escherichia coli* were conducted to evaluate the events which would occur when a septic-tank drainfield became submerged in a perched water table and fecal bacteria were subsequently released into the ground water. Three separately distinguishable bacterial strains were inoculated into three horizontal lines installed in the A, B, and C horizons of two western Oregon hillslope soils. Movement was evaluated by collecting ground water samples from rows of modified piezometers (six piezometers/row) placed at various depths and distances downslope from the injection lines. Transport of *E. coli* differed at both sites with respect to movement rates, zones in the soil profiles through which major translocation occurred, and the relative numbers of cells transported over time. Movement rates of at least 1,500 cm/hour were observed in the B horizon at one site. The strains of *E. coli* survived in large numbers in the soils examined for at least 96 hours and appeared to be satisfactory as tracers of subsurface water flow. The concept of partial displacement (or turbulent flow through macropores) is discussed as an explanation of the rapid movement of substantial numbers of microbial cells through saturated profiles.

Additional Index Words: **fecal coliforms, ground water pollution, waste disposal, septic-tank drainfields.**

Interest in proper treatment and disposal of household wastes arises from a demonstrated pathway for diseases through the fecal-oral route. This pathway has been implicated in the dissemination of intestinal diseases in several outbreaks involving septic tank leach systems coupled with individual and small community water systems (9, 14). The use of septic tank leach systems for on-site treatment of domestic household wastes is a widespread practice. Sixty million people in the U.S. depend on individual home sewage disposal systems, while approximately 37% of all housing units in Oregon are served by septic tank leach systems (9). For these reasons, it is important that an understanding be developed of how and under what conditions fecal microorganisms might be transported through different soils.

Any study of microbial translocation in soil must utilize some techniques for determining the extent and direction of movement through the soil profile with time. Many studies of the effects of septic tanks on the environment have dealt initially with chemical parameters and left the microbiological aspects either unexplored or given only secondary consideration. Some researchers have used increases in numbers of selected fecal organisms as an indication of the movement of contaminants (3, 10, 12, 16). Such approaches have been questioned on the basis of uncertainty of origin for background counts and the possibility that the monitored organisms were not derived from the suspected sources (8). As a result, other investigations have utilized bacteria with special characteristics which allow a specific organism to be distinguished from all background and naturally interferring organisms in the soil. Antibiotic-resistant *Serratia indica* was used for tracing sewage in sea water and to determine mixing at an outfall along a bay (8, 13), and streptomycin-resistant *Serratia marcesens* has been employed as a tracer in an estuary study and to examine pollutant flow in a river system (11). Antibiotic-resistant strains of *Escherichia coli* and *Streptococcus faecalis* were used to monitor movements of subsurface water flow in one soil series in western Oregon and it was found that these organisms were suitable as indicators of microbial translocation and that they survived over a sufficient length of time to be utilized satisfactorily as tracers (5).

Movement of bacteria through saturated profiles was described by Caldwell (3) who noted the translocation of coliform bacteria from pit latrines through soil at distances up to 28 m in 60 days. Griffin and Quail (4) demonstrated the need for continuous water pathways for bacterial movement. They reported the absence of translocation at moisture tensions below saturation and movement of only a few centimeters per day with moisture levels maintained at field capacity. There is evidence that saturated soil conditions exist <30 cm from the soil surface during the winter months for lengthy periods of time in many western Oregon soils (2). This would be well above the depth at which drainfield lines are placed in conventional systems. This paper reports on the transport of antibiotic-resistant *E. coli* through the soil/rock mantle of two western Oregon hillslope soils under saturated flow conditions. These studies simulated the events that occur when fecal organisms are discharged directly into the ground water as a result of the inundation of a septic tank disposal trench.

MATERIALS AND METHODS

Transport of *Escherichia coli* through soil was measured by introducing antibiotic-resistant strains into soil profiles through injection lines located in depths which generally corresponded to the A, B, and C horizons of two soil series. The organisms were subsequently recovered from piezometers located at various distances and depths down-slope from the injection lines.

Soil Descriptions

Soil descriptions were made from pits prepared adjacent to each experimental site. Both sites were located on hillslope soils (footslope position) in Benton County, Oregon. One site was on the Hazelair series with a 10% southwest-facing slope and the profile contained a heavy clay layer starting at approximately 80 cm (Table 1). The second was on the Dixonville series with a 14% east-facing slope and the profile overlayed fractured saprolite (Table 2). The Hazelair series consists of moderately deep, poorly drained soils formed in colluvium weathered from sedimentary bedrock while the Dixonville series are moderately deep, well-drained soils formed in colluvium weathered

[1] Contribution from the Oregon State Agric. Exp. Stn., Tech. Pap. no. 4773. research supported by Oregon Water Resour. Res. Inst. Received 15 Mar. 1978.

[2] Research Assistant, Assistant Professor, Research Assistant, and Assistant Professor, respectively, Dep. of Soil Sci. and Microbiol., Oregon State Univ., Corvallis, OR 97331.

Table 1—Profile description and characteristics of the Hazelair soil series, classified as a very fine, mixed, mesic, Aquultic Haploxeroll.

Horizon	Depth	Profile description	Sand	Silt	Clay	pH	Organic matter	CEC	Base saturation
	cm			%			%	meq/100 g	%
A1	0–12	Dark brown (10YR 3/3) silt loam; few faint dark yellowish brown (10YR 4/4) mottles; moderate, medium granular structure; slightly hard, slightly sticky and slightly plastic; many fine and very fine roots; many fine and very fine interstitial pores; medium acid; abrupt smooth boundary.	17.8	58.0	24.2	6.1	4.8	20.85	84.4
A3	12–47	Dark brown (10YR 3/3) silty clay loam; many distinct dark yellowish brown (10YR 4/4) mottles; moderate, medium subangular blocky structures; hard, slightly sticky and slightly plastic; many fine and very fine tubular pores; slightly acid; gradual, smooth boundary.	17.6	44.8	37.6	5.9	3.3	16.91	79.3
IIB2	47–80	Grayish brown (10YR 5/2) clay; many distinct brownish yellow (10YR 6/6) mottles; moderate, medium prismatic to moderate, medium subangular blocky structure; very hard, very sticky and very plastic; very few fine roots; common fine and very fine tubular pores; medium acid, clear, smooth boundary.	9.1	26.6	64.3	5.7	1.2	14.36	73.1
IIB3	80–110†	Dark yellowish brown (10YR 4/4) clay, massive structure, very firm, very sticky and very plastic; very few fine roots; common very fine tubular pores; medium acid; gradual, wavy boundary.	6.8	40.4	52.9	5.6	0.9	12.40	68.5
IIC	110+	Dark brown (10YR 4/3) clay, massive structure; very firm, very sticky and very plastic; very few fine roots; few very fine tubular pores; slightly acid.	--	--	--	--	--	--	--

† Variability of observations: the depths shown above were those taken at the profile pit adjacent to the experimental site and do not reflect the variations in depth across the site. The distance from the surface to the IIB2 horizon varied from 40 to 70 cm across the site.

from either basic igneous rock or sedimentary bedrock. The injection lines, sampling equipment, and profile descriptions were prepared and used initially in a study by Hammermeister[3] where halogen salts were incorporated to monitor parameters of saturated flow. His study also provided data on both laboratory and in situ hydraulic conductivities at various depths in both soil series (Table 3).

[3] D. Hammermeister. 1978. Water and anion movement in selected soils in western Oregon. Unpublished Ph.D. Thesis. Oregon State Univ., Corvallis, Oreg.

Injection Lines

The injection lines were constructed of 12.5-mm-diam., 221,476.5-kg/m² (315-lb/inch²) polyvinyl chloride (PVC) pipe encased in a nylon sleeve. Three-mm diam holes were drilled through the pipe every 5 cm and the finished unit measured 9.15 m. Shorter unperforated pieces

Table 2—Profile description and characteristics of the Dixonville soil series, classified as a fine, mixed, mesic, pachic, Ultic Argixeroll.

Horizon	Depth	Profile description	Sand	Silt	Clay	pH	Organic matter	CEC	Base saturation
	cm			%			%	meq/100 g	%
A1	0–8	Dark brown (7.5YR 3/2) silty clay loam; moderate, medium granular structure; loose, slightly sticky and slightly plastic; many very fine roots; many very fine and fine interstitial pores; medium acid; clear, and smooth boundary.	19.5	42.4	38.1	5.2	4.3	52.63	67.3
A3	8–34	Dark brown (7.5YR 3/2) silty clay loam; moderate, medium subangular blocky structure; very hard, slightly sticky and slightly plastic; common fine roots; many very fine tubular pores; medium acid; clear, wavy boundary.	18.0	39.6	42.4	4.9	3.8	26.84	60.1
B2	34–56	Dark brown (7.5YR 3/2) silty clay loam; moderate, medium and fine subangular blocky structure; hard, slightly sticky and slightly plastic; few fine roots; many very fine tubular pores; several rodent hole up to 10 cm in diameter present in 1 meter wide soil pit; medium acid; clear, wavy boundary.	17.4	42.0	40.6	4.7	3.0	17.48	49.8
C	56–67†	Reddish brown (2.5YR 5/4) and yellow (10YR 7/6) saprolite; granular to massive structure; very firm; sticky and plastic; few fine roots; clear to diffuse, broken boundary.	--	--	--	--	--	--	--
R	67+	Well-indurated $CaCO_3$ cemented sandstone containing primarily mafic minerals and shell fragments.	--	--	--	--	--	--	--

† Variability of observations: the depths for the C and R horizons were those taken at the profile pit adjacent to the experimental site and do not accurately reflect the variations in depth across the site for these two layers. The R horizon was >110 cm deep at all except the 15-m line where it rose, at a few points, to within 40 cm of the soil surface. The upper portion of this layer was well fragmented. The C horizon (saprolite) was extensively fractured and varied in thickness from 10 to 50 cm across the site, becoming thinner and more shallow at the 10- and 15-m lines.

(to serve as injection ports) were then cemented at right angles to the perforated unit. Seven of these pieces were added every 1.14 m to facilitate uniform distribution of the microorganisms throughout the line. The open end of each injection port extended up to the soil surface and was plugged with a rubber stopper. The assembled injection lines were placed in trenches dug on the contour of the hillsides and these trenches were backfilled and covered with the original soil material. Three injection lines were installed (0.5 m apart) at 12-, 45-, and 80-cm depths in the Dixonville site and at 12-, 30-, and 80-cm depths at the Hazelair site. The 12-cm-deep line occupied the furthest downslope position while the 80-cm-deep line was installed upslope from the other two.

Piezometers

Piezometers which measured positive water pressure potentials were modified from a design by Yee (15). Nineteen-mm-diam., 140,620-kg/m² (200-lb/inch²) PVC pipe was cut into lengths at least 20 cm greater than the depths the piezometers were installed. The bottom 10 cm of each of the B and C horizon piezometers were perforated with four sets of 3.0-mm holes 90° apart (five holes/set) and spaced every 2 cm. The last 4 cm of the A horizon piezometers were similarly perforated except that each set contained only three holes. Nylon window screen was taped in place over the holes in each pipe to prevent the entry of surrounding filter sand and all piezometers were sealed at the bottom with a rubber stopper. A removable vent cap was placed over the top to prevent entry of rain. The height of water within the piezometer was measured by observing a styrofoam float in a 6-mm-diam. acrylic tube placed inside the PVC pipe. As the water table rose, the float was carried upwards where surface tension adhered it to the side of the acrylic tube at the highest level of the water.

The piezometers were placed in the soil in holes (4 cm diam.) drilled with a power auger. Each hole around the tube was then backfilled to the bottom 20 cm of each piezometer with approximately 500 ml of E.I. no. 8 sand. The A horizon piezometer holes were filled with proportionately less sand. Fifty ml of dried soil was then added above the sand, followed by 50 ml of bentonite clay to seal the entry ports of the piezometers from the upper soil horizons. Succeeding layers of soil and bentonite were added to backfill each hole to the surface. Sic piezometers were installed at depths of 12, 30, 80, 110, 150, and 200 cm on the Hazelair site in lines at distances of 2.5, 5.0, 10.0, 15.0, and 20.0 m downslope. Installation depths for the Dixonville series were 12, 45, 80, 110, 150, and 200 cm in lines at distances of 2.5, 5.0, 10.0, and 15.0 m downslope. One additional sampling line which served as a control was installed 2.5 m upslope from the injection lines at each site. The installation sequence of the six piezometers at each sampling line was randomized.

Samples were extracted through the piezometers by adding a 6-mm O.D. glass tube to the top of the acrylic tube and allowing it to extend 2 cm above the plastic cap. By attaching a vacuum line to a sample bottle and then connecting the bottle to the piezometer tubing, water samples were removed.

Tensiometers

Tensiometers (after a design by Harr and Grier [6]) were used to monitor negative water pressures at each site. Five tensiometers were located at both sites at each of the 2.5- and 5.0-m distances and were installed 100 cm apart at 12-, 45- (30 at Hazelair), 80-, 110-, and 150-cm depths. All tensiometers were tested for air leaks by simulating their field operation in the lab prior to installation and subsequent testing when installed in the field. Dibromomethane plus sudan IV dye (0.1 gm/liter) was used as the monometer fluid. Installation of tensiometers included the boring of 4-cm holes with the power auger, mixing the soil (from the same horizon) with water to form a slurry in the bottom of each hole, and then sealing as with the piezometers.

Indicator Bacteria

Antibiotic-resistant strains of *Escherichia coli* were selected from samples of sewage treatment plant influent. Ten-milliliter samples were inoculated into 150 ml of Difco EC broth containing 100 μg/ml of the desired antibiotic. Cultures were then incubated at 37°C on a rotary shaker until turbidity indicated growth. The cultures were then isolated on Difco Bacto Eosin Methylene Blue Agar (EMB) and colonies exhibiting a green-metallic sheen were transferred to Tryptic Soy Agar (TSA) slants. These were incubated at 37°C for 24 hours, stored at 4°C, and transferred at 30-day intervals. Strains of *E. coli* that were resistant to 100 μg/ml of novobiocin, tetracycline, and nalidixic acid were isolated and all strains were rigorously tested to determine that each was resistant only to one of the three antibiotics.

Inoculum of each strain was grown in 150 ml of Difco EC broth plus 100 μg/ml of the appropriate antibiotic. The culture was incubated for 12–14 hours at 37°C and transferred to 1.5 liter of EC broth and reincubated. Two such flasks were prepared for each organism, the contents transferred to a 9.0-liter carboy and, after incubation, brought to 4.0 liter volume with sterile distilled water. The cultures were transported to the site and added to the appropriate injection line at approximately 1.4×10^9 cells/ml (or 5.6×10^{12} cells/line).

Table 3—Laboratory and field hydraulic conductivities and soil moisture pressure values for various depths within the profiles of both sampling sites.

Soil series	Depth	Direction of conductivity†	Hydraulic conductivities	Hydraulic conductivities in situ†	Average soil pressure potentials‡
	cm		cm/hour		cm H_2O
Dixonville	12	H	28.13	--	− 4.4
		V	49.51	--	--
	45	H	26.21	15.15	+ 8.8
		V	11.25	--	--
	80	--	--	8.55	+ 22.6
	110	--	--	17.97	+ 19.8
	150	--	--	0.04	−105.0
Hazelair	12	H	1.35	--	+ 1.4
		V	1.446	--	--
	30	H	0.76	--	− 0.2
		V	14.07	--	--
	80	H	0.01	1.60	− 2.3
		V	0.01	--	--
	110	H	0.01	0.01	−343.6
		V	0.01	--	--
	150	H	0.02	0.03	−387.6
		V	0.15	--	--

† Laboratory hydraulic conductivities were determined both in vertical (V) and horizontal (H) directions. Both laboratory and in situ conductivities (as determined in the field) were performed by Hammermeister.[8]

‡ Soil pressure potentials (determined by the authors) are averages of the measurements obtained from the tensiometers installed at the same depths at both the 2.5- and 5.0-m distances downslope.

Injection and Recovery of Tracer Bacteria

Inoculation of the bacteria into the selected soil horizon was accomplished by elevating the 9.0-liter carboy and siphoning the organisms through seven sections of 6-mm I.D. tygon tubing into the injection ports located along the length of the inoculation line. After the organisms were injected into the appropriate lines, samples were extracted through the piecometers hourly for the first four samples and every 2 hours for the next four samples at the Dixonville site and every 12 hours for 96 hours at the Hazelair site. Control samples were collected from all piezometers just prior to injection of the microorganisms into the various horizons. Samples were collected in 250-ml sample bottles with the aid of vacuum pressure applied by a portable pump. Water samples were transported to the laboratory and stored no longer than 15 hours at 4°C before analysis.

Enumeration of the bacteria was accomplished by serial dilution of a 1-ml portion of each water sample by innoculation into 9.0 ml of Difco EC broth containing 24 mg/liter bromothymol blue and 100 μg/ml of the desired antibiotic. The contents were vortex mixed and a five-tube serial dilution was performed using a series of 1/10 dilutions in EC broth. The number of organisms present (10^1 through 10^5) was estimated by observing the number of serially diluted tubes which demonstrated growth and an acid reaction after incubation at 37°C for 24 hours. Nine sampling runs were performed at the Dixonville site and consisted of three replicate inoculations in each of the injection lines separately using each one of three antibiotic-resistant *E. coli* strains. Six runs were performed at the Hazelair site (three each in the A and B horizons) separately using the three antibiotic-resistant strains. All research was performed between February and July 1977. A computerized program was designed to analyze the data and plot *E. coli* numbers as a function of soil depth, distance downslope, and time. As all three antibiotic-resistant strains behaved in a similar fashion when added to the experimental sites, the data were averaged for the three strains in presenting the results (Fig. 1-3).

Artificial Water Tables

Artificial water tables were maintained by water application with an oscillation sprinkler. Water was applied to the Dixonville site at the rate of 1.0 cm/hour and to the Hazelair site at the rate of 0.92 cm/hour. Sites were irrigated a minimum of 72 hours prior to injection of the tracer microorganisms for each separate run to allow the soil-water system to stabilize. Irrigation continued uninterrupted for the duration of experimentation because natural water tables did not occur due to the 1976-77 winter drought. Rainfall-derived water tables were monitored the prior year[3] and it was found that, over a 5-mo period (Nov.-March), the average depth to the water table at the Dixonville was 38.7 cm and, in the Hazelair, 15.3 cm. Even though the average artificial water tables were higher (24.6 cm Dixonville, 9.0 cm Hazelair), data by Hammermeister[3] indicated that many occasions occurred during storm cycles when natural water tables were at or above those levels maintained by irrigation.

RESULTS

Water Table Measurements

Comparison of water table data indicated that there were no significant differences between water table levels over time by site. The *F*-test probabilities determined for the water table levels were all between 0.932 and 1.0 in the saturated horizons at both sites and indicated that the watering regime maintained the water tables at a nearly constant level throughout the sampling periods. Piezometric and/or tensiometric measurements in the Dixonville site indicated that the soil profile at 12 and 150 cm was at less than saturation throughout the study (Table 3). The sole exception to this was the 12-cm piezometer in the 15-m line where, due to a decrease in depth to restrictive rock layers, the piezometric surface was elevated at that point. Measurements at the 45-, 80-, and 110-cm depths were slightly positive and indicated that the soil was at or near saturation while the average piezometric surface over all experiments at this site was 24.6 cm. Even though the 150- and 200-cm depths appeared to be unsaturated, water samples were obtained from piezometers installed at these depths at the 2.5-, 5.0-, and 10.0-m distances during each sampling period.

Piezometer measurements at the Hazelair site indicated that a water table existed at the 8- to 9-cm depth and, as a result, the pressures observed at the 12-cm depth were near zero (Table 3). Moisture tensions at the 30- and 80-cm depths were also near zero (slightly negative) and appeared to correlate well with the piezometrically observed water table. The 110- and 150-cm depths were never saturated and demonstrated high negative water pressures which often approached 1/4 atm. Unsaturated conditions in the C horizon at the 5-m distance in the Hazelair site resulted in tensions greater than the range of the installed tensiometers. It appeared that the unsaturated zone beginning at 80 to 100 cm in the Hazelair site (conductivity <0.01 cm/hour) was responsible for the water table becoming "perched" above this dense, heavy clay layer.

Bacterial Transport at the Dixonville Site

Results from the piezometer samplings are reported for the particular depth that each was installed even though ground water actually entered the piezometers over the 20-cm bottom portion. Samples taken from piezometers both uphill and downslope from the injection lines produced no positive samples before amendment of the antibiotic-resistant bacteria. Samples removed prior to the second and third experimental repetitions indicated that <10 cells/ml were present in certain horizons 3 weeks after inoculating the site with organisms.

Injection of *E. coli* into the Dixonville site in the A horizon (12-cm depth) resulted in detectable numbers at 15 m in the 45-cm piezometer after 1 hour and in the 12-, 45-, 80-, and 110-cm piezometers at 15 m after 2 hours (Fig. 1a, b). The depth from the soil surface to layers in the horizon which restricted vertical movement of organisms decreased with distance downslope from the inoculation point and, as a result, the 150- and 200-cm piezometers did not produce water samples in the 15-m line. Samples containing *E. coli* (<100 cells/ml) were recovered from the 12-cm depth only in the 15-m line beginning at 2 hours post inoculation. The highest numbers of organisms were observed in the 45-, 80-, and 110-cm depths, while those bacteria observed at the 150- and 200-cm depths were restricted to the 2.5- and 5.0-m distances (Fig. 1a-d).

Inoculation of antibiotic-resistant *E. coli* into either the B horizon (45 cm) or the upper layer of the C horizon (80 cm) resulted in movement patterns and rates similar to those observed with the A horizon inoculations. The only differences were that slightly larger numbers of *E. coli* were recovered from the 45-, 80-, and 110-cm piezometers when the B horizon was inoculated (data not shown). Regardless of the three inoculation depths, the organisms moved downslope through the soil profile in a zone of saturation below 12

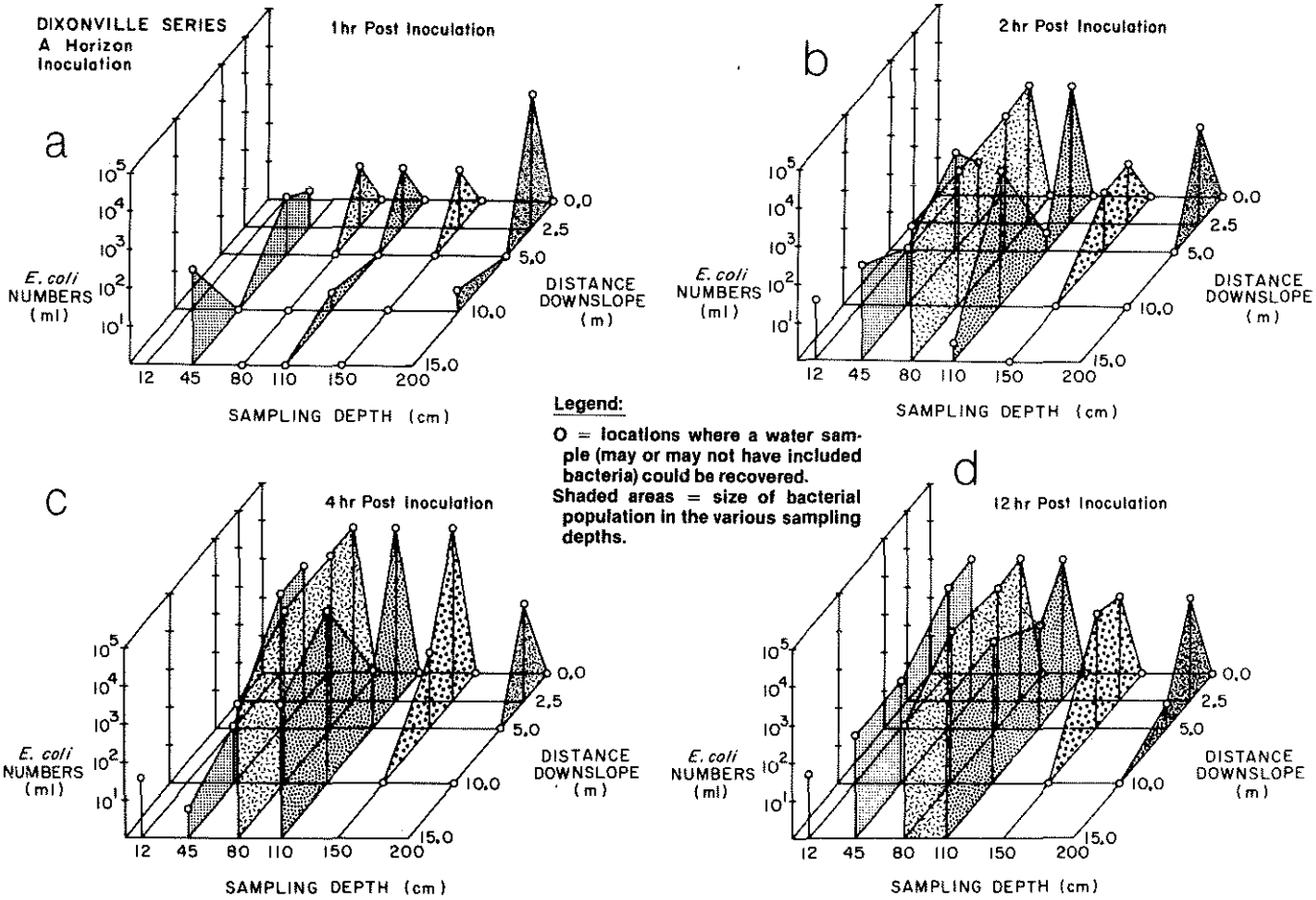

Fig. 1—A-horizon inoculation in the Dixonville series showing translocation of *E. coli* populations at various distances through the soil profile with time. Data are averages of three replicate sampling runs. The various shaded areas represent the bacterial populations (y-axis, no. cells/ml) recovered at the different depths (x-axis) in the downslope piezometer lines (z-axis).

cm and above the cemented sandstone layer which prohibited movement at the 150- and 200-cm depths.

Bacterial Transport at the Hazelair Site

Samples collected prior to inoculation indicated the absence of antibiotic-resistant coliforms in the soil-water system. After the initial sampling periods in the A and B horizons, small populations (< 10 cells/ml) of the amended *E. coli* strains were carried over and recovered on an irregular basis from various peizometers up to 4 weeks post-inoculation.

Injection into the A horizon resulted in detectable numbers of *E. coli* from the 12- and 30-cm piezometers at the most distant sampling line (20 m) within 12 hours (Fig. 2a). In the 12-cm piezometers the numbers of bacteria were greater in the 2.5- and 5.0-m lines, while the 15-m line (at the 12-cm depth) contained as many as 7×10^3 cells/ml (Fig. 2b) and the 20-m line never yeielded more than 80 cells/ml (Fig. 2a–d). Through the sampling period *E. coli* cells were recovered sporadically from the 80-cm piezometers only at the 2.5- and 5.0-m lines.

Inoculation of *E. coli* into the B horizon (30 cm) resulted in slower movement than the A horizon injections (Fig. 3a–d). The bacteria were recovered only from the 12- and 30-cm depths in the 2.5- and 5.0-m lines at 12 hours (Fig. 3b), and from the 10- and 20-m lines at the 12- and 30-cm depths at 48–72 hours (Fig. 3b–c). By 96 hours no *E. coli* were recovered from any of the 12-cm piezometers, while small, residual populations were found in the 30- and 80-cm piezometers only at the 2.5-m line (Fig. 3d).

The bacteria were transported much more slowly and in greatly lowered numbers in the Hazelair soil as compared to the Dixonville and the portion of the profile through which the greatest movement occurred was different. Translocation at the Hazelair site was restricted predominantly to the 12- and 30-cm depths while the *E. coli* strains were transported at the 45-, 80-, and 110-cm depths in the Dixonville site. At the Hazelair site the unsaturated zone was below the perched water table (110–200 cm) while it occurred both above and below the water table in the Dixonville site.

DISCUSSION

This study lends support to the concept of partial displacement in soils as being the mechanism by which rapid water movement rates occurred. This phenomenon was first recognized by Lawes et al. (7) who observed that a major part of the water moving

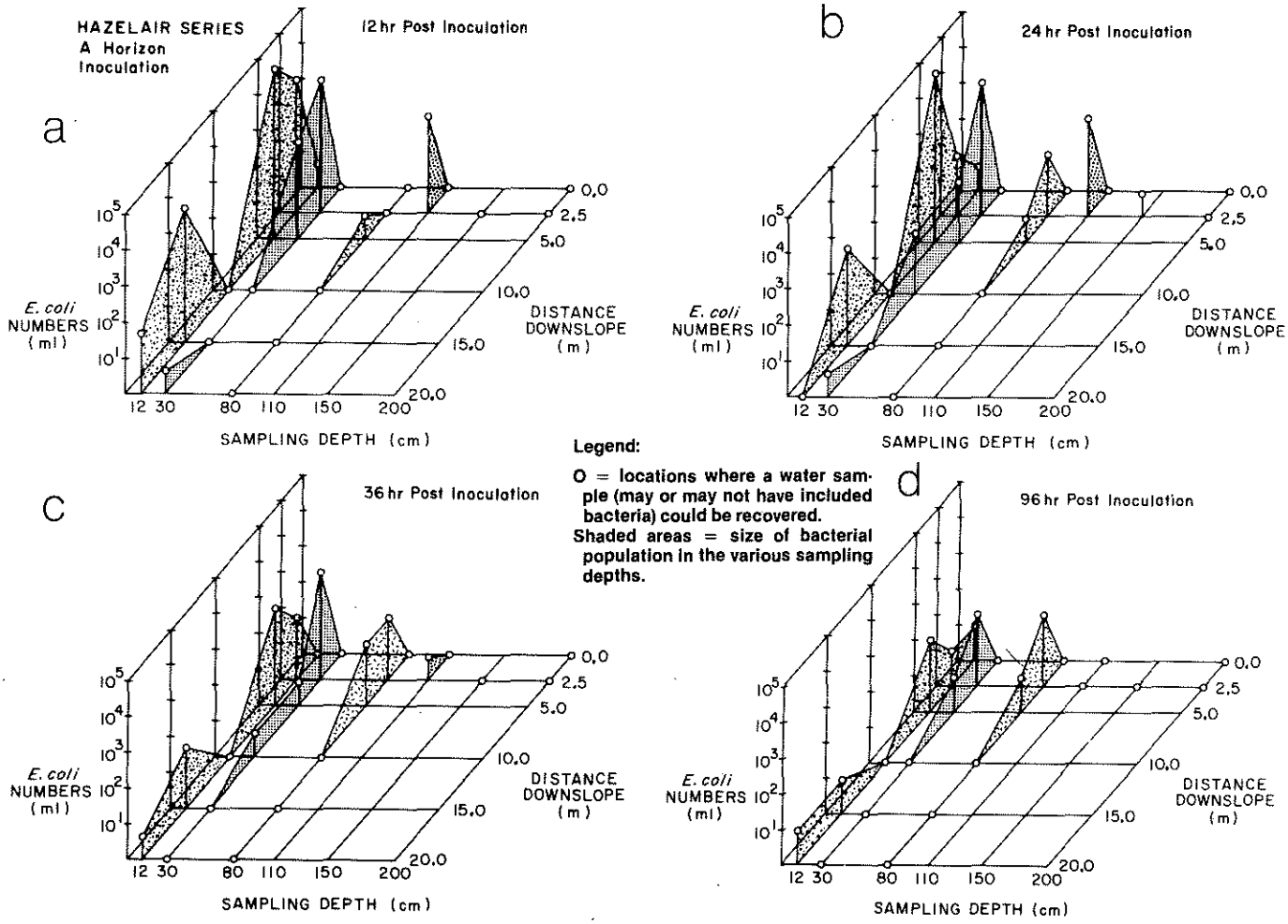

Fig. 2—A-horizon inoculation in the Hazelair series showing translocation of *E. coli* populations at various distances through the soil profile with time. Data are averages of three replicate sampling runs. The various shaded areas represent the bacterial populations (y-axis, no. cells/ml) recovered at the different depths (x-axis) in the downslope piezometer lines (z-axis).

through soil profiles was passing through macropores while the remainder of the water moved in smaller pores at much lower rates. Movement through macropores resulted in the partial displacement of a traceable material present in the soil water and provided for rapid infiltration of tracer material into the macropores with slower movement into the finer pores (7).

The importance of macropores in the movement of large volumes of water at very rapid rates was reported by Aubertin (1) who described passageways derived from structural pores resulting from the arrangement of primary soil particles, disturbed areas (such as krotovena), open animal passages, ranging from small tunnels formed by insects to larger sizes formed by mammals, and structural cracks between soil units. All of these characteristics were observed at the Dixonville site where the most rapid movement rates occurred while, at the Hazelair site, they were few in number. Old root channels, structural voids, rodent burrows (many approaching 10 cm diam.), and small tunnels were readily noticeable at the Dixonville. Results of Hammermeister[3] indicated that these pores were effective in the rapid movement of tracer dyes. Such factors as insect and rodent holes would not usually be included in a soil core since the rodent hole diameter might exceed that of the intact core being tested and insect holes, if visually detectable, would usually be excluded as "unrepresentative."

Hammermeister[3] produced evidence of significant movement in macropores at the Dixonville site and observed that high ion concentrations were recovered from the 5-m distance initially and then appeared later in the 2.5-m line. He concluded that this was evidence of rapid flow through zones of high permeability (or macropores) to the distant piezometer with subsequent slower movement in a lateral direction through smaller pores to the nearer line. This is supported by our data on bacterial translocation in the Dixonville soil where, for example, at the 45-cm depth *E. coli* was initially recovered from the 15-m line and subsequently from the 10-m line (Fig. 1b, c).

Additional evidence of flow through zones of high permeability was obtained from the numbers of organisms recovered. An average of 1.4×10^9 cells/ml were injected in the Dixonville soil and it was not unusual to recover 1×10^5 cells/ml at distances of 2.5 m from the point of injection and 1×10^4 cells/ml at 10-m distances. This recovery rate would indicate that, once

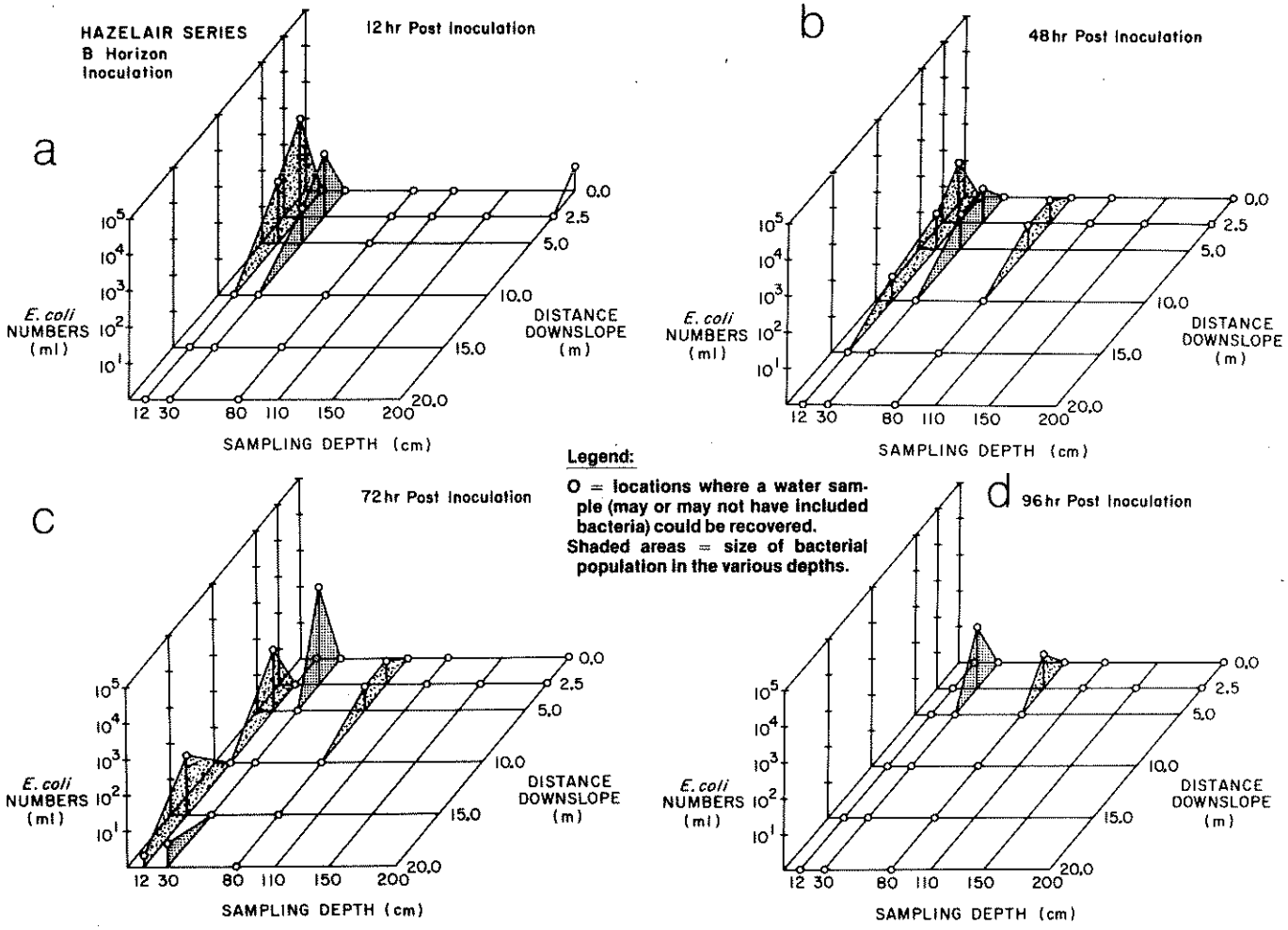

Fig. 3—B-horizon inoculation in the Hazelair series showing translocation of *E. coli* populations at various distances through the soil profile with time. Data are averages of three replicate sampling runs. The various shaded areas represent the bacterial populations (y-axis, no. cells/ml) recovered at the different depths (x-axis) in the downslope piezometer lines (z-axis).

the organisms initially moved into these zones of high permeability, they experienced little mixing or dilution but rather were transported through macropores relatively unaffected by the medium through which they were being moved.

When bacteria were introduced into the Hazelair experimental site, the movement rates were much slower and appeared to be a result of two factors. The first was that of reduced hydraulic gradient at the site (Dixonville, 14%; Hazelair, 10%) which decreased one of the major components of moisture flux, that of hydraulic head. The second factor was the significantly lower hydraulic conductivities resulting from the presence of the heavy clay layer (Tables 1, 3). Much lower numbers of bacteria were recovered at all sampling lines in the Hazelair site. The finer texture of this soil would tend to physically filter greater numbers of organisms than the relatively porous Dixonville soil. Macropores were not as visually detectable in the Hazelair so the potential for rapid transport through macropores under turbulent flow conditions would appear to be reduced. Any effects resulting from cell death would also be maximized under conditions which created longer time periods between injection and recovery of organisms. Even so, the rate of movement through the Hazelair soil was still significant and was greater than one would expect from the hydraulic conductivities determined on cores (Table 3).

The techniques described in this study offer the opportunity to introduce tracer bacteria into additional soil profiles and attempt to develop a predictive model of microbial translocation through soil under saturated flow conditions by quantifying such parameters as flow rate vs. structural and textural soil characteristics, and hydraulic head of the water table. Problems remain concerning the adequate measurement of some soil characteristics such as the distribution and percentage of pore space represented by macropores, the assessment of true saturated hydraulic conductivity rates, and changes in microbial transportation as a function of time.

The role of macropores in the movement of sewage effluent through soil profiles has not received adequate attention by soil scientists and public health officials. The concept of partial displacement and its role in movement of septic wastes under conditions of saturated flow must be considered if adequate protection of domestic drinking and surface water sources is to be provided.

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AREA CODE 503
TELEPHONE 485-0203

March 12, 1979

John Beardsley, Chairman
Benton County Planning Commission
Benton County Courthouse
Corvallis, Oregon 97330

Re: (1) Identification of Specific Issues to be Asserted in Connection with Intervention in City of Corvallis Appeal;

(2) Separate Notice of Appeal of Building Permit Issued to Evans Products Company for Construction on Crystal Lake Drive of a Building for the Manufacture & Warehousing of Glass Fiber.

Dear Mr. Beardsley:

At the same time as I sent to you, on behalf of our clients, our notice of intent to participate in the appeal filed by the City of Corvallis from the issuance by Benton County of a building permit to Evans Products Company, I separately wrote to Mr. Al Couper, Planning Director of Benton County, and asked that he provide me as soon as possible with copies of certain documents relevant to the concerns of our clients in this matter. Last week I received in the mail from Mr. Couper the requested information; and, after receiving the same, and reviewing it, I met in Corvallis with our clients to go over their concerns in light of this information.

In light of the above, one of the primary purposes of this letter is to specify the actual issues that our clients wish to raise as intervenors in the City of Corvallis's appeal. Another purpose, for the reasons stated later in this letter, is to file a separate notice of appeal of the building permit issued to Evans Products.

With the above information in mind, our clients ask that

the planning Commission consider the following material as part of an appeal process of the building permit issued to Evans Products:

I. Identification of Clients and Their Standing in These Matters

(1) Mark and Linda Cook, 625 S.E. Vera, Corvallis, Oregon 97330

The Cooks own and reside on property within sight and sound of the proposed facility. They also use and enjoy several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the city limits, but all within sight and sound of the proposed facility.

(2) Billie Moore, 645 S. E. Vera, Corvallis, Oregon 97330

Ms. Moore owns and resides on property within sight and sound of the proposed facility. She also uses and enjoys several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the City limits, but all within sight and sound of the proposed facility.

(3) Paul and Corrine Converse, 505 S. E. Vera, Corvallis, Oregon 97330

Mr. and Mrs. Converse own and reside on property within sight and sound of the proposed facility. They also use and enjoy several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the City limits, but all within sight and sound of the proposed facility.

(4) Marvin and Bonnie Marcotte, 685 S. E. Vera, Corvallis, Oregon 97330

Mr. and Mrs. Marcotte own and reside on property within sight and sound of the proposed facility. They also use and enjoy several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park,

such facilities being located within the City of Corvallis, or within Benton County outside the city limits, but all within sight and sound of the proposed facility.

(5) Charles A. Boyle, Route 4, Box 389, Corvallis, Oregon 97330

Mr. Boyle is a property owner in and resident of Benton County, Oregon. He also uses and enjoys several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the city limits, but all within sight and sound of the proposed facility.

(6) William B. Snyder, 1360 S. E. Crystal Lake Drive, Corvallis, Oregon 97330.

Mr. Snyder owns property, on which he resides, within sight and sound of the proposed facility. He also uses and enjoys several public facilities, including the Lower Pioneer Park Boat Landing, the Willamette River and adjacent Willamette Greenway area and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the City limits, but all within sight and sound of the proposed facility.

(7) Friends of Benton County, an Oregon nonprofit corporation, Charles A. Boyle, Registered Agent, Route 4, Box 389, Corvallis, Oregon 97330. Friends of Benton County is an organization of individual members, many of whom live and own property within the City of Corvallis, Oregon and many of whom live and own property within Benton County, Oregon. It is devoted to the proper interpretation and application of land use laws, ordinances and land use plans in Corvallis and Benton County. It is appearing on behalf of itself as well as its members. Members of Friends of Benton County use and enjoy several public facilities, including the Lower Pioneer Boat Landing, the Willamette River and adjacent Willamette Greenway area, and the proposed extension to Willamette Park, such facilities being located within the City of Corvallis, or within Benton County outside the city limits, but all within sight and sound of the proposed facility.

All of our clients will be adversely affected by the additional noise and air pollution problems caused by or associated with the proposed facility, as well as by a land use decision

(issuing of the building permit) that tends to pre-commit the land to urban development without insuring that timely and adequate urban services are available to the property. In addition, those of our clients who live and own property within sight and sound of the proposed facility will have their property values adversely affected by the construction of the facility in close proximity to their homes. The additional truck traffic reasonably expected to be associated with the use of the proposed facility will adversely affect non-commercial traffic using Crytal Lake Drive, either for access to the residential areas that front on the street or for access to the public parks and other public facilities in the area. The proposed development will adversely affect our clients' use of the public recreational areas (parks, the Willamette River and the Greenway) located within the immediate area of the proposed facility. Finally, Friends of Benton County, as an organization, will be adversely affected by land use decisions that do not result in a proper interpretation and enforcement of the applicable land use laws and regulations.

II. Issues to Be Asserted as Intervening Parties in Appeal Filed by the City of Corvallis

Our clients incorporate and state as their own, the issues on appeal stated by the City of Corvallis in the letter to you from Rick Rodeman, Deputy City Attorney, dated January 26, 1979, as added to by the two separate letters from Mr. Rodeman to you dated February 28, 1979 and March 7, 1979.

III. Separate Notice of Appeal

The same clients as identified previously in this letter, based on the same allegations of standing and statement of interests adversely affected as set out under item I, above, separately appeal the issuance of a building permit by Benton County to Evans Products Company for the construction of a building on Crystal Lake Drive for the manufacture and warehousing of glass fiber. This separate appeal is timely for the same reasons that the Planning Commission found the City of Corvallis' appeal to be timely and for the further and separate reason that, from a legal standpoint, there could not be a building permit issued by Benton County for the presently proposed facility until on or shortly after January 18, 1979, when the applicable Benton County Public Works Department officials with authority to issue or reject a proposed building permit

application first learned of the change in the proposed manufacturing process over that which was announced when the original building permit application was filed and subsequently approved; and thereafter such officials approved a building permit for the modified proposal.

The grounds for the separate appeal are as follows:

(1) Reincorporation of the grounds stated by the City of Corvallis in its appeal, as referred to under Item II of this letter, above.

(2) The building permit is unlawful because the proposed use in the location authorized by the permit fails to comply with the applicable comprehensive plan (the 1978 Framework Comprehensive Plan of the City of Corvallis, hereinafter, the Plan) in and to the following extents:

(a) The building permit was issued without the review and recommendations of the City Council of the City of Corvallis which such action was necessary because the land in question is in the Urban Fringe. (Plan, page 8(a)).

(b) The permit authorizes a manufacturing process that will cause a diminution in the existing quality of life of residents in the adjacent areas due to noise and dust associated with that process. (Plan page 8(a)).

(c) Because a full range of necessary urban services, in particular city water, will not presently be made available to the proposed facility and there is no assurance that this deficit will be remedied in the future, thereby improperly and in an untimely manner committing urbanizable land to urban uses. (Plan, implementing plans and mechanism no. 4, page 11; public facilities and services policy nos. 3 and 7, page 28; land development and land use policies for the Urban Fringe, no. 2 and no. 7, page 50).

(d) Because the proposed facility will bring about urbanization in the Willamette River Greenway corridor in the absence of a necessary cooperative determination by the city and county that

such change in existing use of Greenway area is necessary and proper. (Plan, policies numbered 3 and 7, pages 16 and 17).

(e) The facility may cause a health and safety hazard (noise and dust) and there has been no showing that the city and the county cooperatively accepted the facility with knowledge of these problems. (Plan, policy no. 1, page 18).

(f) The proposed facility will tend to degrade, and therefore not insure the maintenance and improvement of, immediatley adjacent, established residential areas. In addition, there has been no review by the City of Corvallis for compatibility with such residential areas as well as to insure transportation and public facility planning in a manner that will not be detrimental to the residential areas. Under the circumstances it must be assumed that the industrial activity is incompatible with abutting land uses. (Plan, policy no. 1 and no. 4, page 54 and finding (e), page 56).

(3) The building permit was unlawful for failure to comply with the applicable Goals of the Oregon State Land Conservation and Development Commission in and to the following extents:

State Goals 6, 9, 11, 12, 14 and 15 are directly applicable to this proposal. There is nothing to demonstrate that the applicable County official recognized the application of these goals and in written form, prior to approving the permit, demonstrated how the proposed facility would comply with the applicable state goals. Failure to address the applicable goals prior to issuing the permit invalidates the permit.

(4) The building permit in question was unlawful, at the time it was originally issued because it could not then have been issued in accordance with the applicable provisions of the Uniform Building Code because the responsible official could not have then been satisfied that "the work described in the application for the permit and the plans filed therewith conform to the requirements of this Code, sanitation and health requirements as stipulated by the controlling agencies, and other pertinent laws and ordinances . . . ." Sec. 302(a), UBC.

(5) The proposed building permit is unlawful because its issuance was not preceded by the required coordination under existing agreements between the City of Corvallis and Benton County that are designed to ensure that development within the urban growth boundary, but outside the Corvallis City limits, is carried out in a manner that will assure compatible interpretation and implementation of identically worded land use regulations in a consistent manner, as well as ensure the timely, safe and healthy developments of urbanizable lands in a manner that will not adversely affect established, adjacent land uses.

(6) A portion of the proposed facility lies within the Floodplain, the County Floodplain-Agricultural zone (FP-A), or both; and therefore the proposed building permit, as issued, is unlawful.

Finally, our clients ask that their separate appeal, as stated in this letter, be consolidated with and heard as a part of the separate appeal process that resulted from the appeal filed by the City of Corvallis in this matter.

Very truly yours,

COONS & ANDERSON

Bruce H. Anderson

BHA/ea
cc: Todd Brown, County Counsel
Scott A. Fewel, City Attorney
Al Couper, Benton County Planning Director
Robert J. Miller, Attorney at Law
Peter L. Barnhisel, Attorney at law

Permit 3-3079 DEQ

000001

TO: THE ENVIRONMENTAL QUALITY COMMISSION and THE DEPARTMENT OF ENVIRONMENTAL QUALITY

We, the undersigned, residents of the City of Corvallis and Benton County, request that a formal hearing by the Department of Environmental Quality be held in Corvallis after February 18, 1979 for the Air Discharge Permit under consideration by the Department of Environmental Quality for the Evans Products Fiberglass Manufacturing Facility under construction on Crystal Lake Drive, Corvallis.

At the time of the informal hearing on January 18, 1979 the air discharge permit was combined with an odor permit for the Evans Products Separation Plant. This request for a formal hearing is made because the original permit under consideration by the DEQ has been separated and may be modified and because the public record of the informal hearing held in Corvallis on January 18, 1979 failed to pick up the verbal exchange between the DEQ representative, Fritz Skirvin, and the audience due to an incomplete tape recording by Benton County.

	Name	Address	Precinct	Phone #
1.	Inez Campbell	916 NW 36th St. Corvallis	113	752-3876
2.	Ralph Bogart	937 N.W. 36 St Corvallis	113	753-3867
3.	Jacqueline M Miles	4855 NE Elliott Cir Corvallis		752-1942
4.	Richard S. Miles	4855 NE Elliott Circle, Corvallis		752-1942
5.	Thomas L. Waterman	603 N.W. 3rd, Corvallis		753-0137
6.	Katherine H. Osborn	2926 N.W. Taylor, Corvallis	112	753-7539
7.	Dorothy J. Leach	2815 NW Antler	111	752-4054
8.	Barbara Krussell	R2, Box 136M Philomath		929-5717
9.	Ruth E. Whitehead	1830 NW 14		753-4059
10.	Malcolm Campbell	916 NW 36th St. Corvallis	113	752-3876
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return to W.H. KOENITZER 4990 S.W. FAIRHAVEN DR. PH. 503-754-0877 CORVALLIS, OR 97330

Rec'd 3/30/79

000151

To The Benton County Board of Commissioners
The Benton County Planning Commission
The Benton Government Committee
The Corvallis City Council

Billie Moore
645 SE Vera 753-4365

We, the undersigned, residents of the City of Corvallis and Benton County, strongly object to the **misuse and misintrpretation** of the intent of the light industrial ordinance, Section 11:03 - Permitted Uses. The County, by allowing the construction of the Evans Products Fiberglass manufacturing plant situated on Crystal Lake Drive, zoned light industrial, has located a polluting industry, appropriate only for a heavy industrial zone, where it will negatively impact a city neighborhood and business district.

Item 2 of Section 11:03 allows certain uses **provided they do not "endanger public health, safety, convenience, general welfare, or create a nuisance because of odor, noise, dust, smoke or gas."**

We believe that the manufacturing of fiberglass endangers public health, the general welfare, and creates a nuisance:

1. The fiberglass particles contained in the air emissions from the fiberglass plant will constitute a health hazard to the residents and other persons within the emission area.
2. The continuous twenty-four hour a day, seven day a week operation of this plant will subject the surrounding residents to a nuisance noise level that will be intolerable.
3. Fiberglass particles emitted in the air discharge from this fiber glass plant will constitute an intolerable **nuisance dust** for the residents of the adjoining neighborhoods and for other residents of Benton County affected by the air discharge from this plant.

Further, for all the above reasons, property within the affected area will be seriously devalued.

We, the undersigned citizens of Corvallis and Benton County, maintain the intent of the zoning ordinance does not permit the manufacture of fiberglass or any other polluting industry in a light industrial zone and we request that the Benton County Board of Commissioners insure that the intent of the light industrial zone be upheld. Issuance of the mechanical permit would subvert the intent of the light industrial zoning ordinance.

Further, we request that the portion of Evans Products outside the city limits be annexed to the city in order to prevent further lack of governmental coordination and control and to insure the best protection and equitable benefit for city taxpayers.

Name	Address	Precinct	Phone #
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western union

Telegram

PR8367(1736)(4-056575E088)PD 03/29/79 1715

ICS IPMRNCZ CSP DLY PD

5037576835 TDRN CORVALLIS OR 42 03-29 0515P EST

PMS JOE RICHARDS CHAIRMAN ENVIRONMENTAL QUALITY COMMISSION, DLR

522 SOUTHWEST 5TH YEON BLDG

PORTLAND OR 97205

URGENT DELETION OF THE 38 ACRE CRITERIA FOR THE PROPOSED CHANGES IN ISSUANCE OF SUBSURFACE SEWAGE SYSTEM PERMIT. BELIEVE THAT THIS ADDITIONAL HAS HIGH POTENTIAL FOR CREATING FUTURE HEALTH HAZARD PROBLEMS. CURRENT RURAL VARIANCE PROCEDURES ADDRESS THIS ISSUE IN A BETTER WAY

A K HOTTLE ADMINISTRATOR

NNNN

SF-1201 (R5-69)

March 15, 1979

TO: Environmental Quality Commission

FROM: AQMA Advisory Sub-Committee on Indirect Source Rule

SUBJECT: Status Report on Indirect Source Rule Review

The Portland AQMA Advisory Committee has established a sub-committee to review the proposed changes in the Indirect Source Rule. At this time the direction the sub-committee is taking is to develop a recommendation for the full committee that will retain the indirect source review in some manner. This may be in the form of:

1. Source by source reviews; or

2. Parking and Traffic Circulation Plans with an interium plan for source by source review until such time as Parking and Traffic Circulation Plans are established.

Several issues that have been identified and discussed but are not yet resolved include:

1. In what geographic area should the Committee recommend that the rule apply? Both actual non-attainment areas or the entire AQMA have been discussed. If the oxidant non-attainment area remains the entire AQMA, these boundaries may be the same.

   This question really addresses the issue of whether the program is strictly to assist in meeting standards or if it should also be used as a maintenance program.

2. Would the Parking and Traffic Circulation Plan approach tie land-use planning in more closely with air quality planning and provide for better over-all project adopted?

3. If the Parking and Traffic Circulation Plan is the preferred mechanism, what should be done in the interium until such a plan or plans are developed and adopted?

4. If the source by source review is the preferred mechanism:

   a. Is the recommended TSP incremental concentration set at a justifiable level for indirect source?

   b. Are there additional "Indirect Source Emission Control Programs" which should be added to 340-20-110(16)(a)-(n)?

c. Should any conditions be placed on a project by EQC or should a request be approved or denied only thereby allowing the developer/designer (be it public or private) to be responsible for deciding what changes need to be made in the project?

The Indirect Source Sub-Committee will be mailing its recommendation to the full Committee prior to the Committee's April 10 meeting. The Committee will be asked to take action on the recommendation at that time. A recommendation will be included on the DEQ's mailing to the Commission for your April 27 meeting.

DEQ moves to relax smog control goals

By ED MOSEY
of The Oregonian staff

In a move that could save money for industries and consumers, the state Department of Environmental Quality is proposing to relax its goals for smog control.

The department wants to revise the state ozone standard to bring it into line with regulations recently eased by the U.S. Environmental Protection Agency. But the citizen group Oregon Environmental Council said the move would weaken the state's program for cleaning up dirty air in urban areas.

At its meeting Friday in Salem, the state Environmental Quality Commission is scheduled to consider authorizing DEQ to go ahead with public hearings on the new standard.

Ozone is that eye-watering gas that chokes the Portland area on many hot summer days. An oxidizing agent, it is formed when sunlight strikes hydrocarbons and nitrogen oxides. Automobile engines are the major contributors of the necessary ingredients, but industries also generate the objectionable substances.

John Kowalczyk, supervisor of technical services for the department, says DEQ wants to lift the allowable smog level from .08 to .12 microgram per cubic meter of air. The action would make Oregon's standards the same as EPA's requirements. The state must adopt rules at least as stringent as EPA's.

Kowalczyk said the looser rules would mean that the cities of Salem and Eugene could comply with standards without additional clean-air programs. All cities in the state must meet the federal standard by 1982.

The state has been working on various measures to cut down the emissions of hydrocarbons by industries and to reduce use of automobiles. Industrial equipment to capture hydrocarbons that escape during fuel transfers and incentives to use mass transit are examples of strategies to attack the problem.

Kowalczyk said the state wants to relax its requirements along with the federal government's because "they have the research expertise nationally, and we should defer to them to determine what is a healthy level."

But Melinda Renstrom, spokeswoman for the Oregon Environmental Council, objected that the state is joining the federal government in a new inclination "to confuse health matters with economics."

She said the environmental council will object to the change at hearings to be held by the DEQ.

"Frankly, I don't think we stand much of a chance because the DEQ has made up its mind that the standard ought to be relaxed," she said.

The EQC is scheduled to meet at 9 a.m. Friday in the Black Angus Restaurant in Salem. It will meet informally at 7:30 p.m. Thursday in the George Putnam Center at Willamette University for a discussion of issues.

33 NORTH CENTRAL
SUITE 211
MEDFORD
OREGON
97501

779-7555

ROGUE VALLEY COUNCIL OF GOVERNMENTS

DISTRICT VIII WATER QUALITY PLANNING PROGRAM
John LaRiviere
Coordinator

March 28, 1979

Mr. Joseph B. Richards, Chairman
Environmental Quality Commission
P.O. Box 1760
Portland, Oregon 97207

Dear Mr. Richards:

I have just reviewed agenda item No. H, March 30, 1979, Environmental Quality Commission Meeting. I must take exception to paragraph a. on page 5, which states the City of Medford is seeking federal monies to fund their next growth increment.

The City of Medford operates the regional sewerage treatment plant for the Bear Creek Valley which also serves the cities of Phoenix, Talent, Central Point, and the Bear Creek Valley Sanitary Authority. It is true that the plant is currently meeting permit limits, however, it is proposed that the Cities of Jacksonville, White City, Eagle Point and the BCVSA Westside Trunk district projects be connected to the regional system. The waste load increase from this existing population (12,615) exceeds the projected growth of the City of Medford in the year 2000.

I think the City of Medford is acting in a responsible manner as the Agency charged with operating the regional treatment facility. Expansion at this time is consistent with the 208 Waste Treatment Master Plan and is certainly in the best interests of the downstream communities of Gold Hill and Grants Pass which obtain their municipal water supply from the Rogue River.

Thank you for the opportunity to make this clarification. If you have any questions or if I can be of further assistance please let me know.

Sincerely,

John R LaRiviere

John R. LaRiviere, Coordinator
Water Quality Planning Program

LaRiviere/sp

cc: City of Medford
City of Jacksonville
City of Eagle Point
Bear Creek Valley Sanitary Authority

DIVISION OF
ENVIRONMENTAL MEDICINE

Area Code 503 225-8415

Portland, Oregon 97201

UNIVERSITY OF OREGON
HEALTH SCIENCES CENTER

January 22, 1979

Mr. Fritz Skirvin
Air Quality Division
Dept. of Environmental Quality
P.O. Box 1760
Portland, Oregon 97207

Dear Mr. Skirvin,

Ted Groskevich asked that I communicate with you on the subject of potential health hazards which might be associated with a proposed glass fiber plant to be established in Corvallis by Evans Products Company. To my knowledge there is as yet no evidence that fiber glass is carcinogenic in humans, and the major manufacturers have been looking for such evidence among their employees for a number of years. On the other hand, a number of studies have demonstrated the carcinogenicity of fiber glass in experimental animals. Because of the physical similarity between fiber glass and asbestos, one might anticipate that eventually there might appear evidence of fiber glass carcinogenicity in humans if observations are extended over a sufficient period of time. Since no size or shape of asbestos fiber has been found to be free of cancer risk, I would not expect that any size or shape of glass fibers would be free of this concern.

The experimental animal studies which established the carcinogenicity of fiberglass generally used non-inhalation methods of exposure, but I believe they indicate potential respiratory hazard because the carcinogenic effect apparently depends on the physical characteristics of the fibers and not on local metabolism or bacterial action.

This is a difficult protection problem because of the incomplete knowledge available. I would estimate that the potential hazard would be much greater for the plant workers than for the surrounding community. I expect that some degree of human carcinogenicity of fiber glass will be

proved eventually, but that is not a certainty at this time, and the degree of carcinogenicity risk could be less than asbestos. Emissions from a fiber glass plant would certainly be more hazardous than road dust, but we do not yet have the evidence to justify a no-emission standard as would apply to asbestos, so that it would seem reasonable to consider an intermediate emission standard until such time as more complete evidence were available.

I hope this is helpful to you and would be happy to answer additional questions.

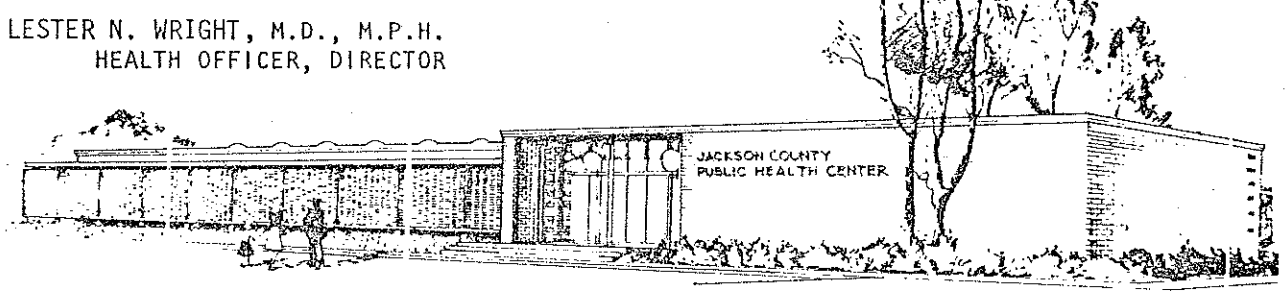
Sincerely,

Wm Morton

Wm E. Morton,MD,DrPH
Professor

WEM:sgt

LESTER N. WRIGHT, M.D., M.P.H.
HEALTH OFFICER, DIRECTOR



1313 MAPLE GROVE DRIVE, MEDFORD, OREGON, 97501

PHONE ~~XXXXXX~~
776-7300

TESTIMONY TO ENVIRONMENTAL QUALITY COMMISSION

By

Lester N. Wright, M. D.
Jackson County Health Officer
30 March 79

Re: Proposal to amend 340-71-030

You have before you a proposal to amend the regulations to allow the issuance of permits to install septic systems that will fail either seasonally or permanently, assuming there is an arbitrary lot size on which to place them. While I can easily understand the political reasons behind such a rule change, I urge careful consideration of what this amendment says about you, your concern for people and their health, and the septic permit process.

While sewage does have certain noxious qualities such as odor, these are not the reasons that society has for many centuries frowned upon its members defecating and micturating wheresoever they choose on top of the ground. Moses in the book of ~~Leviticus~~ Deuteronomy even prohibited it! No, the reason has to do with health. So what does having your neighbor's feces on his ground have to do with your health?

What it has to do with your health is whatever organisms your neighbor happens to have -- salmonella, including typhoid, shigella causing dysentary, Endotoxin producing E. Coli, hepatitis, coxackie virus, echo virus, polio virus, ameba, worms of various types. All of these organisms either exist now or have within the past months in Oregon and in Jackson County.

But, the proposal amendment does specify a fairly large land lot and 200' setback to protect each of us from our neighbor and visa versa. Right? Right, it does. Of course the 38 acres and 200 feet could be from a school yard ballfield. It could even be 200 feet up a 30 ~~degree~~ percent slope from that playground.

But, let's assume that the schoolgrounds are all fenced and the children all stay on their own land. What about the water table that is 12 inches from the surface and the intermittent stream that can flow 50' from the drainfield. That's no hazard to anybody's health?

The next aspect of the problem to consider is insects. Can you assure that the flies, gnats, cockroaches and other arthropods either will not be found at all within the 38 acres or will at least have the good sense not to cross property lines?

And what about animals? I have personally seen otherwise intelligent dogs and cats pick their way through muddy fields and then cross property lines, and there are rodents like rats, mice, ground squirrels that also unwittingly spread disease from there to here.

I have lived in places where sewage on the ground was usual. I'm moving back to a place like that in a few weeks -- in Africa. I don't want to see sewage on the ground in Oregon on any size parcel of land! I've seen 50% infant mortality rates. I've treated all the gastroenteritis and typhoid that I really want to.

If you adopt this amendment, you are denying that health protection is the reason for regulating septic systems. You are saying in that case that this whole permit system is just another arbitrary government beurocratic meddling in people's lives for the sake of meddling. If you adopt this amendment, consistency would dictate that you do away with <u>all</u> requirements for septic permits.

I challenge you to consider the health of the people of Oregon as you consider this amendment. If you do, you cannot pass it, no matter what the pressure of the disappointed landowner no matter what the size of his lot.

Bullock

Ragsdale
Bullock
Hannon

LEGISLATIVE COMMITTEE ON TRADE
AND ECONOMIC DEVELOPMENT
ROOM H-197, STATE CAPITOL
SALEM, OREGON 97310
(503) 378-8811

9'20

February 28, 1979

Memo to: Senate Members, Legislative Committee on Trade and Economic Development

From: Patricia K. Middelburg, Executive Officer

Subject: Staff Recommendations, EPA Clean Air Act as Amended in 1977

The subject before the Senate membership of the Legislative Committee on Trade and Economic Development is its final recommendations to the Environmental Quality Commission. As you recall, on January 26, 1979, the Committee formally requested the Commission to delay its action on the proposed emission offset rule for the Medford/Ashland AQMA. In seeking that delay, the Committee agreed it would review and comment on the State Implementation Plan, and more specifically, the proposed emission offset rule, not later than March 1, 1979. This would enable the Commission to reconsider the proposed rule at its meeting in late March.

After three lengthy public hearings, staff reviewed all the oral and written testimony in order to determine what the options are for the Committee's final recommendations. Today, I would like to outline those options. The Committee may consider each of these options separately or as a package. However, if the Committee decides to adopt any one of these proposals, it must

answer certain policy questions before proceeding. Keep in mind that this list of options and policy questions are not intended to be all inclusive. Rather, these are the key questions I feel must be answered before the Committee makes its final recommendations to the Environmental Quality Commission.

OPTION 1 The Committee would make no recommendation to the Environmental Quality Commission.

Pros: no.

OPTION 2 The Committee would recommend that the Environmental Quality Commission adopt the proposed emission offset rule, with no further comment on the rule or implementation plan from the Committee.

Pros: no

Before the Committee makes a decision on the options 1 and 2, it must first ask itself the following questions:

a. Is this the most appropriate role for the Legislature to assume on this issue of air quality?

b. The Legislature's function is to set policy and to delegate its authority for carrying out that policy. Under ORS 468.280, the Legislature has already set its policy for air quality and delegated its authority for carrying out that policy to the Environmental Quality Commission. However, did the Legislature, in fact, delegate its authority to the Commission to establish and administer

an emission offset policy? Does the Legislature want to modify that authority at this time? If so, how?

OPTION 3 The Committee would recommend that the Environmental Quality Commission adopt the proposed emission offset rule for the Medford/Ashland AQMA, but that it not include this rule in the State Implementation Plan that is to be submitted to the Environmental Protection Agency on June 30, 1979. Further, the Department of Environmental Quality should seek an 18-month delay from the Environmental Protection Agency before submitting the final State Implementation Plan. Further, the Department of Environmental Quality should seek additional research funding to undertake an intensive air quality testing program for the Medford/Ashland AQMA. As part of that testing program, the Department should review the 5-ton per year limitation for new and expanding industry in the Medford/Ashland AQMA and determine if this is an accurate limitation. Finally, the State Implementation Plan should be reviewed by the Legislative Committee on Trade and Economic Development, including the emission offset limitations, before final submission to the Environmental Protection Agency.

If the Committee is to accept this option, it must answer the following questions.

a. Is the Committee willing to assist the Department of Environmental Quality in obtaining additional funding for this air quality testing program?

b. While the study is underway, should the Department periodically report its findings to the Committee?

c. Are there any particular aspects of such a study that the Committee feels the Department should concentrate its efforts? [i.e., identifying point and non-point sources of pollution? studying the economic impacts of the proposed rule on the community's future growth?]

Harmon - state should not mandate it (I/M). state allows county to initiate a mandatory I/M prog

OPTION 4 The Committee could support a legislative measure that would require the Environmental Quality Commission (to require) motor vehicle pollution control inspection program for nonattainment areas.

Harmon (Committee should not take a positive)

a. Should the Committee also support other types of programs designed to reduce automobile emissions, such as public transit systems, "park and ride" programs, "share-a-ride" programs, etc.?

b. Should the Committee urge the Medford/Ashland area to undertake a traffic flow study? If so, who should pay for the study?

c. If the Committee endorses an automobile inspection program for the Medford/Ashland area, should the program be voluntary or mandatory? Who will administer it? Who should pay for it, the county or state? or fees?

Copy

407 Southwest Highway 101

March 5, 1979

TO: Department of Environmental Quality

FROM: Robert L. McWilliams, City Manager
City of Lincoln City

SUBJECT: Reduced levels of funding of sewage works construction grant program and options for managing.

You can't imagine the traumatic impact your notice on the above captioned subject has created for Lincoln City.

Lincoln City has been working diligently to carry out its Phase Two program which included expansion of the City's treatment plant, providing for secondary treatment, remodeling of several pump stations and additional pressure lines and gravity lines.

At the time we received this public notice, our plans had been submitted to DEQ for review and we were looking forward to the authorization to advertise for bids on this project.

Lincoln City is a coastal city with a population of 5,000 persons, and a responsibility for providing service to approximately 20,000+ persons. Much of this situation is due to the fact that Lincoln City is a tourist based town with people from all over the country and throughout the state visiting Lincoln City as a tourist community. Also, under our master plan, we are to provide service to properties adjacent to our city limits. Our planning is based on a regional approach to water pollution control.

It should be recognized that of the permanent population of Lincoln City, a very high percentage of the people are retired and

on limited incomes. Lincoln City lacks the broad employment picture that most communities enjoy. Again, because we are a tourist based community and most of the employment is through tourist related activities, which are low paying occupations. Even if one looks at the demography of Lincoln City, we should appreciate that the people of Lincoln City have objectively looked at the programs needed to solve the problems. Two of our basic problems are a deteriorated water system and a sanitary sewer system which needs upgrading.

In the case of our Phase Two sanitary sewer program, because of inflation and delay in our Step Two grant program, we found that even after the citizens had paid taxes for several years to develop a sinking fund for the local share, we were in a deficit position. In September of 1978, the voters of Lincoln City approved a $5 million general obligation tax levy for improvement of the City water distribution system and an additional $1 million for the sanitary sewer system to cover the City's deficit as far as its local share for funding of the Phase Two program. Both of these issues were approved by the voters in Lincoln City by a five to one margin.

Now, we face the possibility of further delay, further negative impact because of inflation, and perhaps at a later time, having to go back to the voters again for additional monies for local share.

I would also like to point out that should there be further delay, the City would face a legal problem with the bonds that have been issued because of the regulations on arbitrage.

Lincoln City has been under a moratorium placed by the Department

of Environmental Quality, that moratorium established in 1972. Only after we had our Phase Two program (as we felt) under control, did we look forward to some relief on that moratorium. We had been working with the Department of Environmental Quality for lifting of that moratorium and in that process, did negotiate the number of residential equivalents the City could connect prior to the completion of the Phase Two project. However, in receiving the draft of that new permit, we found we could not meet the standards established in that permit and in essence, could face the possibility of a total moratorium in Lincoln City until our Phase Two program was accomplished.

Subsequent to receiving that information, we have had conversation with the DEQ people and the discussion is now a consent decree, although the draft of that consent decree has not yet been received by Lincoln City. I would assume that should you change the managing program, that would have an adverse effect on Lincoln City. The question of additional development and the meeting of standards would be a further problem.

Because of the moratorium which has constricted development, there is a serious housing shortage in Lincoln City as well as a shortage of facilities needed to service the tourist based community. Housing in Lincoln City is unusually costly, no doubt part of that situation is due to the lack of housing starts, and particularly, people of low incomes face serious problems in satisfying their housing needs.

It is my understanding that you are asking for our recommendation on which option DEQ should pursue as outlined in your public notice. We hesitate to recommend an option as we question that this is the correct

approach in this particular situation. It would clearly be self-serving to recommend either Option One or Option Three. Should one of those two options be adopted, we would be able to continue. However, this delay has probably cost us an additional $40,000-$50,000 per month due to inflation on this project.

I would further point out it seems to us that if there is a need for developing a new management program for DEQ because of the decrease in federal funding, this exercise will take time in order for positive new managing techniques to be developed. It also seems to us that changing programs that are in the fiscal year 1979 would not be in the best interest of those communities who have diligently worked to arrive at their positions under the DEQ ranking system, and these projects should not be delayed as new managing techniques are developed, if required.

I also wish to inform you that in conversation with a representative from Senator Hatfield's office it is the opinion of that office that perhaps DEQ is being too pessimistic concerning federal funds to be received by the State of Oregon. That office feels there will be additional funds, and that some states in the nation are in a surplus position. At this time, there is no mechanism under the Rules and Regulations to transfer that money to other states but work is being accomplished in that direction. It is felt that Oregon will receive additional funds since it is recognized this state was probably underfunded in the federal program.

In closing, please consider that those local government jurisdictions who have diligently followed the Rules and Regulations to

achieve a position for funding in fiscal year 1979 should not be placed in an unfair position because of this sudden development. We feel that fiscal year 1979 programs should be expedited and if there is a need for developing a new management approach, that effort should be undertaken and exercised from fiscal year 1980 forward.

The economic impact on Lincoln City, should we lose our position, will be a very serious impact and will have an adverse effect on many people who visit Lincoln City.

RLM:jmd
cc: Honorable Mayor
City Council Members

HLS
CKA

DEPARTMENT OF HUMAN RESOURCES

RECEIVED
return to THB
MAR 0 6 1979

Water Quality Division
Dept. of Environmental Quality

HEALTH DIVISION

1400 S.W. 5th AVENUE • PORTLAND, OREGON • 97201 • Phone 229-5032
(Emergency Telephone No. (503) 229-5599)

~~ROBERT W. STRAUB~~
~~GOVERNOR~~

Tom Blankenship
Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, Oregon 97207

Dear Mr. Blankenship:

The Health Division wishes to comment on the methods of determining funding priorities. The Health Division, Department of Environmental Quality and Environmental Quality Commission have worked cooperatively to assist cities in obtaining funding for installation of sewage systems to alleviate conditions that are causing a danger to public health.

Under ORS 222.850 to 222.915 the Division makes a determination whether conditions in a given area constitute a danger to public health because of inadequate installations for the disposal or treatment of sewage. If such conditions are found, the city is required to prepare and submit plans, specifications and a time schedule for alleviating the problem to the Environmental Quality Commission for approval. The Commission is required to use its powers of enforcement to insure that the facilities are constructed or installed in conformance with the approved plans and schedule.

Most applications for grant funding are the result of long term planning, and there is more opportunity for also planning the funding sources, whereas an imposed construction project by the state is often not planned for, and cities have not budgeted for the necessary engineering studies, let alone the installation of the system. In order to protect the public health the system must be put in, but without funding assistance the costs are usually so high that it is not feasible to assess the costs to the property owner. The Division and the Commission are then in the somewhat uncomfortable position of ordering an action that cannot be enforced: that is the city would be ordered to put in a sewage

system to alleviate a health hazard and would not have the monies necessary to comply.

As I stated earlier, ORS 222.900 (4) requires the Environmental Quality Commission to use its powers of enforcement to insure that the facilities are constructed or installed. I believe it is implied that the EQC should also use its discretionary powers over funding to see that the facilities are constructed.

I therefore urge the Commission to give high priority to the funding of projects to correct a declared danger to public health.

Sincerely,

Kristine M. Gebbie
Assistant Director, Human Resources
Administrator, State Health Division

KMG:hs

FINAL RULE
Adopted September 15, 1978

ADMINISTRATIVE RULE ON STATE PERMIT CONSISTENCY	)	ESTABLISHES REQUIREMENTS FOR DETERMINING CONSISTENCY OF STATE PERMITS WITH STATE-WIDE PLANNING GOALS AND ACKNOWLEDGED LOCAL COM-PREHENSIVE PLANS

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
1175 Court Street N.E.
Salem, OR 97310

1.0 INTRODUCTION

1.1 Purpose

The purpose of this rule is to clarify state agency responsibilities to apply the Statewide Planning Goals or Acknowledged Comprehensive Plans during permit reviews (ORS 197.180(1)). The rule establishes procedures and standards which require consideration of Goals and Acknowledged Plans prior to approval of state permits. The rule also requires that affected state agencies develop and submit to LCDC procedures for consistency review.

1.2 Definitions

"Acknowledged Comprehensive Plan" means a comprehensive plan and implementing ordinances that have been adopted by a city or county and have been found by the Land Conservation and Development Commission to be in compliance with the Statewide Planning Goals pursuant to Chapter 664, Section 20(1) of Oregon Laws 1977.

"Affected Local Government" means the unit of general purpose local government that has comprehensive planning authority over the area where the proposed activity and use would occur.

"Class A Permits" are state permits affecting land use that require public notice and public hearing at the agency's discretion prior to permit approval, including those permits identified as Class A permits in Appendix A.

"Class B Permits" are those state permits affecting land use which do not require public notice or an opportunity for public hearing before permit issuance, including those permits identified as Class B permits in Appendix A.

2.0 CONSISTENCY REVIEW REQUIREMENTS

2.1 Identification of Class A and Class B Permits

Affected state agencies shall by January 1, 1979 submit a program for permit consistency listing their Class A and Class B permits affecting land use including those set forth in Appendix A. Upon submitting its program to the Commission, an agency may request a change in the designation of Class A and Class B permits.

2.2 Consistency Review Procedures

Programs shall describe the process the agency will use to assure that permit approvals are consistent with Statewide Planning Goals and Acknowledged Comprehensive Plans.

A. Class B Permits

For Class B permits, the review process shall assure either:

1. That the proposed activity and use are allowed by the applicable zoning classification where there is an acknowledged comprehensive plan, or,

2. that the applicant is informed that:

   (a) issuance of the permit is not a finding of compliance with the Statewide Planning Goals or the acknowledged comprehensive plan; and,
   (b) the applicant must receive a land use approval from the affected local government. The affected local government must include a determination of compliance with the Statewide Planning Goals when they are applicable, which may be stated in simple conclusory form without extensive findings.

B. Class A Permits

In their review of Class A permits state agencies shall:

(1) Include in the notice for the proposed permit a statement that the proposed activity and use are being reviewed for consistency with the Statewide Planning Goals or the Acknowledged Comprehensive Plan as part of the permit review.

(2) Insure that the notice for the proposed permit is distributed to the appropriate city or county citizen advisory committee.

(3) When there is a public hearing on a proposed permit, consider testimony on consistency of the proposed activity and use with the Statewide Planning Goals or the Acknowledged Comprehensive Plan.

(4) Based on comments received from the public and other agencies, determine whether or not the proposed permit is consistent with the Statewide Planning Goals or the Acknowledged Comprehensive Plan.

If a state agency's existing process for administration of major permits is substantially equivalent to the process required by this section, the agency may request LCDC approval of its existing process as described in its agency coordination program.

2.3 Review Criteria

Where the affected local government does not have an Acknowledged Comprehensive Plan, the state agency's review shall assess whether or not the proposed activity and use are consistent with the Statewide Planning Goals. Where the affected local government has an Acknowledged Comprehensive Plan, the state agency review shall only address consistency with the Acknowledged Local Comprehensive Plan. The Statewide Planning Goals shall not be a criteria for permit review after acknowledgment unless the state agency finds:

(1) The Acknowledged Comprehensive Plan and implementing ordinances do not address or control the activity under consideration; or,

(2) Substantial changes in conditions have occurred which render the comprehensive plan and implementing ordinances inapplicable to the proposed activity.

2.4 Effect of a Determination of Inconsistency

When a state agency determines that a proposed activity or use is inconsistent with an applicable Statewide Planning Goal or the Acknowledged Comprehensive Plan, it shall deny the state permit and cite the inconsistency as the basis for denial. State agencies may defer or conditionally approve a permit when compliance with a Statewide Planning Goal or the acknowledged comprehensive plan requires an action that can only be taken by the affected local government.

2.5 Reliance on the Local Government's Determination

State Agencies shall rely upon the affected local governments consistency determination in the following cases:

1. When the Agency finds the affected local government has determined that the proposed activity and use are consistent or inconsistent with its Acknowledged Comprehensive Plan and implementing ordinances.

2. Where the affected local government does not have an acknowledged plan or the state agency makes a finding in accordance with 2.3 (1) or (2) and, the state agency finds that:

   (a) the local review included consideration of the appropriate Statewide Planning Goals; and,
   (b) the local review provided notice and the opportunity for public and agency review and comment. If notice and the opportunity for public and agency review were not provided, the agency shall only rely on the local determination if no objections are raised during the agency's review. Where objections are raised, the agency shall make its own determination.

   In these cases, the agency's public notice or permit decision shall indicate that the affected local government has reviewed the proposed activity and use and determined that they are consistent with the Statewide Planning Goals and/or the comprehensive plan.

A consistency determination is not required if the proposed permit is a renewal of an existing permit except when the proposed permit would allow a modification or intensification of the proposed use.

APPENDIX A: LISTING OF CLASS A AND CLASS B STATE AGENCY PERMITS AFFECTING LAND USE

CLASS A PERMITS:

Department of Energy (DOE)

-Energy Facility Site Certificates

Department of Fish and Wildlife (DFW)

-Salmon Hatchery Permit

Division of State Lands (DSL)

-Fill and Removal Permits

Department of Transportation (DOT)

-Ocean Shore Improvement Permit

Department of Geology and Mineral Industries (DOGMI)

-Permit to Drill -- Geothermal Well*
-Permit to Drill -- Oil or Gas Well*

*Agency's legislation does not provide for public hearing on permit review. Some other review process providing opportunity for public and agency comment is used.

CLASS B PERMITS:

Department of Environmental Quality

-Subsurface Sewage Disposal System Permit
-Air Contaminant Discharge Permit
-Waste Discharge Permit (National Pollution Discharge Elimination System - NPDES)
-Indirect Source Construction Permit
-Water Pollution Control Facility Permit
-Solid Waste Disposal Site Permit

Department of Geology and Mineral Industries

-Surface Mining Operation Permit

Protective Health Services Section, Health Division, Department of Human Resources

-Community Water Supply System Certification
-Organization Camp Sanitation Certificate
-Recreation Park Sanitation Certificate
-Recreational Vehicle Park Plan Review

Water Resources Department

-Appropriate Groundwater
-Appropriate Public Water
-Water Right Transfer

Public Utility Commissioner (PUC)

-Railroad Highway Crossing Project

Department of Transportation (DOT)

-Road Approach Permit
-Airport Site Approval

BC:krm/MC
9/22/78
304403/7135

STATE AGENCY PERMIT REVIEW PROCESS

(For Class A permits as addressed in the State Permit Consistency Rule)

	PRE-APPLICATION	REVIEW OF APPLICATION	PUBLIC NOTICE ON APPLICATION	DECISION ON APPLICATION
STATE AGENCY	-	- Contact local government to determine whether or not local action has been taken. - If no local action, make an initial assessment of whether plan or Goals apply.	- Prepare public notice stating whether or not there has been a local action *If Yes, Notice states consistency review satisfied by appropriate local action. *If No, Notice states that application is being reviewed for consistency with either Goals or Acknowledged Plan (See section 2.3 of Rule to determine review criteria). - Circulate notice to: * other agencies * local governments * local CAC, public (upon request)	- Compiles comments from agencies, local governments and the public. - Makes findings on: * Whether or not there has been a local action; (if no local action) * Whether Acknowledged Plan or Statewide Goals apply to the project; and * Whether or not the project complies with statewide goal requirements or comprehensive plan policies.
LOCAL GOVERNMENT	- Affected local government may determine consistency through local action if it includes: * notice to public and agencies * opportunity for comment		- Comments on: * Whether or not the application applies to Goals or Acknowledged Plan. (Section 2.3 of Rule) * Whether or not the application complies.	
	If at any time prior to the State Agency's decision on the application, the affected local government takes a land use action including a consistency decision, it should immediately inform the state agency of its decision.			
OTHER AGENCIES/ PUBLIC			- Comments on: * Whether or not the application applies to Goals or Acknowledged Plan. (Section 2.3 of Rule) * Whether or not the application complies.	Decision may be appealed to: - state agency (internal appeal) - LCDC (Goal violations) - Courts (Plan violations)

ADDENDUM TO ATTACHMENT "A" OF AGENDA ITEM F(1), March 30, 1979 EQC Meeting

Amend 340-71-017(1) as follows:

(1) Upon completing the construction for which a permit has been issued, the permit holder shall notify the Department. The Department shall inspect the construction to determine if it complies with the rules contained in this Division. If the construction does comply with such rules, the Department shall issue a Certificate of Satisfactory Completion to the permit holder. If the construction does not comply with such rules, the Department shall notify the permit holder and shall require satisfactory completion before issuing the certificate. Neither the permit holder, the system installer, nor any other person may backfill (cover) a system that, upon inspection, has been found in violation of rules contained in this Division until the deficiencies have been corrected and a Certificate of Satisfactory Completion issued. Failure to meet the requirements for satisfactory completion within [a reasonable time] thirty (30) days after notification in writing constitutes a violation of ORS 454.605 to ORS 454.745 and this rule.

On Page 4 of ATTACHMENT "A" substitute the following for language proposed for 340-71-016(6).

Rescind 340-71-016(6) in its entirety and substitute the following:

(6) When upgrading disposal systems which approximate a pit privy and gray water discharge to the surface or to a pit, system repair rules, 340-71-030(7) shall apply, provided the following criteria can be met:

(a) The system serves an occupied dwelling, and

(b) The system was constructed prior to January 1, 1974.

Amend temporary rule, Geographic Region Rule "C", 340-71-030(10), by adding a new paragraph (D) to subsection (a) to read as follows:

(D) That when the ETA beds have been constructed in accordance with paragraph (B) of subsection (b) below and diagrams 7-C (A) & (B), a minimum of six (6) inches of fine textured soil shall underlie all portions of the ETA beds.

March 28, 1979

oregon environmental health association

oeha

FOUNDED 1941 - AFFILIATED NEHA 1946

REPLY TO: 2405 SW Liberty Street, Albany, OR 97321

March 29, 1979

RESOLUTION ON PROPOSED SUBSURFACE AND ALTERNATIVE
SEWAGE DISPOSAL REGULATIONS DEALING WITH LARGE PARCELS

WHEREAS Oregon Environmental Health Association members evaluate the suitability and safeness of proposed sewage disposal systems, investigate complaints of failing sewage disposal systems, and design and approve sewage disposal systems that conform to rules and approve variances where, in their professional judgment, no health hazards would be created;

WHEREAS OEHA understands and has concern for the difficulties in allowing subsurface sewage disposal systems on large parcels;

WHEREAS OEHA's chief purpose is to see that the public's health is improved and protected and sanitarians are registered by statute to make certain that environmental decisions such as relating to sewage disposal are based upon sound scientific principles;

WHEREAS there is currently no scientific data to support this rule change amendment;

WHEREAS the proposed amendment to Chapter 340-71-030 through the addition of Subsection (11) will allow for the installation of a subsurface sewage disposal system which can be expected to malfunction and discharge raw or inadequately treated sewage to the ground surface or to ground water or to public waters;

WHEREAS a malfunctioning sewage disposal system under Chapter 340-71-012 Section (1) states that a malfunctioning sewage disposal system constitutes a public health hazard;

WHEREAS the present Department of Environmental Quality's administrative rules allow for viable alternatives through the state-wide variance, rural-area variance and regional rules A and C program, and that these alternatives have been tried to the best engineering practices and will operate satisfactorily by not creating a health hazard;

THEREFORE BE IT RESOLVED that the Oregon Environmental Health Association opposes the adoption of the proposed changes to Chapter 340-71-030 Subsection (11) and strongly recommends that the amendment not be accepted.

BE IT FURTHER RESOLVED that OEHA will make their experience, knowledge and assistance available to the EQC to help address the needs of the citizens of Oregon relating to on-site sewage disposal systems.

This resolution was adopted unanimously by the general membership of the Oregon Environmental Health Association on March 28, 1979 as witnessed by Richard H. Swenson, President.

Richard H. Swenson

Richard H. Swenson, President - OEHA

LINN COUNTY DEPARTMENT OF HEALTH SERVICES
COURTHOUSE ANNEX
P.O. Box 100, Albany, Oregon 97321

Michael McCracken, M.S.
Administrator

Benjamin Bonnlander, M.D., M.P.H.
Health Officer

John E. Johnson, M.S.W.
Mental Health Director

Susan Jewell-Larsen, R.N.
Public Health Director

Richard Swenson, R.S.
Environmental Health Director

Public Health 967-3888
Mental Health 967-3866
Environmental Health 967-3821
Administration 967-3905

March 29, 1979

Environmental Quality Commission
c/o Department of Environmental Quality
P. O. Box 1760
Portland, OR 97207

Re: Proposed Amendments to OAR Governing Subsurface and Alternative Sewage Disposal Minimum System Sizing for Single Family Dwellings

Dear Commission Members:

The proposal to change system sizing is not the only proposal that should have been considered in attempting to simplify and improve the methodology of sizing sewage disposal systems for single family dwellings. Attached is an additional method that I believe has some merit and should be considered.

Since the limited time we have had to review this extensive and complex rule change was entirely inadequate, I would hope that decisions regarding sizing of sewage disposal systems be delayed until other methods are considered. A rule change in this area would have immediate and drastic state-wide impact. There must be more input before a decision can be made.

I would be willing to work with you and your staff in providing additional information.

Sincerely,

Richard H. Swenson

Richard H. Swenson, R.S., Director
Environmental Health Services

cc: Mike McCracken
Jack Osborne

Attachment

March 29, 1979

SIZING OF SUBSURFACE SEWAGE DISPOSAL SYSTEMS
FOR SINGLE FAMILY RESIDENCES

Since there are numerous methods for sizing systems we feel the following criteria most important in developing a method.

1. The drainfield must be adequate to handle the expected maximum sewage flow in order to protect the public health.

2. The method must be simple and easily understandable by the public.

3. The method must be reasonable and easy to explain the justification of using this method to the public.

4. The method must be cost-effective (that is, not require unusual oversizing of systems when, realistically, it is not necessary).

5. Reduce the need for future additional permits when dwellings are expanded.

6. Maintain some flexibility to allow for unusual conditions that may face a sanitarian.

Any method of sizing that we can think of will be a compromise of the above considerations. We propose the following method of sizing in light of the above criteria.

Sizing of Subsurface Sewage Disposal Systems
for Single Family Residences

Dwelling Size	Sewage Flow
Less than 750 sq. ft. --	300 gallons per day
750 to 3000 sq. ft. --	450 gallons per day
More than 3000 sq. ft. --	based on number of bedrooms at 150 gallons per day per bedroom -- not to exceed 5 bedrooms.

Explanation of this Proposal -- Ninety-nine percent of single family dwellings fall within the 750-3000 square foot category. The system would be sized based on 450 gallons and therefore eliminate the need to use the bedroom method in ninety-nine percent of the cases. Unusually small dwellings or large dwellings should be designed around number of bedrooms, but in no case shall a system be sized for greater than 5 bedrooms or less than two. The two-bedroom requirement already exists within our rules. We are thus establishing a maximum requirement with this proposal.

Existing dwellings will be allowed to expand up to 3000 square feet if their septic tank and drainfield was designed based upon 450-gallon sewage flow. This should eliminate the need for alteration or expansion permits in most cases. Small dwellings with one or two bedrooms could expand until they reached 750 square feet. At that point they would have to add 150-gallon equivalency to the system and then would be allowed to expand up to 3000 square feet. In effect, we have three different sized systems. We think this method meets the criteria mentioned above and is the best compromise available.

As a resident with sight and sound of the proposed Evans Products fiber glass plant in Corvallis it concerns me greatly that the DEQ can essentially ignore the signatures of over 1900 people requesting a hearing.

Reasons given are -

① We had one hearing - ~~granted~~ there was less than 2 weeks time for preparation for that hearing and a considerable portion is not on public record because of faulty recording equipment. These reasons encouraged questions and writing or signing a petition. and writing a letter to the DEQ Requesting a Hearing ~~would~~ is apparently not an effective way for residents to get the answers to these questions

② Second reason given was that no additional info was expected to come from another hearing. This statement amazes me. There is additional information that was not included in open packet. And our lawyer would like to have an opportunity to present it at a hearing.

Unanswered questions I personally have

1. Why was no source testing done at presently operating plant in Lewisburg, despite the fact that it was requested.

② There are no data about this type of glass wool facility except the plant in Ohio which does not process glass wool. - Why aren't we collecting some?

Why don't workers at present plant have pulmonary function tests upon hiring and at reasonable intervals thereafter so that 20 years down the road we have some data? - Who will monitor the health of these workers?

(3). What kind of noise levels can we expect from this plant? The neighborhood is already heavily impacted by noise

(4). Why ~~don't~~ aren't the residents getting any action out of the DEQ about the present wood dust problem from Evans. Why don't it provide to solve present problems before laying another one on the residents. I don't have a great deal of faith in the process of controlling emissions if they can't solve issues already there.

(5) Where is the dust from the silica sand, ~~[illegible]~~ clay and soda ash going? Into the stack? If so then total emissions are not .77 lbs/hr.

I ask that you delay the issuance of the permit until another hearing can be held and these questions and any others put forth by residents be suitably answered.

Billie B. Moore
645 S.E. Vera
Corvallis, Ore.

TO: JOE RICHARDS, CHAIRMAN
ENVIRONMENTAL QUALITY COMMISSION
FROM: MARILYN KOENITZER, 4240 FAIRHAVEN, CORVALLIS 97330
SUBJECT: EVANS PRODUCTS AIR DISCHARGE PERMIT AND REQUEST FOR HEARING.
DATE 30 MARCH 1979

1. We ask you to instruct the DEQ NOT TO issue the air contaminant discharge permit for the Evans Products Fiberglass facility until the local land use issues concerning issuance of the building permit are resolved at the county hearings. It would be improper for the DEQ to issue the permit at this time.

2. I would like to enter into the record a copy of the petition passed in the County at the same time the petition to you and the DEQ was passed. The petition contains approximately 2000 signatures and lists our concerns that the placement of the fiberglass plant violates the intent of the light industrial zoning ordinance.

3. The Director of the DEQ has stated in a letter to me that he does not wish to delay the project and is inclined to issue the permit now. The project is already delayed until the local land use issues are resolved by the City & County. The building which Evans has constructed is just a shell. The furnace and other equipment cannot be installed until the hearing process on the building permit and zoning ordinance ~~are~~ is completed and a mechanical permit is issued. Therefore there is no necessity to issue the air discharge permit until the County decides whether or not to revoke the building permit.

other plants exist in Santa Clara and Ohio (continued O'Scanlon

4. It is improper to grant the permit at this time because of LCDC's administrative rule on State Permit Consistency which establishes requirements for determining consistency of state permits with Statewide planning goals and acknowledged comprehensive plans. I would like to make a copy of this rule part of the official record. This ruling lists DEQ permits in the Class B category. I will read to you from Page 3:

5. I would also like to enter into the record a copy of the appeal filed by our attorney which consolidates the separate appeal of the residents within sight and sound of the proposed fiberglass facility with the City's appeal of the building permit issued to Evans Products.

   The grounds of the appeal are land use ~~issues~~ issues which should have been addressed by the County and City prior to issuance of the building permit by the County and the air discharge permit by the DEQ.

6. We ask that the EQC direct the DEQ to hold the requested hearing to hear additional comments on the health issues and the new proposed permit. Additional information will be given at this time and at the County hearings.
The DEQ's credibility in Corvallis will be considerably improved if the requested hearing is held. Approximately 2000 people signed the petitions. Only a handful of those people know the contents of the new permit and many questions about Evan's operation are still unanswered.

I have one additional petition to give you which was overlooked.

Are letters written to the DEQ on the EP subject part of the public record?