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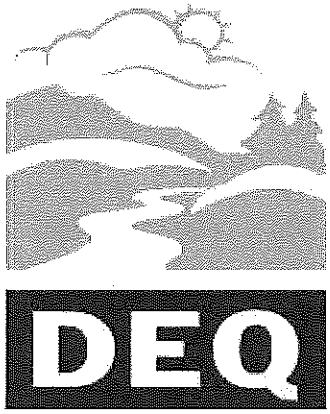
OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 03/12/1992



State of Oregon
Department of Environmental Quality

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State of Oregon

ENVIRONMENTAL QUALITY COMMISSION

A G E N D A

REGULAR MEETING -- March 12, 1992

Auditorium of the Public Services Center
155 N. First Street
Hillsboro, Oregon
8:30 a.m.

A. Approval of Minutes of the December 20, 1991 Telephone Conference Meeting and the January 23, 1992 Regular Meeting

B. Commission Member Reports (Oral)

C. Director's Report (Oral)

D. Approval of Tax Credit Applications

E. Briefing by Unified Sewerage Agency on Current Status of Facility Construction, Facility Operation, Stormwater Management Program, and USGS Study

Rule Adoptions

NOTE: Hearings have already been held on the Rule Adoption items; therefore any testimony received will be limited to comments on changes proposed by the Department in response to hearing testimony. The Commission also may choose to question interested parties present at the meeting.

F. Proposed Adoption of Prevention of Significant Deterioration (PSD) Rules

G. Approval of Oil and Hazardous Materials Emergency Response Master Plan

H. Approval of Preliminary Plans and Specifications for Alleviation of Health Hazard in the Yaquina John Point Area Adjacent to Waldport

I. Review of the State/EPA Agreement (SEA) for FY 93

10:30 a.m. **Public Forum**

This is an opportunity for citizens to speak to the Commission on environmental issues and concerns not a part of the agenda for this meeting. Individual presentations will be limited to 5 minutes. The Commission may discontinue this forum after a reasonable time if an exceptionally large number of speakers wish to appear.

11:00 a.m. J. Appeal of the Hearings Officer's Decision in the Fuel Processors Contested Case

1:00 p.m. K. Hearings Officers Recommendation on the Pulp Mill Permit Appeals

Because of the uncertain length of time needed, the Commission may deal with any item at any time in the meeting except those set for a specific time. Anyone wishing to be heard on any item not having a set time should arrive at 8:30 a.m. to avoid missing any item of interest.

The next Commission meeting will be Thursday, April 23, 1992, in a location to be determined.

Copies of the staff reports on the agenda items are available by contacting the Director's Office of the Department of Environmental Quality, 811 S. W. Sixth Avenue, Portland, Oregon 97204, telephone 229-5395, or toll-free 1-800-452-4011. Please specify the agenda item letter when requesting.

February 26, 1992

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 10, 1992

TO: Fred Hansen

FROM: Lydia Taylor

SUBJECT: Dr. Robert Clause, Sherwood

I spoke with Anna Marie Melmon, Dr. Clause's attorney. She says that he, and several other landowners, have been damaged by the City of Sherwood's failure to deal with stormwater runoff from developing subdivisions in the area immediately adjacent to these properties. She is very reasonable to talk with and I would suspect will end up with several clients on this issue.

Ms. Melmon says that in addition to runoff damaging Dr. Clause's wetlands, one neighbor, Mr. Borke, has a problem with his drinking water well. (She advised him to have Health Division test it.) She says there was also an illegal fill of an existing wetland by one developer. She has talked with Janet Neuman and Janet seemed willing to investigate and possibly seek enforcement. I talked with Janet and she says there was an illegal fill and they sent violation notices out at least a week ago, maybe two.

Ms. Melmon says what her client and the other land owners really want is to have the state agencies sit down with them and Sherwood and USA to work out a solution to the stormwater drainage problem.

I think it would be smart to try to get these people together with Sherwood, USA, Division of State Lands and us, to see if some solution can be developed. I would prefer to try to get USA to take the lead, but if they won't, think we should at least offer to help Sherwood solve this.

I've attached earlier memos from staff on the issue.

Charles Burke
m Sunset / Weed Prob
Chochrens

Date: 3-3-92 8:10am
From: Charles Ashbaker:WQ:DEQ
To: Andrew Schaedel:WQ:DEQ
cc: LydiaT, Andys, Kent Ashbaker, RaneiN
Subj: Jim Claus
In-Reply-To: Message from Andrew Schaedel:WQ:DEQ of 3-2-92

When Ranei and I went to the site, we met an inspector from USA there. At this point in time there seems to be two issues, Mr. Rome would like the city to culvert the creek through his property and to improve his driveway situation. As best we could determine from talking to him and to Junia Huffman, the USA inspector, Mr. McClaus' agenda at this time is for USA to buy part of his property for a storm water treatment pond. It was hard to see where he had been damaged at all from this project, although we did not meander down through his field to see what sediment might have been deposited there. By the way, his name is McClaus not Claus.

---------- Replied Message Body ----------
Date: 3-2-92 5:46pm
From: Andrew Schaedel:WQ:DEQ
To: LydiaT
cc: Andys,Kent Ashbaker,RaneiN
Subj: Jim Claus

Here is my knowledge of the situation:

Concerns were raised by Mr Claus in November about sedimentation and lack of controls, at that time Don followed up by contacting USA (discussions had been made with the region but it was felt that follow up through USA was appropriate). Given shifts in assignments, I don't believe that we followed up with it (e.g. site visit) but had knowledge that USA was addressing it with Sherwood.

Mr Claus started another round of complaints around 2/21 (I recall receiving periodic calls (1 or 2) which I returned - always getting his message machine.

Based on the complaints and the Fax on the law suit, I had followed up with USA - discussions with Chris Bowles indicated that USA dealt with Mr Claus and the upstream development in Nov, the city did not follow the rules (little development up to that time) and USA educated them. Erosion controls were put into place and were inspected weekly. Sediment was on Mr Claus's property - several inches on 1st 100 feet from stream bank. USA was not sure what to do about it, Mr Claus wants the city to buy his wetland, USA said it was not in their plans, Mr Claus has filed a suit.

In addition, I had a call from Mr Sandy Rhome who was concerned about the same development for a different reason. He was concerned about the increased runoff and erosion of some of his property. In addition, he was concerned that when he develops his property, he will need to control the runoff whereas the developer did not. He also had concerns about a possible illegal filling of the creek.

Kent and Ranei went out to inspect the property last Friday. In a brief conversation, Kent indicated that there had been problems as described above. He was unsure of what we could do at this time except to write a letter to USA indicating that they should do a better job of educating the cities.

Don would also have some other history on this. I believe that he sent an NON to USA regarding their on-site vs in-lieu of fees and that they would need on-site treatment as they were not meeting their schedule (we just allowed a six month extension - but the fee option can be decided on a case by case basis based on factors such as size or topography).

Hal's thoughts are that we should put together some information for the EQC meeting next week as Mr Claus will be there. I will be glad to meet with you to discuss this at your convenience.

Approved	✓
Approved with Corrections	

Minutes are not final until approved by the EQC

ENVIRONMENTAL QUALITY COMMISSION

Minutes of the Two Hundred and Eighteenth Meeting
January 23, 1992

Regular Meeting

The Environmental Quality Commission regular meeting was convened at 8:30 a.m. on Thursday, January 23, 1992, in Conference Room 3A, Oregon Department of Environmental Quality (DEQ), 811 S. W. Sixth Avenue in Portland, Oregon. The following commission members were present:

William Wessinger, Chair
Dr. Emery Castle, Vice Chair
Henry Lorenzen, Commissioner (arrived late)
Anne W. Squier, Commissioner
Carol Whipple, Commissioner

Also present were Larry Knudsen, Assistant Attorney General, Oregon Department of Justice, Fred Hansen, Director, DEQ, and other DEQ staff.

Note: Staff reports represented at this meeting, which contain the Department's recommendations, are on file in the Office of the Director, DEQ, 811 S. W. Sixth Avenue, Portland, Oregon 97204. Written material submitted at this meeting is made a part of this record and is on file at the above address. These written materials are incorporated into the minutes of the meeting by reference.

Chair Wessinger called the meeting to order.

A. Approval of Minutes of the November 19, 1991, Special Meeting and December 13, 1991, Regular EQC Meeting.

Commissioner Squier moved that the November 19, 1991, and December 13, 1991, EQC minutes be approved; Commissioner Whipple seconded the motion that the minutes be approved as written; the minutes were approved with four votes in favor.

B. Commission Member Reports: Commissioner Whipple indicated that the Governor's Watershed Enhancement Board (GWEB) conference was successful and well attended.

C. Director's Report.

Director Hansen reported that the Governor would be presenting the State of the State message and would indicate at that time a reduction in state general fund revenue.

Chair Wessinger asked Director Hansen about the Request for Proposal (RFP) for Technical Advice on Mining Rules. Director Hansen replied that the RFP would be mailed soon, and that the Department would be looking at an affordable bid that did not focus on issues already considered by the Department. He said that the Department would be using the expertise of a retired professor from the Colorado School of Mines, who was referred to the Department by Commissioner Castle, to assist in the evaluation of proposals. Chair Wessinger asked Director Hansen about the timeline involved. **Lydia Taylor**, Administrator, Water Quality Division, replied that a 20-day notice would be given and that 30 days would be allowed for proposal submittal.

Director Hansen also discussed the Environmental Cleanup Division's annual report to the legislature, provided an update on enforcement activities and notified the Commission about the Smith's Frozen Foods civil penalty of $75,000.

Chair Wessinger asked if the enforcement matrix would be changing.
Director Hansen said that the Department would be looking at several points: 1) certain issues in the matrix are not appropriate classifications (Class I, II and III); and 2) repeat violations need to be addressed in a more effective way. Director Hansen said that few civil penalty cases become contested cases because if a company presents new facts, civil penalties are adjusted as if the Department were originally determining the assessment based on the new information.

Director Hansen provided the Commission with an update on the Reidel composting plant and indicated that the company would completely shut down when the existing waste was processed. He said the Department promotes composting and would like to see that type of activity return if odor requirements could be met.

There were no hearing authorizations to report. A copy of the Director's Report is included as a part of the meeting record.

(Commissioner Lorenzen arrived at this time.)

D. Approval of Tax Credit Applications.

The Department recommended approval of the following tax credit applications:

Application Number	Applicant	Facility
TC-2604	Portland General Electric	Oil spill stop valve system.
TC-2696	Portland General Electric	Two oil stop valve systems.
TC-3470	Chemical Waste Management	Hazardous waste landfill liner.
TC-3567	Portland General Electric	Downturn elbow and vale in sump to capture oil spills.
TC-3568	Portland General Electric	Modifications to secondary containment structure.
TC-3617	Younger Oil Company	Installation of leak detection equipment (submersible pump) on an underground storage tank.
TC-3666	Neil Reiling	Straw storage shed.
TC-3668	Courtesy Automotive, Inc.	Automobile air conditioner coolant recycling machine.
TC-3669	Cummins N. W. Inc.	Automobile air conditioner coolant recycling machine.
TC-3670	Cummins N. W. Inc.	Automobile air conditioner coolant recycling machine.
TC-3671	Cummins N. W. Inc.	Automobile air conditioner coolant recycling machine.
TC-3672	Cummins N. W. Inc.	Automobile air conditioner coolant recycling machine.
TC-3673	L3 Farms, Inc.	Straw storage shed.

Application Number	Applicant	Facility
TC-3674	Brian David Standiford/Automotive Technologies	Automobile air conditioner coolant recycling machine.
TC-3675	Jefferson Automotive, Inc.	Automobile air conditioner coolant recycling machine.
TC-3676	K. Farms, Inc.	Straw storage shed.
TC-3677	Ware's Auto Body, Inc.	Automobile air conditioner coolant recycling machine.
TC-3678	Pioneer International, Inc.	Installation of impressed current cathodic protection of three underground storage tanks.

Quincy Sugarman, Oregon State Public Interest Research Group (OSPIRG), read and submitted a statement to the Commission about the pollution control tax credit program. That statement is made a part of the meeting minutes. Ms. Sugarman provided a brief history and purpose of the tax credit program. She said that, in particular, a tax credit application being considered by the EQC at this meeting was a concern to OSPIRG. The applicant, Chemical Waste Management, applied for tax credit on a liner at the chemical hazardous waste landfill. Ms. Sugarman added that OSPIRG would like to work with the EQC in examining and changing the tax credit program during the 1993 legislative session.

Chair Wessinger said that the Commission would like to examine this issue. He said that with a $10 million tax credit, he would like to review justification for the Chemical Waste Management application. Chair Wessinger added that he would like the Commission to consider this application as a separate item.

Director Hansen said that the liner was a requirement of state and federal law, and that the liner meets the statutory requirement and principal purpose test of the tax credit rules.

Chair Wessinger asked if the liner was an integral part of the total facility because if it were, the entire facility would make a profit. Commissioner Castle asked Director Hansen to comment on the timing, as to when the requirement was imposed in regard to the landfill being established. Commissioner Castle said the reason he asked this question was that if the requirement existed in the beginning, it seemed that the logic of the chair was persuasive. Director Hansen said this was an issue that Commission Squier had raised. He said this issue raises a legal question and the date would be prior to the liner system installation. **Paul Christiansen**, Hazardous and Solid Waste Division, indicated the liner requirements had been adopted by the Department in 1985/1986. He said the liner was constructed in 1985, and the facility received a permit in March 1988 which included the liner requirement.
Mr. Christiansen added that the facility was constructed before the federal government required the liner.

Larry Knudsen, Assistant Attorney General, stated the Department of Justice and the EQC had interpreted the tax credit statutes to apply to newly constructed facilities and facilities complying with existing requirements. He said that legislative history of the early enactments of the tax credit statutes was being examined to find out if that construction was required by legislative intent or if the EQC would have flexibility to interpret the statutes. Mr. Knudsen indicated that this process takes time but he would report back in three or four weeks. He said the Department of Justice intended to provide a summary of past advice, and that the recommendation was consistent with the past interpretation.

Commission Lorenzen stated the difference between this application and others was the size. He said that while not being a proponent of the tax credit program, he was concerned that the Commission treat this application differently only because of the size of the application as opposed to any methodology applied in the past.

Commissioner Squier asked if the product created for this type of facility is the receptacle for waste which is sold off in increments to people who want to get rid of waste. Commissioner Lorenzen said he would like to defer deciding on this application until they could receive information on the past advice.
Commissioner Castle agreed that this application should be deferred until the criteria could be reworked.

Representatives from Chemical Waste Management told the Commission that DEQ performed a long and thorough examination of the tax credit application. He said based on that review, the company believes the facility qualifies for the tax credit. A company representative said that leachate, which is collected by the liner, is created by the materials accumulated from rainfall and other liquids moving into the landfill. He said the charge to dispose of waste is the same from unlined landfills built before these rules. He noted that a great deal of revenue goes to pay for costs other than the liner including financial assurance and safety. He stated that the liner is not containing waste; it is protecting against other factors such as rain. A company representative also stated that the landfill was started before liners were a requirement and that there are units without liners at the site.

Commissioner Lorenzen, referring back to Commissioner Squier's explanation, provided an example of underground tanks at a service stations, noting that tanks were not eligible but extra costs for leak protection were. He asked if it was necessary that Chemical Waste Management provide their product with the liner in any event. Chemical Waste responded that the geology could qualify for no migration petition (that the landfill provides enough protection) and reiterated that the liner does not contain the waste.

Action: Commissioner Castle moved deferral of the Chemical Waste Management application until the report from the Attorney General's Office could be received, and that the Commission then consider the tax credit application subsequent to a work session; Commissioner Whipple seconded the motion. Commissioner Whipple also added that she shared Commissioner Castle's concern and noted she was not sure the Commission was locked into decisions made in the past.

Chair Wessinger said he was not sure about this application and was persuaded by the fact that this was a new requirement, coming about after the landfill was constructed. Commissioner Lorenzen said that he agreed with the Chair but still would be more comfortable in studying the application.

Commissioner Squier said that she would prefer to delay. She said she had three questions to consider: 1) that of timing, was it a pre-existing regulation; 2) based on the Attorney General's advice to the Commission, what would be the legitimate differentiating factor; and 3) whether a return on investment was an issue that should be further considered.

Commissioners Squier, Castle, Whipple and Lorenzen voted yes; Chair Wessinger voted no.

Director Hansen said that when the Commission reexamines this issue, several items need to be deliberated:

1. Flexibility: if there is a change, should it be prospective or retrospective?

2. The program is an entitlement program: what criteria meets the requirements and is the applicant entitled to tax credits?

3. If there are policy choices the Commission would like to make but statutory and history limits action, how could they best present these to the legislature?

Commissioner Whipple said that the tax credit size was not an issue; Director Hansen said that he believed the issue was the nature of the liner. Chair Wessinger said he would like to have a response from the Attorney General's Office as soon as possible.

Action: Commissioner Castle moved that the remaining tax credit applications be approved; Commissioner Squier seconded the motion. The motion was approved unanimously.

Rule Adoption

E. Proposed adoption of open field burning phase down rules.

Purpose: Chapter 920, Oregon Laws 1991, (House Bill 3343) requires the Department to amend OAR 340, Division 26, to establish a schedule for reducing the acreage open field burned and limiting the acreage propaned flamed, increasing the registration and burn permit fees for open field burning and establishing fees for propane flaming and stack and pile burning. The bill also establishes emission standards for propane flaming.

Discussion: Chair Wessinger asked staff about page 4, **Program Considerations**, second paragraph, first sentence, of the staff report. **Steve Crane**, Air Quality Division, responded that the field burning rules submitted to the U. S. Environmental Protection Agency (EPA) under the State Implementation Plan (SIP) were rejected because the Department had not included a control on stack burning. EPA requested the Department to determine the emissions from stack burning and to perform computer modeling for ascertaining impacts on air quality. Chair Wessinger asked if those determinations are affected by the Commission's action today; Mr. Crane replied no.

Director Hansen added if a state-only requirement is included in the SIP, submitted, approved and adopted by EPA, that it is federally enforceable which limits the state's flexibility and makes changes more difficult.

Action: Commissioner Squier moved that the staff report be approved with the two corrections dated January 14; Commissioner Lorenzen seconded the motion. The motion was unanimously approved.

Mr. Crane told the Commission that the Air Quality staff was involved in ongoing discussions with the grass seed industry. He said that there had been a difference of opinion on interpretation of the statutes and required regulations. Mr. Crane told the Commission that the Department will continue to discuss these issues with the seed council and industry, and that this issue may be revisited at a later date. He added that the Department believes that it is important to adopt the rules at this session so that the growers can register their fields before April 1.

F. Rule adoption for amending the State Implementation Plan (SIP) to revise the existing source Sampling Manual and to add a Continuous Monitoring Manual.

Purpose: The Source Sampling Manual (State Implementation Plan, Volume 3, Appendix A4) was last revised in 1981. Since that time, new methods were developed and existing methods have been revised. The Continuous Monitoring Manual is intended to be a support document for Oregon Administrative Rules and Air Contaminant Discharge Permits. Both documents must be included in the SIP to be federally enforceable.

Discussion: Commissioner Lorenzen expressed a concern about providing public access to information. **Mark Fisher**, Air Quality Division, said the manuals allow access to information through the DEQ; once the information has been submitted to the Department, the information is made available to the public. He said that no public access is available directly at the source. Commissioner Lorenzen asked how much time occurs between when the information is gathered and submitted to DEQ. Mr. Fisher replied that the manual has a default reporting period of 30 days. Commissioner Lorenzen asked about the two-year period referred to in the report. Mr. Fisher indicated that sources must maintain records for two years for Department review. Commission Lorenzen asked what happened to information held by the sources; Mr. Fisher said that the information can be destroyed after the two years.

Commissioner Lorenzen said he believes greater access to information by watchdog groups provides the Department with another level of assuredness that companies are in compliance but at the same time he recognized that availability also creates an extra burden or can expose trade secrets. He said that the manuals may not go far enough in providing access to information.

Commissioner Squier said she was in favor of the Department's approach. She added that if anyone wanted access to the raw data, that a request could be accommodated. She also commented about PGE and N.W. Paper expressing concerns about the continuous monitoring manual requirements. Mr. Fisher replied that he had talked with the companies about their concerns. He said the issues had been resolved: the manual does not apply to PGE at this time, and several discussions have occurred with the pulp and paper industry.

Director Hansen added that the statute in House Bill 2175 does not prohibit adoption of more stringent standards if the state's standards are more stringent and were scientifically defensible. He noted that the Department does not believe the standards are more stringent. Mr. Knudsen added that the statute requires the adoption of these technical standards.

Action: Commission Squier moved adoption of the revised manuals; Commissioner Whipple seconded the motion. The motion was unanimously approved.

G. Proposed adoption of air quality major source emission fee rules.

Purpose: Rules are proposed to provide the Department and affected permittees (major sources with Air Contaminant Discharge Permits) with criteria and procedures to calculate air emissions and interim fees based on actual or permitted air emissions for calendar years 1992 and 1992.

Discussion: Department staff summarized the rule development process. Staff also reported that prior to the meeting, Commissioner Squier had suggested clarifying potential confusion in the rules. In response to the Commissioner's suggestions, staff proposed clarifying amendments to the rules and distributed the proposed changes to the Commission.

Action: Commissioner Castle moved that the new interim emission fee rules including the proposed clarifying amendments be adopted; Commissioner Squier seconded the motion. The motion was unanimously approved.

H. Request for adoption by the Commission of proposed amendments to the illegal drug lab clean up rules.

Purpose: To amend OAR 340-140-010 to 100 to reflect the directions of the 1991 legislature for eliminating mandatory cost share of law enforcement agencies requesting drug lab cleanup assistance from the Department.

Discussion: Director Hansen provided a brief summary of this issue. He discussed a letter from Representative Ted Calouri to the Commission about the proposed amendments. He said Representative Calouri expressed concern about rescinding the current rules which would require a 50 percent match unless waived. The Department interpreted the legislature's intent by searching for another method of funding. He said public hearings did not produce new funding ideas and that direction must now come from the legislature.

Commissioner Lorenzen asked if a provision existed for collecting the clean up cost through restitution requirements upon the criminal defendant, and if there was a provision for applying the proceeds of asset forfeitures as a result of a drug bust to the drug lab clean up cost. **Ed Wilson**, Environmental Cleanup Division, replied that within the courts using the state laws, restitution is a major factor, and the Department receives a small amount of money from those prosecuted and convicted. Commissioner Lorenzen asked if a provision existed for that money to come back to DEQ. Mr. Wilson responded that the money did come back to DEQ, and that the Department's statute provides that any money coming back is returned to be reused for another lab clean up. Mr. Wilson added that in the federal court system, the penalties are higher for these crimes and the sentences are longer. He said the federal judges have much less interest in restitution because if a criminal is put in prison no money will be available when the prisoner is released.

Commissioner Lorenzen asked if the Department conducted clean up of labs for the federal government. Mr. Wilson said some federal agencies use the Department's clean up program for direct cost reimbursement. He said the Forest Service, Bureau of Land Management and Marshall's Office have used the Department's program.

Director Hansen asked Mr. Wilson to explain how any assets seized at the time of the bust are handled. Mr. Wilson indicated that asset forfeiture in Oregon is handled under a separate statute, and formulas are applied to agencies and programs receiving any money or real estate after forfeiture. He added that during an arrest, if money is seized and the court claims and divides the money among the victims, the Department will receive some of the money.

Commissioner Squier said the last line of the budget report suggested that the Department should be seeking throughout the biennium a method to receive voluntary cost share, and she added that now would be the time for the Department to ensure cost sharing if local governments receive forfeitured assets with a pro rata sharing for the clean up costs. She added that the Department should not wait until the next legislative session to seek a voluntary arrangement with local government where significant assets may exist.

Action: Commissioner Whipple moved that the amendments to the illegal drug lab clean up rules be adopted; Commissioner Squier seconded the motion. The motion was unanimously passed.

Director Hansen asked Mr. Wilson to respond to Representative Calouri explaining the Commission's action and Department's intent to pursue this matter during the 1993 legislative session.

I. This item was removed from the agenda. (James River recycle facility: proposed approval of waste load allocation)

J. City of Brookings: request for approval of wastewater mass load increase.

Purpose: Request for a mass load increase for the City of Brookings. An exception to OAR 430-41-026(2) (an EQC policy requiring growth and development be accommodated within existing permitted loads unless otherwise approved by the Commission).

Discussion: **Barbara Burton**, Water Quality Division, provided a brief summary of the issue. Commissioner Lorenzen asked if the facility had experienced combined sewer problems. He asked if during winter the storm drains empty into the municipal waste treatment facility. Ms. Burton replied that the city does not have a combined system but the area does receive about 80 inches of rain which reaches the sewer system through leaks. Commissioner Lorenzen also asked, if since water can leak into the system during winter, can sewage leak out during summer and if this could present a problem and exposure to groundwater. Ms. Burton said the situation he described could be possible.

Commission Castle stated he thought the report was clear and well written. He asked how the Department and Commission viewed the ocean. Director Hansen replied that the State of Oregon has applied the requirements for highest and best technology.

Lydia Taylor, Administrator, Water Quality Division, said the Water Quality Division has very limited resources to devote to the ocean. She said that the Department has five ocean discharges from municipal sewage treatment plants along the Oregon Coast. Ms. Taylor indicated the Department requires highest and best technology because of the limited resources to evaluate the effects of the discharges. She said that the City of Brookings is required to analyze the effect of their discharge on the ocean. She indicated that the Department has some resources devoted to estuaries and near coastal water studies.

Commissioner Wessinger asked Ms. Burton if a constructed wetlands situation was considered in this case; Ms. Burton responded no. She said that the wetlands application was site specific and depended on the treatment process. Ms. Burton further stated that there was no space available for a constructed wetlands at the City of Brookings site.

Commissioner Whipple said this issue brought to mind a previous matter occurring between Charleston and Coos Bay. Director Hansen said that no resolution had been achieved.

Commissioner Squier asked Ms. Burton to review the history of the Brookings facility and referred to the Stipulated Final Order. Ms. Burton gave a brief background of the plant and discussed the order between DEQ and the city. She indicated that the city has complied with the previous stipulation.

Dennis Cluff, City of Brookings, responded to a question about U. S. Borax, the land owner who will be developing a destination-type resort in that area. The company has expressed interest in using the city's system.

Action: Commissioner Lorenzen moved adoption of the wastewater mass load increase for the City of Brookings; Commissioner Whipple seconded the motion. The motion was unanimously approved.

Other Business

James River

Chair Wessinger indicated he had received a request that the James River Recycle Facility: Proposed Approval of Waste Load Allocation item be acted upon before the March 12 meeting. Chair Wessinger said that he would agree to this request on the basis that the Commission set up a special meeting because of the following reasons: 1) the issue is important enough not to have on a regular meeting where time would be limited and the March agenda is quite full; and 2) the Commission would receive the material in adequate

time to study the issue and also to consider other items that could be moved off the next meeting, thus reducing the items scheduled for the March meeting.

Director Hansen suggested the week of February 18 or the following week. In regard to a second item for the special meeting, Director Hansen said that he had talked with Mr. Knudsen about including the tax credit interpretation from the Department of Justice. Because Director Hansen was scheduled to speak at the Albany Rotary Club on Tuesday, February 18, the Commission decided to hold the meeting on that day in Albany. It was decided that the meeting would be held at 9:00 a.m., Tuesday, February 18, in Albany.

Public Forum

Harry Demaray, Salem, spoke to the Commission about the Boise Cascade tax credit issue he raised at the December 13 EQC meeting. He said he believed the Department was stonewalling the issue, and that he had not received an answer from the Department. Mr. Demaray reiterated that the Boise Cascade tax credit was not for pollution control, and that the Department had just ignored the rules. He said he wanted to find a way to resolve complaints between Commission meetings.

Director Hansen indicated that the Commission looked at the items Mr. Demaray had raised, and the Commission had made a decision to approve the tax credit contrary to what Mr. Demaray had recommended. Director Hansen said he believed the loop had been closed and said that the difference of opinion was whether the Commission agreed with the information presented by Mr. Demaray or made a different decision. Director Hansen said the Commission asked the Department to come back at the end of the meeting with additional information. Commissioner Castle told Mr. Demaray that the Commission deferred action at the time the tax credits were considered and, at the end of the meeting, the Commission returned to the Boise Cascade tax credit. Commissioner Castle further stated the Department made some arguments at that point addressing the issues raised by Mr. Demaray, and the Commission voted unanimously to approve the Department's recommendation.

Mr. Demaray agreed that occurred but there was no indication to him that action was going to occur. He said he thought the Commission would reconsider the tax credit between the last EQC meeting and this meeting.

The Commission then discussed a date for a work session. April 24 was chosen as the day for the work session after the April 23 regular EQC meeting. The location for the work session was not determined at that time.

Mike Downs, Administrator of the Environmental Cleanup Division, provided information about the current status of east county groundwater where TCE and chlorinated solvents were found to be threatening six different water systems including the City of Portland backup water supply to Bull Run. He said the two major sources contributing to this problem were identified as the Boeing and Cascade Corporations. He said the companies are working to control the contaminated sources on their property. Mr. Downs further stated that the unresolved issue was the contamination that has spread off of the corporations's property.

Mr. Downs said the Department has been working to develop a groundwater model for determining what is happening to the groundwater and where the movement of the contamination is occurring in the area. He added that the Department believes that the City of Portland wells in the Blue Lake aquifer can be used under close observation. At this time, in terms of area-wide contamination, he said the issue still needs to be dealt with and the Department is working with Boeing and Cascade Corporations to reach agreement about funding additional studies for determining cleanup or containment technologies. Mr. Downs indicated that if the companies are not able to assist in the studies, the Department cannot sell bonds which is the funding method when responsible parties do not provide participate in clean up activities.

Mary Kyle McKurdy, staff attorney for 1000 Friends of Oregon, spoke to the Commission about a proposed parking structure by Pacific Development near the Lloyd Center. She said that this matter was brought to the Commission's attention because the proposed project raises significant land use and air quality issues for the EQC and the City of Portland. She added that 1000 Friends was concerned that an appropriate forum may not exist under current regulations to address the issues raised by this proposed development. Ms. McKurdy handed out and read a written statement to the Commission. This written statement is made a part of the meeting record.

Director Hansen said that the parking lid in the Portland area was established to allow the state to meet carbon monoxide requirements under the State Implementation Plan (SIP). He said the Department is concerned about ozone, an area-wide pollution problem, which depends on the prevailing winds. Director Hansen said ozone violations are the key concern of the Department, and that carbon monoxide is a localized problem.

Director Hansen said the Department is participating in the Central City Management Plan which is looking at alternatives to the parking lid and other methods of providing offsets. He said that was at issue is this type of activity that compounds the ozone problems and frustrates the broader policy issues concerning general livability in the Portland Metropolitan area. He added that two processes are in place to improve this situation: 1) the Governor's Task Force on Motor Vehicle Use in the Portland Metropolitan area which will report to the Governor and legislature about specific strategies; and 2) the indirect source permit which is required to show that ambient air quality standards will not be violated. He said the Department would require modelling analysis to insure ambient air quality standards will not be exceeded.

Howard Harris, Air Quality Division, spoke to the Commission about the difference between carbon monoxide and ozone problems in the airshed. He indicated that the downtown area developed a strategy to meet the former Clean Air Act deadline of 1987, and that the strategy entailed a comprehensive treatment of parking and traffic circulation. Mr. Harris said the strategy contains a parking policy which includes tight ratios for new office development and the creation of an parking inventory for the downtown area.

Commissioner Lorenzen asked if the proposed parking structure for the east side would have an impact on the carbon monoxide levels in the downtown area. Mr. Harris responded that, in general, the impacts from a site occur adjacent to the site. He said the Department follows the traffic generation out of the site and from any one development, the traffic will fan out from within a quarter to half mile of the site. Director Hansen added that the pollution created at a parking structure will not be the result of carbon monoxide affecting the Central Business District (CBD) but by the traffic patterns caused in the CBD which will compound those carbon dioxide problems. Commissioner Lorenzen said that he saw a problem with this proposed structure adjacent to the light rail line which was designed to serve buildings rather than reduce air pollution and automobile dependency.

Chair Wessinger asked if the proposed parking structure would be a park and ride lot. Ms. McKurdy replied that the proposed structure is not a park and ride lot but is meant to serve only the building.

Commissioner Squier asked why the Department is indicating that the effect of ozone is not considered in the indirect source permits. Mr. Harris indicated that when the Department models for ozone, the modelling is performed on the basis of examining the total emissions of hydrocarbons, nitrogen oxides and carbon monoxide. He said difficulty occurs because the concentration models used for ozone are established for regional analysis and are geared to the maximum concentration downwind from urban areas. Additionally, he said, connecting a small portion of the emissions to the actual measured emissions is difficult.

Director Hansen said the Department will be considering the technical modelling issue. He said he wants the Department to explore more creative ways of examining major parking structures. Ms. McKurdy suggested that the parking lid rules be a method of accomplish this examination. She said there is a Central City Transportation Management plan underway that is determining region-wide strategies for air quality. Director Hansen added that Mr. Knudsen pointed out that the Department must be in compliance with the land use requirements including Goal 12 in the new transportation rule. This rule was a comprehensive effort developed by the Land Conservation and Development Department to ensure that vehicle miles of travel and other indicators are considered. Mr. Hansen said DEQ will have to perform an analysis against that rule under Goal 12.

Commissioner Lorenzen summarized that the Department has two issues to consider: 1) the long-range outlook on how the air quality program should be managed in regard to traffic and development patterns in the Portland area; and 2) the immediate proposal to bring a large parking structure that appears to be contrary to the goals of light rail line and mass transit systems within that area. Commissioner Squier suggested that the Commission raise their focus away from the specific issue. She said the Department needs to find a way to address if additional sources that cause formation of ozone will be permitted and, if so, on what rationale. She concluded that she would not like to take any action at this meeting but would like some indication of how much the Commission can reexamine during the direct source permitting process.

Commissioner Lorenzen said there was one further matter he would like to discuss that related to this specific proposal and that was whether the rules in place are adequate to address the concerns that may apply to this particular project. Director Hansen indicated that the Commission can adopt rules and apply the rules at the time of adoption against existing or pending projects. Commissioner Lorenzen suggested the Commission review the existing rules relating to this type of construction to determine if deficiencies exist. Director Hansen said that the indirect source rule is broad. He said there were two actions he will take: 1) in regard to the indirect source permits issued by the Air Quality Administrator, that authorization will revert back to the Director for signature; 2) in reviewing indirect source permits, the Department will notify the Commission if weaknesses seem to exist which do not allow broad Department examination.

The meeting was adjourned at 12:05 p.m.

Approved	✓
Approved with Corrections	

Minutes are not final until approved by the EQC

ENVIRONMENTAL QUALITY COMMISSION

Minutes of the Special Meeting Conference Call
December 20, 1991

A special meeting by a conference call of the Environmental Quality Commission was held on Friday, December 20, 1991, at the Oregon Department of Environmental Quality, Conference Room 3A, 811 S. W. Sixth Avenue, Portland, Oregon. The purpose of the special meeting call was to discuss the Department's draft Request for Proposal (RFP) for technical advice on mining rules.

Commission members present by telephone were Vice Chair Castle, Commissioners Squier, Whipple and Lorenzen. Chair Wessinger, Director Hansen and Larry Knudsen, Assistant Attorney General, and Department staff were present in Conference Room 3A. The conference call began at 9:30 a.m.

Background: At the December 13, 1991, EQC meeting, the Commission asked the Department to initiate a third-party review of liner systems, the removal and reuse of cyanide and the reduction of toxicity of the waste. Additionally, the Department was asked to review the technical means of achieving the Commission's policies. Draft portions of the RFP were forwarded to the Commission prior to the meeting.

Discussion: Director Hansen indicated the draft RFP addressed the questions asked by the Commission and how those questions could be answered by an independent third party. Director Hansen summarized the pre-bid qualifications, procedures and processes related to the bidding and bidders. He requested that the Commission go through policy statements, issues and methods of answering.

Chair Wessinger asked Director Hansen to go through each issue of the draft RFP paragraph by paragraph. Each issue is discussed below.

Dr. Castle asked the staff for reactions to FAXed material the Commission had received. Director Hansen indicated that the memorandum had just been handed to him. The memorandum, from Mr. Richard Bach of Stoel, Rives, Boley, Jones & Grey, to John Parks, expressed concern with the proposed DEQ policy statements.

Lydia Taylor, Administrator, Water Quality Division, responded to Mr. Bach's preference to the wording "threat of harm" versus "release to the environment." Ms. Taylor said that the term "threat of harm" was too open ended and added that the purpose of the liner is to prevent a release. Commissioner Lorenzen agreed that the purpose of a liner is to keep liquid contained; if the liquid does escape from the liner, then that protective barrier is not working. Additionally, Chair Wessinger agreed with Commissioner Lorenzen's interpretation and stated that environment is the important term.

Commissioner Castle further agreed. He said Department staff correctly interpreted the direction with regard to economics; that is, a technical analysis rather than an economic analysis. Commissioner Castle stated he did not agree that risk had been excluded and that the wording asks for statements of the reviewer on the level of certainty in achieving goals.

Director Hansen said that in regard to Mr. Bach's comments about what was described in the Department's memorandum as a note at the bottom of page 1 and top of page 2 and the definition of a double liner at bottom of page 2, the Department did not object to substitute Oregon Mining Council (OMC) wording if the Commission agreed with the OMC proposed language. Director Hansen indicated that the Department was trying to describe the OMC proposal, not editorialize on it. Further, **Jerry Turnbaugh**, Water Quality Division, indicated that he had no objection to OMC's characterization of the double liner, and that it was a fair statement of what the Department believes the liner will accomplish.

Director Hansen told the Commission that OMC had suggested two additional questions be included under **Method to Answer Question--Address.** He said that the answer to their suggested Question No. 5 was implicit; Question No. 6 was the about the issue of economics which the Commission had rejected.

Commissioner Lorenzen commented on the framing of the question itself. He suggested "Will either or both liner systems meet the stated objective of the Commission?" Commission Squier agreed with Commissioner Lorenzen. Commissioner Lorenzen stated that an additional question could be answered as a part of Issue No. 4(a): "Is 36 inches as required by Issue 4(a) the appropriate thickness to assure a high probability of achieving the Commission's objective?" He further stated that the requirement of 36 inches would be a high-cost item in some areas and expressed concern about this requirement if it was unnecessary; however, if this requirement was necessary, he had no reservations. Director Hansen indicated that **Method to Answer**, Question No. 4, addressed this issue.

Commissioner Lorenzen agreed as long as that is what Answer No. 4 meant. He further indicated concern about implementing costly regulations that do not provide further benefits; therefore, economics must be implicitly considered.

Commissioner Whipple also expressed concern about economics and redundancies. She said that it should not be difficult to obtain from the answers to the technical questions about a sense of the relative costs involved.

Commissioner Castle stated that the Commission did not want an economic analysis. He added that it was appropriate that the consultant address the issue of redundancy. From that, Commissioner Castle stated, the Commission can make judgments about whether the rules require additional measures that incur added cost but does not further protect the environment. He said that the Commission will not ignore economics when a decision is made.

Director Hansen said that the question as phrased uses the words "materially reduce." He indicated that the intent was to provide a basis for determining if there are environmental benefits to the requirements. Director Hansen referred to letter from Martha Pagel to Representative Schroeder about the idea that the rules were contrary to legislative intent. Ms. Pagel stated in her letter that two terms must be considered when meeting environmental standards: necessary and practicable. She said "necessary" is defined as that which is necessary to meet the standard and protect the environment. In further clarifying Ms. Pagel's letter, Director Hansen said that the policy statement reflects what the Commission believes is necessary to protect the environment. He stated that the question then becomes whether there are alternatives for meeting the standard and that "practicable" is considered when determining the alternative to meet the standard.

Commissioner Castle asked about the procedures to be followed in developing the final RFP. He asked if the Commission was putting the RFP in final form or if they were giving the staff advice to guide development of the final RFP. Director Hansen responded that it was the Commission's choice but the closer the Commission would come to final wording on the policy statements and questions the better. He asked the Commission to clarify that the question on the first policy issue will read: "Will either or both liner systems meet the stated policy objective of the Commission?"

Chair Wessinger asked Commissioner Lorenzen if that wording contained the difference he sought. Commissioner Lorenzen replied that perhaps one liner would meet the stated policy better than the other; maybe both liners would meet the stated policy adequately but that one will meet the policy better. Director Hansen indicated that the **Method to Answer**, Question No. 3, provides for more detail and level of certainty.

The Commission agreed that the question wording for the first policy would read as follows:

Will either or both liner system meet the stated policy objective of the Commission?

In regard to the second policy issue, Commissioner Whipple said that she believed Mr. Bach's two additional questions (proposed questions 5 and 6) would be answered within the context of how the questions were phrased. Commissioner Squier said she believed industry intended that a difference exist because the term "management practices" was used rather than technology which would allow a broader interpretation. Commissioner Whipple asked if there were other ways to meet the policy and indicated she would not like to delay over the definition of technology. Chair Wessinger asked Department staff about technology as compared with management practices.

Mr. Turnbaugh told the Commission that the rules state that cyanide recovery and reuse are an end-of-pipe treatment technology applied before tailings are released to the impoundment. He said that industry would argue that the tailings pond is a treatment system since some natural degradation occurs and solutions can be recirculated from the tailings pond. He concluded he believed the mining industry was broadening the scope of definition beyond end of pipe and beyond what was intended in the Department's proposed rules.

Director Hansen said the issue to be addressed was whether treatment of the tailings would be required before being released to the tailings pond or whether the tailings pond would be part of the treatment system.

Commissioner Whipple said the policy is aimed at reducing toxicity in the releases to greatest degree practicable through treatment. Director Hansen stated that the Department believes that once the material is in the tailings pond, a greater risk of release to the environment exists; therefore, the Department wanted to reduce the toxicity to the greatest degree practicable before discharging the material to the tailings pond.

Commissioner Whipple asked if the policy addressed long-term impacts of treatment. Director Hansen replied that once the material is discharged to tailings pond, it is difficult to control. Commissioner Lorenzen commented that this issue should be examined by the consultant.

Commissioner Lorenzen asked if a process was discovered in the future to reprocess the tailings pond, would the Department allow material to be discharged to the pond with assurance of containment rather than treatment first. He suggested a possible revision to the policy:

> The Commission establishes as policy that the closure of the heap leach and tailings disposal facilities shall be accomplished by a means that ~~to the greatest extent possible~~ a high degree of probability over the long term will prevent release to the environment of any chemicals contained in the facility.

Commissioner Lorenzen also stated that he would not want the tailings spread over a large area without there being a substantial effort to reduce toxicity. He said that dealing with the tailings was a long-term effort, not just 20 years.

Director Hansen added that the liner system required by the draft rules for a tailing pond is different than under a heap leach pad because of the assumption of lower toxicity due to pretreatment. He added that the Department would look at treatment requirements differently if the liner under the tailings pond was the similar to the liner under the heap leach pad.

Commissioner Squier asked Mr. Turnbaugh about 30 parts per million (ppm) cited under **Issue** in Policy No 3. Mr. Turnbaugh replied that 30 ppm is the "best professional judgment" estimate of achievable level of detoxification that can be achieved with a variety of treatment technologies. Commissioner Squier asked how the Department would respond to a business in Portland that was discharging 35 ppm. She further clarified her question by asking how the Department would view 30 ppm of cyanide in other industrial settings: would that discharge be considered a hazardous waste and require barrelling and labeling?

Mr. Turnbaugh replied that he was uncertain of the answer. He said the Department had intended to require end-of-pipe treatment to reduce the toxicity, which is the purpose of the rules. Consequently, he continued, the Department must decide how much technology should be applied. Mr. Turnbaugh said the Department examined potential technologies and concluded that 30 ppm can be achieved. However, he said, 30 ppm is not intended to be a wildlife protective measure and does not relate to liner design. Cyanide that has been discharged to a pond can be released to the air, and this type of release necessitates modeling to determine human health risk.

Commissioner Whipple indicated her inclination to not expand the policy to include management practices. Director Hansen replied that an additional question could be considered: would a liner system be adequate or would the liner system need to be upgraded to achieve the Commission's policy regarding the release of toxics from the tailings pond. Chair Wessinger replied that he was inclined to agree with current staff recommendation.

Commissioner Squier had two questions regarding end-of-pipe treatment:

1. Is 30 ppm achievable with current technology?

2. Does the Department want to have a policy that allows discharges to the pond and confinement of the pond to protect the environment rather than promotes best achievable technology at the end of pipe?

She indicated that the draft proposal addresses the first question but she did not want to open the second question up for debate; therefore, she agreed with Chair Wessinger. Commissioner Whipple also agreed with the draft proposal. Commissioner Castle stated he had no problem with staff formulation and said that these issues will be addressed if Question Nos. 2 and 4 are adequately answered. Commissioner Lorenzen agreed.

Director Hansen summarized that the suggested Question No. 5 in Mr. Bach's letter would not be included. Mr. Turnbaugh said that he had no problem with Mr. Bach's Question No. 5 but would note that non-use may be a matter of choice rather than technical feasibility.

At this point in the meeting, Commissioner Lorenzen excused himself from the conference call. However, he added that he did have a comment about the policy on page 4, second line, about the reference "...to the greatest extent possible." He suggested the wording to a high degree of probability. Director Hansen replied that the Department was attempting to reflect the Commission's intent. He said that **Method to Answer Question--Address**, No. 3, would partially address this issue. Commissioner Castle said that if Commissioner Lorenzen's questions were adequately answered, would he have concern. Commissioner Lorenzen replied no but believed there may be a problem relating this question to policy. Commissioner Castle suggested the following wording to help meet Commissioner Lorenzen's concerns:

> The Commission establishes as policy that the closure of the heap leach and tailing disposal facilities will prevent release to the environment of toxic chemicals contained in the facility.

He suggested this wording be substituted as policy and the questions would not be changed. Commissioner Lorenzen agreed with Commissioner Castle's suggested wording; Commissioner Squier also agreed.

Commissioner Lorenzen then left the conference call.

Director Hansen Fred suggested that **Method to Answer Question--Address**, No. 2, be changed to read as follows:

> 2. Do detoxification and covering (evaluated and together separately) materially reduce the likelihood of a release of toxic chemicals to the environment?

Commissioners Castle and Squier agreed.

Director Hansen them presented the proposal requirements. He said a concern had surfaced about one item from discussion with the person Commissioner Castle had suggested. In regard to Proposal Requirement No. 2., if followed, the Department would end up with consultants not in touch with the technologies the Commission wanted evaluated. He said that the idea of independence was important.

Commissioner Castle suggested a change to Proposal Requirement No. 2:

2. Noninvolvement for a minimum of ~~the past~~ five years ~~with the mining industry in general, and specifically~~ with mining companies, mining industry groups, or environmental groups active in working on mining regulations and permitting.

Director Hansen suggested a proposed change made by Larry Tuttle, The Wilderness Society, as follows:

2. A substantial portion of income for a minimum of ~~the past~~ five years ~~with the mining industry in general, and specifically~~ with mining companies, mining industry groups, or environmental groups active in working on mining regulations and permitting.

Chair Wessinger indicated that he was apprehensive that consultants who could perform the job would be disqualified. Director Hansen suggested the following wording:

2. Preference will be given to entities who have had no involvement within the five (5) years. As a bid requirement, one must disclose all contacts or contracts they have had over the past five (5) years for evaluation.

Commissioner Squier indicated that she agreed with that wording, and Commissioner Castle also agreed to the proposed wording.

Ms. Taylor indicated that the Department wanted to allow judgment and that conflict of interest with anyone hired was an important consideration. She said that disclosure was important, and that the Department would ask the applicant to disclose any potential conflict of interest and whether a substantial part of their income over the past five (5) years was derived from the mining industry.

Chair Wessinger, Commissioners Castle, Squier and Whipple agreed.

Director Hansen indicated if the Commission had nothing else to add to the memorandum, the Department will proceed. He added that although this memorandum was not the proposal and that more information must be added to meet requirements, it did contain the essential elements and no formal action was needed.

Commissioner Squier stated that she would like to hear back from staff after proposals are in about the time schedule and cost range. Ms. Taylor replied that she will keep the Commission informed. Chair Wessinger asked that the Commission be sent reports about the progress of the proposal. Director Hansen indicated that he will include the status of the proposal in the Director's Report and keep them advised in interim if anything significant occurs.

Tax Credits

The Commission considered a tax credit application for S-S Baling which owns and operates a custom baling business in Junction City, Oregon. **Peter Dalke**, Administrator, Management Services Division, DEQ, and **Jim Britton**, Oregon Department of Agriculture, were present to explain the tax credit application and to answer any questions.

Mr. Dalke indicated that he would present the application in two parts: 1) the application; and 2) the implications of this and future field burning applications. He explained that S-S Baling is in the business of baling, removing, storing and selling the straw. He said that the operation has an investment of $701,000 in capital equipment for the straw removal operation. Mr. Dalke added that a straw market exists at this time, and the Department must look at how much revenue the operation is receiving from selling the straw. He indicated that a question occurs about the useful life of the equipment, and that straw price and useful life are critical factors in coming up with how much of this equipment is going to be allocable to pollution control.

Mr. Dalke indicated that of the $701,000, the application shows that $402,454 was the claimed equipment costs. He said that since 57 percent of the equipment was claimed for tax credit, 57 percent of the revenue from the sale of the straw was applied back to the tax credit for determining the percent allocable for pollution control.

Commissioner Squier asked if straw baling from grass seed operations was the only activity of this baler. Mr. Britton replied that S-S Baling was involved in removing grass seed straw only. Mr. Dalke also added that the Department looked at the operating expenses and straw price. He noted an average price of $27.87 per ton for the straw. He added that S-S Baling averaged 2 tons per acres from 8,015 acres for a total of 16,030 tons.

Director Hansen said there had been a very limited market for straw in the past. Consequently, he said, most facilities had been 100 percent allocable to pollution control. Director Hansen indicated to the Commission that for the first time a market for straw is developing and that is why the computations were being done. Mr. Dalke added that the Department anticipated that most field burning tax credit applications would result in less than 100 percent allocable due to the current straw market.

Mr. Dalke said that the second issue on this tax credit was the useful life of the equipment. He said the applicant claimed a five-year useful life. He added that this was a shorter useful life than normal for other equipment due to the fact that it is a very intensified use of the equipment over a large number of acres.

Chair Wessinger asked how the 80 percent was determined. Mr. Dalke replied that the 80 percent was derived from taking the $90,000 and applying it against the $402,000 and applying that on the return on investment calculation. He added that because there is an average cash flow, it comes out in the formula which says there is an average rate of return based on the standard industry number of 18.3 percent. Mr. Dalke said this return in relation suggests that S-S Baling is turning a profit and, therefore, less than 100 percent is reached.

Mr. Dalke added that the Department found a difference in the certified cost of the equipment that changes the dollar figure from $402,454 to $401,465, and the actual percent allocable dropped to 78 percent. Director Hansen clarified why this happened. He said the applicant provided substantial amounts of information, and there is a requirement that an independent accountant must certify the costs. The accountant's certification was $989 less which was why the dollar amount was slightly less. He added that normally the Commission does not see any difference because there is enough time to have the accountant's certification come in before the report is prepared. In this case, because of the timing nature, it came in after being mailed.

Chair Wessinger asked for clarification of the actual tax credit the Commission was considering. Mr. Dalke replied that the recommendation was that an actual cost of $401,465 was eligible and that the 78 percent of that amount was properly allocable to pollution control. He said this amount would be slightly over $313,142.70.

Chair Wessinger asked if the Department's review of these applications would be more difficult because more information would be needed to verified. Mr. Dalke replied agreed that that was correct. Mr. Hansen added that the Department is looking forward to some form of standardization in terms of the Department of Agriculture doing some analysis on market and price. He said that what the Department would like to ideally have is a standard price that holds for some period of time.

Commissioner Squier said that she had no problem with the calculations but she had difficulty with the principal purpose reducing air pollution. Mr. Dalke responded by referring to the staff report, page 2, No. 5a., Oregon Administrative Rule 340-16-025(2) (f) A), which states:

> Equipment, facilities, and land for gathering, densifying, processing, handling, storing, transporting and incorporating grass straw or straw based products which will result in reduction of open field burning.

He said that this application would come under the eligibility criteria. Commissioner Squier asked Mr. Dalke if the Department was reading the statute as making this type of reduction practices under ORS 468.150 as a pollution control facility without consideration of ORS 468.155a or b; in other words, no requirement of the principal purpose or sole purpose test. **Larry Knudsen**, Assistant Attorney General, indicated that Commissioner Squier's assumption was correct.

Commissioner Squier said that she would not debate that advice but indicated that the first sentence of No. 5a. was very misleading because it said the equipment was eligible because the principal purpose was to reduce a substantial quantity of air pollution. She added that the Department was saying that the principal purpose test was not being applied; the Department was simply saying that it was a pollution control facility in accordance with ORS 468.150. Mr. Hansen replied that this issue refers back to the discussion at the December 13 EQC meeting where the Department advised that it had been attempting to match applications against the principal or sole purpose criteria. He noted that the Commission had indicated a desire to look at the issue differently.

Commissioner Squier asked Mr. Hansen if the Department of Justice had advised that these types of applications should be classified within the principal or sole purpose categories? Mr. Hansen replied that Michael Huston, Assistant Attorney General, had indicated that the language within the statute could be interpreted either way but he did not render a full legal opinion. Consequently, he said, the Department addressed these applications under principal or sole purpose.

Commissioner Squier said she was skeptical of whether the separate statute excuses principal or sole purpose. She said that she saw no justification for saying that the principal purpose of this activity was air pollution control; that the principal purpose of the activity was to conduct a business. Mr. Knudsen replied that the Department of Justice had advised that the statute provides that if the facility is a qualified alternative to field burning, then that facility was a pollution control facility. Additionally, he said he could provide to the Commission detailed written advice.

Mr. Knudsen added that past Assistant Attorney Generals have advised the Department that ORS 468.150 does control this situation. He said that he had not personally worked on those issues and did not know the legislative history involved but said he did understand that that advice had been given and the Department was relying on that advice. Commissioner Squier replied that it would be accurate to say that this equipment was eligible because it fits within the definition of an approved straw utilization methods under ORS 468.150. Mr. Knudsen indicated that Commissioner Squier's statement was correct.

Commissioner Castle said that Commissioner Squier had a very good point. He said that the Commission was seeing a new kind of enterprise that has come into existence as a result of public policy. He continued that when the Legislature approved the tax credit program, they said that equipment facilities that result in the reduction of open field burning are eligible. Commissioner Castle said that what they had in mind was a farm that had to add equipment in order to do this. He said this was an additional cost in order to meet the requirements. Additionally, he said, a new kind of enterprise has now come into existence that makes use of this straw; that this new enterprise was not in existence when the policy was formulated. He said he was not sure that the people that formulated the program intended it to apply to this kind of business. Commissioner Castle added that he did not think it was the Commission's prerogative to make a determination on this new kind of activity.

Commissioner Whipple said that this was an issue that had importance to her. She said that one of her concerns was that if the Commission materially altered the rules, she would be uncomfortable with the Commission deciding on the basis of a single issue. She said the Commission should make some changes to the program. She added that the Commission had some responsibility to examine the issue in a broader content and have participation from industry representatives. Commissioner Whipple said she was somewhat reluctant to turn down this application.

Action: Commissioner Whipple moved that the application be approved; no second was made. Director Hansen noted that the Department would consider this application to be a relatively typical tax credit. He said that what was unique was the fact that there was a separate business involved and that this relates only to amount allocable to pollution control and not to the basic issues of eligibility. Commissioner Castle seconded the motion. Commissioners Squier, Castle and Whipple, and Chair Wessinger voted yes.

Director Hansen indicated that the Department was reviewing one other similar application that needed to be processed before year end. He told the Commission if they believed that the process used by the Department to evaluate the application was appropriate, the Attorney General had advised that the Commission could authorize the director to act between now and December 31. Commissioner Squier asked if this application was another custom baling operation.

Commissioner Squier said that she reluctantly voted on the S-S Baling application and voted based on what she understood to be the advice that the Commission had had from the Attorney General's Office, and that this is custom baling activity, by virtue of fitting into ORS 468.150, automatically qualified for a tax credit. She said that before she acted on or delegated additional approvals, she would be more comfortable if she had a clearer statement of that advice.

Commissioner Castle said that if the Commission looked at this with another telephone call, he would like to consider the two applications together. He added that he was more inclined to delegate this authority to the Director or defer the decision of both applications.

Commissioner Whipple said that she would like to delegate this authority to the Director. She said the Department needs to take care of its business and then bring to the Commission the policy issue involved.

Director Hansen said that the proposed delegation expires on December 31 and was restricted to this issue. Chair Wessinger said that he thought Commissioner Squier's position would be that she would like to receive information from the Attorney General's Office and that if the Commission does not receive that information, they would not go ahead. Commission Squier replied she was not expecting something new but some clearer statement of exactly what advice the Commission has been given. Chair Wessinger said that if the Commission did delegate this authority to the Director, it would be under those parameters.

Director Hansen said that the Department would receive a letter of restatement from the Assistant Attorney General. He said the Department will send that to the Commission and get back with Commissioner Squier. Director Hansen indicated that if Commissioner Squier indicated that this letter was satisfactory, the Department would proceed. He added that if any other Commissioner had a problem with this process, they could notify the Department. Additionally, he said, if the Commission agrees, the Department would proceed with the additional custom baler until year end. He said that if there were any reservations, the Department would not proceed. Commissioner Squier indicated that that plan of action was satisfactory. Commissioner Castle expressed concern about the potential for inconsistency in the way the two applications would be handled.

Action: Commissioner Squier moved to reconsider the Commission's prior vote on the S-S Baling application; Commissioner Castle seconded the motion. Chair Wessinger, Commissioners Squier, Castle and Whipple voted yes. Director Hansen asked if a motion could be made that, under the conditions previously discussed, the decision to approve the S-S Baling application, as well as the next application, was delegated to the Director. Commissioner Castle indicated that he would prefer that and would so move; Commissioner Squier seconded the motion. Chair Wessinger, Commissioners Squier, Castle and Whipple voted yes.

The conference call was adjourned.

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Approved with Corrections	_____

Minutes are not final until approved by the EQC

ENVIRONMENTAL QUALITY COMMISSION

Minutes of the Special Meeting
February 18, 1992

A special meeting of the Environmental Quality Commission was held on Tuesday, February 18, 1992, at the Old Armory, Miller B Room, 104 Fourth Street, Albany, Oregon. The purpose of the special meeting was to discuss:

- The James River Recycle Facility: Approval of Proposed Waste Load Allocation.
- The Pollution Control Tax Credit Program:
    1. General Discussion of Criteria for Tax Credit Eligibility; and
    2. Consideration of Chemical Waste Systems Application.

Commission members present were:

William Wessinger, Chair
Dr. Emery Castle, Vice Chair
Henry Lorenzen, Commissioner
Anne W. Squier, Commissioner
Carol Whipple, Commissioner

Also present were Larry Knudsen, Assistant Attorney General, Oregon Department of Justice, Fred Hansen, Director, DEQ, and other DEQ staff.

Note: Staff reports represented at this meeting, which contain the Department's recommendations, are on file in the Office of the Director, DEQ, 811 S. W. Sixth Avenue, Portland, Oregon 97204. Written material submitted at this meeting is made a part of this record and is on file at the above address. These written materials are incorporated into the minutes of the meeting by reference.

Chair Wessinger called the meeting to order at about 9:45 a.m.

A. James River Recycle Facility: Approval of Proposed Waste Load Allocation.

James River applied to the Department for a permit to discharge highly treated wastewater to the Willamette River from a new facility. This facility will receive waste paper, process the paper to remove ink and other contaminants and use the paper as a source of pulp for the production of new paper. The proposed facility is referred to as the Halsey Secondary Fiber De-Inking Mill (Recycle Facility).

Before the permit could be issued, rules adopted by the Commission require that the Commission approve the allocation of currently unused wasteload assimilative capacity of the river for the proposed new source (Oregon Administrative Rules 340-41-026).

The Department evaluated the application and potential water quality effects. The Department concluded that the proposed discharge would not cause water quality standards to be exceeded and recommended to the Commission that the new discharge to the Willamette River be authorized. The Department drafted a proposed permit and held three public hearings.

Chair Wessinger indicated that the Commission had received and read a great deal of information about this issue. He said he understood that many people wanted to speak to the Commission at this meeting but that public hearings had been held and those hearings were the appropriate place for testimony. Chair Wessinger said the purpose of this meeting was to review the public comments, ask questions and deliberate. To accommodate those who wished to speak and to provide time to deliberate, he asked that a spokesperson be designated who would represent the viewpoint of each of the following groups: 1) James River; 2) environmental groups; 3) City of Corvallis; and 4) Association of Clean Water Agencies (ACWA).

Chair Wessinger introduced Senator Mae Yih, and Representatives Carolyn Oakley and Liz VanLeeuwen. The legislators all stated they would like to be on record as supporting the James River Corporation for this plant and urged the Commission's approval.

Director Hansen outlined that the Department would provide the Commission with 1) an overview consisting of the framework of the standards; 2) a summary of the items raised where most of the focus of controversy and disagreement occurred; 3) a walk through of the analysis of the Department's recommendation; and 4) a respondence to questions. **Lydia Taylor**, Administrator, Water Quality Division, **Jerry Turnbaugh**, Water Quality Division, and **Stephanie Hallock**, Administrator, Hazardous and Solid Waste Division, were available to address these issues.

Ms. Taylor said that she would discuss with the Commission the following topics: the function of new facility, the Department's concern and review of the potential effects for the discharge on dissolved oxygen in the river, the Department's concern about the secondary release of dioxin from materials used in the recycling process, sludge and solid waste, technologies being required and the Department's conclusions that those technologies are the highest and best practicable technologies.

She indicated the Department could hold the James River Corporation and Pope & Talbot Corporation individually responsible for their own discharges even though ultimately the discharge joins together and proceeds out a pipe into a diffuser to the Willamette River. Ms. Taylor said that testing is required of both effluents before they are joined, and both corporations will be responsible for their own discharges. Additionally, she said that during the application process, the Department observed that James River had begun construction of the facility without obtaining the required permit. The Department did notify James River through a notice of possible violation that they were not to begin construction of facilities without a permit or permission from the Department and notified them that any facility constructed was at their own risk. The Department did not guarantee the Commission would make a determination favorable to the corporation.

Ms. Taylor stated that the Department's analysis indicated the proposed discharge would not measurably affect the dissolved oxygen resources of the Willamette River. She also noted that since the Willamette River is designated as Water Quality Limited for Dioxin (TCDD), the Department proposed to include a discharge limitation for TCDD of zero in any permit issued. She stated that the wastewater treatment technology proposed by James River was consistent with the Department's interpretation of the requirements for highest and best practicable control technology. The facilities would achieve a 95 to 97 percent removal efficiency for organic matter, compared to a requirement of about 95 percent removal for new or modified municipal treatment facilities. She added that another question was if the Commission allowed the discharge, would this decision mean that others using the river would face higher sewer rates. The Department's evaluation of this proposed discharge was that it would have no measurable effect on the quality of the water in the Willamette River, and the Department did not believe the discharge would cause sewer rates to increase.

Ms. Hallock advised that although costs associated with landfilling solid waste are expected to go up in order to pay for new federally mandated requirements; however, landfilling sludge from the proposed recycle plant would not create increased costs. She noted that sludge would use capacity in the landfill, and the landfill had the capacity to take the sludge.

Director Hansen noted that the question before the Commission is whether or not to allocate a portion of the unused wasteload assimilative capacity of the Willamette River to James River. If the Commission approves a load allocation, the Department would proceed to issue a permit consistent with the approved load allocation and the rules and standards adopted by the Commission.

Charles Vars, Mayor of Corvallis, read his statement to the Commission. The statement has been made a part of this record. Mayor Vars said the city did not oppose the granting of a permit for James River but requested that three actions be taken: 1) place limitations in the permit to protect those who use the river as a water supply; 2) include in the permit that facilities that discharge treated wastewater into the river will not be subject to more stringent future limitations; and 3) require in the permit a sludge management plan.

The Association of Clean Water Agencies (ACWA) presented comments. **Terry Smith**, chair of ACWA, told the Commission the association's goal was to request issuance of the permit with discharge limits modified to allow a discharge of 2,000 pounds of Biochemical Oxygen Demand (BOD) per day to start with and to allow four years to achieve a reduced the allowable limit to 1,000 pounds per day. He stated that the applicable federal requirements for municipal discharges allowed an effluent BOD concentration of 30 milligrams per liter (mg/l), and that Oregon requires treatment to achieve 10 mg/l or one third the allowable federal limit; therefore, to achieve equitable treatment for cities and industries, the allowable limit for James River should be one third of the 3,000 pounds per day that would be allowed under federal guidelines.

To represent the environmental groups, the following spoke:

Pat Benner, who had been a participant in the Coquille Advisory Committee, said that this committee approached the problem as a water quality limited problem. She suggested that an anti-degradation approach be used and a lower BOD limit be established to avoid having to deal with a Total Maximum Daily Load (TMDL) process. **Liz Frenkel** pointed out there was only one water right for the site and that was issued to Pope & Talbot. She concluded that because of this, and because there is only one outfall to the river, the James River facility could not be considered a new source. **Wayne Hunter** said he was concerned about the future users of the river. **Keith Warner**, representing Northwest Environmental Advocates, talked about the dioxin and noted that the Willamette River was water quality limited for dioxin. Mr. Warren said he believed the public was denied a choice on this permit, and that James River had knowingly begun building before they had received permission from the Department. He said the facility should treat their effluent with tertiary treatment. **Karl Huber**, representing the Corvallis Chapter of the Sierra Club, said the

Department allowed the facility to proceed at their own risk and then rewarded the company by proposing the issuance of a permit. He asked where the antidegradation policy was and indicated the Department did not require the policy because James River had already begun construction. Mr. Huber said the Department changed the standards and rewarded the facility for violating the law. He stated that consideration of alternatives had been inadequate. He urged the Commission to say no to the load allocation and leave James River to work out a settlement with Pope & Talbot.

Jeff Manchester presented comments on behalf of James River. He briefly remarked that James River would ensure that the new Halsey recycling facility will meet or exceed state and federal waste quality requirements. He said the plant will recycle process water which will result in minimizing the quantity of effluent to be treated; water use will be less than one third of the industry average for similar types of plants. The waste paper will be color stripped and the pulp brightened using a non-chlorine sequence consisting of hydrogen peroxide and sodium hydro sulfite. The company said this sequence is not as effective on some color grades of paper as the more widely used hypo-chlorite based sequence and is more expensive from a capital and operating standpoint but produces no dioxin which is consistent with the DEQ determinations that the river is water quality limited. BOD removal efficiency will be 97 percent during the summer months which exceeds current requirements for all other Willamette River industrial dischargers.

James River representatives said the Department has determined from data collected that the proposed discharge will cause no measurable decrease in down stream dissolved dioxin levels and that the discharge will comply with all Willamette River water quality standards which protect the beneficial uses of the river. James River representatives concluded by stating that the facility will provide the market necessary to implement the state recycling goals. The Halsey plant's capabilities to recycle the most difficult office grade wastes will complement existing newsprint and corrugated box facilities in Oregon so that the state will be able to recycle all the major waste paper streams. James River provided the Commission with a list of the supporters for the plant.

Gordon Swanson, United Paperworkers International Union, supplied copies of his written statement which has been made a part of the meeting record. Mr. Swanson briefly summarized this statement. He said the union supported the James River request for a new waste load allocation for the Willamette River so that the company can begin operating its new recycling facility. Mr. Swanson said that customers were requesting products made from recycled fiber, and the new Halsey recycling plant would be able to supply recycled fiber for James River mills in Wauna and Camas, Washington. He said the new Halsey facility would create new family wage jobs and would help to preserve more existing jobs in Oregon and Washington mills because

the new facility would reduce the mill's dependence on purchased market pulp. The new plant also would support hundreds of local recyclers, haulers and other businesses and industries that serve the recycling industries. Additionally, plant construction would employ local citizens directly and indirectly through the purchase of building materials and equipment from the local area.

Tom Donaca, Associated Oregon Industries (AOI), said that the AOI supported the proposed James River waste paper recycling mill at Halsey. He said the permit should be issued without modification other than what was recommended by the Department staff as a result of the public hearings. He said AOI is very sympathetic to the concerns raised by the ACWA and that AOI also represented a large number of members served by municipal sewage treatment plants. Those members have expressed concern about the potential cost imposed if, as expressed by ACWA, municipal sewage treatment plants would in the future have to exist within current permit limits.

Mr. Donaca said that the closure of two pulp and paper mills on the Willamette has resulted in BOD reductions. In addition, the ammonia discharge reductions in the Albany area and elimination of pulping at an Oregon City pulp and paper mill have resulted in further BOD reductions. Additionally, closures of some food processing plants in the Willamette Valley and land application in the food processing waste water at other food processing plants have significantly reduced the summer load from these sources on the Willamette River. He said that municipal plants have been the primary beneficiary of this change.

He said the staff report on the James River Halsey permit public hearing indicated that increased loadings were granted to several municipalities in recent years and suggests that similar increases could be granted in the future. Mr. Donaca said that AOI believes there is a current forum for addressing this issue, the on going Willamette River Study. AOI urged the Commission to authorize the James River Halsey recycling facility permit which would remove currently unrecyclable waste paper from Oregon landfills, meet DEQ's current no observable effects criteria and protect the beneficial uses of the river.

Commissioner Lorenzen asked the company to respond about plant construction prior to permit issuance. Jeff Manchester said that when construction of the facility had started, they were operating under the auspices of site permits held by Pope & Talbot. Due to customer pressure, James River accelerated construction and then concluded the shared permit was unworkable; that operation as two separate ownerships was needed. As a result, the company sought legal advice and applied for their own permit. James River started the permit process in the first quarter of 1991 anticipating the process would take about a half a year.

Commissioner Squier asked that under the existing Pope & Talbot permit that was in place when construction started, would the company have been able to operate this facility without permit modification. Mr. Manchester replied no and that the shared permit created an unworkable situation because of other issues relating to the combined effluent, accountabilities, responsibilities and planning abilities.

Commissioner Castle said that in his experience it would be very unusual for industry to proceed with that kind of investment unless they had the assurance or had some confidence that the process would be successful; that it seemed unusual that the company would embark on this investment if approval had not been granted. A James River stated they recognized they were taking a risk.

Mark Kackley, Jefferson, told the Commission about his experiences on the Willamette River. He said that he empathized with those needing the jobs the facility would provide but expressed concern about the quality of the river for future generations. Mr. Kackley also said he was concerned about what effect the increased discharge would have on fish.

Jeanne Riha expressed concern regarding infrequent monitoring and potential heavy metals effects on fish. She stated there was a need for an independent evaluation of this issue.

Testimony was concluded, and the meeting was recessed for lunch.

Director Hansen commented about the presentations made to the Commission in an effort to frame the issues. He said that although many comments had been made about the jobs the facility would bring, these comments should not be a consideration in the decision the Commission must make. Additionally, he said the issue of whether the facility was constructed before the permit was granted should not be a consideration in determining the merits of the proposed permit. Director Hansen said the Department outlined very clearly to James River that continuing the construction would be at their own risk.

Director Hansen told the Commission they needed to consider three issues: 1) will water quality standards be met; 2) is James River a separate source; and 3) is highest and best treatment being required and is there equity between municipal and industrial requirements.

Chair Wessinger said it appeared there were three direct proposals for changes to the permit by the City of Corvallis and one change by ACWA. He asked staff to respond to those proposed changes. Commissioner Lorenzen asked for clarification of the role of the Commission's role in the matter. Director Hansen said the question before the

Commission was whether or not to approve the requested and recommended wasteload allocation; then, the Department would, assuming the increase was granted, draft the specific permit requirements which would meet not only the conditions imposed by the Commission but also the other requirements necessary to meet water quality standards and other rules adopted by the Commission.

Jerry Turnbaugh, Water Quality Division, spoke to the Commission about preparing the permit and setting BOD limits. He considered four points in determining the permit limits: first was what the U. S. Environmental Protection Agency (EPA) required in the new source performance standards for deinking mills; second was data from other deinking mills similar to the James River facility; third was the efficiency of BOD removal that the Department considered to be attainable by highest and best treatment technology; and fourth was the impact on dissolved oxygen in the river. Based on these four, the Department determined that a discharge limit of 2,000 pounds of BOD per day during the summer would be compatible with all four criteria.

Commission Squier asked Mr. Turnbaugh to clarify some points. In regard to his second point about other deinking plants, she asked if the comparison he was making was based on output per unit of product or output based on calculation of concentrations. Mr. Turnbaugh replied he compared the mass load of BOD discharge per ton of pulp produced, not the concentration. He said concentration varied with the process and amount of water used. Chair Wessinger asked staff if the Department would reject the proposal to change the BOD limit to 1,000 pounds; Ms. Taylor said that was correct.

Director Hansen said in regard to the sludge management plan it made sense to formalize the plan by James River. Ms. Taylor replied that the letter submitted by James River could be included in the National Pollution Discharge Elimination System (NPDES) permit. She said information in that letter would need to be analyzed and a specific recommendation made. She added the City of Corvallis had also suggested that wording be added which would limit discharges if the Willamette River was later determined to be water quality limited. Ms. Taylor said she did not believe that type of wording should be included in the permit since it assumes the Department can identify the problem and source.

Commissioner Castle asked if staff would follow up on the comparison of industry and municipalities specifically in regard to the efficiency of removal. Commissioner Castle said he did not believe the Commission should consider efficiency of removal when the final product was different among the sources. He noted that Mr. Turnbaugh indicated there was no reason to require additional treatment and wondered about the reason for requiring municipalities to provide

additional treatment. Ms. Taylor replied that different issues and operations need to be considered. She said when a municipality installs a treatment facility, it is anticipated that sewage treatment facility use will increase over time because of population growth; that the allocation assimilative capacity is based upon the treatment capacity of the facility at full capacity. An industrial facility, depending on the economic climate, would be designed and built for a production capacity at a specific moment in time. Additionally, she added, an industry, at least in theory, can control through its production process the amount of pollutant contained in the effluent. Ms. Taylor said the closest way of making a comparison about equity on level of technology is the efficiency of pollutant removal. Commissioner Lorenzen said that if the focus was on effluent concentration, there would be numerous ways to use more water and provide justification for the increase in discharge and water use.

Director Hansen replied that the fundamental issue facing the Commission is how to allocate unused assimilative capacity. In answer to Commissioner Castle's question about available technology, Ms. Taylor said that technology required of dischargers on water quality limited streams must ensure water quality standards are met. Commissioner Castle asked what additional technology would be required to lower the discharge to approximately 1,020 pounds per day. Mr. Turnbaugh responded that artificial wetlands could provide additional reduction. Commissioner Squier asked for clarification of Mr. Turnbaugh's statement that the proposed discharge when compared with data from other deinking facilities was neither the best nor worst. Mr. Turnbaugh replied that the data on nine deinking mills were presented in pounds of BOD per ton of pulp produced. The James River proposal fits in the middle of the range; each mill is different in terms of product produced, process used and resulting waste generated.

Commissioner Whipple asked staff to respond to comments that the anti-degradation policy was inadequately addressed. Ms. Taylor replied that the Department analyzed very carefully, particularly with regard to dissolved oxygen, whether there would be degradation in the Willamette River. She said the Department was meeting the anti-degradation policy and rule of the Commission in recommending this discharge. Ms. Taylor said some legal questions were raised regarding the federal new source regulations, and the Department did check with legal council when the document was developed.

Chair Wessinger said the written material and presentations received seemed sufficient for the Commission to come a decision and noted his sense of the discussion that a permit should be approved but with changes in it.

Commissioner Lorenzen said he did not think it was the Commission's role to get into the details of the permit. He said that what was before the Commission was whether to approve the waste load allocation, and the Department should determine the terms of the permit. Chair Wessinger replied that his only other consideration was whether to give direction beyond an approval or disapproval.

Commissioner Castle asked if it would be permissible for the Commission to approve the allocation of assimilative capacity but indicate that certain conditions must be met under which the assimilative capacity can be used. Director Hansen said the staff report indicated the findings the Commission needed to make in granting the unused assimilative capacity. He said the Commission has to be satisfied with the findings as meeting the needs.

Commission Squier said the staff report focused on whether, in the words of the rule, the proposal would lower water quality since the real question to the Commission is how much of the remaining assimilative capacity of the river should be allocated to this project. Director Hansen replied that the Commission had two sets of decisions: that water quality standards must be met; if water standards are not met, no other water quality issues are addressed. Further, once having found that every water quality standard is met, the Commission may still decide as a separate issue to either grant or not grant the unused assimilative capacity because it had not met another part of the rule. Commissioner Squier said that her point was that the threshold of the river was passed but expressed concerned about concluding the numbers were correct in regard to allocation.

Commissioner Castle cited a section of Oregon Revised Statutes (ORS) 340-41 about the assimilative capacity of Oregon streams and beneficial uses that promise the greatest return relative to the unused assimilative capacity that might be used. He said that instream uses that will benefit from reserved assimilative capacity as well as potential future beneficial use will be weighed against economic benefit associated with the increased loading. Commissioner Castle said he wanted to call attention to the fact that if the Commission granted this increase, the best treatment technology would be required to meet the water quality standards. Ms. Taylor said if the Commission concluded that additional tertiary treatment should be imposed and analyzed, the Department could add those terms in the permit.

Commissioner Lorenzen asked if tests would be performed in the future as additional demands are placed upon the river. Ms. Taylor said the Department can ask the facility, if there is reason during the permit cycle, to increase their technological application. She said that typically unless a facility makes a major modification or the Department has reason to believe that technology is going to be applied equally to all industries of that type, and unless a TDML stream is involved, the Department would

not ask the facility for more. Ms. Taylor added that if a new technology could reasonably be placed on an industry, the Department could modify permits to impose new technology on all those industries. Director Hansen said a problem resulting from this issue was illustrated in a rule on page 3 of the staff report. He said the rule indicated that any growth can be accommodated by increased efficiency and effectiveness of waste treatment for existing sources; that is, increased production for industrial sources and increased hookups for municipal sources shall result in no additional loadings. Higher levels of treatment can be achieved without the imposition of a new technology requirement because of the effect of this rule.

Commissioner Castle referred to the Department's recommendations on the first page of Agenda Item A and asked staff for comment on language that would add to the recommendation a requirement of "consistent with the best practical technology in industry generally" so that the motion emphasized the focus of discussion. Commissioner Castle summarized that what would be recommended is that the Commission would adopt the findings contained in Attachment A and approve a new discharge to the Willamette River near Halsey with the monthly average BOD not to exceed 2,000 pounds per day during the summer months and 3,120 pounds per day during the winter months consistent with the best practical technology in the industry generally. He said he was concerned that Oregon should be on the leading edge of the industry performance when a new industry is permitted and that this would provide a lever that could be used on existing facilities. Ms. Taylor noted that in addition to addressing numerical limits, the staff would then evaluate the treatment being employed within the specific kind of industry. If the Department found practicable treatment being used elsewhere and found it was available and could be implemented at this plant, that treatment would be required; that 2,000 pounds per day of BOD in the summer would be permitted but with the understanding the Department would look at that technology again to determine if additional treatment could be applied without regard to the numeric approval.

Mr. Knudsen suggested the Commission clarify what is meant about how often the Department would require the permittee to change their treatment and that any motion would clarify that the facility would have reasonable time to accomplish a new requirement.

Commissioner Squier said she believed there are existing plants that are operating considerably better than the James River plant would do in terms of removal and mass per unit produced. She said she liked ACWA's proposal because it sounded as though the 1,000 pounds limit was in line in what would be achieved with an additional serial, secondary treatment. Commissioner Squier she would rather be careful in allocating the assimilative capacity first.

Commissioner Lorenzen stated he would have trouble, based on information before the Commission, in reaching a conclusion that it would be appropriate to lower the discharge limit to 1,000 pounds per day.

Mr. Turnbaugh commented further on the data from the deink mill study. He noted that two other mills were producing 4.1 and 4.2 pounds of BOD per ton of pulp while the James River permit was based on 5.7 pounds of BOD per ton of pulp produced. The mill producing the least amount was at 2.8 pounds per ton. He said the mills in the study are using either an activated sludge plant or are using an aerated basin which is a lined pond with aerators consuming the BOD. He concluded by saying the James River proposal does have a state of the art activated sludge treatment plant. He further noted that the mill producing 2.8 pounds of BOD per ton may be producing that amount because of product mix and not because of waste water treatment facility efficiency of removal.

Commissioner Whipple noted the concerns expressed by the City of Corvallis. She also indicated that she was supportive of the staff recommendation and that the Department's water quality staff were knowledgeable about the proposed permit. Commissioner Whipple **moved** that the allocation be approved as proposed; Commissioner Lorenzen seconded the motion. Commissioner Squier suggested a proposed amendment. She asked if Commissioners Whipple and Lorenzen would be amenable to an amendment approving the staff recommendation for the period of tine through December 31, 1993, with a presumption that within four years the BOD limit in the summer months would be reduced to 1,000 pounds or 1,020; and at the end of 1993, there would be an opportunity to reexamine whether it is necessary to reduce the amount.

Commissioner Whipple said she was willing to address Commission Squier's concern in some way but was not sure what the correct time should be. Commissioner Squier said she was combining two issues: ACWA's suggestion for a reduction within four years and to include the 1993 date for reexamination if James River thought that should not occur. She said the reason she choose that date was because she was presuming the Willamette River study would be finished by that time, and the Department would have a better idea of the assimilative capacity. The Department indicated the Willamette study was scheduled to be completed in June 1993.

Commissioner Lorenzen stated he was concerned about the concept. He did not object to reviewing the technology to see if something better was available but if that was done, it should be done for all sources not just a new one. Commissioner Castle indicated he would prefer an alternative approach of automatically reducing the allowable discharge in four years.

Chair Wessinger asked for clarification of the proposed amendment to the motion. Commissioner Squier clarified her proposal to adopt the ACWA proposal to reduce the allocation within four years to 1,040 pounds per day during the summer. Commissioner Whipple indicated she was willing to consider a specific timeline for evaluating the matter but questioned whether it should be in this action or in the permit. Commissioner Lorenzen restated his belief that there was insufficient information before the Commission to determine whether 1,000 pounds is a realistic goal. Chair Wessinger indicated he would like to know that people are trying to achieve a lower goal but was not sure what that lower goal should be.

Director Hansen stated that the Commission seemed to agree that 2,000 pounds were acceptable to start with but the number should be lower; the question was where to place the burden and how to put the burden in place to achieve a lower number.

Commissioner Squier restated her position that although we are willing to allocate a piece of assimilative capacity today, that it is too big a chunk to allocate permanently, and at a certain point, it is going to go down. She posed the option of approving the allocation of assimilative capacity for a period of four years. This would allow time to finish studies and evaluate future needs. Mr. Knudsen indicated he had not looked at the issue and was not sure about legal implications. Commissioner Lorenzen indicated he did not think it was a good idea because of implications for other sources and upon investment decisions. Chair Wessinger said that did not bother him in this case because the plant was already constructed. Other Commissioners agreed. Commissioner Castle said the four-year proposal would meet his concerns and was appropriate in this specific case. Commissioner Whipple indicated she could accept a four-year allocation.

Chair Wessinger asked if Commissioner Whipple would accept that language as an amendment to her motion. Commissioner Whipple indicated yes. The Commission discussed what would happen at the end of four years. They concluded that it would force a review sufficiently before the end of the four years for the Commission to determine whether the existing load allocation should continue or whether a revised load allocation should continue.

Director Hansen summarized the Department's understanding of the current proposal that the Commission wants tertiary treatment, will approve 2,000 pounds now but wants to revisit that amount within four years to review study results and establish a number consistent with tertiary treatment technology being applied. Chair Wessinger and Commissioner Whipple did not agree with the assumption that tertiary treatment would be required. Chair Wessinger indicated he interpreted the discussion to be that there would be approval of 2,000 pounds for a period of four years, and the matter would be revisited before the four years concluded to determine if something less should be required. Commissioner Lorenzen indicated he would not second the amendment to the original motion; Commissioner Whipple then withdrew her original motion.

Commissioner Whipple noted that she saw this situation as different because the plant was constructed without first obtaining the necessary approvals and any action would not be a precedent for other proposals. Commissioner Whipple **moved** that the Commission approve the application for the proposed wasteload allocation for a period of four years and was seconded by Commissioner Castle. The motion was unanimously approved in a roll call vote.

Mr. Knudsen recommended that a written order be prepared. Commissioner Squier **moved** that counsel be directed to prepare a written order for the Chair's signature. The motion was seconded by Commissioner Lorenzen and unanimously approved.

B. Pollution Control Facility Tax Credit Program: 1) General Discussion of Criteria for Tax Credit Eligibility; and 2) Consideration of Chemical Waste Systems Application.

The Commission considered the Chemical Waste System tax credit application (TC 3470) before moving to the general discussion. Director Hansen noted the Attorney General's opinion answered the questions that were previously raised, however, that more questions may be asked. The Commission discussed with staff the itemized tax credit application and costs associated with a landfill liner.

Randy Wheeler, comptroller for Chemical Waste Management, said the company did not include excavation in costs and took all capitalized labor and assigned those costs to the excavation activity. Excavation was completed before liner installation began. All overhead during excavation was assigned to the excavation costs. Commissioner Lorenzen asked why Chemical Waste was just applying only for the tax credit for the liner and not entire landfill. Mr. Knudsen answered that to qualify as a pollution control facility, the principal purpose of that portion of the facility must be for pollution control. He said excavation did not meet the purpose of pollution control criteria.

Commissioner Lorenzen said he was concerned about reliance on the applicant and applicant's accountant for all cost information. He asked if there was a way to increase assurance levels by conducting an independent cost review. Director Hansen responded that the Department does not have the expertise. The Department believes the independent Certified Public Account certification plus the Department of Revenue's review of information and determination about whether false claims have been made provides some assurance. Commissioner Lorenzen stated his concern was about the different allocating cost methods that are acceptable but lead to different results.

Chair Wessinger noted this was an issue only on the large applications. He suggested the Department should hire a contractor to review costs on any application with a cost over approximately $250,000. Roberta Young, Management Services Division, noted that the tax credit rules were amended in 1989 to charge a higher fee to an applicant if the Department needed to employ a consultant in evaluating an application. The Commission concluded by asking the Department to further explore this issue.

Commissioner Squier stated that **Scott Forrester** requested the Commission to defer the decision on this tax credit application to another meeting and that he wanted to speak to the Commission about this application. Commissioner Squier indicated she asked staff to advise Mr. Forrester that she was not inclined to delay a decision on the issue.

Harry Demaray, Salem, told the Commission that if Chemical Waste did not have the liner, the facility would not receive any income. He, therefore, believed that at the most, only 50 percent of the cost of the liner should be allocable to pollution control. Commissioner Castle asked how Mr. Demaray arrived at the 50 percent figure; Mr. Demaray responded he guesstimated.

Commissioner Squier suggested the Department consider this issue during the development of legislative concepts and particularly whether tax credits should be allowed for meeting federal requirements.

Commissioner Squier reluctantly **moved** that the tax credit be approved for Chemical Waste Management; Commissioner Castle reluctantly seconded the motion. Commissioner Lorenzen said he would vote in favor only because the Commission was constrained by statute language. He also asked the Department to examine this statute in regard to the State's reduced budget. Tax credit application number TC 3470 was approved unanimously.

Director Hansen said the Commission might want to propose legislation to amend the tax credit program. He also noted that gold mining tax credits could be upcoming. He said this tax credit application would be a good example to take to the 1993 legislative session.

Mr. Demaray further stated the principal purpose of tax credit number 3534 for the Boise Cascade Corporation approved at an earlier meeting was not for pollution control. He suggested the staff report was not modified. **Jean Cameron**, Oregon Environmental Council (OEC), stated that the tax credit rules were bad public policy, and the OEC would like to work with the Department to develop a policy for that would replace the current tax credit program.

There was no further business, and the meeting was adjourned.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 12, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen

SUBJECT: Director's Memo

BUDGET UPDATE

The Department is working on a staff reduction plan that has been requested by the Governor. DEQ has been asked to reduce 65 positions by June 30, 1093. Of those positions, 28 must be managers. The staff reductions are to begin in July of this year.

The Department is developing a "glide path" to reach the required reduction goals. The glide path time-line calls for 30 percent of the reductions by June, another 25 percent by September 1, another 25 percent of January 1 and the final 20 percent by April 1993.

The Department has been asked to provide the Governor with information on savings to the General Fund from position reductions. The total General Fund savings is expected to be $274,000.

GOVERNOR'S VISIT

Governor Barbara Roberts will visit DEQ headquarters tomorrow to talk to staff about measure 5 impacts on state government. The Governor will be in room 3A at 9:00 and, of course, Commission members are welcome.

SHERIDAN FIRE UPDATE

DEQ took over the lead at the site of the grain elevator fire in Sheridan on Tuesday. Water used to fight the fire carried farm chemicals across the yards of nearby homes and the Sheridan High School. Twenty-four homes remain in the "excluded zone" where residents are advised not to return until tests are completed. DEQ is working with the contractor for the owners, West Valley Farmers, to determine the extent of the contamination.

Samples of the soil and the air inside the high school and some homes were collected on Wednesday. Sample results will be available Friday or Saturday. Once the results are analyzed, a determination will be made on when the school can reopen and when it will be safe for residents to return to their homes.

DEQ sponsored a public meeting in Sheridan last night to answer questions from residents.

RFP ON MINING

DEQ issued notice of the Request for Proposals for Technical Advice on Mining Rules on February 7, 1992. Notices were published in newspapers in Portland, Denver, Seattle, Reno, and Vancouver B.C. The RFP was mailed to more than 50 firms or individuals -- either in response to the published notices, or based on other suggestions or indications of potential interest.

The deadline for receipt of proposals was March 10, 1992, at 4:00 p.m. Proposals were received from two firms. Evaluation of the proposals in underway.

OLIVIA CLARK

Olivia Clark has started in her new position as Assistant to the Director, formally held by John Loewy. Olivia was Intergovernmental Affairs Specialist at the City of Salem where she managed their legislative policies and strategic agenda.

WHITING PERMITS

A new large-scale fishing industry with the potential to generate large volumes of fish wastes may be coming to Oregon ports. The Pacific Coast states are trying to get whiting allocations away from factory ships and into shore-based processing plants.

Eighty-five percent of the fish is wasted unless it is further processed into fish meal. Arctic Alaska is proposing a fish meal plant in Newport. Fish that is not processed into meal must be disposed of by landfill or ocean dumping. Ocean dumping is a serious concern and has caused environmental damage in Alaska. An NPDES permit would be required for dumping within our jurisdictional waters with appropriate environmental study and safeguards.

If Oregon receives a whiting allocation, more permit requests can be expected.

HEARING AUTHORIZATIONS

The Director authorized the Department to proceed with a rulemaking hearing on a proposal to modify the wastewater discharge permit fee schedule to add a fee of $150 for application processing for any new categories of general permits that may be issued in the future. The proposal would also add fees for disposal system plan review that may be required for any facilities covered by general permits. A general permit is a permit that is issued to cover a category of sources with similar characteristics. Individual sources apply to be covered by the general permit rather than obtaining an individual permit. The Department is pursuing issuance of additional general permits as an efficiency and streamlining measure.

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

REQUEST FOR EQC ACTION

Meeting Date: March 12, 1992
Agenda Item: F
Division: Air Quality
Section: Planning and Development

SUBJECT:

Rule Adoption: Proposed Amendments to Prevention of Significant Deterioration (PSD) Rules.

PURPOSE:

Amend OAR 340-31-110, Table 1, to include new PSD increments for nitrogen dioxide, and OAR 340-20-225 to include baseline information for nitrogen dioxide. These amendments are required by the Environmental Protection Agency (EPA) in order for the state to maintain full delegation of the New Source Review program.

ACTION REQUESTED:

___ Work Session Discussion
- ___ General Program Background
- ___ Potential Strategy, Policy, or Rules
- ___ Agenda Item ___ for Current Meeting
- ___ Other: (specify)

___ Authorize Rulemaking Hearing
_x_ Adopt Rules

Proposed Rules	Attachment A
Rulemaking Statements	Attachment B
Land Use Consistency Statement	Attachment C
Fiscal and Economic Impact Statement	Attachment D
Public Notice	Attachment E

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

___ Issue a Contested Case Order
___ Approve a Stipulated Order
___ Enter an Order
Proposed Order Attachment ___

____Approve Department Recommendation
___ Variance Request Attachment ___
___ Exception to Rule Attachment ___
___ Informational Report Attachment ___
___ Other: (specify) Attachment ___

DESCRIPTION OF REQUESTED ACTION:

In 1977, the Congress adopted amendments to the Clean Air Act. Those amendments established the Prevention of Significant Deterioration (PSD) permitting program. The purpose of the program was to prevent the air quality in areas where the air was cleaner than the National Ambient Air Quality Standards (NAAQS) from deteriorating to NAAQS levels. PSD increments were established for major air pollutants. PSD increments essentially established the level to which it was permissible to allow the air quality to deteriorate without allowing it to deteriorate to NAAQS levels. They were developed to allow a controlled level of growth within areas which were in compliance with NAAQS. New major sources of air pollution and major modifications to existing sources located in attainment or unclassified areas must be reviewed for conformance with the PSD increments before construction can be authorized.

Originally, federal PSD increments were established for sulfur dioxide and total suspended particulate matter. The Department adopted these increments in 1979. At that time the Department also established baseline dates, consistent with federal requirements, for determining the ambient concentrations for those pollutants from which the increments would be measured.

In 1988, the Environmental Protection Agency (EPA) adopted a new PSD increment for nitrogen oxides. DEQ must add increments for nitrogen oxides to its rules in order to allow EPA to delegate the authority to administer the New Source Review program for sources of nitrogen oxides to DEQ.

The PSD increments adopted by the Department in 1979 are identical to those contained in the federal rules. The Department's proposed increments for nitrogen dioxide are also identical to those which were adopted by EPA in 1988.

AUTHORITY/NEED FOR ACTION:

___ Required by Statute: _____ Attachment ___
Enactment Date: _____
_x_ Statutory Authority: ORS 468.020 Attachment _F_
___ Pursuant to Rule: _____ Attachment ___
___ Pursuant to Federal Law/Rule: _____ Attachment ___

___ Other: Attachment ___

___ Time Constraints: (explain)

DEVELOPMENTAL BACKGROUND:

___ Advisory Committee Report/Recommendation Attachment ___
_x_ Hearing Officer's Report/Recommendations Attachment _G_
___ Response to Testimony/Comments Attachment ___
(Included in staff report discussion)
___ Prior EQC Agenda Items: (list)
Attachment ___

_x_ Other Related Reports/Rules/Statutes:
Federal Register, October 17, 1988, pages 40656 through 40672, 40 CFR Parts 51 and 52, Prevention of Significant Deterioration for Nitrogen Oxides; Final Rule Attachment __
___ Supplemental Background Information Attachment ___

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

In areas which are cleaner than the NAAQS, major new sources and major modifications to existing sources are limited in the amount of emissions the sources may add to the airshed by federal PSD increments established under federal law. The increments specifically affect the permitting process as they are used by the Department in determining whether airshed space is available for major new and modified sources.

The Department has regulated total suspended particulate and sulfur dioxide increments since 1979. In 1988, EPA adopted increments for nitrogen dioxide. To date, Oregon has not incorporated this increment into its program.

The entire state of Oregon is in attainment of the NAAQS for nitrogen dioxide. Therefore, all major new or modified sources of nitrogen dioxide are subject to the nitrogen dioxide PSD requirement. However, because Oregon has not adopted an increment for nitrogen dioxide, any major new or

modified sources of this pollutant must apply to both the Department and EPA for permits. For the regulated community, this makes the permitting requirements more complicated, more costly and more time consuming.

There are currently approximately 170 sources of nitrogen dioxide in the state. Of those sources, approximately 40 emit over 100 tons per year and would be subject to the nitrogen dioxide increment if any modifications significantly affecting nitrogen dioxide emissions occurred. The majority of sources tend to be in the pulp and paper, and chemical industries. Any new major sources, such as a new pulp mill, would also be subject to this requirement.

During the public comment period, one comment was received related to this rulemaking. The individual stated that the Department should not be delegated the authority to administer the PSD program. The individual based this comment on a draft permit from 1989, which he felt was not adequately proposed. The particular permit the individual cited was never approved as the application was withdrawn.

PROGRAM CONSIDERATIONS:

Adoption of the nitrogen dioxide increments by the Department would make the permitting and modification process more efficient for both the regulated community and the Department. The Department already handles the majority of the permitting for major new and modified sources, and analyzes sources' nitrogen dioxides emissions for the purposes of determining the most appropriate control technology. The adoption of the nitrogen dioxide increments should not create any significantly greater workload requiring additional resources.

The Department is required to have PSD increments in order for the New Source Review program to be fully approvable by EPA. The Clean Air Act Amendments of 1990 require other changes to the Department's New Source Review and PSD rules. However, it may be more than a year before EPA promulgates the guidance necessary for states to proceed with changes to these programs.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

1. Adopt the PSD increments for nitrogen dioxide as soon as possible.
2. Defer administration of the nitrogen dioxide portion of the permitting process to EPA until the Department receives new guidance on changes required to the state's PSD program under the 1990 amendments of the Clean Air Act. This would delay the Department's implementation of the nitrogen dioxide portion of the PSD program for at least one year.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department recommends alternative 1 so that the permitting process for major new and modified sources may be consolidated in the Department. This would make the permitting process more efficient and less time consuming for both the Department and the regulated community.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

The proposal is consistent with the Department's strategic plan, and agency and legislative policy because it pursues streamlining the regulatory program as called for under goal 8.

ISSUES FOR COMMISSION TO RESOLVE:

Does the Commission want to proceed with this rulemaking or defer administration of this portion of the PSD program to EPA until such time as EPA has promulgated new guidance under the 1990 amendments to the Clean Air Act. The guidance is expected to affect the New Source Review and, therefore, the PSD programs. The Department does expect the guidance to affect the PSD increment program in any significant way. The New Source Review program guidance was expected by the end of 1991. As of this date, no guidance has been made available.

INTENDED FOLLOWUP ACTIONS:

1. File rules with Secretary of State.

2. Implement rules.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By: Yone C. McNally
Phone: 229-5143
Date Prepared: February 25, 1992

YCM:e
MISC\AH40809
2/25/92

Ambient Air Increments
340-31-110

(1) This rule defines significant deterioration. In areas designated as class I, II or III, emissions from new or modified sources shall be limited such that increases in pollutant concentration over the baseline concentration shall be limited to those set out in Table 1.

(2) For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

TABLE 1
(340-31-110)
MAXIMUM ALLOWABLE INCREASE
Micrograms per cubic meter
CLASS I

POLLUTANT	
Particulate matter:	
TSP, Annual geometric mean	5
TSP, 24-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-hour maximum	5
3-hour maximum	25
Nitrogen dioxide:	
Annual arithmetic mean	**2.5**

CLASS II

Particulate matter:	
TSP, Annual geometric mean	19
TSP, 24-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hour maximum	91
3-hour maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	**25**

CLASS III

Particulate matter:	
TSP, Annual geometric mean	37
TSP, 24-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-hour maximum	182
3-hour maximum	700
Nitrogen dioxide:	
Annual arithmetic mean	**50**

Stat Auth.: Chap. 468
Hist.: DEQ 18 - 1979, f. & ef. 6-22-79; DEQ 8 - 1988, f. & cert. ef. 5-19-88 (corrected 9-30-88)

OAR 340-20-225, Definitions for New Source Review Regulations. Sections (2) and (3) to be amended as follows:

(2) "Baseline Concentration" means ~~[that]~~**:**
(a) the ambient concentration level for [a particular pollutant] **sulfur dioxide and total suspended particulate matter** which existed in an area during the calendar year 1978. If no ambient air quality data is available in an area, the baseline concentration may be estimated using modeling based on actual emissions for 1978. The following emission increases or decreases will be included in the baseline concentration:
(A) ~~[(a)]~~ Actual emission increases or decreases occurring before January 1, 1978; and
(B) ~~[(b)]~~ Actual emission increases from any major source or major modification on which construction commenced before January 6, 1975.
(b) the ambient concentration level for nitrogen oxides which existed in an area during the calendar year 1988.

(3) "Baseline Period" means either calendar years 1977 or 1978 **for sulfur dioxide or total suspended particular matter and calendar year 1988 for nitrogen oxides**. The Department shall allow the use of a prior time period upon a determination that it is more representative of normal source operation.

ATTACHMENT B

RULEMAKING STATEMENT FOR PROPOSED ADDITION OF NITROGEN DIOXIDE INCREMENT TO AMBIENT AIR INCREMENTS

STATEMENT OF NEED FOR RULEMAKING

Pursuant to ORS 183.335(7), this statement provides information on the intended action to amend a rule.

(1) Legal Authority

This proposal amends Oregon Administrative Rules (OAR) 340-20-225 and 340-31-110. It is proposed under authority of Oregon Revised Statutes (ORS) Chapter 468.

(2) Need for Rule

In 1988, the Environmental Protection Agency adopted Prevention of Significant Deterioration increments for nitrogen oxides. The Department must add increments for nitrogen oxides to its rules to obtain full delegation from Environmental Protection Agency to implement the federal New Source Review program. In order to implement the increment once adopted, the definitions of "Baseline Concentration" and "Baseline Period" need to be amended to distinguish between the increments for sulfur dioxide and total suspended particulate, and nitrogen oxides.

(3) Principal Documents Relied Upon

- Clean Air Act Amendments of 1977, PL 95-95
- Federal Register, October 17, 1988, pages 40656 through 40672.

All documents referenced may be inspected at the Department of Environmental Quality, Air Quality Division, 811 S.W. Sixth Avenue, Portland, Oregon, during normal business hours.

DEQ LAND USE EVALUATION STATEMENT FOR RULEMAKING

PROPOSED AMENDMENTS TO PREVENTION
OF SIGNIFICANT DETERIORIATION RULES

(1) Explain the purpose of the proposed rules.

Amend the Prevention of Significant Deterioriation Rules by adopting increments for nitrogen dioxide.

(2) Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program? Yes X No ___

(a) If yes, identify existing program/rule/activity:

Issuance of Air Contaminant Discharge Permits (ACDP).

(b) If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules? Yes X No ___

If no, explain: Not Applicable.

(c) If no, apply criteria 1. and 2. from the instructions for this form and from Section III Subsection 2 of the SAC program document to the proposed rules. In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

Not Applicable.

(3) If the proposed rules have been determined a land use program under 2. above, but are not subject to existing land use compliance and compatibility procedures, explain the new procedures the Department will use to ensure compliance and compatibility.

Not Applicable.

Air Quality Division | Intergovernmental Coor. | Date 11-22-91

ADG:a
RPT\AHxxxx
(10/8/91)

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
EVALUATION STATEMENT FORM FOR
DETERMINATION OF RULES AFFECTING LAND USE

ORS 197.180 requires that state agencies maintain a program of coordination to assure agency actions that affect land use are in compliance with the statewide goals and compatible with city and county comprehensive plans. DEQ's State Agency Coordination Program(SAC) was approved by the EQC 8/10/90 and certified by the Land Conservation and Development Commission on 12/13/90.

A land use evaluation is required of all new/revised rules (except temporary rules). OAR 340 Division 18 and the SAC document contains the criteria for conducting a land use evaluation.

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs or rules that relate to statewide land use goals are considered land use programs if they are:

1. Specifically referenced in the statewide planning goals; or
2. Reasonably expected to have significant effects on
   a. resources, objectives or areas identified in the statewide planning goals, or
   b. present or future land uses identified in acknowledged comprehensive plans.

In applying criterion 2. above, two guidelines should be applied to assess land use significance:

- The land use responsibilities of a program/rule/action that involves more than one agency, are considered the responsibilities of the agency with primary authority.

- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

The evaluation form must be included in the notice to the Secretary of State's office, and mailed to the Special Asst. for Coordination at the Department of Land Conservation and Development within 45 days of final EQC action.

8/91RGUIDE

ATTACHMENT D

FISCAL AND ECONOMIC IMPACT STATEMENT FOR PROPOSED ADDITION OF NITROGEN DIOXIDE INCREMENT TO AMBIENT AIR INCREMENTS

PROPOSAL SUMMARY

The proposed rules would affect major industrial sources of nitrogen dioxide, requiring their major nitrogen dioxide emissions to be covered by an Air Contaminant Discharge Permit issued by the Department of Environmental Quality (DEQ or Department).

COSTS TO OWNERS OF INDUSTRIAL NITROGEN DIOXIDE SOURCES

Sources which emit nitrogen dioxide also emit other pollutants. The U.S. Environmental Protection Agency (EPA) adopted a Prevention of Significant Deterioration increment for nitrogen dioxide in 1988. Thus, since 1988, any major new source or major modification of a source which emits nitrogen dioxide and other pollutants have had to apply for permits or modifications through the Department for other major pollutants and the EPA for nitrogen dioxide. This dual permitting process requires industries to provide information, some duplicative, and pay fees to two separate agencies. The rule amendment represents a benefit to industrial sources of nitrogen dioxide as it centralizes the permitting process in one agency eliminating the necessity of filing two permit applications, supplying certain information twice, dealing with two agencies and paying two application fees.
Therefore, this rule amendment does not represent an additional cost to major industrial sources of nitrogen dioxide.

COSTS TO SMALL BUSINESS

This rule amendment has no economic impact on small business as there are currently no small businesses in Oregon which would qualify as major sources of nitrogen dioxide.

COSTS TO THE DEPARTMENT

The Department does not currently administer this portion of the permitting program. However, under the proposed rule, the nitrogen dioxide increment would be included in the regular permitting process. Thus, it would be part of a pre-existing program and would not require the Department to expend significant additional resources.

COSTS TO OTHER STATE AGENCIES

This rule amendment has no economic impact on other state

agencies as there are currently no other state agencies which operate major sources of nitrogen dioxide.

COSTS TO LOCAL GOVERNMENTS

This rule amendment has no economic impact on local governments in Oregon as there are currently no other state agencies which operate major sources of nitrogen dioxide.

ATTACHMENT E

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

NOTICE OF PUBLIC HEARING

Hearing Date: January 16, 1992
Comments Due: January 17, 1992

WHO IS AFFECTED: Industries which emit nitrogen dioxide.

WHAT IS PROPOSED: The Department of Environmental Quality is proposing to adopt a Prevention of Significant Deterioration (PSD) increment for nitrogen dioxide and establish baseline criteria for determining the consumption of the increment. The adoption of the increment and establishment of baseline criteria are also a revision to the State of Oregon Clean Air Act Implementation Plan, Oregon Administrative Rule 340-20-047.

WHAT ARE THE HIGHLIGHTS: Proposed adoption of a PSD increment for nitrogen dioxide would bring the entire industrial PSD permitting program under the Department's authority. Currently, the authority is shared with the U.S. Environmental Protection Agency (EPA).

HOW TO COMMENT: Copies of the complete proposed rule packages may be obtained from the Air Quality Division at 811 S.W. Sixth Avenue, Portland, OR 97204, or the regional office nearest you. For further information, call toll free 1-800-452-4011 (in Oregon), or contact Yone McNally at (503) 229-5143.

Public hearings will be held before a hearings officer at:

3:00 pm
January 16, 1992
DEQ Offices
811 SW Sixth Avenue
Portland, Oregon

Oral and written comments will be accepted at the public hearings. Written comments may be sent to the DEQ, but must be received no later than 5 pm, January 17, 1992.

811 S.W. 6th Avenue
Portland, OR 97204

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call 1-800-452-4011

11/88

WHAT IS THE NEXT STEP:

After public hearings, the Environmental Quality Commission may adopt rule amendments identical to the proposed amendments, adopt modified rule amendments on the same subject matter, or decline to act. The adopted rules will be submitted to the EPA as part of the State Clean Air Act Implementation Plan. The Commission's deliberation should come as part of the agenda at a regularly scheduled meeting in March, 1992.

A Statement of Need, Fiscal and Economic Impact Statement, and Land Use Consistency Statement are attached to this notice.

YM:a
LTR\AH40240

GENERAL ADMINISTRATION

468.005 Definitions. As used in ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.405, 454.425, 454.505 to 454.535, 454.605 to 454.745 and this chapter, unless the context requires otherwise:

(1) "Commission" means the Environmental Quality Commission.

(2) "Department" means the Department of Environmental Quality.

(3) "Director" means the Director of the Department of Environmental Quality.

(4) "Order" has the same meaning as given in ORS 183.310.

(5) "Person" includes individuals, corporations, associations, firms, partnerships, joint stock companies, public and municipal corporations, political subdivisions, the state and any agencies thereof, and the Federal Government and any agencies thereof.

(6) "Rule" has the same meaning as given in ORS 183.310.

(7) "Standard" or "standards" means such measure of quality or purity for air or for any waters in relation to their reasonable or necessary use as may be established by the commission pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.405, 454.425, 454.505 to 454.535, 454.605 to 454.745 and this chapter. [Formerly 449.001]

468.010 Environmental Quality Commission; appointment; confirmation; term; compensation and expenses. (1) There is created an Environmental Quality Commission. The commission shall consist of five members, appointed by the Governor, subject to confirmation by the Senate as provided in ORS 171.562 and 171.565.

(2) The term of office of a member shall be four years, but the members of the commission may be removed by the Governor. Before the expiration of the term of a member, the Governor shall appoint a successor to assume the duties of the member on July 1 next following. A member shall be eligible for reappointment, but no member shall serve more than two consecutive terms. In case of a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term.

(3) A member of the commission is entitled to compensation and expenses as provided in ORS 292.495. [Formerly 449.016]

468.015 Functions of commission. It is the function of the commission to establish the policies for the operation of the department in a manner consistent with the policies and purposes of ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.405, 454.425, 454.505 to 454.535, 454.605 to 454.745 and this chapter. In addition, the commission shall perform any other duty vested in it by law. [1973 c.835 §4]

468.020 Rules and standards. (1) In accordance with the applicable provisions of ORS 183.310 to 183.550, the commission shall adopt such rules and standards as it considers necessary and proper in performing the functions vested by law in the commission.

(2) Except as provided in ORS 183.335 (5), the commission shall cause a public hearing to be held on any proposed rule or standard prior to its adoption. The hearing may be before the commission, any designated member thereof or any person designated by and acting for the commission. [Formerly 449.173; 1977 c.38 §1]

468.030 Department of Environmental Quality. There is hereby established in the executive-administrative branch of the government of the state under the Environmental Quality Commission a department to be known as the Department of Environmental Quality. The department shall consist of the director of the department and all personnel employed in the department. [Formerly 449.032]

468.035 Functions of department. (1) Subject to policy direction by the commission, the department:

(a) Shall encourage voluntary cooperation by the people, municipalities, counties, industries, agriculture, and other pursuits, in restoring and preserving the quality and purity of the air and the waters of the state in accordance with rules and standards established by the commission.

(b) May conduct and prepare, independently or in cooperation with others, studies, investigations, research and programs pertaining to the quality and purity of the air or the waters of the state and to the treatment and disposal of wastes.

(c) Shall advise, consult, and cooperate with other agencies of the state, political subdivisions, other states or the Federal Government, in respect to any proceedings and all matters pertaining to control of air or water pollution or for the formation and submission to the legislature of interstate pollution control compacts or agreements.

(d) May employ personnel, including specialists, consultants and hearing officers, purchase materials and supplies, and enter into contracts necessary to carry out the purposes set forth in ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.405, 454.425, 454.505 to 454.535, 454.605 to 454.745 and this chapter.

(e) Shall conduct and supervise programs of air and water pollution control education, including the preparation and distribution of

ATTACHMENT G

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY **INTEROFFICE MEMORANDUM**

DATE: February 7, 1992

TO: Environmental Quality Commission

FROM: Yone C. McNally, Hearings Officer

SUBJECT: Hearings Officer Report

On January 16, 1992, a public hearing was held to accept public testimony on proposed adoption of a Prevention of Significant Deterioration increment for nitrogen oxides. The hearing was held in Room 9B of the Department's headquarters building at 811 SW Sixth Avenue at 3 pm. No one attended the hearing. The hearing was adjourned at 4:05 pm. The record for purposes of receiving public comment remained open until 5 pm January 17, 1992.

On January 17, 1992, the Department received one written comment from John Williams of Portland. The comment criticized the Department's ability to adequately perform Best Available Control Technology analyses. The comment also stated that Mr. Williams opposed DEQ being delegated authority to administer the nitrogen oxides increment portion of the Prevention of Significant Deterioration because of this inadequacy. Mr. Williams based his objection on an air contaminant discharge permit application proceeding from 1989.

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

REQUEST FOR EQC ACTION

Meeting Date: March 12, 1992
Agenda Item: G
Division: ECD
Section: Administration

SUBJECT:

The Oil and Hazardous Materials Emergency Response Plan, a section of the State of Oregon's Emergency Operations Plan.

PURPOSE:

A revision of Oregon's Oil and Hazardous Materials Emergency Response Plan has been prepared by the Emergency Management Division of the Executive Department with the help of the Oregon Emergency Response System Council (OERS Council). This revised plan must be reviewed by the Department of Environmental Quality, certain other government and community committees, and be approved by the Environmental Quality Commission to be the replacement for the existing plan.

ACTION REQUESTED:

___ Work Session Discussion
___ General Program Background
___ Potential Strategy, Policy, or Rules
___ Agenda Item ___ for Current Meeting
___ Other: (specify)

___ Authorize Rulemaking Hearing
___ Adopt Rules
Proposed Rules — Attachment ___
Rulemaking Statements — Attachment ___
Fiscal and Economic Impact Statement — Attachment ___
Public Notice — Attachment ___

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

___ Issue a Contested Case Order
___ Approve a Stipulated Order
___ Enter an Order
Proposed Order — Attachment ___

_X_ Approve Department Recommendation
___ Variance Request — Attachment ___
___ Exception to Rule — Attachment ___
___ Informational Report — Attachment ___
_X_ Other: Replace the 1987 plan with the current update. — Attachment _A_

DESCRIPTION OF REQUESTED ACTION:

Oregon's Oil and Hazardous Materials Emergency Response Plan, commonly referred to by its State of Oregon Emergency Operations Plan sub-section name "ANNEX-O", has been updated to reflect state agencies services and relationships that have changed since the Commission approved the plan on January 23, 1987.

This revised plan must receive the approval of the Commission as a replacement for the existing plan. Changes in the plan go beyond routine revisions and describe new roles for some state agencies. The 1985 legislative intent when requiring Commission approval of the plan was to assure concurrence among those affected by the plan about the roles of the state agencies.

AUTHORITY/NEED FOR ACTION:

_X_ Required by Statute: ORS 466.620 — Attachment _B_
Enactment Date: Chapter 733, Oregon Laws 1985
___ Statutory Authority: _____ — Attachment ___
___ Pursuant to Rule: _____ — Attachment ___
___ Pursuant to Federal Law/Rule: _____ — Attachment ___
___ Other: — Attachment ___
___ Time Constraints: (explain)

DEVELOPMENTAL BACKGROUND:

___ Advisory Committee Report/Recommendation — Attachment ___
___ Hearing Officer's Report/Recommendations — Attachment ___
___ Response to Testimony/Comments — Attachment ___
___ Prior EQC Agenda Items: (list) — Attachment ___
___ Other Related Reports/Rules/Statutes: — Attachment ___
_X_ Supplemental Background Information:
1) History of the revised plan. — Attachment _C_
2) Chart of Emergency Plans. — Attachment _D_

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

Compliance with the Oil and Hazardous Materials Emergency Response Plan (OHMERP) is not required by state law. However in general, states and many political subdivisions are required by federal law to have and use emergency plans (please see Attachment D).

State agencies and local government groups engaged in cooperative emergency response activities, such as those covered in the revised OHMERP, will find a realignment of responsibilities for certain types of incidents. The revised plan may require changes in their procedures during emergency situations.

A comparison of the 1987 ANNEX-O and the proposed replacement plan shows these differences:

1) A further recognition of the hazardous materials teams developed by OSFM to provide equipment and trained staff at incidents (Sections III and IV). Dropping the assigned duty of overseeing cleanup by the teams, which is consistent with the OAR developed by OSFM (Section II).

2) That since the dispatch and control of the State Hazardous Materials Teams is the responsibility of the State Fire Marshal (OSFM) the "lead agency" status in situations where the teams respond is now OSFM and not DEQ.

3) The Poison Control Center has requested an enhanced role during incidents with exposures and contaminated victims. On scene responders will be provided information on the proper level of concern for, and field emergency decontamination of, persons injured in hazardous materials incidents.

The Department has considered the changes and determined that the level of service available from the state will remain constant though the agency responsible for providing services may be changed.

PROGRAM CONSIDERATIONS:

The Department will be responsible under the revised plan for the post-emergency public health and environmental aspects of hazardous materials incidents. The revised plan does not put the Department in the role of lead agency automatically. The Department will not be responsible for providing on-site management at most emergency incidents, but will provide ongoing technical assistance and eventually direct the cleanup operations. The Department will provide on-site staff at selected and major incidents where a hazard free command center has been established. The choice of which incidents require on-site DEQ staff will be based on effective use of available resources. Once on site, Department staff will continue to work in coordination with the designated incident commander as outlined in the plan.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

1. Participate with the Office of Emergency Management in development of the revised plan and present it for Commission approval.

2. Retain the 1987 approved plan and attempt to provide the services defined in it.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department recommends that the Commission approve alternative 1; Submit a revised plan for approval.

The recommendation will meet legislative requirements and create a plan that is consistent with the current operations of the state agencies in the plan.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

The recommended action is consistent with legislative policy.

ISSUES FOR COMMISSION TO RESOLVE:

Does the revised plan meet the need of the state for emergency response to oil and hazardous materials incidents? Is the revised plan consistent with other plans as required?

INTENDED FOLLOWUP ACTIONS:

The Department will distribute the revised plan to the primary group of persons potentially utilizing the plan. Further, we will arrange with any interested persons a means to obtain copies of the plan.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By: Ed Wilson

Phone: 229-5373

Date Prepared: 2/21/92

(AEW:ew)
(ANN-O.sr)
(3/12/92)

OREGON EMERGENCY OPERATIONS PLAN

OIL AND HAZARDOUS MATERIALS

EMERGENCY RESPONSE PLAN

(For inland spills and non-costal waters)

Prepared by:

Oregon Emergency Management
Oregon Department of Environmental Quality

Reviewed by:

Oregon Emergency Response System Council
Oregon Fire Chief's Association
Oregon's Interagency Hazard Communication Council
Oregon Local Emergency Planning Committee

In Case of Emergency Notify:

9-1-1

and

Oregon Emergency Response System

1-800-452-0311 (In Oregon)
503-378-4124 (out-of-state)

DISCLAIMERS:

1. This plan is a description of the state system for dealing with oil and hazardous materials emergencies. It does not carry the force of law. This is not an operational procedure to be used during an emergency.

2. The phone numbers listed in this plan may be subject to change at any time and need to be verified periodically.

EQC 3/12/92
Agenda Item G
Attachment A

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PART B

SECTION Page

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PLAN ATTACHMENTS :

1 Oregon Hazardous Materials Emergency Response Teams.

Related Resource Materials Available From:

Office of State Fire Marshal 378-2885
3000 Market Street NE Salem, Oregon 97310

SFM Hazardous Materials Training Plan
SFM Communication Plan and Procedures
SFM Information Systems Directory
SFM Annual Hazardous Materials Incident Report
SFM Hazardous Substance Annual Survey

Oregon Emergency Management 378-6377
595 Cottage Street NE Salem, Oregon 97310

State of Oregon Emergency Operations Plan
Oregon Emergency Response System Monthly Report
Oregon Emergency Response System Annual Report

Oregon Department of Environmental Quality 229-6305
811 SW Sixth Avenue Portland, Oregon 97204

Oregon Oil and Hazardous Materials Emergency Response Plan
Oregon Oil and Hazardous Materials Spill Contingency Plan for the Oregon Coast, Columbia River and Willamette River to Willamette Falls

PART A, SECTION I

PURPOSE AND SCOPE

The purpose of Oregon's Oil and Hazardous Materials Emergency Response Plan is to describe the statewide system for responding to oil and hazardous materials emergencies, excluding those in coastal water or the lower Columbia river. Hazardous materials include radioactive materials and waste as well as chemically hazardous materials and waste and communicable disease agents. Oil includes gasoline, crude oil, fuel and lubricating oil, and any other petroleum based product.

The plan has been developed in cooperation with all levels of government and industry. The plan describes the typical roles and responsibilities of all responders. It identifies who will be in charge of an incident. It provides guidelines for coordinating local, state, federal, industry and volunteer emergency response resources.

Oregon's Oil and Hazardous Materials Emergency Response Plan has been developed to satisfy ORS 401, 453.347, 466.620 and 469.611 and to be part of the requirements of Title III Section 303 of the Superfund Amendments and Re-authorization Act of 1986.

RELATIONSHIP TO OTHER PLANS

This plan is consistent with the DEQ's Oil and Hazardous Materials Spill Contingency Plan, all county and local plans submitted to the State as part of Section 303 of Title III (see Part B for list of plans) and is a hazard specific part of the Oregon Emergency Operations Plan. It is intended to be consistent with the Federal Government's National and Regional Contingency plans. It is also intended to be consistent with any LEPC developed plan. See "related resource material".

SUMMARY OF THE SYSTEM

Local governments will assume the lead role during the emergency phases of an incident while state and federal agencies will provide local government with technical support and access to hazardous materials teams during the emergency phases of an incident. State or federal agencies shall assume the lead role for directing the cleanup and site restoration. At some incidents federal agencies may request \ be requested to assume incident command and apply federal resources during emergency operations. The spiller is legally responsible for reporting the incident, performing cleanup or hiring a cleanup contractor and disposing of the spilled materials. Volunteer organizations may be requested to provide for; the basic social needs of the victims, some types of environmental cleanup, and some types of wildlife rehabilitation

Section I (cont.)

BACKGROUND

In 1986, ODOE and DEQ were directed to develop a statewide plan for responding to oil and hazardous materials emergencies. Hazardous materials include radioactive materials and waste, as well as chemically hazardous materials and waste, and communicable diseases.

Oregon's Oil and Hazardous Materials Emergency Response Plan which described in detail the State's hazardous materials emergency response system was completed and adopted by the Environmental Quality Commission in January of 1987. The Plan satisfied Oregon Revised Statutes ORS 469.611 (ODOE) and 466.620 (DEQ) and was incorporated as ANNEX O in the State's Emergency Response Plan, replacing the outdated Annex's O and P.

In October of 1986, Congress passed the Superfund Amendments and Re-authorization Act of 1986. The third section of the act, know as Title III requires local governments and industry to work together to develop hazardous materials emergency response plans. Title III also requires the state to set up a SERC to designate local emergency planning districts in the state and appoint local emergency planning committees for each district. The local committees would then develop hazmat plans that focus on chemical hazards in their district. In July of 1987, the SERC designated the entire state as a local planning district and appointed a committee of representatives from all the groups identified in Title III. The State LEPC is composed of approximately 30 members who met for the first time in September 1987 and have continued to meet on a periodic basis. The LEPC has provided guidance to local planners in the form of model local hazmat plans patterned after ANNEX O and a set of local plans review criteria, as well as policy guidance on a number of issues.

As part of its obligations under Title III, the LEPC was required to complete its hazardous materials emergency response plan by October 7, 1988. At its October 1988 meeting the LEPC adopted the existing State Hazardous Materials Emergency Response Plan, ANNEX O. The plan was adopted with the understanding that it would:

1. be revised to describe the present status of hazmat response capability in Oregon.

2. include all the local Title III plans submitted to the LEPC as supplements to the State Plan.

EXCEPTIONS: Incidents not covered by this Plan.

Nuclear Reactor accidents, which are addressed in the Oregon Department of Energy's Trojan Emergency Plan, a part of the State Emergency Operations Plan.

Military Weapons or Weapons Related Materials incidents which will be directed by the U.S. Department of Defense or Energy, with the exception of Umatilla Army Depot Activity (UMDA) which is coordinated by OEM. The ODOE will coordinate local and state assistance.

Under the National Contingency Plan (NCP) spills into Coastal Waters of the United States may be directed by the U.S. Coast Guard and spills to inland waters may be directed by the EPA. The State of Oregon response is addressed in the Oil and Hazardous Materials Spill Contingency Plan for the Oregon Coast, Columbia River, and Willamette River to Willamette Falls. (This zone includes coastal rivers to the head of tide and the Pacific Ocean to the three mile limit, the Columbia River to the Washington State border and the Willamette River to Willamette Falls.) The DEQ will coordinate state assistance to the Coast Guard if requested.

LIMITATIONS

Part A of this plan provides a framework for the State Hazardous Materials Response System. It is not meant to be a functional set of emergency procedures. Specific emergency procedures for each of the county and local planning areas (if other than Oregon LEPC) are contained in Part B of this document if submitted to LEPC. Likewise the hazard assessment portions of the plan and the pre-incident plans required by Title III are contained in the individual county and local plans in Part B. In addition, the State Fire Marshal's Office maintains a statewide computerized database of facilities and the hazardous materials that are stored in those facilities above established thresholds. That information is immediately available to emergency responders through a computerized dial-up system (HAZ-COM telephone number) and by hard copy.

PART A, SECTION II

DEFINITIONS OF KEY TERMS

Emergency Operations Center (EOC) means site from where local, state and federal agencies coordinate off-scene support to on-scene responders.

Emergency Service means those activities provided by state and local government to prepare for and carry out any activity to prevent, minimize, respond or to recover from an emergency.

Hazardous Material (Hazmat) means any element, compound, mixture, solution or substance which, when spilled or released into the air or into or on any land or waters of the state, may present a substantial danger to the public health, safety, welfare or the environment. See also OAR 340 Div. 108, ORS 453.307 (4).

Hazardous Materials Specialists mean individuals who are trained and equipped for hazardous material response. This includes trained individuals from DEQ, State Fire Marshal's Office, members of Hazmat teams and Regional Radiological Technical Assistants (RRTAs) who are trained in radiation response and certified by the Oregon Department of Energy and the Oregon Health Division.

Incident means any event, that results in a spill or release of oil or hazardous materials. Action by emergency service personnel will be required to prevent or minimize loss of life or damage to property and/or natural resources.

Incident Commander (IC) means the one individual in charge at any given time of an incident. During the emergency phases the Incident Commander will usually be an official of the local lead agency. During cleanup and restoration the Incident Commander will normally be a lead state agency official. The Incident Commander will be responsible for establishing a unified command with all on-scene coordinators when unified command is appropriate.

Incident Command Post means the location where field commands are given. The Incident Commander and the OSCs direct the on-scene response from this location.

Incident Command System (ICS) means the combination of facilities, equipment, personnel, procedures, and communications operating with a common command structure.

Lead State Agency means the agency which will coordinate state support to local government. The lead may change from one state agency to another as a particular phase of the incident ends and another begins. In all cases, the Lead State Agency will communicate with the local emergency response agencies concerning any hand-off from state to local government, and final disposition of the incident. State agency response may be telephonically, by radio, teletype or actual presence at the incident.

Oil means gasoline, crude oil, fuel oil, diesel oil, lubricating oil, sludge, oil refuse or any other petroleum-related products. (See also OAR 340-Div. 108)

On Scene Coordinator (OSC) means the individual on-scene responsible for coordinating the resources at each respective level of government. OSC's may include:

- Local On-Scene Coordinator (LOSC)
- State On-Scene Coordinator (SOSC)
- Federal On-Scene Coordinator (FOSC)

Public Information Officer (PIO) means a person designated by the Incident Commander who, in coordination with the lead state agency, provides information to the public and media.

Regional Hazardous Materials Response Team means a team of local emergency responders trained, equipped and organized to respond to oil and hazardous materials incidents in a given geographic area.

Responsible Party means the person or firm who by law is [strictly] liable for clean-up of any spill or release. PRP means potentially liable.

Radiation Emergency Response Team (RERT) is a group composed of individuals from the Oregon Health Division Radiation Control Section. This team will respond to any radioactive materials incident.

Unified Command means the method by which local, state and federal agencies will work with the Incident Commander to:

1. Determine their roles, responsibilities, and objectives for a given incident.

2. Select a strategy to achieve agreed upon objectives.

3. Deploy resources to achieve agreed upon objectives.

ACRONYMS

DEQ - Department of Environmental Quality

ECC - Emergency Coordination Center

EPA - Environmental Protection Agency

EOC - Emergency Operations Center

FEMA - Federal Emergency Management Agency

Hazmat - Hazardous Material(s)

IC - Incident Commander

ICS - Incident Command System

LEPC - Local Emergency Planning Committee

OERS - Oregon Emergency Response System

ODOE - Oregon Department of Energy

OEM - Oregon Emergency Management Division

ODOT - Oregon Department of Transportation

ORS - Oregon Revised Statutes

OSC - On Scene Coordinator

OSFM - Office of the State Fire Marshal

OHD - Oregon Health Division

OSHD - Oregon State Highway Division

OSP - Oregon State Police

PIO - Public Information Officer

PRP - Potentially Responsible Party

RERT - Radioactive Emergency Response Team

RHMRT - (Oregon) Regional Hazardous Materials Response Teams

RRT - (Federal) Regional Response Team

RRTA - Radiological Emergency Technical Assistant

UMDA - Umatilla Army Depot Activity

SERC - State Emergency Response Commission

USCG - U.S. Coast Guard

PART A, SECTION III

OREGON's FOUR PART EMERGENCY PREPAREDNESS PROGRAM

A. Coordinated Plans and Procedures

Oregon's Oil and Hazardous Materials Emergency Response Plan provides a description of the statewide hazmat response system and outlines the responsibilities of all those who may be involved in a hazardous materials incident. It provides for a coordinated state agency response as well as detailed plans for how each of the counties and cities in the state will respond. The plans have been reviewed for consistency and will be exercised and updated periodically as needed.

B. Trained Personnel

The goal of Oregon's hazardous materials training system is to organize and coordinate the development and delivery of cost effective, quality hazardous materials training and education opportunities for all who need training in the state. The program will consist of providing basic hazmat training to all who need it and to provide discipline specific hazmat training to identified target groups. A hazardous materials proficiency series consisting of specific qualification levels will be provided for first responders. The hazmat training program is coordinated through the State Fire Marshal's Office.

C. Regional Hazardous Materials Response Teams

To ensure a reasonable emergency response time to all parts of the state, a system of state funded regional hazardous materials response teams consisting of highly trained individuals has been developed. The teams are equipped and trained by the state and manned for the most part by individuals from local fire departments and other emergency providers. Their bases of operation are in Gresham/Multnomah Co., Portland, Tualatin Valley, Linn-Benton Counties, Eugene, Klamath Falls, Coos Bay/Douglas Co., and Redmond. Southern Oregon and eastern Oregon teams are expected in the future. (See attachment 1 for a map of the response regions which lists the team leaders and the contact telephone numbers).

D. Hazardous Materials Information

A computerized call up system has been developed by the Office of the State Fire Marshal. The system provides data on the location and type of hazardous materials stored around the state. It also provides technical information on various hazardous materials and guidance on emergency response procedures.

Other information on hazardous materials can be obtained from state and federal agencies and industry (See Section IV - E, and F, Technical Assistance).

This plan together with the information system, the training program and the regional teams is designed to insure that all emergency responders are adequately prepared for hazmat incidents.

PART A, SECTION IV

Key Elements of Oregon's Emergency Response System

A. Notifications

1. Local Notification - shall be through 9-1-1.

2. State Notification - Spills of reportable quantities (as defined in OAR 340-108), that involve oil or hazardous materials must be reported by the spiller to the Oregon Emergency Response System (OERS) 1-800-452-0311 (out of state 503-378-6377). Local agencies are also requested to notify OERS when responding to incidents. OERS is managed by the Oregon Emergency Management Division. Depending on the type of incident the OERS duty officer will notify the appropriate lead state agency and other agencies as necessary.

3. Federal Notification - Some spills, depending on quantity and type of material spilled, also require the spiller to notify federal agencies (40 CFR Part 302, Table 302.4). Notification shall be through the National Response Center (NRC) 1-800-424-8802. The NRC is managed by the U.S. Coast Guard.

4. Hazmat Team Notification - Incidents which cannot be controlled by local resources may require the services of a Hazmat Response Team. Notification of need for this assistance shall be made to OERS, and RHMRT dispatch approved and coordinated by the OSFM.

B. Statewide Emergency Communications

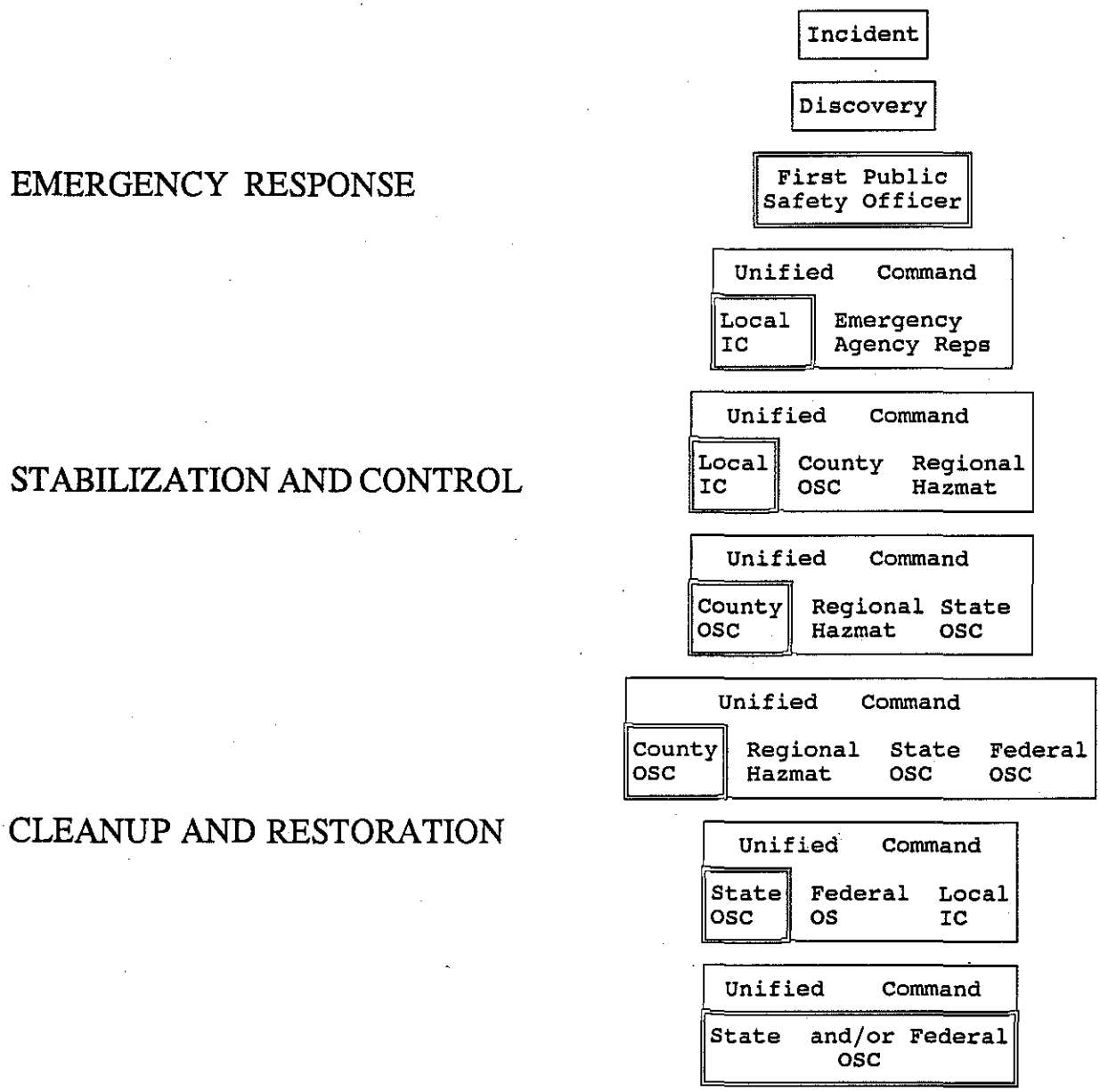
Oregon FIRE NET (VHF frequency 154.280 MHZ) provides a statewide communications network dedicated to assist Oregon's fire services and participating state agencies in coordinating response to fire related activities, response to hazardous materials incidents, and Governor-declared emergencies. It is coordinated by the State Fire Marshal's Office and operated by the Emergency Management Division.

C. Incident Management

1. Emergency Response - A hazardous material incident may involve a variety of local, state, federal and private sector resources. No single agency will have the necessary resources to carry out all response activities. In addition, there may be overlapping authorities and responsibilities. Because speed is so important during an emergency, coordination among the responding agencies is essential. A centralized command structure will be needed. (See Figure I)

Figure 1. INCIDENT MANAGEMENT

The following diagram depicts the command structure described in Section IV.B. The double outlined box indicates the Incident Commander. The local on-scene coordinator (LOSC) would be the Incident Commander (IC) unless otherwise designated. For a minor incident this structure may not proceed beyond the fourth box. For a major incident the command structure builds during the emergency phase as various agencies and levels of government arrive on scene. The structure decreases as the incident is controlled.



Section IV, Part C. 1. Emergency Response (continued)

a. Incident Command

The first public safety official on scene will assume incident command. The person will:

(1) Assess the situation.
(2) Activate the local emergency response system.
(3) Initiate actions to protect the public.

b. Local Incident Command

The lead local emergency response agency predesignated in local plans shall:

(1) Assume incident command upon arriving on scene.
(2) Designate a local on-scene coordinator (LOSC) for local resources.
(3) Establish an appropriate incident command post.
(4) Be in charge of and responsible for all emergency response operations. (See Sections 5B and 7B).

c. Unified Command

The Incident Commander will also set up a unified command system if more than one level of government is involved. All on-scene coordinators (OSCs) shall have a representative at the command post who will work with the Incident Commander. (See Figure 1).

d. Change of Command

Incident Command will remain at the local level until emergency operations which include stabilization and control activities are completed unless:

(1) The local resources are overwhelmed and the Incident Commander requests one of the other on-scene coordinators to assume control.

(2) The incident occurs in areas of federal jurisdiction, such as defense installations or United States waters, in which case, the federal government will be the Incident Commander. (Section 105, CIRCLA).

(3) If necessary, Oregon statute grants the Governor authority to assume command of emergency operations (ORS469.671 and ORS401.115)

Section IV, Part C (cont.)

2. Stabilization and Control

Under most circumstances, the incident command will remain at the local level during the stabilization and control phase of a response. If requested, a state or federal agency could assume control. Several levels of government may be involved in this phase. The Incident Commander and OSCs are expected to work within a unified ICS.

3. Cleanup and Restoration

a. State Incident Command

Once the emergency is over, local responders expect to return to normal duties. At a mutually agreed upon time, the local Incident Commander would usually turn command over to the lead state agency who will then direct cleanup and restoration. Local agencies may need or choose to remain involved. Command could remain at the local level, however if a local government undertakes or contracts for cleanup. They may be held responsible for costs.

Cleanup and restoration activities include:

(1) Compliance with cleanup standards
(2) Restoration of environment and site
(3) Investigation of cause
(4) Assessment of damages
(5) Enforcement actions
(6) Cost recovery

b. Federal Command

The federal on-scene coordinator (FOSC) could also assume command if requested by the state or if the incident occurs in an area under federal jurisdiction (See 1,d above).

D. Emergency Operations Centers (EOCs).

During major incidents, the heads of local and state agencies will meet at EOCs to coordinate their off-scene support to on-scene operations. The federal government can activate the Regional Response Team (RRT) to coordinate federal off-scene support. The RRT is composed of representatives from all affected federal agencies and states in the region.

Section IV, Part D, EOC's (cont.)

1. The local EOC will be activated by the head of local government in coordination with their emergency manager.

2. The State EOC will be activated by the Governor or by the Administrator of the Emergency Management Division in coordination with the state OSC. The State EOC is located at the Oregon Emergency Management Division office at 595 Cottage Street NE in Salem.

3. The Federal Regional Response Team (RRT) will be activated by the chairman of the RRT when there is a major incident or upon request from the federal OSC or a member of the RRT. The Regional Response Team is in Seattle.

E. Technical assistance.

Assistance from state and federal agencies will be provided to on-scene responders. It would usually be in the following sequence:

1. By the lead State Agency who will contact the local Incident Commander.

   Lead State Agencies are:

   DEQ - for oil and chemically hazardous materials incidents. Can provide information on chemical characteristics, environmental effects, control,cleanup and disposal of hazardous materials. (For details, see page 22) Contact through OERS at 1-800-452-0311.

   OHD - for all incidents involving hazards to human beings and for all communicable disease agents. Can provide information on public health effects of hazardous materials including chemical, radiological, physical and biological hazards. (See page 24) Contact through OERS at 1-800-452-0311.

   ODOE - for radioactive materials transportation incidents (See page 23) Contact through OERS at 1-800-452-0311.

   OSFM - For information and guidance on the presence and quantities of hazardous materials at fixed sites, characteristics and hazards of the materials and appropriate control techniques. (For details, see page 22) Contact through OERS at 1-800-452-0311.

Section IV, Part E

2. By Other State Resources

a. The Poison Control Center at 1-800-452-7165 outside Portland or 225-8968 in the Portland area provides 24 hour toxicological information, medical treatment and decontamination advice to on-scene responders.

b. The Pesticide Analytical Response Center (PARC) at 378-3793 provides information on pesticide related health (not treatment related) and environmental exposure from drift or contaminated water. Contact through OERS after hours, 1-800-452-0311.

c. The Public Utility Commission for information on motor carrier and rail shipments of hazardous materials at 378-6204. Contact through OERS after hours, 1-800-452-0311.

3. By locally available specialists, including Hazardous Material Specialists and Regional Radiological Technical Assistants.

4. By Regional Hazardous Materials Response teams who have access to extensive computer and print libraries on hazardous materials and control methods.

5. By the State Radiation Emergency Response Team.

6. By Federal specialists.

a. For incidents involving radioactive materials, response teams may be dispatched from the US Department of Energy, Richland Operations, or from adjacent states. The Oregon DOE or Health Division will activate this help.

b. For oil or hazardous materials spills on U.S. waters, in the coastal zone, the US Coast Guard will respond directly. It will provide the Federal OSC and the Incident Commander. (DEQ will operate under the OHMSCP). For spills on inland waters, EPA may provide an OSC and Incident Commander. The state will notify the Coast Guard and EPA of all spills on U.S. waters. The lead state agency will coordinate state support and provide technical assistance to the Federal OSC. Local agencies will provide emergency functions such as fire suppression and emergency medical help. Hazmat Teams will provide limited assistance upon request. Contact through the National Response Center at 1-800-424-8802.

c. For technical advice about the effects of specific materials on public health, the Agency for Toxic Substances and Disease Registry provides 24 hour service at 1-404-452-4100.

d. Several agencies within the Federal government can also provide technical support for both inland and coastal spills (see Section V).

F. Special Technical Assistance.

For certain types of hazardous materials incidents assistance is available from industry:

1. CHEMTREC is an off-scene 24 hr. emergency information service operated by the Chemical Manufacturers Association Chemical Transportation Emergency Center. 1-800-424-9300. CHEMTREC can supply chemical and safety data as well as contacts to product manufacturers. It can activate a number of industry based response actions including:

a. The CHLOREP team for chlorine incidents which is currently fielded by the ELF Atochem, North America Inc. in Portland (228-7655).

b. CHEMNET - An industry-wide mutual aid program activated by the shipper.

c. Response teams for Pesticides, Hydrogen Cyanide, Hydrogen Fluoride, Phosphorus and Liquified Petroleum Gas.

2. The Association of American Railroad's Bureau of Explosives for incidents involving the railroads. 1-800-826-4662 (24 hrs.)

3. Clean Rivers Cooperative, a nonprofit organization of petroleum companies which contracts to control and cleanup oil spills on the lower Columbia and Willamette Rivers.

G. Volunteer Services.

1. American Red Cross - can offer emergency relief in the form of food, shelter and clothing. (See phone book for nearest office).

2. Salvation Army - can provide emergency food, shelter and clothing. (See phone book for nearest office).

3. Amateur Radio Emergency Service - can provide radio communications through a network of amateur radio operators. Contact through local emergency services director/coordinator.

4. Other locally available volunteer services.

H. Coordination of Public Information

The news media can provide an important public service by distributing information about the nature of an incident. Successful emergency operations require accurate and timely public information. Public information will be coordinated between on-scene and off-scene operations. A Public Information Officer (PIO) will be designated by the Incident Commander to issue information about the incident. The PIO will issue information provided by the Incident Commander and in coordination with the lead state agency information representatives. The lead state agency will see to it that the PIO has accurate public health information. The lead state agency will issue information in coordination with the PIO.

I. Financial Assistance

FEDERAL ASSISTANCE

Financial assistance to local governments for performing temporary emergency measures needed to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance, pollutant or contaminant is available under section 123 of CERCLA. EPA has published a regulation under 52 CFR 39396.

Financial assistance to state and local governments for oil spill response related expenses is available under the Federal Oil Pollution Act of 1990. Procedures for collection are being finalized by the US Coast Guard.

STATE ASSISTANCE

Abandoned Chemicals - The Oil and Hazardous Materials Fund may be used by DEQ to contract for emergency removals of materials presenting public health and environmental risk if the owner, property owner, or responsible party is unable to act. This assistance may be on a cost reimbursement basis.

Section IV, Part I Financial Assistance (cont.)

Drug Lab Chemicals - DEQ's Drug Lab Cleanup Fund (requests must come through a law enforcement agency).

Financial reimbursement is also available through the State Fire Marshal's Office for Hazmat Team response within the terms of the response contract.

SECTION V

Responsibilities of Local, State and Federal Agencies, Industry and Volunteer Organizations

A. Specific responsibilities of Local and Regional Responders.

1. Local Agencies

a. Provide personnel who have been trained in Hazmat emergency response.

b. Provide an Incident Commander and establish a command post. Establish a unified command with other government agencies depending on the incident. Activate the local EOC as appropriate.

c. Undertake emergency response actions including:

- Incident Verification
- Notifications
- Initial hazard determination
- Initial measurements to detect concentrations of materials if possible
- Communications
- Life-saving/rescue
- Emergency medical care
- Fire Fighting
- Security (site perimeter, traffic and crowd control)
- On-scene liaison with other parties
- Providing public information
- Evacuation
- Shelter
- Pet and Livestock Care
- Designate Local OSC

These activities are generally shared among local fire, law enforcement, emergency medical, public works, health departments, etc. Refer to PART II of this document for the individual county and local plans.

Section V, (cont.)

2. Regional Hazmat Response Teams; RHMRTs and RRTs, and Hazmat Specialists.

Under the direction of the Local Incident Commander, and as appropriate in communication with the lead state agency(s), these specialists verify or help establish the following:

- Spill containment.
- Hazard determination.
- Measurements of concentrations of materials.
- Contamination control.
- Control of exposure for emergency workers and the public.
- On-scene liaison.
- Initial decontamination (if necessary).
- Environmental protection measures.
- Support to hospital emergency room (if possible and necessary) for contamination control.

B. Specific Responsibilities of State Agencies

Primary Coordination Agencies

1. Oregon Emergency Management Division (OEM)

a. Maintains 24-hour notification and coordination capability through OERS

b. Notifies lead state agency, other notifications made as needed or upon request

c. Activates, operates and maintains the State's Emergency Operations Center.

d. Provides and/or coordinates state-wide communications systems.

2. Oregon State Police (OSP)

a. Acts as initial Incident Command Agency until local command agency is on scene, or if no local agency is available.

b. Provides law enforcement support including traffic control.

Section V, Part B (cont.)

Primary Responsible Agencies for Oil and Haz-Mat.

1. Department of Environmental Quality (DEQ)

Provides technical assistance during oil spills and hazardous materials incidents, particularly related to the clean-up phase of the operation.

- Receives notification via OERS.
- Provides technical assistance and advises on necessary protective actions.
- Evaluates the environmental implications of a spill, in coordination with OHD, evaluates possible public health effects.
- Coordinates state support to on-scene personnel in cooperation with OEM.
- Coordinates public information with local PIO.
- Liaison with federal agencies, adjacent states, private industry (shippers, carriers, etc).
- Collects and analyzes water, soil, vegetation or tissue samples.
- Identifies clean-up requirements.
- Works with industry to insure that clean-up/ restoration is done to specified standards.
- If necessary, coordinates with the Governor to exercise the Governor's authority to protect health, safety and the environment.
- Insures that materials are disposed of in appropriate manner.
- Investigates causes and pursues enforcement action.
- Assesses environmental damage.

2. Office of the State Fire Marshal (OSFM)

- Provides technical assistance during the initial phases of the incident, including information on materials stored at sites.
- Receives notification via OERS.
- Provides technical assistance and advises on necessary protective actions.
- Authorizes dispatch of Hazmat Regional Response Teams.
- In cooperation with DEQ, considers the environmental implications of spill and control measures.
- In cooperation with OHD and PCC, evaluates possible health effects.
- In cooperation with DEQ and OEM, arranges state agency support to on-scene personnel.
- In cooperation with DEQ, supports dissemination of public information with the local PIO.

- Provides training and planning assistance to fire service agencies, local and state agencies, and other first responders.
- Acts as a liaison with federal agencies, adjacent states, private industry (shippers, carriers, etc).
- Arranges for fire service response to on-scene operations when the Conflagration Act is initiated through the Governor.
- Through field deputies, provides communications, logistics and other support to the local Incident Commander.
- Provides fixed site information on oil and hazardous materials from the Hazardous Materials Data Base.
- Maintains a Hazardous Materials Incident Reporting System.
- Maintains a Fire Service Hazmat Equipment Resource Directory.
- In cooperation with OEM, maintains hazardous materials incident communications through the FIRE NET radio system.

Primary Response Agencies for Radiation Incidents

1. Oregon Department of Energy (ODOE)

a. Is the Lead State Agency for transportation emergencies involving radioactive materials.

- Provides training, drills and exercises.
- Coordinates the distribution of radiation detection equipment.
- Provides coordination of plans and procedures.

b. Acts as Lead State Agency during a transportation specific radiation emergency.

- Receives notification via OERS.
- Assumes the role of Lead State Agency.
- Provides technical assessment and protective action recommendations.
- In cooperation with OEM, coordinates state support operations to on-scene personnel.
- Coordinates release of public information with local PIO.
- Provides liaison with federal agencies, adjacent states, private industry (shippers, carriers, etc).
- Insures that clean-up/restoration from incidents is done to specified standards.
- If necessary, coordinates with the Governor to to exercise the Governor's authority to protect health, safety and the environment.

Section V, Part B (cont.)

2. Oregon Health Division (OHD)

Is the Lead State Agency for radiation emergencies involving fixed sites.

- Receives notification via OERS.
- Assumes the role of Lead State Agency.
- Provides technical assessment and advises on necessary protective actions.
- Coordinates public information with local PIO.
- Provides liaison with federal agencies, adjacent states, private industry (shippers, carriers, etc)
- Insures that clean-up/restoration from a radiation incident is performed.
- Investigates cause.
- Assesses damage.
- Coordinates mortuary services.

State Agencies Capable of Providing Specific Expertise

1. Oregon State Highway Division (OSHD)

a. Notifies OERS and local emergency response agencies if OSHD is first on the scene.

b. Closes state highways and re-routes traffic when requested and necessary.

c. Provides personnel and barricades to implement a closure and detour.

d. Will direct spiller to start immediate clean-up if incident occurs on state highways.

2. Oregon State Parks and Recreation Department (OSPRD)

a. Notifies OERS and local emergency response agencies if first on the scene.

b. For an incident affecting a state park, ocean shore, or state scenic waterway OSPRD personnel assist other agencies in crowd/traffic control and provide equipment and facilities as available.

3. Oregon Department of Fish and Wildlife (ODFW)

a. Notifies OERS and local emergency response agencies if first on the scene.

b. Responds to incidents that could degrade land or water to the point that fish or wildlife would be adversely affected, or their habitat degraded or destroyed.

c. Evaluates and documents the impact on fish and wildlife and assesses monetary damages against the responsible party for losses of fish, wildlife or habitat.

d. Provides advice, counsel, and logistical support to other agencies as available.

4. Oregon Department of Forestry (ODF)

a. Notifies OERS and local emergency response agencies if first on the scene, or upon receiving a report from a forest operator.

b. In emergency response situations, ODF personnel act as first responders, awareness level as defined by Oregon OSHA rules.

c. Ensures that an operator/landowner takes initial remedial action on pesticide and oil spills if the spill occurs on lands regulated under the Oregon Forest Practices Act, and will communicate subsequent clean-up direction to operators as provided by the DEQ.

d. If requested by the Lead State Agency, the ODF is capable of mobilizing a substantial response organization to provide support to emergency responders (radio systems, dispatch and command center trailers, public information personnel, kitchens and other support services).

e. ODF will respond directly as a landowner to any incident on lands managed by the ODF.

5. Public Utility Commission (PUC)

The PUC has specific responsibilities related to motor carrier, railroad and air transportation incidents. PUC will investigate transportation incidents after the scene has been stabilized.

6. Oregon Department of Agriculture (ODA)

a. Provides some technical information on pesticides and fertilizers.

Section V, Part B, ODA (cont.)

b. Evaluates the adverse impact of an accident on agricultural resources (crops and dairy products).

c. Provides laboratory analysis capability.

7. Oregon Occupational Safety and Health Agency (OR-OSHA)

OR-OSHA investigates injuries and fatalities.

8. Oregon Military Department (OMD)

OMD comprises both Army and Air National Guard units assigned to the State of Oregon. In a major incident OMD could provide site security, administer first aid, care for evacuees, transport personnel, and assist in the recovery, identification and disposition of the deceased.

9. Oregon State University (OSU)

a. Provides training in toxicology, chemistry and other technical fields related to hazardous materials.

b. OSU can provide a wide variety of expertise on a non-emergency basis.

c. Operates the Extension Toxicology Network and the Oregon Toxicology Information Center which can provide specific toxicological information. This service can be accessed through PARC.

C. Specific Responsibilities of Federal Agencies

Technical assistance for oil spills and hazardous material incidents is available from a variety of Federal Agencies. The following section briefly summarizes their roles as outlined in the National Contingency Plan.

Primary Federal Agencies

1. The United States Coast Guard (USCG) provides:

a. Expertise and management of Federal Programs in domestic/international fields of port safety and security, maritime law enforcement, ship navigation, safety of vessels and marine facilities.

b. Pre-designated federal on-scene coordinator (FOSC) for the coastal zone if a federal response is required.

Section V, Part C, federal agencies (cont.)

b. Continuously manned facilities which can be used for command, control, and surveillance of oil discharges and hazardous substance releases occurring in the coastal zone.

2. The Environmental Protection Agency (EPA) provides:

a. Expertise on environmental effects of oil discharges or releases of hazardous substances, pollutants, or contaminants and environmental pollution control techniques.

b. Predesignated on-scene coordinator (FOSC) for the inland zone if a federal response is required.

c. Scientific support coordinator for responses in inland areas.

3. The Department of Defense (DOD) assumes incident command if an incident involves defense related materials It acts as the lead response agency within the designated National Security Area.

4. The Department of Energy (USDOE) provides assistance to the FOSC and Incident Commander during radiation incidents. Help is available from their Richland Operations Office.

Other Federal Agencies

1. The Department of Transportation (DOT) offers expertise in the requirements for packaging, handling and transporting regulated hazardous materials.

2. The Department of Agriculture (USDA) provides expertise in managing agricultural, forest, and wilderness areas. USDA's Soil Conservation Service provides predictions of the effects of pollutants on soil and their movements over and through soil.

3. The Department of Commerce (DOC), through National Oceanic and Atmospheric Administration (NOAA), provides:

a. Scientific expertise on living marine resources and their habitats.

b. Scientific Support Coordinator (SSC) who will coordinate scientific support for responses and contingency planning in coastal and marine areas. They can assess hazards that may be involved,

predict movement and dispersion of oil and chemicals through trajectory modeling and provide information on sensitive coastal environments.

c. Information on actual and predicted hydrologic, and oceanographic conditions for marine, coastal, and inland waters. They can provide charts and maps, including tide and circulation information for coastal and territorial waters and for the Great Lakes.

d. Information on actual and predicted meteorological conditions through the National Weather Service.

4. The Army Corps of Engineers has specialized equipment and personnel for maintaining navigation channels, removing navigation obstructions and maintaining hydroelectric facilities.

5. The U.S. Navy is knowledgeable in ship salvage, shipboard damage control and diving. It has an extensive array of specialized equipment and personnel that can be used for collection, containment and removal of pollution materials.

6. The Department of Health and Human Services (HHS) is responsible for providing assistance on all matters related to the assessment of health hazards at a response, and protection of both response workers and the public's health. Includes the Agency for Toxic Substances and Disease Registry (ATSDR) which provides advise to health care providers in cases of public health emergencies and coordinates assistance from the Center for Disease Control (CDC), NIOSH and the FDA.

7. The Federal Emergency Management Agency (FEMA):

a. Provides advice and assistance to the OSC on coordinating civil emergency planning and mitigation efforts with other federal agencies, state and local governments, and the private sector.

b. In the event of a major disaster declaration or emergency determination by the President, FEMA will coordinate all federal disaster or emergency actions with the FOSC.

8. The Department of the Interior (DOI) has jurisdiction over the National Park System, National Wildlife Refuges and Fish Hatcheries, forest and grazing lands, and certain

water projects in western states. In addition, bureaus and offices have relevant expertise as follows:

a. Fish and Wildlife Service: Fish and wildlife, including endangered and threatened species, migratory birds, certain marine mammals; habitats, resource contaminants; laboratory research facilities.

b. Geological Survey: Geology, hydrology (groundwater and surface), and natural hazards.

c. Bureau of Land Management: Minerals, soils, vegetation, wildlife, habitat, archeology, wilderness, hazardous materials, etc.

d. Minerals Management Service: Manned facilities for Outer Continental Shelf oversight.

e. Bureau of Mines: Analysis and identification of inorganic hazardous substances.

f. Office of Surface Mining: Coal mine wastes, land reclamation.

g. National Park Service: Biological and general natural resources expert personnel at Park units.

h. Bureau of Reclamation: Operation and maintenance of water projects in the west; engineering and hydrology; and reservoirs.

i. Bureau of Indian Affairs: Coordination of activities affecting Indian lands.

j. Office of Territorial Affairs: Assistance in implementing the National Contingency Plan in American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

9. The Department of Labor (DOL), through the Occupational Safety and Health Administration (OSHA), provides the OSC with advice, guidance, and assistance on:

a. Hazards to workers involved in removal or control of oil discharges and hazardous materials releases.

b. The precautions necessary to reduce risk to worker health and safety.

D. Responsibilities of Indian Nations

Indian tribes have sovereign governmental powers within federally recognized reservations. If resources are available they will respond to incidents that occur on their reservations. The tribes should familiarize themselves with this plan and make their plan consistent with state and local plans.

a. Confederated tribes

Warm Springs	Police Chief	553-1161
	BIA	553-1121
Umatilla	Police Chief	278-0550
	BIA	276-3811
Siletz		444-2679
		444-2532
		1-800-922-1399
Burns-Paiute		573-2088
		573-2793
Grand Ronde		879-5215
Cow Creek-Band of the Umpauas		672-9405
		839-4635
Coos Bay		267-5454
		267-4612
Chemawa Indian School		399-5721
		399-5755

E. Responsibilities of Adjacent States

The agencies responsible for hazardous material incidents in Idaho, Washington, Nevada and California are:

1. Washington

   a. Department of Ecology - lead state agency for spill response and cleanup. (206) 753-2353.

   b. Department of Emergency Management - lead agency for notification and coordination. (206) 753-5990.

Section V, (cont.)

2. Idaho

a. Division of Environment - lead state agency for coordination of spill response. (208) 334-5879.

b. Emergency Medical Services - lead agency for notification. 24 hour number: (800) 632-8000 in state or (208) 327-7422 out of state.

3. California

a. Office of Emergency Services - lead agency for notification and coordination. (800) - 852-7550 in state, (916) 427-4341 out of state.

b. California Highway Patrol - lead state agency for response to incidents on all freeways and state owned highways. (916) 445-2211.

4. Nevada

a. Division of Emergency Management - lead state agency for notification and coordination. 24 hour number (702) 687-5300. Day number (702) 687-4240.

b. Divisions of Environmental Protection - lead state agency for hazardous materials incidents (702) 687-5872, after hours through DEM as above.

F. Responsibilities of Industry

1. Title III Section 303 of SARA requires private industry to work with the state and local governments to plan for hazardous materials incidents that could occur at their facilities. Private industry is responsible for seeing that their emergency operations plans are consistent with this plan and with local plans. To facilitate this coordination, industry has sponsored local planning groups known as CAER (Community Awareness and Emergency Response) committees in a number of areas in the state.

2. Private industry is responsible for responding to emergencies as required by law unless otherwise directed by the government agency with jurisdiction to enforce the applicable law. Private industry is responsible for cleanup and site restoration when required by law.

Section V, Part F, (cont.)

3. When requested and if possible, private industry will provide expertise and resources to local and/or state government to help mitigate the effects of a hazardous materials incident. Private clean-up contractors can provide resources, equipment and knowledge on the removal and disposal of contamination.

G. Volunteer Organizations

Volunteer organizations such as Red Cross, the Salvation Army and Amateur Radio Operators can provide public assistance in the form of food, clothing, shelter and communications during incidents where the public welfare is affected. Refer to the County and Local Plans in PART II of this document for details on volunteer capabilities. Refer also to the individual plans of the volunteer agencies in their respective geographic area.

SECTION VI

Categorization of Emergencies by Severity

The following section categorizes oil and hazardous materials incidents by the severity of the threat to public health or the environment. Five types of emergencies are defined by increasing severity. The actual severity of an incident is dependent on the amount of material spilled, the location, the toxicity of that material and potential for exposure. Thus a spill involving thousands of gallons of a material with low toxicity could be a minor incident if it poses no public health or environmental threat. On the other hand, a small spill of an extremely toxic material, or a spill in a very sensitive location, could be a major incident if people are exposed or the environment is severely threatened.

The type and level of emergency response is dependent on the severity of the incident. These are described below. Section VII depicts the responsibilities of the various responders and the activities that must be performed during each of the 5 types of incidents.

Types of Incidents

A. Unusual Incident

An event which is out of the ordinary. No oil or hazardous materials are released. Public health and safety may be threatened.

Examples:

1. Mechanical breakdown of a vehicle carrying high-level radioactive shipment, Class A explosives or highly toxic materials requiring it to be parked at one location for a long period of time.

2. Fire at a facility storing or utilizing hazardous materials. The materials not initially involved in the fire.

3. Abandoned drums discovered, no release.

B. Minor Incident

An incident involving the spill or release of a small amount of oil or hazardous materials. Public health, safety and environment are not immediately threatened. A potential exists for the incident to escalate.

Examples:

1. Vehicle or fixed site incident with a small spill or release of oil or hazardous materials.

2. Discovery of abandoned oil or hazardous materials with a small spill or release of products.

3. Vehicle accident with a potential release of radioactive materials.

4. Fire or explosion involving small quantities of oil or hazardous materials.

C. Medium Incident

An incident resulting in a localized release of oil or hazardous materials (i.e. still on site). The health and safety of people and emergency workers in the immediate area may be threatened if protective actions are not taken. A probable environmental impact exists. It may involve activation of the Oregon Emergency Operations Plan.

Example:

1. Accident involving transport of oil or hazardous materials which results in release of substance to air, ground or water in amounts sufficient to pose threat to public health or the environment.

2. Package or container containing radioactive materials crushed or damaged during handling.

3. A fire or explosion at a facility which utilizes hazardous material.

4. An incident which results in a significant amount of uncontrolled radioactive material.

5. Discovery of abandoned oil or hazardous materials being released to environment and posing a threat to public health or the environment.

D. Major Incident

An incident resulting in a spill or release of oil or hazardous materials which requires evacuation or sheltering of nearby residents or businesses or which causes a serious environmental threat. It will probably involve activation of the Oregon Emergency Operations Plan.

Section VI, Part D (cont.)

Example:

1. Truck, rail or fire incident with radiologically contaminated smoke or toxic vapors.

2. Shipping accident resulting in a large release of oil or hazardous materials to a waterway.

3. Radioactive material directly involved in fire or explosion at a fixed facility, resulting in spread of material, or significant accidental exposure to radiation.

4. A fixed facility or transport incident resulting in a major release of toxic fumes to air or hazardous materials to public waters used for drinking water or important to fish and wildlife or other beneficial uses. Results in serious public health and/or environmental impacts.

E. Security Incident

Threatened or actual sabotage or demonstration of civil disobedience. Security events are further classified as follows:

1. Blockage of a shipment of hazardous materials.

2. Threatened or actual sabotage to the shipment.

SECTION VII

Appropriate Response Activities are dependent on:

*. The kind of response that is needed.

*. The number of agencies and levels of government that must respond.

*. The roles and responsibilities of those that do respond.

A minor incident may involve only local government emergency responders and a simple command organization. A major incident may involve many responders from different levels of government who can provide specialized expertise or resources. Such an incident requires a unified command structure. An incident may escalate into a major one or decrease to a minor one as more information becomes available about its severity.

The following section takes each of the 5 types of incidents and depicts the incident management structure and the typical roles and responsibilities of the various responders.

A. Typical Roles and Responsibilities

1. UNUSUAL INCIDENT

An event which could or does involve oil or hazardous materials. No materials are released but a potential public health and safety threat exists. The situation would normally be handled by local emergency response crews with standard emergency equipment. If the situation escalates, outside assistance might be needed.

Roles and Responsibilities

On Scene	Off Scene
RESPONSIBLE PARTY - Notifies 9-1-1 and OERS - Acts to resume normal operations	RESPONSIBLE PARTY - Acts to resume normal operations - Assesses risks
LOCAL AGENCIES - Assures public safety - Assists responsible party - Coordinates public information	LEAD STATE AGENCY(S) -Assists responsible party and provides technical if needed.

2. MEDIUM INCIDENT

An incident resulting in a localized spill or release of oil or hazardous materials (i.e., within several hundred feet). The health, and safety of people and emergency workers in the immediate area may be threatened if protective actions are not taken. A probable environmental impact exists. It may involve activation of the Oregon Emergency Operations Plan. The situation will require state technical assistance and a Regional Hazmat team which can provide specialized equipment and expertise.

Roles and Responsibilities

On Scene	Off Scene
FIRST PUBLIC SAFETY OFFICER	LOCAL EMERGENCY MANAGEMENT
- Notifies 9-1-1 and OERS - Assumes initial command	- Provides support to on scene operations
- Assesses the hazard - Activates local emergency response system - Initiates actions to protect the public	- Sets up EOC if necessary
LOCAL INCIDENT COMMANDER	RESPONSIBLE PARTY
- Assumes command upon arriving on scene - Responsible for: - rescue - emergency medical - fire suppression - security (traffic/crowd control)	- Provides operational support - Provides information about materials
- notifications - communications - on-scene liaison - public information - hazard determination - initial protective actions - decontamination control	LEAD STATE AGENCY - Provides technical support to incident commander if necessary - Coordinates with local agencies to provide public information - Coordinates with responsible party to assure cleanup - Contracts for cleanup if no responsible party
RESPONSIBLE PARTY	
- Notifies OERS and NRC as required - Provides support to Incident Commander - Cleans up or contracts for cleanup - Acts to resume normal operations	

3. MAJOR INCIDENT

An incident resulting in a spill or release of oil or hazardous materials that requires the evacuation or sheltering of nearby residents or businesses or that is a serious environmental threat. It will probably involve activation of the Oregon Emergency Operations Plan. The situation will require state technical assistance, a Regional Hazmat Team, and if needed, Federal assistance.

Roles and Responsibilities

On Scene	Off Scene
FIRST PUBLIC SAFETY OFFICER	LOCAL EMERGENCY MANAGEMENT
- Notifies 9-1-1	
- Assumes initial command	- Provides support to on scene operations
- Assesses the hazard	
- Activates local emergency response system	- Set up EOC if necessary
- Initiates actions to protect the public	RESPONSIBLE PARTY
LOCAL INCIDENT COMMANDERS	- Provides operational support to on-scene responders
	- Provides information about materials
- Assumes command upon arriving on scene	
- Responsible for: rescue emergency medical fire fighting	LEAD STATE AGENCY
	- Provides technical support to Incident Commander if necessary
security (traffic/crowd control)	- Coordinates with local agencies to provide public information
notification communications	- Coordinates with responsible party to assure cleanup
on-scene liaison public information hazard determination initial protective actions decontamination control	- Contracts for cleanup if no responsible party.
	STATE EMERGENCY MANAGEMENT
	- Provides support to on scene operations if needed
	- Activate state EOC if needed

RESPONSIBLE PARTY

- Notifies OERS and NRC (as required)
- Provides support to Incident Commander
- Clean up or contracts cleanup
- Acts to resume normal operations

LOCAL HOSPITAL

- Treats injured
- Maintain contamination control procedures

4. SECURITY INCIDENT

Threatened or actual sabotage incident or a civil disobedience or demonstration event are further classified as follows. The situation would normally involve local emergency response crews and law enforcement agencies.

Roles and Responsibilities

On Scene

LOCAL AND STATE LAW ENFORCEMENT

- Responsible for:
  notifications
  protection of shipment
  crowd and traffic control
  guidance for unnecessary delay
  liaison with shipper
  (defense related)

RESPONSIBLE PARTY

- Supports law enforcement

Off Scene

LEAD STATE AGENCY

- Provides technical assistance to law enforcement agencies about nature of shipment

Threatened or Actual Sabotage to Shipment or Material

LOCAL AND STATE LAW ENFORCEMENT

- Responsible for:
  notifications , (including OERS)
  protection of shipment
  investigation and arrests of saboteurs
  avoidance of unnecessary delay with federal law enforcement agencies

LOCAL INCIDENT COMMANDER

- Responsible for on-scene operations as necessary and possible
  Initiates emergency response plan

LEAD STATE AGENCY

- Technical assistance to on-scene operations
- Initiates state emergency response plan (if necessary)

PART B

Reserved space for:

County and City Title III Plans,
and any additional plan framework
needed to meet LEPC requirements.

copies of Title III plans are available
from the LEPC and can be requested
through the Office of State Fire Marshal

HAZARDOUS MATERIALS EMERGENCY RESPONSE SYSTEM
OAR 837-120-001 TO 837-120-140
APPENDIX B

HAZARDOUS MATERIALS EMERGENCY RESPONSE TEAM REGIONS AND CONTACTS

The map in this appendix is a general depiction, according to county boundaries, of the regions the response teams will serve. The exact boundaries between regions may vary from county boundaries according to fire district lines and/or by agreements made between adjacent regional teams. Agreements to align or realign regional boundaries that do not substantially alter response areas will be considered to be consistent with this map.

The team contacts and their phone numbers are:

HazMat Number	Team	Contact	Phone Number
1	Douglas/Coos	Bill Belding	679-8721
2	Eugene	Larry von Moos	341-5871
3	Gresham/Multnomah	Len Malmquist	669-2348
4	Klamath	Ken Gray	884-0489
5	Linn/Benton	Randy Shaw	755-6984
6	Portland	Bill Henle	248-2680
7	Redmond	Kent Barnes	548-5921
8	Southern Oregon	David Penicook	770-4453
9	Tualatin Valley	Dave Nelson	649-8577
10	Reserved		

HAZARDOUS MATERIALS DUTY OFFICE CONTACT

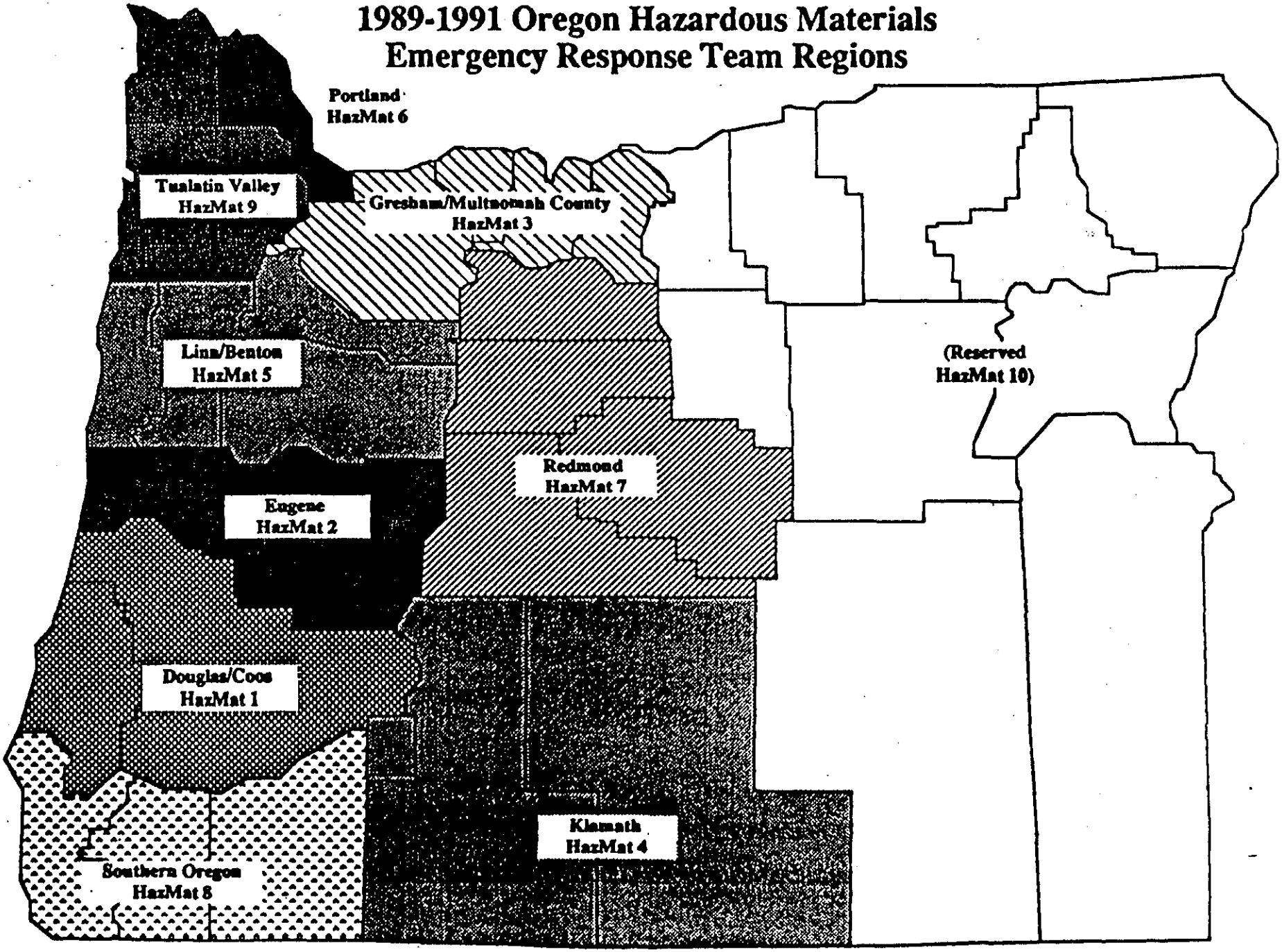
The Hazardous Materials Duty Officer will be contacted whenever there is a question of whether a team should respond. The contact numbers, in descending order of priority, are:

Mode	Number
Cellular Phone	931-5732
Personal Pager	370-1488
Personal Pager	370-3430
Office Phone (Weekdays 8:00 a.m. to 5:00 p.m.)	378-2885

RMR/ric

PLAN/HAZMAT/CORR
HR:OAR837-B

1989-1991 Oregon Hazardous Materials Emergency Response Team Regions



OHMERP, attachment (1)

(10) "Reportable quantity" means one of the following:

(a) A quantity designated by the commission under ORS 466.625.

(b) The lesser of:

(A) The quantity designated for hazardous substances by the United States Environmental Protection Agency pursuant to section 311 of the Federal Water Pollution Control Act, P.L. 92-500, as amended;

(B) The quantity designated for hazardous waste under ORS 466.005 to 466.385, 466.880 (1) and (2), 466.890 and 466.995 (1) and (2);

(C) Any quantity of radioactive material, radioactive substance or radioactive waste;

(D) If spilled into waters of the state, or escape into waters of the state is likely, any quantity of oil that would produce a visible oily slick, oily solids, or coat aquatic life, habitat or property with oil, but excluding normal discharges from properly operating marine engines; or

(E) If spilled on land, any quantity of oil over one barrel.

(c) Ten pounds unless otherwise designated by the commission under ORS 466.625.

(11) "Respond" or "response" means:

(a) Actions taken to monitor, assess and evaluate a spill or release or threatened spill or release of oil or hazardous material;

(b) First aid, rescue or medical services, and fire suppression; or

(c) Containment or other actions appropriate to prevent, minimize or mitigate damage to the public health, safety, welfare or the environment which may result from a spill or release or threatened spill or release if action is not taken.

(12) "Spill or release" means the discharge, deposit, injection, dumping, spilling, emitting, releasing, leaking or placing of any oil or hazardous material into the air or into or on any land or waters of the state, as defined in ORS 468.700, except as authorized by a permit issued under ORS chapter 454, 459, 468 or 469, ORS 466.005 to 466.385, 466.880 (1) and (2), 466.890 and 466.995 (1) and (2) or federal law or while being stored or used for its intended purpose.

(13) "Threatened spill or release" means oil or hazardous material is likely to escape or be carried into the air or into or on any land or waters of the state. [1985 c.733 §1; 1987 c.735 §26; 1989 c.6 §14]

466.610 Department authority relating to cleanup of oil or hazardous material. Subject to policy direction by the commission, the department may:

(1) Conduct and prepare independently or in cooperation with others, studies, investigations, research and programs pertaining to the containment, collection, removal or cleanup of oil and hazardous material.

(2) Advise, consult, participate and cooperate with other agencies of the state, political subdivisions, other states or the Federal Government, in respect to any proceedings and all matters pertaining to responses, remedial actions or cleanup of oil and hazardous material and financing of cleanup costs, including radioactive waste, materials and substances otherwise subject to ORS chapters 453 and 469.

(3) Employ personnel, including specialists, consultants and hearing officers, purchase materials and supplies and enter into contracts with public and private parties necessary to carry out the provisions of ORS 466.605 to 466.680, 466.880 (3) and (4) and 466.995 (3).

(4) Conduct and supervise educational programs about oil and hazardous material, including the preparation and distribution of information regarding the containment, collection, removal or cleanup of oil and hazardous material.

(5) Provide advisory technical consultation and services to units of local government and to state agencies.

(6) Develop and conduct demonstration programs in cooperation with units of local government.

(7) Perform all other acts necessary to carry out the duties, powers and responsibilities of the department under ORS 466.605 to 466.680, 466.880 (3) and (4) and 466.995 (3). [1985 c.733 §2]

466.615 Limit on commission and department authority over radioactive substances. Nothing in ORS 466.605 to 466.680, 466.880 (3) and (4) and 466.995 (3) is intended to grant the Environmental Quality Commission or the Department of Environmental Quality authority over any radioactive substance regulated by the Health Division under ORS chapter 453, or any radioactive material or waste regulated by the Department of Energy or Energy Facility Siting Council under ORS chapter 469. [1985 c.733 §3]

466.620 Emergency response plan. In accordance with the applicable provisions of ORS 183.310 to 183.550, the Environmental Quality Commission shall adopt an oil and hazardous material emergency response master plan consistent with the plan adopted by the Interagency Hazard Communications Council pursuant to the provisions of ORS 453.317 (1) to (6), 453.510, 453.825 and 453.835, and after consultation with the Interagency Hazard Communications Council, the Oregon

State Police, the Oregon Fire Chiefs Association and any other appropriate agency or organization. [1985 c.733 §4; 1989 c.833 §92]

466.625 Rulemaking. In accordance with applicable provisions of ORS 183.310 to 183.550, the commission may adopt rules including but not limited to:

(1) Provisions to establish that quantity of oil or hazardous material spilled or released which shall be reported under ORS 466.635. The commission may determine that one single quantity shall be the reportable quantity for any oil or hazardous material, regardless of the medium into which the oil or hazardous material is spilled or released.

(2) Establishing procedures for the issuance, modification and termination of permits, orders, collection of recoverable costs and filing of notifications.

(3) Any other provision consistent with the provisions of ORS 401.025, 466.605 to 466.680, 466.880 (3) and (4), 466.995 (3) and 468.070 that the commission considers necessary to carry out ORS 401.025, 466.605 to 466.680, 466.880 (3) and (4), 466.995 (3) and 468.070. [1985 c.733 §5]

466.630 Commission designation of substance as hazardous material. (1) By rule, the commission may designate as a hazardous material any element, compound, mixture, solution or substance which when spilled or released into the air or into or on any land or waters of the state may present a substantial danger to the public health, safety, welfare or the environment.

(2) Before designating a substance as hazardous material, the commission must find that the hazardous material, because of its quantity, concentration or physical or chemical characteristics may pose a present or future hazard to human health, safety, welfare or the environment when spilled or released. [1985 c.733 §6]

466.635 Report of spill or release of reportable quantity of hazardous material. Any person owning or having control over any oil or hazardous material who has knowledge of a spill or release shall immediately notify the Emergency Management Division as soon as that person knows the spill or release is a reportable quantity. [1985 c.733 §7]

466.640 Strict liability for spill or release; exceptions. Any person owning or having control over any oil or hazardous material spilled or released or threatening to spill or release shall be strictly liable without regard to fault for the spill or release or threatened spill or release. However, in any action to recover damages, the person shall be relieved from strict liability without regard to fault if the person can prove that the spill or release of oil or hazardous material was caused by:

(1) An act of war or sabotage or an act of God.

(2) Negligence on the part of the United States Government or the State of Oregon.

(3) An act or omission of a third party without regard to whether any such act or omission was or was not negligent. [1985 c.733 §8]

466.645 Cleanup; failure to complete cleanup. (1) Any person liable for a spill or release or threatened spill or release under ORS 466.640 shall immediately clean up the spill or release under the direction of the department. The department may require the responsible person to undertake such investigations, monitoring, surveys, testing and other information gathering as the department considers necessary or appropriate to:

(a) Identify the existence and extent of the spill or release;

(b) Identify the source and nature of oil or hazardous material involved; and

(c) Evaluate the extent of danger to the public health, safety, welfare or the environment.

(2) If any person liable under ORS 466.640 does not immediately commence and promptly and adequately complete the cleanup, the department may clean up, or contract for the cleanup of the spill or release or the threatened spill or release.

(3) Whenever the department is authorized to act under subsection (2) of this section, the department directly or by contract may undertake such investigations, monitoring, surveys, testing and other information gathering as it may deem appropriate to identify the existence and extent of the spill or release, the source and nature of oil or hazardous material involved and the extent of danger to the public health, safety, welfare or the environment. In addition, the department directly or by contract may undertake such planning, fiscal, economic, engineering and other studies and investigations it may deem appropriate to plan and direct clean up actions, to recover the costs thereof and legal costs and to enforce the provisions of ORS 466.605 to 466.680. [1985 c.733 §9; 1987 c.158 §89]

466.650 [1985 c.733 §10; repealed by 1987 c.735 §27]

466.653 [1987 c.539 §42; repealed by 1989 c.833 §175]

466.655 [1985 c.733 §11; repealed by 1987 c.735 §27]

466.660 [1985 c.733 §12; 1987 c.158 §90; repealed by 1989 c.833 §175]

466.665 [1985 c.733 §13; 1987 c.158 §91; repealed by 1989 c.833 §175]

EQC meeting 3/12/92
Agenda Item G
Attachment C

HISTORY OF THE PLAN

The revised Oil and Hazardous Materials Emergency Response Plan (OHMERP) will be only one part in a set of plans maintained by the Executive Department's Emergency Management Division (EMD). The set, called the Emergency Operations Plan, contains numerous disaster specific sub-plans. The existing plan for hazardous materials and oil spills is Annex-O to this state plan.

This type of planning dates back over twenty years. Chemical hazard plans were developed by the State Advisory Committee on Synthetic Chemicals with direction from the governor in 1970.

Additional Executive Orders created the Oregon Accident Response System (OARS), predecessor to the current Oregon Emergency Response System (OERS). It consisted of representatives of state agencies acting in coordination during incidents. By 1979 OERS had developed and distributed a plan.

Early emergency plans evolved into the annex-o of the Oregon Emergency Operations Plan in 1984. The Environmental Quality Commission was directed by the 1985 legislature in ORS 466.620 to review and approve the plan. The Commission approved the current plan on January 23, 1987.

Important improvements in the 1987 over previous plans included clarification of agency roles, and information about how to best use the plan. One of the issues addressed by Annex-O was the need for proper training of emergency responders. This need has been focused on by the Office of the State Fire Marshal (OSFM). The OSFM received authority from the 1989 legislature to establish a network of Hazardous Materials Response Teams (Haz-Mat Teams). This network is nearly complete. The potential of the teams to improve Oregon's ability to resolve emergencies is significant.

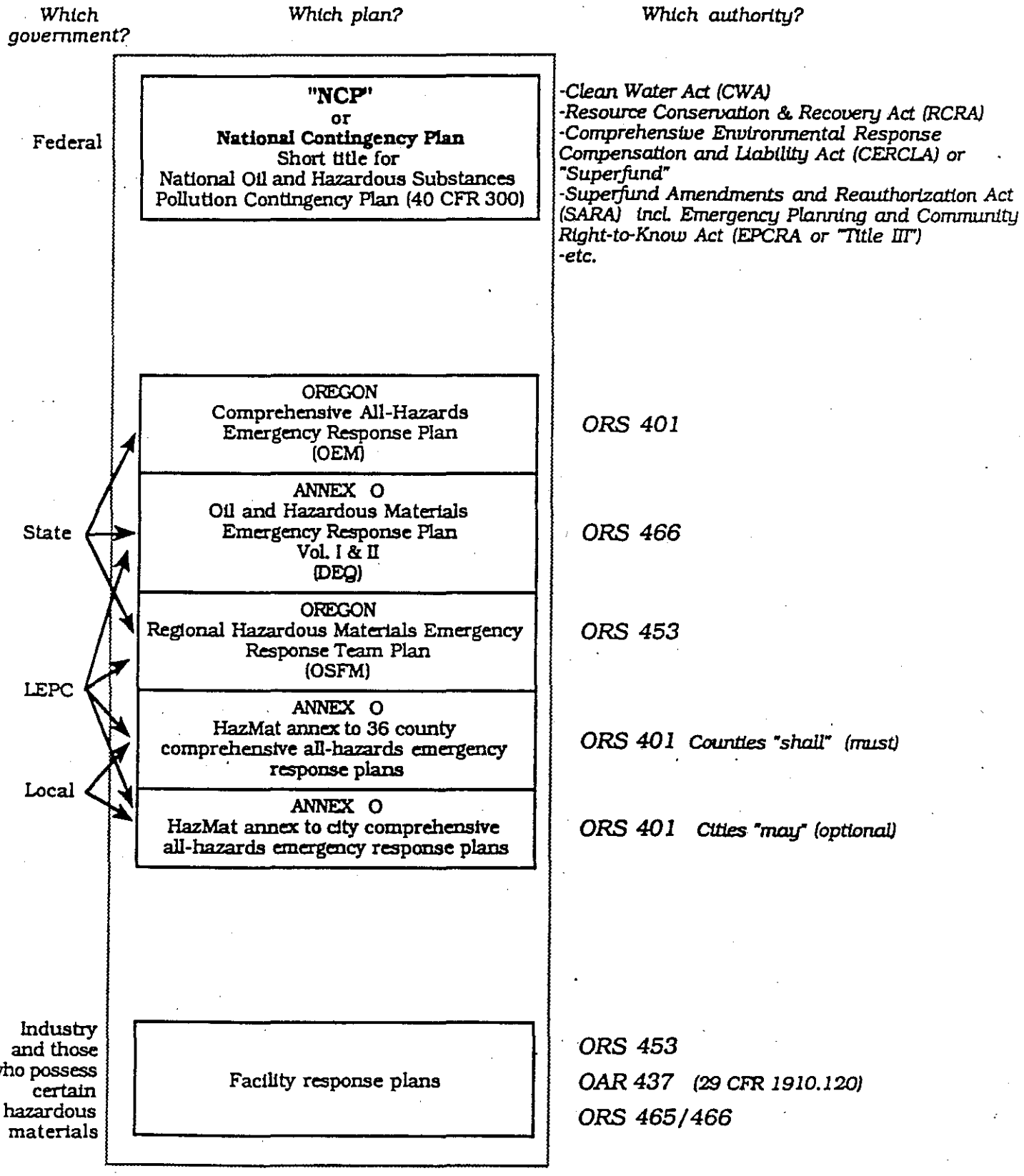
The 1992 revision of the Oil and Hazardous Materials Emergency Response Plan recognizes the need to have the OSFM directly involved in the dispatch and control of these teams. The Department of Environmental Quality's (DEQ) position as lead agency has been replaced in situations where OSFM would be more effective. Concurrence that the revised plan meets the needs of Oregon has been accomplished by involving many of the affected organizations in the updating process, including all of those specified in ORS 466.620.

The revised OHMERP, expected to replace Annex-O, will not be the last update. Federal guidance on emergency planning requires periodic revision and updating.

EQC 3/12/92 meeting
agenda G
attachment D

Hazardous Materials Emergency Response Plans

(all plans to be coordinated)



August 6, 1991
VLH/BMW/HMTΩ-D91.036a

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

REQUEST FOR EQC ACTION

Meeting Date: March 12, 1992
Agenda Item: H
Division: Water Quality
Section: Municipal Projects

SUBJECT:

Yaquina John Point Health Hazard Area Annexation (City of Waldport): Request for Approval of Preliminary Plans, Specifications and Schedule for the Provision of Facilities Necessary for the Removal of Conditions Dangerous to the Public Health.

PURPOSE:

In accordance with the Health Hazard Abatement Law (ORS 222.840 to 222.915), Environmental Quality Commission (EQC) approval of the Preliminary Plans, Specifications and Schedule submitted by the City of Waldport is required before the City may proceed with annexation of the area and installation of sewage collection facilities that will replace failing individual on-site sewage disposal systems.

ACTION REQUESTED:

___ Work Session Discussion
- ___ General Program Background
- ___ Potential Strategy, Policy, or Rules
- ___ Agenda Item ___ for Current Meeting
- ___ Other: (specify)

___ Authorize Rulemaking Hearing
___ Adopt Rules

Proposed Rules	Attachment ___
Rulemaking Statements	Attachment ___
Fiscal and Economic Impact Statement	Attachment ___
Public Notice	Attachment ___

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

___ Issue a Contested Case Order
___ Approve a Stipulated Order
___ Enter an Order
Proposed Order — Attachment ___

_X_ Approve Department Recommendation
___ Variance Request — Attachment ___
___ Exception to Rule — Attachment ___
___ Informational Report — Attachment ___
_X_ Other: Approve the Preliminary Plans, Specifications and Schedule, and authorize the Chairman to execute the attached Certificate on behalf of the EQC. — Attachment A

DESCRIPTION OF REQUESTED ACTION:

The Department of Environmental Quality (Department) requests that the EQC adopt the following motion:

> The Environmental Quality Commission hereby approves the Preliminary Plans, Specification and Schedule submitted by the City of Waldport for the provision of sewage collection facilities needed to remove conditions that constitute a danger to public health in the Yaquina John Point area. The Commission authorizes the Chairman to execute the attached Certificate on its behalf. (Attachment A)

AUTHORITY/NEED FOR ACTION:

_X_ Required by Statute: ORS 222.840 to 222.915 — Attachment ___
Enactment Date: 1983
___ Statutory Authority: _____ — Attachment ___
___ Pursuant to Rule: _____ — Attachment ___
___ Pursuant to Federal Law/Rule: _____ — Attachment ___

___ Other: — Attachment ___

_X_ Time Constraints:
The above cited statute requires the EQC to review and approve or disapprove the City's submittal within 60 days of receipt.

DEVELOPMENTAL BACKGROUND:

___ Advisory Committee Report/Recommendation — Attachment ___
___ Hearing Officer's Report/Recommendations — Attachment ___
___ Response to Testimony/Comments — Attachment ___

___ Prior EQC Agenda Items: (list) Attachment ___
_X_ Other Related Reports/Rules/Statutes: Attachment _B_
Oregon Health Division Findings and Order
___ Supplemental Background Information Attachment ___

On November 7, 1991, the State of Oregon Health Division found that a danger to public health exists in the Yaquina John Point area adjacent to the City of Waldport, Lincoln County, due to inadequate individual on-site sewage disposal systems. The Health Division has ordered that, in accordance with the Health Hazard Abatement Law, appropriate steps be taken to remove the health hazard conditions. (Attachment B)

The subject area is contiguous to the south westerly part of Waldport and within the Urban Growth Boundary. (See location map, Attachment C). It is roughly seven acres in area and includes approximately 37 dwellings and several small commercial facilities.

At present, all sewage treatment and disposal in the area is by means of individual on-site subsurface disposal facilities, primarily septic tanks and drain fields.

In December of 1989, a sanitary survey was conducted in the area by Health Division and Lincoln County personnel. Inadequately treated sewage was detected standing on the ground over drain fields, flowing in ditches and culverts, seeping from the cliff face that runs along the west side of the area, and collecting in pools of standing water on the ocean beach at the base of the cliff. These pools have been posted by the County. In some instances, sewage from dwellings at the top of the cliff is piped directly over the edge.

Subsequent to the declaration of a health hazard by the Health Division in November, 1991, the City, as required by the Law, has prepared Preliminary Plans, Specifications and Schedule for the provision of facilities needed to remove the health hazard conditions. These were submitted to the EQC on February 3, 1992. Within 60 days of receipt of the documents, the EQC must determine if the proposed facilities are adequate to remove the health hazard conditions. If the EQC approves the proposed facilities, the City must then proceed to annex the area and build the project. If the proposed facilities are determined to be inadequate, the City must revise its proposal and resubmit.

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

Department staff believes that the need for sewers to remove the health hazard is widely recognized in the Waldport community. The existence of a posted area of contaminated water on a public ocean beach in a town where tourism is important is perceived to be highly undesirable.

The City Council has acted expeditiously to secure consulting services and have the required documents prepared and submitted on a timely basis. The Council has also acted to secure a State Revolving Fund loan for the project.

PROGRAM CONSIDERATIONS:

Subsequent to EQC approval of the City's proposal, Department staff will continue to be involved with this project in the review of Final Plans and Specifications for bidding, inspection of construction, and finalization of an SRF loan agreement.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

Under the Health Hazard Abatement Law, the EQC may choose between two alternatives when Preliminary Plans, Specifications and Schedule for the provision of facilities for removal of a health hazard have been submitted for review:

1. Approve the proposed facilities and time schedule based on a determination that they are adequate to remove the health hazard conditions. The City would then proceed with annexation and construction.

2. Disapprove the proposed facilities and time schedule based on a determination that they are inadequate to remove the health hazard conditions; inform the City of the deficiencies in the proposal that are the basis of disapproval. The City must then submit a revised proposal.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department recommends alternative one, approval of the City of Waldport's proposal.

The proposed facilities consist of gravity collection sewers that will provide sewer access to all property within the health hazard area; a small pump station; and a force main to convey sewage to the existing Waldport collection system.

The estimated cost of the facilities is $270,000. Attachment D is a schematic drawing of the proposed facilities. The Department has reviewed preliminary detailed engineering plans for the facilities.

The Department has concluded from the Health Division findings that the existing on-site septic systems in the health hazard area do not provide for adequate treatment and disposal of sewage principally because of soil and geologic conditions. The Department has determined that installation of a sewage collection system and conveyance to the existing Waldport facilities will remove the health hazard conditions. The proposed facilities are deemed to be suitable to fulfill the intended purpose.

The Preliminary Schedule proposed by the City is as follows:

EQC Approval	March 12, 1992
Adopt Annexation Ordinance	March 26, 1992
Complete Formation of Local Improvement District and Local Financing	April 15, 1992
DEQ Approval of Final Plans and Specifications for Bidding	April 15, 1992
Award Contracts	May 29, 1992
Complete Construction	September 15, 1992
Complete Private Sewer Connections	November 15, 1992

The Department considers the above to be an appropriate and realistic schedule.

It should be noted that sewage flows from the health hazard area, along with 80 percent of the total Waldport system flows, will reach the sewage treatment plant through a main pump station (Grade School Pump Station) which presently bypasses raw sewage into Lint Slough (arm of Alsea Bay) periodically during high storm flow conditions.

Adding additional sewage flows to an already over taxed pump station is generally not desirable. However, the Department believes in this case it is preferable in order to eliminate unhealthful conditions in a residential area and on a public beach as soon as possible.

Moreover, on October 3, 1991, the Department executed a Stipulation and Final Order with Waldport requiring the City to eliminate raw sewage bypasses and meet discharge permit limits by November 1, 1993. The City has just completed a facilities plan for improvements needed to meet these requirements.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

The City of Waldport's proposal, and EQC approval thereof, are consistent with agency (Strategic Goal number two) and legislative policy (Health Hazard Abatement Law) pertaining to water quality and health hazard abatement.

ISSUES FOR COMMISSION TO RESOLVE:

Should the EQC approve the Preliminary Plans, Specifications and Schedule submitted by the City of Waldport based on a determination that the proposed facilities will remove the conditions that constitute a danger to public health in the Yaquina John Point area?

INTENDED FOLLOWUP ACTIONS:

In the event that the EQC approves the City's submittal, assist the City and monitor progress to assure successful implementation of the project.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By: Richard J. Santner

Phone: 229-5219

Date Prepared: February 7, 1992

Richard J. Santner
MW\WC9\WC9629
2-10-92

ATTACHMENT A

STATE OF OREGON

ENVIRONMENTAL QUALITY COMMISSION

In the Matter of the Proposed Annexation of a Certain Territory Commonly Known as the Yaquina John Point Area to the City of Waldport, Lincoln County, Oregon, Pursuant to the Provisions of ORS 222.840 to 222.915 Due to Conditions Causing a Danger to the Public Health	)))))))	CERTIFICATE

The Environmental Quality Commission of the State of Oregon on February 3, 1992 received preliminary plans, specifications and time schedule for the provision of sanitary collection sewers in a certain territory commonly known as the Yaquina John Point Area contiguous to the City of Waldport, pursuant to ORS 222.897.

Pursuant to ORS 222.898 the Environmental Quality Commission has reviewed and hereby approves said preliminary plans, specifications and time schedule, and does hereby certify to the City that it considers the proposed facilities and time schedule for installation of such facilities adequate to remove conditions dangerous to the public health in said territory.

Dated this 12th day of March, 1992.

_____

William W. Wessinger, Chairman
Environmental Quality Commission

BEFORE THE STATE HEALTH DIVISION

OF THE DEPARTMENT OF HUMAN RESOURCES

OF THE STATE OF OREGON

In the Matter of the Proposed Annexation of a Certain Territory Commonly known as the Yaquina John Point area to the City of Waldport, Lincoln County, Oregon, Pursuant to the Provisions of ORS 222.840 to 222.915 -Due to Conditions Causing a Danger to Public Health	))))))	ASSISTANT DIRECTOR'S FINDINGS OF FACT, ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing on the issue of the existence of a danger to public health in the above-entitled matter was held on October 10, 1990, in the City Council chamber at the Waldport Fire Hall, 125 Alsea Highway, Waldport, Oregon, a place near the proposed area to be annexed, before Samuel J.Nicholls, the hearings officer appointed by the Health Division. The hearing was held pursuant to a Resolution from the Lincoln County Board of Commissioners, acting as the Board of Health (attached as Exhibit C). The hearings officer considered all the evidence presented by the Division and affected persons and made his Findings of Fact, Conclusions of Law and Recommendations. Opportunity for arguments in opposition to the Findings and Recommendations of the hearings officer was thereafter given by publication of notice as prescribed by rules of the Division. After submission of affidavits and memorandum in support of and against the Findings and Recommendations, a hearing was held on April 26, 1991. The Administrator of the Health Division subsequently adopted the Amended Findings of Fact and Conclusions of Law and Recommendations of the hearings officer.

Opportunity to petition for exclusion of property from the area proposed for annexation was subsequently given by publication

of a notice as prescribed by the rules of the Division. Petitions were received for exclusion of seven parcels from the area proposed for annexation. Upon publication of the appropriate notice, a hearing was held on September 5, 1991 at the aforementioned Waldport Fire Hall to receive evidence for and against the exclusion of the seven parcels from the annexed area. Samuel J. Nicholls was appointed as the hearings officer by the Health Division. Following the hearing, the hearings officer received notice from four of the aforementioned petitioners that they wished to withdraw their petitions for exclusion. The hearings officer subsequently issued his Findings of Fact, Conclusions of Law and Recommendations.

The Assistant Director having considered the Findings of Fact, Conclusions of Law and Recommendations of the appointed hearings officer, now makes the following disposition of this matter:

FINDINGS OF FACT

1. The Amended Findings of Fact, Conclusions of Law and Recommendations of the hearings officer submitted after the April 26, 1991 hearing are hereby adopted and approved. They are attached hereto as Exhibit B and are by this reference incorporated herein.

2. The Findings of Fact, Conclusions of Law and Recommendations of the hearings officer submitted after the exclusion hearing on September 5, 1991 are hereby adopted and approved. They are attached hereto as Exhibit A and are by this reference incorporated herein.

B-2

///

ULTIMATE FINDINGS OF FACT

1. The improper and inadequate installations for the disposal or treatment of sewage or other contaminated or putrefying wastes, as described in paragraph 1 above, constitute conditions which are conducive to the propagation of communicable or contagious disease producing organisms and which represent a reasonably clear possibility that the public generally is being exposed to disease caused physical suffering or illness.

2. The area proposed for annexation as described in paragraph 1 above, is contiguous to the City of Waldport and is within the urban growth boundary of the city.

CONCLUSIONS OF LAW

A danger to public health as defined in ORS 222.850 to 222.915 exists within the territory described in the Ultimate Findings of Fact #2 above. Such area is otherwise eligible for annexation to the City of Waldport, Oregon, in accordance with ORS 222.111 and is within the urban growth boundary of the City of Waldport, Oregon.

ORDER

IT IS ORDERED that a certified copy of these Findings and Conclusions be filed with the City of Waldport, Oregon, and with the Environmental Quality Commission, and that upon their receipt of such Findings and Conclusions, the City of Waldport and the Commission proceed in accordance with ORS 222.897 and 222.900 and

///

///

///

///

B-3

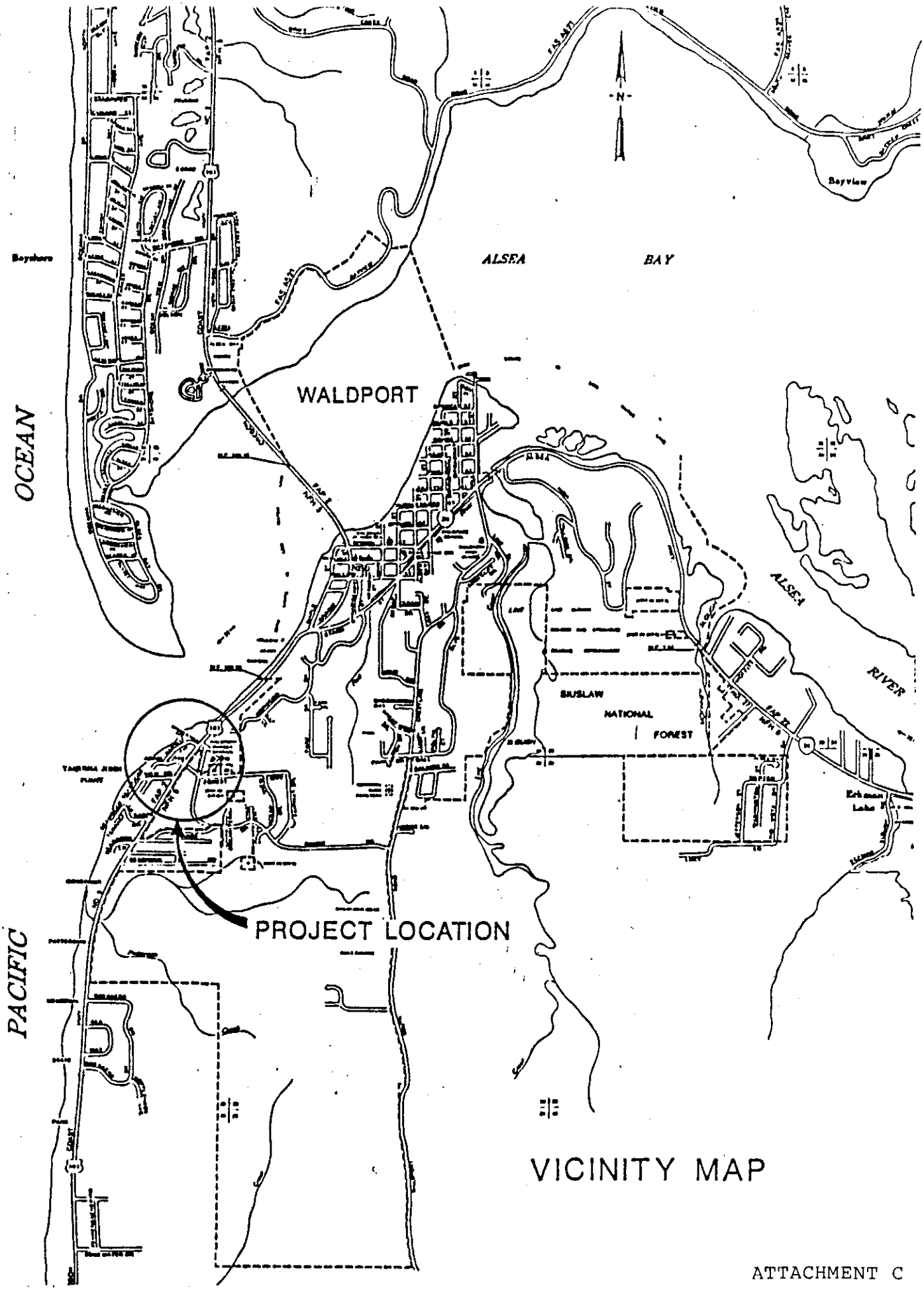
this Order to annex the territory described in Exhibit C.

DATED this ____ day of November, 1991.

Michael R. Skeels
Assistant Director, Health Division

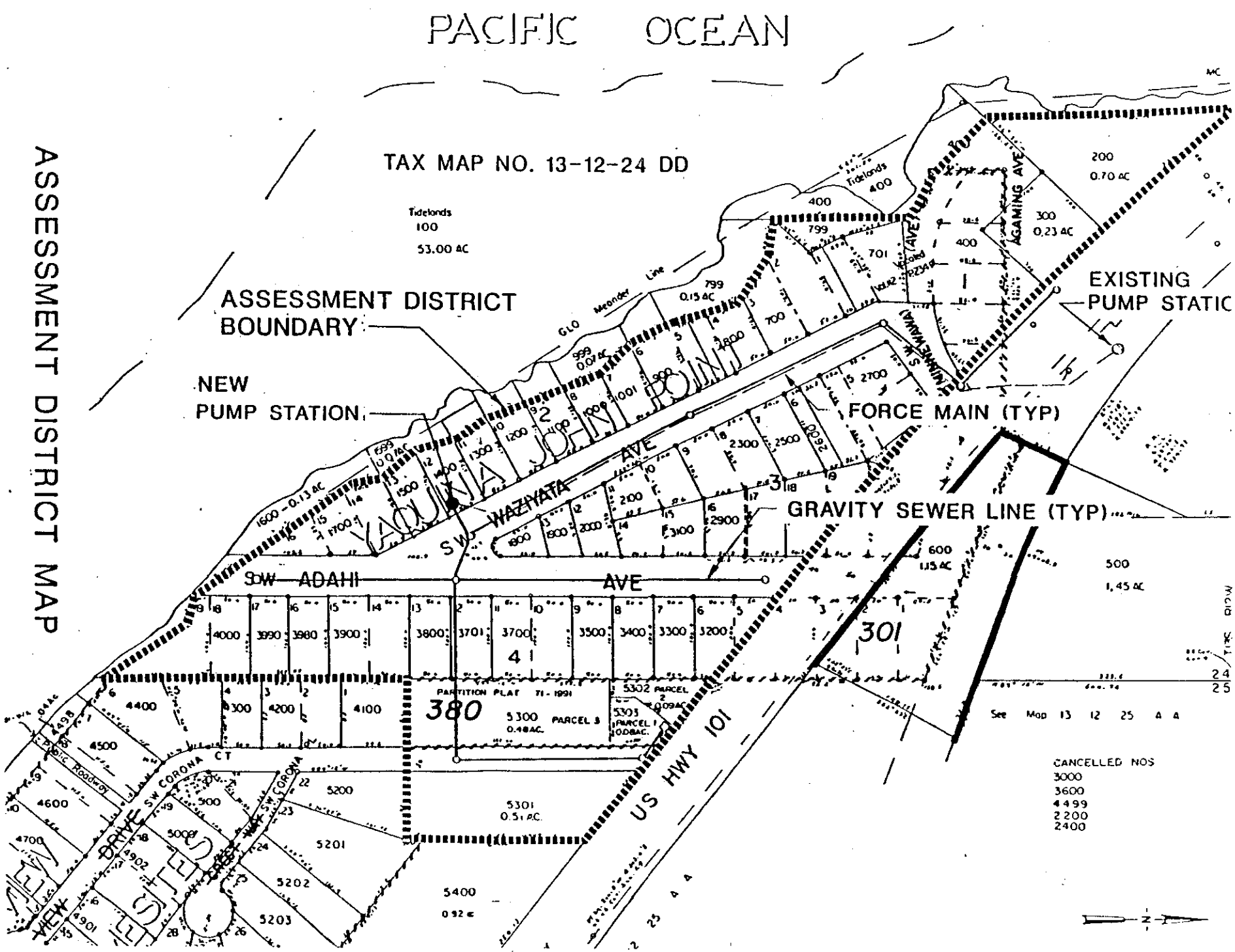
NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review is pursuant to the provisions of ORS 183.482.

B-4



VICINITY MAP

ATTACHMENT C



ATTACHMENT D

ALBRIGHT & KITTELL, P.C.
Attorneys at Law

CHRISTOPHER M. KITTELL
LOIS A. ALBRIGHT

2308 Third Street
P.O. Box 939
TILLAMOOK, OREGON 97141
Telephone (503) 842-6633
Facsimile (503) 842-4540

March 10, 1992

Harold Sawyer
Department of Environmental Quality
811 SW Sixth Street
Portland, OR 97204-1334

FACSIMILE TRANSMISSION
No. 229-6124

Re: Twin Rocks Sanitary District v. Newkirk

Dear Mr. Sawyer:

Pursuant to our telephone conversation of March 9, 1992, I have made inquiries to the Twin Rocks Sanitary District as to whether or not they have received any written or oral notices or letters of complaint from Mr. Newkirk regarding sewage backup into his residence or property located in the District. Since the time of Mr. Newkirk's previous lawsuit being finalized in 1989, the District has received one tort claims notice filed by Mr. Newkirk dated February 24, 1991 for an incident which allegedly occurred on September 1, 1990. This was allegedly a sewage backup out of the manhole in the front of Mr. Newkirk's property. I am enclosing a copy of the letter which I sent to Mr. Pike, the attorney for Mr. Newkirk at that time. The District investigated this particular incident and found no signs of any damage or loss or sewage overflow occurring on the property. I also gave Mr. Newkirk various telephone numbers so that if any future backups occurred that he could promptly contact the District. One of the concerns in the previous lawsuit was that Mr. Newkirk never reported any of the incidents to the District and never had a camera at the ready and therefore all of the alleged incidents were noted only by his memory and there was little or no independent verification. No other claims have been reported to the District.

If you have any additional information noting any other potential claims against the District, please forward that

information as soon as possible. At this time, the September 1, 1990 incident is the only one that we are aware for which Mr. Newkirk is claiming any damage.

Sincerely,

ALBRIGHT AND KITTELL, P.C.

Lois A. Albright

LA/als
Encs.
cc: Twin Rocks Sanitary District

ALBRIGHT & KITTELL, P.C.

Attorneys at Law

CHRISTOPHER M. KITTELL
LOIS A. ALBRIGHT

2308 Third Street
P. O. Box 939
TILLAMOOK, OREGON 97141
Telephone (503) 842-6633

March 26, 1991

Alexis Risk Management Services
1500 SW First Avenue, No. 900
Portland, OR 97201

Re: Insured Twin Rocks Sanitary District
Claimant Gary Newkirk

To Whom It May Concern:

Please find enclosed the tort claim notice which we received from Mr. Newkirk dated March 1, 1991 alleging a sewer backup onto his property on September 1, 1990. Please feel free to contact the sewer district directly regarding any information you need to process this claim. We obviously feel that it has absolutely no merit.

Sincerely,

ALBRIGHT AND KITTELL, P.C.

Lois A. Albright

LA/als
Enc.
cc: Twin Rocks Sanitary District

CLIENT COPY:
3/26/91

FEB 2 8 1991

Gary E. Newkirk
2234 SE 53rd Ave.
Portland, OR 97215
February 24, 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Board of Directors
Twin Rocks Sanitary District
P. O. Box 69
Rockaway, OR 97136

SUBJECT: Tort Claim Notice

Board of Directors:

Please be advised that I hereby put you on notice that I may be taking legal action against the Twin Rocks Sanitary District, its employees and Board of Directors for damages to my property at 15280 Lakeside Drive, Barview Oregon.

On September 1, 1990 I discovered that raw sewage had again backed up and overflowed from your main sewer line's manhole in front of my property. The cost of repairing all sewer damage to my property is estimated at over $50,000.00 and this figure does not include lost rents and loss of use of the property.

This letter also confirms that upon discovering the raw sewer overflow I personally contacted both Mr. Hulbert and Mr. McCormick of the Twin Rocks Sanitary District. Both of these sewer district officials inspected the backup in my presence on September 1, 1990. I also have other witnesses and detailed photographs of this latest known raw sewage overflow onto my property.

It is my belief that the Twin Rocks Sanitary District is responsible for the damages done to my property.

Please be advised that if a satisfactory settlement can not be reached, I shall bring suit for damages or for Inverse Condemnation. I make this demand for purposes of settlement only, and not as an admission of any kind. I reserve the right to amend my claim at a latter date.

Sincerely yours,

Gary E. Newkirk

RECEIVED
MAR 0 1 1991
ALBRIGHT & MITELL, P.C.

ALBRIGHT & KITTELL, P.C.
Attorneys at Law

CHRISTOPHER M. KITTELL
LOIS A. ALBRIGHT

March 22, 1990

2308 Third Street
P. O. Box 939
TILLAMOOK, OREGON 97141
Telephone (503) 842-6633

Robert Pike
Attorney at Law
610 S.W. Alder Street, Ste. 1010
Portland, OR 97205-3606

Re: Newkirk v. Twin Rocks Sanitary District
Tillamook County Case No. 87-2029

Dear Mr. Pike:

I am forwarding this letter to you on behalf of Mr. Newkirk. Mr. Newkirk has been corresponding directly with the Twin Rocks Sanitary District. However, since he has now filed a tort claim notice and since you have not withdrawn as attorney in Tillamook County Circuit Court Case No. 87-2029, I believe I must direct this letter to you as his legal representative.

On January 22, 1990 Mr. Newkirk forwarded a letter to the Twin Rocks Sanitary District outlining his concerns regarding the installation of the pump station on his property. I have enclosed a copy of this letter for your reference. The District referred this matter to Colin Handforth to physically view the area and make a report on it. I am enclosing the report from Mr. Handforth dated February 22, 1990. At a meeting in March, 1990, the Board of Directors adopted the recommendations set forth in Colin Handforth. I believe most if not all of the recommendations have already been completed.

The District then received a letter from Mr. Newkirk directed to the Department of Environmental Quality dated February 10, 1990. Pursuant to this letter, both the District and DEQ viewed Mr. Newkirk's property and found no evidence of sewage backup. Mr. Bekebrede indicates that at the time the District was pressure cleaning the sewer line in front of his residence he experienced sewage backup. Mr. Bekebrede believes that any overflow out of the manhole on Mr. Newkirk's property happened at the same time. Mr. Bekebrede requested that the sewer discontinue its efforts which it did do at that time.

CLIENT COPY
3/28/90

Mr. Bekebrede has no indication that there have been any other occurrences other than the one I have relayed to you. I am enclosing a copy of the DEQ letter for your reference.

I find it curious that Mr. Newkirk dragged his feet throughout the summer in getting the pump station installed. And then, when he had knowledge that there had been a backup, he did not contact the Sewer District and, apparently did not contact you as well. Since September 2, 1989, there have been numerous correspondence between the parties involving the installation of the pump station, granting of various easements and discussion as to various court modification orders. At no time, have I ever received notice from you that there was a backup of sewage onto Mr. Newkirk's property.

It is then with great suprise on February 26, 1990, fully 5 months after the discovery by Mr. Newkirk, that I received a copy of the tort claim notice which Mr. Newkirk has filed for damages for a raw sewage overflow that occurred on his property. Apparently there was no damage to the inside of his house as he has not alleged that in any of his correspondence and did not indicate any type of damage to Mr. Brekebede. Quite frankly, I think that Mr. Newkirk is, if not entirely at fault, substantially contributorily negligent in not putting his best efforts together to resolve this matter so that the pump station could have been installed by July 1, 1990.

At the time that the District and DEQ inspected the property, there was no evidence of any sewage backup. I do not believe that Mr. Newkirk has suffered any damage from any alleged manhole backup onto his real property. If you have any documentation otherwise, please forward it to me as soon as possible. In light of the facts available to me, the District will not pay any damages to Mr. Newkirk for the alleged backup incident.

In addition, you should be aware that Mr. Newkirk does have the burden of proof as to any sewage backups. I would recommend that he take pictures promptly at the time that he finds any sewage backup and that he contact the District immediately. The District's telephone number

is 355-2732. If no one is available at the District office, the following people to contact are:

Martin McCormick	322-0337	
Robert Kellogg	355-8049	
Ted Hulbert	355-2310	(W)
	355-2159	(H)

Mr. Newkirk is hereby instructed that a phone call must be made to any of the above people so that the District can make a prompt inspection of any type of alleged damage to Mr. Newkirk's property.

Quite frankly, the District has bent over backwards to try to accommodate all Mr. Newkirk's concerns. However, when Mr. Newkirk is not even straightforward in providing the information that he has had an alleged sewer backup in September and does not provide that information until February 26, 1990, just days before his 180-day tort claims notice time limit expires, I find his motivations highly suspect and the factual basis of his claim quite suspect.

If you are no longer representing Mr. Newkirk, I would appreciate it if you would file a Withdrawal of Attorney and would forward this letter on to Mr. Newkirk for his consideration.

ALBRICHT AND KITTELL, P.C.

Lois A. Albright

LA/sl

cc: Twin Rocks Sanitary District
Colin Handforth

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

March 10, 1992

Gary E. Newkirk
2234 S. E. 53rd Ave.
Portland, OR 97215

Dear Mr. Newkirk:

Thank you for your March 2, 1992, letter requesting time for a presentation to the Environmental Quality Commission during the scheduled public forum at 10:30 a.m. on March 12, 1992.

We have a very full agenda for the March 12 meeting, and anticipate several people appearing during the public forum. I will plan to give you ten minutes for your presentation. If more time is needed, it will have to be at the end of the meeting.

I would appreciate it if you would share your concern prior to the meeting with Lydia Taylor, Administrator of the Water Quality Division; telephone 229-5324. This will help us in being responsive to your concern.

Sincerely,

William W. Wessinger

William W. Wessinger
Chair

WWW:l

cc: Water Quality Division

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

RECEIVED
MAR - 6 1992

OFFICE OF THE DIRECTOR

Gary E. Newkirk
2234 SE 53rd Ave.
Portland, OR 97215
March 2, 1991

Mr. William Wessinger
Chairman, Environmental Quality Commission
% Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204

SUBJECT: Request for 15 minutes time,
Public Forum
10:30 A.M., March 12, 1992

Dear Mr. Wessinger:

I wish to update the E.Q.C. on the eleventh (11th) and latest flooding of my property at Barview Oregon with over 100,000 gallons of raw sewage by the Twin Rocks Sanitary District.

This information can not be presented in the five minutes allocated.

Please confirm that I shall be allowed the requested 15 minutes and that this time will be reserved for the Public Forum period which starts at 10:30 A.M.

Your consideration and assistance in this matter is appreciated.

Sincerely,

Gary Newkirk

Gary E. Newkirk
2234 SE 53rd Ave.
Portland, OR 97215
December 29, 1990

Department of Environmental Quality
State of Oregon
811 SW Sixth Ave.
Portland, OR 97204

SUBJECT: Raw Sewage Overflow
Reported September 1, 1990
Twin Rocks Sanitary District System
File No. 90578

To Whom It May Concern:

I last reported a raw sewage overflow at my property at 15280 Lakeside Drive, Barview Oregon to DEQ on February 10, 1990. I had observed an overflow from the nearest sewer manhole on September 2, 1989. This was reported to the Twin Rocks Sanitary System. The Twin Rocks Sanitary System again failed to report this incident to DEQ as required by law, their operating permits from DEQ and numerous specific instructions from DEQ to so report overflows.

After the September 2, 1989 raw sewage backup, I wanted some method to help me better evaluate the continued raw sewage overflows. The only practical method that I came up with worked very well. In the depression next to the manhole, I spread a layer of clean, white sand. Thus any future overflows would be easily distinguished from the previous ones and measured independently. This worked very successfully.

I arrived at my Barview property on September 1, 1990 and immediately observed a thick coating of dried raw sewage over the sand.

I immediately contacted Mr. Hulbert, Chairman of the Twin Rocks Sewer District and Mr. McCormick, in charge of their maintenance. At my insistence both came out to personally inspect the raw sewage overflow.

The Sewer District Engineer, Mr. Pearly, had testifed at trial that the raw sewage was over ninety nine percent (99%) water and less than one percent (1%) suspended solids. Using this formula there would have had to have been between thirty (30,000) and thirty five thousand (35,000) gallons of raw sewage overflow this area. But the raw sewage flowed into this low area and

then out, across the gravel driveway and onto a very wide area of the front lawn. Since this raw sewage was flowing and not staying still and settling, it is my estimate that only a small part of the one percent settled in the area I covered with clean sand. Thus it is my opinion that well over one hundred thousand (100,000) gallons of raw sewage overflowed onto my property over an unknown number of times during this period.

When I inspected the file on the Twin Rocks Sanitary District at DEQ, there was no record of a raw sewage overflow being reported. I can be contacted at the above listed address for additional information.

Sincerely yours,

Gary Newkirk

Gary E. Newkirk
2234 SE 53rd Ave.
Portland, OR 97215
April 17, 1990

Environmental Quality Commission
State of Oregon
811 SW 6th Ave.
Portland, OR 97204

SUBJECT: DEQ Failure to Report
Raw Sewage Contamination
of Tillamook Bay.
Twin Rocks Sanitary District.
File # 90578.

Commission Members:

BACKGROUND:

The week of September 11th 1989, I reported to the offices of the Twin Rocks Sanitary District that raw sewage had overflowed the manhole in front of my driveway and yard.

The extent of this overflow was massive. It covered grass in the yard with raw sewage almost halfway to the house. I took measurements of the thickness of this sewage.

In the driveway area just east of the manhole, the "sludge" measured between 3/8 inch and slightly over 1/2 inch at various points tested. Mr. W. F. Perley, the engineer that designed the system for Twin Rocks Sanitary District, stated at their trial that solids comprised less than 1% of sewage. Using this figure, a minimum of 50 inches of raw sewage flowed over these points. Considering the sewage was flowing, it seems likely that much less than the full one percent would have settled out at any one point. Thus the real volume must be much more than four feet.

The manhole from which the raw sewage flowed is about 25 feet from the edge of Tillamook Bay. The ground is primarily sand. Tillamook Bay was undoubtedly contaminated by this raw sewage overflow.

Mr. Hansen stated that the Twin Rocks Sanitary District's NPDES permit is being renewed at this time.

REQUEST:

I request that a wide ranging and complete investigation be made of the operation of this Sewer District before the permit is renewed.

I request that the competency and fitness of the Board of Directors and operators be evaluated.

I particularly request that DEQ publish in the local newspaper a request for information about incidents and experiences from the public. An alternative could be a letter to all system users.

Gary E Newkirk

TA Ex 8 1

Gary E. Newkirk
2234 S.E. 53rd Ave.
Portland, OR 97215
December 11, 1987

Oregon Environmental Quality Commission
811 S.W. 6th Ave.
Portland, OR 97204

Commission Members:

I hereby request that you review and uphold my request for D. E. Q. to acknowledge having jurisdiction over this problem and that corrective action be required of the Twin Rocks Sanitary District to prevent the annual flooding of my house with raw sewage. If the Commission's decision is that you do not have authority for this health problem, I request that you state this formally in writing to me.

Janet A. Gillaspie of DEQ informed me in writing on October 14, 1987 that DEQ has no authority or responsibility to force corrective action because it is not a system wide problem. I filed my first complaint with DEQ in 1982. The Twin Rocks Sanitary District claims that it must only meet DEQ criteria and they will make no changes unless required to do so by DEQ. This is a classic Bureaucratic Catch "22".

I will give you in the following paragraphs a list of the six times the sewage system has flooded my house at Barview and the complaints that I have made up to now.

In 1978, DEQ ordered the construction of a sewage system in an area which included my house. DEQ reviewed and approved the design for this system. DEQ monitored the construction.

Listed below are the dates that raw sewage backed up into my house and the immediate cause given. In four of these occurrences the volume was sufficient to have it flowing out both the front and back doors. In occurrences 2 through 6, the raw sewage overflowed the manhole situated 18" higher than my bathroom floor on the elevated road in front of my house. I have no record of this point on the first occurrence.

March	1980	Main 8" line plugged
April	1981	Electric pump failure
January	1982	Pumps unable to handle volume of sewage
November	1983	Cause not revealed
April	1985	Cause not revealed
August	1987	Pump station setup wrong

The basic cause of all these occurrences is a design flaw. The section of sewer line in front of my house is located between

two pump stations which are situated near the edge of Tillamook Bay. The sewer line between them was put under the elevated road running along the edge of bay's breakwater. This road is elevated 3 feet to 4 feet higher than ground level. The houses are built on ground level. My house has the lowest floor level of this section and thus is flooded whenever there is a sewage system operating problem.

My first official compleint, other than to the Twin Rocks Sanitary District, was to the Tillamook Country Health Department. They refered me to the Oregon State Health Division. After some months, Mr. Greg Chakarun of the Oregon State Health Division, said they did not have responsibility for this area of public health. That this area was the responsibility of DEQ. I then made my first complaints to DEQ in the summer of 1982.

Over the next six years I made a great many written complaints to DEQ under your file number 90578. I also made numerous personal visits to request action on the part of DEQ. Enclosed are just a few examples of both DEQ and my correspondence. The entire file is literally inches thick would be unwieldly to attach. I refer you to the DEQ file for additional details.

Another factor of which you should be aware is that my house is a listed National Historic Building. It was built in 1902 as the first United States Lifesaving Station on Tillamook Bay. It was the second such Station on the entire Oregon coast. The U. S. Lifesaving Service later changed its name to the U. S. Coast Guard. I believe that under several sections of Federal historic preservation laws you have additional responsibilities to protect and preserve historic building. I would call your particular attention to project grant requirements.

I again request your favorable ruling on my petition for help.

Sincerely yours,

Gary E Newkirk

OREGON TAX COURT
520 JUSTICE BUILDING
1162 COURT STREET
SALEM, OREGON
97310

CARL N. BYERS
JUDGE

NANCY PETTERSON
Clerk

(503) 378-4251

VELMA C. FOSTER
Official Court Reporter

January 31, 1991

Mr. Gary E. Newkirk
2234 S. E. 53rd Avenue
Portland, OR 97215

Mr. William Sargent
Tillamook County Counsel
201 Laurel Avenue
Tillamook, OR 97141

Re: Newkirk v. Tillamook Co. Assessor, SC-2247

Gentlemen:

This letter constitutes the court's decision. Trial of the above matter was held on January 23, 1991, in the Justice Courtroom, Tillamook, Oregon. The issue before the court was the true cash value of the land only, identified as Assessor's Account No. R1N10 17CD 02301 as of January 1, 1990. The Board of Equalization had set the value at $5,000. Petitioner maintains the value is $2,000, while respondent contends that the value is $29,500.

The land is located at the entrance to Tillamook Bay in the community of Barview. It is improved with a building that is listed in the National Historic Buildings Register. Before 1978, the property used a septic system for its sewage. In 1978, the Department of Environmental Quality ordered the installation of a sewer system in the area. The sewer system installed was faulty in design and operation. It caused raw sewage to back up into petitioner's building and also flooded the subject land from a nearby manhole.

After years of frustrated attempts to get the system fixed, petitioner filed a lawsuit in 1988 against the sewer district. In that suit, petitioner won money damages but not enough to cover his expenses. In that case, the

court found that the residence was "uninhabitable." It issued an injunction intended to prevent further sewage on petitioner's property. However, petitioner maintains that the problems were not solved. He testified that after the corrections were attempted, sewage has twice flowed onto the property.

Petitioner contends that the sewage problem destroys the property's value. Respondent argues that the sewage problems were solved and the property has a substantial true cash value.

The court finds that the true cash value of the property as of January 1, 1990, was greatly diminished due to the sewage problems. Even if the problems had been corrected, and the court is not persuaded they were, a knowledgeable buyer would be extremely reluctant to purchase the property. A buyer would recognize that if the sewage problem did reoccur, it might cost thousands of dollars in legal fees to enforce his or her rights. Based on petitioner's experience, which would have to be disclosed, no knowledgeable buyer would want to buy into a lawsuit. As petitioner's appraiser testified, if several years pass and the sewage problem does not reoccur, the market might conclude the problem was solved. Until that happens, however, this property's reputation has been soiled by the sewage and thereby greatly diminished. The court finds that the true cash value of the subject property as of January 1, 1990, was $2,000.

Enclosed is a copy of the judgment of the court ordering correction of the roll consistent with this opinion. Also enclosed are your exhibits which you requested we return to you.

Very truly yours,

Carl N. Byers
Judge

CNB:lw
Enclosure

cc: Mr. Tim Lutz
Tillamook County Assessor
201 Laural Avenue
Tillamook, OR 97141

THE COURT: Well, regarding this Court's decision as to the injunction, I think it is appropriate to start with the jury's verdict which found that there was, in fact negligent trespass on the Plaintiff's property, and that the Defendant did engage in conduct, either negligently or intentionally, which constituted a nuisance, and I am willing to be bound by that verdict. I think the jury had an opportunity to judge all the witnesses and hear all the evidence, and, quite frankly, I assessed those elements of this case as the jury did. If it were up to me, I have no problem in concluding that Mr. Newkirk is credible, that in fact the floods did occur as he has stated. I have cleaned up some messes, and his description of what was -- is involved, the kind of detail, is very consistent with -- it would take a very imaginative liar to make all of that stuff up, and I am satisfied that he didn't make that stuff up, and I am satisfied that the jury concluded the same. Otherwise, they couldn't and would not have been able to find the trespass.

It is also readily apparent that this residence is not habitable and has not been as a result of the floods. If you take an look at the definition of habitability as the Landlord-Tenant statute describes it, you know, if somebody was renting and you furnished them a place like this one has been described to be, I think you're going to be sued and -- as a landlord and you will be sued very successfully and you

will either correct it or you will be out of the rental business, and the evidence shows that the Plaintiffs were effectively put out of the rental business and that basically the utilization that they had was a very minimal kind and a very unsatisfactory kind of occupation. I think the testimony about cleaning the refrigerator and the stove, and after looking at that bottle of effluent, that would have gagged most potential renters. The jurors -- quite frankly, I get concerned when I drop something on the floor or in the sink of my own home. Now, maybe you can say Mayer is finicky, but I don't thing anybody, including any member of the district board, could in good conscience say that they would be willing to rent that structure, and basically as long as this condition continues, it is an irreparable kind of thing in -- you know, the damage -- excuse me, I have stated it incorrectly. The damages is really not an adequate remedy. That's what I needed to say. You fix it, and if you don't fix it well enough, it happens again, and I think that Mr. Newkirk's dispair was readily apparent. I can see maybe being strong enough to do it once, but there are very few human beings that could handle the repetitive clean up and the awfulness of never knowing when it will happen again. I thing that at some point you would simply dred going to your beach cottage, especially if you had guests, and God only knows what awaits you on the other side of the door or when you get up in

the morning, and I am satisfied beyond any doubt that the allegations of the complaint regarding the injunctive relief are proven in their entirety. Just a moment, Mr. Youker. I need to check something.

Now, the next part of this boils down to the following: The Plaintiff is entitled to injunctive relief. The terms of the relief -- may I have exhibit 33?

(Clerk approaches bench.)

THE COURT: That's the letter from Mr. --

THE CLERK: Exhibit 33.

THE COURT: I'm sorry, exhibit 33. That was the report by the engineer, Handforth. That is what I want. I think it is 33.

(Clerk approaches bench.)

THE COURT: The first part of the relief I think requires that we find out what really is out there. As I understood exhibit 33, Mr. Handforth set out on page 2 the elevations that he had run, and they show that -- we will be off the record for a moment, Mr. Youker. Back on the record. Page 2 of exhibit 33 causes me to believe that there is a discrepancy between the testimony of Mr. Perley and Mr. Handforth. I'm not -- it has been a long time since I worked on a survey crew, but Mr. Handforth says that the elevation of the rim of the manhole at station 91 plus 30 was elevation 15.11, and the elevation of the other manhole at 88 plus 63

was 15.51, and then he shows the house floor at 14.64, and assuming that 15 -- we are running from zero to 15 and from zero to 14, 15 is certainly higher than 14. I assume that they are dealing with elevations in the sense that I did when I was a young guy on the survey crew. Now, Mr. Perley testified, as I think I heard him say, that he had done a quick check to determine whether -- how close he and -- I think he put it in terms of whether he and Mr. Handforth were working on the same basis, and I think he said they were off a couple of inches or something. It was minimal. But then we started talking a little later in Mr. Perley's testimony about things being a foot higher in one place than in another, and given that water does, in fact, seek its own level, I think the first thing we ought to do is find out whether the as-built plans really reflect the elevations that Mr. Perley and his company indicates they have, or whether Mr. Handforth is right, or whether I am simply completely wrong because it has been too long, and I think the first inquiry ought to be to contact an expert who can say -- and probably Mr. Handforth can tell you that -- what his data on page 2 really means in terms of relative elevations, because the way I understand these elevations, those 2 manholes, 1 and 2, are higher than the shower floor -- or, the -- wait a second. Right, the rims are at 15.11 and 15.51, the manholes, and if the floor is at 14.64 and we are starting from zero and measuring up, those

rims are higher, so we need to find that out. Once we know what is there, then I think that a plan needs to be designed for a lift station, and it must meet the approval of D.E.Q. and current engineering standards. I'm not ordering that there be a double check valve, but that's one of the things that Mr. Van Domlen mentioned. I think he indicated that it would be a number of feet apart so that if the first one gets plugged up, there is still another one functioning. That should be considered and included unless the engineers -- an independent engineer, not the district's engineer, indicates that in balancing the cost of that extra installation against the risk of basically very serious damage to the Plaintiff, that in weighing that it clearly balances in favor of not putting it in, and quite frankly it had better very clearly balance in favor because that is an outrageous thing to have happen to your house, even if it is only once every 14 months. I don't think anybody would volunteer for that. In addition, there will be a lift station. I would like to get that in place by August 1st. It is interesting. At first I thought these things just happened in the winter months, but there was one in June and one in August, and so it is not safe any time of year, but I think that this being almost June 1, that 60 days is probably sufficient, and this ought to be done right. The existing check valve will either -- if it is not replaced in the process of the new installation will be correctly

installed because I think that there is no question, from the report by Mr. Handforth, that there is some kind of a low place there at the check valve or you wouldn't get two inches of water at the invert, but the district will put that in at its expense and they will pay the maintenance and the electrical.

MS. ALBRIGHT: Excuse me, your Honor, the district will pay?

THE COURT: Yes.

MS. ALBRIGHT: There may be some difficulty with that, your Honor, because there won't be an extra bill -- I mean it has to come from the house, the electrical hook-up, otherwise I don't know how you would get an independent hook-up at the lift station.

THE COURT: Well, I don't know. Maybe --

MR. PIKE: Could a separate meter possibly be reviewed?

THE COURT: Well, I don't blame the district for not wanting to set a precedent on a voluntary basis, but I think this is really distinguishable from the other people in the system. It is no problem for them to have figured out that the Newkirk house was there and what the elevations were, and I think that it -- I don't want to specify how that's going to be accomplished, but I think that if it is necessary to have a separate meter, the district will have a separate meter and

will pay the maintenance on this. There seems to be something that is -- about this part of the line that is a problem line, and I am concerned that if there is going to be more than an ordinary problem, why, let the district deal with that. It appears to me that maybe really what ought to be studied is whether or not that main station ought to be lowered a little bit with those wet wells and dry wells a little deeper rather than a little wider to get the capacity, but I'm not ordering that. The visual alarms that are in place will be maintained -- first of all, will be inspected for their adequacy and thereafter they will be inspected on a regular basis, particularly -- Well, on a regular basis, and I would say that that ought to be monthly.

Your Honor, which part of the line are you talking about? Did you say the line?

THE COURT: No. No, the audible and visible alarms. If somebody is not going to those stations at least once a month and taking a look, why -- and any time you are there, why, they should be checked. In fact, I prefer that language. They will go there not less than once a month to check those alarms, but they will check them any other time they are there to see that they are operating correctly.

Ms. Albright: Are you speaking just of the jetty lift station?

THE COURT: Right. I don't see the Barview lift

station as creating the problem in the sense of its malfunctioning. I think what happens is that you get a lot of fluid and stuff, you pump it up on top of that hill, and it is coming down. It is going to come down that hill about 25 feet, and you can talk all you want about 450 pounds of pressure from the pump. You have got 20 feet in an 8 inch pipe. That's a lot of weight, too, and I don't think there's a problem with the Barview pump. If it can't get it over the hill, it isn't going to get to Newkirks'. It is that jetty station, apparently, and what's in between the hill and the jetty station that something is fishy there. I don't know what the malfunction or -- you know, maybe something settled and there is a belly, whatever. I think that during the season, once the rains start in October, that the -- any time there is a storm there ought to be daily checks of the pump record so we get some data about this.

Ms. Albright: Is that part of your order, your Honor?

THE COURT: Yes. You know, I don't see going there every day in October when we are having Indian summer, but when we get a rain, any fool knows where one is coming and can see what's happening and when we start getting that, they better get their bodies down there and check the pumping thing so people like Mr. Van Domlen can get some data and figure out what's going on here. They will inspect for sources of in

flow and infiltration and take steps, reasonable steps, to correct that. What I have in mind is, you know, I'm sure that there are going to be some minor trickles here and there that you are going to spend tons of money to fix them and it just won't pay, but I suspect there may be some fairly serious in flow and infiltration that can be identified and get that corrected. .

MS. ALBRIGHT: Are you speaking just of the line between Newkirks'and the jetty lift station?

THE COURT: Well, I think that we really need to deal with the lines that come into the jetty station that feed into it. I don't know enough about those lines, but it seems to me that maybe somebody like Mr. Van Domlen or the engineers, an independent engineer, could say that line is clearly not going to affect it, but I want to at least check that.

MS. ALBRIGHT: That may be very expensive, your Honor. Generally, grants are given for those sorts of things because it is an expensive process to look for infiltration-type things.

THE COURT: Well, I don't know, but I think the thrust of my order is that some inquiry will be made, and I think maybe we ought to put it: If it is -- maybe we ought to put it in terms of: You report to the Court what the cost is, and if it is too high, I will back off, but --

Then I am satisfied that it is appropriate to require that the wet well levels be reduced as recommended by Mr. Van Domlen, and I believe it is appropriate to inspect for and get out the grease and the sludge accumulations in the lines, the manholes, and the dry wells -- or, the wet wells, and that will be done before the wet season commences, before -- definitely before October 1st. Mr. Van Domlen mentioned his concern about the sump pump and the dry well, and I think that concern ought to be inspected and corrected. I think that that's the one he was saying that if it doesn't get fixed and it doesn't work, you will flood the other pumps and then you will flood the whole system or the whole station, and I -- not knowing enough about these systems, I am going to put regarding inspection that it will be inspected in accord with the directives of D.E.Q. as far as inspection and maintenance rather than put it at an aggressive -- I mean that could be construed as being out there all day every day; maybe once a week. It is too vague and I think somebody who has the experience and expertise needs to say what is appropriate. If there's a dispute, you can bring it back and I will hear it.

And, lastly, this is a -- something that I think is a loose end that needs to be dealt with, and so I will, and that is that Mr. Newkirk testified that he had buried some of this sludge out in his yard, and to the extent anybody gets after him and makes him dig it up, or prosecutes him, the district

will hold him harmless and will bear the expense of the clean up. That really flabbergasted me, that they couldn't agree that he could put their sewage back into their system after it had dumped out into his house; amazing. .

MS. ALBRIGHT: Your Honor, I don't believe anyone asked the district ever at any time.

THE COURT: The testimony was that Mr. Newkirk had inquired and that's what he finally did.

I think that is -- basically covers what I have made notes on.

MS. ALBRIGHT: Your Honor, I think there are two other matters, and one is that I believe the order should require Mr. Newkirk to give us an easement for the purposes of the lift station installation and the maintenance. Otherwise, we may have problems with trespass and that sort of thing.

THE COURT: Well, I think that what we will do is -- when the thing is designed, you know, there will be a plan specifying where it would be located, and then we can draft an easement. I think that is appropriate, but -- rather than to just say an easement, for ingress and egress, we will provide that one will be necessary and one will be allowed, but I don't -- some of these utilities, they want an easement over your whole place, and that's -- unless there is some justification for that --

MS. ALBRIGHT: The other thing, your Honor, since we

have kind of a short time line to August 1 to get the lift station installed and whatnot, we would like to -- we would like to get Mr. Handforth on it and have him design the system and whatnot. I don't want to be dickering over the next month over what engineer or whatever, and since the district is paying the bill and Mr. Handforth is local, and I think he has a good reputation, we would like to use him, if at all possible, and I guess I would need to know whether or not he is acceptable, because we don't want to be spending money on him if all of a sudden we find out that he is not, and we would like to proceed in that fashion.

THE COURT: Any problem?

MR. PIKE: I don't have enough experience as to the availability of other engineers or Mr. Handforth's qualifications to be able to make an intelligent --

THE COURT: I don't know either. All I can say was that he did come in and put in black and white what he found out there. I think it may be that it disagrees with what Mr. Perley says and that may reflect somewhat on the fact that he is independent and is going to do what's right. Let's do this: If you folks can't agree on an engineer by next Friday, let's get on a conference call and we will set something.

MS. ALBRIGHT: Thank you, your Honor.

MR. PIKE: Your Honor, I want to be clear. Am I to include that an easement will be allowed and drafted later in

the injunction?

THE COURT: Right. The exact -- an easement is allowed, the metes and bounds description of which will be set by the Court once the station has been designed and the -- and it has been established what the limits of the easement ought to be.

MR. PIKE: And we have one further item, your Honor. There is 125 dollar cleaning charge on Mr. Newkirk's sewer bill for the hourly charges for cleaning the check valve in 1985. We would request that that also be removed.

THE COURT: It is.

MR. PIKE: Thank you.

THE COURT: All right. Thank you, counsel. Have a good evening.

(Whereupon, proceedings were adjourned at 5:23 p.m.)

(End of requested excerpt.)

CERTIFIED: A TRUE TRANSCRIPT.

Official Court Reporter

C. WARREN YOUKER
Official Court Reporter
Tillamook, OR 97141

State of Oregon

Department of Environmental Quality Memorandum

Date: March 11, 1992

To: Fred Hansen

From: Harold Sawyer

Subject: Fuel Processors Contested Case

I talked to Linda Zucker. She indicated that no advice has been given the parties regarding the procedure before the Commission, thus it was up to the chair. She indicated that the briefs already provided to the Commission should contain all positions. Any oral presentation would be a summary or re-argument of the briefs. She further indicated that she felt a normal expectation of parties in a matter such as this would be to allow each party 15-20 minutes for argument and up to 10 minutes for rebuttal.

Since the Commission has had the opportunity to review the written materials, it seems reasonable for the Commission to do the following:

- Allow 5-10 minutes for each side to summarize their position. (The Department would probably go first, because we are the one appealing the Hearings Officer's decision.)
- The Commission may ask questions of either side or the hearings officer.
- The Commission would deliberate and make a decision.

I called the Chair and discussed this with him.

STATE OF OREGON

ENVIRONMENTAL QUALITY COMMISSION

In the Matter of the Proposed Annexation of a Certain Territory Commonly Known as the Yaquina John Point Area to the City of Waldport, Lincoln County, Oregon, Pursuant to the Provisions of ORS 222.840 to 222.915 Due to Conditions Causing a Danger to the Public Health	)	CERTIFICATE

The Environmental Quality Commission of the State of Oregon on February 3, 1992 received preliminary plans, specifications and time schedule for the provision of sanitary collection sewers in a certain territory commonly known as the Yaquina John Point Area contiguous to the City of Waldport, pursuant to ORS 222.897.

Pursuant to ORS 222.898 the Environmental Quality Commission has reviewed and hereby approves said preliminary plans, specifications and time schedule, and does hereby certify to the City that it considers the proposed facilities and time schedule for installation of such facilities adequate to remove conditions dangerous to the public health in said territory.

Dated this 12th day of March, 1992.

William W. Wessinger

William W. Wessinger, Chairman
Environmental Quality Commission

DEPARTMENT OF JUSTICE
PORTLAND OFFICE
1515 SW 5th Avenue
Suite 410
Portland, Oregon 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
MAR - 6 1992
OFFICE OF THE DIRECTOR

March 5, 1992

BY FAX AND MAIL TO ALL COMMISSIONERS

EQC Commissioners
811 SW Sixth Avenue
Portland, OR 97204

Re: Pulp Mill NPDES Permit Appeals

Dear Commissioners:

This letter responds to motions filed by James River II, Inc., Boise Cascade and the City of St. Helens (hereinafter "the mills") to limit the participation of the Director and the Attorney General's office in the above-referenced contested case proceeding. Specifically, the mills ask the Commission to enter orders prohibiting (1) the Commission from asking the Director to respond to questions, (2) the Commission from receiving confidential legal advice from its legal counsel, and (3) any Assistant Attorneys General (AAGs) involved with the case from communicating with each other.

For the reasons set out below, I conclude that the Commission may, but is not legally required to, enter the first two requested orders. With respect to the third, the Commission may not prohibit AAGs from conferring on legal issues raised by the case. As a matter of general practice,[1] the AAGs assigned to the case have not conferred on factual matters and do not plan to do so.

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1 This practice is not legally required but it shields the attorney representing the Commission from factual information that may not be in the record and, thus, assures that such information will not be discussed inadvertently with the Commission.

Post-it™ brand fax transmittal memo 7671	# of pages ▸ 7
To Neil Mullane	From L. Knudsen
Dept.	Co.
Fax # 229-6124	Phone # 229-5725
	Fax # 229-5120

Analysis

A. Director Participation

The mills argue that "it would be inconsistent with contested case procedures and fundamentally unfair" for the Commission to direct questions to the Director during its deliberations. It is not entirely clear whether this argument is based upon law, policy or both. To the extent that the argument is based upon policy, it is clear that the Commission is not legally required to communicate with the Director and it may choose not to do so. It may do so by amending the order as requested by the mills or by simply electing not to ask any questions of the Director.

On the other hand, the law does not prohibit the Commission from directing questions to the Director. Contested case proceedings are not trials and the Commission is not required to conduct the hearing as if it were a trial. As discussed below, there is no general prohibition on the Commission communicating with the Director or departmental staff.

The Department and the Commission are parts of the same agency for purposes of this contested case hearing. ORS 468.015 to 468.030; 39 Op Atty Gen 431 (1978). The Department and its Director continue to serve as the Commission's staff even though the Commission is reviewing the Department's decision. This combination of administrative functions does not violate a permittee's constitutional rights. See, e.g., Richardson v. Pevales, 402 US 389, 91 S Ct. 1420, 28 L. Ed2d 842 (1972); Black v. Corporation Div[illegible], 54 Or App 432, 434-35 (1981); 39 Op Atty Gen 431 (1978)

The law does require, however, that the Commission make its decision based only upon facts in the administrative record and that parties have an opportunity to rebut those facts. Samuel v. Board of Chiropractic Examiners, 77 Or App 53, 62 (1985). This principle, sometimes referred to as "exclusivity of the record," is also part of the basis for the rule that requires the disclosure of ex parte contacts. Under the ex

parte communication[2] rule, it is inappropriate for the Director, or anyone else, to present facts that are not in the record to the Commission.[3] The prohibition on ex parte communications applies to communications "concerning a fact in issue, but does not include communication from agency staff or counsel about facts in the record." OAR 137-03-055. Generally, the rule does not apply to the communications about the rationale, conclusions, and order in contested case proceedings. See 40 Op Atty Gen 321 (1980).

Contrary to the assertion of the mills, Oregon statues do not prohibit the Commission from communicating with the Director with respect to facts already in the record during the Commission's deliberations. ORS 180.220, cited by the mills, merely provides that the Attorney General shall control all legal proceedings and all legal business of the state. ORS 183.450, cited by the mills, limits the authority of state agencies to use lay representatives in contested case proceedings. See also OAR 137-03-008 (Attorney General's lay representation rule); OAR 340-11-103 (Department's lay representation rule).[4]

The challenged provision in the Commission's order does not authorize the Director to provide legal or lay representation. Rather, it merely recognizes that the Director serves as staff to the Commission and is available to assist the Commission at its request. Further, the provision

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[2] Generally, an ex parte communication occurs when one side in a controversy communicates orally with the decisionmaker and the other sides are not present or one side sends a written communication to the decisionmaker and the other sides are not given a copy.

[3] If prohibited ex parte communication occurs, the law requires that the opposing side be given notice of the communication and an opportunity to rebut.

[4] Generally, the lay representation rules address the presentation of evidence, examination and cross-examination of witnesses and the presentation of factual arguments needed to develop the hearing record and the making of legal arguments. In this instance, the record has already been developed and the Commission order does not purport to authorize the Director to make legal arguments.

acknowledges that the Director will not be called upon to communicate on facts other than those that are already in the hearing record.

B. Confidential Legal Advice

The Commission has the legal right to obtain ex parte and confidential legal advice from its legal counsel. 39 Op Atty Gen 431, 435-36 (1978). The Commission may waive this right if it chooses.

An agency deciding a contested case under the APA has the right to request and receive confidential legal advice from the Attorney General or an AAG assigned to the agency by the Attorney General. 39 Op Atty Gen 431 (1978). The Attorney General has determined that the right to such advice is provided by law and is not a violation of the State Bar's ethical rules. Id.; see also ORS 180.060; 180.220.

The mills acknowledge that the Attorney General has previously advised that AAGs may render ex parte legal advice except in relatively rare cases when the Attorney General's office is also advising another party to the proceeding. The mills argue that the Department should be treated as such a separate party here because "the hearings officer granted DEQ the right to exercise all procedural rights of a party." The mills' analysis is legally flawed. The Department is not party[5] and the exercise of the "procedural rights" in

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5 Under the APA and the Uniform and Model Rules of Procedure adopted by the Commission there are a number of different participants in a contested case proceeding. These include the agency conducting the hearing, parties, limited parties, and interested agencies. A "party" includes only a person or agency that has a right to hearing, a person or agency named as a party by the agency (conducting the hearing) and persons who request to participate and have an interest in the proceeding or represent the public interest. ORS 183.310(7). Parties and "interested agencies" have essentially the same procedural rights, OAR 137-003-007. Many of these rights may also be made available to the agency conducting the hearing. As a general rule, however, only a party has the right to seek judicial review of the agency's decision. ORS 183.480; 183.484; OAR 137-003-007.

question did not make the Department a party to the contested case proceedings for purposes of ex parte legal advice. 39 Op Atty Gen 431 (1978).

The Attorney General has recognized an exception to the general rule allowing confidential legal advice in one very limited situation. That is when a board or commission is required to provide a truly independent and impartial decision, the decision maker or its hearings officers are required to be licensed attorneys, and the department or agency appearing before the decisionmaker is an actual party to the proceedings with the right to appeal. 39 Op Atty Gen 431. The only example provided by in Attorney General's Opinion is the Workers Compensation Board.[6]

As noted above, the Department is not a separate agency and it is not made a party to the proceedings because it has authority to exercise procedural rights in the hearing. Further, even if the Department were a party, the other circumstances discussed in the Attorney General's opinion do not exist in this case. There is no legislative intent to create an independent, law trained tribunal to review the Department's decision and the Department does not have the right to appeal the Commission's decision.

The Attorney General's representation of both the Department and Commission is not contrary to any rule of law and, in fact, it is required by the law. Oregon law requires the Attorney General represent all state agencies and the departments, divisions and officials therein. ORS 180.210 to 180.235; 39 Op Atty Gen 431 (1978). In their motion, the mills speculate that these statutes may be unconstitutional or otherwise improper. As discussed above, neither federal or Oregon law supports this assertion. The mills note that one Oregon Supreme Court Justice would like to see this issue briefed and argued again, but this position was rejected by the remainder of the court.

While it is not required, the Commission may in its discretion, direct its legal counsel not to provide ex parte or

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6 Another possible example would be hearings before the Land Use Board of Appeals, when the Department of Land Conservation and Development is a party.

confidential legal advice. Depending on the circumstances this may not pose a problem. The Commission, however, may wish to be advised on the relative legal strength or weakness of an interpretation of the law or proposed commission action. If this advice must be given in public, it may work to the Commission's disadvantage on appeal. Also, if the Commission should choose to deliberate in a closed session, then legal counsel would not be available.

C. Communications between AAGs

The Attorney General has determined that AAGs involved in the same legal proceedings must be allowed to communicate with each other on legal issues in order to provide consistent legal advice. ORS 180.060(9) (the Attorney General has "[f]ull charge and control of all the legal business of all departments, commissions and bureaus of the state"); see also Oregon Attorney General's Administrative Law Manual, (1991) at 73 (consultation between AAGs required if two or more agencies are involved in a proceeding).

In this regard, the Attorney General's office is fundamentally different from a private law firm. See generally Letter of Advice to LeRoy C. Livermore, dated May 12, 1983) (OP-5512). The examples of procedures used in private law firms to deal with conflicts of interest between clients are not generally applicable to the present situation.

As discussed above, our ordinary practice in contested case proceedings before the Commission is to limit discussion among AAGs to legal issues and routine procedural matters and we will adhere to this practice in the present case.

Conclusions

Except for barring communication on legal issues between AAGs, the Commission may issue the orders requested by the mills, but it is not legally required to do so. If the Commission chooses to enter one or more of the orders, it may do so by holding a special meeting or it may do so at the beginning of its regular meeting on March 12, 1992. In the interim, I will plan to communicate with the Commission in writing and to copy the Department and the parties. If I believe that it is advisable to communicate confidentially, I

will first notify the Department and the parties of my intent to do so. Similarly, the AAGs assigned to this matter will limit communication to issues of law and routine procedural matters.

Sincerely,

Larry Knudsen
Assistant Attorney General

cc: JJS 2005N
Service List

Opinion

Environmental fines and tax credits

Retiree hacks away at agency

Harry Demaray is my kind of hero, a burr on the backside of the bureaucracy.

Even in retirement, Demaray is a stubborn man. At 71, he does volunteer work at the Deepwood Estate in Salem, doing battle with such tenacious opponents as a half-acre of runaway blackberry vines. Demaray keeps hacking away at the vines, not unlike the way he continues to peck at government until it is forced to act.

The last time we checked in on Demaray, he was caught up in the battle of his working life. His job with the Department of Environmental Quality was on the line. His employers said he was uncooperative. Demaray said he was just doing his job.

Demaray's disagreements with the department involved his work in the field. An employee of a fuel-oil dealer sat in his truck reading his newspaper while gallon after gallon of oil gurgled down a storm drain pipe instead of into the tank where it was supposed to go. Demaray, who investigated the case, refused to back off the fine he imposed when his boss told him to.

Another incident involved a Molalla sawmill operator using a wigwam burner to incinerate garbage. Again, Demaray imposed a fine even though his superiors told him not to.

For his personal problems with the department, Demaray is still waiting for his day in court, one that is supposed to come up next June in Marion County Circuit Court.

In the meantime, he's kept a close eye on how his old employers are protecting the environment.

What's grabbed Demaray's attention of late is the Department of Environmental Quality's awarding of tax credits to businesses for their supposed pollution control efforts.

What used to be tax credit awards in the thousands of dollars are now in the millions of dollars, Demaray says. With more than $22 million in tax credits awarded last year, "the situation is out of control. Every dollar these businesses don't pay in taxes is paid by the rest of us."

Demaray's argument, however, isn't with credits made for actual pollution control.

"The idea was to help industry pay for the transition costs of tooling up to reduce pollution,

Commentary

Ron Blankenbaker

not as a continuing taxpayers' subsidy for industrial expansion," he says.

Boise Cascade, Demaray points out, was awarded a $139,000 anti-pollution tax credit last year for installing veneer production equipment at its Independence plant. Even the company's own documents make no claim for pollution control, he says.

But that's peanuts compared with the $5 million pollution credit awarded to Chemical Waste Management of the Northwest, the operators of a garbage dump near the Columbia River Gorge at Arlington. The dump operator is credited for the presence of a plastic liner surrounding the 17-acre hole it dumps garbage into. But Demaray argues that without the liner the dump wouldn't be allowed to exist, and that the cost will be paid off by the dumping fees that are charged.

"The $5 million tax credit is a gift from Oregon's taxpayers," Demaray says.

William Wessinger, the chairman of the Environmental Quality Commission, doesn't disagree. The retired Portland businessman says the tax credits "are out of control." Wessinger insists, however, that the commission is merely following the law, as interpreted by the attorney general.

"This needs to catch the attention of the legislature," Wessinger says.

Something tells me it will.

Harry Demaray isn't the kind to be content merely hacking away at blackberry vines.

☐ **Ron Blankenbaker** is a Statesman Journal writer. His column appears regularly.

Unified Sewerage Agency
of Washington County

Linda Kelly
Public Affairs Manager
Office of the General Manager

unified
sewerage
agency

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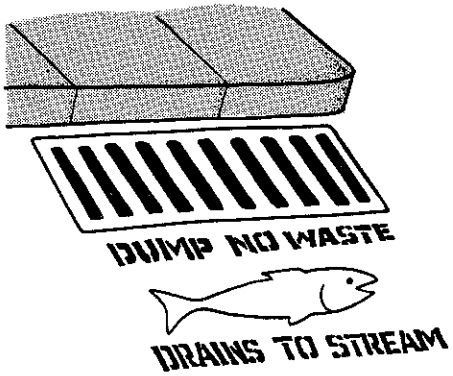
Hillsboro, OR 97124
(503) 648-8621 EXT 4469
(503) 640-3525 FAX

Have You Seen This Fish?

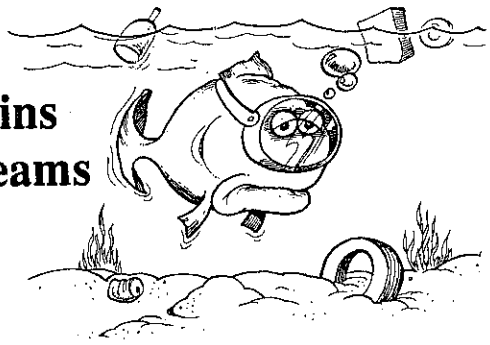


You may have seen this message painted on a catch basin on your street.

It is a reminder not to dump anything down a storm drain.

Many people think the household chemicals, motor oil, antifreeze or yard debris that go into our storm drain system gets "cleaned up" at wastewater treatment plants. They don't. In Washington County, pollutants go to the nearest stream and ultimately to the Tualatin River.

Storm Drains Lead To Streams



Prevent pollution in your neighborhood streams and the Tualatin River. Recycle motor oil and yard debris, and dispose of dangerous chemicals safely.

Please protect our water, fish and wildlife. Don't dump anything down a storm drain.

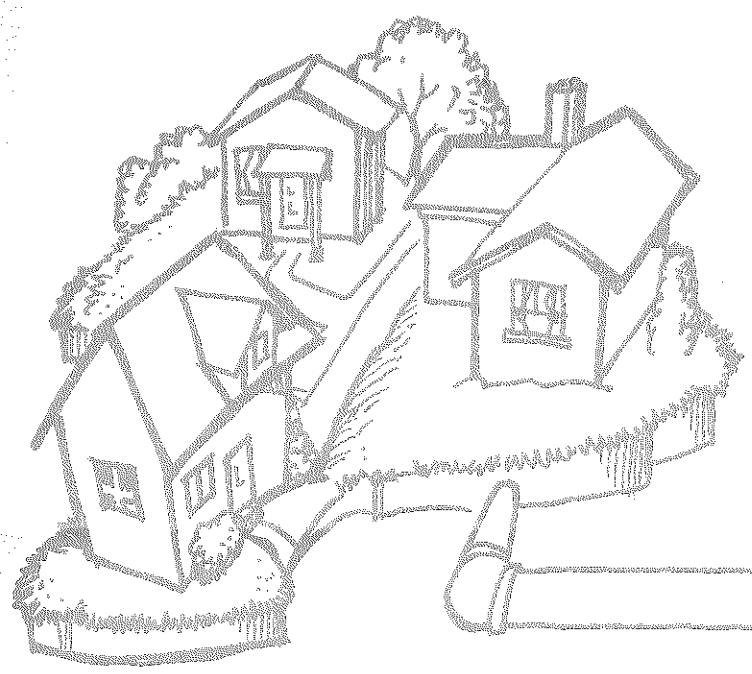
Storm Drain Stenciling is part of the Unified Sewerage Agency's Watershed Partners public education program. If you have questions, please call Public Affairs at 648-8621.

SWM surface water management
USA unified sewerage agency

Tualatin River Watch

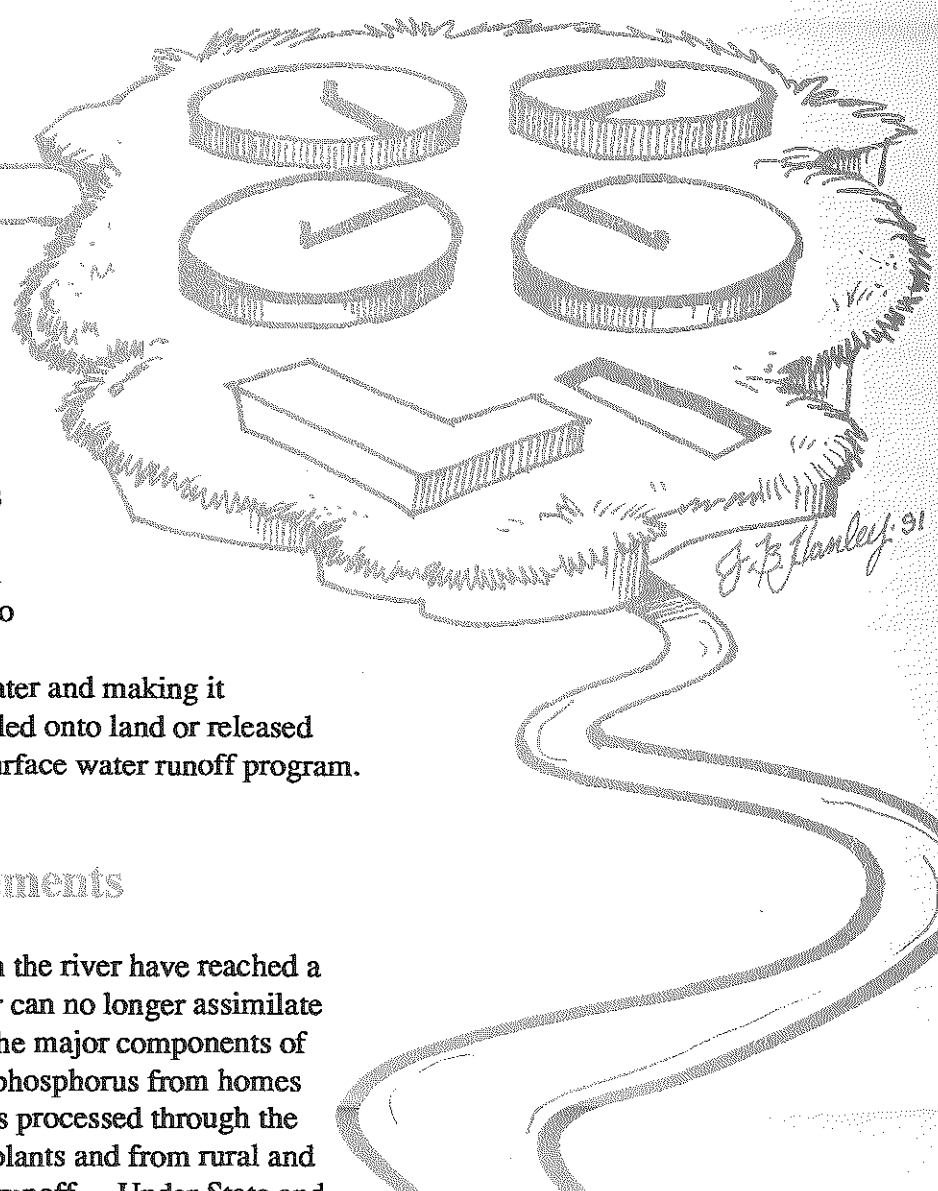
REPORT BY THE UNIFIED SEWERAGE AGENCY

JUNE 1991



Sewer Rates Are Going Up

Sewer rates will increase from $15.50 to $18.50 per month per household on July 1, 1991. The sanitary service fee increase is attributed to the cost of higher levels of treatment to meet regulatory requirements and to accommodate population growth and inflation.



A Little Background

Many residents of our 123-square-mile service district recognize USA as the agency that provides sewer service in their community.

USA is a utility, much like other companies that provide our homes with electricity, gas, phone and water service. Rather than providing something to your home, the sewer district takes away that which you don't want.

Basically, USA is in the business of collecting and treating used wastewater and making it usable again by removing impurities. Once wastewater is treated, it is recycled onto land or released into the Tualatin River. For the last year, USA has also managed the new surface water runoff program.

Highest Standards

Wastewater is not manufactured at USA; it is collected from 149,500 homes and businesses in 12 cities, in unincorporated Washington County and portions of Clackamas and Multnomah Counties.

The 34 million gallons that enter our Durham and Rock Creek plants is cleaned to a higher level than 98 percent of the treatment facilities in the nation, but because of the unique nature of the Tualatin River, we must clean wastewater close to the quality of drinking water before releasing it back into the environment.

New Requirements

Nutrient levels in the river have reached a point where the river can no longer assimilate the excess. One of the major components of that nutrient load is phosphorus from homes and businesses that is processed through the Agency's treatment plants and from rural and urban surface water runoff. Under State and Federal law, these pollutants must be prevented from entering the river.

Taking Out The Phosphorus

Under new requirements, our treated wastewater discharge of phosphorus must be reduced from the current 600 pounds per day to 30 pounds per day from both major treatment plants during the summer.

This level of treatment of the wastewater that comes into the plants is one of the most stringent in the nation. USA is on schedule to remove 99.3 percent of the phosphorus as mandated for our treatment facilities by the Environmental Quality Commission and the Department of Environmental Quality.

The Facilities Plan

In our planning, USA must consider the needs of a comprehensive and complex system: building, operating, and maintaining the facilities required to collect and process wastewater for 311,500 people living within the service district.

The five treatment plants combined are capable of processing 48 million gallons of wastewater each day to be released into the Tualatin River or recycled onto land. In addition, USA maintains about 600 miles of sewer pipeline and 38 sewage pumping stations in USA's sewerage system.

The Facilities Plan Goals

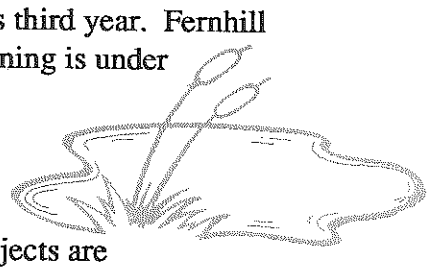
Goal 1 -- Achieve phosphorus and ammonia-nitrogen reductions in USA treated wastewater discharges to the Tualatin River by June 30, 1993 as required by the Environmental Quality Commission (EQC).

Goal 2 -- Achieve compliance with each item in the Compliance Schedule for the Northwest Environmental Defense Center (NEDC) v. USA Consent Decree, July 30, 1990.

Goal 3 -- Continue to provide cost and environmental effective collection and treatment of wastewater within the urban growth boundary of Washington County (USA's boundary) as the area fills in with people.

Wetlands

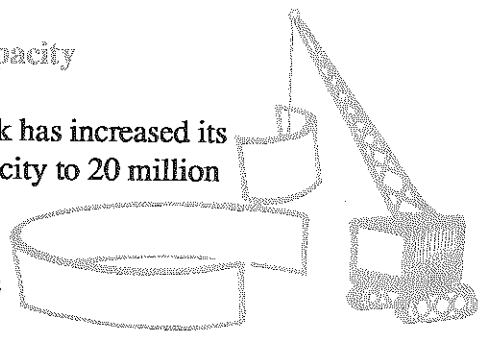
The Jackson Bottom Wetland's Preserve effluent "polishing" project is in its third year. Fernhill Wetlands planning is under way, and several other sites are being studied.



All the projects are utilizing the multiple objectives of providing water quality management and passive recreation, and improving wildlife habitat and educational opportunities.

Increased Capacity

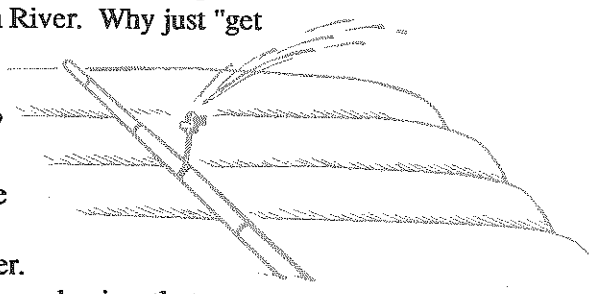
Rock Creek has increased its treatment capacity to 20 million gallons daily from 15 million gallons daily.



Durham's capacity will be increased to 22 million gallons daily. The plant will also be able to provide treatment for winter-time storm events up to 90 million gallons a day to prevent overflows to the river.

Recycled Wastewater

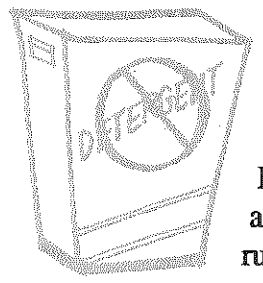
Recycling is a major part of USA's plan for improving the Tualatin River. Why just "get rid of" wastewater when it can be cleaned and used for irrigation?



The goal is to ultimately recycle more than 70% of the community's wastewater. That would bring water predominantly to areas now lacking irragation, make productive use of the nutrients in the water (phosphorus and nitrogen) and reduce the cost of wastewater treatment.

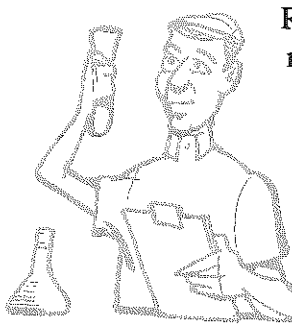
Controlling Pollution At The Source

USA initiated the process which resulted in a tri-county ban on the sale of laundry detergents containing phosphorus effective February 1, 1991. Reducing the amount of phosphorus that enters USA's wastewater treatment plants could save ratepayers as much as $365,000 in the first year, since the need for chemical treatment will be reduced.



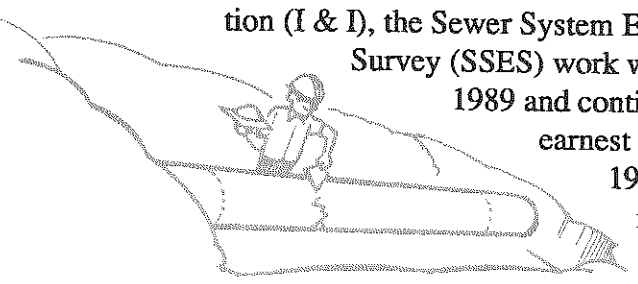
Testing For Success

It is estimated that approximately 85 percent of the phosphorus in the Tualatin River passes through USA treatment plants. The Agency projects that $465 million will be spent over the next 20 years to reduce phosphorus levels to meet DEQ requirements and to insure capacity for future sewer connections. We will be constantly monitoring our achievements to be sure we are spending your money wisely.



Wastewater Flow Management

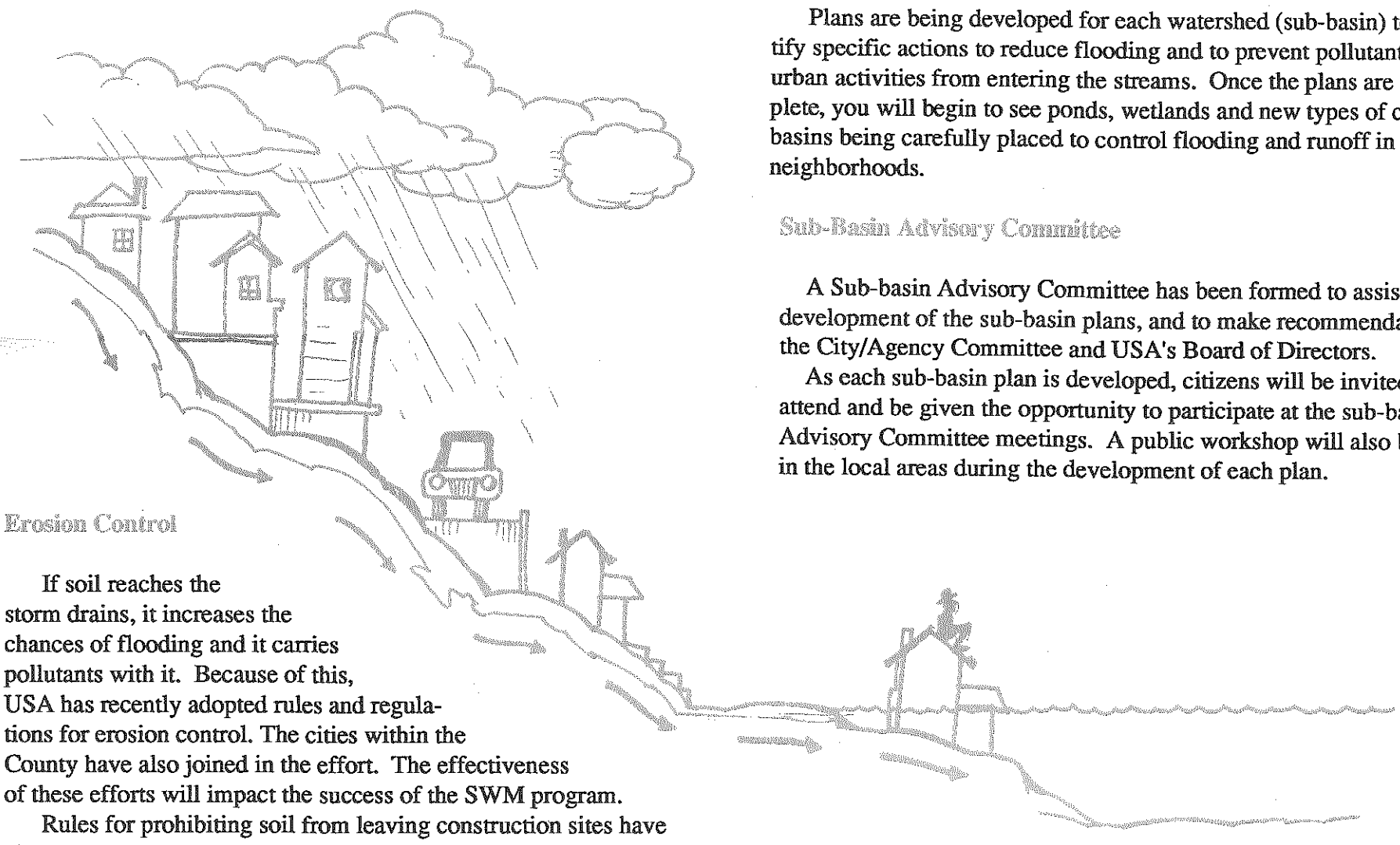
As part of the Agency's effort to reduce the amount of rainwater inflow and infiltration (I & I), the Sewer System Evaluation Survey (SSES) work was begun in 1989 and continued in earnest in 1990 and 1991. Our intent is to find the most cost effective way to eliminate treating water unnecessarily that enters the system from rain.



Surface Water Management

The surface water management (SWM) plan is the pollution and drainage control program that has been developed over the last couple of years by cities in Washington County, county government and USA with the help of three advisory committees.

The SWM program is one part of the larger state mandated effort to reduce the amount of pollutants in streams in our area and the Tualatin River. The term "surface water" refers to runoff from rain or irrigation water.



As Washington County and bordering counties in the Tualatin River watershed have been developed, buildings and pavement cover much of the ground that used to absorb rainfall. Instead of soaking into the ground, increasing amounts of rainwater are going through the natural and man-made storm drainage systems. This causes problems with flooding, as well as washing oil, pesticides, fertilizers and other pollutants into our streams.

Sub-Basin Strategies

Plans are being developed for each watershed (sub-basin) to identify specific actions to reduce flooding and to prevent pollutants from urban activities from entering the streams. Once the plans are complete, you will begin to see ponds, wetlands and new types of catch basins being carefully placed to control flooding and runoff in your neighborhoods.

Sub-Basin Advisory Committee

A Sub-basin Advisory Committee has been formed to assist in the development of the sub-basin plans, and to make recommendations to the City/Agency Committee and USA's Board of Directors.

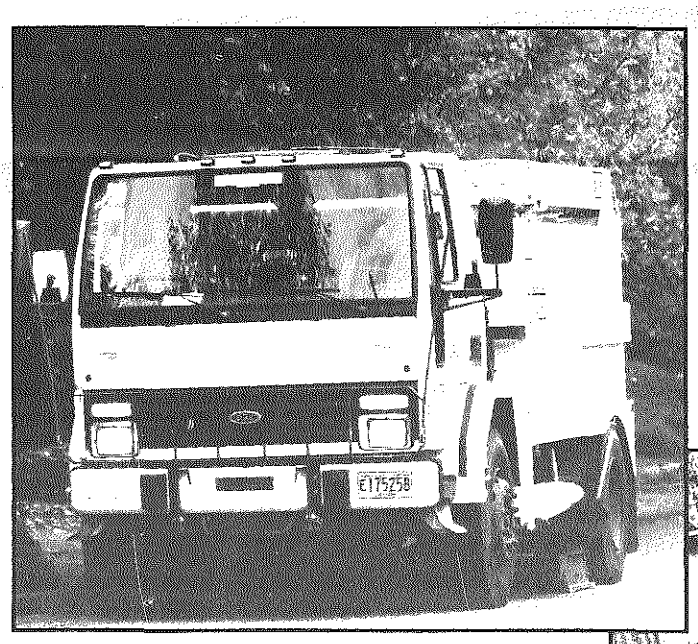
As each sub-basin plan is developed, citizens will be invited to attend and be given the opportunity to participate at the sub-basin Advisory Committee meetings. A public workshop will also be held in the local areas during the development of each plan.

Erosion Control

If soil reaches the storm drains, it increases the chances of flooding and it carries pollutants with it. Because of this, USA has recently adopted rules and regulations for erosion control. The cities within the County have also joined in the effort. The effectiveness of these efforts will impact the success of the SWM program.

Rules for prohibiting soil from leaving construction sites have changed the way contractors and builders approach construction. Builders are required to submit plans and obtain an erosion control permit when they apply for a sanitary sewer permit. They are also required to undergo an erosion control inspection by USA staff.

We're Making Progress

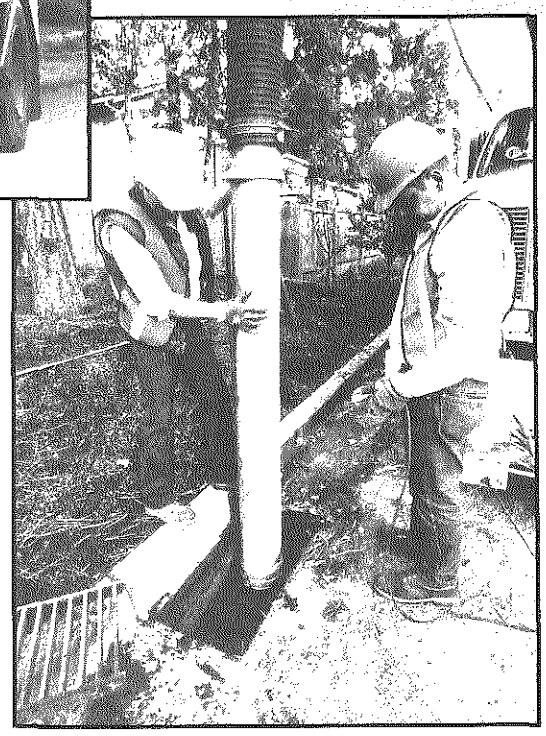


During the first nine months of the new SWM utility, USA and city crews and equipment:

- swept 6,239 miles of streets
- removed 880 cubic yards of street debris
- cleaned 4,027 catch basins
- responded to 240 emergency calls
- cleaned 51,414 feet of storm drain pipe

Workers and equipment continually:

- survey and repair storm drainage systems
- monitor streams (technically and visually)
- monitoring & repairing detention basins
- address erosion problems from new construction



What can I expect to see?

- Consistent regulations and enforcement
- A greatly enhanced storm system maintenance program performed by city or USA crews & equipment
- Measures such as hay bales, matting or other methods to control erosion during construction
- More protection of floodplains and wetlands
- Grassed waterways being used instead of pipes to carry storm water
- Citizen groups doing stream cleanups, stream monitoring or stenciling the message "DUMP NO WASTE, DRAINS TO STREAM" near storm drains
- Capital construction for quality and quantity control

What Can I Do To Prevent Water Pollution?

- Get involved and recognize the importance of surface water as a resource
- Recycle motor oil and other recyclable materials
- NEVER pour anything into a storm drain
- Do not over fertilize your lawn
- Use less toxic alternatives to pesticides & herbicides

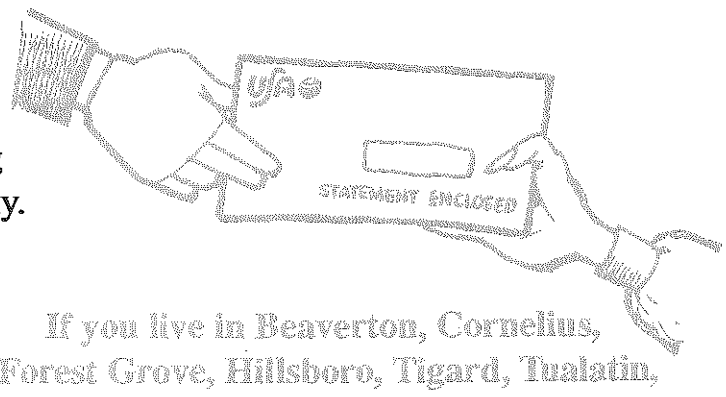
Unified Sewerage Agency
155 N. First Ave.
Suite 270
Hillsboro, OR 97124

BULK RATE
U.S. POSTAGE
PAID
DIRECT MAIL
SERVICES

CAR-RT SORT
Postal Customer

SEWER RATES ARE GOING UP

NEW BILLING INFORMATION



The Unified Sewerage Agency (USA) will be directly billing its unincorporated area customers bi-monthly beginning in July. **Please note how this new method affects you.**

If you live in Unincorporated Washington County or within a portion of Multnomah County or Clackamas County that falls within the USA's service boundary . . .

. . . you will receive a bill for your sanitary and surface water management service fees directly.

The Way It Was...

USA has been collecting the sanitary sewer service fee from its customers through the property tax statement for up to 21 years.

The New Billing Method...

That billing method will be replaced by direct billing beginning July 1. You will see it added to your surface water management (SWM) bill which you have been receiving on an annual basis.

Residential customers now will receive the combined bill bi-monthly for a total of $43.00 ($21.50 per month for **both** sewer and surface water). If you are not currently on sewer, you will be billed the $3 per month SWM service fees only.

If you live in Beaverton, Cornelius, Forest Grove, Hillsboro, Tigard, Tualatin, or Sherwood . . .

. . . you will continue to receive your sanitary and surface water management service bills just as they have been billed.

If you are connected to sewer, the sewer rate has increased from $15.50 to $18.50 per month per household. The increase in the fee is attributed to the cost of higher levels of treatment to meet regulatory requirements, and to accommodate population growth and inflation.

Recycled WASTEWATER

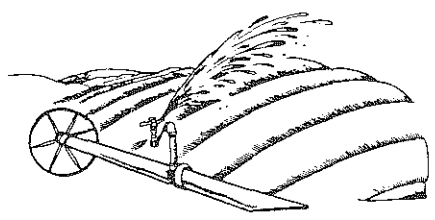
Recycling is a major part of USA's plan for improving the Tualatin River. Why just "get rid of" wastewater when it can be cleaned and used for irrigation?

The goal is to ultimately recycle more than 70% of the community's wastewater. That would bring water predominantly to areas now lacking irragation, make productive use of the nutrients in the water (phosphorus and nitrogen) and reduce the cost of wastewater treatment.

Recycling is not a new concept. California has been using treated wastewater for years on crops and landscaping, to recharge groundwater and to create wildlife and recreational sites. Two golf courses, two school yards and three farms in Washington County currently use recycled water. A recent survey showed a high degree of interest among other potential agricultural and urban users.

Making Sure It's Safe

The Department of Environmental Quality (DEQ) regulates the use of recycled wastewater to protect public health and the environment. Under DEQ rules, several levels of water quality may be recycled, the lower quality water having a number of restrictions on how it can be used. **USA will be producing the highest quality water**, which has virtually no restrictions placed on it except that it cannot be used as drinking water.



Alternatives Explore Levels Of Demand and Storage Options

How much demand will ultimately exist? Will the public accept use on food crops? Should there be a few big reservoirs or many smaller ones? We don't know the answers to those questions yet, so the alternative programs explore minimum, conservative and optimum estimates of demand. Plans for storing the water also differ, ranging from large central reservoirs to a number of smaller reservoirs. One storage option emphasizes using the water to create or enhance wetlands and wildlife habitat.

Each alternative contains *Basic Program components - phasing in the program, careful environmental monitoring, public involvement, and demonstration projects*. For more information, please call Dave Lloyd or John Jackson at 648-8621.

Open House Will Follow Advisory Committee Recommendation

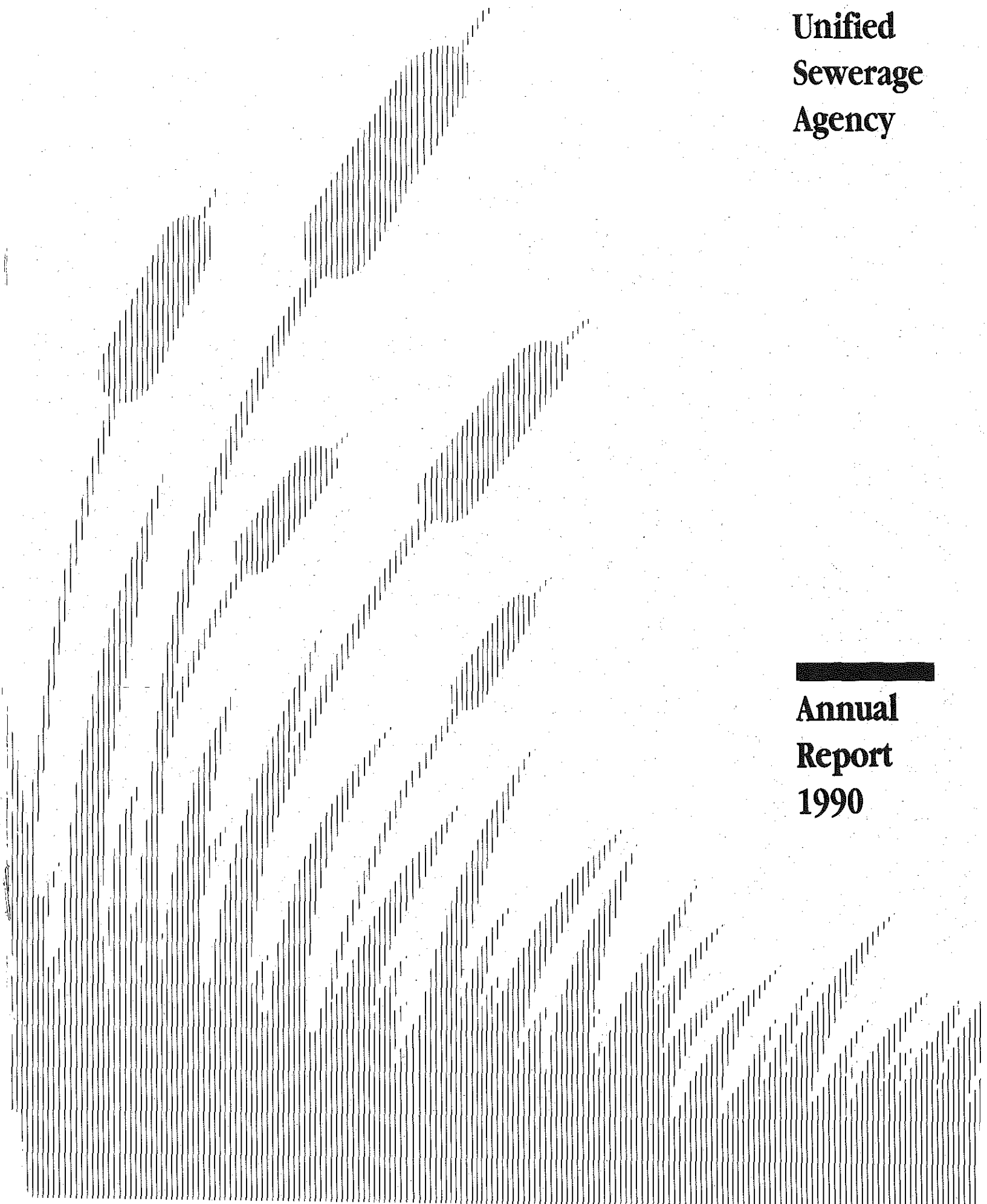
The Recycled Wastewater Advisory Committee (RWAC) - a committee of agricultural, urban and neighborhood representatives - is helping USA identify issues and evaluate the alternatives for the program.

The RWAC will recommend a final plan. In July, an open house and a formal public hearing will give the general public opportunities to comment on the plan.

July 22, 6 p.m. Open House
7 p.m. Public Meeting

Tuality Health Education Building - Auditorium
334 SE 8th - Hillsboro

Unified Sewerage Agency



Annual Report 1990

"The nation behaves well if it treats the natural resources as assets to be turned over to the next generation increased and not impaired in value..."

Theodore Roosevelt
1910

Leadership For The 1990s

The USA Board of Directors (from left to right, top row): Chairman Bonnie Hays, Eva Killpack, John Meek. (Bottom row): Roy Rogers, Steve Larrance.

The Unified Sewerage Agency (USA) is charged with safeguarding the public health and protecting the environment in Washington County and small portions of Portland, Multnomah County and Clackamas County, Oregon. Since our formation in 1970, we have planned programs and developed wastewater collection, treatment, and disposal facilities to achieve these goals.

As the decade of the 1990s emerges, the challenges facing public service agencies are more complex than ever before. However, through our responsible planning efforts, the Agency is positioning itself to meet these challenges and remain a vital part of the Tualatin River Basin community.

With over 38 years of collective experience directing activities of the Agency, the USA Board of Directors, which also serves as the Board of Commissioners for Washington County, is elected by the people who live within the County.

A Comprehensive Perspective

USA is fortunate to have an energetic and hardworking Board of Directors with the knowledge, experience, and vision needed to respond to the challenges of the 1990s.

Board Chairman **Bonnie Hays**, who joined the Board in 1981, has experience in business administration and public education. As Chairman of Commissioners for Washington County, the fastest growing county in Oregon, she knows what it takes "to get the job done."

Eva Killpack, a member of the Board since 1981, has 15 years' experience in construction management. Combined with knowledge of the development process, which she acquired as a former member of the Washington County Planning Commission, she provides a long-term perspective on growth and change.

A solid grasp of financial issues and public agency administration is contributed by **Roy Rogers**. A Board Member since 1985, he is a certified public accountant and past mayor of Tualatin, Oregon.

John Meek, a Board Member since 1983, and a past city councilor for two cities within USA's service district, provides a strong linkage to local government. John was elected to the Oregon Legislature in 1990 and will be a knowledgable advocate for USA on the State level.

Steve Larrance, a member of the Board since 1987 manages a manufacturing business, owned by his family whose Oregon roots date back to 1900. He provides a valuable historical perspective and concern for the people who live within the Tualatin River Basin.

Hands-On Policy Direction

Charged with the public trust, the Board establishes policies to ensure dependable wastewater treatment at a reasonable cost. Board members keep informed of developing trends in this area by participating on Board and other communitywide committees, attending technical conferences, and taking part in the development of local, state, and federal laws and regulations on behalf of the ratepayer.

The policies established by the Board are carried forward by an outstanding staff under the leadership of General Manager **Gary F. Krahmer**. The people at USA work diligently toward the goal of developing one of the best operated wastewater systems in the nation. In both philosophy and practice, the Agency believes that clean water is not just a resource but a responsibility.

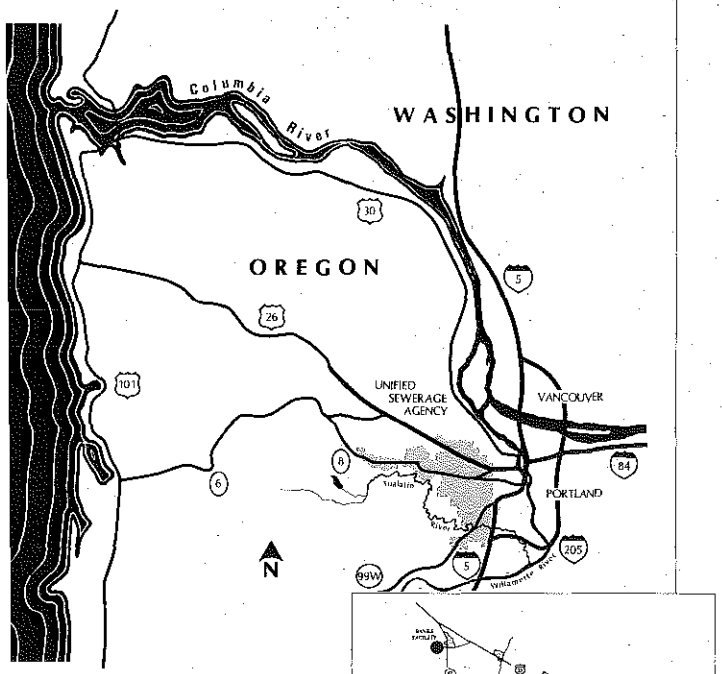
Unified Sewerage Agency management team (from left to right): Operations and Maintenance Department Manager Stanton A. LeSieur, Support Services Manager Roger Swenson, General Manager Gary F. Krahmer, Public Affairs Manager Linda Kelly, Planning and Engineering Department Manager William Gaffi.

The USA division management team (from left to right): Information Systems Manager Kenneth Hart, Engineering Manager Robert Cruz, Maintenance Manager Daniel Leonard, Planning Manager John Jackson, Operations Manager Dale Richwine, Administrative Services Manager Tom Imdieke.

USA systematically matches staff expertise to the demands of a growing service district. A cross-sample of disciplines represented by Agency staff include: Collection Systems, Inflow and Infiltration, Reuse/Reclamation, Technical Support, Financial, Legal, Land Use, Public Information/Public Education, Plant Operations, Air Quality, Monitoring/Testing, Plant Operations, Sludge, Toxics/Pretreatment, Process Control, and Public Policy.

Unified Sewerage Agency has been part of the Washington County community since 1970. For health and environmental reasons, the population of 157,920 at that time wanted a modern sewerage system and voted to form the Agency.

Now after 20 years, our collection system serves a population of 311,500 and has about 600 miles of sewer pipeline. Our treatment plants treat an average of 44 million gallons of wastewater per day. Today, as in 1970, the Agency is committed to providing our communities with the highest level of service at the lowest possible cost to the ratepayer.



USA
UNIFIED SEWERAGE AGENCY
SERVICE AREA

- USA wastewater treatment facilities.
- Unified Sewerage Agency collects and processes wastewater for the cities of Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, North Plains, Sherwood, Tigard, Tualatin; urbanized areas of Washington County; and small portions of Multnomah and Clackamas Counties and the City of Lake Oswego.

Responding to Change

In 1990, USA reaffirmed our commitment to protecting and enhancing the environment by placing a major emphasis on the use of "natural" processes for pollution control. Demonstration wetlands, stream cleanups and maintenance of riparian areas typify the innovative programs designed to preserve the beauty of our surroundings while improving water quality in the Tualatin River. Other non-structural environmental programs, such as irrigating with recycled water, erosion control and a regional ban on phosphate laundry detergents are aimed at stopping pollution at its source, before it enters the treatment system or the river.

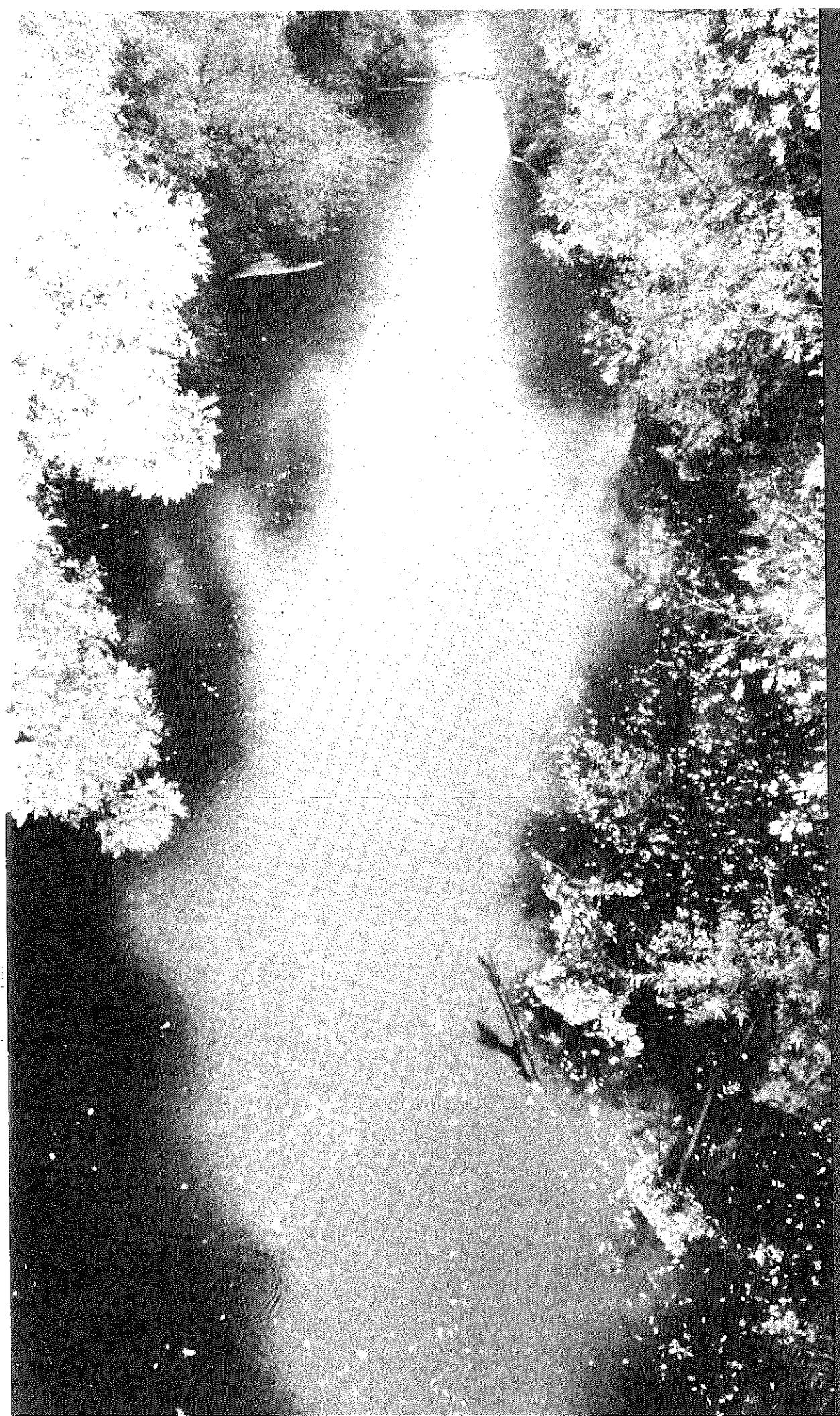
Environmental Ethic

The original focus of wastewater treatment was protection of public health. Until the late 19th century, most large cities discharged their wastewater pollutants directly into lakes, streams, and rivers, causing outbreaks of life-threatening diseases and seriously polluting the environment. Today, the greatest water-quality concern is environmental protection.

In the 1960s, Washington County residents, like the rest of the American public, became concerned about the effects of water pollution on the environment. New regulations aimed at preserving the quality of our rivers and streams were passed by federal and state regulatory agencies. Two major laws, the result of a 1939 initiative petition in Oregon and the Federal Clean Water Act in 1972, were set in place to give the public a major voice in the planning process for water-quality decisions affecting them.

In the past two decades, USA has fought hard to address growth, environmental, and budgetary concerns. Much was accomplished in 1990 to start bringing "conventional" water pollutants under control. These include nutrients that encourage algae growth and consume oxygen in the water and materials that float to the top or settle to the bottom, which cause aesthetics problems and can have a serious impact on aquatic life.

However, there is now a growing emphasis on removal of toxics in water. Government agencies have identified more than 100 toxic compounds called "priority pollutants" that can pose a threat to any given water body. Although treatment technologies have advanced significantly in recent years, economical and reliable methods for detecting and removing some of these priority pollutants still need to be developed.



Protection of the Tualatin River is part of USA's mission. More than 90 percent of Washington County drains eastward through the forks of the Tualatin — the County's only river and the only water body to receive treated wastewater (effluent). Wastewater discharged into this fragile environment meets strict water-quality standards established by state and federal regulatory agencies.

As part of an interconnected network of wetlands, the river provides a vital corridor, riparian and aquatic habitat for plants, fish, and wildlife — cutthroat trout, coho salmon, steelhead, kingfishers, swans, geese, blue herons, beaver, mink, and otter.

Natural characteristics inhibit the river from cleansing itself. The river makes numerous tight turns as it snakes its way for 83 miles to its confluence with the Willamette River. Flat and slow moving, especially in the summer when the river is low, in one 24-mile stretch, the river drops only 12 inches.

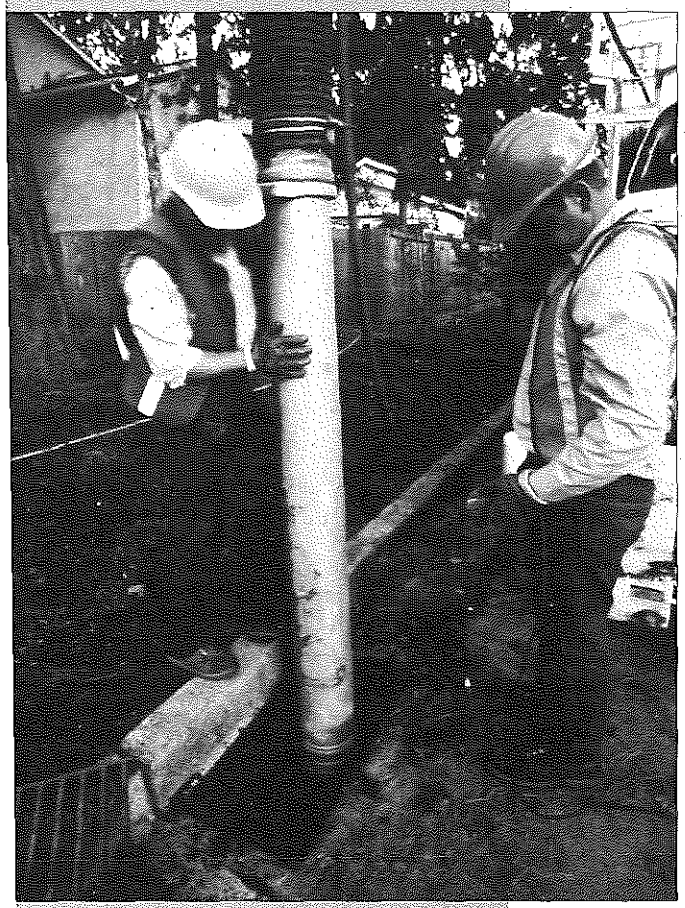
The Tualatin's five major tributaries are fed by rainfall rather than snowmelt. Conflicting demands are made on the river for its scarce resources: drinking water, irrigation, sanitation, and recreation. In the summer, USA works to create a balance by managing the release of water from Scoggins Dam to augment river flows.

Hay bales and plastic fencing prevent soils on construction sites from entering the storm drain system and streams.

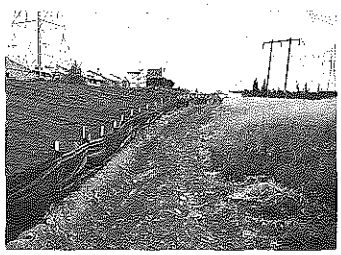
Erosion control inspectors advise builders on effective erosion control practices and monitor construction sites to ensure that standards are met.

USA crews clean catch basins, sweep streets, mow detention ponds and swales to minimize flooding and water quality problems. They quickly respond to emergency flooding calls.

Volunteers stencil "DUMP NO WASTE, DRAINS TO STREAM" on neighborhood streets to keep pollutants out of catch basins.



Surface Water Management (SWM) Plan



The Unified Sewerage Agency Board of Directors adopted the Urban Area Surface Water Management Plan 1990, after two years of study and public participation. The plan covers the urban areas of Washington County and small portions of Portland, Multnomah County and Clackamas County.

Today's plan outlines management of surface and stormwater to protect people, their property, and the general environment from rainfall-related impacts. As a specific USA function, the plan addresses nonpoint source pollution, rainfall-related erosion and sedimentation, rainfall runoff management and flood control throughout the 123-square-mile service area, which contributes runoff to the Tualatin River. It recommends that USA work with others to:

- Prevent pollutants from entering the system rather than providing treatment or mitigation.
- Control runoff at the source to the greatest practical extent to reduce stormwater runoff quantity and associated local and regional flooding.
- Remove pollutants at or as near to the source as practical.
- Reduce the negligent discharge of harmful substances to the surface water system through public education and enforcement.
- Provide for removal of pollutants from the surface water system through maintenance and passive treatment (such as biofiltration).
- Prevent the exposure of soils to erosion from wind or rainfall.

USA's SWM utility began service on July 1, 1990. Employees went right to work implementing programs that cover:

- Storm drainage system maintenance.
- Emergency response to calls about flooding.
- Water quality testing and monitoring of streams.
- Stream inventories and manmade drainage systems.
- Erosion control at construction sites.
- Protection of wetlands, streams, and floodplains.
- Volunteer citizen cleanup efforts.
- Public education.
- Strategies for watersheds to prevent and control growth-related water pollution and flooding.

An Important Balance

As environmental regulations become more stringent, and certain compounds in water and wastewater remain difficult to detect and remove, and as steady growth continues to occur within our service district, collection and treatment costs increase accordingly. USA is committed to the increased level of environmental protection that the public wants and expects, and is dedicated to protecting the ratepayer's current and future investment.

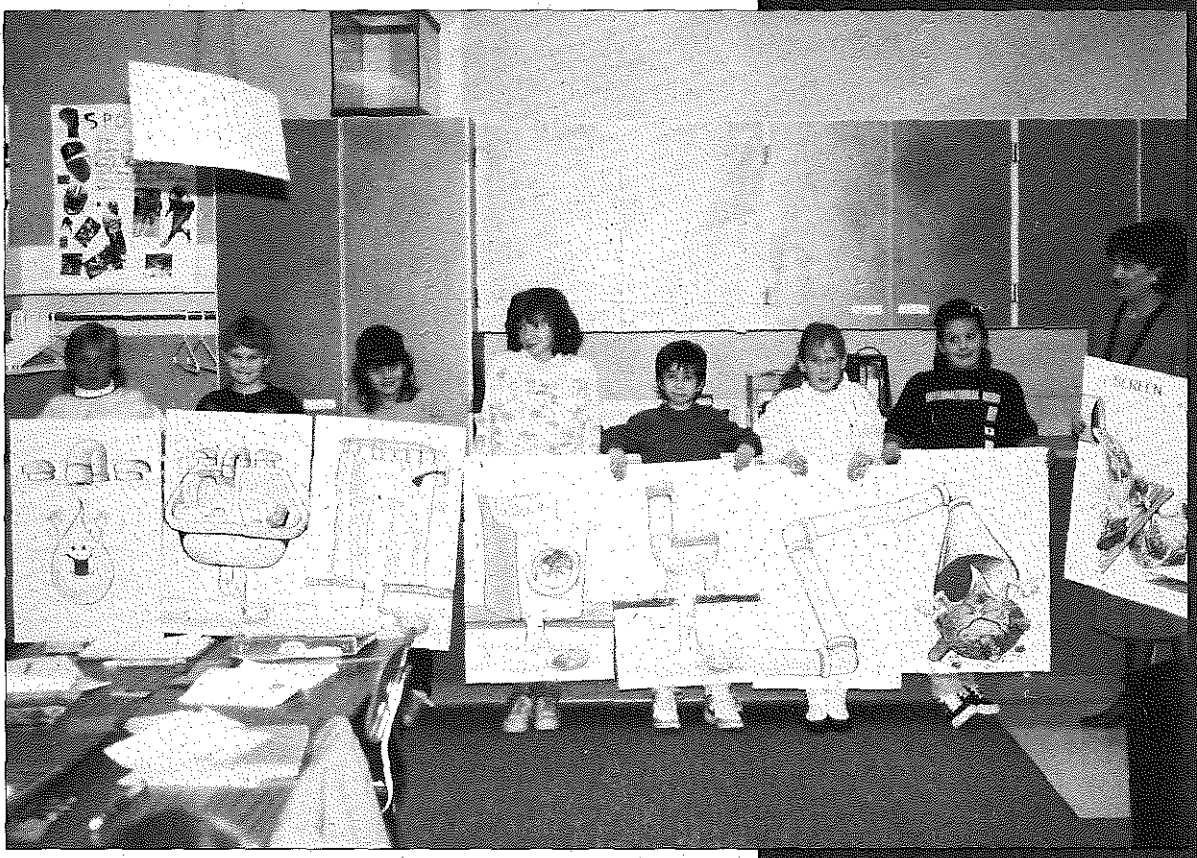
Today, public expectations are reflected in a growing number of increasingly stringent regulatory requirements. Through participation in a variety of national, state, and regional committees, programs, and organizations, Agency staff is providing input to and monitoring the development of new regulations and laws.

The national award-winning Tualatin River Ranger program developed and presented by USA staff is designed to *reach 6,000 fourth grade students* and their parents annually.

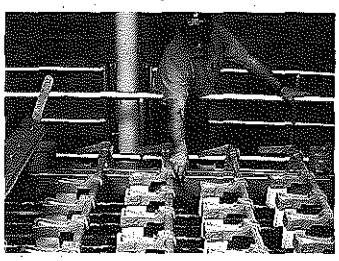
A thought-provoking presentation, the program actively involves the audience, while teaching the importance of clean water, wastewater treatment and recycling, water conservation and how water pollution can be prevented.

"one of the finest special resource presentations I've observed in my 17 years of education."

Marilyn McGlasson
Superintendent
Farmington View Elementary School



Making Tough Decisions for Tomorrow



In our planning, USA must consider the needs of a comprehensive and complex system: building, operating, and maintaining the facilities required to collect and process wastewater for 311,500 people living within the service district. Our five treatment plants combined process an average of 44 million gallons of wastewater each day for discharge into the Tualatin River or on land. In addition, there are approximately 600 miles of sewer pipeline and 38 sewage pumping stations in USA's sewerage system.

Facilities Management

The Wastewater Facilities Plan was adopted by the USA Board and approved by the Environmental Quality Commission (EQC) in 1990. It represents a tremendous amount of staff person-hours as well as a major expenditure of funds towards the goal of a cleaner Tualatin River.

Thirty-seven agencies and jurisdictions, nine citizen advisors, more than 20 USA staff members and a team of nine consulting firms worked together to develop the Facilities Plan. The entire process was completed in 10 months.

The plan calls for a comprehensive approach to protecting water quality in the Tualatin River Basin. It includes the evaluation of technical solutions, incorporates public values, and identifies programs for USA that are needed for the long-term success. The plan's key elements include:

- Controls to reduce the amount of pollutants that users discharge into the wastewater system — at the source — through a ban on phosphorus-containing detergents, water conservation, limiting or placing fees on what industries can discharge.

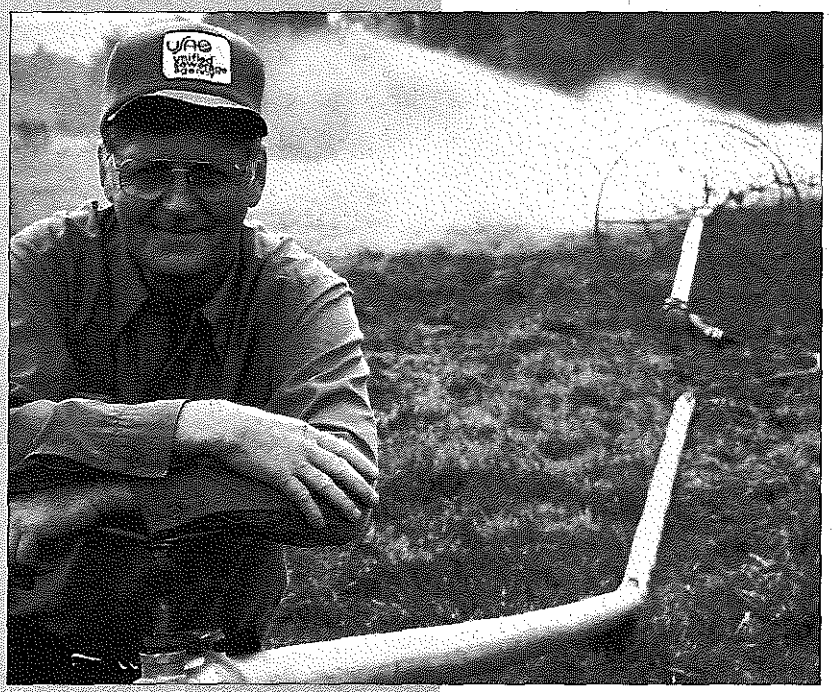
- Planned growth, with USA working to ensure that water quality considerations are incorporated in planning decisions made by responsible state and local agencies.

- Reduced rainwater infiltration and inflow into the wastewater treatment plants by "sealing" the sewers and temporarily storing excess wastewater in wet weather to treat it when flows are lower.

With the belief that water used once is wasted, but water used twice is conserved, USA is about to embark on an aggressive program to market recycled water.

Ultimately, more than 70 percent of USA's treated wastewater may be recycled onto farmland, golf courses, office complexes landscaping, school yards and play fields, nurseries, industrial parks, highway/street landscaping, parks, and cemeteries.

Recycling treated wastewater conserves domestic and agricultural water supplies. Its nutrients (phosphorus and nitrogen) reduce the need for fertilizer. It provides a low cost opportunity to increase productivity of farmland that currently lacks irrigation. Recycled water also reduces the cost of treating wastewater.



- Maximum reuse of effluent (highly treated wastewater) to irrigate farmland; processing and recycling the organic by-product of the treatment process — sludge — for reuse on farmland, providing valuable nutrients for the soil.

- Creation of wetlands to "polish" effluent while providing wildlife habitat.

- Protection of sensitive riverbanks for wildlife habitat and other uses, as well as improved river access.

- Advanced levels of wastewater treatment.

- Expansion of the existing Barney Reservoir, enforcement of water rights, management of irrigation withdrawals, and management of releases from existing upstream reservoirs (Hagg Lake and Barney Reservoir), to ensure adequate river flows in summer months.

The plan establishes an ambitious implementation schedule for three time periods: Interim (1990-93); Short-term (1993-97): and Long-term (1997-2010).

A key feature of the plan is its emphasis on flexibility. The project advisory groups and the public concluded it is best for Unified Sewerage Agency to remain flexible — able to respond to changing conditions, taking advantage of new technology as it is proven effective, and meeting any new regulations which may be imposed in the future. The plan will be reviewed at two-year intervals and adjustments made as necessary.

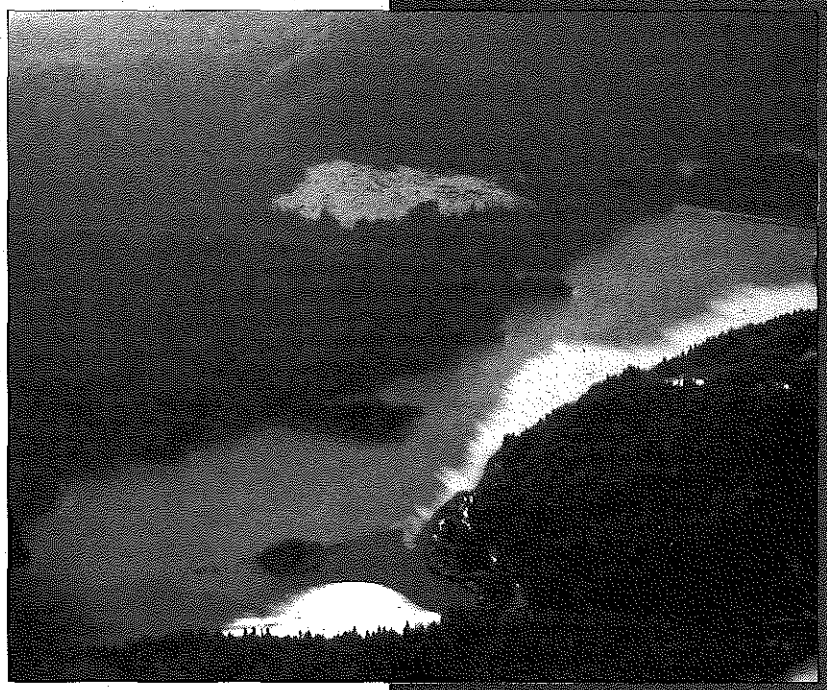
The recommended plan also relies on USA establishing a partnership with the Department of Environmental Quality (DEQ) and other agencies responsible for managing and monitoring implementation, and outlines specific actions by these agencies that are essential for implementation.

The estimated capital cost for the plan is $351.5 million. When escalated to include inflation of 5 percent annually, the total capital cost is estimated to become $465.8 million. Operating costs for the new facilities are projected to total $11.8 million per year by the year 2010.

There is no doubt that this represents a significant amount of money. There are solutions to the issues confronting water quality in the Tualatin River Basin that could appear to be somewhat less expensive, but during the development of the Wastewater Facilities Plan, these alternatives were perceived by citizens, environmentalists and other groups as not being cost effective or environmentally sound in the long run.

A $20 million expansion of the Barney Reservoir will yield an additional 16,000 acre-feet, enabling the Agency to improve water quality in the Tualatin by managing summer flows. USA plans to retain rights to the water for a 10-year period, gradually relinquishing those rights as municipal and industrial demands increase.

USA now releases water from Hagg Lake, during the summer months, to provide the dilution needed to meet permit conditions for the river. The Agency must acquire additional water rights in Barney Reservoir to ensure on-going compliance.

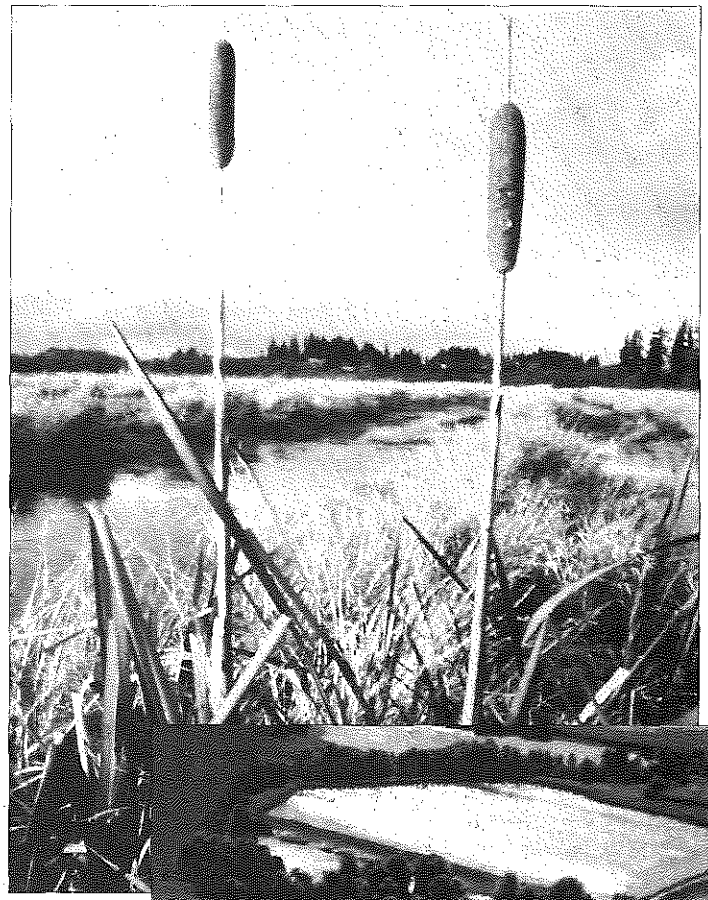


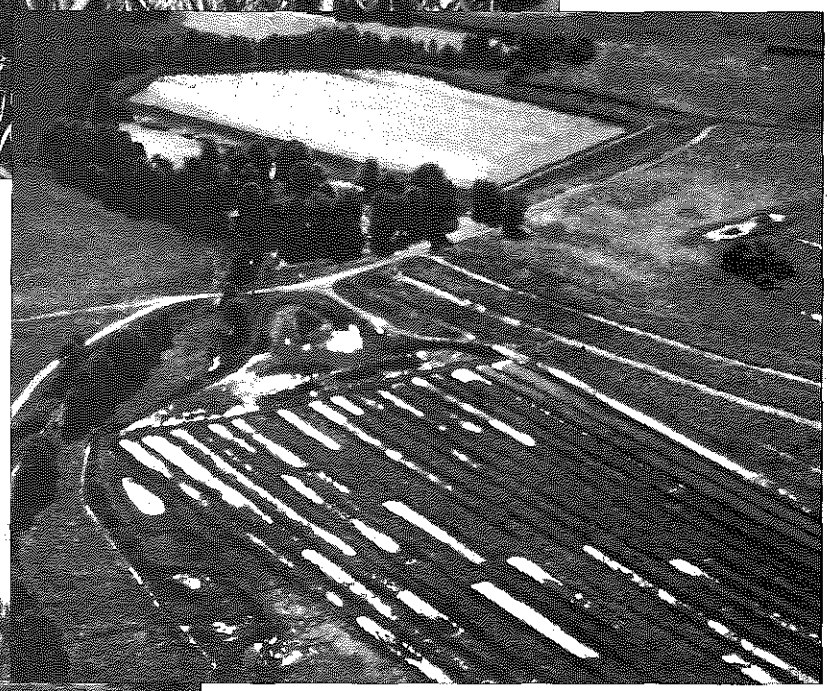
USA conducts water quality research on vegetation types, functions and groundwater makeup and movement at the Jackson Bottom Experimental Wetlands, adjacent to our Hillsboro treatment plant.

Teams of biologists and scientists roam the site taking tests and analyzing data. Computers in the wetlands stand next to botanists exploring vegetated channels; birders survey avian populations while hydrologists study the movement of groundwater under the entire Bottom.

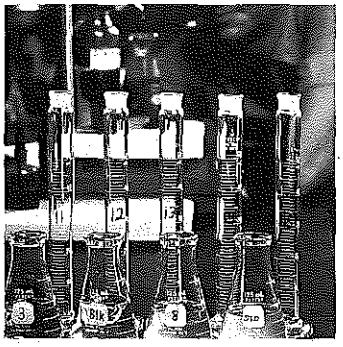
All this to answer the question: Can constructed wetlands systems be used to "polish" secondary sewage, or effluent, before releasing it into the Tualatin River?

This local effort will serve as a regional and national model to help jurisdictions everywhere as the struggle continues to protect our natural systems while developing urban areas.





Looking For Answers



The more we learn about the impact of contaminants on aquatic life and human health, the more questions we raise. These questions are being answered with a variety of programs that determine the effect of effluent on living organisms, the specific chemical substances released into the environment, and the risks these substances pose to human health.

Modern Technology

USA's four laboratories closely monitor our ability to protect the environment and comply with the stringent discharge requirements established by regulatory agencies. Our highly specialized laboratory staff uses sophisticated test equipment and modern instrumentation to perform numerous tests on wastewater and river and stream samples collected throughout the Basin.

Three USA labs monitor process control and permit compliance at our five treatment plants. Accurate process control monitoring enables us to achieve maximum nutrient removal with minimum chemical usage and sludge production.

Our fourth lab monitors surface water and the wastewater generated by industry. Consistent enforcement of industrial wastewater standards protects the treatment plants and the environment from toxic substances.

Surface water monitoring helps identify problem areas throughout the Basin and allows staff to document our progress in meeting the Total Maximum Daily Loads (TMDL). USA expanded our tributary monitoring program in 1990 to study the effects of nonpoint pollution on water quality in the Tualatin River. Results show that a significant amount of effort to control pollution at the source is required before measurable improvements can be detected in the river.

Research and Testing

Developing an adequate data base is the first step toward solving point source (treatment plants, etc.) and nonpoint source (urban runoff) pollution problems. Seventeen years ago, USA voluntarily started sampling and developing one of the most sophisticated data bases in the State. USA's data base provides the foundation for DEQ's statistical records on the Tualatin River Basin.

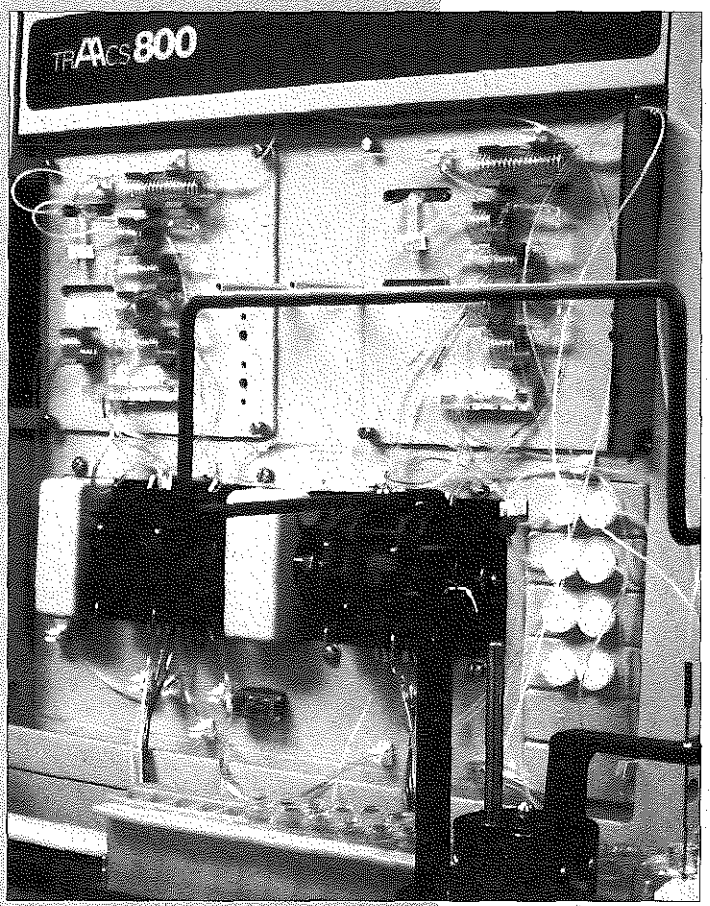
Agency labs perform more than 30 different tests to ensure that treated effluent complies with discharge permit requirements.

After wastewater receives tertiary treatment, 99 percent of the organics are removed. Lab staff spend considerable time monitoring progress on reducing that last one percent.

This year, one of our four labs completed more than 186,000 tests with fewer staff than 10 years ago. TrAAcs 800, an automatic analyzer, streamlines test time, allowing lab analysts to perform complex testing with improved accuracy.

Rock Creek and Durham are the only two USA plants that discharge to the Tualatin River during the summer. Protecting aquatic life is an important part of our work.

In 1990, outside labs performed biomonitoring tests on live organisms to evaluate the environmental effects of effluent treated at these two plants. The results were good. Tests discovered no chronic toxicity to live, test organisms.



Pilot projects at the Rock Creek Plant were successful in demonstrating that we can meet the 0.07 mg/l requirement for phosphorus by EQC's deadline of June 1993.

USA's scientific data bases are fortified by contracting with research scientists, federal agencies and private firms to obtain current, accurate information.

Non-structural Innovations

A portion of Jackson Bottom Wetlands, a wildlife refuge adjacent to USA's Hillsboro treatment plant, is being used to test the ability of wetlands to reduce the nutrients (such as phosphorus and nitrogen) in secondarily treated effluent. If this small-scale study is successful, USA will construct wetlands on various sites within the service district and incorporate them into the Agency's treatment system.

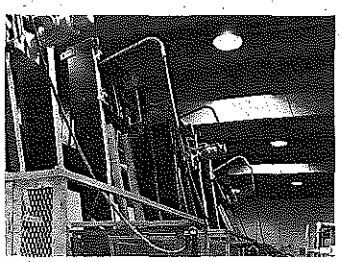
A tri-county ban on phosphate-containing laundry detergents was initiated by USA and approved by our regional government, effective February 1, 1991. We expect to see a 30 percent reduction of phosphorus entering our sewage treatment plants and a savings in excess of $350,000 from reduced chemical usage. This will also result in a higher quality effluent.

Public Education

The public's understanding of water quality issues and its support for the recommended improvement measures will determine the success of our planning efforts. Key areas of public education include building an awareness of the watershed concept, its river and streams, recreational opportunities, problems and solutions, agricultural use of treated wastewater and sludge, costs, and what individuals and groups can do.

USA's aggressive public education program combines a variety of awareness-raising techniques: citizen input committees, newsletters, informational door hangers, stream cleanups, storm drain stenciling, the national award-winning Tualatin River Ranger student education program, open houses, displays, news media coverage, and recognition of positive water quality actions. USA coordinates with other groups to leverage public education efforts.

Finding Solutions



During the past year, USA made significant progress in furthering ongoing projects and initiating new ones to protect the environment. Considerable amounts of time and labor were invested in maintenance, education and pilot projects for our new Surface Water Management utility.

Capital costs, a major portion of USA's budget, reflected treatment plant upgrades and expansions that serve two major purposes. First, a portion of the improvements include advanced levels of wastewater treatment, ensuring that USA meets the highest standards in the nation. Second, other improvements increase treatment plant capacity, enabling USA to continue to serve the fastest growing county in Oregon.

The Agency's largest treatment plant, Durham, was the scene of continuous construction activity during 1990.

A new headworks building, primary, secondary and tertiary facilities were some of the many improvements.

Key Capital Projects During the Year:

- Construction of biological processes that increased treatment capacity at the Rock Creek plant from 15 to 20 million gallons per day (MGD) and allowed removal of ammonia nitrogen to meet 1993 compliance date for ammonia total maximum daily loads (TMDL).

- Improvements to Rock Creek plant sludge thickening facilities and equipment.

- Design and initial construction of Durham plant headworks building to provide screening, grit removal, and flow management.

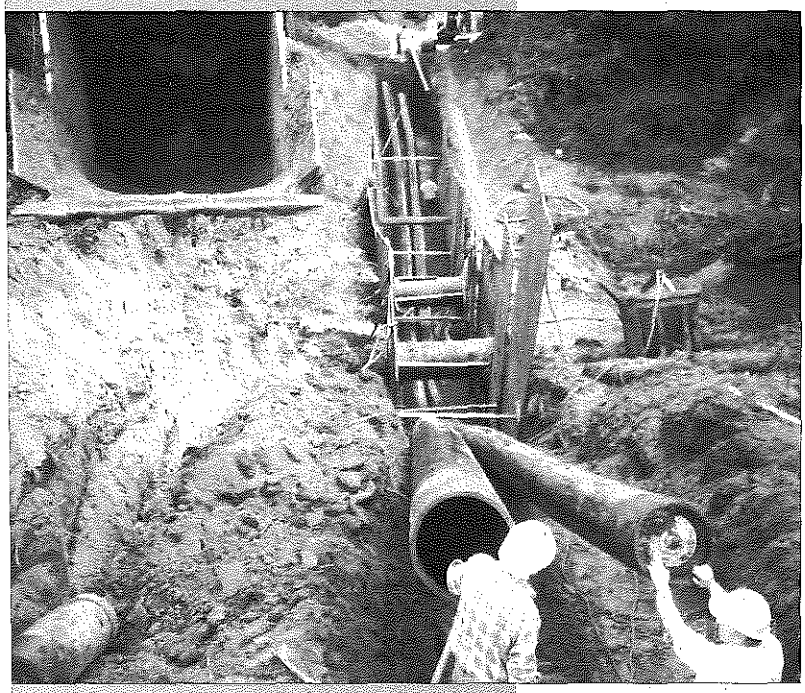
- Design of biological processes at Durham plant to meet mass discharge limits will add a chemical clarifier, chlorine contact basin, secondary clarifier, aeration basins, effluent filters, excess flow pumping station, recycled-water pumping station, and dechlorination.

- Completion of design for Rock Creek plant tertiary system: additional filtration (20 MGD capacity), disinfection (one contact basin), effluent pump station, and modifications to the existing alum system.

- Completion of effluent dechlorination at Durham plant.

- Completion of odor control system including covers over the outfalls of four existing primary clarifiers and implementation of post-aeration and dechlorination systems and a lime system for improved pH control at the Rock Creek plant.

More Capital Improvements...



Lower Council Creek Trunk is a project consisting of 27,800 feet of 42-inch sanitary sewer pipeline extending from the City of Hillsboro to the City of Forest Grove.

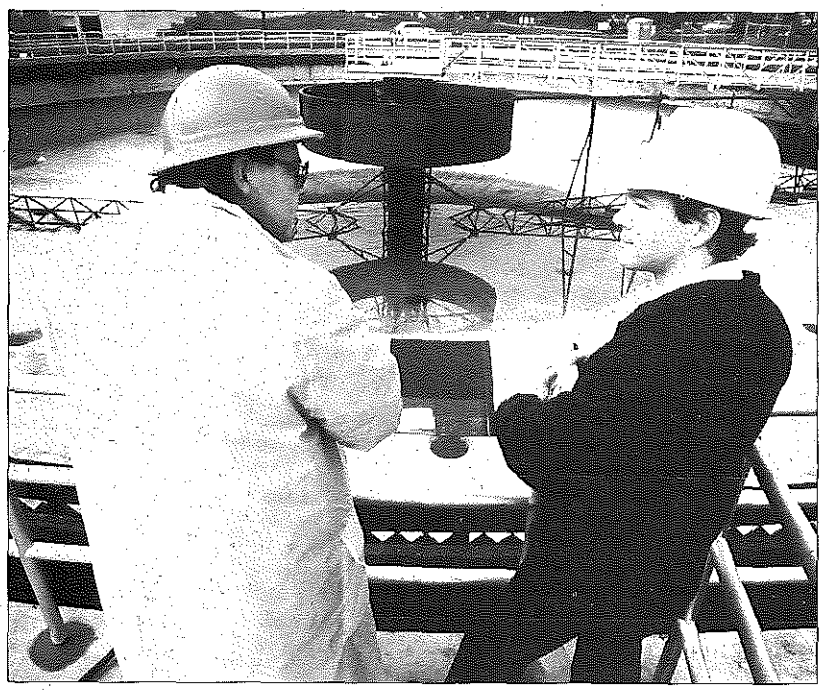
At Dairy Creek, a siphon consisting of three smaller diameter pipes — 10-inch, 18-inch, and 24-inch — increases flow velocity, enabling the flow to go down and up the other side of Dairy Creek, before entering another 42-inch line.

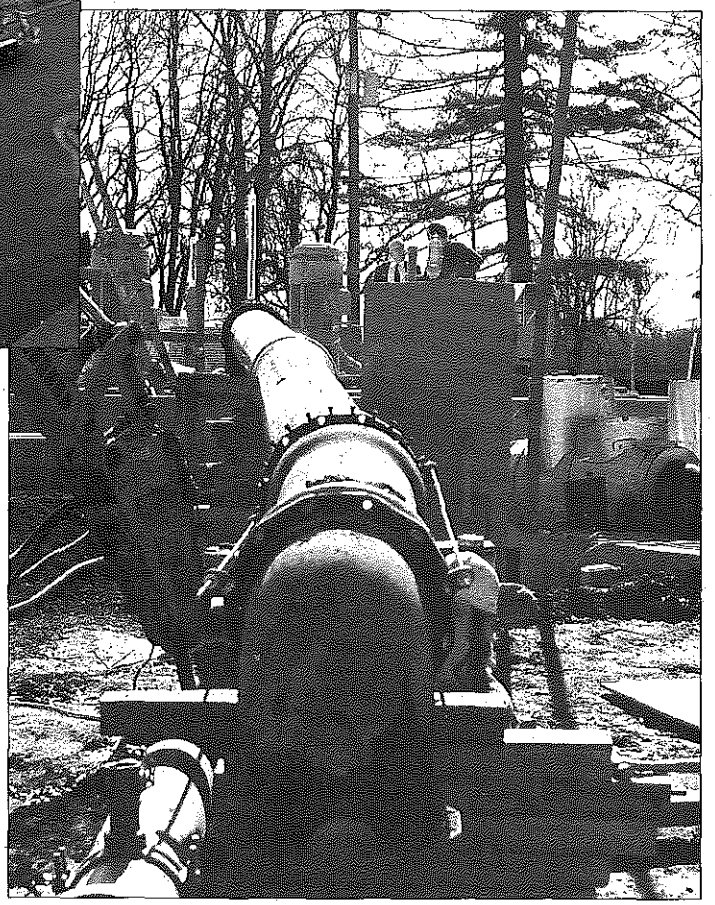
- Ordered equipment for Agency-wide telemetering of remote pump stations and outlying treatment facilities' alarm systems. This will permit all stations to communicate with the computer centrally located at the Rock Creek facility.
- Completion of sludge dewatering improvements and conversion of secondary anaerobic digester to a primary digester at the Forest Grove plant.
- Completion of predesign for adding post-aeration and dechlorination systems and effluent filtration at the Forest Grove plant.
- Design of raw sewage pumps for Hillsboro plant.
- Design of replacement sewer trunk line — Butternut Creek Interceptor.
- Construction of West Hillsboro Trunk line.
- Construction of University Pump Station Upgrade in Forest Grove.
- Predesign engineering for Barney Reservoir expansion. Additional flows generated by this expansion would help meet the DEQ's effluent dilution requirements.
- Completion of improvements to temporary sludge storage sites.
- Monitored wetlands prototype for small-scale testing of the ability of wetlands to remove nutrients and heavy metals from secondarily treated effluent.
- Completion of the Gaston Force Main to transport raw sewage from the City of Gaston to the Forest Grove plant. This allowed the removal of the Gaston plant from service.
- Completion of the Cooper Mountain Trunk Upgrade to increase the capacity of the sewer line.
- Completion of the Lower Council Creek Trunk sewer line that will use gravity flow to carry sewage from areas of Cornelius and Forest Grove to the Hillsboro plant, eliminating several outdated pump stations.

Durham clarifier nears completion (right).

Capacity and treatment level improvements in process at Rock Creek (lower left).

New Forest Grove pump station replaces failing University pump station (lower right).

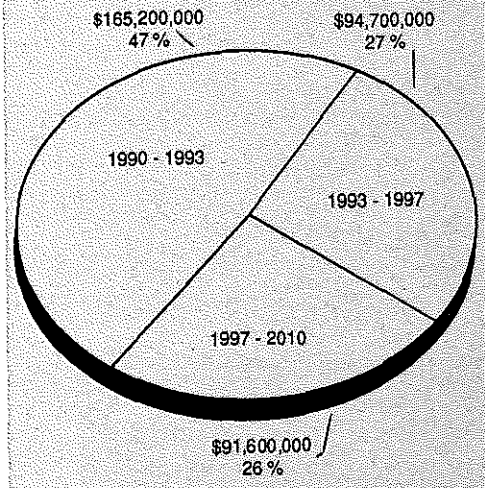




20-year Plan for Protecting the Tualatin River

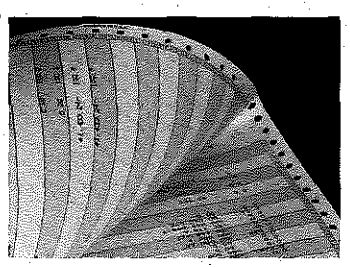
USA's 1990 Facilities Plan outlines the cost of financing plant expansions and upgrades to meet the most stringent water-quality standards for phosphorus removal in the nation, while providing reliable sanitary service for the fastest growing county in Oregon.

Cost of 20-Year Plan



The total cost (in 1990 dollars) is $351.5 million. When a 5 percent inflation rate is added for the 20-year period, total costs rise to $465.8 million.

Financial Planning



Operating a high-quality wastewater collection and treatment system costs money. As environmental regulations become more stringent, collection and treatment costs increase accordingly. USA is committed to the increased level of environmental protection that the public wants and expects, but also is dedicated to protecting the ratepayers' valuable investment today and tomorrow.

Each year, USA collects and spends millions of dollars to provide reliable service to our community. Money received from sewer service and connection charges, property taxes, permit and inspection fees, service contracts, and interest is prudently managed, and flexible, long-range planning assures the development of responsible programs.

In the 1990-1991 budget, customer service charges and connection fees are a significant source of revenue.

Service Charges:

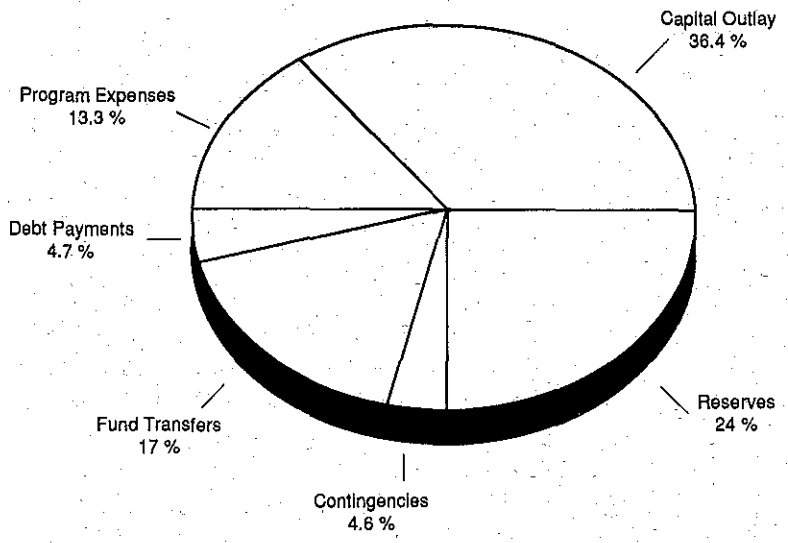
Sanitary sewer	$24,293,343
Surface Water Management	3,540,000
Connection service fees	10,383,000

The Agency funds operating expenses exclusively from operating revenues.

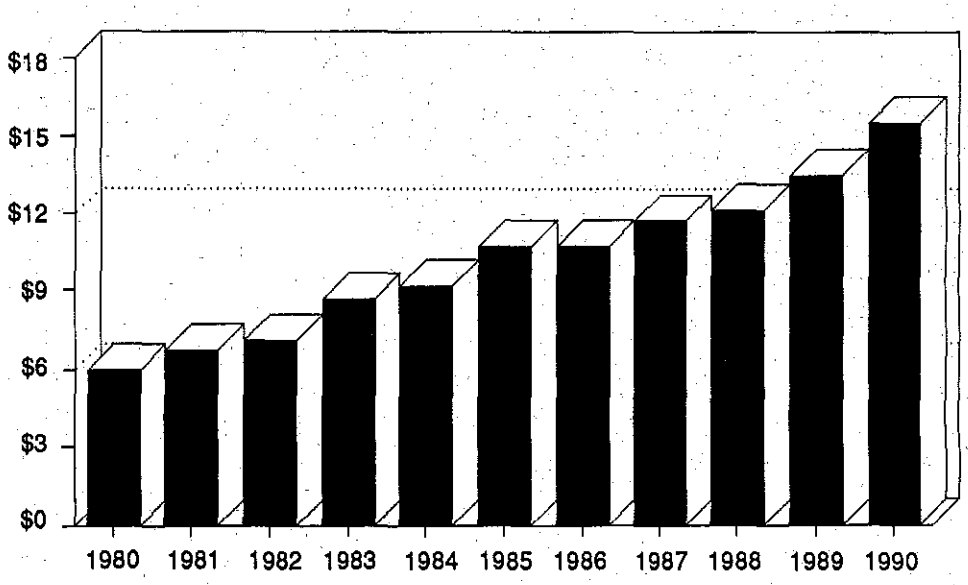
GFOA Awards

The Government Finance Officers Association of the United States and Canada selected the Unified Sewerage Agency of Washington County, Oregon, again this year, to receive the Certificate of Achievement for Excellence in Financial Reporting and the Distinguished Budget Presentation Award for achieving the highest standards in government accounting, financial reporting, and budget presentation.

Total Budget 1990 - 1991
$167,017,218



Monthly Service Charge



Responding to the dynamics of an *expanding service district*, USA experienced record growth in 1990. The beginning of a new, separate utility service — storm and surface water management — and numerous water quality and quantity programs, resulted in increased budgets and additions to staff.

USA added 52 staff positions this year — a 20 percent increase over last year.

Thirty-six workers were hired as part of the new Surface Water Management utility.

Eight more positions were budgeted to enlarge our crews in sanitary sewer service.

Eight positions were needed in support roles as USA broadened services.

How Wastewater Treatment Works

Throughout the urbanized areas of Washington County, an underground network of lateral, trunk, and mainline pipes transports wastewater from homes, businesses, and industries to one of five USA treatment facilities. At the treatment plants, an intricate array of tanks, pumps and pipelines cleans and purifies the wastewater until it is more than safe enough to be discharged into the Tualatin River or recycled for use as irrigation water.

At USA, wastewater treatment consists of three major processes — primary, secondary, and tertiary — plus a complicated solids reduction process that includes digestion of the pollutants (sludge) removed during treatment.

USA's treatment plants use a series of physical and biological processes to produce one of the most highly treated wastewaters in the United States. The wastewater is treated by speeding up the process that nature would use.

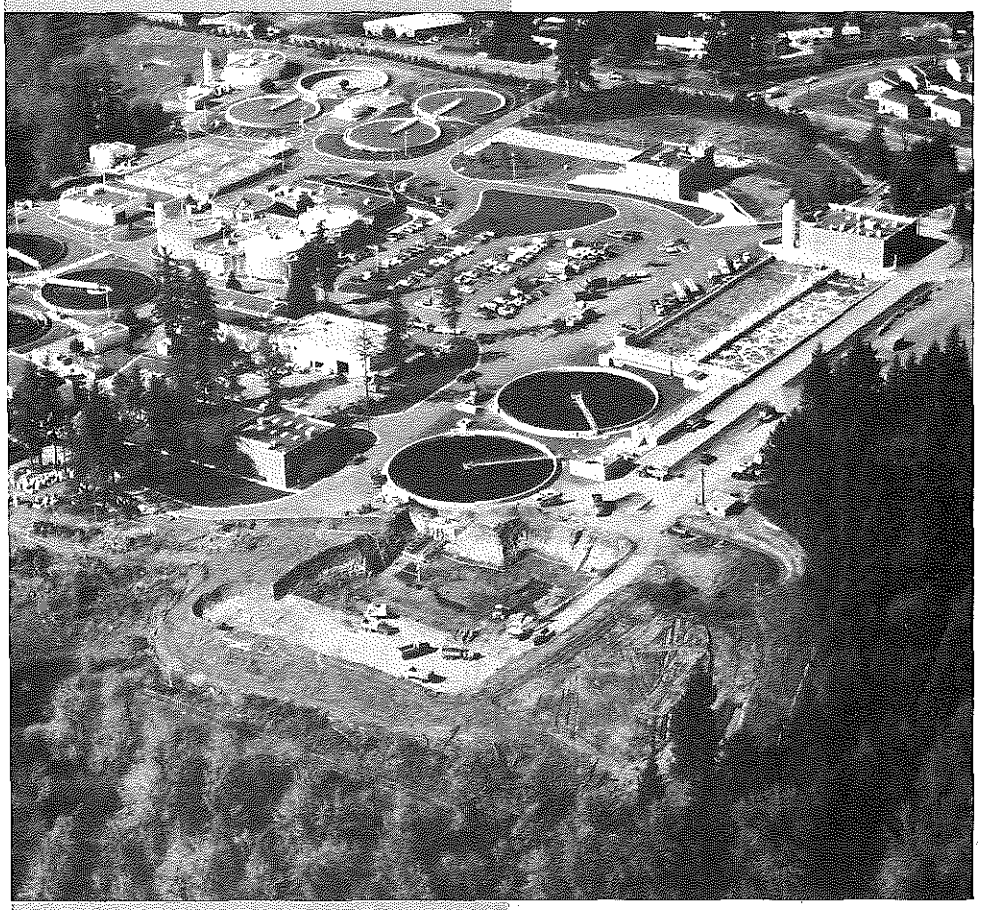
In primary treatment, sand, grit and heavy organic solids are removed by the natural process of settling — using screens, settling tanks and skimming devices. From 50 to 65 percent of the solids are removed during this phase.

During the secondary process, up to 98 percent of the organic pollutants are removed. Oxygen supplied to the wastewater stimulates the growth of the bacteria and other microorganisms, which break down and consume the organic waste particles. These bacteria, the same bacteria that break down waste in the soil or even a compost pile, are then separated from the wastewater by settling.

In the final stage of the process, tertiary treatment, the wastewater is filtered through sand, gravel and charcoal filters and disinfected using chlorine. Excess chlorine is removed, and treated water is tested to ensure that it meets environmental standards. During the summer months, chemicals are added to remove phosphorus. After this process, over 99 percent of the organics are removed from the wastewater.

All solids and organic matter removed during these treatment processes are stabilized by using anaerobic (able to live or grow without air) bacteria. This stabilized sludge is recycled onto local farmland as a soil enhancer.

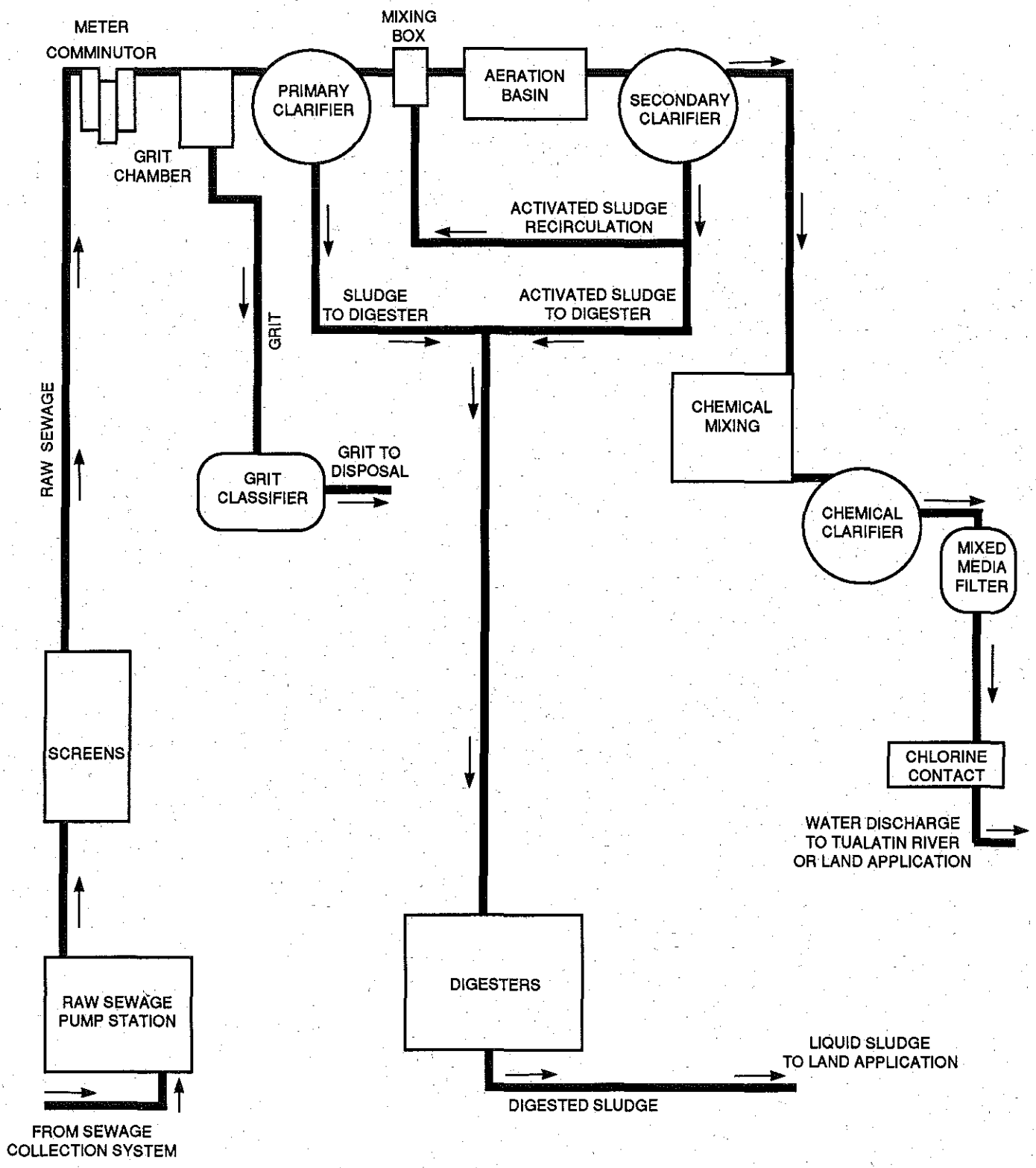
All year long — 365 days a year, 24 hours a day — the wastewater treatment plants provide a total approach to environmental protection.



USA's five treatment plants, located in Tigard, Hillsboro, Forest Grove and Banks, treat an average of 44 million gallons of wastewater per day. The high-quality effluent protects the public health and the environment of the Tualatin River.

Following the Flow

Rock Creek Treatment
Flow Schematic Diagram



Unified Sewerage Agency
of Washington County

For USA information contact
USA Public Affairs
155 N. First Avenue
Hillsboro, OR 97124

Printed on recycled paper

Relationship With Washington County

Unified Sewerage Agency is a service district in Washington County. Sometimes mistaken as a department of Washington County government, we are an entirely separate agency in both management and funding. We do, however, coordinate our work and planning with the County and contract with them for various services. Our Board of Directors is comprised of the individuals who are elected as Washington County Commissioners.

USA Facilities

Unified Sewerage Agency
155 N. First Avenue, Suite 270
Hillsboro, OR 97124
(503) 648-8621

Durham Facility
16580 SW 85th
Tigard, OR 97224
(503) 620-3383

Forest Grove Facility
Route 3, Box 17A
Forest Grove, OR 97116
(503) 357-3162

Rock Creek Facility
3125 SE River Road
Hillsboro, OR 97123
(503) 681-7050

Hillsboro Facility
770 S First Avenue
Hillsboro, OR 97123
(503) 648-8716

Any Questions?

If you have any questions or comments about the Unified Sewerage Agency, we would like to hear them. Please feel free to call us at 648-8621.

If you are from the Southeast portion of our service area, call toll free 684-4643. Our facilities are open for tours. We look forward to hearing from you!

Unified Sewerage Agency
155 N. First Avenue
Suite 270
Hillsboro, Oregon 97124
(503) 648-8621

General Information

Unified Sewerage Agency
of Washington County

The Way It Was

In 1969, 28 treatment plants discharged wastewater to the Tualatin River or its streams. Many of the plants did not treat the raw sewage to par, and water pollution seriously threatened both the health and the economy of residents and businesses. Danger signs were posted along the river to warn streamgoers of foul water.

State regulators declared a stop of development in the county until the river was cleaned up. The County Commissioners recommended one regional sewage authority to manage sanitary treatment for the county, and the Unified Sewerage Agency (USA) was born.

Facing A Massive Task

After USA was formed in 1970 by a special vote of the people to clean up the water pollution in the Riverand its streams, it immediately began to implement a master plan.

The strategy was to phase out the small inefficient plants that discharged to the streams and build facilities that would accommodate the millions of gallons each day and provide advanced treatment. Innovative wastewater treatment has been a tradition in Washington County every since.

USA Today

Our 123-square-mile service area covers the urban areas of Washington County, and small portions of Portland, Multnomah County and Clackamas County.

Sanitary -- USA is responsible for the collection, treatment and disposal of all domestic and industrial wastewater from the cities of Beaverton, Tigard, Tualatin, Hillsboro, King City, Forest Grove, Sherwood, Cornelius, Banks, Gaston, Durham, and North Plains.

Surface Water Management -- In July of 1990, USA began operations as a surface water management (SWM) agency for urban Washington County, working with cities and the county to manage drainage systems and control pollution from runoff.

Flushing Doesn't Make It Disappear

USA is one of the least visible public agencies in Washington County. Our task of collecting, cleaning and disposing of wastewater is not glamorous, but it is important. Wastewater does not disappear when it leaves our homes and businesses down a drain. Without wastewater treatment, the public health and the environment would be in jeopardy. When we do our job, we are usually out of sight and therefore out of the mind of our customers.

Connected To Our Ratepayers

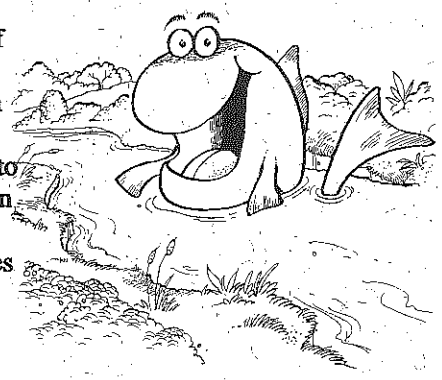
Few ratepayers realize that USA's place in the community extends far beyond our five treatment plants.

Nearly 600 miles of underground sewer pipe connect homes, businesses and industries to our collection and treatment systems. Thirty eight pumping stations located strategically throughout our 123-square-mile service district assist in conveying the wastewater to the plants. Our highly-skilled staff ensures that our plants function safely and efficiently 24 hours a day, 365 days a year.

About 310 employees operate and maintain the plants, sewer lines, surface water management system and perform the administrative functions of USA.

Highest Standards

Today, the 34 million gallons of wastewater that enter our Durham and Rock Creek plants is cleaned to a higher level than 98 percent of the treatment facilities in the nation.



Service Fees

Day-to-day sewer service is paid for by a sewer service fee to our customers.

Cities --

People who live in Beaverton, Cornelius, Forest Grove, Hillsboro, Sherwood, Tigard, and Tualatin receive their sewer bill from their city. By contract with USA, the city keeps a percent of that money for functions they perform and then turns over the remainder to USA.

Unincorporated Areas --

Beginning July 1, 1991, USA began bi-monthly billing for both Sanitary and SWM charges to our 42,000 customers in the unincorporated areas of Washington County. If you live in one of the cities listed above, the city will continue to collect your fees.

Our current sewer fee is $18.50 per month. Our surface water management fee, which is collected either by cities or USA, is $3.00 per month. If you are not connected to sewer, you will receive only the surface water management fee.

USA Tax

If you have a USA tax on your property tax statement, it is paying for the plants and sewers we have built to alleviate past pollution problems and handle Washington County's residential and business population. The tax rate for the current fiscal year is .27/$1,000 of assessed value. (Our fiscal year runs July 1 through June 30.)

If you live in a residential area that has formed a local improvement district (LID) to build sewers, and have chosen to pay over time through installments, you may also have an LID assessment on your tax statement.

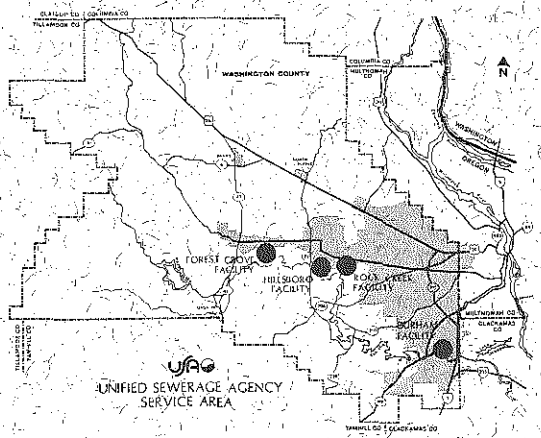
How Can I Prevent Water Pollution?

- Get involved and recognize the importance of surface water pollution
- Recycle motor oil and other recyclable materials
- NEVER pour anything into a storm drain
- Do not over fertilize your lawn
- Use less toxic alternatives to pesticides and herbicides
- Keep streams and drainage ditches clear of yard debris, animal wastes, and trash
- Dispose of paint, antifreeze, pesticides, and other chemicals in an appropriate manner
- Landscape your yard so it uses less chemicals and water, and reduces erosion/runoff
- Call USA's 24-hour emergency service number to report chemical/oil spills, flooding or other serious problems at **648-8621.**

There are many ways for volunteer groups to get involved in improving water quality in your neighborhood streams and the Tualatin River.

USA's Public Affair's department invites your organization to become a "Watershed Partner." Give us a call at **648-8621** to find out more.

Unified Sewerage Agency Service District



Map Key:

Washington County Boundary

Unified Sewerage Agency Service Area

Unified Sewerage Agency
of Washington County
155 N. First Avenue
Suite 270
Hillsboro, Oregon 97124
(503) 648-8621

Surface Water Management

SWM surface water management

USA unified sewerage agency

What Is A SWM Utility?

SWM stands for Surface Water Management. It is a pollution and drainage control program that has been developed over the last couple of years by cities in Washington County, county government and the Unified Sewerage Agency (USA).

The SWM program is one part of a larger state mandated effort to reduce the amount of pollutants in streams in our area and the Tualatin River.

The term "surface water" refers to runoff from rain or irrigation water. As Washington County and bordering counties in the Tualatin River watershed have been developed, buildings and pavement cover much of the ground that used to absorb rainfall. Instead of soaking into the ground, increasing amounts of rain water are going through the natural and man-made storm drainage systems. This causes problems with flooding, as well as washing oil, pesticides, fertilizers and other pollutants into our streams.

What's The Purpose Of The Program?

The problem of pollutants in runoff has become significant enough that the State Department of Environmental Quality (DEQ) set strict new requirements for controlling pollutants that enter streams through the storm drainage system. New limits on phosphorus, erosion and other pollutants will have to be met by 1993.

The basic policies and the fee structure were adopted by USA and the Board or Directors, and the SWM implementation began on July 1, 1990.

Included in the original documents and actions are measures to:

- protect wetlands and floodplains
- control erosion from construction sites
- prevent or reduce pollution from new development
- provide coordinated designs and construction practices throughout the urban area
- identify pollutant sources and strategies for dealing with pollution and flood control issues on each stream

How Is The SWM Program Funded?

A lot of thought went into planning how to fund the charges necessary for a successful surface water management program. Every one of us contributes to the need to have a SWM program simply by having an impervious surface: a rooftop or a driveway, etc.

The SWM advisory committees decided that the fairest way to fund the SWM program would be a fee based on the amount of impervious surface on each property. Impervious surface is defined in USA Ordinance No. 18:

Impervious surface area includes all areas that have been altered from their natural state or are proposed to be altered such that they do not allow the infiltration and retention equivalent to that of undisturbed soil. This shall include, but is not limited to: pavement, buildings, decks, parking areas, and compacted gravel areas.

Who Pays?

We all do. Single family homes will pay a flat fee of $3 per month (or $36 a year). All non single family properties will pay based on their measured (through aerial photos) impervious area. All properties, including churches, schools, state property, city property and businesses, pay based on this rate.

Under this approach, the properties that contribute more to the need for surface water management, pay a greater share of the program costs.

How Is The Money Being Spent?

During the first nine months of the new SWM utility, USA and city crews and equipment:

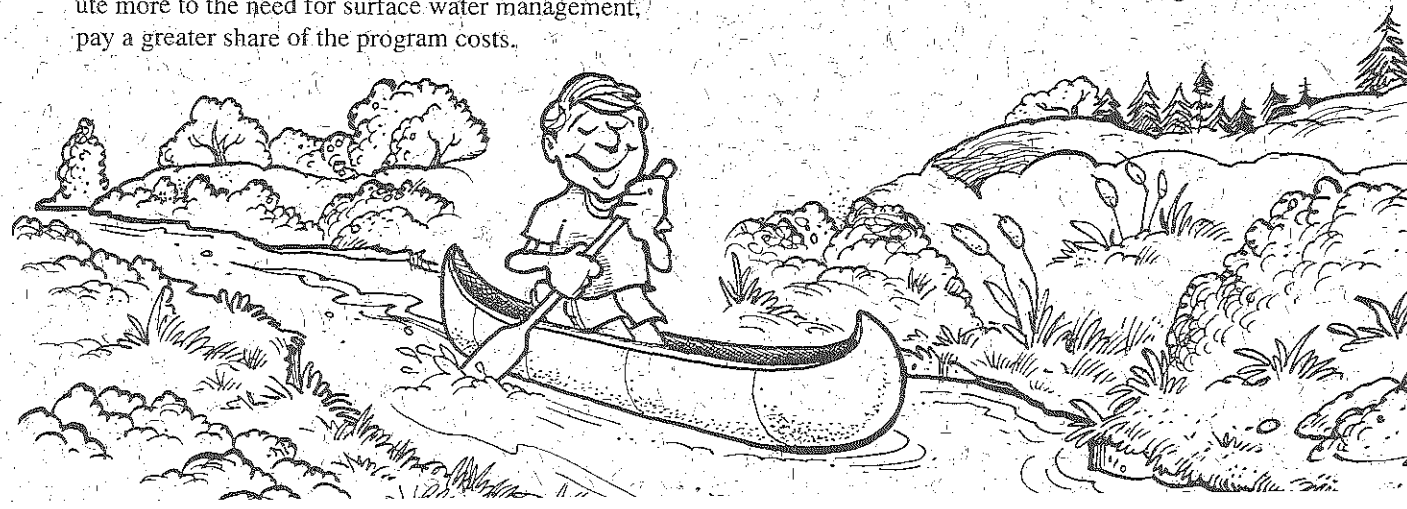
- swept 6,239 miles of streets
- removed 880 cubic yards of street debris
- cleaned 4,027 catch basins
- responded to 240 emergency calls
- cleaned 51,414 feet of storm drain pipe

Workers and equipment continually:

- survey & repair storm drainage systems
- monitor streams
- build water detention basins
- mow ditch vegetation
- address erosion problems

What Can I Expect To See?

- Consistent regulations and enforcement
- A greatly enhanced storm system maintenance program performed by city or USA crews and equipment
- Measures such as hay bales, matting or other methods to control erosion during construction
- More protection of floodplains & wetlands
- Grassed waterways being used instead of pipes to carry storm water
- Citizen groups doing stream cleanups, monitoring & storm drain stenciling



What If I Don't Comply?

If a project does not have a permit or does not establish adequate erosion control, USA has the authority to ensure that standards are met.

Enforcement steps include:

- Written notice of the erosion control violation.
- Stop work order halting construction until the problem is corrected.
- Citation and fine of $100 for the first violation. Fines can increase up to $1000 per day for each violation, if corrective action is not taken.

USA is here to help permit holders meet the erosion control requirements. Staff is available to help develop plans or discuss problems you may have.

Where Can I Get More Information?

The "Erosion Control Plans - Technical Guidance Handbook" is available from the following agencies:

Unified Sewerage Agency
155 N. First Ave., St. 270
Hillsboro, OR
648-8621

Washington County Dept. of Land Use and Transportation (LUT)
155 N. First St.
Hillsboro, OR
648-8761

City of Portland Building Bureau
1120 S.W. Fifth
Portland, OR
796-7303

For information on erosion control rules in Washington County, or for information on developing an erosion control plan, call **Unified Sewerage Agency, 648-8621**

Erosion Control

Unified Sewerage Agency
of Washington County
Suite 270
Hillsboro, Oregon 97124
(503) 648-8621

SWM surface water management
USA unified sewerage agency

What Is Erosion?

Erosion can be natural or manmade. The natural process of erosion is the wearing away of soils by wind and water. That process is accelerated by many human activities, particularly building and construction.

Erosion can be caused by rain or irrigation, or by disturbing soil with machinery and traffic, mixing it with water or grinding it into dust.

Muddy streams, dirt tracked on roadways and dustclouds are all indications of erosion problems.

Why Is Erosion A Problem?

Erosion is a major source of pollution in creeks and rivers.

Pollutants like phosphorus bind to the soil and are carried into waterways along with runoff.

Erosion can also cause water quantity problems. Sediment and silt clog catch basins and storms drains, causing local area flooding problems.

Who Contributes To Erosion?

Development (single family home and commercial construction), farming, timber and even home landscaping all contribute to erosion, but construction contributes the vast majority. In fact, erosion from land being developed for houses, highways and shopping centers is:

- 10 times greater than land farmed in row crops
- 200 times greater than land in pasture
- 2000 times greater than land in timber.

As the amount of development fluctuates, its contribution to the total amount of soil lost increases or decreases; however, without control measures the erosion from open areas remains high.

What Is Erosion Control?

Initiated by the Federal Clean Water Act, the Oregon Department of Environmental Quality has developed new erosion control rules, which have also been adopted by the Unified Sewerage Agency (USA) and Washington County.

Erosion control means taking steps to prevent soil from washing or blowing away. Most new building and construction projects must have a plan for preventing erosion. A free technical handbook for developing erosion control plans is available from USA, Washington County, or the City of Portland.

Erosion control needs to be a "forever" activity. Temporary measures are recommended in the handbook. They are to be placed and maintained until permanent measures like lawns, landscaping and paving have been established.

Can You Give Me Examples?

There are a variety of erosion control measures that are very effective. Every construction project will have slightly different erosion control needs. Here are some of the most common erosion control methods:

- Use silt barriers, like hay bales and silt fences, to trap sediment and keep it out of the drainage system.
- Build retention areas or use reverse grading to trap water that could carry soil from the building site into the drainage system.
- Avoid grading during rainy periods and put in vegetation as quickly as possible to keep soil from leaving the site.

The technical handbook details erosion control methods. USA staff can also give you information on choosing and installing your erosion control devices.

I'm Planning A Building Project. What Do I Do?

Most construction projects in Washington County will require an erosion control permit, even if you are simply remodeling an existing home or landscaping. Permits are available from USA or your local building official. You need to know the following information to obtain a permit:

Permits are required for any project that disturbs 500 square feet of dirt or more.

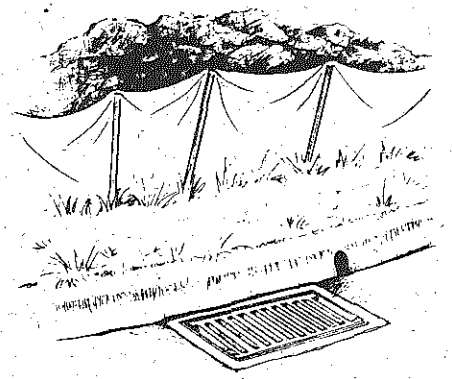
Permits are required for all types of building activity including street widening, single family home construction and exterior home remodeling.

You must submit a detailed erosion control plan and pay a modest fee, based on the value of the home or project, before a permit will be issued.

Erosion control measures at the building site must be inspected and approved by USA before you have a building department "footing" inspection.

If you want help, your local building official can assist you in developing an erosion control plan.

If you have questions about developing an erosion control plan, please contact USA or your local city building department.



Tualatin River Watch

REPORT BY THE UNIFIED SEWERAGE AGENCY

April 1991

About This Status Report

The Unified Sewerage Agency (USA) has undergone many changes in order to better meet the community's needs for clean water. Interim, short, and long-term plans and programs are being implemented to meet fast-approaching deadlines for meeting the toughest standards in the nation for controlling phosphorus levels in the river and reducing pollution from storm water runoff by 1993.

"The Tualatin River Watch" is our reformatted status report which updates the progress of major programs and announces upcoming public meetings and opportunities for input. This report covers the period from July 1990 to April 1991.

A Little Background

Many residents of our 123-square-mile service district recognize USA as the agency that provides sewer service in their community.

USA is a utility, much like other companies that provide our homes with electricity, gas, phone and water service. Rather than providing something to your home, the sewer district takes away that which you don't want.

Basically, USA is in the business of managing surface water runoff and collecting and treating used water and making it usable again by removing impurities. Once wastewater is treated, it is recycled onto land or released into the Tualatin River. Thus, USA is helping to preserve one of our most valuable and dwindling natural resources . . . water. It is also helping to insure public health and safety of residents.

Unlike the private utilities that provide service to your home or business, USA is a public body. When the District was created in 1970, it was established by a vote of the people. It is the residents of the 12 cities and the unincorporated areas who own USA. There is no profit; the funds USA collects from fees and taxes are used to operate the District and to construct improvements.

Highest Standards

Wastewater is not manufactured at USA; it is collected from 149,500 homes in 12 cities, unincorporated Washington County and portions of Clackamas and Multnomah Counties.

The 34 million gallons that enter our Durham and Rock Creek plants is cleaned to a higher level than 98 percent of the treatment facilities in the nation, but because of the unique nature of the Tualatin River, we must clean wastewater close to drinking water level before releasing it back into the environment.

Pollution Problems

The standard definition of pollution is anything beyond natural levels that does harm to the stream or river. The word itself has a lot of emotion behind it and brings to mind images of toxic chemicals. The type of "pollution" found in the Tualatin is excess nutrients which alter oxygen levels in the river thereby affecting aquatic life habitat. It also affects the way the river looks and potentially the beneficial uses of the river such as swimming and aesthetics.

New Requirements

Nutrient levels in the river have reached a point where the river can no longer assimilate the excess. One of the major components of that nutrient load is phosphorus from homes and businesses that is processed through the Agency's treatment plants and rural and urban surface water runoff.

Under State and Federal law, pollutant levels are regulated by discharge permits. Under new requirements, our treated wastewater discharge of phosphorus must be reduced from the current 600 pounds per day to 30 pounds per day from both major treatment plants during the summer.

This level of treatment of the wastewater that comes into the plants is the most stringent in the nation. USA is on schedule to remove 99.3 percent of the phosphorus as mandated for our treatment facilities by the Environmental Quality Commission (EQC) and the Department of Environmental Quality (DEQ).

The Facilities Plan

In our planning, USA must consider the needs of a comprehensive and complex system: building, operating, and maintaining the facilities required to collect and process wastewater for 311,500 people living within the service district.

The five treatment plants combined are capable of processing 48 million gallons of wastewater each day to be released into the Tualatin River or recycled onto land. In addition, USA maintains about 600 miles of sewer pipeline and 38 sewage pumping stations in USA's sewerage system.

The Facilities Plan Goals

The USA Wastewater Facilities Plan completed in June 1990, is designed to achieve many goals. The plan is designed to chart a course of action for USA over the next 20 years beginning in 1990. The goals of the plan are:

Goal 1 -- Achieve phosphorus and ammonia-nitrogen reductions in USA treated wastewater discharges to the Tualatin River by June 30, 1993 as required by the EQC.

Goal 2 -- Achieve compliance with each item in the Compliance Schedule for the Northwest Environmental Defense Center (NEDC) v. USA Consent Decree, July 30, 1990. All items in the schedule to be completed by December 31, 1997.

Goal 3 -- Continue to provide cost and environmental effective collection and treatment of wastewater within the urban growth boundary of Washington County (USA's boundary) as the area fills in with people.

The current USA focus is on meeting the 1993 deadline (Goal 1) and the 1997 deadline (Goal 2) while accommodating growth (Goal 3). As the urban area proceeds towards improving water quality by 1997, it is also growing.

When 1998 is reached, the USA focus will shift to accommodate growth while maintaining the water quality goals achieved in 1993 and 1997.

A Flexible Water Quality Plan

The Facilities Plan was adopted by the Board and approved by the EQC in 1990. It represents a tremendous amount of staff work as well as a major expenditure of funds towards the goal of a cleaner Tualatin River.

Thirty-seven agencies and jurisdictions, nine citizen advisors, more than 20 USA staff members and a team of nine consulting firms worked together to complete the Facilities Plan in ten months.

The plan calls for a comprehensive approach to protecting water quality in the Tualatin River Basin. It includes the evaluation of technical solutions and identifies programs for USA that are needed for the long-term success. The Plan was developed using one of the most extensive public involvement efforts in Washington County's history.

Full Speed Ahead

It is estimated that approximately 85 percent of the phosphorus in the Tualatin River passes through USA treatment plants. The Agency projects that $465 million will be spent over the next 20 years to reduce phosphorus levels to meet DEQ requirements and to insure capacity for future sewer connections.

Source Controls

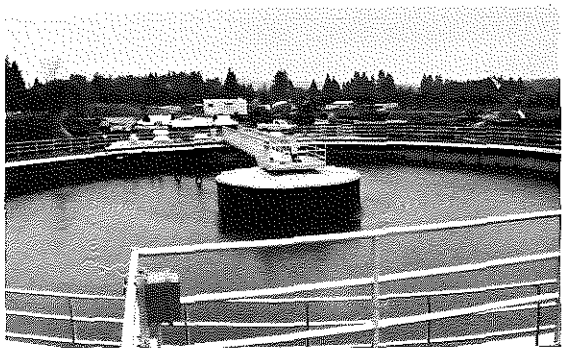
USA initiated the process which resulted in a tri-county ban on the sale of laundry detergents containing phosphorus effective February 1, 1991. Reducing the amount of phosphorus that enters USA's wastewater treatment plants could save ratepayers as much as $365,000 in the first year, since the need for chemical treatment will be reduced. USA expects approximately a 30% reduction in the phosphorus coming to the plants.

Our wastewater pretreatment program has established strict requirements for wasteloads coming from industry. Since January, our staff has surveyed 152 industries and issued 18 new permits.

Increased Capacity

Rock Creek design capacity has been increased to 20 million gallons daily from 15 million gallons daily.

Durham's design capacity will be increased to 22 million gallons daily. The plant will also be able to provide treatment for winter-time storm events up to 90 million gallons a day.



Wastewater Treatment

The construction improvements at Durham will allow for ammonia-nitrogen removal to meet the new requirements by the deadline, and will allow the plant to be retro-fitted to meet the phosphorus requirements. Rock Creek currently meets the requirements for ammonia.

The Rock Creek pilot projects were successful in demonstrating that we can meet the phosphorus requirement by June of 1993.

River Management

This effort is designed to protect what water is remaining in the river from further diversion. It is also providing for more stable day-to-day flows with an eye to the future by increasing river flows for multiple benefits.

Wetlands

The Jackson Bottom Wildlife Refuge effluent "polishing" project is in its third year. Fern Hill Wetlands planning is under way, and several other sites are being studied. All the projects are utilizing the multiple objectives of providing water quality management, improving wildlife habitat, passive recreation and education opportunities.

Wastewater Flow Management

As part of the Agency's effort to reduce the amount of rainwater infiltration and inflow (I & I), the Sewer System Evaluation Survey (SSES) work was begun in 1989 and continued in earnest in 1990.

USA will rehabilitate two test basins to see if it is more cost effective to increase treatment plant capacity to treat the excess I & I or to replace and repair lines to prevent the I & I from entering the treatment system.

The solution will most likely be a combination of pipe rehabilitation and treatment. The study includes identifying areas for pilot projects, providing a plan for implementation, and developing a computer model of the system to evaluate the effectiveness of any improvements.

Planned Growth

USA is working to strengthen its input into the planning process to ensure incorporation of water quality considerations and impacts in land use planning by the responsible state and local agencies.

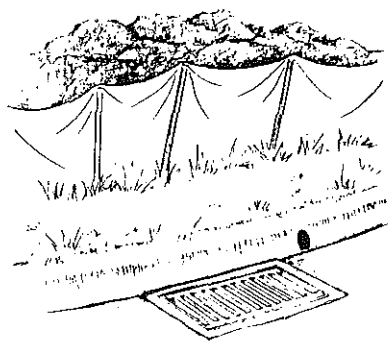
Water Quality Monitoring

USA began an expanded county-wide water quality monitoring program in 1987 that monitors the quality of surface water at 63 locations. These locations are permanent and are selected to determine the effects of discharges from septic tanks, businesses, industries, agriculture, and surface water runoff.

The program has provided water quality data including temperature, dissolved oxygen and pH (acidity or alkalinity). Levels of solids, bacteria, metals and organic compounds are also recorded.

Erosion Control

USA is responsible for enforcing recently adopted rules and regulations for erosion control in unincorporated Washington County. The Cities within the County have also joined in the effort. The effectiveness of these efforts will impact the success of the SWM program. Rules for prohibiting soil from leaving construction sites have changed the way contractors and builders approach construction. Builders are required to submit plans and obtain an erosion control permit when they apply for a sanitary sewer permit. They are also required to undergo an erosion control inspection by USA staff. USA has added two inspectors to its staff for erosion control.



Recycled Wastewater

It's Safe, It's Clean, It Makes Sense.

It's also a major part of USA's plan for improving the quality of the Tualatin River. Ultimately, more than 70% of USA's highly cleaned wastewater is targeted for recycling onto land as irrigation water. This will bring water predominantly to areas currently lacking irrigation, make valuable use of the nutrients in the water (phosphorus and nitrogen) and reduce the cost of wastewater treatment.

Planning began in January to determine just how to put together a recycling program. USA is working closely with the Tualatin Valley Irrigation District, the Washington County Extension Service, water suppliers and other key governmental agencies. An advisory committee of agricultural, urban and neighborhood representatives is helping USA identify the issues, address any problems and evaluate alternatives for the program.

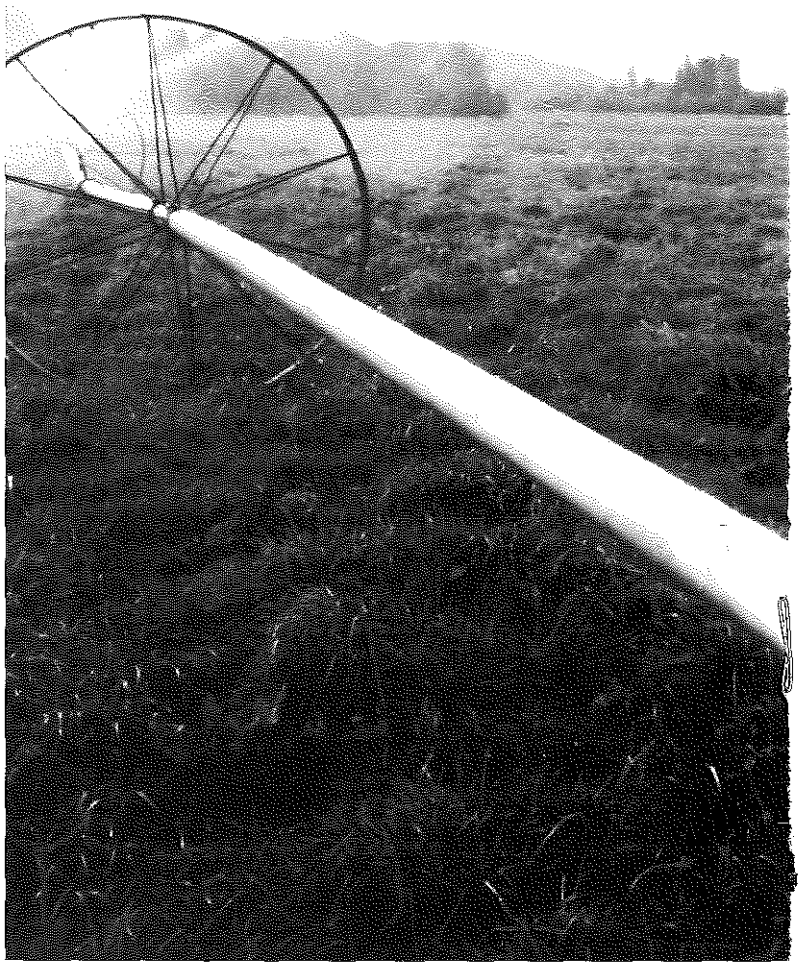
Recycling water is not a new concept. It's just not as widely used here as in other states. In California, for example, it is a common and well accepted practice for irrigating a variety of food and non-food crops. It is also used for landscape irrigation, to recharge groundwater and to create wildlife and recreational sites.

Here in Washington County, two golf courses, two schools and three farmers irrigate with recycled water from USA facilities. A recent survey shows a wide range of agricultural and urban users interested in using this new source of water for field crops, pasture, nurseries, and office complex and street/ highway landscaping. And at least one water agency sees using recycled wastewater in our own yards as a good way to conserve water.

Recycled WASTEWATER
UNIFIED SEWERAGE AGENCY

Who Might Use Recycled Wastewater?

- Farms
- Golf courses
- Office complex landscaping
- School yards / play fields
- Nurseries
- Industrial Parks
- Parks & cemetaries
- Highway / street landscaping
- Fire protection



A wide range of agricultural and urban users are interested in using recycled water for irrigation.

The Department of Environmental Quality regulates the use of recycled wastewater to protect public health and the environment -- groundwater, rivers, streams and soils. Under DEQ rules, several levels of water quality may be recycled, the lower quality water having a number of restrictions on it. USA will be producing the highest quality water -- Level IV -- which has virtually no restrictions placed on it except that it cannot be used as drinking water.

OPEN HOUSE / PUBLIC MEETING

The **Recycled Wastewater** Master Plan is scheduled to be complete by the end of July. The first two public meetings will be held to receive input from urban and agricultural users, neighbors, and citizens regarding the present plan alternatives. A third meeting will be held in July to present the recommended plan.

May 21, 1991, 6 - 9 pm
Tigard High School Cafeteria
9000 SW Durham
Tigard

May 22, 1991, 6:30 - 9:30 pm
North Plains Community Hall
255 NW Hillcrest
North Plains

If you would like more information, please call Dave Lloyd or John Jackson at 648-8621.

The Sludge Story

Our customers send 15 tons of solid waste to USA each day. The solids are extracted from the wastewater, dewatered, mixed with sawdust and used as a soil amendment in the agricultural community. Currently USA has more demand for the sludge than it has supply.

Looking ahead, USA is considering expanding the sludge program to include composting it and making it available to urban gardeners who might want it for gardens or flower beds.

Another idea being looked into is to expand our yard debris collection program to homeowners clippings as a source to mix with the sludge.

Surface Water Management

The Start Up

The surface water management (SWM) plan is the pollution and drainage control program that has been developed over the last couple of years by cities in Washington County, county government and USA with the help of three advisory citizen committees.

The SWM program is one part of the larger state mandated effort to reduce the amount of pollutants in streams in our area and the Tualatin River. The term "surface water" refers to runoff from rain or irrigation water.

As Washington County and bordering counties in the Tualatin River watershed have been developed, buildings and pavement cover much of the ground that used to absorb rainfall. Instead of soaking into the ground, increasing amounts of rainwater are going through the natural and man-made storm drainage systems. This causes problems with flooding, as well as washing oil, pesticides, fertilizers and other pollutants into our streams.

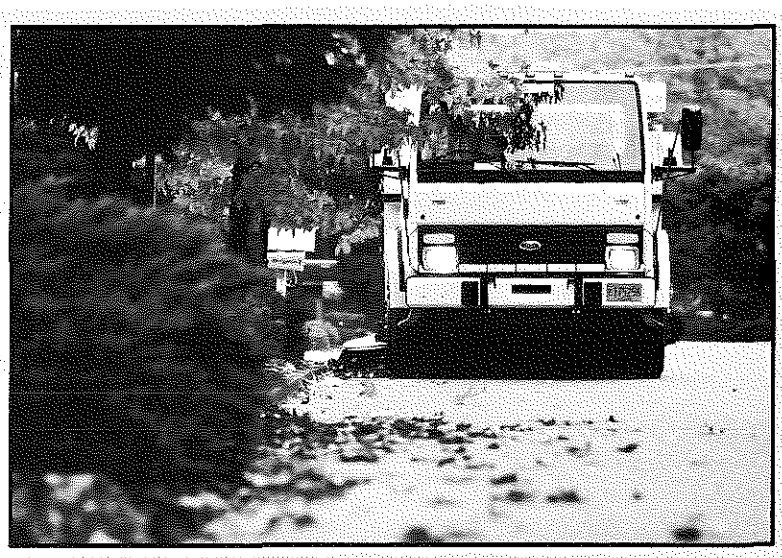
We're Making Progress

During the first nine months of the new SWM utility, USA and City crews and equipment:

- swept 6,239 miles of streets
- removed 880 cubic yards of street debris
- cleaned 4,027 catch basins
- responded to 240 emergency calls
- cleaned 51,414 feet of storm drain pipe

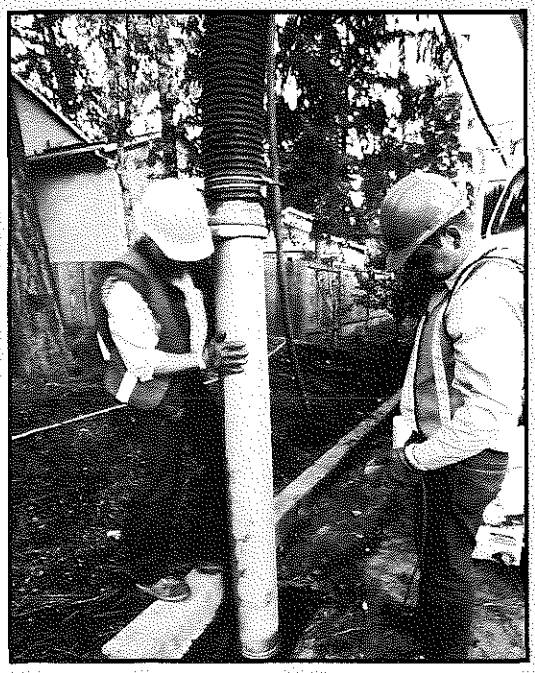
Workers and equipment continually:

- survey and repair storm drainage systems
- monitor streams (technically and visually)
- build water detention basins
- address erosion problems from new construction



What can I expect to see?

- Consistent regulations and enforcement
- A greatly enhanced storm system maintenance program performed by city or USA crews & equipment
- Measures such as hay bales, matting or other methods to control erosion during construction
- More protection of floodplains and wetlands
- Grassed waterways being used instead of pipes to carry storm water
- Citizen groups doing stream cleanups, stream monitoring or stenciling the message "DUMP NO WASTE, DRAINS TO STREAM" near storm drains.



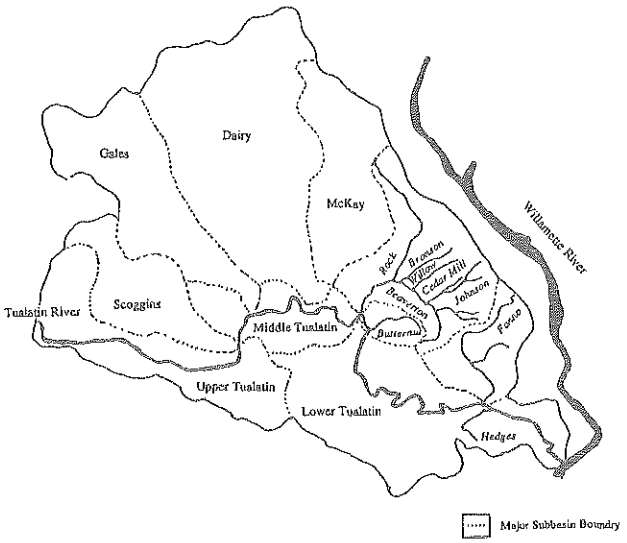
What Can I Do To Prevent Water Pollution?

- Get involved and recognize the importance of surface water as a resource
- Recycle motor oil and other recyclable materials
- NEVER pour anything into a storm drain
- Do not over fertilize your lawn
- Use less toxic alternatives to pesticides & herbicides

Watershed Sub-Basin Strategies

The next step in the SWM plan is the development of a series of sub-basin strategies.

USA has divided the urban area of the Tualatin River Basin into 16 sub-basins. The strategies must individually address the water quality and quantity problems associated with urban development in each sub-basin. The Agency is looking for strategies that contain a high degree of creativity, public involvement, and predictable results once the strategy is implemented.



Butternut and Hedges Creeks have been chosen as initial pilot sub-basins. An inventory of existing drainage facilities and wetland areas is being taken. Sophisticated aerial photography and video imaging techniques will be used to map stream corridors and detect sources of pollution.

In keeping with the goals of the SWM program, the sub-basin strategies will study non-structural solutions to drainage and pollution problems: developing detention facilities, modifying existing drainage facilities, and managing wetlands.

The first two sub-basin projects should be completed in August. The next sub-basins in line for planning are Fanno Creek, Ash Creek, Cedar Mill Creek, Willow Creek, Bronson Creek, Beaverton Creek and Upper Rock Creek.

Sub-Basin Advisory Committee

A Sub-basin Advisory Committee is being formed to assist in the development of the general plan and subsequent sub-basin plans, and to make recommendations regarding those plans for the consideration of the All-City Committee and USA's Board of Directors.

As each sub-basin plan is developed, citizens will be invited to attend and be given the opportunity to participate at the sub-basin Advisory Committee meetings. A public workshop will also be held in the local areas during the development of each plan.

The All-City Committee

The All-City Committee is made up of representatives from each city and a representative of Washington County to review and advise the Agency on the standards, regulations and specifications, work programs, capital improvement programs, rates and charges, long range planning, etc.

The committee has been reviewing a number of SWM issues and will recommend changes in the billing for on-site water detention and trafficed gravel. A list of issue papers can be obtained at USA by calling 648-8621.

Public Awareness

Public involvement, information and education programs continue to play an important role in development and implementation of USA's major programs. Efforts include newsletters, developing citizen input committees, action activities such as fairs, storm drain stenciling, and educational programs such as the national award winning "Tualatin River Rangers."

Future Goals

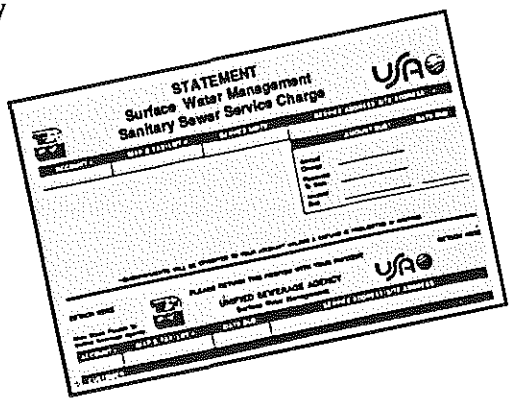
The SWM program was originally intended to provide a consistent maintenance so we could evaluate how well our current system works to control flooding and water quality. Many of the county's current stormwater systems have received poor or no maintenance.

The SWM program has made significant progress during its first 9 months, and continues to gain national attention as one of the most comprehensive and effective for a large multi-jurisdictional urban area.

Future Billing Statements

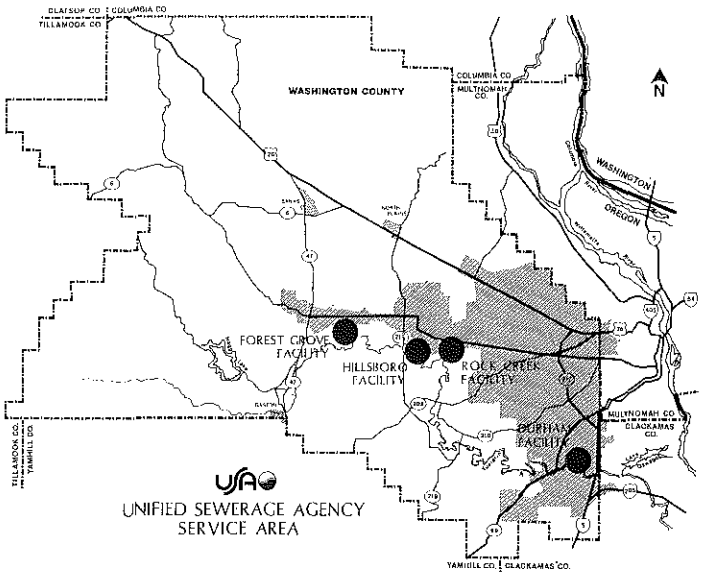
USA has been collecting and cleaning your wastewater for up to 21 years. Historically, the sanitary charge has been billed through the property owner's tax statement, but that **sanitary billing method will soon be replaced by direct billing.**

Beginning July 1, 1991, USA will start bi-monthly billing for both Sanitary and SWM charges. While the Agency is making this transition to bi-monthly billing for our Sanitary program, the SWM charge is currently being billed directly to property owners on an annual basis.



If you are not currently on sewer, you will be billed for SWM charges only.

USA Service District

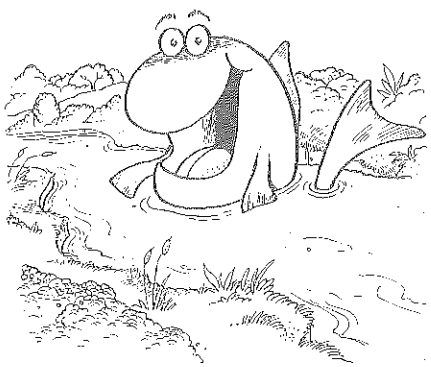


Map Key:

Washington County Boundary

Unified Sewerage Agency Service Area

Unified Sewerage Agency
155 N. First Ave.
Suite 270
Hillsboro, OR 97124



Recycled WASTEWATER

REPORT BY THE UNIFIED SEWERAGE AGENCY

May 1991

Recycled Wastewater Planning: Keeping You Current

An April "Tualatin River Watch" reviewed the status of three major Unified Sewerage Agency (USA) programs: The Facilities Plan, Recycled Wastewater and Surface Water Management. The second program — recycling cleaned wastewater — is a key component of USA's plan to improve the quality of the Tualatin River and meet stringent Oregon water quality standards by 1993. Ultimately, USA plans to use more than 70% of the community's highly cleaned wastewater for irrigation. Currently, two golf courses, two school yards and three farms irrigate with this water.

This update and future reports will keep you informed of the issues, alternatives and status of the Recycled Wastewater Master Plan.

The Planning Process

The Recycled Wastewater Master Plan process began in February with an intense effort to identify: 1) the level of interest in using recycled water, and 2) questions and concerns about using the water. Just under 200 farmers, nursery owners, pasture owners, golf course managers and potential urban users were surveyed in person or by mail. Two community meetings were held in March to present the planning program and receive further comment.

A citizen panel — the Recycled Wastewater Advisory Committee (RWAC) — was formed to provide detailed review and advice to USA at key stages of the planning process. The RWAC includes representatives of agricultural, urban, citizen and regulatory interests. Meetings will also be held with local, state and federal agencies during the planning to ensure intergovernmental coordination.

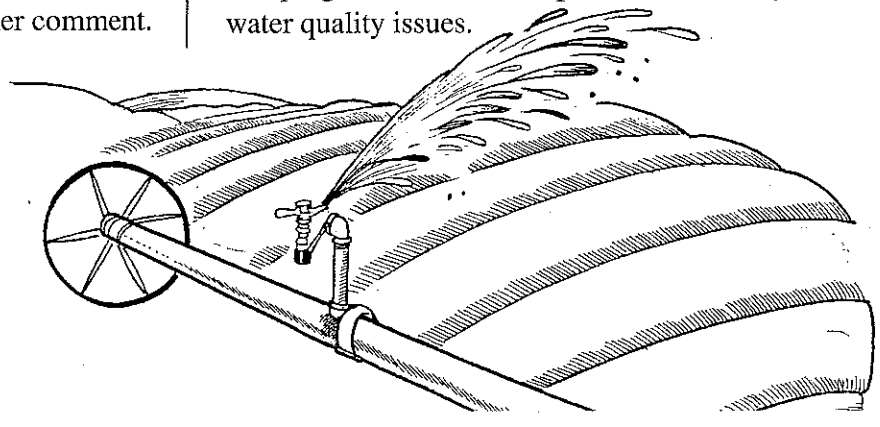
Survey Shows Agricultural And Urban Users Interested

Potential Agricultural Users express different levels of interest:

- those currently without irrigation express a high level of interest
- some with irrigation want recycled water to supplement their current supply; others are interested if the water is offered at an attractive price, with guaranteed supply

A significant amount of the land area that is likely to use recycled water is growing non-food crops (such as clover) that use low amounts of water, as opposed to food crops that use more water. In general, potential agricultural users feel that cost and quality of the water are two important issues that need to be addressed in the planning.

Potential Urban Users express a high level of interest if recycled water costs less than drinking water. While USA has a high level of credibility with this group, they generally felt that teaming with local water districts to promote and retail the product would be wise. They suggested an education program to inform the public about safety and water quality issues.



Project Objectives

Project Objectives adopted by the advisory committee are based on: public values identified during the Facilities Plan process, issues raised during interviews or at the informational meetings, and input from the advisory committee.

1. Maintain the Facilities Plan* focus on solutions with multiple benefits.
2. Retain the water from USA facilities in the Tualatin River Basin.
3. Keep summertime flows in the Tualatin at or above current levels.
4. Emphasize the connection between recycling wastewater and conserving water.
5. Keep on-going public involvement and a public education public program that emphasizes safety and public health information.
6. Focus on providing recycled wastewater where it is wanted, cost effective and acceptable to neighbors and users.
7. Be open and responsive to questions about the water, costs and program.
8. Develop the program in partnership with local, regional, state and federal agencies.
9. Identify and address obstacles to implementing the plan (water rights issues, regulation of runoff, consumer acceptance of food crops, transfer of urban phosphates to rural areas, etc.)
10. Define the long-range vision and ensure short term actions will further those goals.

* Overall plan for improving water quality of Tualatin River.

Proposed Recycli

Five alternatives have been prepared to show different ways that USA's recycling program might work to meet varying levels of demand. A couple of different storage options are also identified.

Alternative 1:

Base Level Customer Demand

This alternative assumes agricultural demand at the level indicated by the survey — focusing on clover, alfalfa, nurseries and other non-food crops. Urban use is targeted to large, landscaped areas such as schools and parks. This alternative would not attain USA's recycling goals (amount of water recycled).

Key elements include:

- Recycling of USA's Forest Grove, Hillsboro and Banks Facility water as a first priority
- Water provided in phases: 1) users near USA facilities, 2) farmland north of Hillsboro, extending toward Banks, and 3) farmland generally south of Hillsboro and west of King City
- Large, centralized storage reservoir(s)
- Winter discharge of "excess" water to river if recycling demand too low
- Programs and facilities to assure reliability and handle emergency needs
- System-wide environmental monitoring program
- Demonstration projects
- Continued and expanded public involvement and public education programs
- Competitive price for the water

Alternative 2:

Optimum Customer Demand

Assumes that demand for recycled wastewater for non-food crops will be higher than projected and there will be more acceptance for use on food crops. Urban use will increase due to requirements that new residential and commercial/industrial landscaping use recycled water. Under these assumptions, the recycled wastewater program would meet USA recycling goals.

Many key elements for this alternative are the same as Alternative 1. However, this alternative places a higher priority on serving the area south of Hillsboro and west of King City.

ng Alternatives

Alternative 3:

Minimum Customer Demand

Assumes the customer demand is lower than expected or some other factor precludes a large recycling program. Most or all of the land using treated wastewater from USA's Forest Grove, Hillsboro and Banks Facilities will be Agency-owned or leased. Recycling methods may include high-rate irrigation.

For the larger Durham and Rock Creek Facilities, USA would use either the same type of program or: 1) build a pipeline to take treated effluent to the Columbia or Willamette Rivers,* or 2) build additional reservoirs* to provide increased summertime flow for the Tualatin (for dilution) and discharge nearly all treated wastewater to the river.

* These options were considered earlier in the Facilities Plan process, but rejected as less desirable than reuse.

Alternative 4:

Decentralized Storage

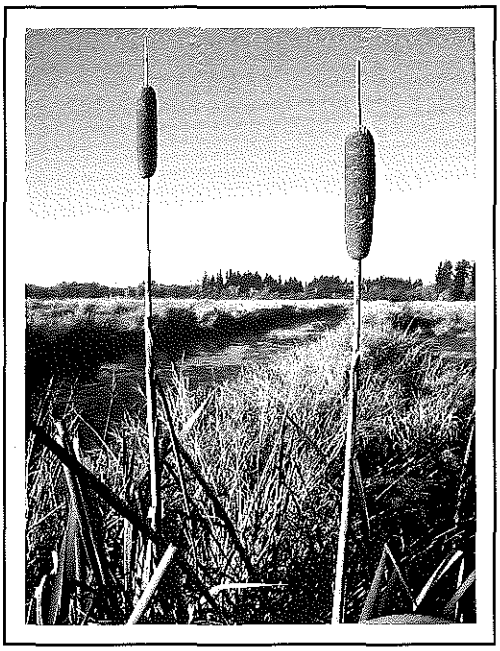
Same approach and assumptions as Alternative 1, except that there are many more storage reservoirs, and they are smaller, dispersed and closer to the users.

Alternative 5:

Decentralized Storage, Emphasis on Natural Systems

Similar to Alternatives 1 and 4, but places more emphasis on wetlands and natural systems. A potential for using water in different geographic areas.

- Multiple use of reservoirs for wildlife habitat, recreation, etc.
- Buffer wetlands to catch and treat runoff at selected irrigation sites
- Wetland enhancement, including year-round provision of water as needed
- More demonstration projects and public involvement
- Increased system-wide environmental monitoring



Policy Issues

Decisions also needed to be made about two major issues that face all of the alternatives:

1. What kind of partnership arrangements are needed between USA and existing water purveyors (Tualatin Valley Irrigation District, and district/cities that provide drinking water) for distributing recycled water?
2. At what water pressure should recycled wastewater be delivered to best meet the needs of agricultural users (low, medium, high)?

What Are The Next Steps?
The Recycled Wastewater Advisory Committee (RWAC) met on May 6 to finalize the proposed alternatives. A preliminary evaluation of the alternatives will be presented at two public meetings, May 21 and May 22. In June, the RWAC will meet to recommend a single alternative, and the USA Board of Directors is scheduled to consider adoption of the plan in late July.

Recycled Wastewater Open Houses/ Public Meetings

Are you a potential user of recycled wastewater in Washington County? A neighbor? Just interested? The Unified Sewerage Agency would like to hear your thoughts and answer your questions about the proposed alternatives and the two policy issues. Please join us at an open house/public meeting:

May 21, 1991, 6 - 9 p.m.
Tigard High School Cafeteria
9000 SW Durham Rd.
Tigard

May 22, 1991, 6:30 - 9:30 p.m.
North Plains Community Hall
255 NW Hillcrest
North Plains

If you would like more information, please call Dave Lloyd or John Jackson at 648-8621.

Recycled WASTEWATER
UNIFIED SEWERAGE AGENCY

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North Plains Community Hall
255 NW Hillcrest
North Plains

USA

Unified Sewerage Agency
of Washington County
155 N. First Avenue
Suite 270
Hillsboro, OR 97124

BULK RATE
U.S. POSTAGE
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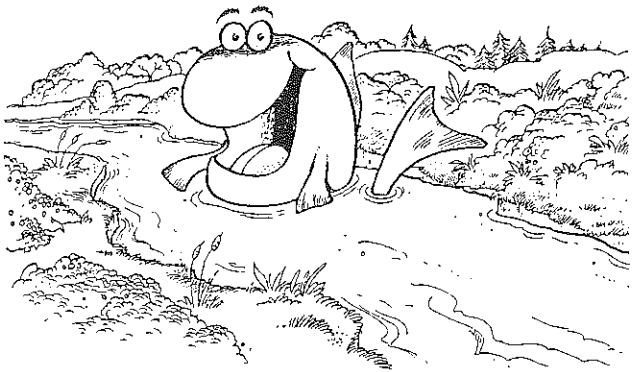
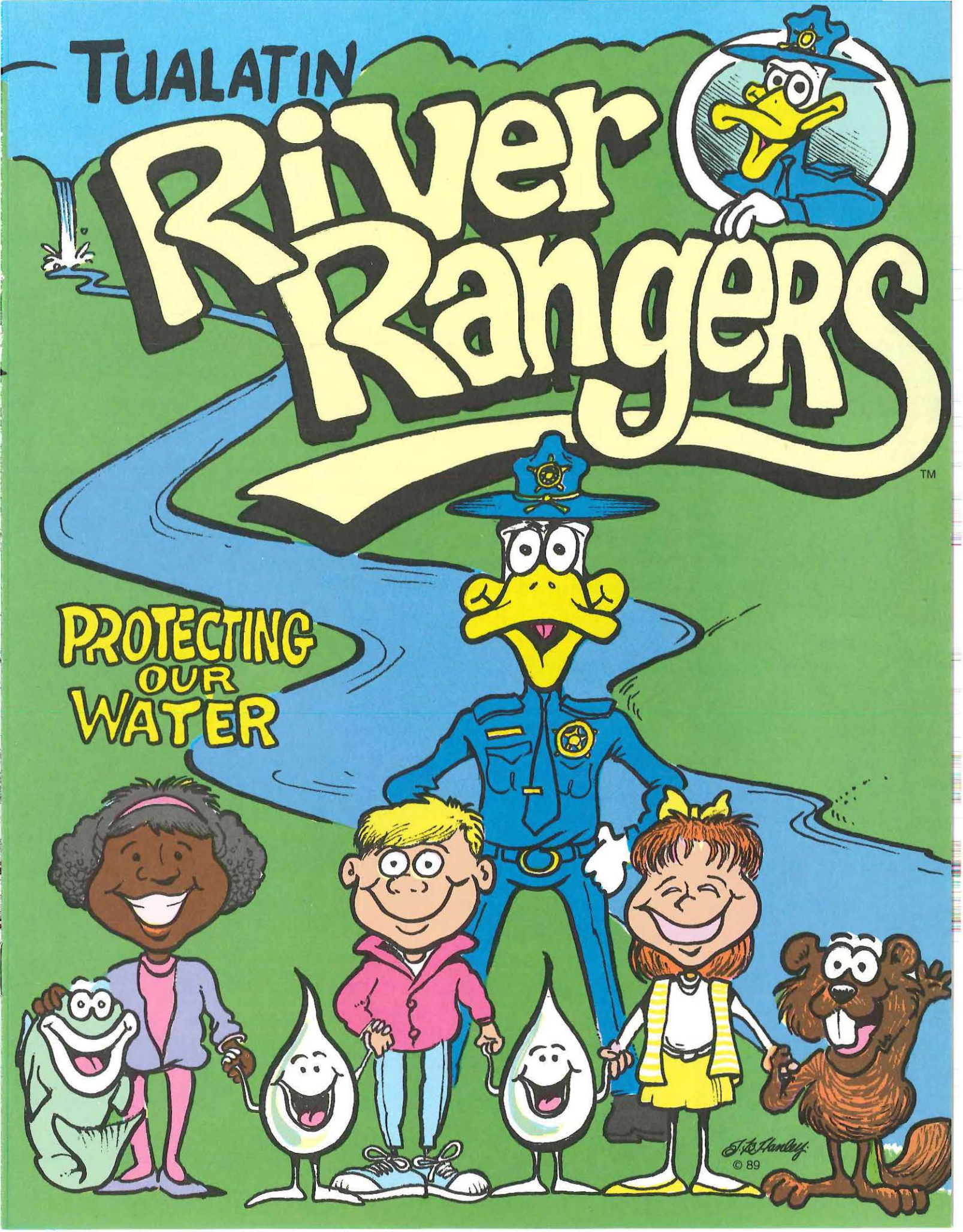
PERMIT NO. 282
HILLSBORO, OR
97124




TUALATIN
River Rangers
™
PROTECTING OUR WATER
© 89

WATER RUN-OFF

Did you know the water that runs down the storm drains in our streets runs directly to the nearest stream or river?

Protecting our streams and river from the pollutants that run off with the water is a big job and an important job for everyone.

River Rangers and their families can help protect our community's streams and river by following these simple tips:

Recycle yard debris instead of dumping it near the streams. (It causes water problems when it decays.)

Recycle used motor oil and antifreeze. Don't allow any pollutants to enter the storm drains.

Use non-phosphorus soaps or direct soap suds onto the lawn instead of letting them run into the storm drains.

Use only as much fertilizer and pesticide as you really need. Most of them wash off into the storm drains.

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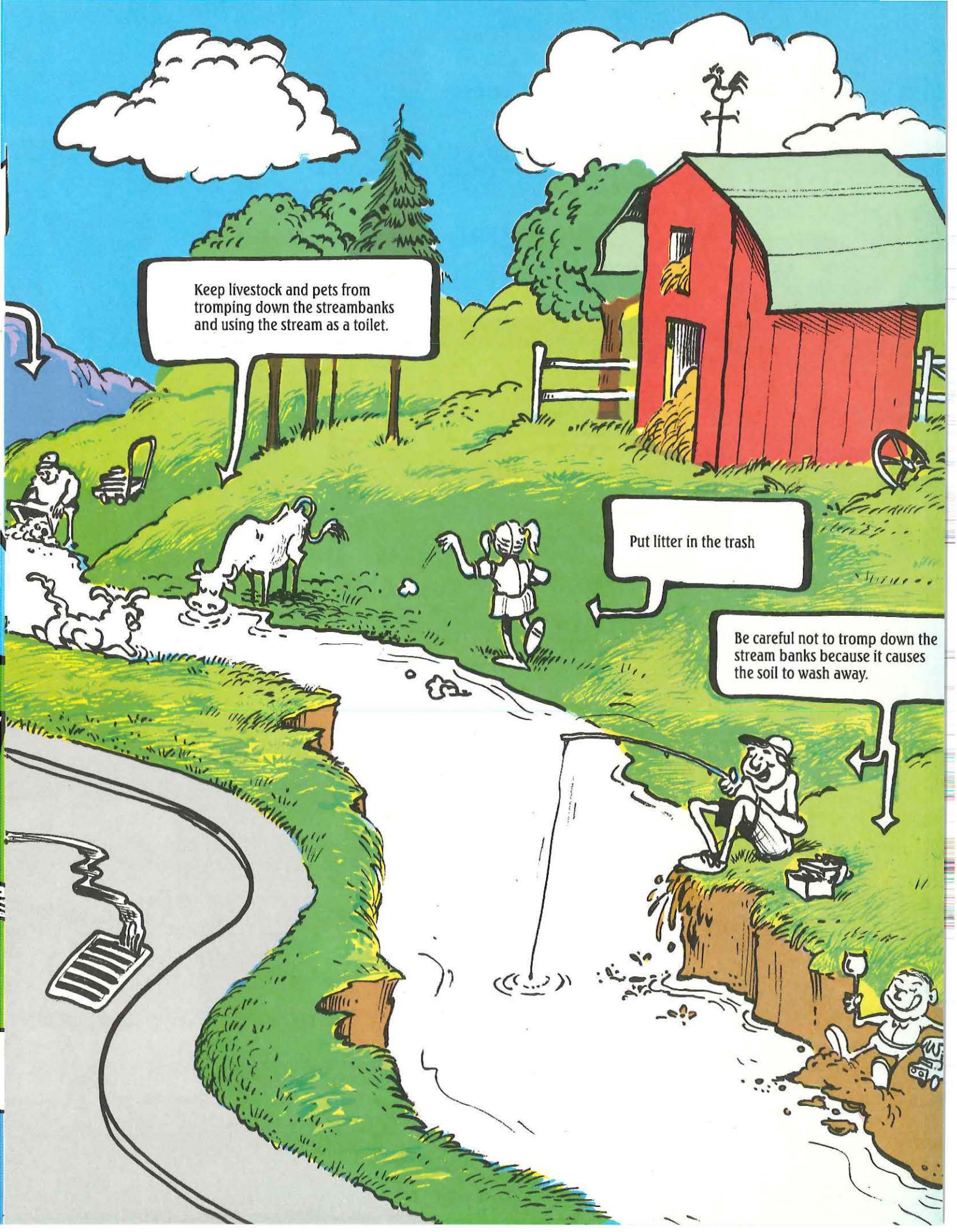
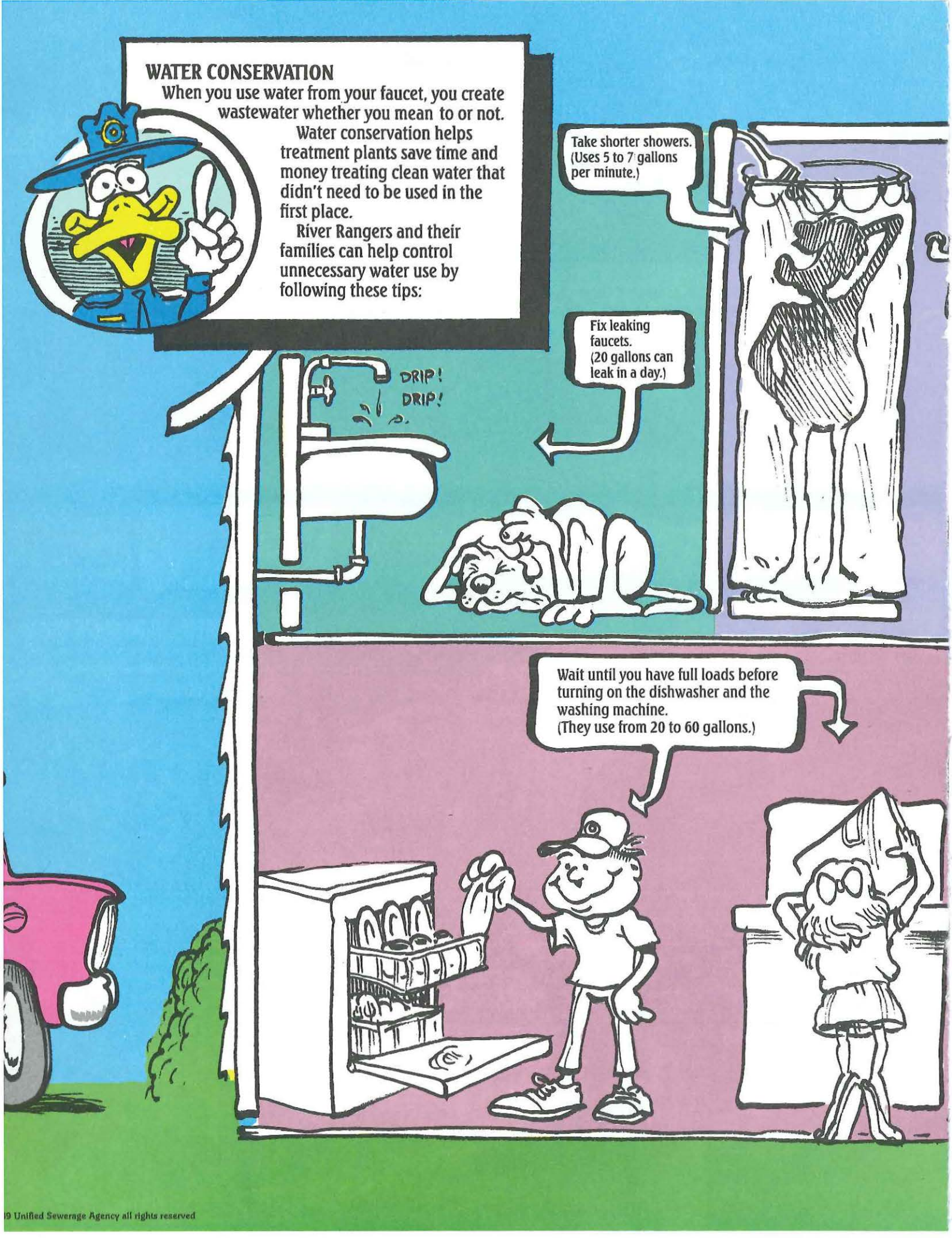

Keep livestock and pets from tromping down the streambanks and using the stream as a toilet.
Put litter in the trash
Be careful not to tromp down the stream banks because it causes the soil to wash away.



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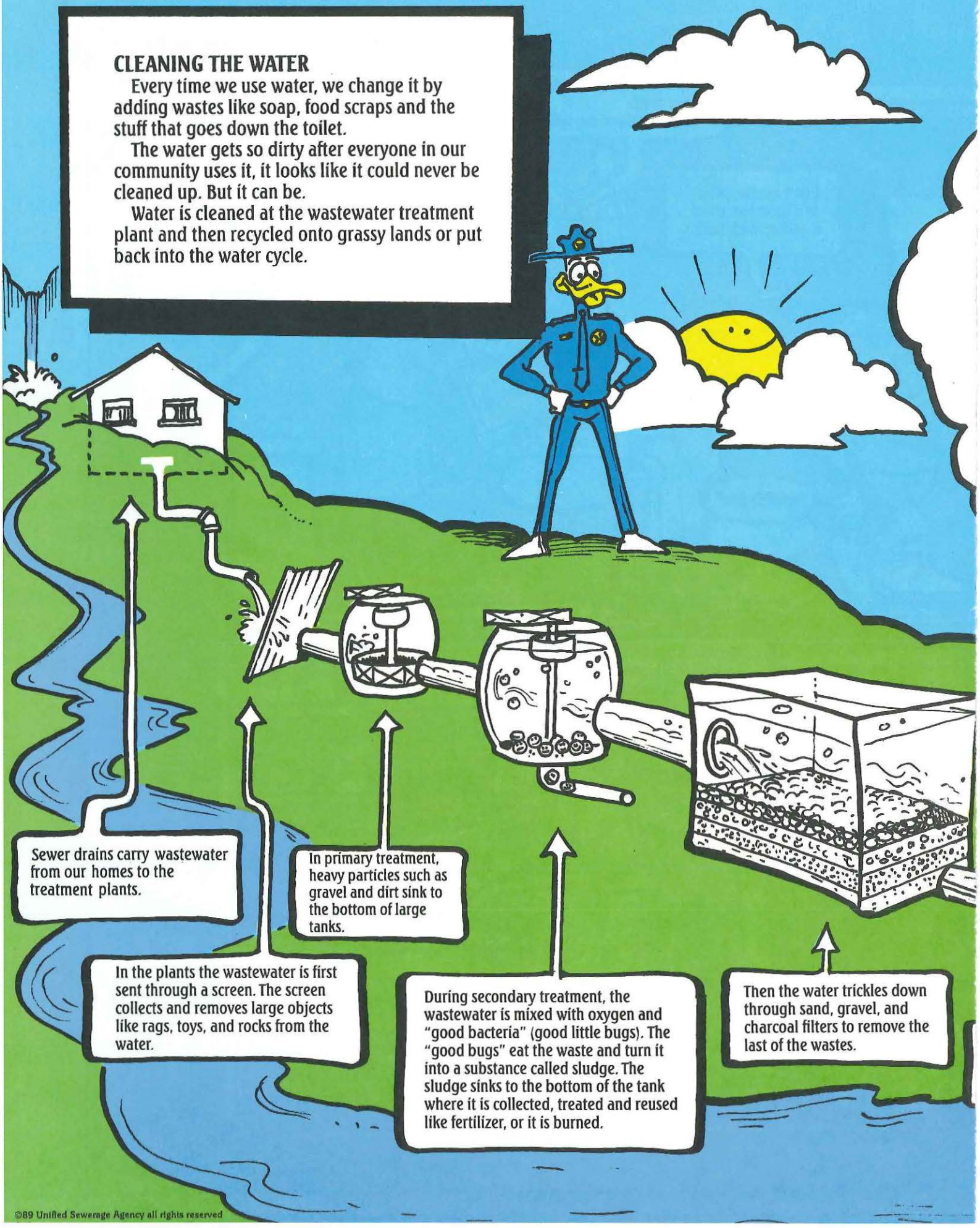
Turn off the water while brushing your teeth. (Uses 3 gallons per minute.)
Don't use the toilet as a trash can. (Uses 5 gallons each flush.)
OREGON
Use low or non-phosphorus soaps and detergents. (Phosphorus causes foam, makes algae grow, and is costly to clean out of waste-water.)
Recycle or properly discard any hazardous things instead of dumping them down the drains. (Call Metro, 224-5555 for information.)

CLEANING THE WATER

Every time we use water, we change it by adding wastes like soap, food scraps and the stuff that goes down the toilet.

The water gets so dirty after everyone in our community uses it, it looks like it could never be cleaned up. But it can be.

Water is cleaned at the wastewater treatment plant and then recycled onto grassy lands or put back into the water cycle.



Sewer drains carry wastewater from our homes to the treatment plants.

In primary treatment, heavy particles such as gravel and dirt sink to the bottom of large tanks.

In the plants the wastewater is first sent through a screen. The screen collects and removes large objects like rags, toys, and rocks from the water.

During secondary treatment, the wastewater is mixed with oxygen and "good bacteria" (good little bugs). The "good bugs" eat the waste and turn it into a substance called sludge. The sludge sinks to the bottom of the tank where it is collected, treated and reused like fertilizer, or it is burned.

Then the water trickles down through sand, gravel, and charcoal filters to remove the last of the wastes.

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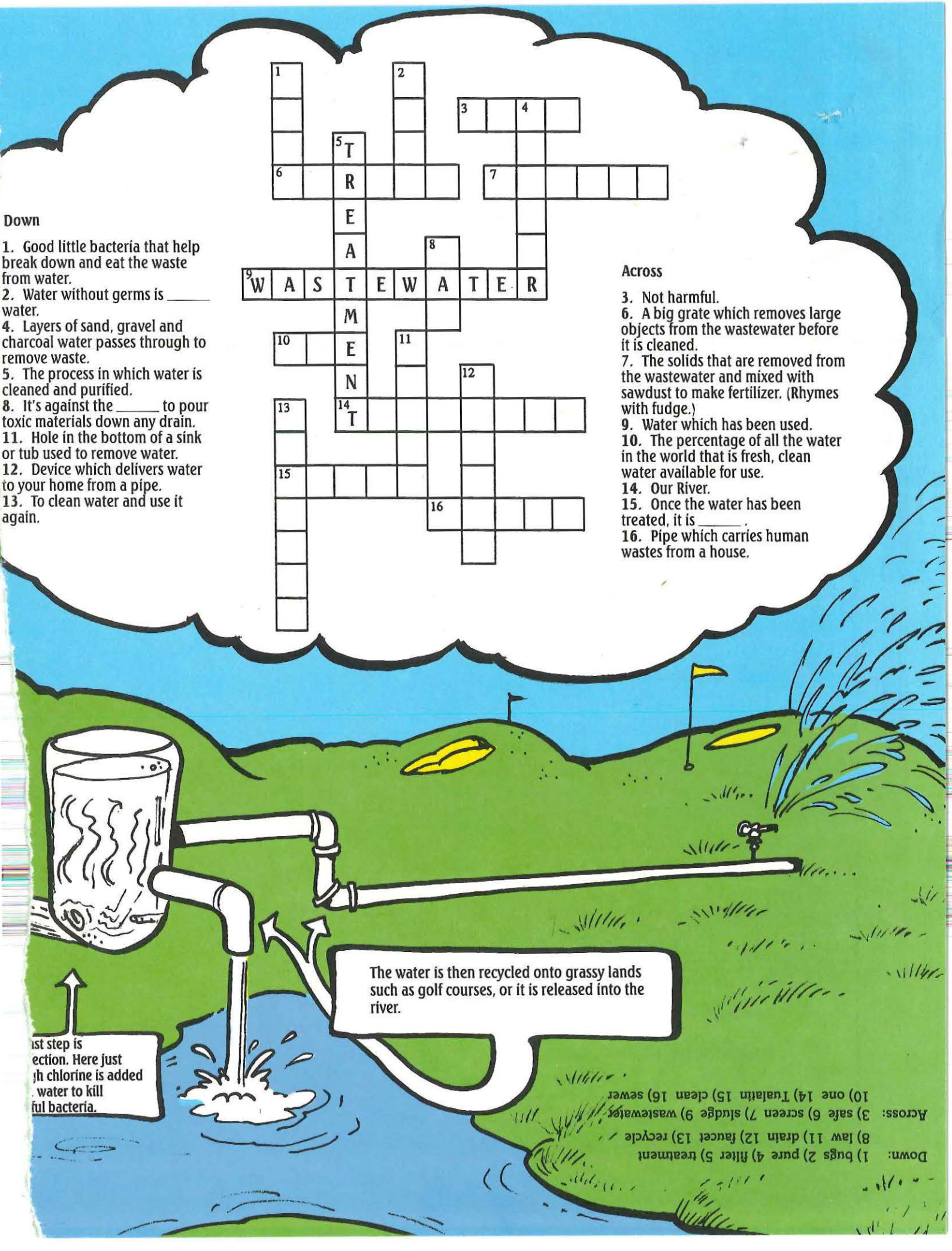

Down: 1) bugs 2) pure 4) filter 5) treatment 8) law 11) drain 12) faucet 13) recycle

Across: 3) safe 6) screen 7) sludge 9) wastewater 10) one 14) Tualatin 15) clean 16) sewer

River Rangers check List™

River Rangers protect the environment by making everyone aware of anything that could harm the water.

Have an adult help you search your home and garage for the things listed below that could pollute the water.

When you find them, check them off and place a River Ranger sticker on the container as a reminder to dispose of the material properly when you are finished with it.

- ☐ Bug Spray
- ☐ Furniture Polish
- ☐ Antifreeze
- ☐ Brake Fluid
- ☐ Used Motor Oil
- ☐ Gasoline, Kerosene, Diesel Fuel
- ☐ Transmission Fluid
- ☐ Paint (Oil Based, Auto, Model)
- ☐ Paint Thinner
- ☐ Varnish
- ☐ Fertilizer
- ☐ Herbicide, Insecticide, Fungicide
- ☐ Rat Poison
- ☐ Weed Killer
- ☐ Dry Cleaning Solvents
- ☐ Swimming Pool Chemicals

_____
(Name)

Is A Certified
Tualatin River Ranger
for
Helping to conserve clean water
and
Preventing pollution of clean water

_____ _____
(Teacher) (Parent)

After you have completed the River Ranger assignment, have your parent sign the card, cut it out and then bring it back to your teacher to receive your official Tualatin River Ranger Badge.

Printed on Recycled Paper

For More Clean Water Information,
Please Call:
(503) 648-8621

USA
Unified Sewerage Agency
of Washington County

155 N. First Ave., Suite 270
Hillsboro, Oregon 97124

TUALATIN RIVER RANGERS
RTR
Unified Sewerage Agency

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 12, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen

SUBJECT: Director's Memo

BUDGET UPDATE

The Department is working on a staff reduction plan that has been requested by the Governor. DEQ has been asked to reduce 65 positions by June 30, 1093. Of those positions, 28 must be managers. The staff reductions are to begin in July of this year.

The Department is developing a "glide path" to reach the required reduction goals. The glide path time-line calls for 30 percent of the reductions by June, another 25 percent by September 1, another 25 percent of January 1 and the final 20 percent by April 1993.

The Department has been asked to provide the Governor with information on savings to the General Fund from position reductions. The total General Fund savings is expected to be $274,000.

GOVERNOR'S VISIT

Governor Barbara Roberts will visit DEQ headquarters tomorrow to talk to staff about measure 5 impacts on state government. The Governor will be in room 3A at 9:00 and, of course, Commission members are welcome.

SHERIDAN FIRE UPDATE

DEQ took over the lead at the site of the grain elevator fire in Sheridan on Tuesday. Water used to fight the fire carried farm chemicals across the yards of nearby homes and the Sheridan High School. Twenty-four homes remain in the "excluded zone" where residents are advised not to return until tests are completed. DEQ is working with the contractor for the owners, West Valley Farmers, to determine the extent of the contamination.

Samples of the soil and the air inside the high school and some homes were collected on Wednesday. Sample results will be available Friday or Saturday. Once the results are analyzed, a determination will be made on when the school can reopen and when it will be safe for residents to return to their homes.

DEQ sponsored a public meeting in Sheridan last night to answer questions from residents.

RFP ON MINING

DEQ issued notice of the Request for Proposals for Technical Advice on Mining Rules on February 7, 1992. Notices were published in newspapers in Portland, Denver, Seattle, Reno, and Vancouver B.C. The RFP was mailed to more than 50 firms or individuals -- either in response to the published notices, or based on other suggestions or indications of potential interest.

The deadline for receipt of proposals was March 10, 1992, at 4:00 p.m. Proposals were received from two firms. Evaluation of the proposals in underway.

OLIVIA CLARK

Olivia Clark has started in her new position as Assistant to the Director, formally held by John Loewy. Olivia was Intergovernmental Affairs Specialist at the City of Salem where she managed their legislative policies and strategic agenda.

WHITING PERMITS

A new large-scale fishing industry with the potential to generate large volumes of fish wastes may be coming to Oregon ports. The Pacific Coast states are trying to get whiting allocations away from factory ships and into shore-based processing plants.

Eighty-five percent of the fish is wasted unless it is further processed into fish meal. Arctic Alaska is proposing a fish meal plant in Newport. Fish that is not processed into meal must be disposed of by landfill or ocean dumping. Ocean dumping is a serious concern and has caused environmental damage in Alaska. An NPDES permit would be required for dumping within our jurisdictional waters with appropriate environmental study and safeguards.

If Oregon receives a whiting allocation, more permit requests can be expected.

HEARING AUTHORIZATIONS

The Director authorized the Department to proceed with a rulemaking hearing on a proposal to modify the wastewater discharge permit fee schedule to add a fee of $150 for application processing for any new categories of general permits that may be issued in the future. The proposal would also add fees for disposal system plan review that may be required for any facilities covered by general permits. A general permit is a permit that is issued to cover a category of sources with similar characteristics. Individual sources apply to be covered by the general permit rather than obtaining an individual permit. The Department is pursuing issuance of additional general permits as an efficiency and streamlining measure.

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

DATE: February 7, 1992

TO: Environmental Quality Commission

FROM: Linda K. Zucker, Hearing Officer

SUBJECT: Review of the Hearing Officer's Order in
DEQ v Fuel Processors, Inc.,
Case #AQAB NWR 90 81
Agenda Item J, March 12, 1992, EQC Meeting

Enclosed for your review at the March 12, 1992 meeting is the case record which includes the following:

1. Notice of Civil Penalty Assessment.
2. Answer, Affirmative Defense and Request for Contested Case Hearing.
3. Exhibits.
4. February 8, 1991 letter from Fuel Processors.
5. February 12, 1991 letter from DEQ.
6. Hearing Officer's Findings of Fact and Conclusions of Law.
7. Notice of Appeal.
8. Department Exceptions to Hearing Officer's Findings of Fact, Conclusions of Law, Final Order and Judgment.
9. Environmental Quality Commission Findings of Fact, Conclusions of Law and Final Order (Proposed).
10. Respondent's Response to Department's Opening Brief.
11. Respondent's Response to Department's Proposed Findings of Fact, Conclusions of law and Final Order.
12. Respondent's Response to Department's Exceptions.
13. Department Reply Brief.
14. Hearing Transcript.

LKZ:y
HZ102513
Enclosures

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1390 PHONE (503) 229-5696

May 24, 1990

CERTIFIED MAIL P476 980 156

Fuel Processors, Inc.
c/o Registered Agent
WL Briggs
701 Bozarth St
PO Box 1407
Woodland, Washington 97674

Re: Notice of Civil
Penalty Assessment
No. AQAB-NWR-90-81
Multnomah County

Between February 26, 1990 and March 9, 1990, Fuel Processors, Inc. removed chemical tanks and a boiler from property formerly owned by West Coast Adhesive located at 11104 NW Front Avenue, Portland, Oregon. In the process of removing the tanks, Fuel Processors removed a large amount of asbestos-containing insulation from the pipes connected to the chemical tanks. The asbestos material was stored in several large piles on the property.

On March 10, 1990, a representative of the Department's asbestos section inspected the site and observed asbestos material scattered throughout the property and stored in large piles. He took samples of the material in the piles. Laboratory analysis confirmed that the material contained 25 to 35% Amosite asbestos and 80 to 85% Chrysotile asbestos.

In the course of removing the tanks, Fuel Processors violated the following asbestos regulations listed below which were adopted under the authority of Oregon Revised Statute 468.893(8).

Oregon Administrative Rule (OAR) 340-25-465(6) states that during an asbestos abatement project, the following shall be employed:

> "(a) Remove friable asbestos materials before any wrecking or dismantling that would break up the materials or preclude access to the materials for subsequent removal."

OAR 340-25-465(15) states:

> "Open storage or accumulation of friable asbestos material or asbestos-containing waste material is prohibited."

The site of the tank removal and asbestos storage is located near a residential neighborhood and children were playing within 20 feet of the asbestos abatement project. The violations of the asbestos work practice and storage regulations created the likelihood for public exposure to asbestos and, therefore, the violations are classified as Class I violations under OAR 340-12-050(1)(i) and (j).

Because you violated the asbestos regulations, you are liable for a civil penalty assessment up to $10,000 per day for each violation. In the enclosed Notice of Assessment of Civil Penalty, I have assessed a penalty in the amount of $12,000. In determining the amount of the penalty, I used the procedures set forth in OAR 340-12-045. The Department's findings and civil penalty determination are attached to the Notice as Exhibits 1 and 2.

The penalty is due and payable. Appeal procedures are outlined in Section V of the Notice. If you fail to either pay or appeal the penalty within twenty (20) days, a Default Order and Judgment will be entered against you.

If you wish to discuss this matter, or if you believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, you may request an informal discussion by attaching your request to your appeal. Your request to discuss this matter with the Department will not waive your right to a contested case hearing.

Copies of referenced rules are enclosed. If you have any questions about this action, please contact Holly Duncan with the Department's Enforcement Section in Portland at 229-6742.

Sincerely,

Fred Hansen
Director

FH:hd
Enclosures
cc: Northwest Region, DEQ
Air Quality Division, DEQ
Department of Justice
Environmental Protection Agency

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. Fuel Processors, Inc., a Washington Corporation, Respondent.	)	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. AQAB-NWR-90-81 MULTNOMAH COUNTY

I. AUTHORITY

This notice is issued to Respondent, Fuel Processors, Inc., a Washington Corporation, by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.125 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. VIOLATIONS FOR WHICH A CIVIL PENALTY IS BEING ASSESSED

Between February 26, 1990 and March 9, 1990, Respondent conducted an asbestos abatement project by removing tanks and a boiler from the facility located at 11104 NW Front Avenue, Portland, Oregon, during which the Respondent violated the following asbestos regulations adopted pursuant to ORS 468.893(8):

1. Respondent violated OAR 340-25-465(6) when respondent failed to remove the asbestos materials from the connecting pipes before dismantling and removing the chemical tanks and boiler from the property.

2. Respondent violated OAR 340-25-465(15) when Respondent openly stored asbestos-containing waste material in large piles during the asbestos abatement project.

III. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the following violations cited in Section II:

Violation	Penalty Amount
1.	$6000
2.	$6000

Respondent's total civil penalty is $12,000.

The findings and determination of Respondent's civil penalty pursuant to OAR 340-12-045 are attached and incorporated as Exhibits Nos. 1 and 2.

The penalties are being imposed without advance notice pursuant to OAR 340-12-040(3)(b)(G) as the penalty is for a violation of the rules adopted under ORS 468.893(8).

IV. PAYMENT OF CIVIL PENALTY

The total penalty is now due and payable. Respondent's check or money order in the amount of $12,000 should be made payable to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

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V. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right, if Respondent so requests, to have a formal contested case hearing before the Environmental Quality Commission (Commission) or its hearings 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 and must be received by the Commission's hearings officer 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 claims or defenses to the assessment of this civil penalty that Respondent may have and the reasoning in support thereof. Except for good cause shown:

1. Factual matters not controverted shall be presumed admitted;

2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or defense;

3. New matters alleged in the "Answer" shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

Send the request for hearing and "Answer" to: **Linda K. Zucker, Hearings Officer, Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for hearing and an "Answer," Respondent will be notified of the date, time and place of the hearing.

If Respondent fails to file a timely request for hearing or "Answer", 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.

Failure to appear at a scheduled hearing or meet a required deadline, may result in a dismissal of the contested case.

May 24, 1990
Date

Fred Hansen, Director

EXHIBIT 1.

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO: 1. (Failing to remove asbestos prior to dismantling the tanks and boiler).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(i) because the violation of the work practice regulation resulted in the likelihood for public exposure. Residences are located and children were playing within 20 feet of the property on which the asbestos was disturbed and the Respondent's activities created a likelihood for public exposure to asbestos.

MAGNITUDE: The magnitude of the violation is major. The Respondent disturbed material containing up to 35% amosite asbestos and 85% chrysotile asbestos from pipes which were connected to the tanks and boiler. Once removed from the pipes, the asbestos material was accumulated in several large piles on the property.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: BP+[(.1xBP)(P+H+E+O+R+C)].

"BP" is the base penalty which is $ 5,000 for a Class I major magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant actions and receives a value of 0 as the Respondent has no prior significant actions as defined in OAR 340-12-030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant actions and receives a value of 0 as the Respondent has no prior significant actions.

"E" is the economic condition of Respondent and receives a value of 0 as there is insufficient information on which to base a finding.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0 as the violation was a single occurrence.

"R" is the cause of the violation and receives a value of 2 as the Respondent was negligent in failing to determine whether the material was asbestos prior to removing the insulation from the pipes.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as the Respondent was neither cooperative nor uncooperative in correcting the violation.

PENALTY CALCULATION:

Penalty = BP+[(.1xBP) (P+H+E+O+R+C)]
= 5000 + [(.1x5000)((0)+(0)+(0)+(0)+(2)+(0))]
= 5000 + [(500)(+2)]
= 5000 + 1000
= 6000

EXHIBIT 2.

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO: 2. (Open storage and accumulation of asbestos-containing waste material).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(j) because the storage of asbestos-containing waste material created the likelihood for public exposure to asbestos. Residences are located and children were playing within 20 feet of the property on which the asbestos was openly stored. The piles of asbestos-containing insulation on the property were within a close enough proximity to the residences that the activity created the likelihood for public exposure.

MAGNITUDE: The magnitude of the violation is major. The Respondent stored asbestos-containing pipe insulation in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained up to 35% amosite asbestos and chrysotile asbestos.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: BP+[(.1xBP)(P+H+E+O+R+C)].

"BP" is the base penalty which is $ 5000 for a Class I Major magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant actions and receives a value of 0 as Respondent has no prior significant actions as defined in OAR 340-12-030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant actions and receives a value of 0 as Respondent has no prior significant actions.

"E" is the economic condition of Respondent and receives a value of 0 as there is insufficient information on which to base a finding.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0 as this violation was a single occurrence.

"R" is the cause of the violation and receives a value of 2 as the Respondent was negligent in openly accumulating the asbestos-containing waste material on the property.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as Respondent was neither cooperative nor uncooperative in correcting the violation.

PENALTY CALCULATION:

Penalty = BP+[(.1xBP) (P+H+E+O+R+C)]
= 5000 + [(.1x5000) ((0)+(0)+(0)+(0)+(2)+(0))]
= 5000 + [(500)(+2)]
= 5000 + 1000
= 6000

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., a Washington Corporation, Respondent.	ANSWER, AFFIRMATIVE DEFENSE AND REQUEST FOR CONTESTED CASE HEARING No. AWAB-NWR-90-81 MULTNOMAH COUNTY

For its Answer to the Department's Notice of Assessment of Civil Penalty ("Notice") dated May 24, 1990, Respondent, Fuel Processors, Inc., a Washington corporation ("Fuel Processors"), hereby admits, denies, and alleges as follows:

I.

Admits that between the dates of February 26, 1990, and March 9, 1990, Fuel Processors removed tanks and a boiler from the West Coast Adhesive facility formerly located at 11104 N.W. Front Avenue, Portland, Oregon.

II.

Except as expressly admitted above, Fuel Processors denies each and every allegation contained in the Notice and the exhibits attached thereto.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

III.

Fuel Processors, Inc., realleges paragraphs I and II, above.

IV.

The Department has failed to state facts sufficient to give rise to a claim for relief against Fuel Processors.

BOGLE & GATES
1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

SECOND AFFIRMATIVE DEFENSE

(Failure to Plead Sufficient Facts)

V.

The Department has failed to provide sufficient information to Fuel Processors to enable Fuel Processors to prepare an adequate defense to the allegations contained in the Notice.

THIRD AFFIRMATIVE DEFENSE

(Inadequate Notice - Failure to Provide Notice of Enforcement Action)

VI.

Fuel Processors realleges paragraphs I and II, above.

VII.

The Department failed to provide timely and/or adequate notice of a pending enforcement action and intent to assess civil penalty for the alleged violations.

FOURTH AFFIRMATIVE DEFENSE

(Improper Penalty Assessment-Amount)

VIII.

Fuel Processors realleges paragraphs I and II, above;

IX.

The amount of the civil penalty the Department seeks to collect in the above-captioned case in cause is inappropriate in that the assessment procedure failed to take into account material mitigating factors, some of which are described below, which were evident to the Department of the time of the assessment and will be presented as evidence at the hearing.

X.

The amount that the Department seeks to collect in the above captioned case and cause is inappropriate in that the Department has failed to properly apply and assess

BOGLE & GATES
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222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

those factors which the Department concludes to have been "aggravating" for the reason that some of the factors are factually inaccurate, some of the factors have been misconstrued by the Department and its personnel, and some of the factors are not, in fact, "aggravating." Fuel Processors will present specific evidence on each point at the hearing to follow.

XI.

Fuel Processors affirmatively alleges the following mitigating factors:

1. Fuel Processors made reasonable and appropriate inquiries regarding the composition of the subject materials.

2. Respondent visually inspected the subject materials prior to removal and confirmed that there was no reason to suspect the presence of asbestos.

3. Respondent has cooperated with the Department and its personnel throughout the Department's investigation of the matter.

4. Fuel Processors was not offered an opportunity to correct the alleged violations before the Department began formal enforcement proceedings.

STATEMENT OF FACTS SUPPORTING FUEL PROCESSORS' DEFENSE

XII.

Fuel Processors specially alleges the following facts, upon which it will rely to disprove the Department's claims and in support of which evidence will be presented at the hearing:

1. Fuel Processors' conduct at the subject premises did not create a likelihood of public exposure to asbestos-containing materials.

2. To the extent that Fuel Processors stored or accumulated asbestos-containing materials, said materials were placed in contained concrete bermed areas on the subject premises.

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BOGLE & GATES
1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

3. All materials, including the substances alleged to be asbestos-containing, were exposed to open rainfall during the storage period, which significantly reduced the possibility of airborne dust emissions.

4. All rainwater which accumulated in the concrete bermed area was captured, containerized and shipped to Fuel Processors' water treatment plant for proper disposal.

5. The subject premises is located in a heavily industrialized area, remote from commercial, business or residential surroundings. The area is not heavily traveled by pedestrian traffic and presents the possibility of only limited exposure to the public.

6. The site was isolated from the general public by cable chains placed across the driveway and other points of access.

7. Fuel Processors made all appropriate and reasonable inquiries to determine the content and composition of the material alleged to contain asbestos. Fuel Processors reasonably relied on representations made to it by the owner of the facility regarding the composition of the materials.

8. Fuel Processors, based on lack of sufficient information to form a reasonable belief, denies that the materials removed from the facility contained asbestos.

WHEREFORE, having fully answered the Notice of Assessment in the above-captioned case and cause, Fuel Processors respectfully requests:

1. That a hearing, as provided for in the Notice and in the applicable statutes and rules and the applicable Rules of Procedure, be promptly scheduled; and

2. That the Department take nothing by way of its complaint; and

3. That Fuel Processors be awarded a judgment against the Department for its attorneys fees and costs incurred in this action and such other relief as may be deemed just and proper.

////

////

BOGLE & GATES
1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

DATED: this 3rd of June, 1990.

Respectfully submitted,

BOGLE & GATES

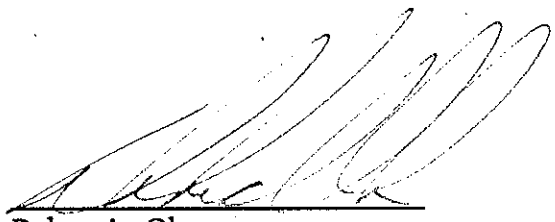
Debra A. Olson, OSB# 86256
Trial Attorney: Christopher L. Reive, OSB# 83305
1400 KOIN Center
222 S.W. Columbia
Portland, Oregon 97201
Of Attorneys for Respondent, Fuel Processors, Inc.

BOGLE & GATES
1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Answer Affirmative Defense and Request for Contested Case Hearing on Department of Environmental Quality of the State of Oregon v. Fuel Processors, Inc., a Washington Corporation, case No. AWAB-NWR-90-81, on the 3rd day of July, 1990, by causing to be hand delivered a true copy thereof, to:

Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97201



Debra A. Olson
Of Attorneys for Respondent

Attachment 7

DEPARTMENT OF ENVIRONMENTAL QUALITY ①
Request for Analysis

LEGAL Case No. 900199

Location/Site: 1104 SW FRONT Date Sampled: 3-10-90 Date Received in Lab: MAR 12 1990

Collected by: DAVID WALL Fund Code: 1432 Date Reported: MAR 20 1990

Purpose: ANALYSIS Report Data to:

Comments:

Item #	Sampling Point Description (include time)	Sample container according to test(s) requested: Nutrients / Basic	DO / BOD	Metals / Organic	Misc. / Misc.	Test(s) Required
1	S.W. Section of LOT				Z3006	ASBESTOS CONTENT
2	WEST END OF BOILER BUILDING				Z3007	" "
3	NE corner of LOT OUT BUILDING				Z3008	" "
4	" " "				Z3009	" "
5	BOILER Jacket				Z3012	" "
6						

State of Oregon DEPARTMENT OF ENVIRONMENTAL QUALITY RECEIVED MAR 22 1990

Laboratory Comments: AIR QUALITY CONTROL

Contact Sample Tracker for proper sampling containers and preservation procedure. (503) 229-5983

Ex 1-1

DEPARTMENT OF ENVIRONMENTAL QUALITY
Laboratories and Applied Research Division
1712 S.W. 11th Avenue, Portland, OR 97201

LEGAL SAMPLE

Chain of Custody Record

Site Name: 1600 NE Alberta Co.
Location: NW 16th Front
Date Sampled: 3-10-92
Time Sampled: 10:30 AM
Collected By: Dawn Wall

Laboratory Number:
Program Code: HED
Date Received: 3-12-92
Time Received: 3:15 P.M.

Sample Container Information

Container Type/Number	Container Type/Number	Container Type/Number
Poly 1 liter / E 3006	/	/
" / E 3007	/	/
" / E 3008	/	/
" / E 3009	/	/
" / E 3010	/	/
/	/	/

Total Number of Containers Received: 5

Relinquished By: Dawn Wall
(signature)

Received By:
(signature)

Initial Placement in Refrigerator # 5 C 3

Subsequent Out of Laboratory Transfers:

Relinquished By: (time/date)	Received By: (time/date)

7/86 DEQ/LB-106

(COPY FOR PERSON WHO BROUGHT IN THE SAMPLE)

DEPARTMENT OF ENVIRONMENTAL QUALITY LABORATORIES

Analytical Records Report

*** LEGAL *** TUESDAY MARCH 20th, 1990

CASE NAME: 900199 11104 S.W. FRONT
SUBMITTER: Wall, David E. COLLECTOR: Wall, David E.
FUND CODE: 1432 Asbestos Control

ITEM #	RESULT	UNITS	TEST
001	S.W. Section of lot 03/10/90		
	Attached		Microscopic exam.
002	West end of boiler building 03/10/90		
	Attached		Microscopic exam.
003	N.E. Corner of lot outbuilding 03/10/90		
	Attached		Microscopic exam.
004	N.E. Corner of lot outbuilding sample 2 03/10/90		
	Attached		Microscopic exam.
005	Boiler jacket 03/10/90		
	Attached		Microscopic exam.

DEPARTMENT OF ENVIRONMENTAL QUALITY
LABORATORIES AND APPLIED RESEARCH
INORGANIC/NONMETALS SECTION
MICROSCOPIC TEST RESULTS

****

SITE: 11104 SW Front
LABORATORY NO: 900199
PROGRAM CODE: 1432
COLLECTED BY: David Wall
DATE COMPLETED: March 15, 1990
DATE COLLECTED: March 10, 1990
ANALYST: BVJ

==========

ITEM #	CONTAINER	DESCRIPTION
1.	Z3006	Macro: The sample consists of wet, gray, loose material with obvious fiber content. Micro: The sample contains 35% Amosite asbestos. The remainder is the non-fibrous matrix.
2.	Z3007	Macro: The sample consists of a gray plaster-like material and a deteriorated piece of cloth. Micro: The sample contains 25% Amosite asbestos. It also contain 15% plant fibers. The remainder is non-fibrous.
3.	Z3008	Macro: The sample consists of a 1/8" thick, triangular piece of tough, tan material. Micro: The sample contains 80% Chrysotile asbestos. The remainder is non-fibrous binders.
4.	Z3009	Macro: The sample consists of a 1/8" thick piece of stiff, gray material. Micro: The sample contains 85% Chrysotile asbestos. The remainder is non-fibrous binders.
5.	Z3012	Macro: The sample consists of loose, vermiculite-like material. Micro: No Asbestos found. The sample contains vermiculite.

COMMENTS: Results to D. Wall on 3/14/90. BVJ

ASB00199
BVJ/lotus

SITE NAME: West Coast Adhesive Co.
DATE:20-Mar-90 TIME:3:30 pm PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of residences from south side of demo site. Across the street from site there are five children that play in the area approximately 20 feet from the adhesive plant.

SITE NAME: West Coast Adhesive Co.
DATE:20-Mar-90 TIME:3:30 pm PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of residences from north side of demolition site.

E+2

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1334 PHONE (503) 229-5696

March 21, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P 560 339 588

Fuel Processors, Inc.
Registered Agent
WL Briggs
PO Box 1407
701 Bozarth St.
Woodland, WA 98674

Re: NOTICE OF NONCOMPLIANCE
AQAB-NWR-90-323
Multnomah County

Dear Mr. Briggs:

On March 10, 1990, a representative of the Department conducted an inspection at the former site of West Coast Adhesive Co. located at 11104 NW Front, Portland, Oregon. During the course of this inspection it was found that Fuel Processors, Inc. was contracted to remove all the chemical tanks and the boiler from this site. The process of removing these tanks and the boiler disturbed a large amount of asbestos-containing pipe insulation.

Lab analysis of the pipe insulation showed it to contain 25 to 35% AMOSITE asbestos. Removal of asbestos-containing material must be done by an Oregon licensed asbestos abatement contractor and must be done prior to any demolition work.

The violations committed by Fuel Processors, Inc. employees while salvaging chemical tanks and a boiler are listed below:

Class II violation. OAR 340-25-465(6)(a), remove asbestos-containing materials before any wrecking or dismantling that would break up the materials or preclude access to the materials for subsequent removal.

Class II violation. OAR 340-25-465(15), open storage or accumulation of friable asbestos material or asbestos-containing waste material is prohibited.

Ex 3

Class III violation. OAR 340-25-465(5), written notification of any asbestos abatement project shall be provided to the Department on a Department form. The notification must be submitted by the facility owner or operator or by the contractor in accordance with on of the procedures specified in subsection (a) or (b).

Class of violation pertains to the amount of risk to the public or the environment. Class I is a major risk and Class III is a minor risk.

The Department is very concerned that Fuel Processors, Inc. be able to recognized asbestos-containing material when they encounter it. The business of tank and boiler recovery will bring you into contact with asbestos-containing pipe insulation as well as other asbestos-containing materials on a regular basis. The Department strongly suggests that you get some formal training so that you may more easily recognize suspect asbestos-containing material. Information on training classes may be obtained from the Department.

You need to be aware that violations of the asbestos regulations can lead to civil penalty of up to $10,000 per day per violation. The Department is referring this case to our enforcement section for further investigation and enforcement.

Copies of the above mention rules are enclosed for your information and use. If you have any questions on this matter please contact me at (503) 229-5364.

Sincerely,

David E. Wall
Asbestos Control Analyst
Air Quality Division

DEW:a
ASB\AH3066
Enclosure
cc: Enforcement Section, DEQ
Northwest Region, DEQ
Environmental Clean-up Division, DEQ
Oregon OSHA, Region 1

Dept. of Environmental Quality
RECEIVED
MAR 22 1990
NORTHWEST REGION

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1334 PHONE (503) 229-5696

March 21, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P 560 339 587

West Coast Adhesive Co.
Registered Agent
William Dubs
11104 NW Front
Portland, OR 97231

Re: NOTICE OF NONCOMPLIANCE
AQAB-NWR-90-324
Multnomah County

Dear Mr. Dubs:

On March 10, 1990, a representative of the Department conducted an inspection of West Coast Adhesive Co. located at 11104 NW Front, Portland, Oregon. During the course of this inspection it was found that several lengths of asbestos-containing pipe insulation had been disturbed and piled around the site by Fuel Processors, Inc. Your company contracted with Fuel Processors, Inc. to remove and/or salvage chemical tanks and the boiler on the site.

This is a Class III Violation of the Department's asbestos regulations. OAR 340-33-030(2) states that an owner or operator of a facility shall not allow any persons other than those employees of the facility owner or operator who are appropriately certified or a licensed asbestos abatement contractor to perform an asbestos abatement project in or on that facility. Facility owners and operators are not required to be licensed to perform asbestos abatement projects in or on their own facilities.

Class of violation pertains to the amount of public and environmental risk. A Class I is a major risk and a Class III is a minor risk.

Please be aware that violations of the Department's asbestos regulations can lead to civil penalty of up to $10,000 per day per violation. In the future the Department expects you to conform to all the asbestos regulations.

Ex 4

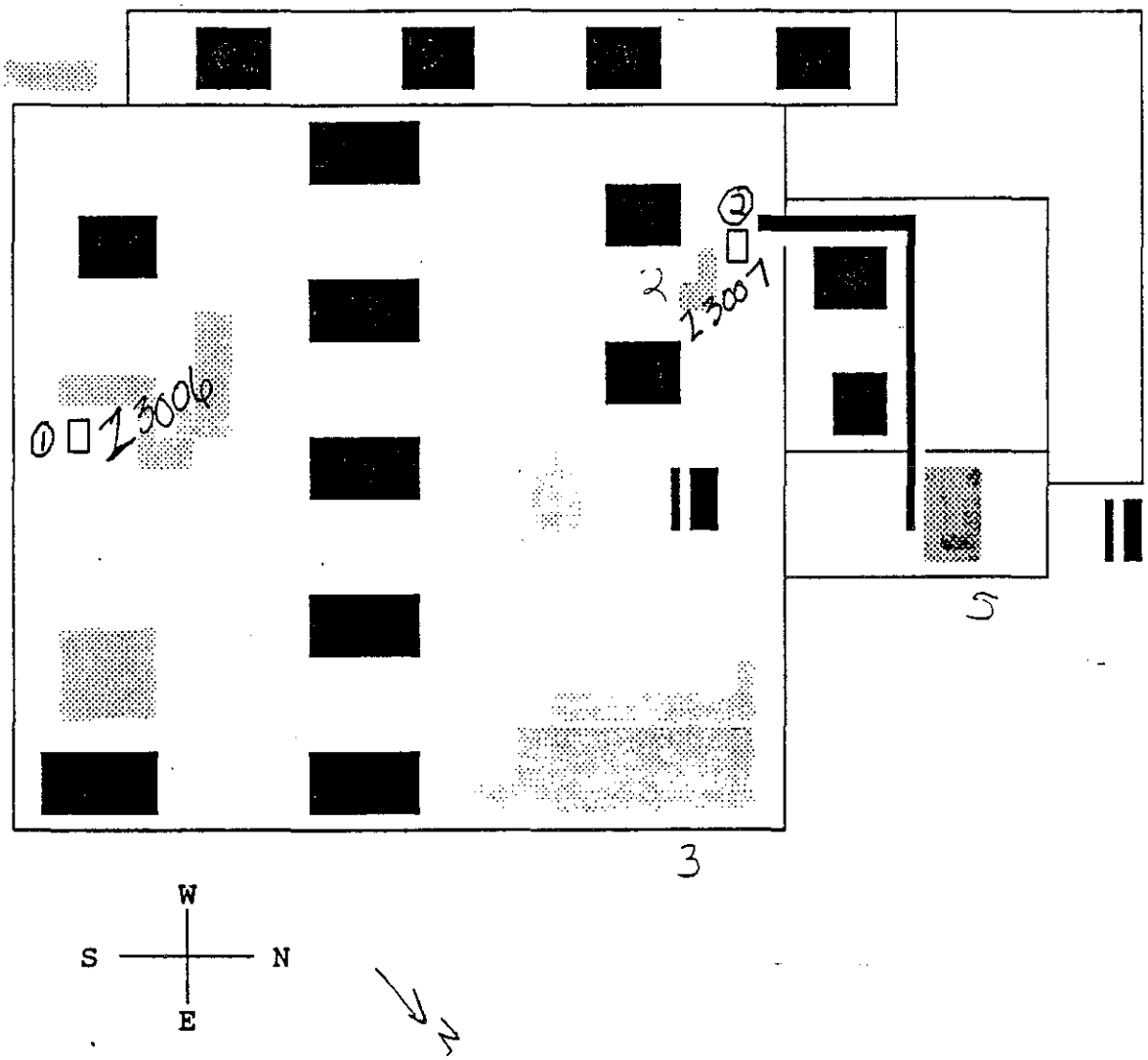
Copies of the above mentioned rules are enclosed for your information and use. If you have any questions on this matter please contact me at (503) 229-5364.

Sincerely,

David E. Wall
Asbestos Control Analyst
Air Quality Division

DEW:a
ASB\AH3065
Enclosure
cc: Enforcement Section, DEQ
Northwest Region, DEQ
Environmental Clean-up Division, DEQ
Oregon OSHA, Region 1

West Coast Adhesive Co.



Asbestos Contamination Sites.....

Large Tanks.....

Small Tanks.....

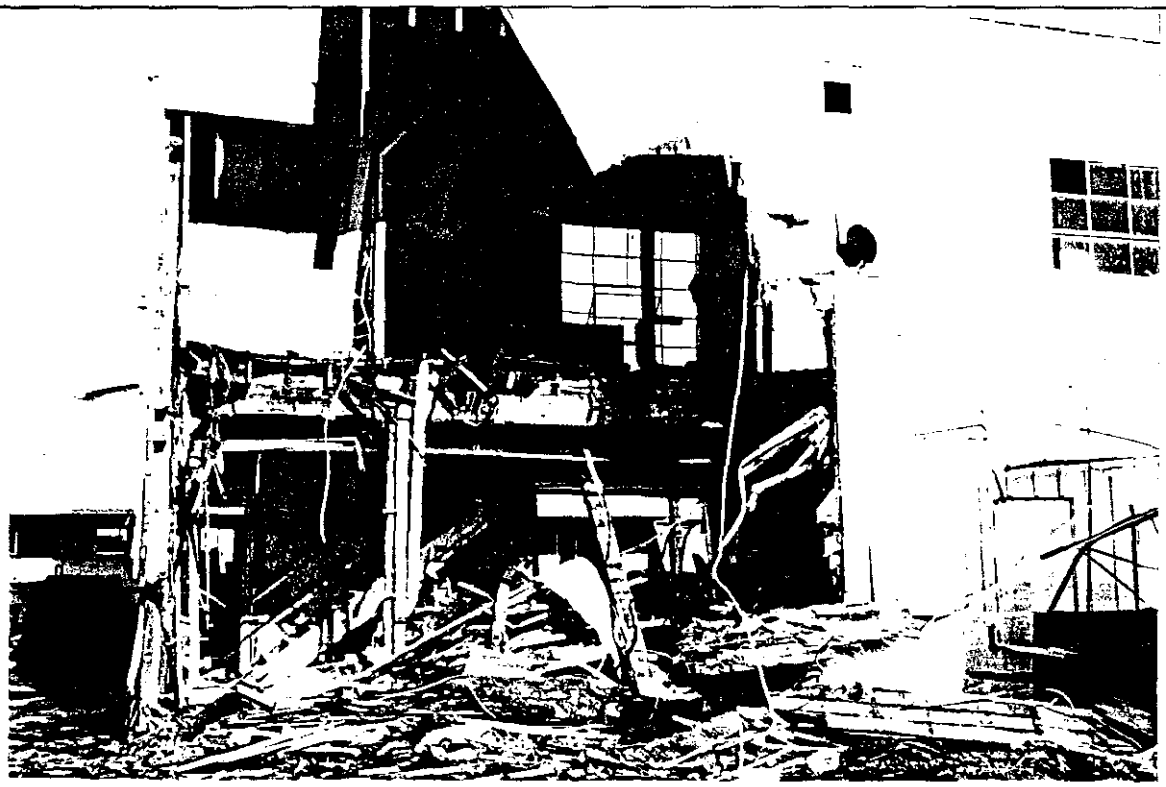
Asbestos Pipe Line.....

Asbestos Sampling Sites.....

Non Asbestos Insulated Boiler.....

Ex5

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of reactor building take from the south side of the tank farm area.

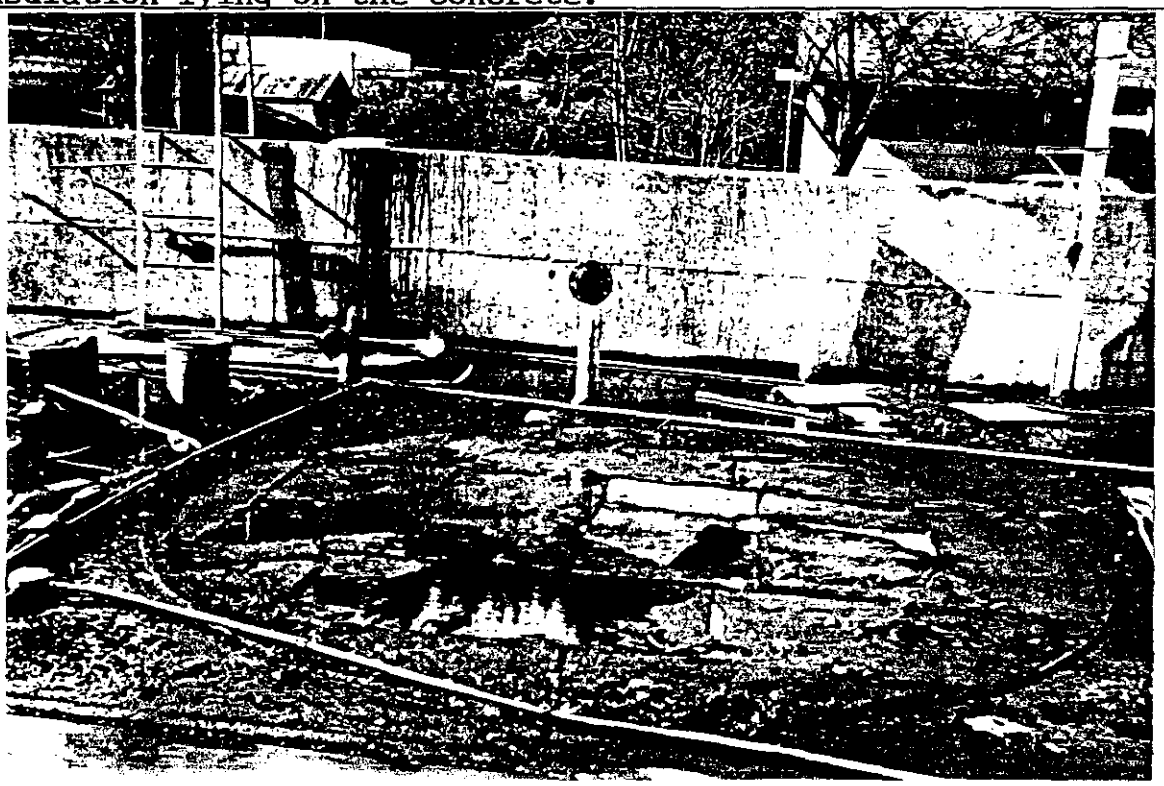


SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: Sample point south side of tank farm area mag type pipe insulation.

Ex 6

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER:DEWall JOB#:6508
COMMENTS: Sample point in reactor building. West end of main pipe from boiler room.

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER:DEWall JOB#:6508
COMMENTS: Facing away from reactor building toward the middle of the tank farm. Shows tank placement and small amount of pipe insulation lying on the concrete.



Ex 7

RICHARD H. KRAUSE

HAZCON, Inc.
9500 S.W. Barbur Blvd.
Suite 100
Portland, Oregon 97219
(503) 244-8045

EMPLOYMENT

1986-Present HAZCON, INC., Portland, Oregon
President
Formed Industrial Hygiene service corporation to provide occupational and environmental health management services; Instructor in Approved Washington and Oregon State Asbestos training courses, manages staff of Certified Industial Hygienists, Industrial Hygienists, and Industrial Hygiene Technicians in the field and laboratory.

1985-1986 JAMES L. GROVES COMPANY, Portland, Oregon
Assistant Manager
Assisted in management of the H2M Division, provided industrial hygiene sampling and analytical services to clients, marketed for new clients, arranged seminars, participated in professional organizations and regulatory actions, developed and presented training programs, developed, implemented and participated in asbestos control programs and performed numerous industrial hygiene surveys of industrial, institutional, and governmental facilities.

1980-1985 SAIF CORPORATION
Industrial Hygiene Manager
Duties included managing four Industrial Hygiene Consultants, consulting with insureds about the recognition evaluation and control of occupational health hazards, evaluating occupational disease worker's compensation claims and providing expert witness testimony at claims hearings.

1977-1980 STATE OF OREGON, ACCIDENT PREVENTION DIVISION
Health Compliance Officer
Responsible for conducting industrial hygiene inspections of work places in Oregon to determine compliance with the Oregon Safe Employment Act. Reports were prepared describing violations of standards and work place conditions observed.

EDUCATION

M.S. in Public Health, Industrial Hygiene and Safety, University of Washington
B.S. in Microbiology, University of Washington

PROFESSIONAL ORGANIZATIONS

American Industrial Hygiene Association American Academy of Industrial Hygiene
American Society of Safety Engineers

CERTIFICATIONS

Comprehensive Practice of Industrial Hygiene by
American Board of Industrial Hygiene
Certified Safety Professional

Ex 8

HEALTH HAZARD CONTROL SERVICES
HAZCON INC.

RECEIVED
OCT 0 3 1990
BOGLE & GATES

Debra Olson
Bogle & Gates
222 SW Columbia
Portland, Oregon 97201

Dear Ms. Olson:

At your request, I have performed a factual investigation regarding the DEQ notice of violation (Case No. AWAB-NWR-90-81) against Fuel Processors, Inc.

As a part of this investigation, I visited the Department of Environmental Quality offices to review their files, interviewed Mr. Bill Briggs, Mr. Dale Poor and Mr. Dan Goodhue of Fuel Processors, Inc., Mr. Bill Dubbs of West Coast Chemicals, and Mr. Jim Barnes of Cascade Industrial Maintenance, obtained information from the National Weather Service, and visited the cleared site. My findings are as follows:

The initial inspection of the site was conducted by Mr. Dave Wall, Asbestos Control Analyst of the Air Quality Division.

Upon close review, several questions arise which serve to raise doubt about the degree of hazard presented by the actions of Fuel Processors, Inc.

The first question involves the actual amount of friable asbestos debris that was present.

The DEQ photos show large piles of insulation at the site. The bulk samples collected by Mr. Wall included two (Nos. 1 & 2) that appeared to be from pipe insulation. These contained amosite asbestos. The two other samples (Nos. 3 & 4) contained chrysotile asbestos and consisted of "tough," "stiff" materials. These likely may have been gasket materials of low friability. In my opinion, to establish the actual amount of asbestos materials in these piles, more samples should have been collected. This would have reduced possible sampling bias resulting from the natural tendency to only sample those materials with the highest potential for asbestos content.

In conversations with Mr. Dubbs I learned that he estimated that 60-70% of the pipe insulation in this plant had been replaced since his arrival in 1977. Non-asbestos pipe insulation materials can look identical to older asbestos containing materials, particularly when piled in a dirty, soaking wet pile of demolition debris. It is probable that only a small amount of asbestos material was present in the photographed piles.

The second question involves the condition of the material as it was taken off of the pipes. The material at the time of the inspection was obviously saturated with water as shown in the DEQ photographs.

I spoke with Dan Goodhue (the person who actually removed the insulation) about the condition during the removal. He stated the insulation was removed later in the demolition time frame from 2/26 to 3/10 and was saturated on the pipes as well as when it was in piles on the ground. In light of this information, the potential for airborne exposure was greatly lessened.

9500 SOUTHWEST BARBUR BOULEVARD
SUITE 100
PORTLAND, OREGON 97219
503/244-8045

Ex 9

I discussed the weather conditions with the National Weather Service for this time period. This information is consistent with Mr. Goodhue's observations of the wetness.

Date	Rainfall	Wind
2/26	None	11 mph East
2/27	None	18 mph East
2/28	None	11 mph East
2/21	None	6 mph South East
3/02	Trace	6 mph South East
3/03	.52 inches	10 mph South
3/04	.24 inches	8 mph East South East
3/05	.02 inches	8 mph South East
3/06	.14 inches	8 mph South
3/07	.45 inches	11 mph South
3/08	.02 inches	14 mph South East
3/09	.33 inches	14 mph South East
3/10	.28 inches	10 mph South East

The third question involves the exact proximity of children playing and the likelihood of exposure from wind-driven asbestos dust.

Mr. Wall's report mentions children playing approximately 20 feet from the plant. The final DEQ Notice of Penalty refers to children being 20 feet from the asbestos removal. From my observations of the site and inspection of the maps, the two statements are not consistent. A more accurate distance (as measured on the aerial photographs) from removal to children would be at least 60 - 70 feet. Also, as previously mentioned, the material was likely soaked with water as it was removed and it is therefore unlikely that asbestos fibers would have become airborne as a result of the removal activities. In addition, the wind direction during the days when the asbestos was removed would not have been toward the closest houses where DEQ has alleged children were playing.

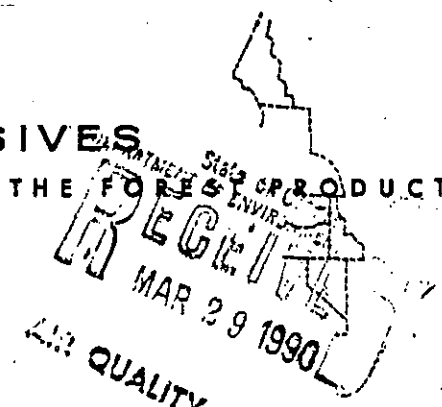
In my opinion, the hazard alleged in the final DEQ notice of penalty exceeds the hazard associated with actual conditions at the site during the period in question.

Sincerely,

Richard H. Krause, CIH

RHK/jl

WEST COAST ADHESIVES
JOB-TESTED ADHESIVES FOR THE FOREST PRODUCTS INDUSTRIES
Area Code 503 286-3515
11104 N. W. FRONT AVENUE
PORTLAND, OREGON 97231



3-19-90

MR. DAVID E. WALL
ASBESTOS CONTROL ANALYST
AIR QUALITY DIVISION
PROGRAM OPERATIONS SECTION
DEPARTMENT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE
PORTLAND, OR 97204

DEAR MR. WALL:

MOST RECENTLY, WEST COAST ADHESIVES SOLD ALL OF ITS PLANT EQUIPMENT TO OIL RE-REFINERS CO., INC. OF PORTLAND, OR. DURING THE NEGOTIATION AND ULTIMATE SALE OF THE EQUIPMENT, NO DISCUSSION OF THE POTENTIAL PRESENCE OF ASBESTOS INSULATION AROUND PIPING WAS DISCUSSED WITH BILL BRIGGS PRESIDENT OF OIL RE-REFINING. IT WAS SIMPLY A MATTER IF NOT THINKING ABOUT THE POSSIBILITY OF ASBESTOS BEING PRESENT. IN RETROSPECT, I SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF OLD ASBESTOS INSULATION BEING PRESENT, BUT THE IDEA DID NOT OCCUR TO ME. THIS ESPECIALLY TRUE WHEN THE FINAL SALE WAS COMPLETED OF 1-31-90.

SOME WEEKS PRIOR TO THE SALE (AROUND 1-6-90) MR. BRIGGS HAD ORIGINALLY EXPRESSED INTEREST IN THE BOILER ONLY. AT THAT TIME MR. BRIGGS COULD HAVE INQUIRED ABOUT THE POSSIBLE PRESENCE OF ASBESTOS INSULATION AROUND THE BOILER. I DO NOT REMEMBER THIS POSSIBILITY, BUT IT COULD HAVE BEEN MENTIONED. OTHER THAN THAT I DID NOT DISCUSS THE POSSIBILITY OF ASBESTOS BEING PRESENT. I DON'T BELIEVE THAT EITHER PARTY WAS OPENLY AWARE THAT A ASBESTOS PROBLEM EXISTED.

VERY TRULY YOURS.
William Duke
GENERAL MANAGER

EXT 0

BOGLE & GATES

LAW OFFICES

1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201

(503) 222-1515
Fax: (503) 721-3666

DEBRA A. OLSON

Seattle
Anchorage
Bellevue
Tacoma
Washington, D.C.
Yakima

71173/05224

February 8, 1991

Ms. Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 S.W. Sixth Avenue
Portland, OR 97201

Re: DEQ v. Fuel Processors, Inc.
Contested Case No. AWAB-NWR90-81

Dear Ms. Zucker:

Respondent Fuel Processors, Inc. ("Respondent") submits this letter in response to your invitation for comments regarding the issue of whether a Hearings Officer has the authority to order an award for violations different than those violations alleged in the DEQ's pleadings if DEQ has failed to meet the burden of proof required for the violations contained in the pleadings. It is not within the discretion of the Hearings Officer to issue an Order for violations other than those actually plead by DEQ.

On or about May 24, 1990 Respondent received a Notice of Assessment of Civil Penalty (the "Notice") for two alleged Class I major violations under OAR 340-12-050(1)(i) and (j). Respondent requested a contested case hearing to resolve these issues, and also pursued informal resolution of this matter with DEQ.

The Administrative Procedures Act does not provide guidance on this issue and we must refer to the Rules of Civil Procedure for guidance. Under ORCP 23B, courts are given discretion to impose liability for offenses not raised in the pleadings "when issues not raised by the pleadings are tried by express or implied consent of the parties." This provision does not provide the Hearings Officer the latitude in this matter to amend DEQ's pleadings, because at no time during the hearing did DEQ present any evidence to establish a class or magnitude of violation other than those contained in the DEQ pleadings, and DEQ did not request that the Hearings Officer consider any violations other

than those contained in the Notice. At the hearing, the Department focused solely on establishing liability for Class I major violations. The Department clearly established, both in its pleadings and in settlement discussions with Respondent, that the issues addressed at the hearing would include only the Class I major violations contained in the Notice. The parties did not, either expressly or impliedly, try any theories of liability other than the violations alleged in DEQ's pleadings. DEQ cannot now be allowed to take advantage of theories of liability which it earlier rejected. See Georgeson v. State of Oregon, 75 Or App 213, 216 (1985) (tort claimant, who had earlier opportunity to replead defective notice, and instead chose to plead a different theory of notice, was denied further opportunity to replead). It was incumbent upon DEQ to amend its pleadings if DEQ intended the Respondent Hearings Officer to address violations other than those outlined in the Notice. At no time before or during the hearing did DEQ attempt to amend its pleadings to include a different class or magnitude of violation. DEQ cannot, after the fact, rely upon the Hearings Officer to remedy DEQ's failure to amend the pleadings. If an Order is issued imposing liability for any violations other than those actually plead in the DEQ Notice, Respondent intends to pursue its rights to appeal such an Order to the Environmental Quality Commission and/or the Oregon Court of Appeals.

Notwithstanding the above, Respondent also believes that the Department has failed to meet its burden under Violation No. 2 of the Notice of proving a violation of OAR 340-12-030(j), which provides that:

> "Visible emissions of asbestos during an asbestos abatement project or during collection, processing, packaging, transportation, or disposal of asbestos-containing waste material is a Class I violation."

DEQ did not present any evidence at the hearing regarding visible asbestos emissions allegedly created by Respondent. For this reason, Violation No. 2 of the Notice must be dismissed.

Respondent believes that DEQ failed at the contested case hearing to meet its burden of proving that Respondent committed the Class I major violations alleged in the Notice. The Oregon Administrative Procedure Act requires a determination by the Hearings Officer in favor of the Respondent.

Thank you for allowing us to comment on this issue. If you have any questions, please do not hesitate to contact me.

Very truly yours,

BOGLE & GATES

Debra A. Olson

DAO/rln
cc: Arnold V. Silver
[48\cl\dao\fpi\zucker.L01]

DAVE FROHNMAYER
ATTORNEY GENERAL

JACK L. LANDAU
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
1515 SW 5th Avenue
Suite 410
Portland, Oregon 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

2/15/91

February 12, 1991

Linda Zucker
Hearing Officer
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

Re: DEQ v. Fuel Processors, Inc.

Dear Ms. Zucker:

I received a copy of a letter to you from Ms. Olson dealing with your authority to enter an order for a violation different than one alleged in the notice if DEQ failed to meet its burden of proof for the alleged violations. I paraphrased the sentence because it was somewhat lengthy and difficult to grasp. Certainly we agree that if the Department fails to establish a violation, it fails to prove conduct resulting in assessment of a civil penalty. I do not recall the Hearing Officer asking the specific question. I do recall an inquiry from the Hearing Officer relating to DEQ classification systems. If the Hearing Officer has a specific question in mind it might be helpful to counsel to reduce it to writing for briefing. In the meantime, the Department feels Ms. Olson is confused in her analysis.

The confusion may result from not distinguishing between the Department's ability to assess a penalty and the amount of such penalty. The Hearing Officer may reduce such amount based upon new information coming in at the hearing. See OAR 340-11-132(5)(a)(A)(B). The case is not dismissed however.

Second, Ms. Olson refers to Violation No. 2 of the notice claiming the Department failed to prove a violation of OAR 340-12-030(j) dealing with visible emissions, and asks this allegation be dismissed. However, the Department did not

allege as Violation No. 2, a Violation of OAR 340-12-030(j). Violation No. 2 as alleged by the Department is a violation of OAR 340-25-465(15). (See Notice, p. 2.) Violation No. 2 is given a classification based on OAR 340-12-050(1)(j) (storage). (See exhibit.)

I do not believe the Hearing Officer invited legal argument and further I am of the opinion that counsel had not raised any issue for the Hearing Officer's evaluation.

Sincerely,

Arnold B. Silver
Assistant Attorney General

ABS:dld
5870H
cc: Debra Olson

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW NO. AQAB NWR 90 81

BACKGROUND

On May 24, 1990, DEQ notified Fuel Processors, Inc., that it was liable for a $12,000 civil penalty for failing to remove friable asbestos materials before dismantling a facility and for openly storing or accumulating friable asbestos materials in violation of OAR 340-25-465(6) and (15). The amount of the penalty was predicated on DEQ's view that the violations created a "likelihood for public exposure to asbestos," were of major magnitude, and were negligent.

Fuel Processors admitted removing tanks and the boiler, generally denied the remainder of the allegations in DEQ's notice, and affirmatively alleged failure to state a claim for relief, failure to plead sufficient facts, and failure to provide notice of enforcement action and intent to assess a penalty. Fuel Processors also challenged the penalty amount for deficiencies in procedure and for factual accuracy and sufficiency.

A hearing was conducted on December 13, 1990. Fuel Processors was represented by Debra A. Olson, its attorney. DEQ was represented by Arnold Silver, Assistant Attorney General.

Post hearing briefing concluded on February 14, 1991.

ISSUES

Whether Fuel Processors, Inc. violated OAR 340-25-465(6) and (15) and, if so, whether $12,000 is the appropriate penalty for these violations.

OFFICIAL NOTICE

I take official notice of ORS 468.877 which provides:

> **468.877 Findings.** The Legislative Assembly finds and declares that:
>
> (1) Asbestos-containing material in a friable condition, or when physically or chemically altered, can release asbestos fibers into the air. Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are a danger to the public health.
>
> (2) There is no known minimal level of exposure to asbestos fibers that guarantees the full protection of the public health.
>
> (3) Asbestos-containing material found in or on facilities or used for other purposes within the state is a potential health hazard.
>
> (4) The increasing number of asbestos abatement projects increases the exposure of contractors, workers and the public to the hazards of asbestos.
>
> (5) If improperly performed, an asbestos abatement project creates unnecessary health and safety hazards that are detrimental to citizens and to the state in terms of health, family life, preservation of human resources, wage loss, insurance, medical expenses and disability compensation payments.
>
> (6) It is in the public interest to reduce exposure to asbestos caused by improperly performed asbestos abatement projects through the upgrading of contractor and worker knowledge, skill and competence.

FINDINGS OF FACT

Between February 26, 1990 and March 9, 1990, Fuel Processors

dismantled and removed tanks and a boiler from a building in Portland's northwest industrial area. At the time of the work, the building was being torn down by a demolition contractor which had removed one wall of the building to facilitate removal of the tanks and boiler. The site had been the object of environmental scrutiny because of the presence of phenols. Environmental remediation contractors had breached some pipe lines and "opened" all tanks.

A sample of material disturbed by Fuel Processors during dismantling contained 35% wet friable amosite asbestos. The asbestos material was wet when disturbed. Wet asbestos material is not likely to become airborne. The material was in a concrete bermed area in which rainwater accumulated until removed by pumping. The sample was taken from material which was accumulated uncovered.

The material was in a "medium-large" pile. Two thirds of the material in the pile appeared similar to the sampled material; however, the presence of asbestos cannot be determined without laboratory analysis. Since 1977, 60-70% of the facility's pipe insulation material had been replaced.

There were two residences within 60-70 feet of the asbestos and within 20-25 feet of the property boundary. On one occasion children were seen playing in the vicinity. There was a possibility of public exposure to asbestos.

In evaluating the likelihood of public exposure to asbestos it is appropriate to consider the condition of the materials,

degree of friability, degrees of wetness, direction of wind and proximity of people.

Fuel Processors is in the business of recovering used oils and converting them to fuel. From time to time in the course of its business, Fuel Processors encounters asbestos. Fuel Processors inquired about the presence of asbestos on this site and was told that none was present.

Fuel Processors cooperated with DEQ by answering all questions asked by DEQ and by providing all statements requested by DEQ.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. Between February 26, 1990 and March 9, 1990, Fuel Processors violated OAR 340-25-465(6)(a) and 340-25-465(15) by dismantling equipment without first removing friable asbestos material and by openly storing friable asbestos material. Consequently, Fuel Processors is liable for a civil penalty.

3. The case record establishes Class Two violations of moderate magnitude followed by cooperative conduct.

4. Application of the penalty formula to the facts proved at hearing produces a $1,600 penalty.

OPINION

DEQ proved the alleged violations by proving that during an asbestos abatement project Fuel Processors handled friable asbestos-containing material from pipes and that Fuel Processors

openly stored asbestos-containing waste material. In determining the amount of the penalty for each violation, DEQ relied on a penalty schedule matrix contained in OAR 340-12-042, on the determination procedure set out in OAR 340-12-045, and on the classification list provided by OAR 340-12-050.

Classification

Applying the classification list set out in OAR 340-12-050, DEQ charged Fuel Processors as follows:

VIOLATION NO: 1. (Failing to remove asbestos prior to dismantling the tanks and boiler).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(i)* because the violation of the work practice regulation resulted in the likelihood for public exposure. Residences are located and children were playing within 20 feet of the property on which the asbestos was disturbed and the Respondent's activities created a likelihood for public exposure to asbestos.

VIOLATION NO: 2. (Open storage and accumulation of asbestos-containing waste material).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(j) because the storage of asbestos-containing waste material created the likelihood for public exposure to asbestos. Residences are located and children were playing within 20 feet of he property on which the asbestos was openly stored. The piles of asbestos-containing insulation on the property were within a close enough proximity to the residences that the activity created the likelihood for public exposure. Notice of Assessment, Exhibits 1 and 2.

---

* Cited provisions of OAR Chapter 340 Division 12 were renumbered but not otherwise changed on March 30, 1990.

Classification is based on risk of harm. As cited in this case, a Class One violation is a:

> Violation of a work practice requirement which results in or creates the likelihood for public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(1)(i).*

or

> Storage of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which results in or creates the likelihood for public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(1)(j).

Their Class Two counterparts are:

> Violation of a work practice requirement for asbestos abatement projects which are not likely to result in public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(2)(h).

and

> Improper storage of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which is not likely to result in public exposure to asbestos or release of asbestos into the environment...OAR 340-12-050(2)(i).

To prove Class One violations, DEQ was required to show that the violations occurred under the circumstances alleged and created a likelihood of public exposure to asbestos.

Condition of the material, degree of friability, degree of wetness, wind direction and proximity to people affect the likelihood of public exposure. DEQ considered the proximity of people. As alleged, residences and people were approximately 20 feet from the property boundary. However, they were 60 - 70 feet

---

* DEQ did not allege action resulting in or creating the likelihood of release of asbestos into the environment.

from the asbestos-containing material. The case record establishes that the only asbestos material clearly tied to Fuel Processors's activities had a significant asbestos content but was wet when disturbed and wet when tested. Moreover, the weather and the site's disposition to collect water make it more likely than not that the material was wet between disturbance and testing. Because wet asbestos is unlikely to become airborne, the facts proved establish only a possibility, not a likelihood, of public exposure to asbestos as a result of the violations.

A finding of possible public exposure supports a Class Two violation. Fuel Processors contends that because DEQ alleged a likelihood of public exposure, it cannot exact any penalty when the proof establishes only possible exposure. Agency rules suggest otherwise. OAR 340-11-132(5) contemplates adjustment of penalties where DEQ fails to establish some or any of the facts regarding the violation, or where new information is provided which was not initially considered by the Director. The civil penalty calculation may be adjusted and the penalty reduced to conform to the matters proved.

MAGNITUDE

According to agency rules "'Magnitude of the Violation' means the extent of a violator's deviation from the Commission's and Department's statutes, rules, standards, permits, or orders, taking into account such factors as, but not limited to, concentration, volume, duration, toxicity, or proximity to human

or environmental receptors. Deviations are categorized as major, moderate or minor." OAR 340-12-030(11).

DEQ characterized the magnitude of Fuel Processor's violations as major, relying on the following allegations:

Violation No. 1:	Failure to remove asbestos prior to dismantling the tanks and boiler).
Magnitude:	The magnitude of the violation is major. The Respondent disturbed material containing up to 35% amosite asbestos and 85% chrysotile asbestos from pipes which were connected to the tanks and boiler. Once removed from the pipes, the asbestos material was accumulated in several large piles on the property.
Violation No. 2.	(Open storage and accumulation of asbestos-containing waste material).
Magnitude:	The magnitude of the violation is major. The Respondent stored asbestos-containing pipe insulation in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained up to 35% amosite asbestos and chrysotile asbestos. Notice of Assessment, Exhibits 1 and 2.

The two elements considered by DEQ in determining the magnitude of the violation were the quantity of asbestos material and its concentration.

DEQ did not prove that Fuel Processors stored "several large piles" of asbestos material and did not prove the storage of chrysotile asbestos.

DEQ acknowledged it had no way of knowing whether someone from Fuel Processors had disturbed any of the accumulated asbestos containing material, other than the material contained

in the wet sample Z 3006. Both a demolition contractor and environmental contractors had engaged in work which could have been responsible for the accumulations. Moreover, the replacement since 1977 of a significant amount of material inhibits an inference that untested material had asbestos content. Because the case proof did not conform to the information considered in characterizing the magnitude as major, a reconsideration of magnitude is necessary.

DEQ did prove that Fuel Processors failed to remove and openly stored material containing 35% friable amosite asbestos in an amount that was "medium-large." Because even a small amount of friable asbestos is a potential hazard the volume and toxicity in this case establish violations of moderate magnitude.

NEGLIGENCE

DEQ alleged that Fuel Processors "was negligent in openly accumulating the asbestos-containing waste material on the property" and "was negligent in failing to determine whether the material was asbestos prior to removing the insulation from pipes." Notice of Assessment, Exhibits 1 and 2. These allegations simply restate the violations. They do not disclose the reasons the violations are considered culpable as negligence. While administrative rules define the behavior which will characterize violation as "flagrant" or "intentional", they provide no definition of negligence. OAR 340-12-030(7) and (9). The combination of this failure and the failure to identify the negligent behavior apart from commission of the violation itself,

deprives the reviewer of a standard against which to measure the record and precludes a finding of negligence. See, DEQ v Excel Environmental, Inc., May 25, 1990.

COOPERATIVENESS

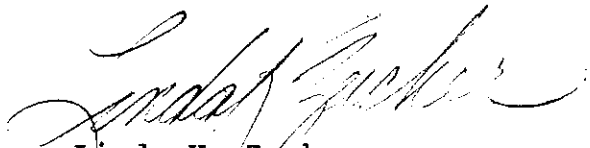
ORS 468.130(2)(g) directs the Commission to consider a violator's cooperativeness and efforts to correct the violation. Both attitude and conduct must be considered. See, DEQ v Thatcher Company, December 7, 1990. The record does not disclose any efforts to correct the violation. The record does establish cooperative conduct. Fuel Processors requested mitigation of the penalty for cooperativeness and is entitled to that adjustment.

OTHER DEFENSES

Fuel Processors did not plead or prove any exceptions to the work practices requirements. Except for the matters discussed, Fuel Processors did not establish the facts or defenses raised in its answer.

Dated this 20th day of May, 1991.

ENVIRONMENTAL QUALITY COMMISSION



Linda K. Zucker
Hearings Officer

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	FINAL ORDER AND JUDGMENT
	)	NO. AQAB NWR 90 81

The Environmental Quality Commission, through its hearings officer, orders that Respondent, Fuel Processors, Inc., is liable to the State of Oregon in the sum of $1,600 and that the State have judgment for and recover the amount pursuant to a civil penalty assessment dated May 24, 1990. Review of this order is by appeal to the Environmental Quality Commission pursuant to OAR 340-11-132. A request for review must be filed within 30 days of the date of this order.

Dated this 20th day of May, 1991.

ENVIRONMENTAL QUALITY COMMISSION

Linda K. Zucker
Hearings Officer

NOTICE: If you disagree with this Order you may request review by the Environmental Quality Commission. Your request must be in writing directed to the Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204. The request must be <u>received</u> by the Environmental Quality Commission within 30 days of the date of mailing or personal service of Order. If you

do not file a request for review within the time allowed, this order will become final and thereafter shall not be subject to review by any agency or court.

A full statement of what you must do to appeal a hearings officer's order is in Oregon Administrative Rule (OAR) 340-11-132. That rule is enclosed.

7/19/91

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 NOTICE OF APPEAL

Department requests that the Environmental Quality Commission review Hearings Officer Linda K. Zucker's Findings of Fact and Conclusions of Law and Final Order and Judgment dated May 20, 1991.

ARNOLD B. SILVER, OSB No. 58088
Assistant Attorney General
Of Attorneys for Department of
Environmental Quality

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department,	)	No. AQAB-NWR-90-81
v.	)	DEPARTMENT EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT
FUEL PROCESSORS, INC., Respondent.	)	

The Department excepts to the hearing officer's Final Order:

1. Reclassifying and reducing the Department's classification of the assessed civil penalties from class one violations to class two violations:

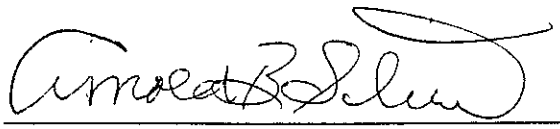
2. Reducing the Department's finding that Respondent's violations were of major magnitude to moderate magnitude.

3. Finding no basis for concluding the violations by respondent were culpable as negligence.

4. Finding that respondent engaged in cooperative conduct to correct the alleged violations.

5. Reducing the total amount of civil penalty imposed against Respondent from $12,000 to $1,600.

Respectfully submitted,



ARNOLD B. SILVER
Assistant Attorney General
Of Attorneys for the Department

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department,	)	No. AQAB-NWR-90-81
v.	)	DEPARTMENT OPENING BRIEF
FUEL PROCESSORS, INC., Respondent.	)	

I.

BACKGROUND OF CASE AND APPEAL

On May 24, 1990, the Department assessed a $6,000 civil penalty against Respondent for failing to remove insulation containing asbestos materials from pipes connected to tanks and a boiler prior to dismantling and removing such fixtures in violation of OAR 340-25-465(6) (violation 1) and a $6,000 civil penalty for openly storing asbestos-containing waste material in violation of OAR 340-25-465(15) (violation 2). These two penalties totaled $12,000 and were arrived at by the Department utilizing the civil penalty formula codified by Commission rule.

The Department found that the base penalty for violation 1 was $5,000 because it was a Class I major magnitude violation in the matrix listed in OAR 340-12-040(1). This base amount was increased by $1,000 because the Department found that the cause of the violation was Respondent's negligence. Similarly, the Department found that the base penalty for violation 2 was $5,000 because it was a Class I major magnitude violation in

the matrix listed in OAR 340-12-042(1). Again, this base amount was increased by $1,000 because the Department found that the cause of violation was Respondent's negligence.

Respondent requested and was granted a hearing regarding the Department's assessment of civil penalty. The Hearing Officer in making her final order reduced the Department's assessment of civil penalty from $12,000 to $1,600. The Department believes the hearing officer reduction was in error.

II.

REASONS FOR APPEAL

There are four Department grounds for appealing the Hearing Officer's order to the commission:

1. The Hearing Officer erred when she reduced the class of violations found by the Department from Class I to Class II.

2. The Hearing Officer erred when she reduced the magnitude of the violations found by the Department from "major magnitude" to "moderate magnitude."

3. The Hearing Officer erred when she found that the violations of asbestos rules by Respondent were not negligent.

4. The Hearing Officer erred when she found that Respondent engaged in cooperative conduct.

Each of these grounds cited by the Department for appeal will be discussed separately.

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III.

REDUCTION OF THE CLASS OF THE VIOLATIONS FROM CLASS I TO CLASS II WAS IN ERROR

The Department found that Respondent's failure to remove asbestos-containing insulation from pipes prior to engaging in its dismantling process and storage of the resulting friable asbestos-containing waste material "created the likelihood for public exposure to asbestos." This finding made these types of violations Class 1 violations. The Hearing Officer, however, concluded that the evidence only supported a finding that the violations resulted in Class II violations because they were "not likely to result in public exposure to asbestos." She arrived at this conclusion because she found that residences and people were approximately 60-70 feet from the asbestos-containing material and not approximately 20 feet as alleged; that the asbestos-containing material was wet when disturbed and wet when tested (Order, p. 3 ls. 9-14; p. 3 ls. 21-24; p. 6 ls. 22-23 and p. 7 ls. 3-4). The Hearing Officer was clearly in error in reaching this conclusion.

A. Distance

Department's witness, Dave Wall, testified two residences were directly across the street to the west of the site with a business to the northwest of the site (Tr 22). He further testified the residences were approximately 60 feet from the area where the asbestos was disturbed, and 20-25 feet from the site proper (Tr 22). Witness Wall, on March 10, 1990, also

observed several children playing across the street from the site at the time of his inspection (Tr 23). Witness Wall was asked: "Do you believe that the removed asbestos-containing pipe insulation and the storage of those materials could have created the likelihood of public exposure to asbestos?" (Tr 23) Witness Wall stated, in response to this question: "Yes, I do!" (Tr 23)

He elaborated on this answer by explaining a likelihood of public exposure was created by the proximity of the people living in the area to the asbestos; that the salvage operation went on for a long period of time; and the lack of rain occurring during the total salvage operation (Tr 23 and 32).

Witness Wall further testified that the fact people were 60 feet from the salvage operations rather than 20-25 feet did not diminish the likelihood that they could be exposed to asbestos fibers (Tr 28).

The Hearing Officer either disregarded, ignored or did not hear or read the foregoing testimony. This evidence clearly establishes that there was a likelihood for public exposure to asbestos fibers by persons residing or playing in the vicinity of Respondent's salvage operations.

B. Wetness

Whether or not asbestos-containing material is sufficiently wet is of significant importance to this case. If the material is sufficiently wetted, it mitigates against asbestos fibers becoming airborne and exposing members of the public to health

hazards. On the other hand, if the material is not sufficiently wetted it increases the likelihood of public exposure to asbestos fibers.

Witness Wall's testimony about whether the asbestos-containing material was wet commences at the bottom of page 12 of the transcript.

Witness Wall testified he examined the pipe insulation accumulated at the site. He testified that piles in certain areas of the site were sitting in water and thus wet, however, there were other sections of the pipe insulation strewn across the slab that were not in water and were dry (Tr 13). Respondent did not wet any of the material. Any wetness resulted from rainfall (Tr 15). Thus, the Hearing Officer in concluding that the material was "wet," had to rely on evidence about sporadic rainfall and not on any evidence that Respondent made a conscious effort to intentionally wet the material to prevent migration of airborne asbestos fibers. In fact, Witness Wall specifically testified that not all of the material was sufficiently wet to prevent asbestos fibers (Tr 15). Witness Wall further testified that rainfall is not an acceptable industrial standard for wetting asbestos insulation (Tr 15). Rainfall cannot adequately wet the asbestos-containing material while it is being removed (Tr 16-17). Further, Witness Wall pointed out that a certain type of asbestos will not retain water and even asbestos that has been wetted will nonetheless allow asbestos fibers to

become airborne (Tr 17). This type of asbestos was present at the site.

Witness Wall testified that pipe insulation remaining in a covered building after removal of the tanks and boiler by Respondent was exposed and was not wet (Tr 21).

The Hearing Officer found that the material sampled by Mr. Wall was wet when disturbed (Order, p. 3 ls. 10-11); and was wet when disturbed and when tested (Order, p. 10-11, ls. 3-4).

There is absolutely no evidence supporting the Hearing Officer's finding and conclusion. Witness Wall did not testify the sample taken was wet nor that the asbestos material was wet when disturbed. In fact, he testified to the contrary.

Nor does the testimony of Respondent's chief witness, Krause, assist the Hearing Officer in reaching this unsupported conclusion.

Witness Krause did not actually see the piles of material at the site that are claimed to be wetted (Tr 8). Witness Krause based his conclusion that the material was wet on Respondent's employee's testimony (Tr 89). The witness further confirmed it would be to Respondent's advantage to tell him the material was wet (Tr 89).

Witness Krause, as well as the Department, relied on meteorological data taken at the Portland airport. The rainfall amounts are measured at the airport and are not measures of rainfall in other parts of the city (Tr 93-94).

The airport is located on NE Marine Drive, on the Columbia River while the site in question is in northwest Portland. The amount of rainfall at the northwest site is totally unknown by Witness Krause. His testimony that asbestos-containing material at the site was possibly wet was based on conversation with Respondent's employees (Tr 95).

Respondent conducted salvage operations between February 26, 1990, and March 9, 1990. Witness Krause acknowledged the meteorological data he looked at shows no rain on February 26, 27, 28 and March 1, 1990. In fact, there was no rain from the 20th of February. Only a trace of rain shows on March 2 (Tr 97). The witness further points out if the salvage operations took place on the days there was no rain, it would increase the likelihood of public exposure to asbestos fibers (Tr 97-98 and 99). To sum up, Witness Krause does not know if the asbestos waste material was wet (Tr 99).

IV.

MAGNITUDE

The Hearing Officer apparently misconstrued the evidence in this case regarding the issue of the "magnitude" of the violations. Her decision was seemingly based on perceived semantic distinctions between "several piles," "large piles" and a "medium-large pile" of asbestos-containing material (ACM).

The Department did characterize the magnitude of Respondent's violations as major. The Department concluded that for violation 1, the violation was major because

Respondent disturbed material containing up to 35 percent amosite asbestos and 85 percent chrysotile asbestos from pipes which were connected to tanks and boilers. Once removed, the ACM was accumulated in several large piles on the property. The Department thus found the "disturbing" and "accumulating in several large piles" was a violation of major magnitude.

The Department concluded that for violation 2, the violation was major because the respondent stored ACM (pipe insulation) in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained a high percentage of asbestos. The samples traced to Respondent confirmed the asbestos was of the amosite form.

The Hearing Officer found that Department sampled a "medium-large" pile (Order p. 3, l. 16). Her opinion further concluded that the Department did not prove Respondent stored several large piles of asbestos material and also did not prove the storage of chrysotile asbestos (Order p. 8 ls. 21-23). However, she subsequently stated the Department did prove that Respondent failed to remove and openly stored material containing 35 percent friable amosite asbestos in an amount that was "medium-large." She correctly concludes that even a small amount of friable asbestos is, at least, a potential hazard (Order p. 9 ls. 12-13). However, she limits the magnitude to moderate.

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The Department believes the Hearing Officer misconstrued the evidence in this case regarding the issue of the magnitude of the violations.

Witness Wall testified that while on site, he talked to two of Fuel Processor's employees, Dan Goodhue and Dale Poor. These employees informed Mr. Wall that they salvaged tanks and a boiler. Witness Wall then asked them if they pulled the insulation off the pipes while they were salvaging those tanks and the reply was that they did (Tr 7-8).

Witness Wall honestly states he did not see Respondent do the actual removal of the tanks and boilers, but that the result of the salvage operation was pipe insulation in piles strewn over a good portion of the slabs where most of the tanks were located (Tr 8). Thus, Respondent admits pulling the insulation of the pipes and Wall testifies the pipe insulation was in piles strewn over a good portion of the area. Wall again states at the time of his inspection the pipe insulation was in a large number of piles on the site. (Tr 8-9).

Witness Wall took five samples of the pipe insulation that Respondent removed from pipes. Four of the samples were positive for asbestos material (Tr 9 and 11). Two samples were taken from the tank area, one sample from the boiler and two from sheds north of the site (Tr 10). The samples showed two different percentages and two different types of asbestos; 25-35 percent of amosite asbestos and 85 percent chrysotile asbestos (Tr 11). Witness Wall explains his sampling procedure

beginning on page 47 of the transcript. Witness Wall did not claim Respondent was responsible for the material in the shed giving rise to the sample (Tr 49). A third sample was taken from material surrounding a boiler. It did not contain asbestos (Tr 50). Witness Wall testifies that two of the five samples containing asbestos are directly attributable to the salvage operations of Respondent (Tr 50). These samples are sample No. 1; Z3006 and sample No. 2; Z3007 (Ex 1-4; Tr 52 and 54). These samples contained 35 percent and 25 percent amosite asbestos respectively (Ex 1-4). Amosite asbestos does not retain water and disturbing it allows airborne asbestos fibers to migrate through the ambient air and remain in the air for long periods of time (Witness Wall, Tr 17). Slight rainfall, in particular, would have no effect on migration of amosite asbestos (Witness Wall, Tr 13-17).

The error committed by the Hearing Officer regarding the issue of the magnitude of the violations can be summarized as a voyage into a semantical sea of nuances.

Respondent's employees admitted they pulled off the insulation from pipes. This insulation was in various size accumulations scattered around the site. These were not neat, orderly, planned, discrete piles of a workman's work product. The material was scattered all over. Some accumulations were large, some small, some medium-large. The accumulated piles were not separated by a river, a building, a fence or natural contours. More than likely the piles were interconnected. Two

samples taken from different locations on site proved positive for amosite asbestos, the type of asbestos most resistant to wetting by water. The Hearing Officer's Order suggests, but does not expressly so state, that the Department must sample every accumulation of material on site to determine if everything therein is asbestos. Such a conclusion is absurd and could result in thousands of samples. Instead, it is more reasonable to find that all of the material was asbestos contaminated. Frankly, if only one sample from a "medium-large pile," as the Hearing Officer found, proved positive for amosite asbestos, it should be sufficient to sustain a violation of major magnitude because of its toxicity and concentration. The simple reason is that:

> Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are a danger to public health.
>
> There is no known minimal level of exposure to asbestos fibers that guarantees the full protection of the public health.

ORS 468.877: Legislative Findings.

V.

NEGLIGENCE

The Department made a causal finding for violation 1 that Respondent was negligent in failing to determine whether insulation on pipes was asbestos, prior to the insulation's removal. The Department again made a causal finding for

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violation 2 that Respondent was negligent in openly accumulating asbestos-containing waste material on site.

The Hearing Officer's decision is strangely silent about her basis for concluding Respondent was not negligent. The Hearing Officer made no conclusions of law about this issue (Order p. 4). The Findings of Fact are also largely silent about this question. The only finding remotely applicable to the issue is a terse statement that [respondent] "* * * inquired about the presence of asbestos on this site and was told that none was present." [Order p. 4 ls. 5, 6, 7.] It is, however, difficult to know what issue this finding is supposed to be related to in the order. The Hearing Officer does get around to discuss the negligence issue in her "opinion" (Order pp. 9-10). However, without appropriate findings and conclusions of law, both Department and Respondent are at a disadvantage to make a rational nexus between findings, conclusions and opinion.

In essence, the Hearing Officer opines that the Department only restated the alleged violations and did not disclose the reasons the violations are considered culpable as negligence. She further argues that the Commission's rules do not define negligence. The failure to define negligence and the negligent behavior deprives the reviewer of a standard against which to measure the record and precludes a finding of negligence. The Hearing Officer is wrong. ORS 468.130 provides that in imposing a penalty pursuant to the schedule adopted under the

statutory framework that the Commission shall consider several factors, including whether the cause of the violation was an unavoidable accident, negligence or an intentional act. ORS 468.130(2)(f). The notice alleging the violations includes a "short and plain statement of the matters asserted or charged." ORS 468.135(1)(b).

The Court of Appeals has construed the term "negligence" as an inexact term. Pratt v. Real Estate Div., 76 Or App 488, 492 (1985). Inexact terms comprise a complete expression of legislative policy, and the Commission's responsibility is to interpret the term consistent with that policy, which can occur through contested case orders. Negligence within the statutory framework of ORS chapter 468 clearly indicates that it was intended to embody a complete expression of legislative meaning. Because the scope of the term is limited to conduct contemplated by ORS chapter 468, the legislature made a complete expression of its meaning. All that is left for the Hearing Officer to do is apply the term consistent with its meaning. Pratt, at p. 493. The Hearing Officer erroneously concluded that the Commission must define the inexact term "negligence" by rule.

The Hearing Officer states the Department did not disclose the reasons the violations are considered culpable as negligence. However, the notice and exhibits do disclose the Department's reasoning leading it to conclude respondent was negligent. Prior to discussing this reasoning, it is important

to stress, the Oregon Administrative Procedure Act (APA), is intended to provide a fair, impartial procedure for fact finding in contested cases. The APA is designed so that its major components of rulemaking and contested cases can be administered by laypersons and not lawyers. The legislature consciously designed a "roadmap" for laypersons to follow and avoided creating a "judicialized" system of procedure. The Department followed this roadmap and provided Respondent with notice and exhibits alleging the violations in a "short and plain statement of the matters asserted." The Hearing Officer apparently desires the Department staff to produce legal documents in the form of circuit court pleadings. The Department is not required to do so. The notice and exhibits are not for the convience of the Hearing Officer. They are for the purpose of furnishing reasonable notice of the matters charged to the Respondent. The Department has complied with the requirements of notice to Respondent. The Hearing Officer has to only look to the notice and exhibits as the four-corners of the Department's allegations to find its reasoning.

The Department found Respondent negligent by failing to determine whether insulation on pipes contained asbestos prior to removing the insulation and was negligent in openly accumulating asbestos-containing waste material. The Department supplied its reasoning in its assignment of the classification of the violation. This reasoning was that a failure to determine whether insulation contained asbestos,

prior to the insulation's removal is negligent because this conduct resulted in the likelihood of public exposure to asbestos (Ex 1 to Notice of Civil Penalty). Similarly, storage of asbestos-containing waste material was negligent because it was reasonably foreseeable that such storage created the likelihood for public exposure to asbestos (Ex 2 to Notice of Civil Penalty). While it may be more convenient for the Hearing Officer to have the Department's reasoning for finding negligence set forth in one paragraph, it is not legally required to do so. The rationale for concluding Respondent was negligent was set forth in a short and plain statement within the four corners of the notice and exhibits served upon Respondent and before the Hearing Officer and is sufficient to conclude that Respondent was negligent in committing the violations.

VI.

COOPERATIVENESS

The Department found that Respondent was neither cooperative nor uncooperative in correcting the violations and neither aggravated or mitigated the base penalty for this factor. The Hearing Officer concluded that ORS 468.130(2)(g) directs the Commission to consider a violators cooperativeness and efforts to correct a violation. She further opined both attitude and conduct must be considered. She then concludes the record does not disclose any efforts to correct the

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violation but that there was "cooperative conduct." (Order p. 10 ls. 5-12.)

The only cooperative conduct of Respondent cited by the Hearing Officer is that it answered questions by Department and provided statements required by Department (Order p. 4 ls. 8-9). The Hearing Officer's analysis is wrong and rewards passive or nonbehavior of a violator. The conclusion also is in conflict with both ORS 468.130(2)(g) and OAR 340-12-045(1)(f). ORS 468.130 provides the Commission shall consider certain factors including: the violator's cooperativeness and efforts to correct the violation. ORS 468.130(2)(g). This statutory subsection is phrased in the conjunctive "and"; not the disjunctive "or." In order for the Commission to consider this factor the violator must be both cooperative and expend efforts to correct the violation. If one of the elements of cooperativeness and efforts is missing, the violator is not entitled to a reduction in penalty. Since their were no efforts expended to correct the violation, Respondent is not entitled to a reduction.

The Hearing Officer's conclusion also conflicts with the Commission's rule regarding this factor. OAR 340-12-045(1)(F). This rule defines the factor to be considered by the Commission as: "* * * the violators cooperativeness in correcting the violation."

The Hearing Officer found that Respondent did nothing to correct the violation, but then disregarded the rule and

granted a reduction in penalty anyway. This conclusion flies in the face of articulated commission policy and is clearly wrong.

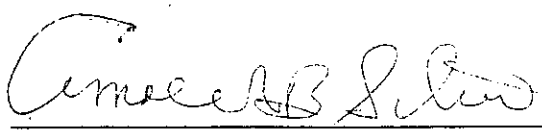
SUMMARY

The Hearing Officer was in error when she reclassified and reduced the Department's classification of the assessed civil penalties from Class I violations to Class II violations. The Hearing Officer was in error when she reduced the Department's finding that Respondent's violations were of major magnitude to moderate magnitude.

The Hearing Officer was in error when she concluded there was no basis for finding that Respondent's conduct was culpable as negligence. The Hearing Officer was in error when she found that Respondent engaged in cooperative conduct in correcting the alleged violations.

The civil penalty imposed by the Department in the amount of $12,000 should be imposed by the Commission and the Hearing Officer's reduction of such civil penalty to the sum of $1,600 should be vacated.

Respectfully submitted,



Arnold B. Silver
Assistant Attorney General
Of Attorneys for the Department

CERTIFICATE OF SERVICE BY MAIL

I certify that on September 24, 1991, I served the foregoing DEPARTMENT OPENING BRIEF, DEPARTMENT EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT, and ENVIRONMENTAL QUALITY COMMISSION FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Debra Ann Olson
Attorney At Law
Bogle & Gates
1400 KOIN Center
222 SW Columbia
Portland, OR 97201

ARNOLD B. SILVER #58088
Assistant Attorney General
Of Attorneys for Department

1 - CERTIFICATE OF MAILING
(dld 0452N)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 ENVIRONMENTAL QUALITY COMMISSION FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This case is before the Environmental Quality Commission on the appeal by the Department of Environmental Quality of the Hearing Officer's Order dated May 20, 1991, finding that Respondent violated certain Commission rules but reducing the civil penalties imposed by the Department from $12,000 to $1,600.

This appeal was considered by the Commission on _____ in _____, Oregon. After considering the record in this case and hearing argument of counsel, the Commission enters the following decision. The Commission adopts the background and issues as stated by the Hearing Officer in her order and also takes official notice of ORS 468.817 as taken by the Hearing Officer. The Commission additionally adopts the Hearing Officer's conclusion that Respondent did not establish the facts or defenses raised in its answer.

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I. Classification of Civil Penalties

A. Findings of Fact

1. OAR 340-25-465(6) requires specific work practices to be employed while conducting an asbestos project to prevent emissions of particulate asbestos material into the ambient air. Unless friable asbestos materials are adequately wetted, a person must remove friable asbestos material before any wrecking or dismantling is commenced because such conduct would break up the asbestos materials and cause them to be emitted into the ambient air.

2. OAR 340-25-465(15) prohibits a person from the open storage or accumulation of friable asbestos material or asbestos-containing waste materials (ACWM).

3. Under former Commission rule OAR 340-12-050(1)(1), the failure to remove friable asbestos materials before any wrecking or dismantling is undertaken is a Class I violation if there is a likelihood for public exposure.

4. Additionally, under former Commission rule OAR 340-12-050(1)(j), the open storage or accumulating of friable asbestos material or ACWM is also a Class I violation if there is a likelihood for public exposure.

5. Respondent engaged in a dismantling project on another person's property to salvage tanks and a boiler connected to the real property for use in Respondent's business operations.

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6. Respondent did not remove friable asbestos materials in pipe insulation connected to tanks and boilers prior to engaging in its salvage operations.

7. Respondent did not adequately wet friable asbestos materials prior to their removal and further, did not engage in any wetting operations at all.

8. Respondent removed the ACWM resulting from the salvage operations and stored or accumulated such materials in several piles throughout the site of the dismantling operations.

9. Respondent did not adequately wet the ACWM being stored or accumulated and further, did not engage in any wetting operations at all.

10. Samples taken from the ACWM and analyzed showed that the materials contained 25-35 percent amosite asbestos. The materials were friable which means that it can be easily crushed by hand pressure to release asbestos fibers into the ambient air.

11. The samples were not wet when taken by Department staff or when they were tested.

12. Respondent conducted its salvage operations between February 26, 1990, and March 9, 1990. Official records at the National Climatic Data Center, as shown by an official publication of the National Oceanic and Atmospheric Administration (NOAA) show the following precipitation for relevant dates in February and March 1990 as measured at Portland International Airport, 5420 NE Marine Drive, Portland.

February

a)	22	0.00
b)	23	0.00
c)	24	0.00
d)	25	0.00
e)	26	0.00
f)	27	0.00
g)	28	0.00

March

a)	1	0.00
b)	2	0.00
c)	3	0.52
d)	4	0.24
e)	5	0.02
f)	6	0.14
g)	7	0.45
h)	8	0.02
i)	9	0.33

The Commission takes official notice of this publication.

13. There was no precipitation for four days prior to Respondent's salvage operations (February 22-25).

14. There was no precipitation for the first four days of Respondent's salvage operations and only a trace on the fifth day (Feb. 26-March 1 and 2).

15. Some precipitation occurred between March 3 and March 9. However, most of this precipitation was not heavy precipitation. Available meteorological information indicates that more likely than not

16. The site where Respondent conducted its salvage operations was free of rainfall for four days prior to engaging in salvage operations and four days after such operations were commenced. This combination of days clearly shows the ACWM removed by Respondent was not wetted by rain during the period of time of salvage. Further, the rainfall that did occur

during the remainder of the days' salvage operations were engaged in was not sufficient to adequately wet the ACWM.

17. Natural rainfall is not an accepted industry or Department standard for adequately wetting asbestos waste materials, because it is subject to the whim and fancy of nature. Wetting agents must be directly applied to asbestos materials during removal to prevent fiber migration.

18. Amosite asbestos, a type of asbestos that Respondent failed to remove prior to its salvage operations does not retain water well and can still migrate into the ambient air, even when wetted. Assuming it rained throughout the total period of time Respondent conducted its operations, the asbestos-containing material would not have been adequately wetted to prevent its migration into the ambient air.

19. Several residences and a small business were in near proximity to the salvage operations of Respondent. Children were playing in the street adjacent to the salvage operations site. The residences, business and children were approximately 20-25 feet from the property line where the salvage operations were conducted and approximately 60-70 feet from the actual site of the salvage operations.

20. Whether human receptors were 20 feet or 70 feet from the salvage operations is not significant. The residences, business and children were in close enough proximity to the asbestos-containing material resulting from Respondent's dismantling operations and Respondent's subsequent

accumulation and storage of such material to produce a likelihood of public exposure to the human receptors.

B. Ultimate Finding of Fact

1. Likelihood for public exposure is more than a potential for public exposure, but is a probability for public exposure. Respondent's salvage operations resulted in a likelihood for public exposure to asbestos.

2. The number of days without rainfall preceding Respondent's salvage operations; the large amount of asbestos material present on site; lack of significant rainfall during said operation; and lack of engineering controls used combined with the fact the asbestos on site was amosite asbestos created the likelihood of public exposure for human receptors within 70 feet from Respondent's salvage operations.

C. Conclusion of Law

Respondent's failure to remove amosite asbestos-containing waste material (ACWM) from pipes prior to dismantling tanks and boilers and the open storage or accumulation of such material are Class I violations under OAR 340-12-050(1)(i) and (1)(J).

II.

Magnitude of Civil Penalties

A. Findings of Fact

1. Respondent failed to remove asbestos-containing waste material "ACWM" prior to dismantling operations. This dismantling took place over several days.

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2. ACWM was strewn about and accumulated on the salvage site by Respondent. Some of this material accumulated in various pile sizes. There was no orderly disposition of the ACWM by Respondent, and such material was scattered haphazardly around the site.

3. The removal and storage of the asbestos-containing waste material was performed by Respondent and not third parties.

4. The asbestos-containing pipe installation within site buildings was not replaced by non-asbestos-containing pipe insulation by the property owner.

5. The accumulation of ACWM and its storage on the site was in close proximity to human receptors. The exact volume of the ACWM could not be determined. However, whether it was scattered around the site; in one medium-large pile or several large piles is not significant.

6. Asbestos is a human health hazard. There is no known safe miminum level of human exposure to asbestos fibers that guarantees the full protection of the public health. The toxicity of asbestos in its amosite form is all the more dangerous because this form of asbestos does not retain water well to retard its airborne migration. A concentration of 25-35 percent amosite asbestos was found at the site resulting from Respondent's salvage operations.

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B. Ultimate Finding of Fact

Respondent's failed to remove ACWM from pipes prior to dismantling tanks and a boiler and stored and accumulated such materials containing amosite asbestos waste materials in close proximity to human receptors.

C. Conclusion of Law

Respondent's failure to remove asbestos-containing waste materials from pipes prior to dismantling tanks and a boiler and the open storage of 35 percent friable amosite asbestos on the site, whether strewn about or accumulated in several large piles or in a medium-large pile, are violations of major magnitude.

III.

Negligence

The Commission is of the opinion that findings of fact are unnecessary regarding the issue of negligence because the question is more in the nature of one of law rather than fact. The following conclusions of law are made.

Conclusions of Law

1. The Commission is not required to define negligence by rule for violations within the statutory framework of ORS chapter 468 governing this case. Pratt v. Real Estate Division, 76 Or App 483 (1985). Its context within the statutory framework indicates that it was intended to embody a complete expression of legislative meaning, that can be applied to contested case proceedings.

ORS chapter 468 was not enacted to codify tort law. The term negligence has a common meaning and it is that meaning that the legislature intended for the Department and Commission to utilize.

2. ORS 468.135(1)(a) requires the Department to state in its notice the particular sections of the rule involved in the case.

3. Both ORS 468.135(1)(b) and ORS chapter 183, the Administrative Procedures Act (APA) requires the Department to provide Respondent with a notice setting forth a short and plain statement of the matters charged or asserted. The question is whether a notice setting forth a short and plain statement of the matters charged or asserted was furnished to Respondent and not whether such allegations were in one neat paragraph.

4. The Department reasonably identified the rules involved in this case and what it considered to be Respondent's negligent conduct and furnished Respondent due notice of such conduct and of the rules considered to be violated. Respondent's openly accumulating asbestos-containing waste material on site was negligent because in accumulating such material it was reasonably foreseeable that it would create the likelihood for public exposure to asbestos. Respondent's failure to determine whether material was asbestos-containing material prior to its removal from pipes was negligent because it was reasonably foreseeable that it would create the

likelihood of public exposure to asbestos. In sum, Respondent's conduct unreasonably created a foreseeable risk of exposure to asbestos by members of the public. Foreseeability in the context of ORS chapter 468 refers to generalized risks rather than the mere predictability of the actual sequence of events. Respondent's conduct produced a risk of harm to the public which could reasonably be foreseen by Respondent.

IV.

Cooperativeness

The Commission is of the opinion that findings of fact are largely unnecessary regarding the issue of cooperativeness, because the question is more in the nature of one of law rather than fact. The Commission does find and agrees with the Hearing Officer that the record does not disclose any efforts by Respondent to correct the violations. The Commission makes the following conclusions of law.

Conclusions of Law

1. ORS 468.130(2)(g) required the Commission to consider the violator's cooperativeness and efforts to correct the violation when the Commission imposes a civil penalty. The statutory subsection is phrased in the conjunctive "and" so that both cooperativeness and efforts must be present before the factor can be considered. The factor is not phrased in the disjunctive "or" to allow the Commission to consider either cooperativeness or efforts. Respondent did not engage in any efforts to correct the violation.

2. Commission rules provide that when determining the amount of civil penalty to be assessed for any violation certain procedures are to be applied. OAR 340-12-045. Subparagraph 340-12-045(1)(c)(F) states the violator's cooperativeness in correcting the violation shall be considered. This rule requires the violator to perform or engage in affirmative conduct or acts to correct the violation. Respondent's answering questions is not the performance or engaging in affirmative conduct. At most it was a passive response. Respondent is not entitled to an adjustment based on this factor in the imposition of the civil penalties by the Department.

Opinion

This matter is before us on the appeal of the Department. The appeal relates to the amount of the penalty to be imposed for the violations rather than whether the violations were committed by Respondent. We agree with the Hearing Officer that the violations were proved and that Respondent failed to remove friable asbestos materials prior to dismantling a facility and for openly storing or accumulating friable asbestos in violation of OAR 340-25-465(6) and (15).

The Commission disagrees with the Hearing Officer in the interpretation of the evidence and certain conclusions of law in this case. In some instances, a rational nexus between findings and conclusions is not made totally clear. A review of the record discloses a disagreement over evidence between

Department and Respondent's witnesses. However, the Commission does not want to decide this case based upon the selection of a winner between a "battle of experts." Instead, the evidence indicates a different view of the case to the Commission than to the Hearing Officer.

The $12,000 civil penalty imposed against Respondent, was, as recited by the Hearing Officer, predicated on the Department's view that the cited violations 1) created a likelihood for public exposure to asbestos 2) were of major magnitude and 3) were negligent. In addition, the Department found no basis for finding that Respondent was cooperative and entitled to a reduction in penalty. However, the Hearing Officer did so find.

The Commission does not find that the asbestos-containing material disturbed by Respondent during dismantling was wet. The Commission also does not find any evidence that such material was wet when sampled and tested. Respondent did not intentionally attempt to wet the material during salvage operations as required by Commission rules but instead claims rainfall adequately wetted the material. The Commission does not find this claim convincing. While acts of God are many different things to many people, Respondent cannot rely on such acts of God, in the form of rain to excuse it from liability. The number of days preceding Respondent's salvage operations without rainfall, and the number of days during such operations without rainfall, together with the minimum reported rainfall

during the remainder of days of salvage indicates the asbestos material was dry, or minimally wet.

Additionally, the fact that the asbestos was in the form of amosite asbestos which does not retain water mitigates against a conclusion that asbestos fibers would not become readily airborne. The fact the human receptors to the site were 60 to 70 feet from the salvage operations rather than 25-30 feet does not alter the likelihood of public exposure of asbestos fibers to the human receptors. Respondent's witness neither inspected the site during salvage operations, observed the asbestos materials at the time of salvage nor conducted any tests of the material. Department's witnesses were on scene and had hands on contact with Respondent's employees, the asbestos waste on site and subsequent removal of such waste by licensed asbestos contractors. We find Department witnesses more persuasive regarding the nature of the salvage operations find the condition of the asbestos waste materials than Respondent's after-the-fact expert.

There was considerable discussion in this case about the volume of ACWM; whether it was several large piles; piles scattered about or a medium-large pile. Certainly, the volume of the asbestos waste material bears upon its magnitude. The evidence, while not clear in this regard, demonstrates at least what is characterized as a "medium-large" pile (perhaps a large medium pile!) Semantics aside, a medium-large pile of asbestos-containing material is a sufficient volume in our mind to

conclude that the magnitude is major when it is combined with the toxic elements of amosite asbestos. The inability of amosite asbestos to retain water, and its proximity to human receptors is of major magnitude in the Commission's opinion.

Respondent on one hand claims it knows nothing about asbestos and on the other hand makes a production over its efforts to determine whether asbestos was present on site. These efforts are claimed by Respondent to be limited to asking the owner of the site whether asbestos was present on site. The answer by the owner was either "no" or that he could not recall the question. However, the written contract between Respondent and the owner does not disclose any mention of asbestos or whether the site was free therefrom, and in fact, makes it clear that Respondent assumed the risk of environmental concerns found on site.

Respondent has engaged in previous salvage operations and given today's modern knowledge of the dangers of asbestos in buildings and on industrial equipment, it is reasonable to conclude that Respondent should have reasonably foreseen that asbestos may be present and that its salvage operations could disturb asbestos-containing materials in the proximity of human receptors. Respondent suggested third parties may have been responsible for work on the site. However, Respondent did not produce such parties as witnesses. This testimony was more speculation than evidence that these third parties may have been responsible for the asbestos waste materials.

Finally, we believe the Hearing Officer erred in her interpretation of negligence within the context of ORS chapter 468 and in finding Respondent was cooperative in this case. We conclude to the contrary.

ORDER

Respondent is liable to the State of Oregon in the sum of $12,000 and that the state have judgment for and recover the amount pursuant to a civil penalty assessment dated May 24, 1990.

DATED this _____ day of _____, 1991.

ENVIRONMENTAL QUALITY COMMISSION

_____

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
OCT 31 1991
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. FUEL PROCESSORS, INC., Respondent.	No. AQAB-NWR-90-81 RESPONDENT'S RESPONSE TO DEPARTMENT'S OPENING BRIEF

Respondent, Fuel Processors, Inc., responds to the Department's Opening Brief as follows:

I.

The Hearings Officer carefully and completely reviewed all evidence submitted by the parties at hearing and correctly concluded that the civil penalty which was assessed by the Department against Respondent should be reduced to $1,600.

The Department used the civil penalty matrix in assessing a civil penalty of $12,000. The Department classified the alleged violations as Class I violations based upon the Department's allegation that Respondent had created a likelihood of public exposure to asbestos. The Department alleged the violations were of a major magnitude because of the quantity and concentration of materials. Applying those factors to the civil penalty matrix resulted in the Department's base penalty of $5,000 per alleged violation. The Department further increased the penalty by $1,000 per alleged violation based on the Department's allegation that Respondent's actions were negligent.

The Hearings Officer found: 1) Respondent's actions did not create a likelihood of public exposure and reclassified the violations from Class I to Class II; 2) the violations were not of major magnitude, but were of moderate magnitude; and 3) the proof did not establish that Respondent was negligent. Moreover, the Hearings Officer declared that Respondent had cooperated with the Department and accordingly reduced the civil penalty.

A. RECLASSIFICATION OF THE ALLEGED VIOLATIONS BY THE HEARINGS OFFICER FROM CLASS I TO CLASS II AND FROM MAJOR TO MODERATE WAS APPROPRIATE

1. Reclassification of Violation

The Hearings Officer reviewed all evidence presented by the parties at the hearing and properly concluded that the alleged violations, if proved, were more appropriately classified as Class II than Class I because the violations did not create a likelihood of public exposure to asbestos. The evidence produced at hearing demonstrated a strong basis for the Hearings Officer's conclusion. In fact, given the evidence submitted at hearing, the Hearings Officer had no choice but to conclude that the violations were Class II, not Class I, violations.

David Wall, the Department's witness, visited the site, generated reports on his visits to the site, and on March 21, 1990, sent a Notice of Non-Compliance to Respondent which alleged that Respondent had committed only Class II and Class III violations. At the time Mr. Wall generated that letter, he had been to the site twice and had received the DEQ laboratory test results (Tr. 30). It was only after discussions with the DEQ Enforcement Section that Mr. Wall increased the classification of the violations (Tr. 30). Mr. Wall received no new factual information before he made the upward adjustment in the classification of the violations.

Exhibit 1 to the Notice of Civil Penalty Assessment dated May 24, 1990, stated that the Department classified the violation as Class I because residences were located, and children were playing, within 20 feet of the property on which the alleged asbestos was disturbed which created a likelihood of public exposure. Respondent disputed those contentions at the hearing on two grounds: First, that the Department was incorrect in its allegation of distance; and, second, that the suspect material was wet and was, therefore, not likely to become airborne. Substantial evidence was presented at the hearing on these issues.

a. Distance

During the hearing, the Department's only witness, David Wall, stated that the residences were actually 60 feet from the work site (Tr. 22). On page 4 of its Brief, the Department mischaracterizes Mr. Wall's testimony by asserting that Mr. Wall testified that people 60 feet from the salvage operations rather than 20 to 25 feet would not have a diminished likelihood of exposure to asbestos. Mr. Wall was never asked to compare the difference in likelihood of exposure between people at 20 to 25 feet and people at 60 feet distance.

Mr. Richard Krause (resume attached, Hearing Exhibit No. 8, Tr. 73), a Certified Industrial Hygienist with extensive experience in the industrial hygiene field, performed a thorough independent investigation into this matter, and generated a detailed report (attached - Hearing Exhibit 9, Tr. 74). Mr. Krause has worked for SAIF Corporation and the State of Oregon as an industrial hygienist, and currently teaches classes for asbestos workers and asbestos supervisors for the State of Oregon and State of

Washington asbestos programs. Mr. Krause testified that it was his expert opinion that there was not a likelihood for public exposure to asbestos fibers as a result of Respondent's activities at the site (Tr. 87).

Mr. Krause's report also stated that the wind direction at the site, as indicated by the National Weather Service report, was not in the direction of the area where DEQ alleged that children were playing, which further supports the Hearings Officer's finding that there was not a likelihood of public exposure to airborne asbestos fibers. During the hearing, David Wall stated that likelihood of exposure to asbestos fibers could be affected by wind direction and weather, but Mr. Wall did not confirm the wind direction or weather at the site (Tr. 59).

b. Moisture Content

Wet asbestos is not likely to migrate through the air and, consequently, would not create a likelihood of public exposure to asbestos fibers.

Notwithstanding, the Department's claims, there is an abundance of evidence in the record supporting the Hearings Officer's finding that Sample No. 1 was wet. The Department was able to connect Respondent's activities with only one pile of material out of the many piles of materials at the site (See Hearings Officer's Findings of Fact, page 9). Sample No. 1 was taken from that one pile. That sample is shown on the DEQ laboratory report as Sample Z3006 (Tr. 52). As shown by the pictures taken by Mr. Wall and the description of the sample from the DEQ laboratory report, Sample No. 1 was wet when it was taken from the site by Mr. Wall and it arrived at the laboratory still wet. Wilmar Briggs, President of Respondent, Fuel Processors, Inc., testified that the concrete area

constantly had water in it and had to be pumped out (Tr. 109). David Wall testified that he saw puddles of water accumulated in the concrete bermed area (Tr. 46) and there were piles of materials in certain areas of the site that were actually sitting in water (Tr. 13). The Hearings Officer correctly concluded that Sample No. 1 was wet when taken by Mr. Wall.

The Department would have the Commission believe that the Hearings Officer "disregarded, ignored and did not hear or read" Mr. Wall's testimony on these issues. Yet, it is clear that the Hearings Officer reviewed the entire record, including Mr. Wall's testimony, and properly concluded there was not a likelihood of public exposure to asbestos. Not only did the Department fail to meet its burden of proof on this issue, but the Respondent presented extensive evidence which strongly refuted the Department's allegation of a likelihood of public exposure.

The Hearings Officer correctly found that the evidence presented at the hearing did not establish a likelihood of public exposure to asbestos.

2. Reduction of Magnitude of Violation

The Hearings Officer also correctly reduced the magnitude of the violation from major to moderate based on the evidence, or lack thereof, presented regarding the volume and toxicity of materials handled by Respondent.

a. Volume

The Department admits on page 8 of its Brief that Sample No. 1 was taken from the only material which Mr. Wall could testify had been handled by Respondent. The Department based its allegation of a violation of major magnitude on Mr. Wall's

assumption that all materials he saw piled on the site had been placed there by Respondent. That assumption was incorrect. Mr. Wall did not actually see Respondent's employees remove tanks or boilers at the site (Tr. 8) and he did not even ask Respondent's employees to point out exactly which materials they had handled at the site (Tr. 33). In addition, Mr. Briggs testified that there had been other demolition contractors working at the site (Tr. 106-107).

b. Toxicity

Mr. Krause stated that, in his expert opinion, Mr. Wall did not follow a protocol which Mr. Krause would have followed to determine the amount of asbestos materials at the site (Tr. 82-83). Mr. Wall conceded that it was not his concern during the inspection to ascertain the amount of asbestos on the site, but rather to simply ascertain the presence of asbestos at the site (Tr. 61). Mr. Wall and Mr. Krause agreed that the only way to determine whether materials contain asbestos is through laboratory sampling (Tr. 62-63, and 83). Mr. Wall assumed, however, without such testing, that materials at the site which looked similar had a similar asbestos content. Mr. Krause testified that 60 to 70 percent of the materials at the site had been replaced since 1977, and after 1977 asbestos-containing insulation materials were not used in the United States (Tr. 81). That testimony refutes Mr. Wall's assumptions regarding the homogenous asbestos content of materials at the site.

The only conclusion the finder of fact can reasonably make is that Mr. Wall's testimony was replete with assumptions not based on fact. Yet, on page 9 of its Brief, the Department attempts to restate Mr. Wall's assumptions as fact, and again mischaracterizes

the evidence which was presented at the hearing. Respondent's employees did admit that they pulled some insulation from pipes at the site. They did not, however, tell Mr. Wall that they had handled all of the materials contained in the concrete bermed area.

The Department's criticism of the Hearings Officer's "voyage into a semantical sea of nuances" with regard to the issue of magnitude is not appropriate. In fact, the Hearings Officer was compelled by the only evidence available in the record to adopt the term "medium-large" in describing volume, as that term was the only measurement presented by the Department's witness as to the amount of materials from which Sample No. 1 was taken (Tr. 53). When asked again, under cross-examination, to quantify the materials in the pile associated with Sample No. 1, Mr. Wall concluded that he did not know if he could speculate on that (Tr. 57). If the Department wanted the Hearings Officer to be more specific than "medium-large" in her discussion regarding the volume of materials at the site, the Department should have presented more specific and detailed evidence on that issue by instructing or training its inspector to perform more accurate measurements of the materials which the Department alleged were handled by Respondent.

The Hearings Officer carefully reviewed the evidence submitted by the parties, correctly concluded that the evidence did not support a finding of major magnitude, and correctly reduced the magnitude from major to moderate.

II. THE HEARINGS OFFICER CORRECTLY CONCLUDED THERE WAS NO BASIS FOR A FINDING THAT RESPONDENT WAS NEGLIGENT

The Hearings Officer was also correct in concluding that the Department did not provide a basis for a finding that Respondent's acts were negligent. In addition to failing to properly provide a standard for the Hearings Officer to use in deciding whether

Respondent was negligent, the Department also failed to provide a factual basis for that allegation. Respondent provided extensive evidence which established that Respondent was not negligent.

Respondent attempted to ascertain whether asbestos was present at the site. On one of the days Mr. Briggs was on the property, there were consultants from two different environmental companies at the site (Tr. 106). Mr. Briggs also testified that, when he asked Mr. Dubbs, the lessee of the real property and the owner of the subject equipment and insulation, if there was any asbestos on the piping or equipment, Mr. Dubbs replied that there was not (Tr. 108-109). Mr. Briggs reasonably relied upon Mr. Dubbs' representations as he had no basis to suspect anything less than honesty and there appeared to be a factual basis for Mr. Dubbs' representation due to the presence of the consultants. Mr. Richard Krause also testified that the actions taken by Mr. Briggs in determining whether asbestos was present at the site were reasonable (Tr. 86). In response, the Department offered nothing.

The Hearings Officer correctly concluded that there was no basis to conclude that Respondent had been negligent in its actions and correctly reduced the civil penalty.

III. THE HEARINGS OFFICER CORRECTLY CONCLUDED THAT RESPONDENT COOPERATED WITH DEQ

The Hearings Officer correctly concluded that a reduction of the Civil Penalty should be made for Respondent's cooperativeness with DEQ. Mr. Wall testified that Respondent's employees cooperated fully with him when he visited the site, and continued to assist the Department through written statements and follow-up letters (Tr. 63-64). Again, there was no evidence to the contrary. The Hearings Officer correctly reduced the

civil penalty based on her finding that Respondent cooperated with the Department in this matter.

SUMMARY

Respondent requests that the Commission carefully consider all of the evidence submitted at the hearing, and not rely upon what the Department believes or wishes it had submitted. The burden of presenting evidence to support a fact or position in a contested case rests on proponent of the fact or position. ORS 183.450(2). The parties attended a hearing on December 13, 1990, to present all evidence for the record. The Commission's Hearings Officer observed the witnesses, examined the evidence, and generated the Hearings Officer's Findings of Fact and Conclusions of Law and Final Order dated May 20, 1991. The Department asks the Commission to disregard the Hearings Officer's conclusions. When the Commission completed its review of the hearing record, it must concur with the Hearings Officer's Findings, Conclusions, and Final Order.

Respectfully submitted,

Debra Olson Soren, OSB# 86256
Of Attorneys for Respondent

RICHARD H. KRAUSE

HAZCON, Inc.
9500 S.W. Barbur Blvd.
Suite 100
Portland, Oregon 97219
(503) 244-8045

EMPLOYMENT

1986-Present HAZCON, INC., Portland, Oregon
President
Formed Industrial Hygiene service corporation to provide occupational and environmental health management services; Instructor in Approved Washington and Oregon State Asbestos training courses, manages staff of Certified Industial Hygienists, Industrial Hygienists, and Industrial Hygiene Technicians in the field and laboratory.

1985-1986 JAMES L. GROVES COMPANY, Portland, Oregon
Assistant Manager
Assisted in management of the H2M Division, provided industrial hygiene sampling and analytical services to clients, marketed for new clients, arranged seminars, participated in professional organizations and regulatory actions, developed and presented training programs, developed, implemented and participated in asbestos control programs and performed numerous industrial hygiene surveys of industrial, institutional, and governmental facilities.

1980-1985 SAIF CORPORATION
Industrial Hygiene Manager
Duties included managing four Industrial Hygiene Consultants, consulting with insureds about the recognition evaluation and control of occupational health hazards, evaluating occupational disease worker's compensation claims and providing expert witness testimony at claims hearings.

1977-1980 STATE OF OREGON, ACCIDENT PREVENTION DIVISION
Health Compliance Officer
Responsible for conducting industrial hygiene inspections of work places in Oregon to determine compliance with the Oregon Safe Employment Act. Reports were prepared describing violations of standards and work place conditions observed.

EDUCATION

M.S. in Public Health, Industrial Hygiene and Safety, University of Washington
B.S. in Microbiology, University of Washington

PROFESSIONAL ORGANIZATIONS

American Industrial Hygiene Association American Academy of Industrial Hygiene
American Society of Safety Engineers

CERTIFICATIONS

Comprehensive Practice of Industrial Hygiene by
American Board of Industrial Hygiene
Certified Safety Professional

ATTACHMENT TO RESPONDENT'S BRIEF HEARING EXHIBIT 8, TR. 73.

HEALTH HAZARD CONTROL SERVICES
HAZCON INC.

RECEIVED
OCT 0 3 1990
BOGLE & GATES

Debra Olson
Bogle & Gates
222 SW Columbia
Portland, Oregon 97201

Dear Ms. Olson:

At your request, I have performed a factual investigation regarding the DEQ notice of violation (Case No. AWAB-NWR-90-81) against Fuel Processors, Inc.

As a part of this investigation, I visited the Department of Environmental Quality offices to review their files, interviewed Mr. Bill Briggs, Mr. Dale Poor and Mr. Dan Goodhue of Fuel Processors, Inc., Mr. Bill Dubbs of West Coast Chemicals, and Mr. Jim Barnes of Cascade Industrial Maintenance, obtained information from the National Weather Service, and visited the cleared site. My findings are as follows:

The initial inspection of the site was conducted by Mr. Dave Wall, Asbestos Control Analyst of the Air Quality Division.

Upon close review, several questions arise which serve to raise doubt about the degree of hazard presented by the actions of Fuel Processors, Inc.

The first question involves the actual amount of friable asbestos debris that was present.

The DEQ photos show large piles of insulation at the site. The bulk samples collected by Mr. Wall included two (Nos. 1 & 2) that appeared to be from pipe insulation. These contained amosite asbestos. The two other samples (Nos. 3 & 4) contained chrysotile asbestos and consisted of "tough," "stiff" materials. These likely may have been gasket materials of low friability. In my opinion, to establish the actual amount of asbestos materials in these piles, more samples should have been collected. This would have reduced possible sampling bias resulting from the natural tendency to only sample those materials with the highest potential for asbestos content.

In conversations with Mr. Dubbs I learned that he estimated that 60-70% of the pipe insulation in this plant had been replaced since his arrival in 1977. Non-asbestos pipe insulation materials can look identical to older asbestos containing materials, particularly when piled in a dirty, soaking wet pile of demolition debris. It is probable that only a small amount of asbestos material was present in the photographed piles.

The second question involves the condition of the material as it was taken off of the pipes. The material at the time of the inspection was obviously saturated with water as shown in the DEQ photographs.

I spoke with Dan Goodhue (the person who actually removed the insulation) about the condition during the removal. He stated the insulation was removed later in the demolition time frame from 2/26 to 3/10 and was saturated on the pipes as well as when it was in piles on the ground. In light of this information, the potential for airborne exposure was greatly lessened.

9500 SOUTHWEST BARBUR BOULEVARD
SUITE 100
PORTLAND, OREGON 97219
503/244-8045

I discussed the weather conditions with the National Weather Service for this time period. This information is consistent with Mr. Goodhue's observations of the wetness.

Date	Rainfall	Wind
2/26	None	11 mph East
2/27	None	18 mph East
2/28	None	11 mph East
2/21	None	6 mph South East
3/02	Trace	6 mph South East
3/03	.52 inches	10 mph South
3/04	.24 inches	8 mph East South East
3/05	.02 inches	8 mph South East
3/06	.14 inches	8 mph South
3/07	.45 inches	11 mph South
3/08	.02 inches	14 mph South East
3/09	.33 inches	14 mph South East
3/10	.28 inches	10 mph South East

The third question involves the exact proximity of children playing and the likelihood of exposure from wind-driven asbestos dust.

Mr. Wall's report mentions children playing approximately 20 feet from the plant. The final DEQ Notice of Penalty refers to children being 20 feet from the asbestos removal. From my observations of the site and inspection of the maps, the two statements are not consistent. A more accurate distance (as measured on the aerial photographs) from removal to children would be at least 60 - 70 feet. Also, as previously mentioned, the material was likely soaked with water as it was removed and it is therefore unlikely that asbestos fibers would have become airborne as a result of the removal activities. In addition, the wind direction during the days when the asbestos was removed would not have been toward the closest houses where DEQ has alleged children were playing.

In my opinion, the hazard alleged in the final DEQ notice of penalty exceeds the hazard associated with actual conditions at the site during the period in question.

Sincerely,

Richard H. Krause, CIH

RHK/jl

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 RESPONDENT'S RESPONSE TO DEPARTMENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Respondent objects to, and strongly disagrees with, the Department's Proposed EQC Findings of Fact, Conclusions of Law and Final Order. In support of this objection, Respondent incorporates the arguments set forth in Respondent's Response Brief. As outlined in Respondent's Brief, the Hearings Officer was correct in her findings and conclusions in this matter. The Proposed EQC Findings, Conclusions, Opinion and Order are a reflection of what the Department wishes had been established at hearing, but in fact, are not supported by the weight of the evidence presented at hearing in this matter. The EQC should reject the Department's Proposed Findings, Conclusions, and Order, and instead enter the Final Order dated May 20, 1991, which was prepared for the Commission by the Commission's Hearings Officer.

Respectfully submitted,

DEBRA OLSON SOREN, OSB# 86256
Of Attorneys for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 RESPONDENT'S RESPONSE TO DEPARTMENT'S EXCEPTIONS

Respondent disagrees with, and objects to, the Department's Exceptions to the Hearings Officer's Findings of Fact, Conclusions of Law, Final Order and Judgment. In support of this objection, Respondent refers the Commission to the Respondent's Response to Department's Opening Brief. Further, Respondent affirmatively states that the weight of evidence presented at hearing supports the Hearings Officer's Findings, Conclusions, and Final Order prepared by the Hearings Officer and dated May 20, 1991.

1. The Hearings Officer correctly reclassified the violations from Class I to Class II.
2. The Hearings Officer correctly concluded that the magnitude of the Respondent's violation should be reduced from major to moderate.
3. The Hearings Officer correctly concluded that there was no basis for finding the Respondent was negligent.
4. The Hearings Officer correctly concluded Respondent was entitled to a reduction of the civil penalty based on its cooperative conduct.

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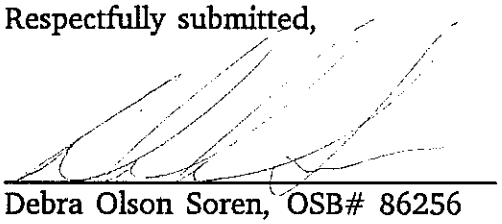
5. The Hearings Officer correctly reduced the total amount of the civil penalty from $12,000 to $1,600.

Respectfully submitted,



Debra Olson Soren, OSB# 86256
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on October 31, 1991, I served the foregoing RESPONDENT'S RESPONSE TO DEPARTMENT'S OPENING BRIEF, RESPONDENT'S RESPONSE TO DEPARTMENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER, and RESPONDENT'S RESPONSE TO DEPARTMENT'S EXCEPTIONS upon the parties hereto by hand delivering a true, exact and full copy thereof to:

Arnold B. Silver
Department of Justice
410 1515 Building
1515 SW 5th Avenue
Portland, Oregon 97201

DEBRA OLSON SOREN, OSB# 86256
Of Attorneys for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 DEPARTMENT REPLY BRIEF

The Department replies to Fuel Processors, Inc.'s Response.

Respondent presents no new argument or issues of substance that the Department believes need additional briefing. Respondent instead offers its expert witness, Richard H. Krause, as its argument. Mr. Krause is president of Hazcon, Inc. and a paid expert witness of Respondent. His primary investigation consisted of talking to Respondent's employees and officers and looking at pictures of the site after it was cleared. He did not inspect the site prior to or during the actual demolition of the structures located thereon. Mr. Krause also does not state how many samples would even be "enough" for testing. Finally, his weather service data only supports the Department's position that the asbestos-containing

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waste material removed by Respondent was not wet and was capable of creating a likelihood of public exposure.

Respectfully submitted,

Arnold B. Silver
Assistant Attorney General
Of Attorneys for Respondent

CERTIFICATE OF SERVICE BY MAIL

I certify that on November 18, 1991, I served the foregoing DEPARTMENT REPLY BRIEF upon the party hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Debra Olson Soren
Attorney at Law
Bogle & Gates
222 SW Columbia
Portland, OR 97201

ARNOLD B. SILVER #58088
Assistant Attorney General
Of Attorneys for Department

1 - CERTIFICATE OF SERVICE
(0655N)

Tape No. 1 - Fuel Processors (Demolition-Asbestos Removal)

Zucker: Good Morning. This is December 13, 1990. We are in Portland, Oregon, and this is the time and place scheduled for hearing in DEQ v Fuel Processors, Inc., Case No. AQAB-NWR-90-81. My name is Linda Zucker, and I am the Agency's hearings officer. We spoke very briefly before the beginning of the hearing and determined that we will proceed through the Notice of Assessment and DEQ will present its case. What I understand to be alleged are two violations of the asbestos rules; the first being a violation of OAR 340-25-465(a) which involves removal of friable asbestos materials prior to wrecking, or dismantling, where the materials would... (excuse, me) ...in wrecking or dismantling, that would break up the asbestos materials. The allegation and the notice departs from that to some extent. It is a little bit short of the rule, but we will see what the proof provides. The second is OAR 340-25-465(15) in which DEQ is required to prove open storage or accumulation of friable asbestos materials or as they alleged, asbestos-containing waste material, which is prohibited, and the allegation

conformed essentially to the rule. So, DEQ is obliged to prove those behaviors, and in addition, their allegation that this is a Class I, Major Magnitude Violation that was characterized by negligent conduct. I did have some trouble with the penalty calculation and look forward to DEQ's establishment of the classification and the magnitude. I am interested in knowing how those determinations were made, and particularly the negligence analysis; especially, in the second violation. I'd like to understand better what the nature of the negligent behavior is. But those are the things they are required to prove. I think the excuse from notice I find appropriate. That is, that it was a work practice violation. I don't know if you have any issues first and I am turning to Debra Olson who is here and representing Fuel Processors.

Debra Olson: We are ready to proceed and to follow DEQ's presentation of this.

Zucker: Fair enough. Then, Arnold Silver is representing DEQ, and, do you have an opening statement?

Arnold Silver: I do not have one at this time, Ms. Zucker.

Zucker: Good enough. Then why don't you go to it.

Arnold Silver: May we call David Wall, please.

OATH ADMINISTERED.

Silver: Mr. Wall, will you state your full name and title and your employer. . .

Wall: David Wall. I work for the Department of Environmental Quality as an Asbestos Control Analyst in the Asbestos Section of the Air Quality Division.

Silver: Would you tell the hearings officer the nature of your DEQ responsibility.

Wall: I inspect asbestos removal projects when they take place throughout the state to determine whether or not those projects are being conducted according to the regulations.

Silver: How long have you been doing that?

Wall: For three years.

Silver: Have you previously investigated sites or projects which have been reported to you as asbestos-containing material?

Wall: Yes, I have.

Silver: Approximately how many of these sites have you investigated?

Wall: Over 150, approximately.

Silver: Have you received any training or taken any courses regarding asbestos removal practices or asbestos identification during your employment?

Wall: Yes, I have. I've gone to the University of Washington Engineering Class on such removal. That was back in 1987. I went through the Asbestos Hazard Emergency Response Inspector Management Plan training class in 1988. I have also gone through several investigators classes; one given by the Department of Environmental Quality, and one given by the Environmental Protection Agency in Seattle.

Silver: Have you tried to give any programs at all for asbestos removal and asbestos...

Wall: Yes, in the past three years I have put on several presentations throughout parts of the state explaining the regulations and detailing how asbestos is supposed to be removed, to different organizations and groups.

Silver: Mr. Wall, during March of 1990, did you have any reason to inspect a parcel of real property located at 11104 NW Front Avenue in Portland?

Wall: Yes, I did.

Silver: Approximately how many times--and do you remember the dates_____?

Wall: On March 10, which was a Saturday, I inspected the site in the morning--approximately 10:00 o'clock in the morning, and on March 12, the following Monday.

Silver: Why are you making these investigations?

Wall: We received a phone call from a licensed asbestos contractor, Cascade Industrial Maintenance, requesting a waiver of the required 10-day notification period for an emergency removal at this site.

Zucker: When was that?

Wall: That was on March 9.

Zucker: Okay.

Silver: I guess I am not clear--why did the contractor contact your office?

Wall: We had been contacted by a demolition firm and asked to come out and remove some material that they suspected to be asbestos pipe insulation, on the site. And in order to do that removal, they are required to contact the Department and either get a waiver of the ten day permission to work in less than ten days.

Silver: Did you grant the waiver?

Wall: Yes, we did.

Silver: Did you subsequently ascertain the nature of the business located at this address?

Wall: Yes. When I arrived on the site on March 10, I spoke with Mr. William Dubbs who is I believe the manager of a company called West Coast Adhesive which occupied the site for seven years.

Silver: Now, during the inspection at the site, did you talk to any persons while you were there?

Wall: Yes, I did. I talked with Mr. Dubbs and I talked with a gentleman named Dan Goodhue, who is a worker for Fuel Processors. This was on March 12, which was the following Monday. I also talked with a gentleman named Dale Poor, representing himself as a _____ for Field Processors.

Silver: Did they tell you what Fuel Processors was doing at the site?

Wall: Yes, they told me that, _____ told me they had salvaged the tanks that at one time contained phenol and the boiler from the site. I asked him if they had pulled the insulation

off of the pipes while they were salvaging those tanks, and he said that they did.

Silver: I don't know if you can, but with your conversations with these gentlemen, could you possibly be a little more specific in describing the procedures_____ _____.

Wall: I didn't see them do the actual removal of the tanks and boilers, but the result was that there was pipe insulation--piles strewn over a good portion of the slabs where most of the tanks were and there was a building on the site that has two tanks - and a portion of the building had been torn out so that they could accommodate the removal of the those tanks from that building.

Silver: What was done with the pipe insulation?

Wall: It was on the site, to the best of my knowledge, all of it was on the site at the time of inspection in piles on the site.

Silver: Was there more than one pile.

Wall: There were several--more than five, I believe. When we left there were 20 or 30.

Silver: Did you subsequently take any samples of that material?

Wall: Yes, I took five samples at the site, and four of those samples did turn out to be positive for containing asbestos material.

Zucker: At the site. You took five and four were positive?

Wall: Four were positive, yes.

Silver: Let me ask you-- May I write on this as an exhibit

Zucker: Yes, actually, if you don't mind, I would prefer to mark it.

Silver: Would you hand that to the hearings officer, please.

Zucker: And, before we continue, what you were describing are things that you saw?

Wall: Yes.

Silver: They were all one exhibit.

Zucker: Okay.

Silver: Can you take a look at those, please, Mr. Wall, and tell the hearings officer what they are and what they represent

Wall: They represent samples that I took at the West Coast Adhesive site. Two of the samples were taken from the tank area of the site. One sample was taken from the boiler; and two of the samples were taken from sheds to the north of the tank site.

Silver: Who did you submit the samples to?

Wall: To the Department of Environmental Quality Lab.

Silver: And you subsequently received the results back?

Wall: Yes, I did.

Silver: Would you please hand those documents to Ms. Olson? I'm going to offer those as an exhibit.

Zucker: Good. Received.

Pause.

Silver: Maybe you have already explained this, but what was the results of these tests?

Wall: Four of the five samples showed asbestos in the material. The sample that did not show asbestos was from an insulation material that sort of looked like a foamy, beady stuff that was around the boiler itself. All of the samples of pipe insulation that I took showed positive for asbestos.

Silver: What percentages?

Wall: There were two different percentages and two different types of asbestos; 25 - 35% of amosite asbestos and 85% chrysotile.

Silver: Is this material friable?

Wall: In my opinion, it was.

Silver: What does friable mean?

Wall: Friable means that the material can be easily crushed by hand pressure to release asbestos fibers.

Silver: Did you ask any of the Fuel Processor _____. _____ whether they inspected or otherwise determined whether asbestos was present on the site prior to the salvage operation?

Wall: Yes, I asked Dale Poor if they had tried to determine whether or not there was asbestos on the site. He said that at one time they talked with Mr. William Dubbs and asked him whether there was asbestos on the site and that Mr. Dubbs had told them that there was not. I talked with Mr. Dubbs and he did not remember that conversation.

Silver: Did you examine the pipe insulation accumulated at the site?

Wall: Yes, I did.

Silver: Did you determine whether it was wet?

Wall: There were piles in certain areas of the site that were actually sitting in water and the material in those areas could have been considered wet. There were other sections strewn across the slab that were not in water that had been setting out for quite a while that I considered in a dry condition.

Silver: Was the material wetted by Fuel Processors?

Wall: Not to my knowledge.

Silver: Can you tell me why it's important for this material to be wet?

Wall: During the process of removal, when you are breaking these materials apart, the fibers will release and they will go into the air and can migrate over a large area. And, water is used in the process of removal to help prevent fiber from migrating, because water droplets can grab the fibers and help hold them to the ground.

Zucker: Excuse me, I know this could have been an issue in this case, but is it, Mr. Silver? There's no allegation of failing to "adequately wet" and there's no reference to it anywhere.

Silver: I think, Ms. Zucker, if you will bear with me, that this may be somewhat of an issue.

Olson: I concur with this...

Silver: Okay, go ahead.

Olson: It is an issue in that we are talking about the likelihood of public exposure, and the material was wet, and so there is less of a likelihood that the asbestos fibers would have migrated away from the site. It will become more obvious later on as we go through "Violation I"...

Zucker: Thank you.

Silver: Where was I?

Zucker: "Was the material wetted by Fuel Processors?" "Not to my knowledge."

Silver: All right. If the material was not wetted by Fuel Processors, and you know how it would become wet.

Wall: From rainfall.

Silver: Was it sufficiently wet to prevent airborne asbestos fibers?

Wall: In some areas of the site, yes. In other areas, no.

Silver: Let me ask you, Mr. Wall, do you know the approximate dates of this salvage operation... the dates it took place?

Wall: I asked both Dale Poor and Mr. Briggs how long the operation went and they told me it was approximately February 26 through March 9.

Silver: Well, is rainwater an acceptable method of wetting asbestos insulation?

Wall: It is not an accepted industry standard.

Silver: What is an acceptable standard?

Wall: Normally, when an asbestos contractor goes into wet material, what they will do is either have it inside of containers or in what they call a glove bag, which is just a bag that goes over a section of pipe. And, after it is inside this bag, they will split the pipe and then use water in combination with a compactant, which is a silky material, and soak this stuff down completely before it's removed from the pipe. It's a very standardized process in the asbestos industry. We don't feel that rainfall is an accepted method of wetting material down because there's no way for that water to get inside to the asbestos-containing material while it is being taken off. Maybe after a period of time it is soaked because it has been setting there, but while it is being taken off, it can't get wetted properly.

Silver: Well, let's assume it was raining while Fuel Processors was removing the tanks and the boiler and pipes and insulation off the pipes. Would that have prevented asbestos fibers from becoming airborne?

Wall: No, not in my opinion, and not according to information which we have compiled over the years.

Silver: Maybe you could expand upon that, Mr. Wall, why wouldn't the rain have prevented the airborne asbestos from becoming airborne after its release?

Wall: One of the reasons is that certain types of asbestos will not retain water and we have seen in the past in projects where this asbestos has been heavily wetted that the fiber count stayed in the air for long periods of time and it would, or could, migrate from that.

Silver: What type of asbestos is that?

Wall: That's the amosite type of asbestos, and that's because of the configuration of the material.

Silver: Was that the type of asbestos that was found at the site?

Wall: One of the types.

Silver: Were these tanks and boiler in any type of structure at the site prior to removal?

Wall: My investigation showed that two of the tanks were inside a two-story building on the site and were removed from that building.

Silver: Would you describe the building?

Wall: Just basically a two-story structure. I have no idea what it was used for, but there were two tanks inside that building that had lines connected to them that had insulation material on them.

Silver: Well, did the building have walls or a ceiling...

Wall: Yes, it was a building, at least before the salvage operation started.

Silver: Windows?

Wall: Windows, yes.

Silver: Open or closed?

Wall: At the time that I was it, the south wall had been torn off to accommodate the removal of tanks.

Silver: And, did you observe any pipe insulation that remained in the building after the removal? There was a link of pipe that ran east-west in the building, approximately 12 inches in diameter that had pipe insulation on it and that material was sampled--was one of the samples.

Silver: Did you observe whether it was wet?

Wall: It was not wet.

Zucker: Mr. Silver, may I interrupt? I can't tell from what you have just said what I think you want to establish. You have described the building; I don't have a certain time. And I don't know whether you... I assume you are offering this to show that there was free asbestos at the time. I can't get it from the language you are using. Perhaps I should be able to, but there was pipe material? Was

there exposed pipe material? Maybe you could just go back and...

Silver: Let me go back a little bit. While you were observing the building, did you observe any pipe insulation remaining in this building after the tanks and the boiler were removed?

Zucker: And may I just ask, what we are talking about now is either on 3/10 or 3/12?

Silver: Yes.

Zucker: Okay, and a wall was missing?

Wall: Yes.

Zucker: And, okay, go ahead. Ask the question one more time.

Silver: When you observed the building, did you observe any pipe insulation remaining in the building after removal of the tanks and boiler from the building?

Wall: Yes.

Zucker: And, was it exposed?

Silver: That was going to be my next question?

Zucker: I'm sorry.

Silver: Was the pipe insulation exposed?

Wall: Yes, there were several sections of the pipe insulation that were damaged, causing the material to hang, some of it had fallen to the floor. There was a length of pipe at the west end of the building that ran vertical that had a considerable amount of damage.

Silver: Was this exposed pipe insulation wet?

Wall: No, it wasn't.

Silver: Just a couple more questions, Mr. Wall. Are there any residences or businesses near the site Fuel Processors was working on?

Wall: Yes, there are.

Silver: Approximately, how many?

Wall: I noted two residences directly across the street to the west of the site. There is a business to the northwest of the site.

Silver: Approximately, how far are these residences?

Wall: The residence is about twenty...

Silver: Well, let me finish the question... I have a question...

Wall: Okay.

Silver: Approximately how far are the residences from the area where the asbestos was disturbed?

Wall: About 60 feet.

Silver: Approximately, how far are the residences from the site proper?

Wall: Approximately 20 - 25 feet.

Silver: The distance you indicated, in the calculation at least, I believe was 20 feet. Is that correct? And that's probably 20 feet from the

property line, but it is more than that from the actual work site...

Wall: Yes.

Silver: Did you see any people at these residences?

Wall: Yes, I was several children playing across the street at the time of my personal inspection.

Silver: What date was that?

Wall: That was March 10.

Silver: Was it your knowledge that the operation was going on at that time?

Wall: At that time? No.

Silver: You believe that the removed asbestos contained pipe insulation and the storage of those materials could have created the likelihood of public exposure to that substance?

Wall: Yes, I do.

Silver: Why?

Wall: Well, because of the proximity of the people living in the area, and the fact that the salvage operation went on for what appears to be a long period of time. It was not raining that entire time. The first part of the project, from what we have been able to find from our investigation is that there were four or five days that it wasn't raining at all.

Silver: To the best of your knowledge, Mr. Wall, is there any safe public exposure to asbestos?

Wall: Neither the State Legislature or the EPA has determined a safe level of exposure.

Silver: This may not be within your knowledge, Mr. Wall, but do you know why Fuel Processors did not give prior advance notice of this...

Wall: The work practice regulations according to the rule don't require advance notice - violations of the work practice regulations.

Silver: Would you hand this to the hearings officer, Mr. Wall?

Pause.

Silver: Can you identify those pictures, please?

Wall: Yes, those are pictures... one facing... the top picture is the picture facing the north, and the bottom picture is the picture facing the south showing residences directly across the street from the West Coast Adhesive site.

Silver: Did you take those pictures?

Wall: Yes, I did.

Silver: Do those pictures truly represent what you saw at the site at the time you took those pictures?

Wall: Yes.

Silver: Would you hand those pictures to Ms. Olson, please?

Zucker: No objections?

Silver: Mr. Wall, I have no further questions for you at this time. I think I am going to have to turn you over to the hearings officer... and Ms. Olson.

Zucker: Happily, in either case. What did you mean when you said that no safe level has been determined, that there has been no effort to determine, or that...

Wall: No. They have been investigating asbestos exposure problems for a long time, and the EPA has determined, and the Legislature has determined that there is no safe level of exposure.

Zucker: Okay. And, Ms. Olson, are you going to inquire about how asbestos moves?

Olson: How it moves through the air?

Zucker: Yes.

Olson: I didn't intent to; I could go through that if you...

Zucker: I don't need to. I am curious, however. When you talk about likelihood of exposure, I assume you mean that the asbestos fibers are going to travel through the air and reach children, or others, at a distance of... at some distance. Are they? What is the mobility of...

Wall: Because of the aerodynamics of the fiber itself, it can stay animated and in the air for great, long periods of time. And every time there is an air movement, it will become re-animated. So it can float in the air for a long period of time, and migrate with the wind.

Zucker: When I try to look at likelihood, how do I examine the behavior of airborne asbestos fiber and the likelihood of public exposure?

Wall: If the fibers are in the air, and they migrate with the wind, and there are people in the area where that wind is traveling, then there is a likelihood those people will be exposed to those fibers.

Zucker: What is the area?

Wall: In the breathing zone, of each individual-- maybe I don't understand?

Zucker: Well, I'm just trying to think what unit sited residence is: 60 - 65 feet from the accumulation of asbestos, and I'm just trying to get a sense of the likelihood of that material.

Silver: May I try to help?

Zucker: Sure.

Silver: Mr. Wall, would individuals within the distance of 20 - 60 feet away from the site be likely to be exposed to asbestos fibers by virtue of their traveling into the air?

Wall: Yes, I think so.

Olson: Think so?

Silver: Well, answer...

Wall: Yes.

Olson: Thank you.

Zucker: Okay, would you like... you are welcome to inquire.

Olson: Mr. Wall, on March 21, did you send a letter to Fuel Processors, which was a letter of noncompliance.

I remember--it is back here, the letter that you sent.

Wall: Yes.

Silver: I've seen it, thank you, Ms. Olson.

Zucker: Any objection?

Silver: No objection.

Olson: In that letter of noncompliance, did you state that there had been violations made by Fuel Processors of the asbestos work law.. work compliance standards?

Wall: Yes.

Olson: Okay. And, what class of violations did you state that Fuel Processors made in this letter.

Wall: In that letter... could I see it?

Olson: Sure.

Wall: Okay. I stated that two of the violations were Class II and one was a Class III violation.

Olson: Okay. On the date that you sent this letter, had you been out to the site twice?

Wall: Yes, I had.

Olson: Okay. Had you received the results of the asbestos sampling that you performed at the site?

Wall: Yes.

Olson: And, was it your conclusion at that time that these were Class II and Class III violations?

Wall: According to my interpretation of the rules involved at the time, I thought it was a Class II.

Olson: Okay. Can you tell me the difference between a Class I and a Class II violation in this context?

Wall: A Class I violation, as I read the rule, is required if there is a likelihood of public exposure and a Class II violation is required if there is no likelihood of public exposure.

Olson: Okay. Mr. Wall, you have just testified that you believe now that you believe now there was the likelihood of public exposure. What changed your mind?

Wall: When I re-read the rule, along with my manager and the Region Operations Enforcement Section, it was pointed out to me that because of the likelihood of public exposure that I had classified the violation wrong. I had always believed that there was a likelihood of public exposure, but I had misinterpreted the reading of the regulation at the time I made the notice of noncompliance.

Olson: In determining the likelihood of public exposure, what factors did you consider?

Wall: Dry asbestos on the site, and the fact that the air where people...

Zucker: Excuse me, may I ask when... while you were making the initial determination?

Olson: I am making the initial determination.

Wall: Dry asbestos on the site could cause a public exposure and the fact that members of the public were in an area where they could become exposed from that material.

Olson: Do you know what the weather conditions were throughout the entire period of time that Fuel Processors was working on the site?

Wall: I have seen reports from the weather service as to what the weather was like at the Portland Airport during that time.

Olson: Okay. But you don't have personal knowledge.

Wall: Of what the weather was like on the site-only for the days that I inspected.

Olson: Did you talk to Mr. Poor or Mr. Goodhue about the weather conditions at the site while they were working at the site?

Wall: I don't believe I asked them about the weather conditions at the site.

Olson: When you were talking to Mr. Poor or Mr. Goodhue, you said you asked them if they had worked with or disturbed any of the insulation material that was on the site.

Wall: Yes.

Olson: Did you ask them to point out to you exactly which materials they had removed from _____ or other physical equipment?

Wall: No, I did not.

Olson: You swore in your statement you took five samples.

Wall: That is correct.

Olson: How did you determine where to take samples?

Wall: The Department requires that we show that there is asbestos in whatever materials are on a specific site, and I walked over the entire site and looked at several different materials. I considered that quite a few of them were homogeneous in nature and the two most different types of materials are the ones that I sampled.

Olson: In how many different locations... in sampling... in looking at your report, you stated that there were several piles around on the site.

Wall: That is correct.

Olson: How many different types of materials were on the site?

Wall: There were two different types of materials that I suspected to be asbestos-containing, and those were the ones that I sampled.

Olson: So the rest of the materials, the rest of the types of materials in those piles you did not believe to be asbestos-containing.

Wall: That isn't what I said. I said that there were two different types of materials on the site. Those piles contained those types of materials. I considered them to be homogeneous for the site.

Zucker: Mr. Wall, it would help if you would answer the question as it is asked, and you did not. Why don't you ask your initial question again, because it is hard for me to understand the answers when you proceed that way. And, we will pause if you have any problem with the content of the question.

Olson: Maybe it will help if we work with some of the pictures that Mr. Wall took of the piles of asbestos. I think that would make it clear for all of us. Mr. Wall, did you take this picture at the bottom of this page? I believe it's attachment number 4 of your report.

Wall: Yes, I did.

Olson: Okay. And in this pile of debris... I'm sorry...

Silver: No, just give me the number of it.

Olson: Four.

Silver: Is there another number on it?

Olson: I couldn't check because...

Silver: Okay, I'll find it.

Olson: How many different types of materials do you see in this pile of debris?

Wall: There could be as many as four different types of materials...

Olson: How many types of materials did you sample from this pile?

Wall: I did not sample that pile.

Olson: Okay. Do you believe that there are asbestos-containing material in that pile?

Wall: At the time, my experience told me that there was material that I considered suspect; material that was homogenous to material that we had sampled.

Olson: But you do not have a lab analysis that would prove that there is suspect asbestos-containing material in this pile.

Wall: No, I don't; no, I don't.

Pause.

Olson: When speaking with Mr. Dubbs about the fact that there may have been asbestos material on that property, did you ask Mr. Dubbs how much material he believed was on the property? Excuse me. How much asbestos material was on the property?

Wall: No.

Olson: Mr. Wall, in your report of March 29, 1990, I believe it was your case report... you stated that Fuel Processors was negligent because this, and I am quoting, "this company deals with the salvage of tanks and boilers and

encounters asbestos-containing materials quite often. They do know that asbestos needs to be handled in a certain way." Who gave you that information; where did you...

Wall: I got that from Mr. Dan Goodhue, one of its employees.

Olson: Do you recall when he told you that?

Wall: My first conversation with him was March 12, and I was inspecting the site.

Olson: Do you know what... Did you receive a copy of a contract between Fuel Processors and West Coast Adhesive?

Wall: Yes.

Olson: And, did that contract state that Fuel Processors was simply purchasing equipment from West Coast Adhesive? Did you recall?

Wall: I don't recall.

Olson: In your case report, the question is asked of you, "Did the violator gain an economic

benefit as a result of the violation?" And you statement was: "It was certainly cheaper not to deal with the asbestos pipe insulation." Could you explain that statement.

Wall: Normally, if there...

Zucker: Excuse me, just a moment. Is that an issue in the case?

Olson: It goes to the standard of care and the expectations that we had of Fuel Processors.

Zucker: Would standard of care refer to negligence?

Olson: His statement earlier in his report is that they held Fuel Processors to a higher standard, or to a higher level of knowledge than other contractors. And, as I go through this report, there are other statements that are consistent with what he was expecting from Fuel Processors.

Zucker: I don't understand what it is you are trying to prove, or disprove.

Olson: Actually, what I am trying to show is that he had the wrong belief regarding Fuel Processors' knowledge and level of expertise with regard to asbestos products. And that goes to negligence.

Zucker: Okay.

Olson: When you say that it was cheaper not to deal with the effects of pipe insulation, could you explain that statement?

Wall: It is expensive to...it can be expensive to remove asbestos prior to doing any type of demolition.

Olson: And, who would have been responsible for removing asbestos pipe insulation at this particular site?

Wall: I don't know if I can answer that question.

Olson: Well, West Coast Adhesives was the operator of the West Coast Adhesives plant, and Mr. Dubbs was the general manager, if I recall. If there was going to be demolition done at the

site, would Mr. Dubbs not have been responsible for having that removal done?

Wall: Honestly, I don't know.

Olson: Did you send a notice of noncompliance to Mr. Dubbs with regard to this project?

Wall: Yes, I did.

Olson; And, what was that notice of noncompliance for, what citation did you make to violation of the statute?

Wall: I would like to...

Pause.

Olson: Is there a letter dated March 21 to Mr. Dubbs?

Zucker: And, while you are looking, I'm going to change the tape.

End of Tape 1, Side A

Zucker: Continuing.

Wall: Inaudible... or not hiring a licensed asbestos contractor to do asbestos removal.

Olson: And would that... based on this letter, is it proper to conclude that you believe that Mr. Dubbs is responsible for handling the proper removal of asbestos material?

Wall: Based on that letter, Mr. Dubbs would be responsible for hiring a licensed asbestos contractor.

Olson: Okay. Is Fuel Processors, to your knowledge, an asbestos or demolition contractor?

Wall: No, not to my knowledge.

Olson: What is your understanding of why Fuel Processors was on the site.

Wall: To salvage the tanks, pipes and other material.

Olson: They were not contracting with Mr. Dubbs or performing services for Mr. Dubbs, in doing demolition or removal of asbestos from the site.

Wall: Not as far as I know.

Olson: I will offer this.

Zucker: And the question is not to do demolition or...

Olson: ... or asbestos removal work on the site.

Zucker: I am marking it. And you are offering it. Any objection?

Silver: No objections.

Zucker: Received. I now have Exhibits II and IV, only.

Olson: Is it...

Zucker: I'm sorry. Don't abscond with exhibits.

Silver: Two and four? There is one and. . .

Zucker: Three was the March 21 letter, and who has it? It wasn't March 21...

Olson: There are two March 21 letters. There was one to Fuel Processors and one to West Coast Adhesive.

Zucker: Okay, and this is the first. I have the one to West Coast Adhesive.

Silver: I think there is an additional one to West Coast, also.

Zucker: Right. Thank you.

Olson: Mr. Wall, with regard to the asbestos materials inside the building, did you specifically ask Mr. Goodhue or Mr. Poor if they had worked with those materials or if they had damaged those materials?

Wall: No.

Olson: So, you have no way of knowing whether Fuel Processors, or somebody from Fuel Processors had in fact disturbed those particular materials.

Wall: No.

Pause.

Olson: With regard to the material outside, can you describe the area that they were in? Actually... the insulation materials that you looked at and that you suspected to be asbestos, were those not contained in a yellow, concrete, bermed area?

Zucker: Were they contained in a concrete walled bermed area?

Wall: Yes.

Zucker: They were so contained?

Wall: Yes.

Olson: And, was that concrete bermed area water tight? Did it hold water and accumulate water to your knowledge?

Wall: I saw a puddle of water on the site.

Olson: And, so did the rainfall into that bermed area accumulate?

Wall: I saw puddles of water...

Olson: Okay.

Zucker: Did it accumulate?

Wall: Yes.

Olson: This... the piping on tanks outside--there was insulation around that piping to your knowledge? And this was--at the time the violation occurred, this was February or March. Given that time of year would you believe that there had been, probably, a great deal of rainfall...

Wall: I don't know.

Olson: Okay. Assuming, since this is Oregon, there would have been... I realize without calling the weather service, you can't say exactly. And, in fact, could those materials have been soaked from rainfall?

Wall: Yes, they could have been.

Olson: Mr. Wall, I'm going to pull out a map on this, which I believe you made after you took... while you took samples at the site, and I'd like you to help me understand this map. I believe it was Attachment No. 5 to your case report.

Wall: Generally, in the cases that I work on, I try and draw a map that describes in a very general way what I found on the site, or I may have found on the site, so that I can keep the area straight. And, I reconstructed part of this from a diagram that I received from West Coast Adhesive that shows where the tanks were located on the site. The lighter shaded areas on this particular diagram depict some of the larger piles of material that I found on the site. It does not depict the smaller pieces of debris that were found in other areas.

Olson: Okay. And, if I look at the legend, it says that the box means that's where you sample.

Wall: That's correct.

Olson: Okay. But, I only see two boxes.

Wall: That's correct.

Olson: Would you explain why that is.

Wall: I did not fill in the building to the north; well, actually, there were three buildings to the north--a large office building, and then two sheds. Two of the samples were taken from one of those sheds.

Olson: And from what material in those sheds?

Wall: A piece of gasket material. Actually, I believe it was two pieces of gasket material. I'd have to look and. . .

Olson: And, going back to my earlier question. Did you specifically ask anybody if those were the materials that Fuel Processors had handled--in the shed...

Wall: In the shed?

Olson: Hu ha.

Wall: No, I didn't, but I didn't assume that those materials were things that Fuel Processors had handled.

Olson: Did those materials turn out to be asbestos-containing materials?

Zucker: I'm going to ask you to back up. I don't understand what has just happened?

Olson: Well...

Zucker: Okay, let me just... I don't think it's just a matter of a map. There were five samples taken; four indicating the presence of asbestos. This map shows sampling at two sites. Okay? We haven't correlated these sites to the samples that were reported, but you are now asking--Had Mr. Wall established in any way that Fuel Processors was involved in the accumulation of the materials at these two sites?

Olson: Well, actually, we hadn't discussed whether he had established whether Fuel Processors had accumulated these materials. I was asking him, since there are only two sampling sites

shown on this map, my question was: Where were the other three samples taken? And, his answer was: In the shed. No? Correct me if I am wrong.

Wall: Two of the samples were taken in the shed.

Olson: Okay, and there was a fifth. Where was that taken?

Wall: The fifth sample was taken from the material that surrounded the boiler.

Olson: And, was that found to be asbestos-containing material?

Wall: No, it wasn't.

Olson: Okay. So, if we are identifying just the materials that you sampled that you knew that Field Processors had worked with, we are talking just about these two samples right here, is that correct?

Wall: That is correct.

Olson: And, can you tell me what the results were from those two samplings?

Wall: I'll have to look at the analysis.

Olson: The lab analysis?

Wall: Yes.

Pause.

Zucker: While he is looking, I would like to mark this map.

Olson: It has some handwriting on it that...

Zucker: And now, did you say that there is no objection if she wishes to offer it?

I'm going to mark it as Exhibit 5 and admit it.

Now, let's go off the record for a moment.

Pause.

Olson: Mr. Wall, I'm going to ask you a question that I'm hoping you can help me with? Did you take a picture of every sample site? Do you recall?

Wall: I don't recall. I would have to look at the pictures...

Olson: Okay. That might help clarify it.

Silver: Why don't you look through these pictures, Mr. Wall? I notice that some of them have pictures of sample bags on them--see if that helps--see if that answers the question.

Pause.

Wall: Okay. Sample No. Z3006 is the south... yes, in the southern portion of this diagram.

Olson: Maybe we should have you just write on the diagram, that might...

Zucker: 3006 is which number on your list to the lab, your sample list?

Wall: It is sample No. 1.

Zucker: Okay. Now, would you mark on Exhibit 5, in this red pen, a No. 1 next to the pile from which you extracted a sample of No. 1. Thank you.

Olson: And, is there a picture of that pile in these photographs?

Wall: That's a portion of the pile.

Olson: This is not the whole pile.

Wall: No, it's not the whole pile.

Olson: Do you recall how large that pile was?

Wall: The thing that is difficult about it is that it was strewn over, as you can see, a fairly large area--and, it is medium large?

Olson: Do you recall how many different types of materials would have been in there?

Wall: In that particular pile, I sampled the material that I thought contained asbestos and

most of the pile, at least three quarters of it, contained similar material.

Olson: But you took only one sample from this pile?

Wall: That's correct.

Olson: Then, why don't we go to the next one?

Wall: Sample No. Z3007, the west end of the boiler building, I call it the structure that held the two tanks on the boiler...

Zucker: Yes.

Wall: And that would be the second sample on my list here.

Zucker: Would you mark No. 2 on your diagram next to that pile?

Olson: And, do you have a picture of that sample?

Wall: Now, that's a picture of the material that the sample came from, the actual insulation.

Olson: This is the main pipe, or is it just a...

Wall: A portion of the main pipe that was in sight.

Olson: And, going back to my earlier question, do you know if Fuel Processors worked on or worked with this pipe?

Wall: No.

Olson: Okay. Mr. Wall...

Zucker: Excuse me, is your question whether he knew whether Fuel Processors worked on that pipe, which--you know--I don't know what pipe, you have not shown me the picture and I don't know whether it refers to some pile, and I am having trouble with tying this together.

Olson: I'm sorry, what... Mr. Wall, I'm going to go back and re-ask one of my earlier questions, which is: Which materials, or which piles of asbestos-containing materials in this area do you believe Fuel Processors' worked with?

Wall: I have no reason to believe they didn't work on all of them. The bermed area--that is a difficult question to answer...

Olson: Okay. Do you know if any of these materials--this debris--was present before Fuel Processors came to the site and did their work...

Wall: No, I don't.

Olson: Of the materials that you believe Fuel Processors worked with in the bermed area, how many samples did you take of those materials?

Wall: Two. At the time of the inspection, I believe they had worked on all of the materials.

Olson: And, given the questions I have asked you today where you said that in fact you did not specifically determine that Fuel Processors had worked with the materials in this building, would it be correct to say... I'm sorry...strike that... You have stated that you do not know if Fuel Processors, in fact, worked on or with this pipe that you sampled and is sample No. 2, is that correct?

Wall: Yes.

Olson: Okay. So, with the remaining materials in the bermed area that you testified Fuel Processors handled or worked with, is it correct that you took one sample of all of these materials?

Wall: On the remaining materials, yes.

Olson: Okay. Mr. Wall, could you give me an idea of the quantity of the materials in the pile you associate with sample No. 1?

Wall: ... I know the material was over a fair size area. I suppose it could be considered... I don't know if I can speculate on that.

Olson: Okay. You have several other areas shaded, where you said there were piles of what you suspected to asbestos-containing materials. Did you take any samples from those other piles?

Wall: No.

Olson: So, do you know exactly whether they contained asbestos?

Wall: My experience told me that the material was homogeneous; I do not have the scientific lab analysis to show...

Pause.

Olson: Did he authorize these pictures?

Zucker: No.

Olson: I'll have to do that.

Zucker: How should they be marked?

Olson: This is five, so I would say six and seven.

Zucker: Did you speak of them in some order? There is six, first. Then there is no objection to the admission of Mr. Wall's pictures?

Silver: No, no objection.

Zucker: Admitted as six and seven.

Olson: I have one other picture that I would like to... Mr. Wall, you testified that there is the possibility that a person 60 - 70 feet

away could be exposed to asbestos, airborne asbestos fibers. Is that correct?

Wall: Yes.

Olson: From a point source?

Wall: Correct.

Olson: Would the likelihood of that person being exposed to asbestos fibers be affected by any factors such as wind direction, weather...

Wall: Yes, they could be.

Olson: Did you consider those factors in reaching your conclusions regarding the likelihood of exposure?

Wall: I was unable to confirm the wind direction or weather at the site.

Olson: To your knowledge, has Mr. Dobbs, the manager of West Coast Adhesives, received a notice of civil penalty or a notice assessing civil penalty for any activities that took place out at the site?

Wall: No.

Olson: Okay.

Pause.

Olson: Mr. Wall, based on the scientific evidence, the samples--actually, if you should take the sample that you have of the material in the bermed area, can you tell me exactly how much asbestos-containing material was at that site? Excuse me, that was handled by Fuel Processors?

Wall: No.

Olson: Would it have helped you to have had more samples?

Wall: The Department requires that we find out if there is asbestos at the site. There is no protocol that we use or that is available for us to determine how many samples should be taken at a specific site. There were other factors that prevented me from taking more samples; one of those factors was the fact

that it was a site that had contained some phenols, and there was a concern that exposure to that outweighed getting more samples.

Olson: Okay. I now need to understand--I'm going to ask you a couple of questions. Are you telling me that your job, or that your purpose in going to the site was just to establish the presence of asbestos-containing materials and not necessarily determine the amount of asbestos-containing materials at the site?

Wall: When we do our investigation, to establish the presence of asbestos is the reason for sampling.

Olson: Okay. Mr. Wall, in the Notice of Assessment of Civil Penalty, the Department has alleged that there were large amounts of asbestos-containing materials, and based the class of violation, the magnitude of violation, both I believe, on the large amounts of asbestos-containing materials that were at the site; and I'm trying to determine how the Department concluded if there were large amounts of asbestos there.

Wall: Both from the samples and from my experience in the industry, my experience in the field--I have been on many investigations and have found that these materials that are homogeneous in the era that this facility was built and used, contains asbestos, and it was my opinion and experience that said that there were large amounts of asbestos at the site.

Olson: Did you ask Mr. Dobbs whether there had been repairs or replacement of insulation materials on the pipes in, say, the last ten years?

Wall: No.

Olson: Okay. Mr. Wall, from looking at two pieces of insulation sitting side by side--actually, from just looking at a piece of insulation, can you tell whether there is asbestos in that insulation?

Wall: No.

Olson: What would you have to do to determine that there is actually asbestos in that insulation?

Wall: Lab analysis is the usual method for that determination.

Pause.

Olson: How tall was the berm around the concrete area?

Wall: Somewhere between two and three feet, and it didn't totally enclose the concrete area.

Olson: How much of the concrete area did it enclose?

Wall: To my recollection, approximately three-quarters of the concrete area.

Olson: Mr. Wall, did the few people you dealt with from Fuel Processors cooperate with you in your investigation?

Wall: They answered all the questions that I asked of them.

Olson: Did they also send you letters, further answering questions?

Wall: Yes, I requested statements, and they sent them to me.

Olson: To your knowledge, was Fuel Processors ever contacted and given the opportunity to correct the violation?

Wall: I really don't know.

Pause.

Olson: Okay, I have no further questions.

Zucker: Okay, I would like to pause for a moment and ask... I would like to discuss the issues in the case with you. And, I think the easiest thing would be not to have witnesses available; it doesn't involve the witness, and it may make it cleaner. So, if anyone is going to testify, I would appreciate their taking a walk. We are now off the record--I intended that to be off the record.

Pause.

Zucker: Okay, so continuing.

Silver: Mr. Wall, were you able to sample any of the pipe insulation that Fuel Processors removed?

Wall: I sampled pipe insulation on the bermed area.

Zucker: Okay, stop. Let me understand what's asked and what's answered and get control of it. So the question is--Did you sample pipe insulation material and test it, or...

Silver: Let me start over. Did you sample any pipe insulation that Fuel Processors removed? You may answer 'yes' or 'no' to that.

Wall: The answer's 'yes.'

Silver: Did you... You mentioned that there was the insulation on the bermed area. Do you know who put the pipe insulation there?

Wall: According to my investigation, it was a Fuel Processor's employee.

Silver: Did you sample that material from the berm?

Wall: Yes.

Silver: Did you get a result back from the laboratory?

Wall: Yes.

Silver: What did that laboratory sample show?

Wall: It showed positive for asbestos...

Silver: I'm not going to ask anything further.

Zucker: I appreciate that; that really is what I needed to have. May we just ask him how he knew that it was... his investigation revealed--what does that mean?

Silver: Didn't you say, your investigation...

Zucker: What did you mean...

Chuckles from the group.

Zucker: I think you showed prudence as well, but excuse me...

Silver: How did your investigation reveal that, that...

Wall: An interview with the a Fuel Processor employee named Dan Goodyear said that Fuel Processors removed the tank insulation off the tanks in the bermed area.

Zucker: Thank you very much.

Olson: Could I follow that for second...

Zucker: Certainly.

Silver: Could I ask one more question before you do, please.

Olson: Certainly.

Silver: If a pile of material--small, large, medium, bigger than a bread box--contains asbestos, how do you treat the total pile?

Wall: We treat it as containing asbestos material.

Silver: Is there any reason for treating the whole pile of asbestos...

Wall: Once the contamination has happened, there is no way to separate the contaminated material

from the other material because of the way the asbestos fibers migrate.

Silver: I'm going to stop this... go ahead.

Olson: The one pile that you sampled in the bermed area, do we know for a fact that anything other than the sample--the material that you sampled--say the material that was in the bag that you sent to the lab actually contained asbestos?

Wall: I guess I don't understand the question.

Olson: You have identified through laboratory analysis that the material in the bag that you sent to the lab contained asbestos.

Wall: Correct.

Olson: ... and you... so, can you tell me, did you have lab samples done on any other samples in the bermed area?

Wall: No.

Olson: That's all I have.

Zucker: Thank you very much. Do you have anything further?

Silver: No more witnesses, Ms. Zucker, I would ask... that the Department would take official notice of OAR 468.877.

Zucker: 468...

Silver: .877.

Zucker: Is that the...

Silver: It's the legislative findings... and with that we have nothing further to comment.

Zucker: Okay. There has been that request.

Olson: No Objection.

Zucker: Okay. What number was... what sample number was the sample from the bermed area?

Wall: Z3006, I believe.

Zucker: The first one.

Wall: That was the first.

Zucker: Okay. Thank you very much. And no other witnesses?

Silver: No further witnesses, Ms. Zucker.

Olson: We would like to call Mr. Richard Crouse, please.

Zucker: He's warmed it, Mr. Crouse.

Administration of Oath.

Olson: Mr. Crouse, could you tell me what your present employment is?

Crouse: I'm President of HAZCON, Incorporated.

Olson: And what does that company do?

Crouse: We are an industrial hygiene and environmental consulting firm.

Olson: And what is your position with that company?

Crouse: I am President.

Olson: And how long have you been with that company?

Crouse: Since April of 1986.

Olson: Can you give me a brief description of your former employment?

Crouse: I worked for the Accident Prevention Division of the Workers' Compensation Department for approximately two years as an industrial hygiene compliance officer. And then I worked for SAIF Corporation as an industrial hygienist consultant and as the manager of the Industrial Hygiene Department SAIF Corporation, and then I worked for a risk management consulting firm as an industrial hygiene consultant. Following that I formed HAZCON Corporation.

Olson: Are you a member of any professional organization?

Crouse: Yes, I am a member of the American Hygiene Association, and I am a board certified

industrial hygienist by the American Board of Industrial Hygiene.

Olson: Could you describe to me what a certified industrial hygienist--what qualifications and what testing protocol is required to receive that certification?

Crouse: To be a certified industrial hygienist, you need to have a college degree in a scientific background, plus five years of experience practicing industrial hygiene and complete two days of examination.

Olson: Mr. Crouse, I am going to hand you what I believe is your resume, and I'd like you to show it to Mr. Silver, and also to...

Zucker: I wish you would show it to Mr. Silver...

Silver: Is this all true, Mr. Crouse?

Crouse: Yes.

Chuckles.

Zucker: I'm sorry, just a moment.

It's Exhibit 8, thank you.

Olson: Mr. Crouse, did you perform an investigation regarding the DEQ's Fuel Processors Notice of Assessment of Civil Penalty?

Crouse: Yes, I did.

Olson: And did you generate a report as a result of the investigation?

Crouse: Yes.

Olson: Okay. I'm going to hand you a copy of that--what I believe is that report, and I would like for you to identify that for Mr. Silver and for Ms. Zucker.

Crouse: Yes, this is my report.

Silver: Is that the report that you shared with me? I have already seen the report.

Zucker: You want me to mark it?

Olson: Yes.

Zucker: That's Exhibit 9? You want me to hold on to it?

Olson: Actually, I'll be talking to him about it, but then he can give it back to me.

Olson: Mr. Crouse, what did you do... what steps did you take to inform yourself of the issues and facts regarding this case.

Crouse: I visited the Department of Environmental Quality offices to review the file on this particular case. I spoke with Mr. Bill Briggs, Mr. Dale Poor and Mr. Gale Goodhu of Fuel Processors, Inc. I spoke with Mr. Bill Dobbs of West Coast Chemical and Mr. Jim Barnes of Cascade Maintenance and I also drove out to visit the site.

Olson: Okay. Mr. Crouse, I'm going to you about... ask you questions about the likelihood of public exposure in light of the conditions that were present at the site. Can you tell me if... actually, as a certified industrial hygienist, is it within your expertise to

assess the likelihood of public exposure to airborne asbestos fibers?

Crouse: The principle job of industrial hygiene involves the recognition, evaluation and control of occupational health hazards and within that evaluation would be sampling air--air and light to determine the concentrations of the contaminants.

Olson: Okay. When you were employed by SAIF Corporation and by the State of Oregon, did you do those types of analyses?

Crouse: Yes.

Olson: Okay. Do you currently teach classes on asbestos--I believe it's asbestos - State of Oregon and State of Washington Asbestos Program?

Crouse. Yes. Our firm has licensed, accredited classes for teaching asbestos workers and asbestos supervisors in both states, and I am an instructor that teaches parts of those classes.

Olson: Okay. In assessing the likelihood for public exposure to asbestos fibers at a site, what are the factors that you would consider?

Crouse: I would consider the condition of the material, the degree of friability, the degree of wetness, the direction of the wind, the proximity of...

Olson: Okay. And did you investigate each of those factors when reaching your conclusions regarding the likelihood of public exposure at the site?

Crouse: Since I was investigating long after the case had occurred, I interviewed two people who tried to contribute... I did talk to the National Weather Service to find out the weather conditions during that time frame. I talked with people who had been on the site, who worked with those materials and knew the condition of those materials.

Olson: Okay, and what were your findings regarding the conditions of those materials?

Crouse: I spoke with Mr. Dan Goodhue and he identified himself as being one of those who actually did removing of materials on the site, disturbing the insulation materials, and I asked him the condition of those materials, and he said that they were piled on the ground and were saturated and in a wet state. I also asked him what was the condition of those materials as they were on the pipes as they were being removed, and he said they were also in a saturated state at that time.

Olson: Okay. And is that consistent with the information that you received from the National Weather Service?.

Crouse: Yes, it is. There was a long period of days that Fuel Processors was on site and there were varying rainfall amounts that had accumulated. In my letter I had asked Mr. Goodhue when during the process, how... what length of time, what was the time frame when they actually disturbed the material and he told me it was more toward the end of their activities on the site which corresponded to the days that there was actually rainfall.

Olson: Okay.

END OF SIDE B (Tape 1)

TAPE 2 SIDE A

Olson: Did you talk to Mr. Dubbs, the manager of West Coast Adhesives, regarding the presence of asbestos on the site?

Crouse: Yes. Yes, I did.

Olson: And did you ask him how much asbestos he believed was on site?

Crouse: Well, I asked him, not in exactly those words; I asked him if he had noted any survey for such material on the site and he said he was not aware of any survey that had been done. I asked him if any materials covering the pipes had been replaced, and he responded that he had been involved at the plant since 1977 and he estimated that somewhere between 60 and 70% of the pipe insulation had been replaced since he had been involved in the plant.

Zucker: 1970?

Crouse: 1977.

Zucker: Okay.

Olson: Okay. I'm going to take you back a moment. Mr. Wall had testified that with older industrial facilities it is sometimes quite likely that there would be asbestos-containing materials at those facilities. Is that correct?

Crouse: Yes.

Olson: And, did you ask Mr. Dubbs that question to find out if in fact there had been asbestos-containing materials at that facility earlier, had they been replaced, subsequent, there is no asbestos-containing material. That was not a very artful question.

Mixed responses.

Olson: What I'm trying to determine here is... when Mr. Dubbs said that 60 to 70% of the insulation materials had been replaced within

the last 13 years, why was that important to your investigation?

Crouse: Well, it is important because with the type of insulation that was used it is thought that asbestos was used as part of the insulation. The newer types of insulation would most likely not have asbestos materials within them.

Olson: So, it was Mr. Dubbs' statement that at least 60 to 70% of the materials at the site were not asbestos.

Silver: I think I'm going to object to that, Ms. Olson. I think the testimony was that 60 to 70% of the pipe insulation was replaced, and not necessarily replaced with non-asbestos material.

Zucker: Would you like for me to respond?

Olson: That's fine. Was it Mr. Dubbs' statement that 60 to 70% of the insulation material at the plant had been replaced since 1977?

Crouse: Yes.

Olson: And, cam you tell me--after 1977, were asbestos-containing materials used for insulation in the United States?

Crouse: No. In that time frame (inaudible)...

Olson: So after 1978, you would not have expected insulation materials to contain asbestos.

Crouse: No.

Olson: Mr. Crouse, based on your investigation, what are the factors that you would take into account with regard to the likelihood of public exposure? In your opinion was it likely or unlikely that there would be public exposure as a result of the conditions associated with Fuel Processors' activities at the site?

Crouse: ..... saturated..... (inaudible) it is unlikely that there would be public exposure.

Olson: Mr. Crouse, with regard to the sampling protocol followed by Mr. Wall at the site, if you were attempting to identify whether

asbestos-containing materials were on the site, would you have done what Mr. Wall did, which was to take random samples?

Crouse: ... (inaudible) take suspect material and sampled that--that would have been my approach.....(inaudible)... I would look for what I thought to be the most suspect material and sample it.

Olson: What would you do if you were attempting to prove how much asbestos material was on site?

Crouse: Again, I would have to look carefully at the pile and try to plug samples from each material that was somehow distinctive in nature, whether it be the diameter of the insulation, or slightly different texture, or slightly different color try to take samples from each of those materials.

Olson: Okay. And, given your review of the records and listening to Mr. Wall answering questions today, is it your understanding that Mr. Wall followed that type of protocol? The protocol that you would have followed if you were going

to attempt to determine the amount of asbestos at the site?

Crouse: No.

Pause.

Olson: Mr. Crouse, in your experience, is there any way short of lab analysis to positively identify materials as asbestos-containing?

Crouse: No.

Pause.

Olson: In your discussions with Mr. Goodhue and Mr. Poor, did you ask them whether they believed they had created any dust or friable asbestos from their activity?

Crouse: Yes.

Olson: And what did they say?

Crouse: They said the material was still wet and they didn't observe any dust coming out.

Olson; Mr. Crouse, you talked with Mr. Dubbs and Mr. Briggs, what is your understanding of the actions taken by Fuel Processors before beginning this project with regard to the possibility of asbestos?

Crouse: We did a review of the file...it was mentioned that... we talked with him because we had asked Mr. Dubbs if there was asbestos materials on the site. Mr. Dubbs did not recall that conversation.

Olson: Okay. And what is your understanding of Mr. Dubbs' answer to Mr. Briggs, when Mr. Briggs asked if there was asbestos on the site?

Silver: I thought he had answered that he didn't recall the conversation.

Olson: No, he said that Mr. Dubbs didn't recall the conversation.

Zucker: And what are you asking him?

Olson: What we are trying to determine is... what I am discussing here is negligence.

Zucker: I understand.

Olson: ... the appropriate action. Do you know if Mr. Briggs asked Mr. Dubbs... Did Mr. Briggs tell you that he asked Mr. Dubbs whether there was asbestos on the site?

Crouse: Yes.

Olson: And from your discussion with Mr. Briggs, what was Mr. Dubbs answer?

Crouse: That there was asbestos on the site.

Olson: Was that a reasonable inquiry for Mr. Briggs to have made?

Crouse: Yes.

Olson: And do you feel it was reasonable for him to rely upon Mr. Dubbs' answer in that instance?

Crouse: It's difficult for me to answer. From my own experience and knowledge, if someone told me that some asbestos was present or not, I would want to have some documentation, then I am not in the business of ascertaining his

position. If I were to put myself in this position, I would say yes... (inaudible)

Olson: So if you were in Mr. Briggs' position, you would... given Mr. Briggs' position, you believe that his inquiry was reasonable.

Crouse: Yes.

Olson: I am going to just quickly go through a couple of the items on your report... which we will introduce as an exhibit. With regard to the children playing near the site. When you visited the site, did you see any children?

Crouse: No.

Olson: Next to the houses or around the site?

Crouse: No.

Olson: And from your review of... well, from your visit to the site and your examination of aerial photographs, can you tell me what the distance was from the area where the children were alleged to have been playing to the concrete bermed area?

Crouse: Well, from reviewing the files, I have become aware ... but having viewed the photograph-- a scale of the photograph taken -- the corner of the apartment -- 50-70 feet from the houses.

Olson: Okay. And given the -- given your understanding of the conditions at the site, at that point in time--the weather conditions and everything else you discovered through your investigation, do you believe that it was likely or unlikely that there would have been public exposure to airborne asbestos--to people, say--between those houses across the street?

Crouse: I would say they would unlikely have public exposure to asbestos fibers.

Zucker: That people would unlikely...

Crouse: Unlikely.

Olson: Mr. Silver-- or, actually, I'm sorry...

Zucker: That's fine.

Silver: Mr. Crouse, I think I have a few questions, because...(inaudible)... but I want to get a better understanding of what you are basing your opinion on. Did you actually see the piles of material at the site that is claimed to have been soaked with water?

Crouse: No, I had photographs.

Silver: Were you on the site when the actual salvage operation took place, do you remember all the tanks...

Crouse: Yes.

Silver: Your testimony is based upon viewing of the pictures? Is that correct?

Crouse: It is based on viewing of the pictures and...

Silver: And the pictures that you viewed, were they the pictures of the Department of Environmental Quality?

Crouse: Yes.

Silver: You mentioned that you discussed whether this material was wet. I think your testimony was that the employees at Fuel Processors told you it was wet.

Crouse: Yes.

Silver: Does that come as any real surprise to you that the people who removed the material and took off the insulation would claim that it was wet?

Crouse: Inaudible.

Silver: But, wouldn't it be to their advantage to tell you that it was wet rather than dry?

Crouse: Yes.

Silver: I think you also indicated that you had talked to Mr. Dubbs about replacing the insulation, and I would like to get this straight. I think your testimony is that he estimated approximately from 50 to 70% of the insulation be replaced. (In 1977)

Crouse: Yes.

Silver: He did not tell you, however, that it was not replaced--that it was replaced with non-asbestos insulation, did he?

Crouse: Yeah, ... inaudible

Silver: Mr. Briggs, I guess, was going to inquire of Mr. Dubbs whether there was asbestos present. Is that what you testified to?

Crouse: Yes.

Silver: Is that what you testified to? Then tell me, do you recall Mr. Dubbs saying--What did Mr. Dubbs imply to Mr. Briggs, what did he imply? Do you remember?

Crouse: Yeah. Inaudible.

Silver: Mr. Dubbs implied he could not recall whether or not he was asked whether asbestos was present?

Crouse: Yes.

Silver: Asbestos is a pretty serious matter, isn't it, Mr. Crouse, and whether or not it is present on a given piece of property is a pretty serious matter.

Crouse: Yes, it is.

Silver: Did you ask Mr. Briggs if he had any documentation that he made the inquiry whether the asbestos was present?

Crouse: Yeah...

Silver: Did you ask Mr. Briggs whether he had any documentation that he asked whether or not asbestos was present?

Crouse: Inaudible.

Silver: Did you see the contract between Mr. Briggs and Mr.-- I think it's Dubbs of West Coast, isn't it?

Crouse: Yes. I can verify that from the file.

Silver: Were there any recitals, or were there any

provisions dealing with asbestos in the contract?

Crouse: I didn't observe any ... inaudible

Silver: Inaudible... Wouldn't it reasonably... Wouldn't it have been appropriate for Mr. Briggs to ask for samples to be taken of the pipe insulation from Mr. Dubbs prior to removing the tank?

Crouse: Inaudible...

Silver: Are you only saying that you are an industrial hygienist, is that what you are saying?

Crouse: Inaudible...

Silver: Yes, wouldn't it... Given that this is 1990, isn't it reasonable that businessmen... would ask for documentation that there is no asbestos present prior to engaging in salvage operations? Is that totally unreasonable to expect?

Crouse: It is not unreasonable to expect, but quite

common, because we get involved all the time with situations after the fact... inaudible...

Silver: I think that... would you agree that it is foreseeable that there may be asbestos pipe insulation?

Crouse: Yes.

Silver: Just a couple more questions, Mr. Crouse. I know that you have looked at the meteorological data from the airport, and I know that you have had conversations with them.

Crouse: Yes.

Silver: Am I correct in my basic assumption that these are the official statistics of the rainfall at the Portland Airport?

Crouse: Yes.

Silver: And they are not necessarily statistical measures of rainfall in other parts of the city?

Crouse: Yes.

Silver: So, the rainfall at the airport would be more or less that at any other place?

Crouse: Yes.

Silver: If the airport is on NE... well, 5420 NE Marine Drive, which I believe is on the Columbia River?

Crouse: Yes.

Silver: ... the location of this site was in northwest Portland...

Crouse: Yes.

Silver: ... which is quite a distance away from the airport. We have really no way of knowing how much rainfall there was at this site, as established near the Portland Airport. Is that an accurate statement?

Crouse: Inaudible...

Silver: Spoken like a true scientist. Your testimony, Mr. Crouse... I think your testimony, Mr. Crouse... I think your testimony was that it was unlikely that the asbestos fibers (excuse my layman's language) would travel airborne 50 to 60 feet away, because they were wet-- because the material was wet. Is that in essence what you...

Crouse: I would say that because the material was wet it is more unlikely that it would become airborne... inaudible...

Silver: If... your testimony is that if it is wet it is less likely to become airborne?

Crouse: Yes.

Silver: But, you don't know how wet the material was, is that correct?

Crouse: I can only base my opinion on the conversations I had with Goodhue.

Silver: I have to ask you this. In your judgment as an industrial hygienist and based on your

experience, is rainwater effective enough in wetting asbestos-containing material?

Crouse: The rules and regulations for asbestos require wetting of the material. This is not a typical situation, and typically... inaudible... is done in buildings and wherever else...the materials are dry to begin with, and you have to wet them to speed the process and remove them. In that case if you take the material, and you don't pry it and put it with water, it is very difficult to saturate that material until it is thoroughly wet and you will have airborne material... inaudible... broken up into little parts. It seems to me a different situation where it has been out doors for a long period of time... inaudible ... saturated or not, you can still remove it from the pipes.

Silver: You know, it's almost like God's on the side of the respondent, and he made it rain, doesn't it?

Crouse: Yes.

Silver: The salvage operations apparently took place between February 26, 1990 and March 9, 1990, at least that is what everybody seems to agree upon. According to the letter data--I think that you looked at the same weather data that the Department looked at... there doesn't seem to be any rain at all on the 26th of February, 27th of February, 28th of February, and with no rain a number of days before those dates; I think your report indicates there may have been a trace of rain on March 2, and then we got a good dose of rain on March 3.

Crouse: Yes.

Silver: You don't know when the tanks were removed, and the insulation removed, yourself; you are basing that on what, I guess, Fuel Processor employees told you...

Crouse: Yes, Mr. Goodhue's conversation.

Silver: Now, if for example some of these salvage operations took place on the days that there wasn't any rain, would you agree that there would be more of the likelihood of public exposure to airborne asbestos fibers?

Crouse: Yes, if the materials are dry that would increase the likelihood of public exposure.

Zucker: That actually isn't the question he asked you, so why don't you ask again?

Silver: I forgot, I...

Zucker: Its if the actual activity--salvage activity--took place on the day when it did not rain--on one of the non-rainy days. Would that fact increase the likelihood of exposure?

Crouse: Yes, I guess... my answer would be that if the material was wet on the pipes, it may not have made a difference. If the material was dry on the pipes, then it would have made a difference.

Zucker: Okay.

Silver: But, I guess my question is that since there was no rain on those days, there would be no reason for the insulation to be wet, would there?

Crouse: I guess I can't comment on how long asbestos will remain wet on a pipe...

Silver: I guess what I am trying to ask at, Mr. Crouse, maybe, maybe. You will have to bear with me, I'm not very good at this kind of thing. There was no rain on March 26, March 27, March 28, there was no rain... excuse, me -- February 26, February 27, February 28, March 1 there was no rain and March 2 there was just a trace of rain. Then the chronological data indicates that there was no rain from the 20th of February on. Well, if there is no rain during those periods of time, and the salvage operation took place during this period of time, logically, and maybe I'm incorrect--I'm just assuming none of that material was wet.

Crouse: I can't say that I can comment. I don't know...

Silver: Am I making an unreasonable assumption as a layperson?

Crouse: I really don't know.

Silver: That's fine. You were very honest with me, and that's all I can... You know, I don't like to get into this, because I just don't understand ...

Zucker: Careful, Mr. Silver, we're going to believe you.

Silver: Well, it's true. If... I think you indicated there is some protocol for identifying the quantity of material. Is there a protocol that you follow which will enable a person to quantify the amount of asbestos material in a pile?

Crouse: Inaudible.

Silver: I guess... What I am asking, where would you find such protocol?

Crouse: Inaudible.

Silver: So if Mr. Wall went to some asbestos sampling volume, he would not find the protocol that would enable him to determine the quantity of asbestos-containing material, would he?

Crouse: Well, the protocol for ... inaudible ... but none that I know of -- protocol for determining piles of debris.

Silver: I guess one final question, Mr. Crouse. Is any scientist ever satisfied with the number of samples they take?

Crouse: I would probably say no.

Silver: Thank you very much, you were very kind and generous in answering some of these questions that were bothering me. I appreciate that. I have nothing further of the witness, Ms. Zucker.

Olson: I have ...

Zucker: See if you would like to undermine whether he was kind and helpful-- go ahead.

Olson: Mr. Crouse, when you reviewed the DEQ files, did you review Attachment No. 11 to Mr. Wall's police report, which was, I believe, a letter dated March 19, 1990 to David Wall from ... Bogard (?)

Crouse: Yes. You keep on finding things that I don't know exist.

You got that...

Silver: I have no objections.

Olson: I'm going to offer that as an exhibit.

Zucker: I'll mark it 10 and admit it?

Just a minute... Go ahead.

Olson: Mr. Crouse, could you read for me the last paragraph in that letter?

Crouse: Yes, some weeks prior to the sale, around 2-6-90, Mr. Briggs had originally expressed interest in the boiler, only. At that time, Mr. Briggs could have inquired about the possible presence of asbestos insulation around the boiler. I don't remember this possibility, but it could have been --there is a work I cannot read--

Olson: I believe the word is "mention', but that is my reading.

Crouse: It does look like "mention". Other than that, I did not mention the possibility of asbestos being present. I don't believe that either party was openly aware that an asbestos problem existed. Very truly yours, _____ _____.

Olson: Okay. Mr. Crouse, in speaking with Mr. Goodhue and Mr. Poor and reviewing Mr. Wall's case notes from his interview Mr. Goodhue and Mr. Poor, do you have any reason to believe they were any less than truthful in their discussions with you?

Crouse: No.

Olson: No further questions.

Zucker: Anything further?

Silver: Nothing further, Ms. Zucker.

Zucker: Okay, thank you. And do you want him to remain?

Olson: Actually, I think we are going to be done in five minutes, so I'd like to... inaudible ...

Zucker: He may not be able... okay.

Olson: I would like to call Mr. Briggs, please.

Zucker: Okay, that's fine. Would you come around that way?

Briggs: Yes. I'll get up close.

OATH ADMINISTERED.

Olson: Mr. Briggs, would you state your full name and occupation, please?

Briggs: Wilmer Lee Briggs, and I am President of Fuel Processors, Inc.

Olson: Okay. Mr. Briggs, what is your business? What business are you involved in?

Briggs: I am in the recovery of used oil and making it into fuel...

Olson: Have you ever been in the business of asbestos removal or building demolition?

Briggs: No.

Olson: Did you at some point in time become aware of the West Coast Adhesive site and the possibility that there was equipment for sale there?

Briggs: Yes, I did.

Olson: And did you then talk to a Mr. Dubbs about purchasing equipment from that site?

Briggs: Yes, I heard from a contractor who was already working on the site, Lockwood Industries, that the tanks and boiler were for sale. I then went to the site and met Mr. Dubbs and walked through the site with him to determine what he wanted us to sell and what he wanted to do. At that point, he says to me that he would rather sell the whole operation in tact, complete--property and all. I determined from him that the property was leased from Pacific... or from Burlington-Northern Railroad. I then made contact with

Burlington-Northern to determine if they would lease the property to us so that we could operate the plant in tact with that operation. While I was on the site, I determined that Mr. Dubbs had approximately 30,000 gallons of water stored in the tanks, and it was lightly contaminated with phenol. I determined that they had been pumped from the site inside bermed areas, which while I was there, the observation was there were six to eight inches of water in the cement bermed areas where the insulation and tanks were determined. There was no outlet in the bermed areas. The water is pumped with a sump into the existing tanks so that it is properly disposed and handled of and so that there is no possible way that the water would get inside. I then asked Mr. Dubbs if that was something we could help him with and at that point he had asked to bring in three environmental consultants on site; two were on there the day I was there...

Olson: Do you know what company they were from?

Briggs: One was from Chempro and one was from _____ Rogers. The tanks were being orderly cleaned by an outside contractor who

had had to break some of the lines, and had to open all of the tanks in order to be able to properly clean the material and remove it to barrels that were on site, inside bermed areas--in the bermed areas--and then the barrels were sealed and they were removed as part of the environmental remediation at that site. I am aware of that. In my conversations with the railroad, I am aware that the site was under scrutiny environmentally, and that was one of our concerns that it had to be a clean site before we could operate it.

Olson: And did you at some point arrive at an agreement to purchase some of the equipment from Mr. Dubbs that was on the site?

Briggs: The agreement was actually written in such a way-- the first agreement was actually written in such a way that we could either operate it or we could remove the equipment that we wanted which was basically the boiler and the tanks.

Olson: Okay. And what did you actually wind up

doing? You had a choice, what did you end up doing?

Briggs: Birmingham-Northern would not renew the lease with for him or would not lease the property to anybody with any environmental concerns; therefore, we had to remove the equipment from the site with a demo, of which the demolition contractor had been there, the first day I was there and was given the bid on demolition.

Olson; Okay. Did you... And so at some point you agreed to simply purchase equipment and then remove it from the site.

Briggs: After Birmingham-Northern had said we could not lease the property.

Olson: And, during those conversations when you were negotiating the purchase of that equipment, did you walk through the site?

Briggs: Yes.

Olson: And, did you ask Mr. Dubbs if there was any asbestos on any of the piping or equipment?

Briggs: Yes, I asked him if there were any asbestos problems on the site, and he said no.

Olson: Okay. And-- how many times were you out at the site before Fuel Processors performed any work on the site?

Briggs: I was there probably four times, plus a couple Saturdays, to walk through the equipment, to see if it would fit my needs. And that was prior to our final document which gave us the right to buy that.

Olson: And, as you were walking around on the site, did you observe water contained in the concrete bermed area?

Brigs: Yes. Mostly every time, there was water in it. It had to be pumped with a separate sump pump in the tanks, so you had to physically go get the sump pump, put it in the lower area of the bermed area and pump the water into the tank.

Zucker: You don't know when this is?

Olson: This is-- I'm sorry-- How long-- Fuel Processors actually came on site and removed equipment at the end of February and the beginning of March. Is that correct?

Briggs: That's correct.

Olson: And the site visits that I asked you about earlier were prior to the end of February. Is that correct?

Briggs: I believe it was around the 3d or 4th of February.

Olson: Okay.

Briggs: That was the first visit.

Olson; Okay. And then you visited the site -- how many times between the beginning of February and the end of February?

Briggs: Before we removed it. At least four times. After we began to remove it, I probably visited the site at least three times during the week of removal.

Olson; Okay. And each time you visited the site, there was water standing in the concrete bermed area.

Briggs: No, there was no water. We used the hose to clear the fuel residue to one corner so we could pick it up and put back into the tank. So we had an active hose on the site at all times.

Olson: Okay.

Zucker: Mr. Silver?

Silver: I have no questions of Mr. Briggs.

Zucker: You may be excused.

Briggs: Thank you.

Olson: Did you say you wanted us to stay...

Zucker: Yes, I do. So that is the conclusion?

Silver: That's the conclusion.

Zucker: There is nothing further?

Silver: I think so.

Zucker: Okay. I do want to talk... Do take a break if you need one. But, I do want to talk to you about your views of the aggravating factors, but more importantly, I would like DEQ to tell me something about its proof. So, I think you can decide whether you need your witnesses. I don't expect to take further testimony. Do you want to take a break now?

Silver: Sure. I would love to take a break.

Zucker: Okay. So we are off the record, and how much time should we have?

END OF TAPE B, SIDE A

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

DATE: February 7, 1992

TO: Environmental Quality Commission

FROM: Linda K. Zucker, Hearing Officer

SUBJECT: Review of the Hearing Officer's Order in
DEQ v Fuel Processors, Inc.,
Case #AQAB NWR 90 81
Agenda Item J, March 12, 1992, EQC Meeting

Enclosed for your review at the March 12, 1992 meeting is the case record which includes the following:

1. Notice of Civil Penalty Assessment.
2. Answer, Affirmative Defense and Request for Contested Case Hearing.
3. Exhibits.
4. February 8, 1991 letter from Fuel Processors.
5. February 12, 1991 letter from DEQ.
6. Hearing Officer's Findings of Fact and Conclusions of Law.
7. Notice of Appeal.
8. Department Exceptions to Hearing Officer's Findings of Fact, Conclusions of Law, Final Order and Judgment.
9. Environmental Quality Commission Findings of Fact, Conclusions of Law and Final Order (Proposed).
10. Respondent's Response to Department's Opening Brief.
11. Respondent's Response to Department's Proposed Findings of Fact, Conclusions of law and Final Order.
12. Respondent's Response to Department's Exceptions.
13. Department Reply Brief.
14. Hearing Transcript.

LKZ:y
HZ102513
Enclosures

811 SW Sixth Avenue
Portland, OR 97204-13
(503) 229-5696

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1390 PHONE (503) 229-5696

May 24, 1990

CERTIFIED MAIL P476 980 156

Fuel Processors, Inc.
c/o Registered Agent
WL Briggs
701 Bozarth St
PO Box 1407
Woodland, Washington 97674

Re: Notice of Civil
Penalty Assessment
No. AQAB-NWR-90-81
Multnomah County

Between February 26, 1990 and March 9, 1990, Fuel Processors, Inc. removed chemical tanks and a boiler from property formerly owned by West Coast Adhesive located at 11104 NW Front Avenue, Portland, Oregon. In the process of removing the tanks, Fuel Processors removed a large amount of asbestos-containing insulation from the pipes connected to the chemical tanks. The asbestos material was stored in several large piles on the property.

On March 10, 1990, a representative of the Department's asbestos section inspected the site and observed asbestos material scattered throughout the property and stored in large piles. He took samples of the material in the piles. Laboratory analysis confirmed that the material contained 25 to 35% Amosite asbestos and 80 to 85% Chrysotile asbestos.

In the course of removing the tanks, Fuel Processors violated the following asbestos regulations listed below which were adopted under the authority of Oregon Revised Statute 468.893(8).

Oregon Administrative Rule (OAR) 340-25-465(6) states that during an asbestos abatement project, the following shall be employed:

> "(a) Remove friable asbestos materials before any wrecking or dismantling that would break up the materials or preclude access to the materials for subsequent removal."

OAR 340-25-465(15) states:

> "Open storage or accumulation of friable asbestos material or asbestos-containing waste material is prohibited."

The site of the tank removal and asbestos storage is located near a residential neighborhood and children were playing within 20 feet of the asbestos abatement project. The violations of the asbestos work practice and storage regulations created the likelihood for public exposure to asbestos and, therefore, the violations are classified as Class I violations under OAR 340-12-050(1)(i) and (j).

Because you violated the asbestos regulations, you are liable for a civil penalty assessment up to $10,000 per day for each violation. In the enclosed Notice of Assessment of Civil Penalty, I have assessed a penalty in the amount of $12,000. In determining the amount of the penalty, I used the procedures set forth in OAR 340-12-045. The Department's findings and civil penalty determination are attached to the Notice as Exhibits 1 and 2.

The penalty is due and payable. Appeal procedures are outlined in Section V of the Notice. If you fail to either pay or appeal the penalty within twenty (20) days, a Default Order and Judgment will be entered against you.

If you wish to discuss this matter, or if you believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, you may request an informal discussion by attaching your request to your appeal. Your request to discuss this matter with the Department will not waive your right to a contested case hearing.

Copies of referenced rules are enclosed. If you have any questions about this action, please contact Holly Duncan with the Department's Enforcement Section in Portland at 229-6742.

Sincerely,

Fred Hansen
Director

FH:hd
Enclosures
cc: Northwest Region, DEQ
Air Quality Division, DEQ
Department of Justice
Environmental Protection Agency

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. Fuel Processors, Inc., a Washington Corporation, Respondent.	)	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. AQAB-NWR-90-81 MULTNOMAH COUNTY

I. AUTHORITY

This notice is issued to Respondent, Fuel Processors, Inc., a Washington Corporation, by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.125 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. VIOLATIONS FOR WHICH A CIVIL PENALTY IS BEING ASSESSED

Between February 26, 1990 and March 9, 1990, Respondent conducted an asbestos abatement project by removing tanks and a boiler from the facility located at 11104 NW Front Avenue, Portland, Oregon, during which the Respondent violated the following asbestos regulations adopted pursuant to ORS 468.893(8):

1. Respondent violated OAR 340-25-465(6) when respondent failed to remove the asbestos materials from the connecting pipes before dismantling and removing the chemical tanks and boiler from the property.

2. Respondent violated OAR 340-25-465(15) when Respondent openly stored asbestos-containing waste material in large piles during the asbestos abatement project.

III. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the following violations cited in Section II:

Violation	Penalty Amount
1.	$6000
2.	$6000

Respondent's total civil penalty is $12,000.

The findings and determination of Respondent's civil penalty pursuant to OAR 340-12-045 are attached and incorporated as Exhibits Nos. 1 and 2.

The penalties are being imposed without advance notice pursuant to OAR 340-12-040(3)(b)(G) as the penalty is for a violation of the rules adopted under ORS 468.893(8).

IV. PAYMENT OF CIVIL PENALTY

The total penalty is now due and payable. Respondent's check or money order in the amount of $12,000 should be made payable to "State Treasurer, State of Oregon" and sent to the Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.

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V. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right, if Respondent so requests, to have a formal contested case hearing before the Environmental Quality Commission (Commission) or its hearings 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 and must be received by the Commission's hearings officer 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 claims or defenses to the assessment of this civil penalty that Respondent may have and the reasoning in support thereof. Except for good cause shown:

1. Factual matters not controverted shall be presumed admitted;

2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or defense;

3. New matters alleged in the "Answer" shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

Send the request for hearing and "Answer" to: **Linda K. Zucker, Hearings Officer, Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for hearing and an "Answer," Respondent will be notified of the date, time and place of the hearing.

If Respondent fails to file a timely request for hearing or "Answer", 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.

Failure to appear at a scheduled hearing or meet a required deadline, may result in a dismissal of the contested case.

May 24, 1990
Date

Fred Hansen, Director

EXHIBIT 1.

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO: 1. (Failing to remove asbestos prior to dismantling the tanks and boiler).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(i) because the violation of the work practice regulation resulted in the likelihood for public exposure. Residences are located and children were playing within 20 feet of the property on which the asbestos was disturbed and the Respondent's activities created a likelihood for public exposure to asbestos.

MAGNITUDE: The magnitude of the violation is major. The Respondent disturbed material containing up to 35% amosite asbestos and 85% chrysotile asbestos from pipes which were connected to the tanks and boiler. Once removed from the pipes, the asbestos material was accumulated in several large piles on the property.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: BP+[(.1xBP)(P+H+E+O+R+C)].

"BP" is the base penalty which is $ 5,000 for a Class I major magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant actions and receives a value of 0 as the Respondent has no prior significant actions as defined in OAR 340-12-030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant actions and receives a value of 0 as the Respondent has no prior significant actions.

"E" is the economic condition of Respondent and receives a value of 0 as there is insufficient information on which to base a finding.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0 as the violation was a single occurrence.

"R" is the cause of the violation and receives a value of 2 as the Respondent was negligent in failing to determine whether the material was asbestos prior to removing the insulation from the pipes.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as the Respondent was neither cooperative nor uncooperative in correcting the violation.

PENALTY CALCULATION:

Penalty = BP+[(.1xBP) (P+H+E+O+R+C)]
= 5000 + [(.1x5000)((0)+(0)+(0)+(0)+(2)+(0))]
= 5000 + [(500)(+2)]
= 5000 + 1000
= 6000

EXHIBIT 2.

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO: 2. (Open storage and accumulation of asbestos-containing waste material).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(j) because the storage of asbestos-containing waste material created the likelihood for public exposure to asbestos. Residences are located and children were playing within 20 feet of the property on which the asbestos was openly stored. The piles of asbestos-containing insulation on the property were within a close enough proximity to the residences that the activity created the likelihood for public exposure.

MAGNITUDE: The magnitude of the violation is major. The Respondent stored asbestos-containing pipe insulation in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained up to 35% amosite asbestos and chrysotile asbestos.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: BP+[(.1xBP)(P+H+E+O+R+C)].

"BP" is the base penalty which is $ 5000 for a Class I Major magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant actions and receives a value of 0 as Respondent has no prior significant actions as defined in OAR 340-12-030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant actions and receives a value of 0 as Respondent has no prior significant actions.

"E" is the economic condition of Respondent and receives a value of 0 as there is insufficient information on which to base a finding.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0 as this violation was a single occurrence.

"R" is the cause of the violation and receives a value of 2 as the Respondent was negligent in openly accumulating the asbestos-containing waste material on the property.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as Respondent was neither cooperative nor uncooperative in correcting the violation.

PENALTY CALCULATION:

Penalty = BP+[(.1xBP) (P+H+E+O+R+C)]
= 5000 + [(.1x5000) ((0)+(0)+(0)+(0)+(2)+(0))]
= 5000 + [(500)(+2)]
= 5000 + 1000
= 6000

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., a Washington Corporation, Respondent.	ANSWER, AFFIRMATIVE DEFENSE AND REQUEST FOR CONTESTED CASE HEARING No. AWAB-NWR-90-81 MULTNOMAH COUNTY

For its Answer to the Department's Notice of Assessment of Civil Penalty ("Notice") dated May 24, 1990, Respondent, Fuel Processors, Inc., a Washington corporation ("Fuel Processors"), hereby admits, denies, and alleges as follows:

I.

Admits that between the dates of February 26, 1990, and March 9, 1990, Fuel Processors removed tanks and a boiler from the West Coast Adhesive facility formerly located at 11104 N.W. Front Avenue, Portland, Oregon.

II.

Except as expressly admitted above, Fuel Processors denies each and every allegation contained in the Notice and the exhibits attached thereto.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

III.

Fuel Processors, Inc., realleges paragraphs I and II, above.

IV.

The Department has failed to state facts sufficient to give rise to a claim for relief against Fuel Processors.

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1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

SECOND AFFIRMATIVE DEFENSE

(Failure to Plead Sufficient Facts)

V.

The Department has failed to provide sufficient information to Fuel Processors to enable Fuel Processors to prepare an adequate defense to the allegations contained in the Notice.

THIRD AFFIRMATIVE DEFENSE

(Inadequate Notice - Failure to Provide Notice of Enforcement Action)

VI.

Fuel Processors realleges paragraphs I and II, above.

VII.

The Department failed to provide timely and/or adequate notice of a pending enforcement action and intent to assess civil penalty for the alleged violations.

FOURTH AFFIRMATIVE DEFENSE

(Improper Penalty Assessment-Amount)

VIII.

Fuel Processors realleges paragraphs I and II, above;

IX.

The amount of the civil penalty the Department seeks to collect in the above-captioned case in cause is inappropriate in that the assessment procedure failed to take into account material mitigating factors, some of which are described below, which were evident to the Department of the time of the assessment and will be presented as evidence at the hearing.

X.

The amount that the Department seeks to collect in the above captioned case and cause is inappropriate in that the Department has failed to properly apply and assess

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Portland, OR 97201
(503) 222-1515

those factors which the Department concludes to have been "aggravating" for the reason that some of the factors are factually inaccurate, some of the factors have been misconstrued by the Department and its personnel, and some of the factors are not, in fact, "aggravating." Fuel Processors will present specific evidence on each point at the hearing to follow.

XI.

Fuel Processors affirmatively alleges the following mitigating factors:

1. Fuel Processors made reasonable and appropriate inquiries regarding the composition of the subject materials.

2. Respondent visually inspected the subject materials prior to removal and confirmed that there was no reason to suspect the presence of asbestos.

3. Respondent has cooperated with the Department and its personnel throughout the Department's investigation of the matter.

4. Fuel Processors was not offered an opportunity to correct the alleged violations before the Department began formal enforcement proceedings.

STATEMENT OF FACTS SUPPORTING FUEL PROCESSORS' DEFENSE

XII.

Fuel Processors specially alleges the following facts, upon which it will rely to disprove the Department's claims and in support of which evidence will be presented at the hearing:

1. Fuel Processors' conduct at the subject premises did not create a likelihood of public exposure to asbestos-containing materials.

2. To the extent that Fuel Processors stored or accumulated asbestos-containing materials, said materials were placed in contained concrete bermed areas on the subject premises.

////

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Portland, OR 97201
(503) 222-1515

3. All materials, including the substances alleged to be asbestos-containing, were exposed to open rainfall during the storage period, which significantly reduced the possibility of airborne dust emissions.

4. All rainwater which accumulated in the concrete bermed area was captured, containerized and shipped to Fuel Processors' water treatment plant for proper disposal.

5. The subject premises is located in a heavily industrialized area, remote from commercial, business or residential surroundings. The area is not heavily traveled by pedestrian traffic and presents the possibility of only limited exposure to the public.

6. The site was isolated from the general public by cable chains placed across the driveway and other points of access.

7. Fuel Processors made all appropriate and reasonable inquiries to determine the content and composition of the material alleged to contain asbestos. Fuel Processors reasonably relied on representations made to it by the owner of the facility regarding the composition of the materials.

8. Fuel Processors, based on lack of sufficient information to form a reasonable belief, denies that the materials removed from the facility contained asbestos.

WHEREFORE, having fully answered the Notice of Assessment in the above-captioned case and cause, Fuel Processors respectfully requests:

1. That a hearing, as provided for in the Notice and in the applicable statutes and rules and the applicable Rules of Procedure, be promptly scheduled; and

2. That the Department take nothing by way of its complaint; and

3. That Fuel Processors be awarded a judgment against the Department for its attorneys fees and costs incurred in this action and such other relief as may be deemed just and proper.

////

////

BOGLE & GATES
1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

DATED: this 3rd of June, 1990.

Respectfully submitted,

BOGLE & GATES

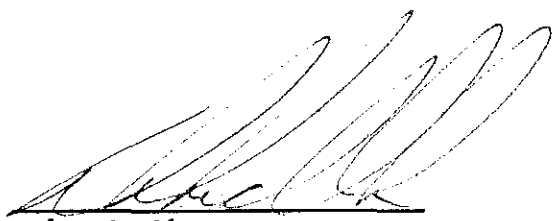
Debra A. Olson, OSB# 86256
Trial Attorney: Christopher L. Reive, OSB# 83305
1400 KOIN Center
222 S.W. Columbia
Portland, Oregon 97201
Of Attorneys for Respondent, Fuel Processors, Inc.

BOGLE & GATES
1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Answer Affirmative Defense and Request for Contested Case Hearing on Department of Environmental Quality of the State of Oregon v. Fuel Processors, Inc., a Washington Corporation, case No. AWAB-NWR-90-81, on the 3rd day of July, 1990, by causing to be hand delivered a true copy thereof, to:

Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97201



Debra A. Olson
Of Attorneys for Respondent

Attachment 7

DEPARTMENT OF ENVIRONMENTAL QUALITY ①
Request for Analysis

LEGAL Case No. 900199

Location/Site: 1104 SW FRONT Date Sampled: 3-10-90 Date Received in Lab: MAR 12 1990

Collected by: DAVID WALL Fund Code: 1432 Date Reported: MAR 20 1990

Purpose: ANALYSIS Report Data to:

Comments:

Item #	Sampling Point Description (include time)	Sample container according to test(s) requested: Nutrients / Basic	DO / BOD	Metals / Organic	Misc. / Misc.	Test(s) Required
1	S.W. Section of LOT				Z3006	ASBESTOS CONTENT
2	WEST END OF BOILER BUILDING				Z3007	" "
3	NE corner of LOT OUT BUILDING				Z3008	" "
4	" " "				Z3009	" "
5	BOILER Jacket				Z3012	" "
6						

State of Oregon DEPARTMENT OF ENVIRONMENTAL QUALITY RECEIVED MAR 22 1990

Laboratory Comments: AIR QUALITY CONTROL

Contact Sample Tracker for proper sampling containers and preservation procedure. (503) 229-5983

Ex 1-1

DEPARTMENT OF ENVIRONMENTAL QUALITY

Laboratories and Applied Research Division
1712 S.W. 11th Avenue, Portland, OR 97201

LEGAL SAMPLE

Chain of Custody Record

Site Name: 100% Last Avenue Co.
Location: NW 6th and Front
Date Sampled: 3-10-90
Time Sampled: 10:30 AM
Collected By: Dawn Wall

Laboratory Number:
Program Code: HED
Date Received: 3-12-90
Time Received: 3:15 PM

Sample Container Information

Container Type/Number	Container Type/Number	Container Type/Number
Poly 1 Liter / Z 3026	/	/
" / Z 3027	/	/
" / Z 3008	/	/
" / Z 3009	/	/
" / Z 3012	/	/
/	/	/

Total Number of Containers Received: 5

Relinquished By: Dawn E. Wall
(signature)

Received By:
(signature)

Initial Placement in Refrigerator # 5 °C

Subsequent Out of Laboratory Transfers:

Relinquished By: (time/date)	Received By: (time/date)

12-1

7/86 DEQ/LB-106

(COPY FOR PERSON WHO BROUGHT IN THE SAMPLE)

DEPARTMENT OF ENVIRONMENTAL QUALITY LABORATORIES
Analytical Records Report

* LEGAL *** TUESDAY MARCH 20th, 1990

CASE NAME: 900199 11104 S.W. FRONT
SUBMITTER: Wall, David E. COLLECTOR: Wall, David E.
FUND CODE: 1432 Asbestos Control

ITEM #	RESULT	UNITS	TEST
001	S.W. Section of lot 03/10/90		
	Attached		Microscopic exam.
002	West end of boiler building 03/10/90		
	Attached		Microscopic exam.
003	N.E. Corner of lot outbuilding 03/10/90		
	Attached		Microscopic exam.
004	N.E. Corner of lot outbuilding sample 2 03/10/90		
	Attached		Microscopic exam.
005	Boiler jacket 03/10/90		
	Attached		Microscopic exam.

DEPARTMENT OF ENVIRONMENTAL QUALITY
LABORATORIES AND APPLIED RESEARCH
INORGANIC/NONMETALS SECTION
MICROSCOPIC TEST RESULTS

****

SITE: 11104 SW Front
LABORATORY NO: 900199
PROGRAM CODE: 1432
COLLECTED BY: David Wall
DATE COMPLETED: March 15, 1990
DATE COLLECTED: March 10, 1990
ANALYST: BVJ

==========

ITEM #	CONTAINER	DESCRIPTION
1.	Z3006	Macro: The sample consists of wet, gray, loose material with obvious fiber content. Micro: The sample contains 35% Amosite asbestos. The remainder is the non-fibrous matrix.
2.	Z3007	Macro: The sample consists of a gray plaster-like material and a deteriorated piece of cloth. Micro: The sample contains 25% Amosite asbestos. It also contain 15% plant fibers. The remainder is non-fibrous.
3.	Z3008	Macro: The sample consists of a 1/8" thick, triangular piece of tough, tan material. Micro: The sample contains 80% Chrysotile asbestos. The remainder is non-fibrous binders.
4.	Z3009	Macro: The sample consists of a 1/8" thick piece of stiff, gray material. Micro: The sample contains 85% Chrysotile asbestos. The remainder is non-fibrous binders.
5.	Z3012	Macro: The sample consists of loose, vermiculite-like material. Micro: No Asbestos found. The sample contains vermiculite.

COMMENTS: Results to D. Wall on 3/14/90. BVJ

ASB00199
BVJ/lotus

F-1

SITE NAME: West Coast Adhesive Co.
DATE:20-Mar-90 TIME:3:30 pm PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of residences from south side of demo site. Across the street from site there are five children that play in the area approximately 20 feet from the adhesive plant.

SITE NAME: West Coast Adhesive Co.
DATE:20-Mar-90 TIME:3:30 pm PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of residences from north side of demolition site.

Ex 2

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1334 PHONE (503) 229-5696

March 21, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P 560 339 588

Fuel Processors, Inc.
Registered Agent
WL Briggs
PO Box 1407
701 Bozarth St.
Woodland, WA 98674

Re: NOTICE OF NONCOMPLIANCE
AQAB-NWR-90-323
Multnomah County

Dear Mr. Briggs:

On March 10, 1990, a representative of the Department conducted an inspection at the former site of West Coast Adhesive Co. located at 11104 NW Front, Portland, Oregon. During the course of this inspection it was found that Fuel Processors, Inc. was contracted to remove all the chemical tanks and the boiler from this site. The process of removing these tanks and the boiler disturbed a large amount of asbestos-containing pipe insulation.

Lab analysis of the pipe insulation showed it to contain 25 to 35% AMOSITE asbestos. Removal of asbestos-containing material must be done by an Oregon licensed asbestos abatement contractor and must be done prior to any demolition work.

The violations committed by Fuel Processors, Inc. employees while salvaging chemical tanks and a boiler are listed below:

Class II violation. OAR 340-25-465(6)(a), remove asbestos-containing materials before any wrecking or dismantling that would break up the materials or preclude access to the materials for subsequent removal.

Class II violation. OAR 340-25-465(15), open storage or accumulation of friable asbestos material or asbestos-containing waste material is prohibited.

Ex 3

Class III violation. OAR 340-25-465(5), written notification of any asbestos abatement project shall be provided to the Department on a Department form. The notification must be submitted by the facility owner or operator or by the contractor in accordance with on of the procedures specified in subsection (a) or (b).

Class of violation pertains to the amount of risk to the public or the environment. Class I is a major risk and Class III is a minor risk.

The Department is very concerned that Fuel Processors, Inc. be able to recognized asbestos-containing material when they encounter it. The business of tank and boiler recovery will bring you into contact with asbestos-containing pipe insulation as well as other asbestos-containing materials on a regular basis. The Department strongly suggests that you get some formal training so that you may more easily recognize suspect asbestos-containing material. Information on training classes may be obtained from the Department.

You need to be aware that violations of the asbestos regulations can lead to civil penalty of up to $10,000 per day per violation. The Department is referring this case to our enforcement section for further investigation and enforcement.

Copies of the above mention rules are enclosed for your information and use. If you have any questions on this matter please contact me at (503) 229-5364.

Sincerely,

David E. Wall
Asbestos Control Analyst
Air Quality Division

DEW:a
ASB\AH3066
Enclosure
cc: Enforcement Section, DEQ
Northwest Region, DEQ
Environmental Clean-up Division, DEQ
Oregon OSHA, Region 1

Dept. of Environmental Quality
RECEIVED
MAR 22 1990
NORTHWEST REGION

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1334 PHONE (503) 229-5696

March 21, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P 560 339 587

West Coast Adhesive Co.
Registered Agent
William Dubs
11104 NW Front
Portland, OR 97231

Re: NOTICE OF NONCOMPLIANCE
AQAB-NWR-90-324
Multnomah County

Dear Mr. Dubs:

On March 10, 1990, a representative of the Department conducted an inspection of West Coast Adhesive Co. located at 11104 NW Front, Portland, Oregon. During the course of this inspection it was found that several lengths of asbestos-containing pipe insulation had been disturbed and piled around the site by Fuel Processors, Inc. Your company contracted with Fuel Processors, Inc. to remove and/or salvage chemical tanks and the boiler on the site.

This is a Class III Violation of the Department's asbestos regulations. OAR 340-33-030(2) states that an owner or operator of a facility shall not allow any persons other than those employees of the facility owner or operator who are appropriately certified or a licensed asbestos abatement contractor to perform an asbestos abatement project in or on that facility. Facility owners and operators are not required to be licensed to perform asbestos abatement projects in or on their own facilities.

Class of violation pertains to the amount of public and environmental risk. A Class I is a major risk and a Class III is a minor risk.

Please be aware that violations of the Department's asbestos regulations can lead to civil penalty of up to $10,000 per day per violation. In the future the Department expects you to conform to all the asbestos regulations.

Ex 4

Copies of the above mentioned rules are enclosed for your information and use. If you have any questions on this matter please contact me at (503) 229-5364.

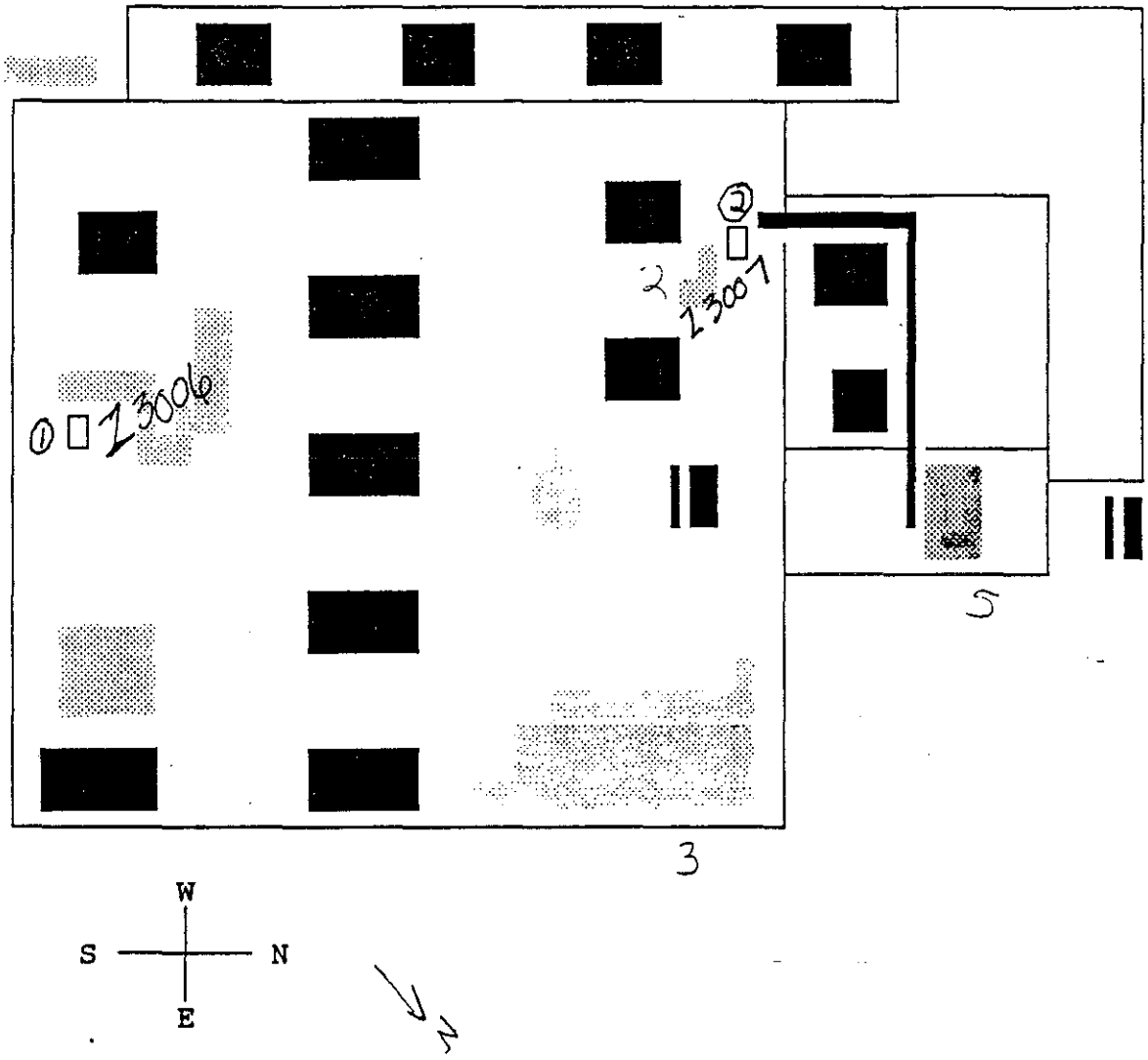
Sincerely,

David E. Wall

David E. Wall
Asbestos Control Analyst
Air Quality Division

DEW:a
ASB\AH3065
Enclosure
cc: Enforcement Section, DEQ
Northwest Region, DEQ
Environmental Clean-up Division, DEQ
Oregon OSHA, Region 1

West Coast Adhesive Co.



Asbestos Contamination Sites.....

Large Tanks.....

Small Tanks.....

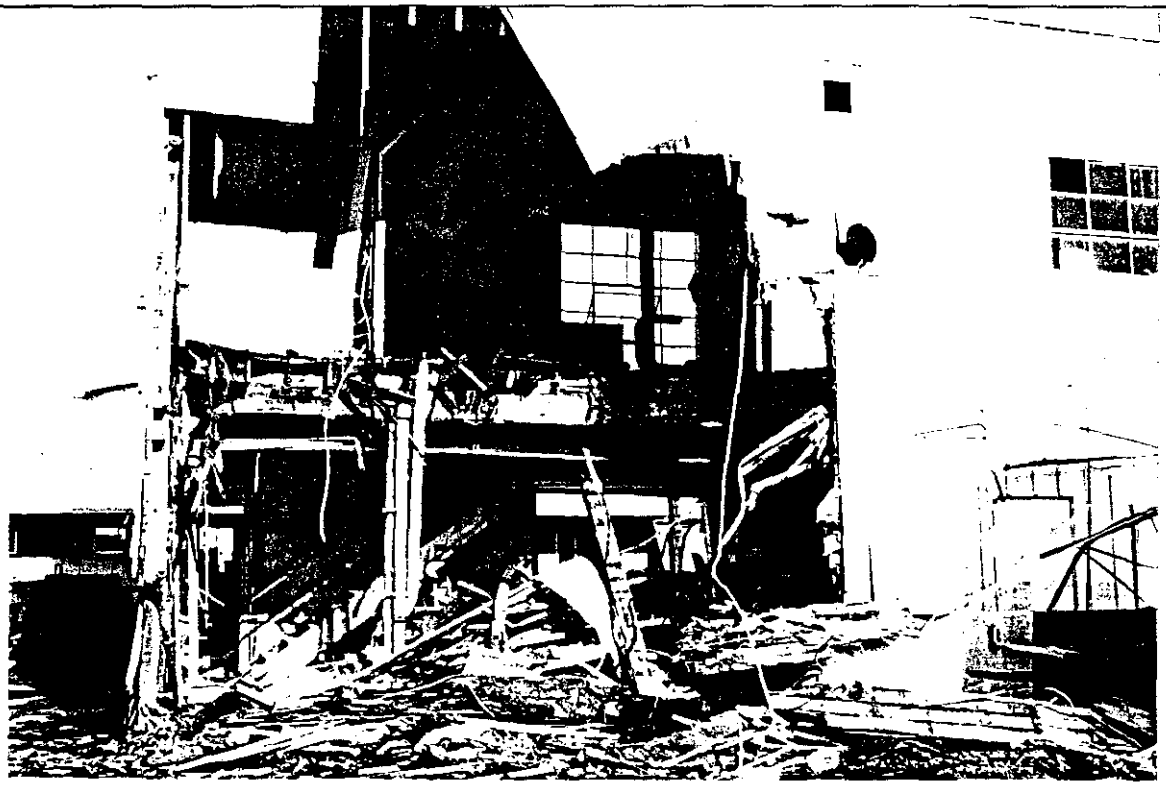
Asbestos Pipe Line.....

Asbestos Sampling Sites.....

Non Asbestos Insulated Boiler.....

Ex5

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of reactor building take from the south side of the tank farm area.

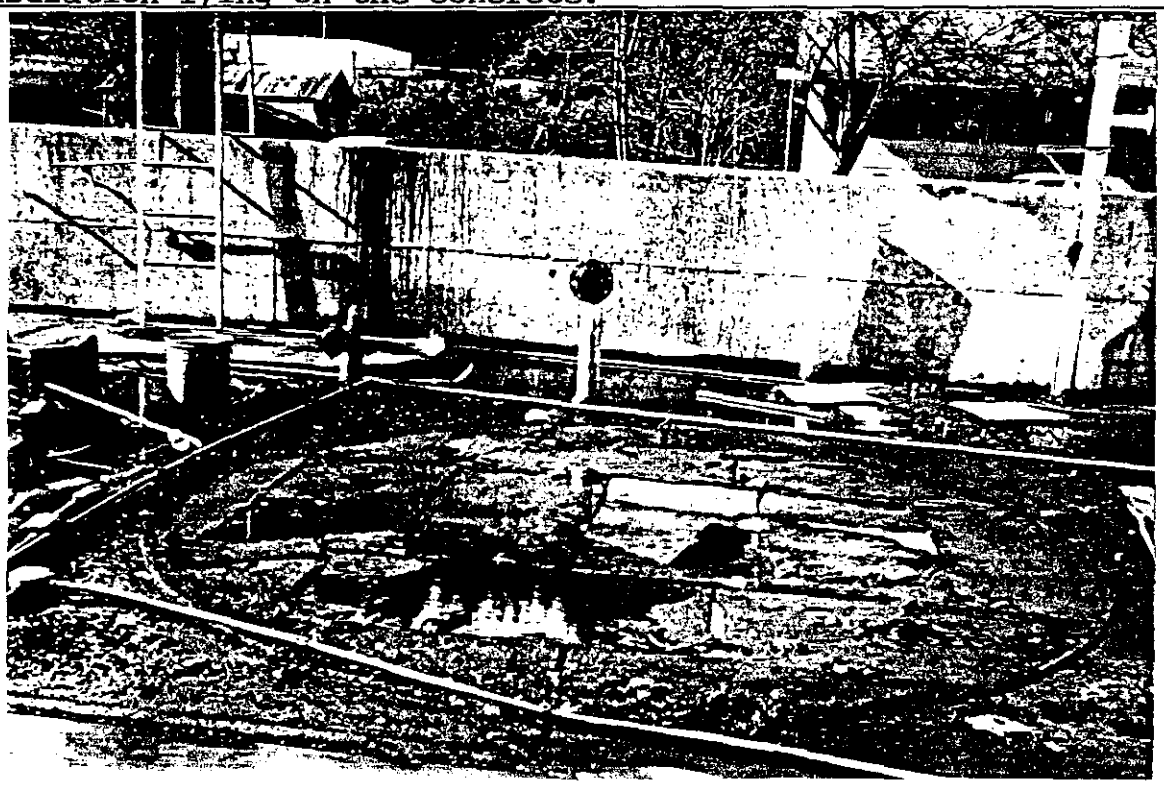


SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: Sample point south side of tank farm area mag type pipe insulation.

Ex 6

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER:DEWall JOB#:6508
COMMENTS: Sample point in reactor building. West end of main pipe from boiler room.

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER:DEWall JOB#:6508
COMMENTS: Facing away from reactor building toward the middle of the tank farm. Shows tank placement and small amount of pipe insulation lying on the concrete.



Ex 7

RICHARD H. KRAUSE

HAZCON, Inc.
9500 S.W. Barbur Blvd.
Suite 100
Portland, Oregon 97219
(503) 244-8045

EMPLOYMENT

1986-Present HAZCON, INC., Portland, Oregon
President
Formed Industrial Hygiene service corporation to provide occupational and environmental health management services; Instructor in Approved Washington and Oregon State Asbestos training courses, manages staff of Certified Industial Hygienists, Industrial Hygienists, and Industrial Hygiene Technicians in the field and laboratory.

1985-1986 JAMES L. GROVES COMPANY, Portland, Oregon
Assistant Manager
Assisted in management of the H2M Division, provided industrial hygiene sampling and analytical services to clients, marketed for new clients, arranged seminars, participated in professional organizations and regulatory actions, developed and presented training programs, developed, implemented and participated in asbestos control programs and performed numerous industrial hygiene surveys of industrial, institutional, and governmental facilities.

1980-1985 SAIF CORPORATION
Industrial Hygiene Manager
Duties included managing four Industrial Hygiene Consultants, consulting with insureds about the recognition evaluation and control of occupational health hazards, evaluating occupational disease worker's compensation claims and providing expert witness testimony at claims hearings.

1977-1980 STATE OF OREGON, ACCIDENT PREVENTION DIVISION
Health Compliance Officer
Responsible for conducting industrial hygiene inspections of work places in Oregon to determine compliance with the Oregon Safe Employment Act. Reports were prepared describing violations of standards and work place conditions observed.

EDUCATION

M.S. in Public Health, Industrial Hygiene and Safety, University of Washington
B.S. in Microbiology, University of Washington

PROFESSIONAL ORGANIZATIONS

American Industrial Hygiene Association American Academy of Industrial Hygiene
American Society of Safety Engineers

CERTIFICATIONS

Comprehensive Practice of Industrial Hygiene by
American Board of Industrial Hygiene
Certified Safety Professional

Ex 8

HEALTH HAZARD CONTROL SERVICES
HAZCON INC.

RECEIVED
OCT 0 3 1990
BOGLE & GATES

Debra Olson
Bogle & Gates
222 SW Columbia
Portland, Oregon 97201

Dear Ms. Olson:

At your request, I have performed a factual investigation regarding the DEQ notice of violation (Case No. AWAB-NWR-90-81) against Fuel Processors, Inc.

As a part of this investigation, I visited the Department of Environmental Quality offices to review their files, interviewed Mr. Bill Briggs, Mr. Dale Poor and Mr. Dan Goodhue of Fuel Processors, Inc., Mr. Bill Dubbs of West Coast Chemicals, and Mr. Jim Barnes of Cascade Industrial Maintenance, obtained information from the National Weather Service, and visited the cleared site. My findings are as follows:

The initial inspection of the site was conducted by Mr. Dave Wall, Asbestos Control Analyst of the Air Quality Division.

Upon close review, several questions arise which serve to raise doubt about the degree of hazard presented by the actions of Fuel Processors, Inc.

The first question involves the actual amount of friable asbestos debris that was present.

The DEQ photos show large piles of insulation at the site. The bulk samples collected by Mr. Wall included two (Nos. 1 & 2) that appeared to be from pipe insulation. These contained amosite asbestos. The two other samples (Nos. 3 & 4) contained chrysotile asbestos and consisted of "tough," "stiff" materials. These likely may have been gasket materials of low friability. In my opinion, to establish the actual amount of asbestos materials in these piles, more samples should have been collected. This would have reduced possible sampling bias resulting from the natural tendency to only sample those materials with the highest potential for asbestos content.

In conversations with Mr. Dubbs I learned that he estimated that 60-70% of the pipe insulation in this plant had been replaced since his arrival in 1977. Non-asbestos pipe insulation materials can look identical to older asbestos containing materials, particularly when piled in a dirty, soaking wet pile of demolition debris. It is probable that only a small amount of asbestos material was present in the photographed piles.

The second question involves the condition of the material as it was taken off of the pipes. The material at the time of the inspection was obviously saturated with water as shown in the DEQ photographs.

I spoke with Dan Goodhue (the person who actually removed the insulation) about the condition during the removal. He stated the insulation was removed later in the demolition time frame from 2/26 to 3/10 and was saturated on the pipes as well as when it was in piles on the ground. In light of this information, the potential for airborne exposure was greatly lessened.

9500 SOUTHWEST BARBUR BOULEVARD
SUITE 100
PORTLAND, OREGON 97219
503/244-8045

Ex 9

I discussed the weather conditions with the National Weather Service for this time period. This information is consistent with Mr. Goodhue's observations of the wetness.

Date	Rainfall	Wind
2/26	None	11 mph East
2/27	None	18 mph East
2/28	None	11 mph East
2/21	None	6 mph South East
3/02	Trace	6 mph South East
3/03	.52 inches	10 mph South
3/04	.24 inches	8 mph East South East
3/05	.02 inches	8 mph South East
3/06	.14 inches	8 mph South
3/07	.45 inches	11 mph South
3/08	.02 inches	14 mph South East
3/09	.33 inches	14 mph South East
3/10	.28 inches	10 mph South East

The third question involves the exact proximity of children playing and the likelihood of exposure from wind-driven asbestos dust.

Mr. Wall's report mentions children playing approximately 20 feet from the plant. The final DEQ Notice of Penalty refers to children being 20 feet from the asbestos removal. From my observations of the site and inspection of the maps, the two statements are not consistent. A more accurate distance (as measured on the aerial photographs) from removal to children would be at least 60 - 70 feet. Also, as previously mentioned, the material was likely soaked with water as it was removed and it is therefore unlikely that asbestos fibers would have become airborne as a result of the removal activities. In addition, the wind direction during the days when the asbestos was removed would not have been toward the closest houses where DEQ has alleged children were playing.

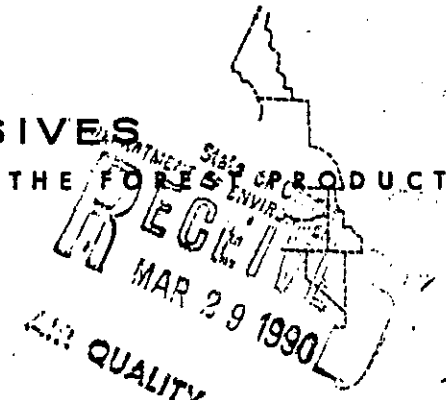
In my opinion, the hazard alleged in the final DEQ notice of penalty exceeds the hazard associated with actual conditions at the site during the period in question.

Sincerely,

Richard H. Krause, CIH

RHK/jl

WEST COAST ADHESIVES
JOB-TESTED ADHESIVES FOR THE FOREST PRODUCTS INDUSTRIES
Area Code 503 286-3515
11104 N. W. FRONT AVENUE
PORTLAND, OREGON 97231



3-19-90

MR. DAVID E. WALL
ASBESTOS CONTROL ANALYST
AIR QUALITY DIVISION
PROGRAM OPERATIONS SECTION
DEPARTMENT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE
PORTLAND, OR 97204

DEAR MR. WALL:

MOST RECENTLY, WEST COAST ADHESIVES SOLD ALL OF ITS PLANT EQUIPMENT TO OIL RE-REFINERS CO., INC. OF PORTLAND, OR. DURING THE NEGOTIATION AND ULTIMATE SALE OF THE EQUIPMENT, NO DISCUSSION OF THE POTENTIAL PRESENCE OF ASBESTOS INSULATION AROUND PIPING WAS DISCUSSED WITH BILL BRIGGS PRESIDENT OF OIL RE-REFINING. IT WAS SIMPLY A MATTER IF NOT THINKING ABOUT THE POSSIBILITY OF ASBESTOS BEING PRESENT. IN RETROSPECT, I SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF OLD ASBESTOS INSULATION BEING PRESENT, BUT THE IDEA DID NOT OCCUR TO ME. THIS ESPECIALLY TRUE WHEN THE FINAL SALE WAS COMPLETED OF 1-31-90.

SOME WEEKS PRIOR TO THE SALE (AROUND 1-6-90) MR. BRIGGS HAD ORIGINALLY EXPRESSED INTEREST IN THE BOILER ONLY. AT THAT TIME MR. BRIGGS COULD HAVE INQUIRED ABOUT THE POSSIBLE PRESENCE OF ASBESTOS INSULATION AROUND THE BOILER. I DO NOT REMEMBER THIS POSSIBILITY, BUT IT COULD HAVE BEEN MENTIONED. OTHER THAN THAT I DID NOT DISCUSS THE POSSIBILITY OF ASBESTOS BEING PRESENT. I DON'T BELIEVE THAT EITHER PARTY WAS OPENLY AWARE THAT A ASBESTOS PROBLEM EXISTED...

VERY TRULY YOURS.
William Duke
GENERAL MANAGER

EXHIBIT O

BOGLE & GATES

LAW OFFICES

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Portland, OR 97201

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DEBRA A. OLSON

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Yakima

71173/05224

February 8, 1991

Ms. Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 S.W. Sixth Avenue
Portland, OR 97201

Re: DEQ v. Fuel Processors, Inc.
Contested Case No. AWAB-NWR90-81

Dear Ms. Zucker:

Respondent Fuel Processors, Inc. ("Respondent") submits this letter in response to your invitation for comments regarding the issue of whether a Hearings Officer has the authority to order an award for violations different than those violations alleged in the DEQ's pleadings if DEQ has failed to meet the burden of proof required for the violations contained in the pleadings. It is not within the discretion of the Hearings Officer to issue an Order for violations other than those actually plead by DEQ.

On or about May 24, 1990 Respondent received a Notice of Assessment of Civil Penalty (the "Notice") for two alleged Class I major violations under OAR 340-12-050(1)(i) and (j). Respondent requested a contested case hearing to resolve these issues, and also pursued informal resolution of this matter with DEQ.

The Administrative Procedures Act does not provide guidance on this issue and we must refer to the Rules of Civil Procedure for guidance. Under ORCP 23B, courts are given discretion to impose liability for offenses not raised in the pleadings "when issues not raised by the pleadings are tried by express or implied consent of the parties." This provision does not provide the Hearings Officer the latitude in this matter to amend DEQ's pleadings, because at no time during the hearing did DEQ present any evidence to establish a class or magnitude of violation other than those contained in the DEQ pleadings, and DEQ did not request that the Hearings Officer consider any violations other

than those contained in the Notice. At the hearing, the Department focused solely on establishing liability for Class I major violations. The Department clearly established, both in its pleadings and in settlement discussions with Respondent, that the issues addressed at the hearing would include only the Class I major violations contained in the Notice. The parties did not, either expressly or impliedly, try any theories of liability other than the violations alleged in DEQ's pleadings. DEQ cannot now be allowed to take advantage of theories of liability which it earlier rejected. See Georgeson v. State of Oregon, 75 Or App 213, 216 (1985) (tort claimant, who had earlier opportunity to replead defective notice, and instead chose to plead a different theory of notice, was denied further opportunity to replead). It was incumbent upon DEQ to amend its pleadings if DEQ intended the Respondent Hearings Officer to address violations other than those outlined in the Notice. At no time before or during the hearing did DEQ attempt to amend its pleadings to include a different class or magnitude of violation. DEQ cannot, after the fact, rely upon the Hearings Officer to remedy DEQ's failure to amend the pleadings. If an Order is issued imposing liability for any violations other than those actually plead in the DEQ Notice, Respondent intends to pursue its rights to appeal such an Order to the Environmental Quality Commission and/or the Oregon Court of Appeals.

Notwithstanding the above, Respondent also believes that the Department has failed to meet its burden under Violation No. 2 of the Notice of proving a violation of OAR 340-12-030(j), which provides that:

> "Visible emissions of asbestos during an asbestos abatement project or during collection, processing, packaging, transportation, or disposal of asbestos-containing waste material is a Class I violation."

DEQ did not present any evidence at the hearing regarding visible asbestos emissions allegedly created by Respondent. For this reason, Violation No. 2 of the Notice must be dismissed.

Respondent believes that DEQ failed at the contested case hearing to meet its burden of proving that Respondent committed the Class I major violations alleged in the Notice. The Oregon Administrative Procedure Act requires a determination by the Hearings Officer in favor of the Respondent.

Thank you for allowing us to comment on this issue. If you have any questions, please do not hesitate to contact me.

Very truly yours,

BOGLE & GATES

Debra A. Olson

DAO/rln
cc: Arnold V. Silver
[48\cl\dao\fpi\zucker.L01]

DAVE FROHNMAYER
ATTORNEY GENERAL

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DEPUTY ATTORNEY GENERAL

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Portland, Oregon 97201
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2/15/91

February 12, 1991

Linda Zucker
Hearing Officer
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

Re: DEQ v. Fuel Processors, Inc.

Dear Ms. Zucker:

I received a copy of a letter to you from Ms. Olson dealing with your authority to enter an order for a violation different than one alleged in the notice if DEQ failed to meet its burden of proof for the alleged violations. I paraphrased the sentence because it was somewhat lengthy and difficult to grasp. Certainly we agree that if the Department fails to establish a violation, it fails to prove conduct resulting in assessment of a civil penalty. I do not recall the Hearing Officer asking the specific question. I do recall an inquiry from the Hearing Officer relating to DEQ classification systems. If the Hearing Officer has a specific question in mind it might be helpful to counsel to reduce it to writing for briefing. In the meantime, the Department feels Ms. Olson is confused in her analysis.

The confusion may result from not distinguishing between the Department's ability to assess a penalty and the amount of such penalty. The Hearing Officer may reduce such amount based upon new information coming in at the hearing. See OAR 340-11-132(5)(a)(A)(B). The case is not dismissed however.

Second, Ms. Olson refers to Violation No. 2 of the notice claiming the Department failed to prove a violation of OAR 340-12-030(j) dealing with visible emissions, and asks this allegation be dismissed. However, the Department did not

allege as Violation No. 2, a Violation of OAR 340-12-030(j). Violation No. 2 as alleged by the Department is a violation of OAR 340-25-465(15). (See Notice, p. 2.) Violation No. 2 is given a classification based on OAR 340-12-050(1)(j) (storage). (See exhibit.)

I do not believe the Hearing Officer invited legal argument and further I am of the opinion that counsel had not raised any issue for the Hearing Officer's evaluation.

Sincerely,

Arnold B. Silver
Assistant Attorney General

ABS:dld
5870H
cc: Debra Olson

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW NO. AQAB NWR 90 81

BACKGROUND

On May 24, 1990, DEQ notified Fuel Processors, Inc., that it was liable for a $12,000 civil penalty for failing to remove friable asbestos materials before dismantling a facility and for openly storing or accumulating friable asbestos materials in violation of OAR 340-25-465(6) and (15). The amount of the penalty was predicated on DEQ's view that the violations created a "likelihood for public exposure to asbestos," were of major magnitude, and were negligent.

Fuel Processors admitted removing tanks and the boiler, generally denied the remainder of the allegations in DEQ's notice, and affirmatively alleged failure to state a claim for relief, failure to plead sufficient facts, and failure to provide notice of enforcement action and intent to assess a penalty. Fuel Processors also challenged the penalty amount for deficiencies in procedure and for factual accuracy and sufficiency.

A hearing was conducted on December 13, 1990. Fuel Processors was represented by Debra A. Olson, its attorney. DEQ was represented by Arnold Silver, Assistant Attorney General.

Post hearing briefing concluded on February 14, 1991.

ISSUES

Whether Fuel Processors, Inc. violated OAR 340-25-465(6) and (15) and, if so, whether $12,000 is the appropriate penalty for these violations.

OFFICIAL NOTICE

I take official notice of ORS 468.877 which provides:

> **468.877 Findings.** The Legislative Assembly finds and declares that:
>
> (1) Asbestos-containing material in a friable condition, or when physically or chemically altered, can release asbestos fibers into the air. Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are a danger to the public health.
>
> (2) There is no known minimal level of exposure to asbestos fibers that guarantees the full protection of the public health.
>
> (3) Asbestos-containing material found in or on facilities or used for other purposes within the state is a potential health hazard.
>
> (4) The increasing number of asbestos abatement projects increases the exposure of contractors, workers and the public to the hazards of asbestos.
>
> (5) If improperly performed, an asbestos abatement project creates unnecessary health and safety hazards that are detrimental to citizens and to the state in terms of health, family life, preservation of human resources, wage loss, insurance, medical expenses and disability compensation payments.
>
> (6) It is in the public interest to reduce exposure to asbestos caused by improperly performed asbestos abatement projects through the upgrading of contractor and worker knowledge, skill and competence.

FINDINGS OF FACT

Between February 26, 1990 and March 9, 1990, Fuel Processors

dismantled and removed tanks and a boiler from a building in Portland's northwest industrial area. At the time of the work, the building was being torn down by a demolition contractor which had removed one wall of the building to facilitate removal of the tanks and boiler. The site had been the object of environmental scrutiny because of the presence of phenols. Environmental remediation contractors had breached some pipe lines and "opened" all tanks.

A sample of material disturbed by Fuel Processors during dismantling contained 35% wet friable amosite asbestos. The asbestos material was wet when disturbed. Wet asbestos material is not likely to become airborne. The material was in a concrete bermed area in which rainwater accumulated until removed by pumping. The sample was taken from material which was accumulated uncovered.

The material was in a "medium-large" pile. Two thirds of the material in the pile appeared similar to the sampled material; however, the presence of asbestos cannot be determined without laboratory analysis. Since 1977, 60-70% of the facility's pipe insulation material had been replaced.

There were two residences within 60-70 feet of the asbestos and within 20-25 feet of the property boundary. On one occasion children were seen playing in the vicinity. There was a possibility of public exposure to asbestos.

In evaluating the likelihood of public exposure to asbestos it is appropriate to consider the condition of the materials,

degree of friability, degrees of wetness, direction of wind and proximity of people.

Fuel Processors is in the business of recovering used oils and converting them to fuel. From time to time in the course of its business, Fuel Processors encounters asbestos. Fuel Processors inquired about the presence of asbestos on this site and was told that none was present.

Fuel Processors cooperated with DEQ by answering all questions asked by DEQ and by providing all statements requested by DEQ.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. Between February 26, 1990 and March 9, 1990, Fuel Processors violated OAR 340-25-465(6)(a) and 340-25-465(15) by dismantling equipment without first removing friable asbestos material and by openly storing friable asbestos material. Consequently, Fuel Processors is liable for a civil penalty.

3. The case record establishes Class Two violations of moderate magnitude followed by cooperative conduct.

4. Application of the penalty formula to the facts proved at hearing produces a $1,600 penalty.

OPINION

DEQ proved the alleged violations by proving that during an asbestos abatement project Fuel Processors handled friable asbestos-containing material from pipes and that Fuel Processors

openly stored asbestos-containing waste material. In determining the amount of the penalty for each violation, DEQ relied on a penalty schedule matrix contained in OAR 340-12-042, on the determination procedure set out in OAR 340-12-045, and on the classification list provided by OAR 340-12-050.

Classification

Applying the classification list set out in OAR 340-12-050, DEQ charged Fuel Processors as follows:

VIOLATION NO: 1. (Failing to remove asbestos prior to dismantling the tanks and boiler).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(i)* because the violation of the work practice regulation resulted in the likelihood for public exposure. Residences are located and children were playing within 20 feet of the property on which the asbestos was disturbed and the Respondent's activities created a likelihood for public exposure to asbestos.

VIOLATION NO: 2. (Open storage and accumulation of asbestos-containing waste material).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(j) because the storage of asbestos-containing waste material created the likelihood for public exposure to asbestos. Residences are located and children were playing within 20 feet of he property on which the asbestos was openly stored. The piles of asbestos-containing insulation on the property were within a close enough proximity to the residences that the activity created the likelihood for public exposure. Notice of Assessment, Exhibits 1 and 2.

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* Cited provisions of OAR Chapter 340 Division 12 were renumbered but not otherwise changed on March 30, 1990.

Classification is based on risk of harm. As cited in this case, a Class One violation is a:

> Violation of a work practice requirement which results in or creates the likelihood for public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(1)(i).*
>
> or
>
> Storage of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which results in or creates the likelihood for public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(1)(j).

Their Class Two counterparts are:

> Violation of a work practice requirement for asbestos abatement projects which are not likely to result in public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(2)(h).
>
> and
>
> Improper storage of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which is not likely to result in public exposure to asbestos or release of asbestos into the environment...OAR 340-12-050(2)(i).

To prove Class One violations, DEQ was required to show that the violations occurred under the circumstances alleged and created a likelihood of public exposure to asbestos.

Condition of the material, degree of friability, degree of wetness, wind direction and proximity to people affect the likelihood of public exposure. DEQ considered the proximity of people. As alleged, residences and people were approximately 20 feet from the property boundary. However, they were 60 - 70 feet

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* DEQ did not allege action resulting in or creating the likelihood of release of asbestos into the environment.

from the asbestos-containing material. The case record establishes that the only asbestos material clearly tied to Fuel Processors's activities had a significant asbestos content but was wet when disturbed and wet when tested. Moreover, the weather and the site's disposition to collect water make it more likely than not that the material was wet between disturbance and testing. Because wet asbestos is unlikely to become airborne, the facts proved establish only a possibility, not a likelihood, of public exposure to asbestos as a result of the violations.

A finding of possible public exposure supports a Class Two violation. Fuel Processors contends that because DEQ alleged a likelihood of public exposure, it cannot exact any penalty when the proof establishes only possible exposure. Agency rules suggest otherwise. OAR 340-11-132(5) contemplates adjustment of penalties where DEQ fails to establish some or any of the facts regarding the violation, or where new information is provided which was not initially considered by the Director. The civil penalty calculation may be adjusted and the penalty reduced to conform to the matters proved.

MAGNITUDE

According to agency rules "'Magnitude of the Violation' means the extent of a violator's deviation from the Commission's and Department's statutes, rules, standards, permits, or orders, taking into account such factors as, but not limited to, concentration, volume, duration, toxicity, or proximity to human

or environmental receptors. Deviations are categorized as major, moderate or minor." OAR 340-12-030(11).

DEQ characterized the magnitude of Fuel Processor's violations as major, relying on the following allegations:

Violation No. 1:	Failure to remove asbestos prior to dismantling the tanks and boiler).
Magnitude:	The magnitude of the violation is major. The Respondent disturbed material containing up to 35% amosite asbestos and 85% chrysotile asbestos from pipes which were connected to the tanks and boiler. Once removed from the pipes, the asbestos material was accumulated in several large piles on the property.
Violation No. 2.	(Open storage and accumulation of asbestos-containing waste material).
Magnitude:	The magnitude of the violation is major. The Respondent stored asbestos-containing pipe insulation in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained up to 35% amosite asbestos and chrysotile asbestos. Notice of Assessment, Exhibits 1 and 2.

The two elements considered by DEQ in determining the magnitude of the violation were the quantity of asbestos material and its concentration.

DEQ did not prove that Fuel Processors stored "several large piles" of asbestos material and did not prove the storage of chrysotile asbestos.

DEQ acknowledged it had no way of knowing whether someone from Fuel Processors had disturbed any of the accumulated asbestos containing material, other than the material contained

in the wet sample Z 3006. Both a demolition contractor and environmental contractors had engaged in work which could have been responsible for the accumulations. Moreover, the replacement since 1977 of a significant amount of material inhibits an inference that untested material had asbestos content. Because the case proof did not conform to the information considered in characterizing the magnitude as major, a reconsideration of magnitude is necessary.

DEQ did prove that Fuel Processors failed to remove and openly stored material containing 35% friable amosite asbestos in an amount that was "medium-large." Because even a small amount of friable asbestos is a potential hazard the volume and toxicity in this case establish violations of moderate magnitude.

NEGLIGENCE

DEQ alleged that Fuel Processors "was negligent in openly accumulating the asbestos-containing waste material on the property" and "was negligent in failing to determine whether the material was asbestos prior to removing the insulation from pipes." Notice of Assessment, Exhibits 1 and 2. These allegations simply restate the violations. They do not disclose the reasons the violations are considered culpable as negligence. While administrative rules define the behavior which will characterize violation as "flagrant" or "intentional", they provide no definition of negligence. OAR 340-12-030(7) and (9). The combination of this failure and the failure to identify the negligent behavior apart from commission of the violation itself,

deprives the reviewer of a standard against which to measure the record and precludes a finding of negligence. See, DEQ v Excel Environmental, Inc., May 25, 1990.

COOPERATIVENESS

ORS 468.130(2)(g) directs the Commission to consider a violator's cooperativeness and efforts to correct the violation. Both attitude and conduct must be considered. See, DEQ v Thatcher Company, December 7, 1990. The record does not disclose any efforts to correct the violation. The record does establish cooperative conduct. Fuel Processors requested mitigation of the penalty for cooperativeness and is entitled to that adjustment.

OTHER DEFENSES

Fuel Processors did not plead or prove any exceptions to the work practices requirements. Except for the matters discussed, Fuel Processors did not establish the facts or defenses raised in its answer.

Dated this 20th day of May, 1991.

ENVIRONMENTAL QUALITY COMMISSION

Linda K. Zucker
Hearings Officer

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	FINAL ORDER AND JUDGMENT NO. AQAB NWR 90 81

The Environmental Quality Commission, through its hearings officer, orders that Respondent, Fuel Processors, Inc., is liable to the State of Oregon in the sum of $1,600 and that the State have judgment for and recover the amount pursuant to a civil penalty assessment dated May 24, 1990. Review of this order is by appeal to the Environmental Quality Commission pursuant to OAR 340-11-132. A request for review must be filed within 30 days of the date of this order.

Dated this 20th day of May, 1991.

ENVIRONMENTAL QUALITY COMMISSION

Linda K. Zucker
Hearings Officer

NOTICE: If you disagree with this Order you may request review by the Environmental Quality Commission. Your request must be in writing directed to the Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204. The request must be <u>received</u> by the Environmental Quality Commission within 30 days of the date of mailing or personal service of Order. If you

do not file a request for review within the time allowed, this order will become final and thereafter shall not be subject to review by any agency or court.

A full statement of what you must do to appeal a hearings officer's order is in Oregon Administrative Rule (OAR) 340-11-132. That rule is enclosed.

7/19/91

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 NOTICE OF APPEAL

Department requests that the Environmental Quality Commission review Hearings Officer Linda K. Zucker's Findings of Fact and Conclusions of Law and Final Order and Judgment dated May 20, 1991.

ARNOLD B. SILVER, OSB No. 58088
Assistant Attorney General
Of Attorneys for Department of
Environmental Quality

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 DEPARTMENT EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT

The Department excepts to the hearing officer's Final Order:

1. Reclassifying and reducing the Department's classification of the assessed civil penalties from class one violations to class two violations:

2. Reducing the Department's finding that Respondent's violations were of major magnitude to moderate magnitude.

3. Finding no basis for concluding the violations by respondent were culpable as negligence.

4. Finding that respondent engaged in cooperative conduct to correct the alleged violations.

5. Reducing the total amount of civil penalty imposed against Respondent from $12,000 to $1,600.

Respectfully submitted,

ARNOLD B. SILVER
Assistant Attorney General
Of Attorneys for the Department

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81
	)	DEPARTMENT OPENING BRIEF

I.

BACKGROUND OF CASE AND APPEAL

On May 24, 1990, the Department assessed a $6,000 civil penalty against Respondent for failing to remove insulation containing asbestos materials from pipes connected to tanks and a boiler prior to dismantling and removing such fixtures in violation of OAR 340-25-465(6) (violation 1) and a $6,000 civil penalty for openly storing asbestos-containing waste material in violation of OAR 340-25-465(15) (violation 2). These two penalties totaled $12,000 and were arrived at by the Department utilizing the civil penalty formula codified by Commission rule.

The Department found that the base penalty for violation 1 was $5,000 because it was a Class I major magnitude violation in the matrix listed in OAR 340-12-040(1). This base amount was increased by $1,000 because the Department found that the cause of the violation was Respondent's negligence. Similarly, the Department found that the base penalty for violation 2 was $5,000 because it was a Class I major magnitude violation in

the matrix listed in OAR 340-12-042(1). Again, this base amount was increased by $1,000 because the Department found that the cause of violation was Respondent's negligence.

Respondent requested and was granted a hearing regarding the Department's assessment of civil penalty. The Hearing Officer in making her final order reduced the Department's assessment of civil penalty from $12,000 to $1,600. The Department believes the hearing officer reduction was in error.

II.

REASONS FOR APPEAL

There are four Department grounds for appealing the Hearing Officer's order to the commission:

1. The Hearing Officer erred when she reduced the class of violations found by the Department from Class I to Class II.

2. The Hearing Officer erred when she reduced the magnitude of the violations found by the Department from "major magnitude" to "moderate magnitude."

3. The Hearing Officer erred when she found that the violations of asbestos rules by Respondent were not negligent.

4. The Hearing Officer erred when she found that Respondent engaged in cooperative conduct.

Each of these grounds cited by the Department for appeal will be discussed separately.

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III.

REDUCTION OF THE CLASS OF THE VIOLATIONS FROM CLASS I TO CLASS II WAS IN ERROR

The Department found that Respondent's failure to remove asbestos-containing insulation from pipes prior to engaging in its dismantling process and storage of the resulting friable asbestos-containing waste material "created the likelihood for public exposure to asbestos." This finding made these types of violations Class 1 violations. The Hearing Officer, however, concluded that the evidence only supported a finding that the violations resulted in Class II violations because they were "not likely to result in public exposure to asbestos." She arrived at this conclusion because she found that residences and people were approximately 60-70 feet from the asbestos-containing material and not approximately 20 feet as alleged; that the asbestos-containing material was wet when disturbed and wet when tested (Order, p. 3 ls. 9-14; p. 3 ls. 21-24; p. 6 ls. 22-23 and p. 7 ls. 3-4). The Hearing Officer was clearly in error in reaching this conclusion.

A. Distance

Department's witness, Dave Wall, testified two residences were directly across the street to the west of the site with a business to the northwest of the site (Tr 22). He further testified the residences were approximately 60 feet from the area where the asbestos was disturbed, and 20-25 feet from the site proper (Tr 22). Witness Wall, on March 10, 1990, also

observed several children playing across the street from the site at the time of his inspection (Tr 23). Witness Wall was asked: "Do you believe that the removed asbestos-containing pipe insulation and the storage of those materials could have created the likelihood of public exposure to asbestos?" (Tr 23) Witness Wall stated, in response to this question: "Yes, I do!" (Tr 23)

He elaborated on this answer by explaining a likelihood of public exposure was created by the proximity of the people living in the area to the asbestos; that the salvage operation went on for a long period of time; and the lack of rain occurring during the total salvage operation (Tr 23 and 32).

Witness Wall further testified that the fact people were 60 feet from the salvage operations rather than 20-25 feet did not diminish the likelihood that they could be exposed to asbestos fibers (Tr 28).

The Hearing Officer either disregarded, ignored or did not hear or read the foregoing testimony. This evidence clearly establishes that there was a likelihood for public exposure to asbestos fibers by persons residing or playing in the vicinity of Respondent's salvage operations.

B. Wetness

Whether or not asbestos-containing material is sufficiently wet is of significant importance to this case. If the material is sufficiently wetted, it mitigates against asbestos fibers becoming airborne and exposing members of the public to health

hazards. On the other hand, if the material is not sufficiently wetted it increases the likelihood of public exposure to asbestos fibers.

Witness Wall's testimony about whether the asbestos-containing material was wet commences at the bottom of page 12 of the transcript.

Witness Wall testified he examined the pipe insulation accumulated at the site. He testified that piles in certain areas of the site were sitting in water and thus wet, however, there were other sections of the pipe insulation strewn across the slab that were not in water and were dry (Tr 13). Respondent did not wet any of the material. Any wetness resulted from rainfall (Tr 15). Thus, the Hearing Officer in concluding that the material was "wet," had to rely on evidence about sporadic rainfall and not on any evidence that Respondent made a conscious effort to intentionally wet the material to prevent migration of airborne asbestos fibers. In fact, Witness Wall specifically testified that not all of the material was sufficiently wet to prevent asbestos fibers (Tr 15). Witness Wall further testified that rainfall is not an acceptable industrial standard for wetting asbestos insulation (Tr 15). Rainfall cannot adequately wet the asbestos-containing material while it is being removed (Tr 16-17). Further, Witness Wall pointed out that a certain type of asbestos will not retain water and even asbestos that has been wetted will nonetheless allow asbestos fibers to

become airborne (Tr 17). This type of asbestos was present at the site.

Witness Wall testified that pipe insulation remaining in a covered building after removal of the tanks and boiler by Respondent was exposed and was not wet (Tr 21).

The Hearing Officer found that the material sampled by Mr. Wall was wet when disturbed (Order, p. 3 ls. 10-11); and was wet when disturbed and when tested (Order, p. 10-11, ls. 3-4).

There is absolutely no evidence supporting the Hearing Officer's finding and conclusion.. Witness Wall did not testify the sample taken was wet nor that the asbestos material was wet when disturbed. In fact, he testified to the contrary.

Nor does the testimony of Respondent's chief witness, Krause, assist the Hearing Officer in reaching this unsupported conclusion.

Witness Krause did not actually see the piles of material at the site that are claimed to be wetted (Tr 8). Witness Krause based his conclusion that the material was wet on Respondent's employee's testimony (Tr 89). The witness further confirmed it would be to Respondent's advantage to tell him the material was wet (Tr 89).

Witness Krause, as well as the Department, relied on meteorological data taken at the Portland airport. The rainfall amounts are measured at the airport and are not measures of rainfall in other parts of the city (Tr 93-94).

The airport is located on NE Marine Drive, on the Columbia River while the site in question is in northwest Portland. The amount of rainfall at the northwest site is totally unknown by Witness Krause. His testimony that asbestos-containing material at the site was possibly wet was based on conversation with Respondent's employees (Tr 95).

Respondent conducted salvage operations between February 26, 1990, and March 9, 1990. Witness Krause acknowledged the meteorological data he looked at shows no rain on February 26, 27, 28 and March 1, 1990. In fact, there was no rain from the 20th of February. Only a trace of rain shows on March 2 (Tr 97). The witness further points out if the salvage operations took place on the days there was no rain, it would increase the likelihood of public exposure to asbestos fibers (Tr 97-98 and 99). To sum up, Witness Krause does not know if the asbestos waste material was wet (Tr 99).

IV.

MAGNITUDE

The Hearing Officer apparently misconstrued the evidence in this case regarding the issue of the "magnitude" of the violations. Her decision was seemingly based on perceived semantic distinctions between "several piles," "large piles" and a "medium-large pile" of asbestos-containing material (ACM).

The Department did characterize the magnitude of Respondent's violations as major. The Department concluded that for violation 1, the violation was major because

Respondent disturbed material containing up to 35 percent amosite asbestos and 85 percent chrysotile asbestos from pipes which were connected to tanks and boilers. Once removed, the ACM was accumulated in several large piles on the property. The Department thus found the "disturbing" and "accumulating in several large piles" was a violation of major magnitude.

The Department concluded that for violation 2, the violation was major because the respondent stored ACM (pipe insulation) in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained a high percentage of asbestos. The samples traced to Respondent confirmed the asbestos was of the amosite form.

The Hearing Officer found that Department sampled a "medium-large" pile (Order p. 3, l. 16). Her opinion further concluded that the Department did not prove Respondent stored several large piles of asbestos material and also did not prove the storage of chrysotile asbestos (Order p. 8 ls. 21-23). However, she subsequently stated the Department did prove that Respondent failed to remove and openly stored material containing 35 percent friable amosite asbestos in an amount that was "medium-large." She correctly concludes that even a small amount of friable asbestos is, at least, a potential hazard (Order p. 9 ls. 12-13). However, she limits the magnitude to moderate.

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The Department believes the Hearing Officer misconstrued the evidence in this case regarding the issue of the magnitude of the violations.

Witness Wall testified that while on site, he talked to two of Fuel Processor's employees, Dan Goodhue and Dale Poor. These employees informed Mr. Wall that they salvaged tanks and a boiler. Witness Wall then asked them if they pulled the insulation off the pipes while they were salvaging those tanks and the reply was that they did (Tr 7-8).

Witness Wall honestly states he did not see Respondent do the actual removal of the tanks and boilers, but that the result of the salvage operation was pipe insulation in piles strewn over a good portion of the slabs where most of the tanks were located (Tr 8). Thus, Respondent admits pulling the insulation of the pipes and Wall testifies the pipe insulation was in piles strewn over a good portion of the area. Wall again states at the time of his inspection the pipe insulation was in a large number of piles on the site. (Tr 8-9).

Witness Wall took five samples of the pipe insulation that Respondent removed from pipes. Four of the samples were positive for asbestos material (Tr 9 and 11). Two samples were taken from the tank area, one sample from the boiler and two from sheds north of the site (Tr 10). The samples showed two different percentages and two different types of asbestos; 25-35 percent of amosite asbestos and 85 percent chrysotile asbestos (Tr 11). Witness Wall explains his sampling procedure

beginning on page 47 of the transcript. Witness Wall did not claim Respondent was responsible for the material in the shed giving rise to the sample (Tr 49). A third sample was taken from material surrounding a boiler. It did not contain asbestos (Tr 50). Witness Wall testifies that two of the five samples containing asbestos are directly attributable to the salvage operations of Respondent (Tr 50). These samples are sample No. 1; Z3006 and sample No. 2; Z3007 (Ex 1-4; Tr 52 and 54). These samples contained 35 percent and 25 percent amosite asbestos respectively (Ex 1-4). Amosite asbestos does not retain water and disturbing it allows airborne asbestos fibers to migrate through the ambient air and remain in the air for long periods of time (Witness Wall, Tr 17). Slight rainfall, in particular, would have no effect on migration of amosite asbestos (Witness Wall, Tr 13-17).

The error committed by the Hearing Officer regarding the issue of the magnitude of the violations can be summarized as a voyage into a semantical sea of nuances.

Respondent's employees admitted they pulled off the insulation from pipes. This insulation was in various size accumulations scattered around the site. These were not neat, orderly, planned, discrete piles of a workman's work product. The material was scattered all over. Some accumulations were large, some small, some medium-large. The accumulated piles were not separated by a river, a building, a fence or natural contours. More than likely the piles were interconnected. Two

samples taken from different locations on site proved positive for amosite asbestos, the type of asbestos most resistant to wetting by water. The Hearing Officer's Order suggests, but does not expressly so state, that the Department must sample every accumulation of material on site to determine if everything therein is asbestos. Such a conclusion is absurd and could result in thousands of samples. Instead, it is more reasonable to find that all of the material was asbestos contaminated. Frankly, if only one sample from a "medium-large pile," as the Hearing Officer found, proved positive for amosite asbestos, it should be sufficient to sustain a violation of major magnitude because of its toxicity and concentration. The simple reason is that:

> Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are a danger to public health.
>
> There is no known minimal level of exposure to asbestos fibers that guarantees the full protection of the public health.

ORS 468.877: Legislative Findings.

V.

NEGLIGENCE

The Department made a causal finding for violation 1 that Respondent was negligent in failing to determine whether insulation on pipes was asbestos, prior to the insulation's removal. The Department again made a causal finding for

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violation 2 that Respondent was negligent in openly accumulating asbestos-containing waste material on site.

The Hearing Officer's decision is strangely silent about her basis for concluding Respondent was not negligent. The Hearing Officer made no conclusions of law about this issue (Order p. 4). The Findings of Fact are also largely silent about this question. The only finding remotely applicable to the issue is a terse statement that [respondent] "* * * inquired about the presence of asbestos on this site and was told that none was present." [Order p. 4 ls. 5, 6, 7.] It is, however, difficult to know what issue this finding is supposed to be related to in the order. The Hearing Officer does get around to discuss the negligence issue in her "opinion" (Order pp. 9-10). However, without appropriate findings and conclusions of law, both Department and Respondent are at a disadvantage to make a rational nexus between findings, conclusions and opinion.

In essence, the Hearing Officer opines that the Department only restated the alleged violations and did not disclose the reasons the violations are considered culpable as negligence. She further argues that the Commission's rules do not define negligence. The failure to define negligence and the negligent behavior deprives the reviewer of a standard against which to measure the record and precludes a finding of negligence. The Hearing Officer is wrong. ORS 468.130 provides that in imposing a penalty pursuant to the schedule adopted under the

statutory framework that the Commission shall consider several factors, including whether the cause of the violation was an unavoidable accident, negligence or an intentional act. ORS 468.130(2)(f). The notice alleging the violations includes a "short and plain statement of the matters asserted or charged." ORS 468.135(1)(b).

The Court of Appeals has construed the term "negligence" as an inexact term. Pratt v. Real Estate Div., 76 Or App 488, 492 (1985). Inexact terms comprise a complete expression of legislative policy, and the Commission's responsibility is to interpret the term consistent with that policy, which can occur through contested case orders. Negligence within the statutory framework of ORS chapter 468 clearly indicates that it was intended to embody a complete expression of legislative meaning. Because the scope of the term is limited to conduct contemplated by ORS chapter 468, the legislature made a complete expression of its meaning. All that is left for the Hearing Officer to do is apply the term consistent with its meaning. Pratt, at p. 493. The Hearing Officer erroneously concluded that the Commission must define the inexact term "negligence" by rule.

The Hearing Officer states the Department did not disclose the reasons the violations are considered culpable as negligence. However, the notice and exhibits do disclose the Department's reasoning leading it to conclude respondent was negligent. Prior to discussing this reasoning, it is important

to stress, the Oregon Administrative Procedure Act (APA), is intended to provide a fair, impartial procedure for fact finding in contested cases. The APA is designed so that its major components of rulemaking and contested cases can be administered by laypersons and not lawyers. The legislature consciously designed a "roadmap" for laypersons to follow and avoided creating a "judicialized" system of procedure. The Department followed this roadmap and provided Respondent with notice and exhibits alleging the violations in a "short and plain statement of the matters asserted." The Hearing Officer apparently desires the Department staff to produce legal documents in the form of circuit court pleadings. The Department is not required to do so. The notice and exhibits are not for the convience of the Hearing Officer. They are for the purpose of furnishing reasonable notice of the matters charged to the Respondent. The Department has complied with the requirements of notice to Respondent. The Hearing Officer has to only look to the notice and exhibits as the four-corners of the Department's allegations to find its reasoning.

The Department found Respondent negligent by failing to determine whether insulation on pipes contained asbestos prior to removing the insulation and was negligent in openly accumulating asbestos-containing waste material. The Department supplied its reasoning in its assignment of the classification of the violation. This reasoning was that a failure to determine whether insulation contained asbestos,

prior to the insulation's removal is negligent because this conduct resulted in the likelihood of public exposure to asbestos (Ex 1 to Notice of Civil Penalty). Similarly, storage of asbestos-containing waste material was negligent because it was reasonably foreseeable that such storage created the likelihood for public exposure to asbestos (Ex 2 to Notice of Civil Penalty). While it may be more convenient for the Hearing Officer to have the Department's reasoning for finding negligence set forth in one paragraph, it is not legally required to do so. The rationale for concluding Respondent was negligent was set forth in a short and plain statement within the four corners of the notice and exhibits served upon Respondent and before the Hearing Officer and is sufficient to conclude that Respondent was negligent in committing the violations.

VI.

COOPERATIVENESS

The Department found that Respondent was neither cooperative nor uncooperative in correcting the violations and neither aggravated or mitigated the base penalty for this factor. The Hearing Officer concluded that ORS 468.130(2)(g) directs the Commission to consider a violators cooperativeness and efforts to correct a violation. She further opined both attitude and conduct must be considered. She then concludes the record does not disclose any efforts to correct the

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violation but that there was "cooperative conduct." (Order p. 10 ls. 5-12.)

The only cooperative conduct of Respondent cited by the Hearing Officer is that it answered questions by Department and provided statements required by Department (Order p. 4 ls. 8-9). The Hearing Officer's analysis is wrong and rewards passive or nonbehavior of a violator. The conclusion also is in conflict with both ORS 468.130(2)(g) and OAR 340-12-045(1)(f). ORS 468.130 provides the Commission shall consider certain factors including: the violator's cooperativeness and efforts to correct the violation. ORS 468.130(2)(g). This statutory subsection is phrased in the conjunctive "and"; not the disjunctive "or." In order for the Commission to consider this factor the violator must be both cooperative and expend efforts to correct the violation. If one of the elements of cooperativeness and efforts is missing, the violator is not entitled to a reduction in penalty. Since their were no efforts expended to correct the violation, Respondent is not entitled to a reduction.

The Hearing Officer's conclusion also conflicts with the Commission's rule regarding this factor. OAR 340-12-045(1)(F). This rule defines the factor to be considered by the Commission as: "* * * the violators cooperativeness in correcting the violation."

The Hearing Officer found that Respondent did nothing to correct the violation, but then disregarded the rule and

granted a reduction in penalty anyway. This conclusion flies in the face of articulated commission policy and is clearly wrong.

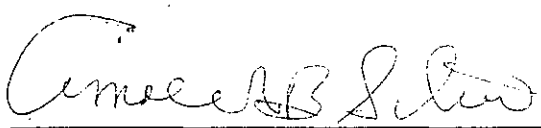
SUMMARY

The Hearing Officer was in error when she reclassified and reduced the Department's classification of the assessed civil penalties from Class I violations to Class II violations. The Hearing Officer was in error when she reduced the Department's finding that Respondent's violations were of major magnitude to moderate magnitude.

The Hearing Officer was in error when she concluded there was no basis for finding that Respondent's conduct was culpable as negligence. The Hearing Officer was in error when she found that Respondent engaged in cooperative conduct in correcting the alleged violations.

The civil penalty imposed by the Department in the amount of $12,000 should be imposed by the Commission and the Hearing Officer's reduction of such civil penalty to the sum of $1,600 should be vacated.

Respectfully submitted,



Arnold B. Silver
Assistant Attorney General
Of Attorneys for the Department

CERTIFICATE OF SERVICE BY MAIL

I certify that on September 24, 1991, I served the foregoing DEPARTMENT OPENING BRIEF, DEPARTMENT EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT, and ENVIRONMENTAL QUALITY COMMISSION FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Debra Ann Olson
Attorney At Law
Bogle & Gates
1400 KOIN Center
222 SW Columbia
Portland, OR 97201

ARNOLD B. SILVER #58088
Assistant Attorney General
Of Attorneys for Department

1 - CERTIFICATE OF MAILING
(dld 0452N)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 ENVIRONMENTAL QUALITY COMMISSION FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This case is before the Environmental Quality Commission on the appeal by the Department of Environmental Quality of the Hearing Officer's Order dated May 20, 1991, finding that Respondent violated certain Commission rules but reducing the civil penalties imposed by the Department from $12,000 to $1,600.

This appeal was considered by the Commission on _____ in _____, Oregon. After considering the record in this case and hearing argument of counsel, the Commission enters the following decision. The Commission adopts the background and issues as stated by the Hearing Officer in her order and also takes official notice of ORS 468.817 as taken by the Hearing Officer. The Commission additionally adopts the Hearing Officer's conclusion that Respondent did not establish the facts or defenses raised in its answer.

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I. Classification of Civil Penalties

A. Findings of Fact

1. OAR 340-25-465(6) requires specific work practices to be employed while conducting an asbestos project to prevent emissions of particulate asbestos material into the ambient air. Unless friable asbestos materials are adequately wetted, a person must remove friable asbestos material before any wrecking or dismantling is commenced because such conduct would break up the asbestos materials and cause them to be emitted into the ambient air.

2. OAR 340-25-465(15) prohibits a person from the open storage or accumulation of friable asbestos material or asbestos-containing waste materials (ACWM).

3. Under former Commission rule OAR 340-12-050(1)(1), the failure to remove friable asbestos materials before any wrecking or dismantling is undertaken is a Class I violation if there is a likelihood for public exposure.

4. Additionally, under former Commission rule OAR 340-12-050(1)(j), the open storage or accumulating of friable asbestos material or ACWM is also a Class I violation if there is a likelihood for public exposure.

5. Respondent engaged in a dismantling project on another person's property to salvage tanks and a boiler connected to the real property for use in Respondent's business operations.

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6. Respondent did not remove friable asbestos materials in pipe insulation connected to tanks and boilers prior to engaging in its salvage operations.

7. Respondent did not adequately wet friable asbestos materials prior to their removal and further, did not engage in any wetting operations at all.

8. Respondent removed the ACWM resulting from the salvage operations and stored or accumulated such materials in several piles throughout the site of the dismantling operations.

9. Respondent did not adequately wet the ACWM being stored or accumulated and further, did not engage in any wetting operations at all.

10. Samples taken from the ACWM and analyzed showed that the materials contained 25-35 percent amosite asbestos. The materials were friable which means that it can be easily crushed by hand pressure to release asbestos fibers into the ambient air.

11. The samples were not wet when taken by Department staff or when they were tested.

12. Respondent conducted its salvage operations between February 26, 1990, and March 9, 1990. Official records at the National Climatic Data Center, as shown by an official publication of the National Oceanic and Atmospheric Administration (NOAA) show the following precipitation for relevant dates in February and March 1990 as measured at Portland International Airport, 5420 NE Marine Drive, Portland.

February

a)	22	0.00
b)	23	0.00
c)	24	0.00
d)	25	0.00
e)	26	0.00
f)	27	0.00
g)	28	0.00

March

a)	1	0.00
b)	2	0.00
c)	3	0.52
d)	4	0.24
e)	5	0.02
f)	6	0.14
g)	7	0.45
h)	8	0.02
i)	9	0.33

The Commission takes official notice of this publication.

13. There was ~~no precipitation~~ for four days prior to Respondent's salvage operations (February 22-25).

14. There was no precipitation for the first four days of Respondent's salvage operations and only a trace on the fifth day (Feb. 26-March 1 and 2).

15. Some precipitation occurred between March 3 and March 9. However, most of this precipitation was not heavy precipitation.

16. The site where Respondent conducted its salvage operations was free of rainfall for four days prior to engaging in salvage operations and four days after such operations were commenced. This combination of days clearly shows the ACWM removed by Respondent was not wetted by rain during the period of time of salvage. Further, the rainfall that did occur

during the remainder of the days' salvage operations were engaged in was not sufficient to adequately wet the ACWM.

17. Natural rainfall is not an accepted industry or Department standard for adequately wetting asbestos waste materials, because it is subject to the whim and fancy of nature. Wetting agents must be directly applied to asbestos materials during removal to prevent fiber migration.

18. Amosite asbestos, a type of asbestos that Respondent failed to remove prior to its salvage operations does not retain water well and can still migrate into the ambient air, even when wetted. Assuming it rained throughout the total period of time Respondent conducted its operations, the asbestos-containing material would not have been adequately wetted to prevent its migration into the ambient air.

19. Several residences and a small business were in near proximity to the salvage operations of Respondent. Children were playing in the street adjacent to the salvage operations site. The residences, business and children were approximately 20-25 feet from the property line where the salvage operations were conducted and approximately 60-70 feet from the actual site of the salvage operations.

20. Whether human receptors were 20 feet or 70 feet from the salvage operations is not significant. The residences, business and children were in close enough proximity to the asbestos-containing material resulting from Respondent's dismantling operations and Respondent's subsequent

accumulation and storage of such material to produce a likelihood of public exposure to the human receptors.

B. Ultimate Finding of Fact

1. Likelihood for public exposure is more than a potential for public exposure, but is a probability for public exposure. Respondent's salvage operations resulted in a likelihood for public exposure to asbestos.

2. The number of days without rainfall preceding Respondent's salvage operations; the large amount of asbestos material present on site; lack of significant rainfall during said operation; and lack of engineering controls used combined with the fact the asbestos on site was amosite asbestos created the likelihood of public exposure for human receptors within 70 feet from Respondent's salvage operations.

C. Conclusion of Law

Respondent's failure to remove amosite asbestos-containing waste material (ACWM) from pipes prior to dismantling tanks and boilers and the open storage or accumulation of such material are Class I violations under OAR 340-12-050(1)(i) and (1)(J).

II.

Magnitude of Civil Penalties

A. Findings of Fact

1. Respondent failed to remove asbestos-containing waste material "ACWM" prior to dismantling operations. This dismantling took place over several days.

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2. ACWM was strewn about and accumulated on the salvage site by Respondent. Some of this material accumulated in various pile sizes. There was no orderly disposition of the ACWM by Respondent, and such material was scattered haphazardly around the site.

3. The removal and storage of the asbestos-containing waste material was performed by Respondent and not third parties.

4. The asbestos-containing pipe installation within site buildings was not replaced by non-asbestos-containing pipe insulation by the property owner.

5. The accumulation of ACWM and its storage on the site was in close proximity to human receptors. The exact volume of the ACWM could not be determined. However, whether it was scattered around the site; in one medium-large pile or several large piles is not significant.

6. Asbestos is a human health hazard. There is no known safe miminum level of human exposure to asbestos fibers that guarantees the full protection of the public health. The toxicity of asbestos in its amosite form is all the more dangerous because this form of asbestos does not retain water well to retard its airborne migration. A concentration of 25-35 percent amosite asbestos was found at the site resulting from Respondent's salvage operations.

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B. Ultimate Finding of Fact

Respondent's failed to remove ACWM from pipes prior to dismantling tanks and a boiler and stored and accumulated such materials containing amosite asbestos waste materials in close proximity to human receptors.

C. Conclusion of Law

Respondent's failure to remove asbestos-containing waste materials from pipes prior to dismantling tanks and a boiler and the open storage of 35 percent friable amosite asbestos on the site, whether strewn about or accumulated in several large piles or in a medium-large pile, are violations of major magnitude.

III.

Negligence

The Commission is of the opinion that findings of fact are unnecessary regarding the issue of negligence because the question is more in the nature of one of law rather than fact. The following conclusions of law are made.

Conclusions of Law

1. The Commission is not required to define negligence by rule for violations within the statutory framework of ORS chapter 468 governing this case. Pratt v. Real Estate Division, 76 Or App 483 (1985). Its context within the statutory framework indicates that it was intended to embody a complete expression of legislative meaning, that can be applied to contested case proceedings.

ORS chapter 468 was not enacted to codify tort law. The term negligence has a common meaning and it is that meaning that the legislature intended for the Department and Commission to utilize.

2. ORS 468.135(1)(a) requires the Department to state in its notice the particular sections of the rule involved in the case.

3. Both ORS 468.135(1)(b) and ORS chapter 183, the Administrative Procedures Act (APA) requires the Department to provide Respondent with a notice setting forth a short and plain statement of the matters charged or asserted. The question is whether a notice setting forth a short and plain statement of the matters charged or asserted was furnished to Respondent and not whether such allegations were in one neat paragraph.

4. The Department reasonably identified the rules involved in this case and what it considered to be Respondent's negligent conduct and furnished Respondent due notice of such conduct and of the rules considered to be violated. Respondent's openly accumulating asbestos-containing waste material on site was negligent because in accumulating such material it was reasonably foreseeable that it would create the likelihood for public exposure to asbestos. Respondent's failure to determine whether material was asbestos-containing material prior to its removal from pipes was negligent because it was reasonably foreseeable that it would create the

likelihood of public exposure to asbestos. In sum, Respondent's conduct unreasonably created a foreseeable risk of exposure to asbestos by members of the public. Foreseeability in the context of ORS chapter 468 refers to generalized risks rather than the mere predictability of the actual sequence of events. Respondent's conduct produced a risk of harm to the public which could reasonably be foreseen by Respondent.

IV.

Cooperativeness

The Commission is of the opinion that findings of fact are largely unnecessary regarding the issue of cooperativeness, because the question is more in the nature of one of law rather than fact. The Commission does find and agrees with the Hearing Officer that the record does not disclose any efforts by Respondent to correct the violations. The Commission makes the following conclusions of law.

Conclusions of Law

1. ORS 468.130(2)(g) required the Commission to consider the violator's cooperativeness and efforts to correct the violation when the Commission imposes a civil penalty. The statutory subsection is phrased in the conjunctive "and" so that both cooperativeness and efforts must be present before the factor can be considered. The factor is not phrased in the disjunctive "or" to allow the Commission to consider either cooperativeness or efforts. Respondent did not engage in any efforts to correct the violation.

2. Commission rules provide that when determining the amount of civil penalty to be assessed for any violation certain procedures are to be applied. OAR 340-12-045. Subparagraph 340-12-045(1)(c)(F) states the violator's cooperativeness in correcting the violation shall be considered. This rule requires the violator to perform or engage in affirmative conduct or acts to correct the violation. Respondent's answering questions is not the performance or engaging in affirmative conduct. At most it was a passive response. Respondent is not entitled to an adjustment based on this factor in the imposition of the civil penalties by the Department.

Opinion

This matter is before us on the appeal of the Department. The appeal relates to the amount of the penalty to be imposed for the violations rather than whether the violations were committed by Respondent. We agree with the Hearing Officer that the violations were proved and that Respondent failed to remove friable asbestos materials prior to dismantling a facility and for openly storing or accumulating friable asbestos in violation of OAR 340-25-465(6) and (15).

The Commission disagrees with the Hearing Officer in the interpretation of the evidence and certain conclusions of law in this case. In some instances, a rational nexus between findings and conclusions is not made totally clear. A review of the record discloses a disagreement over evidence between

Department and Respondent's witnesses. However, the Commission does not want to decide this case based upon the selection of a winner between a "battle of experts." Instead, the evidence indicates a different view of the case to the Commission than to the Hearing Officer.

The $12,000 civil penalty imposed against Respondent, was, as recited by the Hearing Officer, predicated on the Department's view that the cited violations 1) created a likelihood for public exposure to asbestos 2) were of major magnitude and 3) were negligent. In addition, the Department found no basis for finding that Respondent was cooperative and entitled to a reduction in penalty. However, the Hearing Officer did so find.

The Commission does not find that the asbestos-containing material disturbed by Respondent during dismantling was wet. The Commission also does not find any evidence that such material was wet when sampled and tested. Respondent did not intentionally attempt to wet the material during salvage operations as required by Commission rules but instead claims rainfall adequately wetted the material. The Commission does not find this claim convincing. While acts of God are many different things to many people, Respondent cannot rely on such acts of God, in the form of rain to excuse it from liability. The number of days preceding Respondent's salvage operations without rainfall, and the number of days during such operations without rainfall, together with the minimum reported rainfall

during the remainder of days of salvage indicates the asbestos material was dry, or minimally wet.

Additionally, the fact that the asbestos was in the form of amosite asbestos which does not retain water mitigates against a conclusion that asbestos fibers would not become readily airborne. The fact the human receptors to the site were 60 to 70 feet from the salvage operations rather than 25-30 feet does not alter the likelihood of public exposure of asbestos fibers to the human receptors. Respondent's witness neither inspected the site during salvage operations, observed the asbestos materials at the time of salvage nor conducted any tests of the material. Department's witnesses were on scene and had hands on contact with Respondent's employees, the asbestos waste on site and subsequent removal of such waste by licensed asbestos contractors. We find Department witnesses more persuasive regarding the nature of the salvage operations find the condition of the asbestos waste materials than Respondent's after-the-fact expert.

There was considerable discussion in this case about the volume of ACWM; whether it was several large piles; piles scattered about or a medium-large pile. Certainly, the volume of the asbestos waste material bears upon its magnitude. The evidence, while not clear in this regard, demonstrates at least what is characterized as a "medium-large" pile (perhaps a large medium pile!) Semantics aside, a medium-large pile of asbestos-containing material is a sufficient volume in our mind to

conclude that the magnitude is major when it is combined with the toxic elements of amosite asbestos. The inability of amosite asbestos to retain water, and its proximity to human receptors is of major magnitude in the Commission's opinion.

Respondent on one hand claims it knows nothing about asbestos and on the other hand makes a production over its efforts to determine whether asbestos was present on site. These efforts are claimed by Respondent to be limited to asking the owner of the site whether asbestos was present on site. The answer by the owner was either "no" or that he could not recall the question. However, the written contract between Respondent and the owner does not disclose any mention of asbestos or whether the site was free therefrom, and in fact, makes it clear that Respondent assumed the risk of environmental concerns found on site.

Respondent has engaged in previous salvage operations and given today's modern knowledge of the dangers of asbestos in buildings and on industrial equipment, it is reasonable to conclude that Respondent should have reasonably foreseen that asbestos may be present and that its salvage operations could disturb asbestos-containing materials in the proximity of human receptors. Respondent suggested third parties may have been responsible for work on the site. However, Respondent did not produce such parties as witnesses. This testimony was more speculation than evidence that these third parties may have been responsible for the asbestos waste materials.

Finally, we believe the Hearing Officer erred in her interpretation of negligence within the context of ORS chapter 468 and in finding Respondent was cooperative in this case. We conclude to the contrary.

ORDER

Respondent is liable to the State of Oregon in the sum of $12,000 and that the state have judgment for and recover the amount pursuant to a civil penalty assessment dated May 24, 1990.

DATED this _____ day of _____, 1991.

ENVIRONMENTAL QUALITY COMMISSION

_____

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
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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. FUEL PROCESSORS, INC., Respondent.	No. AQAB-NWR-90-81 RESPONDENT'S RESPONSE TO DEPARTMENT'S OPENING BRIEF

Respondent, Fuel Processors, Inc., responds to the Department's Opening Brief as follows:

I.

The Hearings Officer carefully and completely reviewed all evidence submitted by the parties at hearing and correctly concluded that the civil penalty which was assessed by the Department against Respondent should be reduced to $1,600.

The Department used the civil penalty matrix in assessing a civil penalty of $12,000. The Department classified the alleged violations as Class I violations based upon the Department's allegation that Respondent had created a likelihood of public exposure to asbestos. The Department alleged the violations were of a major magnitude because of the quantity and concentration of materials. Applying those factors to the civil penalty matrix resulted in the Department's base penalty of $5,000 per alleged violation. The Department further increased the penalty by $1,000 per alleged violation based on the Department's allegation that Respondent's actions were negligent.

The Hearings Officer found: 1) Respondent's actions did not create a likelihood of public exposure and reclassified the violations from Class I to Class II; 2) the violations were not of major magnitude, but were of moderate magnitude; and 3) the proof did not establish that Respondent was negligent. Moreover, the Hearings Officer declared that Respondent had cooperated with the Department and accordingly reduced the civil penalty.

A. RECLASSIFICATION OF THE ALLEGED VIOLATIONS BY THE HEARINGS OFFICER FROM CLASS I TO CLASS II AND FROM MAJOR TO MODERATE WAS APPROPRIATE

1. Reclassification of Violation

The Hearings Officer reviewed all evidence presented by the parties at the hearing and properly concluded that the alleged violations, if proved, were more appropriately classified as Class II than Class I because the violations did not create a likelihood of public exposure to asbestos. The evidence produced at hearing demonstrated a strong basis for the Hearings Officer's conclusion. In fact, given the evidence submitted at hearing, the Hearings Officer had no choice but to conclude that the violations were Class II, not Class I, violations.

David Wall, the Department's witness, visited the site, generated reports on his visits to the site, and on March 21, 1990, sent a Notice of Non-Compliance to Respondent which alleged that Respondent had committed only Class II and Class III violations. At the time Mr. Wall generated that letter, he had been to the site twice and had received the DEQ laboratory test results (Tr. 30). It was only after discussions with the DEQ Enforcement Section that Mr. Wall increased the classification of the violations (Tr. 30). Mr. Wall received no new factual information before he made the upward adjustment in the classification of the violations.

Exhibit 1 to the Notice of Civil Penalty Assessment dated May 24, 1990, stated that the Department classified the violation as Class I because residences were located, and children were playing, within 20 feet of the property on which the alleged asbestos was disturbed which created a likelihood of public exposure. Respondent disputed those contentions at the hearing on two grounds: First, that the Department was incorrect in its allegation of distance; and, second, that the suspect material was wet and was, therefore, not likely to become airborne. Substantial evidence was presented at the hearing on these issues.

a. Distance

During the hearing, the Department's only witness, David Wall, stated that the residences were actually 60 feet from the work site (Tr. 22). On page 4 of its Brief, the Department mischaracterizes Mr. Wall's testimony by asserting that Mr. Wall testified that people 60 feet from the salvage operations rather than 20 to 25 feet would not have a diminished likelihood of exposure to asbestos. Mr. Wall was never asked to compare the difference in likelihood of exposure between people at 20 to 25 feet and people at 60 feet distance.

Mr. Richard Krause (resume attached, Hearing Exhibit No. 8, Tr. 73), a Certified Industrial Hygienist with extensive experience in the industrial hygiene field, performed a thorough independent investigation into this matter, and generated a detailed report (attached - Hearing Exhibit 9, Tr. 74). Mr. Krause has worked for SAIF Corporation and the State of Oregon as an industrial hygienist, and currently teaches classes for asbestos workers and asbestos supervisors for the State of Oregon and State of

Washington asbestos programs. Mr. Krause testified that it was his expert opinion that there was not a likelihood for public exposure to asbestos fibers as a result of Respondent's activities at the site (Tr. 87).

Mr. Krause's report also stated that the wind direction at the site, as indicated by the National Weather Service report, was not in the direction of the area where DEQ alleged that children were playing, which further supports the Hearings Officer's finding that there was not a likelihood of public exposure to airborne asbestos fibers. During the hearing, David Wall stated that likelihood of exposure to asbestos fibers could be affected by wind direction and weather, but Mr. Wall did not confirm the wind direction or weather at the site (Tr. 59).

b. Moisture Content

Wet asbestos is not likely to migrate through the air and, consequently, would not create a likelihood of public exposure to asbestos fibers.

Notwithstanding, the Department's claims, there is an abundance of evidence in the record supporting the Hearings Officer's finding that Sample No. 1 was wet. The Department was able to connect Respondent's activities with only one pile of material out of the many piles of materials at the site (See Hearings Officer's Findings of Fact, page 9). Sample No. 1 was taken from that one pile. That sample is shown on the DEQ laboratory report as Sample Z3006 (Tr. 52). As shown by the pictures taken by Mr. Wall and the description of the sample from the DEQ laboratory report, Sample No. 1 was wet when it was taken from the site by Mr. Wall and it arrived at the laboratory still wet. Wilmar Briggs, President of Respondent, Fuel Processors, Inc., testified that the concrete area

constantly had water in it and had to be pumped out (Tr. 109). David Wall testified that he saw puddles of water accumulated in the concrete bermed area (Tr. 46) and there were piles of materials in certain areas of the site that were actually sitting in water (Tr. 13). The Hearings Officer correctly concluded that Sample No. 1 was wet when taken by Mr. Wall.

The Department would have the Commission believe that the Hearings Officer "disregarded, ignored and did not hear or read" Mr. Wall's testimony on these issues. Yet, it is clear that the Hearings Officer reviewed the entire record, including Mr. Wall's testimony, and properly concluded there was not a likelihood of public exposure to asbestos. Not only did the Department fail to meet its burden of proof on this issue, but the Respondent presented extensive evidence which strongly refuted the Department's allegation of a likelihood of public exposure.

The Hearings Officer correctly found that the evidence presented at the hearing did not establish a likelihood of public exposure to asbestos.

2. Reduction of Magnitude of Violation

The Hearings Officer also correctly reduced the magnitude of the violation from major to moderate based on the evidence, or lack thereof, presented regarding the volume and toxicity of materials handled by Respondent.

a. Volume

The Department admits on page 8 of its Brief that Sample No. 1 was taken from the only material which Mr. Wall could testify had been handled by Respondent. The Department based its allegation of a violation of major magnitude on Mr. Wall's

assumption that all materials he saw piled on the site had been placed there by Respondent. That assumption was incorrect. Mr. Wall did not actually see Respondent's employees remove tanks or boilers at the site (Tr. 8) and he did not even ask Respondent's employees to point out exactly which materials they had handled at the site (Tr. 33). In addition, Mr. Briggs testified that there had been other demolition contractors working at the site (Tr. 106-107).

b. Toxicity

Mr. Krause stated that, in his expert opinion, Mr. Wall did not follow a protocol which Mr. Krause would have followed to determine the amount of asbestos materials at the site (Tr. 82-83). Mr. Wall conceded that it was not his concern during the inspection to ascertain the amount of asbestos on the site, but rather to simply ascertain the presence of asbestos at the site (Tr. 61). Mr. Wall and Mr. Krause agreed that the only way to determine whether materials contain asbestos is through laboratory sampling (Tr. 62-63, and 83). Mr. Wall assumed, however, without such testing, that materials at the site which looked similar had a similar asbestos content. Mr. Krause testified that 60 to 70 percent of the materials at the site had been replaced since 1977, and after 1977 asbestos-containing insulation materials were not used in the United States (Tr. 81). That testimony refutes Mr. Wall's assumptions regarding the homogenous asbestos content of materials at the site.

The only conclusion the finder of fact can reasonably make is that Mr. Wall's testimony was replete with assumptions not based on fact. Yet, on page 9 of its Brief, the Department attempts to restate Mr. Wall's assumptions as fact, and again mischaracterizes

the evidence which was presented at the hearing. Respondent's employees did admit that they pulled some insulation from pipes at the site. They did not, however, tell Mr. Wall that they had handled all of the materials contained in the concrete bermed area.

The Department's criticism of the Hearings Officer's "voyage into a semantical sea of nuances" with regard to the issue of magnitude is not appropriate. In fact, the Hearings Officer was compelled by the only evidence available in the record to adopt the term "medium-large" in describing volume, as that term was the only measurement presented by the Department's witness as to the amount of materials from which Sample No. 1 was taken (Tr. 53). When asked again, under cross-examination, to quantify the materials in the pile associated with Sample No. 1, Mr. Wall concluded that he did not know if he could speculate on that (Tr. 57). If the Department wanted the Hearings Officer to be more specific than "medium-large" in her discussion regarding the volume of materials at the site, the Department should have presented more specific and detailed evidence on that issue by instructing or training its inspector to perform more accurate measurements of the materials which the Department alleged were handled by Respondent.

The Hearings Officer carefully reviewed the evidence submitted by the parties, correctly concluded that the evidence did not support a finding of major magnitude, and correctly reduced the magnitude from major to moderate.

II. THE HEARINGS OFFICER CORRECTLY CONCLUDED THERE WAS NO BASIS FOR A FINDING THAT RESPONDENT WAS NEGLIGENT

The Hearings Officer was also correct in concluding that the Department did not provide a basis for a finding that Respondent's acts were negligent. In addition to failing to properly provide a standard for the Hearings Officer to use in deciding whether

Respondent was negligent, the Department also failed to provide a factual basis for that allegation. Respondent provided extensive evidence which established that Respondent was not negligent.

Respondent attempted to ascertain whether asbestos was present at the site. On one of the days Mr. Briggs was on the property, there were consultants from two different environmental companies at the site (Tr. 106). Mr. Briggs also testified that, when he asked Mr. Dubbs, the lessee of the real property and the owner of the subject equipment and insulation, if there was any asbestos on the piping or equipment, Mr. Dubbs replied that there was not (Tr. 108-109). Mr. Briggs reasonably relied upon Mr. Dubbs' representations as he had no basis to suspect anything less than honesty and there appeared to be a factual basis for Mr. Dubbs' representation due to the presence of the consultants. Mr. Richard Krause also testified that the actions taken by Mr. Briggs in determining whether asbestos was present at the site were reasonable (Tr. 86). In response, the Department offered nothing.

The Hearings Officer correctly concluded that there was no basis to conclude that Respondent had been negligent in its actions and correctly reduced the civil penalty.

III. THE HEARINGS OFFICER CORRECTLY CONCLUDED THAT RESPONDENT COOPERATED WITH DEQ

The Hearings Officer correctly concluded that a reduction of the Civil Penalty should be made for Respondent's cooperativeness with DEQ. Mr. Wall testified that Respondent's employees cooperated fully with him when he visited the site, and continued to assist the Department through written statements and follow-up letters (Tr. 63-64). Again, there was no evidence to the contrary. The Hearings Officer correctly reduced the

civil penalty based on her finding that Respondent cooperated with the Department in this matter.

SUMMARY

Respondent requests that the Commission carefully consider all of the evidence submitted at the hearing, and not rely upon what the Department believes or wishes it had submitted. The burden of presenting evidence to support a fact or position in a contested case rests on proponent of the fact or position. ORS 183.450(2). The parties attended a hearing on December 13, 1990, to present all evidence for the record. The Commission's Hearings Officer observed the witnesses, examined the evidence, and generated the Hearings Officer's Findings of Fact and Conclusions of Law and Final Order dated May 20, 1991. The Department asks the Commission to disregard the Hearings Officer's conclusions. When the Commission completed its review of the hearing record, it must concur with the Hearings Officer's Findings, Conclusions, and Final Order.

Respectfully submitted,

Debra Olson Soren, OSB# 86256
Of Attorneys for Respondent

RICHARD H. KRAUSE

HAZCON, Inc.
9500 S.W. Barbur Blvd.
Suite 100
Portland, Oregon 97219
(503) 244-8045

EMPLOYMENT

1986-Present HAZCON, INC., Portland, Oregon
President
Formed Industrial Hygiene service corporation to provide occupational and environmental health management services; Instructor in Approved Washington and Oregon State Asbestos training courses, manages staff of Certified Industial Hygienists, Industrial Hygienists, and Industrial Hygiene Technicians in the field and laboratory.

1985-1986 JAMES L. GROVES COMPANY, Portland, Oregon
Assistant Manager
Assisted in management of the H2M Division, provided industrial hygiene sampling and analytical services to clients, marketed for new clients, arranged seminars, participated in professional organizations and regulatory actions, developed and presented training programs, developed, implemented and participated in asbestos control programs and performed numerous industrial hygiene surveys of industrial, institutional, and governmental facilities.

1980-1985 SAIF CORPORATION
Industrial Hygiene Manager
Duties included managing four Industrial Hygiene Consultants, consulting with insureds about the recognition evaluation and control of occupational health hazards, evaluating occupational disease worker's compensation claims and providing expert witness testimony at claims hearings.

1977-1980 STATE OF OREGON, ACCIDENT PREVENTION DIVISION
Health Compliance Officer
Responsible for conducting industrial hygiene inspections of work places in Oregon to determine compliance with the Oregon Safe Employment Act. Reports were prepared describing violations of standards and work place conditions observed.

EDUCATION

M.S. in Public Health, Industrial Hygiene and Safety, University of Washington
B.S. in Microbiology, University of Washington

PROFESSIONAL ORGANIZATIONS

American Industrial Hygiene Association American Academy of Industrial Hygiene
American Society of Safety Engineers

CERTIFICATIONS

Comprehensive Practice of Industrial Hygiene by
American Board of Industrial Hygiene
Certified Safety Professional

ATTACHMENT TO RESPONDENT'S BRIEF HEARING EXHIBIT 8, TR. 73.

HEALTH HAZARD CONTROL SERVICES
HAZCON INC.

RECEIVED
OCT 0 3 1990
BOGLE & GATES

Debra Olson
Bogle & Gates
222 SW Columbia
Portland, Oregon 97201

Dear Ms. Olson:

At your request, I have performed a factual investigation regarding the DEQ notice of violation (Case No. AWAB-NWR-90-81) against Fuel Processors, Inc.

As a part of this investigation, I visited the Department of Environmental Quality offices to review their files, interviewed Mr. Bill Briggs, Mr. Dale Poor and Mr. Dan Goodhue of Fuel Processors, Inc., Mr. Bill Dubbs of West Coast Chemicals, and Mr. Jim Barnes of Cascade Industrial Maintenance, obtained information from the National Weather Service, and visited the cleared site. My findings are as follows:

The initial inspection of the site was conducted by Mr. Dave Wall, Asbestos Control Analyst of the Air Quality Division.

Upon close review, several questions arise which serve to raise doubt about the degree of hazard presented by the actions of Fuel Processors, Inc.

The first question involves the actual amount of friable asbestos debris that was present.

The DEQ photos show large piles of insulation at the site. The bulk samples collected by Mr. Wall included two (Nos. 1 & 2) that appeared to be from pipe insulation. These contained amosite asbestos. The two other samples (Nos. 3 & 4) contained chrysotile asbestos and consisted of "tough," "stiff" materials. These likely may have been gasket materials of low friability. In my opinion, to establish the actual amount of asbestos materials in these piles, more samples should have been collected. This would have reduced possible sampling bias resulting from the natural tendency to only sample those materials with the highest potential for asbestos content.

In conversations with Mr. Dubbs I learned that he estimated that 60-70% of the pipe insulation in this plant had been replaced since his arrival in 1977. Non-asbestos pipe insulation materials can look identical to older asbestos containing materials, particularly when piled in a dirty, soaking wet pile of demolition debris. It is probable that only a small amount of asbestos material was present in the photographed piles.

The second question involves the condition of the material as it was taken off of the pipes. The material at the time of the inspection was obviously saturated with water as shown in the DEQ photographs.

I spoke with Dan Goodhue (the person who actually removed the insulation) about the condition during the removal. He stated the insulation was removed later in the demolition time frame from 2/26 to 3/10 and was saturated on the pipes as well as when it was in piles on the ground. In light of this information, the potential for airborne exposure was greatly lessened.

9500 SOUTHWEST BARBUR BOULEVARD
SUITE 100
PORTLAND, OREGON 97219
503/244-8045

I discussed the weather conditions with the National Weather Service for this time period. This information is consistent with Mr. Goodhue's observations of the wetness.

Date	Rainfall	Wind
2/26	None	11 mph East
2/27	None	18 mph East
2/28	None	11 mph East
2/21	None	6 mph South East
3/02	Trace	6 mph South East
3/03	.52 inches	10 mph South
3/04	.24 inches	8 mph East South East
3/05	.02 inches	8 mph South East
3/06	.14 inches	8 mph South
3/07	.45 inches	11 mph South
3/08	.02 inches	14 mph South East
3/09	.33 inches	14 mph South East
3/10	.28 inches	10 mph South East

The third question involves the exact proximity of children playing and the likelihood of exposure from wind-driven asbestos dust.

Mr. Wall's report mentions children playing approximately 20 feet from the plant. The final DEQ Notice of Penalty refers to children being 20 feet from the asbestos removal. From my observations of the site and inspection of the maps, the two statements are not consistent. A more accurate distance (as measured on the aerial photographs) from removal to children would be at least 60 - 70 feet. Also, as previously mentioned, the material was likely soaked with water as it was removed and it is therefore unlikely that asbestos fibers would have become airborne as a result of the removal activities. In addition, the wind direction during the days when the asbestos was removed would not have been toward the closest houses where DEQ has alleged children were playing.

In my opinion, the hazard alleged in the final DEQ notice of penalty exceeds the hazard associated with actual conditions at the site during the period in question.

Sincerely,

Richard H. Krause, CIH

RHK/jl

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 RESPONDENT'S RESPONSE TO DEPARTMENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Respondent objects to, and strongly disagrees with, the Department's Proposed EQC Findings of Fact, Conclusions of Law and Final Order. In support of this objection, Respondent incorporates the arguments set forth in Respondent's Response Brief. As outlined in Respondent's Brief, the Hearings Officer was correct in her findings and conclusions in this matter. The Proposed EQC Findings, Conclusions, Opinion and Order are a reflection of what the Department wishes had been established at hearing, but in fact, are not supported by the weight of the evidence presented at hearing in this matter. The EQC should reject the Department's Proposed Findings, Conclusions, and Order, and instead enter the Final Order dated May 20, 1991, which was prepared for the Commission by the Commission's Hearings Officer.

Respectfully submitted,

DEBRA OLSON SOREN, OSB# 86256
Of Attorneys for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	No. AQAB-NWR-90-81 RESPONDENT'S RESPONSE TO DEPARTMENT'S EXCEPTIONS

Respondent disagrees with, and objects to, the Department's Exceptions to the Hearings Officer's Findings of Fact, Conclusions of Law, Final Order and Judgment. In support of this objection, Respondent refers the Commission to the Respondent's Response to Department's Opening Brief. Further, Respondent affirmatively states that the weight of evidence presented at hearing supports the Hearings Officer's Findings, Conclusions, and Final Order prepared by the Hearings Officer and dated May 20, 1991.

1. The Hearings Officer correctly reclassified the violations from Class I to Class II.
2. The Hearings Officer correctly concluded that the magnitude of the Respondent's violation should be reduced from major to moderate.
3. The Hearings Officer correctly concluded that there was no basis for finding the Respondent was negligent.
4. The Hearings Officer correctly concluded Respondent was entitled to a reduction of the civil penalty based on its cooperative conduct.

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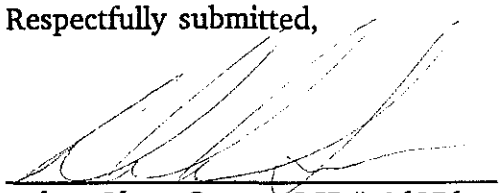
5. The Hearings Officer correctly reduced the total amount of the civil penalty from $12,000 to $1,600.

Respectfully submitted,



Debra Olson Soren, OSB# 86256
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on October 31, 1991, I served the foregoing RESPONDENT'S RESPONSE TO DEPARTMENT'S OPENING BRIEF, RESPONDENT'S RESPONSE TO DEPARTMENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER, and RESPONDENT'S RESPONSE TO DEPARTMENT'S EXCEPTIONS upon the parties hereto by hand delivering a true, exact and full copy thereof to:

Arnold B. Silver
Department of Justice
410 1515 Building
1515 SW 5th Avenue
Portland, Oregon 97201

DEBRA OLSON SOREN, OSB# 86256
Of Attorneys for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
	)	No. AQAB-NWR-90-81
Department,	)	
	)	DEPARTMENT REPLY BRIEF
v.	)	
	)	
FUEL PROCESSORS, INC.,	)	
	)	
Respondent.	)	

The Department replies to Fuel Processors, Inc.'s Response.

Respondent presents no new argument or issues of substance that the Department believes need additional briefing. Respondent instead offers its expert witness, Richard H. Krause, as its argument. Mr. Krause is president of Hazcon, Inc. and a paid expert witness of Respondent. His primary investigation consisted of talking to Respondent's employees and officers and looking at pictures of the site after it was cleared. He did <u>not</u> inspect the site prior to or during the actual demolition of the structures located thereon. Mr. Krause also does not state how many samples would even be "enough" for testing. Finally, his weather service data only supports the Department's position that the asbestos-containing

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waste material removed by Respondent was not wet and was capable of creating a likelihood of public exposure.

Respectfully submitted,

Arnold B. Silver
Assistant Attorney General
Of Attorneys for Respondent

CERTIFICATE OF SERVICE BY MAIL

I certify that on November 18, 1991, I served the foregoing DEPARTMENT REPLY BRIEF upon the party hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Debra Olson Soren
Attorney at Law
Bogle & Gates
222 SW Columbia
Portland, OR 97201

ARNOLD B. SILVER #58088
Assistant Attorney General
Of Attorneys for Department

1 - CERTIFICATE OF SERVICE
(0655N)

Tape No. 1 - Fuel Processors (Demolition-Asbestos Removal)

Zucker: Good Morning. This is December 13, 1990. We are in Portland, Oregon, and this is the time and place scheduled for hearing in DEQ v Fuel Processors, Inc., Case No. AQAB-NWR-90-81. My name is Linda Zucker, and I am the Agency's hearings officer. We spoke very briefly before the beginning of the hearing and determined that we will proceed through the Notice of Assessment and DEQ will present its case. What I understand to be alleged are two violations of the asbestos rules; the first being a violation of OAR 340-25-465(a) which involves removal of friable asbestos materials prior to wrecking, or dismantling, where the materials would... (excuse, me) ...in wrecking or dismantling, that would break up the asbestos materials. The allegation and the notice departs from that to some extent. It is a little bit short of the rule, but we will see what the proof provides. The second is OAR 340-25-465(15) in which DEQ is required to prove open storage or accumulation of friable asbestos materials or as they alleged, asbestos-containing waste material, which is prohibited, and the allegation

conformed essentially to the rule. So, DEQ is obliged to prove those behaviors, and in addition, their allegation that this is a Class I, Major Magnitude Violation that was characterized by negligent conduct. I did have some trouble with the penalty calculation and look forward to DEQ's establishment of the classification and the magnitude. I am interested in knowing how those determinations were made, and particularly the negligence analysis; especially, in the second violation. I'd like to understand better what the nature of the negligent behavior is. But those are the things they are required to prove. I think the excuse from notice I find appropriate. That is, that it was a work practice violation. I don't know if you have any issues first and I am turning to Debra Olson who is here and representing Fuel Processors.

Debra Olson: We are ready to proceed and to follow DEQ's presentation of this.

Zucker: Fair enough. Then, Arnold Silver is representing DEQ, and, do you have an opening statement?

Arnold Silver: I do not have one at this time, Ms. Zucker.

Zucker: Good enough. Then why don't you go to it.

Arnold Silver: May we call David Wall, please.

OATH ADMINISTERED.

Silver: Mr. Wall, will you state your full name and title and your employer. . .

Wall: David Wall. I work for the Department of Environmental Quality as an Asbestos Control Analyst in the Asbestos Section of the Air Quality Division.

Silver: Would you tell the hearings officer the nature of your DEQ responsibility.

Wall: I inspect asbestos removal projects when they take place throughout the state to determine whether or not those projects are being conducted according to the regulations.

Silver: How long have you been doing that?

Wall: For three years.

Silver: Have you previously investigated sites or projects which have been reported to you as asbestos-containing material?

Wall: Yes, I have.

Silver: Approximately how many of these sites have you investigated?

Wall: Over 150, approximately.

Silver: Have you received any training or taken any courses regarding asbestos removal practices or asbestos identification during your employment?

Wall: Yes, I have. I've gone to the University of Washington Engineering Class on such removal. That was back in 1987. I went through the Asbestos Hazard Emergency Response Inspector Management Plan training class in 1988. I have also gone through several investigators classes; one given by the Department of Environmental Quality, and one given by the Environmental Protection Agency in Seattle.

Silver: Have you tried to give any programs at all for asbestos removal and asbestos...

Wall: Yes, in the past three years I have put on several presentations throughout parts of the state explaining the regulations and detailing how asbestos is supposed to be removed, to different organizations and groups.

Silver: Mr. Wall, during March of 1990, did you have any reason to inspect a parcel of real property located at 11104 NW Front Avenue in Portland?

Wall: Yes, I did.

Silver: Approximately how many times--and do you remember the dates_____?

Wall: On March 10, which was a Saturday, I inspected the site in the morning--approximately 10:00 o'clock in the morning, and on March 12, the following Monday.

Silver: Why are you making these investigations?

Wall: We received a phone call from a licensed asbestos contractor, Cascade Industrial Maintenance, requesting a waiver of the required 10-day notification period for an emergency removal at this site.

Zucker: When was that?

Wall: That was on March 9.

Zucker: Okay.

Silver: I guess I am not clear--why did the contractor contact your office?

Wall: We had been contacted by a demolition firm and asked to come out and remove some material that they suspected to be asbestos pipe insulation, on the site. And in order to do that removal, they are required to contact the Department and either get a waiver of the ten day permission to work in less than ten days.

Silver: Did you grant the waiver?

Wall: Yes, we did.

Silver: Did you subsequently ascertain the nature of the business located at this address?

Wall: Yes. When I arrived on the site on March 10, I spoke with Mr. William Dubbs who is I believe the manager of a company called West Coast Adhesive which occupied the site for seven years.

Silver: Now, during the inspection at the site, did you talk to any persons while you were there?

Wall: Yes, I did. I talked with Mr. Dubbs and I talked with a gentleman named Dan Goodhue, who is a worker for Fuel Processors. This was on March 12, which was the following Monday. I also talked with a gentleman named Dale Poor, representing himself as a _____ for Field Processors.

Silver: Did they tell you what Fuel Processors was doing at the site?

Wall: Yes, they told me that, _____ told me they had salvaged the tanks that at one time contained phenol and the boiler from the site. I asked him if they had pulled the insulation

off of the pipes while they were salvaging those tanks, and he said that they did.

Silver: I don't know if you can, but with your conversations with these gentlemen, could you possibly be a little more specific in describing the procedures_____ _____.

Wall: I didn't see them do the actual removal of the tanks and boilers, but the result was that there was pipe insulation--piles strewn over a good portion of the slabs where most of the tanks were and there was a building on the site that has two tanks - and a portion of the building had been torn out so that they could accommodate the removal of the those tanks from that building.

Silver: What was done with the pipe insulation?

Wall: It was on the site, to the best of my knowledge, all of it was on the site at the time of inspection in piles on the site.

Silver: Was there more than one pile.

Wall: There were several--more than five, I believe. When we left there were 20 or 30.

Silver: Did you subsequently take any samples of that material?

Wall: Yes, I took five samples at the site, and four of those samples did turn out to be positive for containing asbestos material.

Zucker: At the site. You took five and four were positive?

Wall: Four were positive, yes.

Silver: Let me ask you-- May I write on this as an exhibit

Zucker: Yes, actually, if you don't mind, I would prefer to mark it.

Silver: Would you hand that to the hearings officer, please.

Zucker: And, before we continue, what you were describing are things that you saw?

Wall: Yes.

Silver: They were all one exhibit.

Zucker: Okay.

Silver: Can you take a look at those, please, Mr. Wall, and tell the hearings officer what they are and what they represent

Wall: They represent samples that I took at the West Coast Adhesive site. Two of the samples were taken from the tank area of the site. One sample was taken from the boiler; and two of the samples were taken from sheds to the north of the tank site.

Silver: Who did you submit the samples to?

Wall: To the Department of Environmental Quality Lab.

Silver: And you subsequently received the results back?

Wall: Yes, I did.

Silver: Would you please hand those documents to Ms. Olson? I'm going to offer those as an exhibit.

Zucker: Good. Received.

Pause.

Silver: Maybe you have already explained this, but what was the results of these tests?

Wall: Four of the five samples showed asbestos in the material. The sample that did not show asbestos was from an insulation material that sort of looked like a foamy, beady stuff that was around the boiler itself. All of the samples of pipe insulation that I took showed positive for asbestos.

Silver: What percentages?

Wall: There were two different percentages and two different types of asbestos; 25 - 35% of amosite asbestos and 85% chrysotile.

Silver: Is this material friable?

Wall: In my opinion, it was.

Silver: What does friable mean?

Wall: Friable means that the material can be easily crushed by hand pressure to release asbestos fibers.

Silver: Did you ask any of the Fuel Processor _____ _____ whether they inspected or otherwise determined whether asbestos was present on the site prior to the salvage operation?

Wall: Yes, I asked Dale Poor if they had tried to determine whether or not there was asbestos on the site. He said that at one time they talked with Mr. William Dubbs and asked him whether there was asbestos on the site and that Mr. Dubbs had told them that there was not. I talked with Mr. Dubbs and he did not remember that conversation.

Silver: Did you examine the pipe insulation accumulated at the site?

Wall: Yes, I did.

Silver: Did you determine whether it was wet?

Wall: There were piles in certain areas of the site that were actually sitting in water and the material in those areas could have been considered wet. There were other sections strewn across the slab that were not in water that had been setting out for quite a while that I considered in a dry condition.

Silver: Was the material wetted by Fuel Processors?

Wall: Not to my knowledge.

Silver: Can you tell me why it's important for this material to be wet?

Wall: During the process of removal, when you are breaking these materials apart, the fibers will release and they will go into the air and can migrate over a large area. And, water is used in the process of removal to help prevent fiber from migrating, because water droplets can grab the fibers and help hold them to the ground.

Zucker: Excuse me, I know this could have been an issue in this case, but is it, Mr. Silver? There's no allegation of failing to "adequately wet" and there's no reference to it anywhere.

Silver: I think, Ms. Zucker, if you will bear with me, that this may be somewhat of an issue.

Olson: I concur with this...

Silver: Okay, go ahead.

Olson: It is an issue in that we are talking about the likelihood of public exposure, and the material was wet, and so there is less of a likelihood that the asbestos fibers would have migrated away from the site. It will become more obvious later on as we go through "Violation I"...

Zucker: Thank you.

Silver: Where was I?

Zucker: "Was the material wetted by Fuel Processors?" "Not to my knowledge."

Silver: All right. If the material was not wetted by Fuel Processors, and you know how it would become wet.

Wall: From rainfall.

Silver: Was it sufficiently wet to prevent airborne asbestos fibers?

Wall: In some areas of the site, yes. In other areas, no.

Silver: Let me ask you, Mr. Wall, do you know the approximate dates of this salvage operation... the dates it took place?

Wall: I asked both Dale Poor and Mr. Briggs how long the operation went and they told me it was approximately February 26 through March 9.

Silver: Well, is rainwater an acceptable method of wetting asbestos insulation?

Wall: It is not an accepted industry standard.

Silver: What is an acceptable standard?

Wall: Normally, when an asbestos contractor goes into wet material, what they will do is either have it inside of containers or in what they call a glove bag, which is just a bag that goes over a section of pipe. And, after it is inside this bag, they will split the pipe and then use water in combination with a compactant, which is a silky material, and soak this stuff down completely before it's removed from the pipe. It's a very standardized process in the asbestos industry. We don't feel that rainfall is an accepted method of wetting material down because there's no way for that water to get inside to the asbestos-containing material while it is being taken off. Maybe after a period of time it is soaked because it has been setting there, but while it is being taken off, it can't get wetted properly.

Silver: Well, let's assume it was raining while Fuel Processors was removing the tanks and the boiler and pipes and insulation off the pipes. Would that have prevented asbestos fibers from becoming airborne?

Wall: No, not in my opinion, and not according to information which we have compiled over the years.

Silver: Maybe you could expand upon that, Mr. Wall, why wouldn't the rain have prevented the airborne asbestos from becoming airborne after its release?

Wall: One of the reasons is that certain types of asbestos will not retain water and we have seen in the past in projects where this asbestos has been heavily wetted that the fiber count stayed in the air for long periods of time and it would, or could, migrate from that.

Silver: What type of asbestos is that?

Wall: That's the amosite type of asbestos, and that's because of the configuration of the material.

Silver: Was that the type of asbestos that was found at the site?

Wall: One of the types.

Silver: Were these tanks and boiler in any type of structure at the site prior to removal?

Wall: My investigation showed that two of the tanks were inside a two-story building on the site and were removed from that building.

Silver: Would you describe the building?

Wall: Just basically a two-story structure. I have no idea what it was used for, but there were two tanks inside that building that had lines connected to them that had insulation material on them.

Silver: Well, did the building have walls or a ceiling...

Wall: Yes, it was a building, at least before the salvage operation started.

Silver: Windows?

Wall: Windows, yes.

Silver: Open or closed?

Wall: At the time that I was it, the south wall had been torn off to accommodate the removal of tanks.

Silver: And, did you observe any pipe insulation that remained in the building after the removal? There was a link of pipe that ran east-west in the building, approximately 12 inches in diameter that had pipe insulation on it and that material was sampled--was one of the samples.

Silver: Did you observe whether it was wet?

Wall: It was not wet.

Zucker: Mr. Silver, may I interrupt? I can't tell from what you have just said what I think you want to establish. You have described the building; I don't have a certain time. And I don't know whether you... I assume you are offering this to show that there was free asbestos at the time. I can't get it from the language you are using. Perhaps I should be able to, but there was pipe material? Was

there exposed pipe material? Maybe you could just go back and...

Silver: Let me go back a little bit. While you were observing the building, did you observe any pipe insulation remaining in this building after the tanks and the boiler were removed?

Zucker: And may I just ask, what we are talking about now is either on 3/10 or 3/12?

Silver: Yes.

Zucker: Okay, and a wall was missing?

Wall: Yes.

Zucker: And, okay, go ahead. Ask the question one more time.

Silver: When you observed the building, did you observe any pipe insulation remaining in the building after removal of the tanks and boiler from the building?

Wall: Yes.

Zucker: And, was it exposed?

Silver: That was going to be my next question?

Zucker: I'm sorry.

Silver: Was the pipe insulation exposed?

Wall: Yes, there were several sections of the pipe insulation that were damaged, causing the material to hang, some of it had fallen to the floor. There was a length of pipe at the west end of the building that ran vertical that had a considerable amount of damage.

Silver: Was this exposed pipe insulation wet?

Wall: No, it wasn't.

Silver: Just a couple more questions, Mr. Wall. Are there any residences or businesses near the site Fuel Processors was working on?

Wall: Yes, there are.

Silver: Approximately, how many?

Wall: I noted two residences directly across the street to the west of the site. There is a business to the northwest of the site.

Silver: Approximately, how far are these residences?

Wall: The residence is about twenty...

Silver: Well, let me finish the question... I have a question...

Wall: Okay.

Silver: Approximately how far are the residences from the area where the asbestos was disturbed?

Wall: About 60 feet.

Silver: Approximately, how far are the residences from the site proper?

Wall: Approximately 20 - 25 feet.

Silver: The distance you indicated, in the calculation at least, I believe was 20 feet. Is that correct? And that's probably 20 feet from the

property line, but it is more than that from the actual work site...

Wall: Yes.

Silver: Did you see any people at these residences?

Wall: Yes, I was several children playing across the street at the time of my personal inspection.

Silver: What date was that?

Wall: That was March 10.

Silver: Was it your knowledge that the operation was going on at that time?

Wall: At that time? No.

Silver: You believe that the removed asbestos contained pipe insulation and the storage of those materials could have created the likelihood of public exposure to that substance?

Wall: Yes, I do.

Silver: Why?

Wall: Well, because of the proximity of the people living in the area, and the fact that the salvage operation went on for what appears to be a long period of time. It was not raining that entire time. The first part of the project, from what we have been able to find from our investigation is that there were four or five days that it wasn't raining at all.

Silver: To the best of your knowledge, Mr. Wall, is there any safe public exposure to asbestos?

Wall: Neither the State Legislature or the EPA has determined a safe level of exposure.

Silver: This may not be within your knowledge, Mr. Wall, but do you know why Fuel Processors did not give prior advance notice of this...

Wall: The work practice regulations according to the rule don't require advance notice - violations of the work practice regulations.

Silver: Would you hand this to the hearings officer, Mr. Wall?

Pause.

Silver: Can you identify those pictures, please?

Wall: Yes, those are pictures... one facing... the top picture is the picture facing the north, and the bottom picture is the picture facing the south showing residences directly across the street from the West Coast Adhesive site.

Silver: Did you take those pictures?

Wall: Yes, I did.

Silver: Do those pictures truly represent what you saw at the site at the time you took those pictures?

Wall: Yes.

Silver: Would you hand those pictures to Ms. Olson, please?

Zucker: No objections?

Silver: Mr. Wall, I have no further questions for you at this time. I think I am going to have to turn you over to the hearings officer... and Ms. Olson.

Zucker: Happily, in either case. What did you mean when you said that no safe level has been determined, that there has been no effort to determine, or that...

Wall: No. They have been investigating asbestos exposure problems for a long time, and the EPA has determined, and the Legislature has determined that there is no safe level of exposure.

Zucker: Okay. And, Ms. Olson, are you going to inquire about how asbestos moves?

Olson: How it moves through the air?

Zucker: Yes.

Olson: I didn't intent to; I could go through that if you...

Zucker: I don't need to. I am curious, however. When you talk about likelihood of exposure, I assume you mean that the asbestos fibers are going to travel through the air and reach children, or others, at a distance of... at some distance. Are they? What is the mobility of...

Wall: Because of the aerodynamics of the fiber itself, it can stay animated and in the air for great, long periods of time. And every time there is an air movement, it will become re-animated. So it can float in the air for a long period of time, and migrate with the wind.

Zucker: When I try to look at likelihood, how do I examine the behavior of airborne asbestos fiber and the likelihood of public exposure?

Wall: If the fibers are in the air, and they migrate with the wind, and there are people in the area where that wind is traveling, then there is a likelihood those people will be exposed to those fibers.

Zucker: What is the area?

Wall: In the breathing zone, of each individual-- maybe I don't understand?

Zucker: Well, I'm just trying to think what unit sited residence is: 60 - 65 feet from the accumulation of asbestos, and I'm just trying to get a sense of the likelihood of that material.

Silver: May I try to help?

Zucker: Sure.

Silver: Mr. Wall, would individuals within the distance of 20 - 60 feet away from the site be likely to be exposed to asbestos fibers by virtue of their traveling into the air?

Wall: Yes, I think so.

Olson: Think so?

Silver: Well, answer...

Wall: Yes.

Olson: Thank you.

Zucker: Okay, would you like... you are welcome to inquire.

Olson: Mr. Wall, on March 21, did you send a letter to Fuel Processors, which was a letter of noncompliance.

I remember--it is back here, the letter that you sent.

Wall: Yes.

Silver: I've seen it, thank you, Ms. Olson.

Zucker: Any objection?

Silver: No objection.

Olson: In that letter of noncompliance, did you state that there had been violations made by Fuel Processors of the asbestos work law.. work compliance standards?

Wall: Yes.

Olson: Okay. And, what class of violations did you state that Fuel Processors made in this letter.

Wall: In that letter... could I see it?

Olson: Sure.

Wall: Okay. I stated that two of the violations were Class II and one was a Class III violation.

Olson: Okay. On the date that you sent this letter, had you been out to the site twice?

Wall: Yes, I had.

Olson: Okay. Had you received the results of the asbestos sampling that you performed at the site?

Wall: Yes.

Olson: And, was it your conclusion at that time that these were Class II and Class III violations?

Wall: According to my interpretation of the rules involved at the time, I thought it was a Class II.

Olson: Okay. Can you tell me the difference between a Class I and a Class II violation in this context?

Wall: A Class I violation, as I read the rule, is required if there is a likelihood of public exposure and a Class II violation is required if there is no likelihood of public exposure.

Olson: Okay. Mr. Wall, you have just testified that you believe now that you believe now there was the likelihood of public exposure. What changed your mind?

Wall: When I re-read the rule, along with my manager and the Region Operations Enforcement Section, it was pointed out to me that because of the likelihood of public exposure that I had classified the violation wrong. I had always believed that there was a likelihood of public exposure, but I had misinterpreted the reading of the regulation at the time I made the notice of noncompliance.

Olson: In determining the likelihood of public exposure, what factors did you consider?

Wall: Dry asbestos on the site, and the fact that the air where people...

Zucker: Excuse me, may I ask when... while you were making the initial determination?

Olson: I am making the initial determination.

Wall: Dry asbestos on the site could cause a public exposure and the fact that members of the public were in an area where they could become exposed from that material.

Olson: Do you know what the weather conditions were throughout the entire period of time that Fuel Processors was working on the site?

Wall: I have seen reports from the weather service as to what the weather was like at the Portland Airport during that time.

Olson: Okay. But you don't have personal knowledge.

Wall: Of what the weather was like on the site-only for the days that I inspected.

Olson: Did you talk to Mr. Poor or Mr. Goodhue about the weather conditions at the site while they were working at the site?

Wall: I don't believe I asked them about the weather conditions at the site.

Olson: When you were talking to Mr. Poor or Mr. Goodhue, you said you asked them if they had worked with or disturbed any of the insulation material that was on the site.

Wall: Yes.

Olson: Did you ask them to point out to you exactly which materials they had removed from _____ or other physical equipment?

Wall: No, I did not.

Olson: You swore in your statement you took five samples.

Wall: That is correct.

Olson: How did you determine where to take samples?

Wall: The Department requires that we show that there is asbestos in whatever materials are on a specific site, and I walked over the entire site and looked at several different materials. I considered that quite a few of them were homogeneous in nature and the two most different types of materials are the ones that I sampled.

Olson: In how many different locations... in sampling... in looking at your report, you stated that there were several piles around on the site.

Wall: That is correct.

Olson: How many different types of materials were on the site?

Wall: There were two different types of materials that I suspected to be asbestos-containing, and those were the ones that I sampled.

Olson: So the rest of the materials, the rest of the types of materials in those piles you did not believe to be asbestos-containing.

Wall: That isn't what I said. I said that there were two different types of materials on the site. Those piles contained those types of materials. I considered them to be homogeneous for the site.

Zucker: Mr. Wall, it would help if you would answer the question as it is asked, and you did not. Why don't you ask your initial question again, because it is hard for me to understand the answers when you proceed that way. And, we will pause if you have any problem with the content of the question.

Olson: Maybe it will help if we work with some of the pictures that Mr. Wall took of the piles of asbestos. I think that would make it clear for all of us. Mr. Wall, did you take this picture at the bottom of this page? I believe it's attachment number 4 of your report.

Wall: Yes, I did.

Olson: Okay. And in this pile of debris... I'm sorry...

Silver: No, just give me the number of it.

Olson: Four.

Silver: Is there another number on it?

Olson: I couldn't check because...

Silver: Okay, I'll find it.

Olson: How many different types of materials do you see in this pile of debris?

Wall: There could be as many as four different types of materials...

Olson: How many types of materials did you sample from this pile?

Wall: I did not sample that pile.

Olson: Okay. Do you believe that there are asbestos-containing material in that pile?

Wall: At the time, my experience told me that there was material that I considered suspect; material that was homogenous to material that we had sampled.

Olson: But you do not have a lab analysis that would prove that there is suspect asbestos-containing material in this pile.

Wall: No, I don't; no, I don't.

Pause.

Olson: When speaking with Mr. Dubbs about the fact that there may have been asbestos material on that property, did you ask Mr. Dubbs how much material he believed was on the property? Excuse me. How much asbestos material was on the property?

Wall: No.

Olson: Mr. Wall, in your report of March 29, 1990, I believe it was your case report... you stated that Fuel Processors was negligent because this, and I am quoting, "this company deals with the salvage of tanks and boilers and

encounters asbestos-containing materials quite often. They do know that asbestos needs to be handled in a certain way." Who gave you that information; where did you...

Wall: I got that from Mr. Dan Goodhue, one of its employees.

Olson: Do you recall when he told you that?

Wall: My first conversation with him was March 12, and I was inspecting the site.

Olson: Do you know what... Did you receive a copy of a contract between Fuel Processors and West Coast Adhesive?

Wall: Yes.

Olson: And, did that contract state that Fuel Processors was simply purchasing equipment from West Coast Adhesive? Did you recall?

Wall: I don't recall.

Olson: In your case report, the question is asked of you, "Did the violator gain an economic

benefit as a result of the violation?" And you statement was: "It was certainly cheaper not to deal with the asbestos pipe insulation." Could you explain that statement.

Wall: Normally, if there...

Zucker: Excuse me, just a moment. Is that an issue in the case?

Olson: It goes to the standard of care and the expectations that we had of Fuel Processors.

Zucker: Would standard of care refer to negligence?

Olson: His statement earlier in his report is that they held Fuel Processors to a higher standard, or to a higher level of knowledge than other contractors. And, as I go through this report, there are other statements that are consistent with what he was expecting from Fuel Processors.

Zucker: I don't understand what it is you are trying to prove, or disprove.

Olson: Actually, what I am trying to show is that he had the wrong belief regarding Fuel Processors' knowledge and level of expertise with regard to asbestos products. And that goes to negligence.

Zucker: Okay.

Olson: When you say that it was cheaper not to deal with the effects of pipe insulation, could you explain that statement?

Wall: It is expensive to...it can be expensive to remove asbestos prior to doing any type of demolition.

Olson: And, who would have been responsible for removing asbestos pipe insulation at this particular site?

Wall: I don't know if I can answer that question.

Olson: Well, West Coast Adhesives was the operator of the West Coast Adhesives plant, and Mr. Dubbs was the general manager, if I recall. If there was going to be demolition done at the

site, would Mr. Dubbs not have been responsible for having that removal done?

Wall: Honestly, I don't know.

Olson: Did you send a notice of noncompliance to Mr. Dubbs with regard to this project?

Wall: Yes, I did.

Olson; And, what was that notice of noncompliance for, what citation did you make to violation of the statute?

Wall: I would like to...

Pause.

Olson: Is there a letter dated March 21 to Mr. Dubbs?

Zucker: And, while you are looking, I'm going to change the tape.

End of Tape 1, Side A

Zucker: Continuing.

Wall: Inaudible... or not hiring a licensed asbestos contractor to do asbestos removal.

Olson: And would that... based on this letter, is it proper to conclude that you believe that Mr. Dubbs is responsible for handling the proper removal of asbestos material?

Wall: Based on that letter, Mr. Dubbs would be responsible for hiring a licensed asbestos contractor.

Olson: Okay. Is Fuel Processors, to your knowledge, an asbestos or demolition contractor?

Wall: No, not to my knowledge.

Olson: What is your understanding of why Fuel Processors was on the site.

Wall: To salvage the tanks, pipes and other material.

Olson: They were not contracting with Mr. Dubbs or performing services for Mr. Dubbs, in doing demolition or removal of asbestos from the site.

Wall: Not as far as I know.

Olson: I will offer this.

Zucker: And the question is not to do demolition or...

Olson: ... or asbestos removal work on the site.

Zucker: I am marking it. And you are offering it. Any objection?

Silver: No objections.

Zucker: Received. I now have Exhibits II and IV, only.

Olson: Is it...

Zucker: I'm sorry. Don't abscond with exhibits.

Silver: Two and four? There is one and. . .

Zucker: Three was the March 21 letter, and who has it? It wasn't March 21...

Olson: There are two March 21 letters. There was one to Fuel Processors and one to West Coast Adhesive.

Zucker: Okay, and this is the first. I have the one to West Coast Adhesive.

Silver: I think there is an additional one to West Coast, also.

Zucker: Right. Thank you.

Olson: Mr. Wall, with regard to the asbestos materials inside the building, did you specifically ask Mr. Goodhue or Mr. Poor if they had worked with those materials or if they had damaged those materials?

Wall: No.

Olson: So, you have no way of knowing whether Fuel Processors, or somebody from Fuel Processors had in fact disturbed those particular materials.

Wall: No.

Pause.

Olson: With regard to the material outside, can you describe the area that they were in? Actually... the insulation materials that you looked at and that you suspected to be asbestos, were those not contained in a yellow, concrete, bermed area?

Zucker: Were they contained in a concrete walled bermed area?

Wall: Yes.

Zucker: They were so contained?

Wall: Yes.

Olson: And, was that concrete bermed area water tight? Did it hold water and accumulate water to your knowledge?

Wall: I saw a puddle of water on the site.

Olson: And, so did the rainfall into that bermed area accumulate?

Wall: I saw puddles of water...

Olson: Okay.

Zucker: Did it accumulate?

Wall: Yes.

Olson: This... the piping on tanks outside--there was insulation around that piping to your knowledge? And this was--at the time the violation occurred, this was February or March. Given that time of year would you believe that there had been, probably, a great deal of rainfall...

Wall: I don't know.

Olson: Okay. Assuming, since this is Oregon, there would have been... I realize without calling the weather service, you can't say exactly. And, in fact, could those materials have been soaked from rainfall?

Wall: Yes, they could have been.

Olson: Mr. Wall, I'm going to pull out a map on this, which I believe you made after you took... while you took samples at the site, and I'd like you to help me understand this map. I believe it was Attachment No. 5 to your case report.

Wall: Generally, in the cases that I work on, I try and draw a map that describes in a very general way what I found on the site, or I may have found on the site, so that I can keep the area straight. And, I reconstructed part of this from a diagram that I received from West Coast Adhesive that shows where the tanks were located on the site. The lighter shaded areas on this particular diagram depict some of the larger piles of material that I found on the site. It does not depict the smaller pieces of debris that were found in other areas.

Olson: Okay. And, if I look at the legend, it says that the box means that's where you sample.

Wall: That's correct.

Olson: Okay. But, I only see two boxes.

Wall: That's correct.

Olson: Would you explain why that is.

Wall: I did not fill in the building to the north; well, actually, there were three buildings to the north--a large office building, and then two sheds. Two of the samples were taken from one of those sheds.

Olson: And from what material in those sheds?

Wall: A piece of gasket material. Actually, I believe it was two pieces of gasket material. I'd have to look and. . .

Olson: And, going back to my earlier question. Did you specifically ask anybody if those were the materials that Fuel Processors had handled--in the shed...

Wall: In the shed?

Olson: Hu ha.

Wall: No, I didn't, but I didn't assume that those materials were things that Fuel Processors had handled.

Olson: Did those materials turn out to be asbestos-containing materials?

Zucker: I'm going to ask you to back up. I don't understand what has just happened?

Olson: Well...

Zucker: Okay, let me just... I don't think it's just a matter of a map. There were five samples taken; four indicating the presence of asbestos. This map shows sampling at two sites. Okay? We haven't correlated these sites to the samples that were reported, but you are now asking--Had Mr. Wall established in any way that Fuel Processors was involved in the accumulation of the materials at these two sites?

Olson: Well, actually, we hadn't discussed whether he had established whether Fuel Processors had accumulated these materials. I was asking him, since there are only two sampling sites

shown on this map, my question was: Where were the other three samples taken? And, his answer was: In the shed. No? Correct me if I am wrong.

Wall: Two of the samples were taken in the shed.

Olson: Okay, and there was a fifth. Where was that taken?

Wall: The fifth sample was taken from the material that surrounded the boiler.

Olson: And, was that found to be asbestos-containing material?

Wall: No, it wasn't.

Olson: Okay. So, if we are identifying just the materials that you sampled that you knew that Field Processors had worked with, we are talking just about these two samples right here, is that correct?

Wall: That is correct.

Olson: And, can you tell me what the results were from those two samplings?

Wall: I'll have to look at the analysis.

Olson: The lab analysis?

Wall: Yes.

Pause.

Zucker: While he is looking, I would like to mark this map.

Olson: It has some handwriting on it that...

Zucker: And now, did you say that there is no objection if she wishes to offer it?

I'm going to mark it as Exhibit 5 and admit it.

Now, let's go off the record for a moment.

Pause.

Olson: Mr. Wall, I'm going to ask you a question that I'm hoping you can help me with? Did you take a picture of every sample site? Do you recall?

Wall: I don't recall. I would have to look at the pictures...

Olson: Okay. That might help clarify it.

Silver: Why don't you look through these pictures, Mr. Wall? I notice that some of them have pictures of sample bags on them--see if that helps--see if that answers the question.

Pause.

Wall: Okay. Sample No. Z3006 is the south... yes, in the southern portion of this diagram.

Olson: Maybe we should have you just write on the diagram, that might...

Zucker: 3006 is which number on your list to the lab, your sample list?

Wall: It is sample No. 1.

Zucker: Okay. Now, would you mark on Exhibit 5, in this red pen, a No. 1 next to the pile from which you extracted a sample of No. 1. Thank you.

Olson: And, is there a picture of that pile in these photographs?

Wall: That's a portion of the pile.

Olson: This is not the whole pile.

Wall: No, it's not the whole pile.

Olson: Do you recall how large that pile was?

Wall: The thing that is difficult about it is that it was strewn over, as you can see, a fairly large area--and, it is medium large?

Olson: Do you recall how many different types of materials would have been in there?

Wall: In that particular pile, I sampled the material that I thought contained asbestos and

most of the pile, at least three quarters of it, contained similar material.

Olson: But you took only one sample from this pile?

Wall: That's correct.

Olson: Then, why don't we go to the next one?

Wall: Sample No. Z3007, the west end of the boiler building, I call it the structure that held the two tanks on the boiler...

Zucker: Yes.

Wall: And that would be the second sample on my list here.

Zucker: Would you mark No. 2 on your diagram next to that pile?

Olson: And, do you have a picture of that sample?

Wall: Now, that's a picture of the material that the sample came from, the actual insulation.

Olson: This is the main pipe, or is it just a...

Wall: A portion of the main pipe that was in sight.

Olson: And, going back to my earlier question, do you know if Fuel Processors worked on or worked with this pipe?

Wall: No.

Olson: Okay. Mr. Wall...

Zucker: Excuse me, is your question whether he knew whether Fuel Processors worked on that pipe, which--you know--I don't know what pipe, you have not shown me the picture and I don't know whether it refers to some pile, and I am having trouble with tying this together.

Olson: I'm sorry, what... Mr. Wall, I'm going to go back and re-ask one of my earlier questions, which is: Which materials, or which piles of asbestos-containing materials in this area do you believe Fuel Processors' worked with?

Wall: I have no reason to believe they didn't work on all of them. The bermed area--that is a difficult question to answer...

Olson: Okay. Do you know if any of these materials--this debris--was present before Fuel Processors came to the site and did their work...

Wall: No, I don't.

Olson: Of the materials that you believe Fuel Processors worked with in the bermed area, how many samples did you take of those materials?

Wall: Two. At the time of the inspection, I believe they had worked on all of the materials.

Olson: And, given the questions I have asked you today where you said that in fact you did not specifically determine that Fuel Processors had worked with the materials in this building, would it be correct to say... I'm sorry...strike that... You have stated that you do not know if Fuel Processors, in fact, worked on or with this pipe that you sampled and is sample No. 2, is that correct?

Wall: Yes.

Olson: Okay. So, with the remaining materials in the bermed area that you testified Fuel Processors handled or worked with, is it correct that you took one sample of all of these materials?

Wall: On the remaining materials, yes.

Olson: Okay. Mr. Wall, could you give me an idea of the quantity of the materials in the pile you associate with sample No. 1?

Wall: ... I know the material was over a fair size area. I suppose it could be considered... I don't know if I can speculate on that.

Olson: Okay. You have several other areas shaded, where you said there were piles of what you suspected to asbestos-containing materials. Did you take any samples from those other piles?

Wall: No.

Olson: So, do you know exactly whether they contained asbestos?

Wall: My experience told me that the material was homogeneous; I do not have the scientific lab analysis to show...

Pause.

Olson: Did he authorize these pictures?

Zucker: No.

Olson: I'll have to do that.

Zucker: How should they be marked?

Olson: This is five, so I would say six and seven.

Zucker: Did you speak of them in some order? There is six, first. Then there is no objection to the admission of Mr. Wall's pictures?

Silver: No, no objection.

Zucker: Admitted as six and seven.

Olson: I have one other picture that I would like to... Mr. Wall, you testified that there is the possibility that a person 60 - 70 feet

away could be exposed to asbestos, airborne asbestos fibers. Is that correct?

Wall: Yes.

Olson: From a point source?

Wall: Correct.

Olson: Would the likelihood of that person being exposed to asbestos fibers be affected by any factors such as wind direction, weather...

Wall: Yes, they could be.

Olson: Did you consider those factors in reaching your conclusions regarding the likelihood of exposure?

Wall: I was unable to confirm the wind direction or weather at the site.

Olson: To your knowledge, has Mr. Dobbs, the manager of West Coast Adhesives, received a notice of civil penalty or a notice assessing civil penalty for any activities that took place out at the site?

Wall: No.

Olson: Okay.

Pause.

Olson: Mr. Wall, based on the scientific evidence, the samples--actually, if you should take the sample that you have of the material in the bermed area, can you tell me exactly how much asbestos-containing material was at that site? Excuse me, that was handled by Fuel Processors?

Wall: No.

Olson: Would it have helped you to have had more samples?

Wall: The Department requires that we find out if there is asbestos at the site. There is no protocol that we use or that is available for us to determine how many samples should be taken at a specific site. There were other factors that prevented me from taking more samples; one of those factors was the fact

that it was a site that had contained some phenols, and there was a concern that exposure to that outweighed getting more samples.

Olson: Okay. I now need to understand--I'm going to ask you a couple of questions. Are you telling me that your job, or that your purpose in going to the site was just to establish the presence of asbestos-containing materials and not necessarily determine the amount of asbestos-containing materials at the site?

Wall: When we do our investigation, to establish the presence of asbestos is the reason for sampling.

Olson: Okay. Mr. Wall, in the Notice of Assessment of Civil Penalty, the Department has alleged that there were large amounts of asbestos-containing materials, and based the class of violation, the magnitude of violation, both I believe, on the large amounts of asbestos-containing materials that were at the site; and I'm trying to determine how the Department concluded if there were large amounts of asbestos there.

Wall: Both from the samples and from my experience in the industry, my experience in the field--I have been on many investigations and have found that these materials that are homogeneous in the era that this facility was built and used, contains asbestos, and it was my opinion and experience that said that there were large amounts of asbestos at the site.

Olson: Did you ask Mr. Dobbs whether there had been repairs or replacement of insulation materials on the pipes in, say, the last ten years?

Wall: No.

Olson: Okay. Mr. Wall, from looking at two pieces of insulation sitting side by side--actually, from just looking at a piece of insulation, can you tell whether there is asbestos in that insulation?

Wall: No.

Olson: What would you have to do to determine that there is actually asbestos in that insulation?

Wall: Lab analysis is the usual method for that determination.

Pause.

Olson: How tall was the berm around the concrete area?

Wall: Somewhere between two and three feet, and it didn't totally enclose the concrete area.

Olson: How much of the concrete area did it enclose?

Wall: To my recollection, approximately three-quarters of the concrete area.

Olson: Mr. Wall, did the few people you dealt with from Fuel Processors cooperate with you in your investigation?

Wall: They answered all the questions that I asked of them.

Olson: Did they also send you letters, further answering questions?

Wall: Yes, I requested statements, and they sent them to me.

Olson: To your knowledge, was Fuel Processors ever contacted and given the opportunity to correct the violation?

Wall: I really don't know.

Pause.

Olson: Okay, I have no further questions.

Zucker: Okay, I would like to pause for a moment and ask... I would like to discuss the issues in the case with you. And, I think the easiest thing would be not to have witnesses available; it doesn't involve the witness, and it may make it cleaner. So, if anyone is going to testify, I would appreciate their taking a walk. We are now off the record--I intended that to be off the record.

Pause.

Zucker: Okay, so continuing.

Silver: Mr. Wall, were you able to sample any of the pipe insulation that Fuel Processors removed?

Wall: I sampled pipe insulation on the bermed area.

Zucker: Okay, stop. Let me understand what's asked and what's answered and get control of it. So the question is--Did you sample pipe insulation material and test it, or...

Silver: Let me start over. Did you sample any pipe insulation that Fuel Processors removed? You may answer 'yes' or 'no' to that.

Wall: The answer's 'yes.'

Silver: Did you... You mentioned that there was the insulation on the bermed area. Do you know who put the pipe insulation there?

Wall: According to my investigation, it was a Fuel Processor's employee.

Silver: Did you sample that material from the berm?

Wall: Yes.

Silver: Did you get a result back from the laboratory?

Wall: Yes.

Silver: What did that laboratory sample show?

Wall: It showed positive for asbestos...

Silver: I'm not going to ask anything further.

Zucker: I appreciate that; that really is what I needed to have. May we just ask him how he knew that it was... his investigation revealed--what does that mean?

Silver: Didn't you say, your investigation...

Zucker: What did you mean...

Chuckles from the group.

Zucker: I think you showed prudence as well, but excuse me...

Silver: How did your investigation reveal that, that...

Wall: An interview with the a Fuel Processor employee named Dan Goodyear said that Fuel Processors removed the tank insulation off the tanks in the bermed area.

Zucker: Thank you very much.

Olson: Could I follow that for second...

Zucker: Certainly.

Silver: Could I ask one more question before you do, please.

Olson: Certainly.

Silver: If a pile of material--small, large, medium, bigger than a bread box--contains asbestos, how do you treat the total pile?

Wall: We treat it as containing asbestos material.

Silver: Is there any reason for treating the whole pile of asbestos...

Wall: Once the contamination has happened, there is no way to separate the contaminated material

from the other material because of the way the asbestos fibers migrate.

Silver: I'm going to stop this... go ahead.

Olson: The one pile that you sampled in the bermed area, do we know for a fact that anything other than the sample--the material that you sampled--say the material that was in the bag that you sent to the lab actually contained asbestos?

Wall: I guess I don't understand the question.

Olson: You have identified through laboratory analysis that the material in the bag that you sent to the lab contained asbestos.

Wall: Correct.

Olson: ... and you... so, can you tell me, did you have lab samples done on any other samples in the bermed area?

Wall: No.

Olson: That's all I have.

Zucker: Thank you very much. Do you have anything further?

Silver: No more witnesses, Ms. Zucker, I would ask... that the Department would take official notice of OAR 468.877.

Zucker: 468...

Silver: .877.

Zucker: Is that the...

Silver: It's the legislative findings... and with that we have nothing further to comment.

Zucker: Okay. There has been that request.

Olson: No Objection.

Zucker: Okay. What number was... what sample number was the sample from the bermed area?

Wall: Z3006, I believe.

Zucker: The first one.

Wall: That was the first.

Zucker: Okay. Thank you very much. And no other witnesses?

Silver: No further witnesses, Ms. Zucker.

Olson: We would like to call Mr. Richard Crouse, please.

Zucker: He's warmed it, Mr. Crouse.

Administration of Oath.

Olson: Mr. Crouse, could you tell me what your present employment is?

Crouse: I'm President of HAZCON, Incorporated.

Olson: And what does that company do?

Crouse: We are an industrial hygiene and environmental consulting firm.

Olson: And what is your position with that company?

Crouse: I am President.

Olson: And how long have you been with that company?

Crouse: Since April of 1986.

Olson: Can you give me a brief description of your former employment?

Crouse: I worked for the Accident Prevention Division of the Workers' Compensation Department for approximately two years as an industrial hygiene compliance officer. And then I worked for SAIF Corporation as an industrial hygienist consultant and as the manager of the Industrial Hygiene Department SAIF Corporation, and then I worked for a risk management consulting firm as an industrial hygiene consultant. Following that I formed HAZCON Corporation.

Olson: Are you a member of any professional organization?

Crouse: Yes, I am a member of the American Hygiene Association, and I am a board certified

industrial hygienist by the American Board of Industrial Hygiene.

Olson: Could you describe to me what a certified industrial hygienist--what qualifications and what testing protocol is required to receive that certification?

Crouse: To be a certified industrial hygienist, you need to have a college degree in a scientific background, plus five years of experience practicing industrial hygiene and complete two days of examination.

Olson: Mr. Crouse, I am going to hand you what I believe is your resume, and I'd like you to show it to Mr. Silver, and also to...

Zucker: I wish you would show it to Mr. Silver...

Silver: Is this all true, Mr. Crouse?

Crouse: Yes.

Chuckles.

Zucker: I'm sorry, just a moment.

It's Exhibit 8, thank you.

Olson: Mr. Crouse, did you perform an investigation regarding the DEQ's Fuel Processors Notice of Assessment of Civil Penalty?

Crouse: Yes, I did.

Olson: And did you generate a report as a result of the investigation?

Crouse: Yes.

Olson: Okay. I'm going to hand you a copy of that--what I believe is that report, and I would like for you to identify that for Mr. Silver and for Ms. Zucker.

Crouse: Yes, this is my report.

Silver: Is that the report that you shared with me? I have already seen the report.

Zucker: You want me to mark it?

Olson: Yes.

Zucker: That's Exhibit 9? You want me to hold on to it?

Olson: Actually, I'll be talking to him about it, but then he can give it back to me.

Olson: Mr. Crouse, what did you do... what steps did you take to inform yourself of the issues and facts regarding this case.

Crouse: I visited the Department of Environmental Quality offices to review the file on this particular case. I spoke with Mr. Bill Briggs, Mr. Dale Poor and Mr. Gale Goodhu of Fuel Processors, Inc. I spoke with Mr. Bill Dobbs of West Coast Chemical and Mr. Jim Barnes of Cascade Maintenance and I also drove out to visit the site.

Olson: Okay. Mr. Crouse, I'm going to you about... ask you questions about the likelihood of public exposure in light of the conditions that were present at the site. Can you tell me if... actually, as a certified industrial hygienist, is it within your expertise to

assess the likelihood of public exposure to airborne asbestos fibers?

Crouse: The principle job of industrial hygiene involves the recognition, evaluation and control of occupational health hazards and within that evaluation would be sampling air--air and light to determine the concentrations of the contaminants.

Olson: Okay. When you were employed by SAIF Corporation and by the State of Oregon, did you do those types of analyses?

Crouse: Yes.

Olson: Okay. Do you currently teach classes on asbestos--I believe it's asbestos - State of Oregon and State of Washington Asbestos Program?

Crouse. Yes. Our firm has licensed, accredited classes for teaching asbestos workers and asbestos supervisors in both states, and I am an instructor that teaches parts of those classes.

Olson: Okay. In assessing the likelihood for public exposure to asbestos fibers at a site, what are the factors that you would consider?

Crouse: I would consider the condition of the material, the degree of friability, the degree of wetness, the direction of the wind, the proximity of...

Olson: Okay. And did you investigate each of those factors when reaching your conclusions regarding the likelihood of public exposure at the site?

Crouse: Since I was investigating long after the case had occurred, I interviewed two people who tried to contribute... I did talk to the National Weather Service to find out the weather conditions during that time frame. I talked with people who had been on the site, who worked with those materials and knew the condition of those materials.

Olson: Okay, and what were your findings regarding the conditions of those materials?

Crouse: I spoke with Mr. Dan Goodhue and he identified himself as being one of those who actually did removing of materials on the site, disturbing the insulation materials, and I asked him the condition of those materials, and he said that they were piled on the ground and were saturated and in a wet state. I also asked him what was the condition of those materials as they were on the pipes as they were being removed, and he said they were also in a saturated state at that time.

Olson: Okay. And is that consistent with the information that you received from the National Weather Service?.

Crouse: Yes, it is. There was a long period of days that Fuel Processors was on site and there were varying rainfall amounts that had accumulated. In my letter I had asked Mr. Goodhue when during the process, how... what length of time, what was the time frame when they actually disturbed the material and he told me it was more toward the end of their activities on the site which corresponded to the days that there was actually rainfall.

Olson: Okay.

END OF SIDE B (Tape 1)

TAPE 2 SIDE A

Olson: Did you talk to Mr. Dubbs, the manager of West Coast Adhesives, regarding the presence of asbestos on the site?

Crouse: Yes. Yes, I did.

Olson: And did you ask him how much asbestos he believed was on site?

Crouse: Well, I asked him, not in exactly those words; I asked him if he had noted any survey for such material on the site and he said he was not aware of any survey that had been done. I asked him if any materials covering the pipes had been replaced, and he responded that he had been involved at the plant since 1977 and he estimated that somewhere between 60 and 70% of the pipe insulation had been replaced since he had been involved in the plant.

Zucker: 1970?

Crouse: 1977.

Zucker: Okay.

Olson: Okay. I'm going to take you back a moment. Mr. Wall had testified that with older industrial facilities it is sometimes quite likely that there would be asbestos-containing materials at those facilities. Is that correct?

Crouse: Yes.

Olson: And, did you ask Mr. Dubbs that question to find out if in fact there had been asbestos-containing materials at that facility earlier, had they been replaced, subsequent, there is no asbestos-containing material. That was not a very artful question.

Mixed responses.

Olson: What I'm trying to determine here is... when Mr. Dubbs said that 60 to 70% of the insulation materials had been replaced within

the last 13 years, why was that important to your investigation?

Crouse: Well, it is important because with the type of insulation that was used it is thought that asbestos was used as part of the insulation. The newer types of insulation would most likely not have asbestos materials within them.

Olson: So, it was Mr. Dubbs' statement that at least 60 to 70% of the materials at the site were not asbestos.

Silver: I think I'm going to object to that, Ms. Olson. I think the testimony was that 60 to 70% of the pipe insulation was replaced, and not necessarily replaced with non-asbestos material.

Zucker: Would you like for me to respond?

Olson: That's fine. Was it Mr. Dubbs' statement that 60 to 70% of the insulation material at the plant had been replaced since 1977?

Crouse: Yes.

Olson: And, cam you tell me--after 1977, were asbestos-containing materials used for insulation in the United States?

Crouse: No. In that time frame (inaudible)...

Olson: So after 1978, you would not have expected insulation materials to contain asbestos.

Crouse: No.

Olson: Mr. Crouse, based on your investigation, what are the factors that you would take into account with regard to the likelihood of public exposure? In your opinion was it likely or unlikely that there would be public exposure as a result of the conditions associated with Fuel Processors' activities at the site?

Crouse: ..... saturated..... (inaudible) it is unlikely that there would be public exposure.

Olson: Mr. Crouse, with regard to the sampling protocol followed by Mr. Wall at the site, if you were attempting to identify whether

asbestos-containing materials were on the site, would you have done what Mr. Wall did, which was to take random samples?

Crouse: ... (inaudible) take suspect material and sampled that--that would have been my approach.....(inaudible)... I would look for what I thought to be the most suspect material and sample it.

Olson: What would you do if you were attempting to prove how much asbestos material was on site?

Crouse: Again, I would have to look carefully at the pile and try to plug samples from each material that was somehow distinctive in nature, whether it be the diameter of the insulation, or slightly different texture, or slightly different color try to take samples from each of those materials.

Olson: Okay. And, given your review of the records and listening to Mr. Wall answering questions today, is it your understanding that Mr. Wall followed that type of protocol? The protocol that you would have followed if you were going

to attempt to determine the amount of asbestos at the site?

Crouse: No.

Pause.

Olson: Mr. Crouse, in your experience, is there any way short of lab analysis to positively identify materials as asbestos-containing?

Crouse: No.

Pause.

Olson: In your discussions with Mr. Goodhue and Mr. Poor, did you ask them whether they believed they had created any dust or friable asbestos from their activity?

Crouse: Yes.

Olson: And what did they say?

Crouse: They said the material was still wet and they didn't observe any dust coming out.

Olson; Mr. Crouse, you talked with Mr. Dubbs and Mr. Briggs, what is your understanding of the actions taken by Fuel Processors before beginning this project with regard to the possibility of asbestos?

Crouse: We did a review of the file...it was mentioned that... we talked with him because we had asked Mr. Dubbs if there was asbestos materials on the site. Mr. Dubbs did not recall that conversation.

Olson: Okay. And what is your understanding of Mr. Dubbs' answer to Mr. Briggs, when Mr. Briggs asked if there was asbestos on the site?

Silver: I thought he had answered that he didn't recall the conversation.

Olson: No, he said that Mr. Dubbs didn't recall the conversation.

Zucker: And what are you asking him?

Olson: What we are trying to determine is... what I am discussing here is negligence.

Zucker: I understand.

Olson: ... the appropriate action. Do you know if Mr. Briggs asked Mr. Dubbs... Did Mr. Briggs tell you that he asked Mr. Dubbs whether there was asbestos on the site?

Crouse: Yes.

Olson: And from your discussion with Mr. Briggs, what was Mr. Dubbs answer?

Crouse: That there was asbestos on the site.

Olson: Was that a reasonable inquiry for Mr. Briggs to have made?

Crouse: Yes.

Olson: And do you feel it was reasonable for him to rely upon Mr. Dubbs' answer in that instance?

Crouse: It's difficult for me to answer. From my own experience and knowledge, if someone told me that some asbestos was present or not, I would want to have some documentation, then I am not in the business of ascertaining his

position. If I were to put myself in this position, I would say yes... (inaudible)

Olson: So if you were in Mr. Briggs' position, you would... given Mr. Briggs' position, you believe that his inquiry was reasonable.

Crouse: Yes.

Olson: I am going to just quickly go through a couple of the items on your report... which we will introduce as an exhibit. With regard to the children playing near the site. When you visited the site, did you see any children?

Crouse: No.

Olson: Next to the houses or around the site?

Crouse: No.

Olson: And from your review of... well, from your visit to the site and your examination of aerial photographs, can you tell me what the distance was from the area where the children were alleged to have been playing to the concrete bermed area?

Crouse: Well, from reviewing the files, I have become aware ... but having viewed the photograph-- a scale of the photograph taken -- the corner of the apartment -- 50-70 feet from the houses.

Olson: Okay. And given the -- given your understanding of the conditions at the site, at that point in time--the weather conditions and everything else you discovered through your investigation, do you believe that it was likely or unlikely that there would have been public exposure to airborne asbestos--to people, say--between those houses across the street?

Crouse: I would say they would unlikely have public exposure to asbestos fibers.

Zucker: That people would unlikely...

Crouse: Unlikely.

Olson: Mr. Silver-- or, actually, I'm sorry...

Zucker: That's fine.

Silver: Mr. Crouse, I think I have a few questions, because...(inaudible)... but I want to get a better understanding of what you are basing your opinion on. Did you actually see the piles of material at the site that is claimed to have been soaked with water?

Crouse: No, I had photographs.

Silver: Were you on the site when the actual salvage operation took place, do you remember all the tanks...

Crouse: Yes.

Silver: Your testimony is based upon viewing of the pictures? Is that correct?

Crouse: It is based on viewing of the pictures and...

Silver: And the pictures that you viewed, were they the pictures of the Department of Environmental Quality?

Crouse: Yes.

Silver: You mentioned that you discussed whether this material was wet. I think your testimony was that the employees at Fuel Processors told you it was wet.

Crouse: Yes.

Silver: Does that come as any real surprise to you that the people who removed the material and took off the insulation would claim that it was wet?

Crouse: Inaudible.

Silver: But, wouldn't it be to their advantage to tell you that it was wet rather than dry?

Crouse: Yes.

Silver: I think you also indicated that you had talked to Mr. Dubbs about replacing the insulation, and I would like to get this straight. I think your testimony is that he estimated approximately from 50 to 70% of the insulation be replaced. (In 1977)

Crouse: Yes.

Silver: He did not tell you, however, that it was not replaced--that it was replaced with non-asbestos insulation, did he?

Crouse: Yeah, ... inaudible

Silver: Mr. Briggs, I guess, was going to inquire of Mr. Dubbs whether there was asbestos present. Is that what you testified to?

Crouse: Yes.

Silver: Is that what you testified to? Then tell me, do you recall Mr. Dubbs saying--What did Mr. Dubbs imply to Mr. Briggs, what did he imply? Do you remember?

Crouse: Yeah. Inaudible.

Silver: Mr. Dubbs implied he could not recall whether or not he was asked whether asbestos was present?

Crouse: Yes.

Silver: Asbestos is a pretty serious matter, isn't it, Mr. Crouse, and whether or not it is present on a given piece of property is a pretty serious matter.

Crouse: Yes, it is.

Silver: Did you ask Mr. Briggs if he had any documentation that he made the inquiry whether the asbestos was present?

Crouse: Yeah...

Silver: Did you ask Mr. Briggs whether he had any documentation that he asked whether or not asbestos was present?

Crouse: Inaudible.

Silver: Did you see the contract between Mr. Briggs and Mr.-- I think it's Dubbs of West Coast, isn't it?

Crouse: Yes. I can verify that from the file.

Silver: Were there any recitals, or were there any

provisions dealing with asbestos in the contract?

Crouse: I didn't observe any ... inaudible

Silver: Inaudible... Wouldn't it reasonably... Wouldn't it have been appropriate for Mr. Briggs to ask for samples to be taken of the pipe insulation from Mr. Dubbs prior to removing the tank?

Crouse: Inaudible...

Silver: Are you only saying that you are an industrial hygienist, is that what you are saying?

Crouse: Inaudible...

Silver: Yes, wouldn't it... Given that this is 1990, isn't it reasonable that businessmen... would ask for documentation that there is no asbestos present prior to engaging in salvage operations? Is that totally unreasonable to expect?

Crouse: It is not unreasonable to expect, but quite

common, because we get involved all the time with situations after the fact... inaudible...

Silver: I think that... would you agree that it is foreseeable that there may be asbestos pipe insulation?

Crouse: Yes.

Silver: Just a couple more questions, Mr. Crouse. I know that you have looked at the meteorological data from the airport, and I know that you have had conversations with them.

Crouse: Yes.

Silver: Am I correct in my basic assumption that these are the official statistics of the rainfall at the Portland Airport?

Crouse: Yes.

Silver: And they are not necessarily statistical measures of rainfall in other parts of the city?

Crouse: Yes.

Silver: So, the rainfall at the airport would be more or less that at any other place?

Crouse: Yes.

Silver: If the airport is on NE... well, 5420 NE Marine Drive, which I believe is on the Columbia River?

Crouse: Yes.

Silver: ... the location of this site was in northwest Portland...

Crouse: Yes.

Silver: ... which is quite a distance away from the airport. We have really no way of knowing how much rainfall there was at this site, as established near the Portland Airport. Is that an accurate statement?

Crouse: Inaudible...

Silver: Spoken like a true scientist. Your testimony, Mr. Crouse... I think your testimony, Mr. Crouse... I think your testimony was that it was unlikely that the asbestos fibers (excuse my layman's language) would travel airborne 50 to 60 feet away, because they were wet-- because the material was wet. Is that in essence what you...

Crouse: I would say that because the material was wet it is more unlikely that it would become airborne... inaudible...

Silver: If... your testimony is that if it is wet it is less likely to become airborne?

Crouse: Yes.

Silver: But, you don't know how wet the material was, is that correct?

Crouse: I can only base my opinion on the conversations I had with Goodhue.

Silver: I have to ask you this. In your judgment as an industrial hygienist and based on your

experience, is rainwater effective enough in wetting asbestos-containing material?

Crouse: The rules and regulations for asbestos require wetting of the material. This is not a typical situation, and typically... inaudible... is done in buildings and wherever else...the materials are dry to begin with, and you have to wet them to speed the process and remove them. In that case if you take the material, and you don't pry it and put it with water, it is very difficult to saturate that material until it is thoroughly wet and you will have airborne material... inaudible... broken up into little parts. It seems to me a different situation where it has been out doors for a long period of time... inaudible ... saturated or not, you can still remove it from the pipes.

Silver: You know, it's almost like God's on the side of the respondent, and he made it rain, doesn't it?

Crouse: Yes.

Silver: The salvage operations apparently took place between February 26, 1990 and March 9, 1990, at least that is what everybody seems to agree upon. According to the letter data--I think that you looked at the same weather data that the Department looked at... there doesn't seem to be any rain at all on the 26th of February, 27th of February, 28th of February, and with no rain a number of days before those dates; I think your report indicates there may have been a trace of rain on March 2, and then we got a good dose of rain on March 3.

Crouse: Yes.

Silver: You don't know when the tanks were removed, and the insulation removed, yourself; you are basing that on what, I guess, Fuel Processor employees told you...

Crouse: Yes, Mr. Goodhue's conversation.

Silver: Now, if for example some of these salvage operations took place on the days that there wasn't any rain, would you agree that there would be more of the likelihood of public exposure to airborne asbestos fibers?

Crouse: Yes, if the materials are dry that would increase the likelihood of public exposure.

Zucker: That actually isn't the question he asked you, so why don't you ask again?

Silver: I forgot, I...

Zucker: Its if the actual activity--salvage activity--took place on the day when it did not rain--on one of the non-rainy days. Would that fact increase the likelihood of exposure?

Crouse: Yes, I guess... my answer would be that if the material was wet on the pipes, it may not have made a difference. If the material was dry on the pipes, then it would have made a difference.

Zucker: Okay.

Silver: But, I guess my question is that since there was no rain on those days, there would be no reason for the insulation to be wet, would there?

Crouse: I guess I can't comment on how long asbestos will remain wet on a pipe...

Silver: I guess what I am trying to ask at, Mr. Crouse, maybe, maybe. You will have to bear with me, I'm not very good at this kind of thing. There was no rain on March 26, March 27, March 28, there was no rain... excuse, me -- February 26, February 27, February 28, March 1 there was no rain and March 2 there was just a trace of rain. Then the chronological data indicates that there was no rain from the 20th of February on. Well, if there is no rain during those periods of time, and the salvage operation took place during this period of time, logically, and maybe I'm incorrect--I'm just assuming none of that material was wet.

Crouse: I can't say that I can comment. I don't know...

Silver: Am I making an unreasonable assumption as a layperson?

Crouse: I really don't know.

Silver: That's fine. You were very honest with me, and that's all I can... You know, I don't like to get into this, because I just don't understand ...

Zucker: Careful, Mr. Silver, we're going to believe you.

Silver: Well, it's true. If... I think you indicated there is some protocol for identifying the quantity of material. Is there a protocol that you follow which will enable a person to quantify the amount of asbestos material in a pile?

Crouse: Inaudible.

Silver: I guess... What I am asking, where would you find such protocol?

Crouse: Inaudible.

Silver: So if Mr. Wall went to some asbestos sampling volume, he would not find the protocol that would enable him to determine the quantity of asbestos-containing material, would he?

Crouse: Well, the protocol for ... inaudible ... but none that I know of -- protocol for determining piles of debris.

Silver: I guess one final question, Mr. Crouse. Is any scientist ever satisfied with the number of samples they take?

Crouse: I would probably say no.

Silver: Thank you very much, you were very kind and generous in answering some of these questions that were bothering me. I appreciate that. I have nothing further of the witness, Ms. Zucker.

Olson: I have ...

Zucker: See if you would like to undermine whether he was kind and helpful-- go ahead.

Olson: Mr. Crouse, when you reviewed the DEQ files, did you review Attachment No. 11 to Mr. Wall's police report, which was, I believe, a letter dated March 19, 1990 to David Wall from ... Bogard (?)

Crouse: Yes. You keep on finding things that I don't know exist.

You got that...

Silver: I have no objections.

Olson: I'm going to offer that as an exhibit.

Zucker: I'll mark it 10 and admit it?

Just a minute... Go ahead.

Olson: Mr. Crouse, could you read for me the last paragraph in that letter?

Crouse: Yes, some weeks prior to the sale, around 2-6-90, Mr. Briggs had originally expressed interest in the boiler, only. At that time, Mr. Briggs could have inquired about the possible presence of asbestos insulation around the boiler. I don't remember this possibility, but it could have been --there is a work I cannot read--

Olson: I believe the word is "mention', but that is my reading.

Crouse: It does look like "mention". Other than that, I did not mention the possibility of asbestos being present. I don't believe that either party was openly aware that an asbestos problem existed. Very truly yours, _____ _____.

Olson: Okay. Mr. Crouse, in speaking with Mr. Goodhue and Mr. Poor and reviewing Mr. Wall's case notes from his interview Mr. Goodhue and Mr. Poor, do you have any reason to believe they were any less than truthful in their discussions with you?

Crouse: No.

Olson: No further questions.

Zucker: Anything further?

Silver: Nothing further, Ms. Zucker.

Zucker: Okay, thank you. And do you want him to remain?

Olson: Actually, I think we are going to be done in five minutes, so I'd like to... inaudible ...

Zucker: He may not be able... okay.

Olson: I would like to call Mr. Briggs, please.

Zucker: Okay, that's fine. Would you come around that way?

Briggs: Yes. I'll get up close.

OATH ADMINISTERED.

Olson: Mr. Briggs, would you state your full name and occupation, please?

Briggs: Wilmer Lee Briggs, and I am President of Fuel Processors, Inc.

Olson: Okay. Mr. Briggs, what is your business? What business are you involved in?

Briggs: I am in the recovery of used oil and making it into fuel...

Olson: Have you ever been in the business of asbestos removal or building demolition?

Briggs: No.

Olson: Did you at some point in time become aware of the West Coast Adhesive site and the possibility that there was equipment for sale there?

Briggs: Yes, I did.

Olson: And did you then talk to a Mr. Dubbs about purchasing equipment from that site?

Briggs: Yes, I heard from a contractor who was already working on the site, Lockwood Industries, that the tanks and boiler were for sale. I then went to the site and met Mr. Dubbs and walked through the site with him to determine what he wanted us to sell and what he wanted to do. At that point, he says to me that he would rather sell the whole operation in tact, complete--property and all. I determined from him that the property was leased from Pacific... or from Burlington-Northern Railroad. I then made contact with

Burlington-Northern to determine if they would lease the property to us so that we could operate the plant in tact with that operation. While I was on the site, I determined that Mr. Dubbs had approximately 30,000 gallons of water stored in the tanks, and it was lightly contaminated with phenol. I determined that they had been pumped from the site inside bermed areas, which while I was there, the observation was there were six to eight inches of water in the cement bermed areas where the insulation and tanks were determined. There was no outlet in the bermed areas. The water is pumped with a sump into the existing tanks so that it is properly disposed and handled of and so that there is no possible way that the water would get inside. I then asked Mr. Dubbs if that was something we could help him with and at that point he had asked to bring in three environmental consultants on site; two were on there the day I was there...

Olson: Do you know what company they were from?

Briggs: One was from Chempro and one was from _____ Rogers. The tanks were being orderly cleaned by an outside contractor who

had had to break some of the lines, and had to open all of the tanks in order to be able to properly clean the material and remove it to barrels that were on site, inside bermed areas--in the bermed areas--and then the barrels were sealed and they were removed as part of the environmental remediation at that site. I am aware of that. In my conversations with the railroad, I am aware that the site was under scrutiny environmentally, and that was one of our concerns that it had to be a clean site before we could operate it.

Olson: And did you at some point arrive at an agreement to purchase some of the equipment from Mr. Dubbs that was on the site?

Briggs: The agreement was actually written in such a way-- the first agreement was actually written in such a way that we could either operate it or we could remove the equipment that we wanted which was basically the boiler and the tanks.

Olson: Okay. And what did you actually wind up

doing? You had a choice, what did you end up doing?

Briggs: Birmingham-Northern would not renew the lease with for him or would not lease the property to anybody with any environmental concerns; therefore, we had to remove the equipment from the site with a demo, of which the demolition contractor had been there, the first day I was there and was given the bid on demolition.

Olson; Okay. Did you... And so at some point you agreed to simply purchase equipment and then remove it from the site.

Briggs: After Birmingham-Northern had said we could not lease the property.

Olson: And, during those conversations when you were negotiating the purchase of that equipment, did you walk through the site?

Briggs: Yes.

Olson: And, did you ask Mr. Dubbs if there was any asbestos on any of the piping or equipment?

Briggs: Yes, I asked him if there were any asbestos problems on the site, and he said no.

Olson: Okay. And-- how many times were you out at the site before Fuel Processors performed any work on the site?

Briggs: I was there probably four times, plus a couple Saturdays, to walk through the equipment, to see if it would fit my needs. And that was prior to our final document which gave us the right to buy that.

Olson: And, as you were walking around on the site, did you observe water contained in the concrete bermed area?

Brigs: Yes. Mostly every time, there was water in it. It had to be pumped with a separate sump pump in the tanks, so you had to physically go get the sump pump, put it in the lower area of the bermed area and pump the water into the tank.

Zucker: You don't know when this is?

Olson: This is-- I'm sorry-- How long-- Fuel Processors actually came on site and removed equipment at the end of February and the beginning of March. Is that correct?

Briggs: That's correct.

Olson: And the site visits that I asked you about earlier were prior to the end of February. Is that correct?

Briggs: I believe it was around the 3d or 4th of February.

Olson: Okay.

Briggs: That was the first visit.

Olson; Okay. And then you visited the site -- how many times between the beginning of February and the end of February?

Briggs: Before we removed it. At least four times. After we began to remove it, I probably visited the site at least three times during the week of removal.

Olson; Okay. And each time you visited the site, there was water standing in the concrete bermed area.

Briggs: No, there was no water. We used the hose to clear the fuel residue to one corner so we could pick it up and put back into the tank. So we had an active hose on the site at all times.

Olson: Okay.

Zucker: Mr. Silver?

Silver: I have no questions of Mr. Briggs.

Zucker: You may be excused.

Briggs: Thank you.

Olson: Did you say you wanted us to stay...

Zucker: Yes, I do. So that is the conclusion?

Silver: That's the conclusion.

Zucker: There is nothing further?

Silver: I think so.

Zucker: Okay. I do want to talk... Do take a break if you need one. But, I do want to talk to you about your views of the aggravating factors, but more importantly, I would like DEQ to tell me something about its proof. So, I think you can decide whether you need your witnesses. I don't expect to take further testimony. Do you want to take a break now?

Silver: Sure. I would love to take a break.

Zucker: Okay. So we are off the record, and how much time should we have?

END OF TAPE B, SIDE A

Bonine 3/4/92

Western Environmental Law Clinic

Law Center · University of Oregon · Eugene, Oregon 97403 · 503-346-3823 · FAX: 503-346-3985

Michael D. Axline
John E. Bonine
Attorneys

Kathryn Cannon
Office Manager

March 3, 1992

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
MAR - 9 1992
OFFICE OF THE DIRECTOR

To: Environmental Quality Commission
811 SW Sixth Avenue
Portland, Oregon 97204

Fr: Columbia River United

Re: Petition for Rulemaking

Dear Commission,

Pursuant to ORS 183.390 and the Attorney General's Uniform and Model Rule 137-01-070, Columbia River United (CRU) hereby petitions the Oregon Environmental Quality Commission to adopt a new rule as authorized by ORS 468.020(1).

This new rule provides for the elimination of organochlorine discharge by Oregon paper pulp mills by the turn of the century. The text of the rule is set out in the enclosed petition for rulemaking.

We await your action within the 30-day response period required by ORS 183.390. Thank you for the Commission's time and courtesy in this matter.

Sincerely,

John Bonine,
Counsel for CRU

enc

Clinic statements do not represent University positions

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON

In the Matter of Columbia River United's Petition for Rulemaking Before the Oregon Environmental Quality Commission	)	**PETITION FOR RULEMAKING**

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
MAR - 9 1992
OFFICE OF THE DIRECTOR

March 3, 1992

This Caption Page in the Original Copies is Printed on CHLORINE-FREE Bleached Paper Bought in Sweden

1. Pursuant to ORS 183.390 and the Attorney General's Uniform and Model Rule 137-01-070, Columbia River United ("CRU"), P.O. Box 667 Bingen, Washington 98605, hereby petitions the Oregon Environmental Quality Commission **to adopt a new rule** as authorized by ORS 468.020(1).

This new rule provides for the elimination of organochlorine discharge by Oregon paper pulp mills by the turn of the century. Its text is set out at the end of this petition. Pursuant to OAR 137-01-070, CRU submits the following reasons for the adoption of the rule.

2. The Government of British Columbia has enacted regulations which require bleached kraft pulp mills within British Columbia to cease the discharge of organochlorine compounds by the years 2000 to 2002. *See* Appendix A.

3. Dramatic new evidence shows that destruction of the ozone over North America due to chorine-containing compounds has proceeded much faster than expected. The President of the United States has ordered all commercial production of ozone-depleting chemicals to cease by December 31, 1995. The use of chlorine or chlorine compounds to bleach pulp results in the formation and release of substantial amounts of carbon tetrachloride, a potent ozone-depleting compound. Some U.S. government officials are now calling for the elimination of **all** chlorine from all industries because of its chlorine's

role in ozone depletion. *See* Appendix B.

4. The United States Fish and Wildlife Service has recommended to the United States Environmental Protection Agency (EPA) that the EPA strive toward limiting permits to zero discharge of dioxins in order to protect bald eagles and other predator bird species. *See* Appendix C.

5. The primary goal of the federal Clean Water Act is "that the discharge of pollutants into our nations waters be eliminated." 33 U.S.C. § 1251(a)(1) (1990). Fulfillment of this goal will require bleached kraft pulp mills to cease the discharge of organochlorine compounds.

6. Organochlorine compounds discharged by bleached kraft pulp are harmful to human health. These compounds cause cancer, birth defects, liver and kidney damage, and immune system dysfunction. They persist in the environment and bioaccumulate in many species, including humans, which occupy a higher place in the food chain. Such compounds include polychlorinated phenols, and polychlorinated dioxins and dibenzofurans, the most potent known carcinogens. A recent review of scientific studies show that birth defects are the most sensitive indicator of exposure to polychlorinated dioxins and dibenzo furans. *See* Appendix D.

7. Adoption of the proposed rule will benefit the economy of Oregon by enabling it to meet growing public demand for chlorine-free pulp and paper products. *See* Appendix E.

8. The proposed rule provides the following:

> "(9) Every pulp mill shall:
>
> > (a) meet a monthly average discharge limit of 1.5 kg AOX/ADMT[1] of pulp produced by November 31, 1992; and
> >
> > (b) eliminate the discharge of organochlorine compounds by December 31, 1999."

9. The following parties will likely take interest in this proposed rule:

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[1]/ A limit on the discharge of organochlorine compounds in units of kilograms of adsorbable organic halogens (AOX) per air dried metric ton (ADMT) of pulp produced.

Pulp Mills:

Boise Cascade Corporation
Through its attorney
Michael R. Campbell
Stoel, Rives, Boley, *et al.*
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204

James River II, Inc.
Through its attorney
John Wiley Gould
Lane, Powell, Spears & Lubersky
520 SW Yamhill Street, Suite 800
Portland, Oregon 97204-1383

Pope & Talbot Corporation
Through its attorney
Jay T. Waldron
Schwabe, Williamson & Wyatt
1211 SW Fifth Avenue
Portland, Oregon 97204

Public Interest Organizations:

Columbia River Inter-tribal Fish Commission
975 SE Sandy Blvd.
Suite 202
Portland, Oregon 97214

Oregon Trout
6261 SW 47th Place
Portland, Oregon 9721

Oregon Salmon Commission
313 SW 2nd Street, Suite C
P.O. Box 1033
Newport, Oregon 97365

Oregon Rivers Council
P.O. Box 309
Eugene, Oregon 97440

And other groups concerned with fish, wildlife, human health and the environment.

I discussed the weather conditions with the National Weather Service for this time period. This information is consistent with Mr. Goodhue's observations of the wetness.

Date	Rainfall	Wind
2/26	None	11 mph East
2/27	None	18 mph East
2/28	None	11 mph East
2/21	None	6 mph South East
3/02	Trace	6 mph South East
3/03	.52 inches	10 mph South
3/04	.24 inches	8 mph East South East
3/05	.02 inches	8 mph South East
3/06	.14 inches	8 mph South
3/07	.45 inches	11 mph South
3/08	.02 inches	14 mph South East
3/09	.33 inches	14 mph South East
3/10	.28 inches	10 mph South East

The third question involves the exact proximity of children playing and the likelihood of exposure from wind-driven asbestos dust.

Mr. Wall's report mentions children playing approximately 20 feet from the plant. The final DEQ Notice of Penalty refers to children being 20 feet from the asbestos removal. From my observations of the site and inspection of the maps, the two statements are not consistent. A more accurate distance (as measured on the aerial photographs) from removal to children would be at least 60 - 70 feet. Also, as previously mentioned, the material was likely soaked with water as it was removed and it is therefore unlikely that asbestos fibers would have become airborne as a result of the removal activities. In addition, the wind direction during the days when the asbestos was removed would not have been toward the closest houses where DEQ has alleged children were playing.

In my opinion, the hazard alleged in the final DEQ notice of penalty exceeds the hazard associated with actual conditions at the site during the period in question.

Sincerely,

Richard H. Krause, CIH

RHK/jl

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 RESPONDENT'S RESPONSE TO DEPARTMENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Respondent objects to, and strongly disagrees with, the Department's Proposed EQC Findings of Fact, Conclusions of Law and Final Order. In support of this objection, Respondent incorporates the arguments set forth in Respondent's Response Brief. As outlined in Respondent's Brief, the Hearings Officer was correct in her findings and conclusions in this matter. The Proposed EQC Findings, Conclusions, Opinion and Order are a reflection of what the Department wishes had been established at hearing, but in fact, are not supported by the weight of the evidence presented at hearing in this matter. The EQC should reject the Department's Proposed Findings, Conclusions, and Order, and instead enter the Final Order dated May 20, 1991, which was prepared for the Commission by the Commission's Hearings Officer.

Respectfully submitted,

DEBRA OLSON SOREN, OSB# 86256
Of Attorneys for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81
	)	RESPONDENT'S RESPONSE TO DEPARTMENT'S EXCEPTIONS

Respondent disagrees with, and objects to, the Department's Exceptions to the Hearings Officer's Findings of Fact, Conclusions of Law, Final Order and Judgment. In support of this objection, Respondent refers the Commission to the Respondent's Response to Department's Opening Brief. Further, Respondent affirmatively states that the weight of evidence presented at hearing supports the Hearings Officer's Findings, Conclusions, and Final Order prepared by the Hearings Officer and dated May 20, 1991.

1. The Hearings Officer correctly reclassified the violations from Class I to Class II.
2. The Hearings Officer correctly concluded that the magnitude of the Respondent's violation should be reduced from major to moderate.
3. The Hearings Officer correctly concluded that there was no basis for finding the Respondent was negligent.
4. The Hearings Officer correctly concluded Respondent was entitled to a reduction of the civil penalty based on its cooperative conduct.

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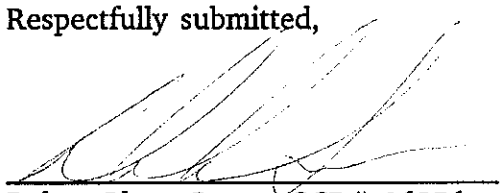
5. The Hearings Officer correctly reduced the total amount of the civil penalty from $12,000 to $1,600.

Respectfully submitted,



Debra Olson Soren, OSB# 86256
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on October 31, 1991, I served the foregoing RESPONDENT'S RESPONSE TO DEPARTMENT'S OPENING BRIEF, RESPONDENT'S RESPONSE TO DEPARTMENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER, and RESPONDENT'S RESPONSE TO DEPARTMENT'S EXCEPTIONS upon the parties hereto by hand delivering a true, exact and full copy thereof to:

Arnold B. Silver
Department of Justice
410 1515 Building
1515 SW 5th Avenue
Portland, Oregon 97201

DEBRA OLSON SOREN, OSB# 86256
Of Attorneys for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Department,	)	No. AQAB-NWR-90-81
v.	)	DEPARTMENT REPLY BRIEF
FUEL PROCESSORS, INC.,	)	
Respondent.	)	

The Department replies to Fuel Processors, Inc.'s Response.

Respondent presents no new argument or issues of substance that the Department believes need additional briefing. Respondent instead offers its expert witness, Richard H. Krause, as its argument. Mr. Krause is president of Hazcon, Inc. and a paid expert witness of Respondent. His primary investigation consisted of talking to Respondent's employees and officers and looking at pictures of the site after it was cleared. He did not inspect the site prior to or during the actual demolition of the structures located thereon. Mr. Krause also does not state how many samples would even be "enough" for testing. Finally, his weather service data only supports the Department's position that the asbestos-containing

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waste material removed by Respondent was not wet and was capable of creating a likelihood of public exposure.

Respectfully submitted,

Arnold B. Silver
Assistant Attorney General
Of Attorneys for Respondent

CERTIFICATE OF SERVICE BY MAIL

I certify that on November 18, 1991, I served the foregoing DEPARTMENT REPLY BRIEF upon the party hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Debra Olson Soren
Attorney at Law
Bogle & Gates
222 SW Columbia
Portland, OR 97201

ARNOLD B. SILVER #58088
Assistant Attorney General
Of Attorneys for Department

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

DATE: February 7, 1992

TO: Environmental Quality Commission

FROM: Linda K. Zucker, Hearing Officer

SUBJECT: Review of the Hearing Officer's Order in
DEQ v Fuel Processors, Inc.,
Case #AQAB NWR 90 81
Agenda Item J, March 12, 1992, EQC Meeting

Enclosed for your review at the March 12, 1992 meeting is the case record which includes the following:

1. Notice of Civil Penalty Assessment.
2. Answer, Affirmative Defense and Request for Contested Case Hearing.
3. Exhibits.
4. February 8, 1991 letter from Fuel Processors.
5. February 12, 1991 letter from DEQ.
6. Hearing Officer's Findings of Fact and Conclusions of Law.
7. Notice of Appeal.
8. Department Exceptions to Hearing Officer's Findings of Fact, Conclusions of Law, Final Order and Judgment.
9. Environmental Quality Commission Findings of Fact, Conclusions of Law and Final Order (Proposed).
10. Respondent's Response to Department's Opening Brief.
11. Respondent's Response to Department's Proposed Findings of Fact, Conclusions of law and Final Order.
12. Respondent's Response to Department's Exceptions.
13. Department Reply Brief.
14. Hearing Transcript.

LKZ:y
HZ102513
Enclosures

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1390 PHONE (503) 229-5696

May 24, 1990

CERTIFIED MAIL P476 980 156

Fuel Processors, Inc.
c/o Registered Agent
WL Briggs
701 Bozarth St
PO Box 1407
Woodland, Washington 97674

Re: Notice of Civil
Penalty Assessment
No. AQAB-NWR-90-81
Multnomah County

Between February 26, 1990 and March 9, 1990, Fuel Processors, Inc. removed chemical tanks and a boiler from property formerly owned by West Coast Adhesive located at 11104 NW Front Avenue, Portland, Oregon. In the process of removing the tanks, Fuel Processors removed a large amount of asbestos-containing insulation from the pipes connected to the chemical tanks. The asbestos material was stored in several large piles on the property.

On March 10, 1990, a representative of the Department's asbestos section inspected the site and observed asbestos material scattered throughout the property and stored in large piles. He took samples of the material in the piles. Laboratory analysis confirmed that the material contained 25 to 35% Amosite asbestos and 80 to 85% Chrysotile asbestos.

In the course of removing the tanks, Fuel Processors violated the following asbestos regulations listed below which were adopted under the authority of Oregon Revised Statute 468.893(8).

Oregon Administrative Rule (OAR) 340-25-465(6) states that during an asbestos abatement project, the following shall be employed:

> "(a) Remove friable asbestos materials before any wrecking or dismantling that would break up the materials or preclude access to the materials for subsequent removal."

OAR 340-25-465(15) states:

> "Open storage or accumulation of friable asbestos material or asbestos-containing waste material is prohibited."

The site of the tank removal and asbestos storage is located near a residential neighborhood and children were playing within 20 feet of the asbestos abatement project. The violations of the asbestos work practice and storage regulations created the likelihood for public exposure to asbestos and, therefore, the violations are classified as Class I violations under OAR 340-12-050(1)(i) and (j).

Because you violated the asbestos regulations, you are liable for a civil penalty assessment up to $10,000 per day for each violation. In the enclosed Notice of Assessment of Civil Penalty, I have assessed a penalty in the amount of $12,000. In determining the amount of the penalty, I used the procedures set forth in OAR 340-12-045. The Department's findings and civil penalty determination are attached to the Notice as Exhibits 1 and 2.

The penalty is due and payable. Appeal procedures are outlined in Section V of the Notice. If you fail to either pay or appeal the penalty within twenty (20) days, a Default Order and Judgment will be entered against you.

If you wish to discuss this matter, or if you believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, you may request an informal discussion by attaching your request to your appeal. Your request to discuss this matter with the Department will not waive your right to a contested case hearing.

Copies of referenced rules are enclosed. If you have any questions about this action, please contact Holly Duncan with the Department's Enforcement Section in Portland at 229-6742.

Sincerely,

Fred Hansen
Director

FH:hd
Enclosures
cc: Northwest Region, DEQ
Air Quality Division, DEQ
Department of Justice
Environmental Protection Agency

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. Fuel Processors, Inc., a Washington Corporation, Respondent.	)	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. AQAB-NWR-90-81 MULTNOMAH COUNTY

I. AUTHORITY

This notice is issued to Respondent, Fuel Processors, Inc., a Washington Corporation, by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.125 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. VIOLATIONS FOR WHICH A CIVIL PENALTY IS BEING ASSESSED

Between February 26, 1990 and March 9, 1990, Respondent conducted an asbestos abatement project by removing tanks and a boiler from the facility located at 11104 NW Front Avenue, Portland, Oregon, during which the Respondent violated the following asbestos regulations adopted pursuant to ORS 468.893(8):

1. Respondent violated OAR 340-25-465(6) when respondent failed to remove the asbestos materials from the connecting pipes before dismantling and removing the chemical tanks and boiler from the property.

2. Respondent violated OAR 340-25-465(15) when Respondent openly stored asbestos-containing waste material in large piles during the asbestos abatement project.

III. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the following violations cited in Section II:

Violation	Penalty Amount
1.	$6000
2.	$6000

Respondent's total civil penalty is $12,000.

The findings and determination of Respondent's civil penalty pursuant to OAR 340-12-045 are attached and incorporated as Exhibits Nos. 1 and 2.

The penalties are being imposed without advance notice pursuant to OAR 340-12-040(3)(b)(G) as the penalty is for a violation of the rules adopted under ORS 468.893(8).

IV. PAYMENT OF CIVIL PENALTY

The total penalty is now due and payable. Respondent's check or money order in the amount of $12,000 should be made payable to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

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V. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right, if Respondent so requests, to have a formal contested case hearing before the Environmental Quality Commission (Commission) or its hearings 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 and must be received by the Commission's hearings officer 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 claims or defenses to the assessment of this civil penalty that Respondent may have and the reasoning in support thereof. Except for good cause shown:

1. Factual matters not controverted shall be presumed admitted;

2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or defense;

3. New matters alleged in the "Answer" shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

Send the request for hearing and "Answer" to: **Linda K. Zucker, Hearings Officer, Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for hearing and an "Answer," Respondent will be notified of the date, time and place of the hearing.

If Respondent fails to file a timely request for hearing or "Answer", 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.

Failure to appear at a scheduled hearing or meet a required deadline, may result in a dismissal of the contested case.

May 24, 1990
Date

Fred Hansen, Director

EXHIBIT 1.

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO: 1. (Failing to remove asbestos prior to dismantling the tanks and boiler).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(i) because the violation of the work practice regulation resulted in the likelihood for public exposure. Residences are located and children were playing within 20 feet of the property on which the asbestos was disturbed and the Respondent's activities created a likelihood for public exposure to asbestos.

MAGNITUDE: The magnitude of the violation is major. The Respondent disturbed material containing up to 35% amosite asbestos and 85% chrysotile asbestos from pipes which were connected to the tanks and boiler. Once removed from the pipes, the asbestos material was accumulated in several large piles on the property.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: BP+[(.1xBP)(P+H+E+O+R+C)].

"BP" is the base penalty which is $ 5,000 for a Class I major magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant actions and receives a value of 0 as the Respondent has no prior significant actions as defined in OAR 340-12-030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant actions and receives a value of 0 as the Respondent has no prior significant actions.

"E" is the economic condition of Respondent and receives a value of 0 as there is insufficient information on which to base a finding.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0 as the violation was a single occurrence.

"R" is the cause of the violation and receives a value of 2 as the Respondent was negligent in failing to determine whether the material was asbestos prior to removing the insulation from the pipes.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as the Respondent was neither cooperative nor uncooperative in correcting the violation.

PENALTY CALCULATION:

Penalty = BP+[(.1xBP) (P+H+E+O+R+C)]
= 5000 + [(.1x5000)((0)+(0)+(0)+(0)+(2)+(0))]
= 5000 + [(500)(+2)]
= 5000 + 1000
= 6000

EXHIBIT 2.

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO: 2. (Open storage and accumulation of asbestos-containing waste material).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(j) because the storage of asbestos-containing waste material created the likelihood for public exposure to asbestos. Residences are located and children were playing within 20 feet of the property on which the asbestos was openly stored. The piles of asbestos-containing insulation on the property were within a close enough proximity to the residences that the activity created the likelihood for public exposure.

MAGNITUDE: The magnitude of the violation is major. The Respondent stored asbestos-containing pipe insulation in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained up to 35% amosite asbestos and chrysotile asbestos.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP+[(.1xBP)(P+H+E+O+R+C)]$.

"BP" is the base penalty which is $ 5000 for a Class I Major magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant actions and receives a value of 0 as Respondent has no prior significant actions as defined in OAR 340-12-030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant actions and receives a value of 0 as Respondent has no prior significant actions.

"E" is the economic condition of Respondent and receives a value of 0 as there is insufficient information on which to base a finding.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0 as this violation was a single occurrence.

"R" is the cause of the violation and receives a value of 2 as the Respondent was negligent in openly accumulating the asbestos-containing waste material on the property.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as Respondent was neither cooperative nor uncooperative in correcting the violation.

PENALTY CALCULATION:

Penalty = BP+[(.1xBP) (P+H+E+O+R+C)]
= 5000 + [(.1x5000) ((0)+(0)+(0)+(0)+(2)+(0))]
= 5000 + [(500)(+2)]
= 5000 + 1000
= 6000

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., a Washington Corporation, Respondent.	ANSWER, AFFIRMATIVE DEFENSE AND REQUEST FOR CONTESTED CASE HEARING No. AWAB-NWR-90-81 MULTNOMAH COUNTY

For its Answer to the Department's Notice of Assessment of Civil Penalty ("Notice") dated May 24, 1990, Respondent, Fuel Processors, Inc., a Washington corporation ("Fuel Processors"), hereby admits, denies, and alleges as follows:

I.

Admits that between the dates of February 26, 1990, and March 9, 1990, Fuel Processors removed tanks and a boiler from the West Coast Adhesive facility formerly located at 11104 N.W. Front Avenue, Portland, Oregon.

II.

Except as expressly admitted above, Fuel Processors denies each and every allegation contained in the Notice and the exhibits attached thereto.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

III.

Fuel Processors, Inc., realleges paragraphs I and II, above.

IV.

The Department has failed to state facts sufficient to give rise to a claim for relief against Fuel Processors.

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222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

SECOND AFFIRMATIVE DEFENSE

(Failure to Plead Sufficient Facts)

V.

The Department has failed to provide sufficient information to Fuel Processors to enable Fuel Processors to prepare an adequate defense to the allegations contained in the Notice.

THIRD AFFIRMATIVE DEFENSE

(Inadequate Notice - Failure to Provide Notice of Enforcement Action)

VI.

Fuel Processors realleges paragraphs I and II, above.

VII.

The Department failed to provide timely and/or adequate notice of a pending enforcement action and intent to assess civil penalty for the alleged violations.

FOURTH AFFIRMATIVE DEFENSE

(Improper Penalty Assessment-Amount)

VIII.

Fuel Processors realleges paragraphs I and II, above;

IX.

The amount of the civil penalty the Department seeks to collect in the above-captioned case in cause is inappropriate in that the assessment procedure failed to take into account material mitigating factors, some of which are described below, which were evident to the Department of the time of the assessment and will be presented as evidence at the hearing.

X.

The amount that the Department seeks to collect in the above captioned case and cause is inappropriate in that the Department has failed to properly apply and assess

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Portland, OR 97201
(503) 222-1515

those factors which the Department concludes to have been "aggravating" for the reason that some of the factors are factually inaccurate, some of the factors have been misconstrued by the Department and its personnel, and some of the factors are not, in fact, "aggravating." Fuel Processors will present specific evidence on each point at the hearing to follow.

XI.

Fuel Processors affirmatively alleges the following mitigating factors:

1. Fuel Processors made reasonable and appropriate inquiries regarding the composition of the subject materials.

2. Respondent visually inspected the subject materials prior to removal and confirmed that there was no reason to suspect the presence of asbestos.

3. Respondent has cooperated with the Department and its personnel throughout the Department's investigation of the matter.

4. Fuel Processors was not offered an opportunity to correct the alleged violations before the Department began formal enforcement proceedings.

STATEMENT OF FACTS SUPPORTING FUEL PROCESSORS' DEFENSE

XII.

Fuel Processors specially alleges the following facts, upon which it will rely to disprove the Department's claims and in support of which evidence will be presented at the hearing:

1. Fuel Processors' conduct at the subject premises did not create a likelihood of public exposure to asbestos-containing materials.

2. To the extent that Fuel Processors stored or accumulated asbestos-containing materials, said materials were placed in contained concrete bermed areas on the subject premises.

////

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3. All materials, including the substances alleged to be asbestos-containing, were exposed to open rainfall during the storage period, which significantly reduced the possibility of airborne dust emissions.

4. All rainwater which accumulated in the concrete bermed area was captured, containerized and shipped to Fuel Processors' water treatment plant for proper disposal.

5. The subject premises is located in a heavily industrialized area, remote from commercial, business or residential surroundings. The area is not heavily traveled by pedestrian traffic and presents the possibility of only limited exposure to the public.

6. The site was isolated from the general public by cable chains placed across the driveway and other points of access.

7. Fuel Processors made all appropriate and reasonable inquiries to determine the content and composition of the material alleged to contain asbestos. Fuel Processors reasonably relied on representations made to it by the owner of the facility regarding the composition of the materials.

8. Fuel Processors, based on lack of sufficient information to form a reasonable belief, denies that the materials removed from the facility contained asbestos.

WHEREFORE, having fully answered the Notice of Assessment in the above-captioned case and cause, Fuel Processors respectfully requests:

1. That a hearing, as provided for in the Notice and in the applicable statutes and rules and the applicable Rules of Procedure, be promptly scheduled; and

2. That the Department take nothing by way of its complaint; and

3. That Fuel Processors be awarded a judgment against the Department for its attorneys fees and costs incurred in this action and such other relief as may be deemed just and proper.

////

////

BOGLE & GATES
1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

DATED: this 3rd of June, 1990.

Respectfully submitted,

BOGLE & GATES

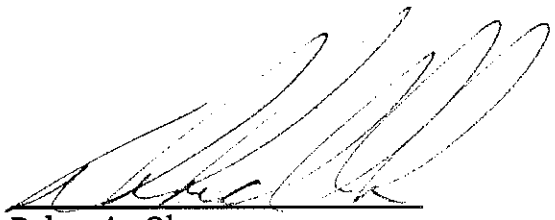
Debra A. Olson, OSB# 86256
Trial Attorney: Christopher L. Reive, OSB# 83305
1400 KOIN Center
222 S.W. Columbia
Portland, Oregon 97201
Of Attorneys for Respondent, Fuel Processors, Inc.

BOGLE & GATES
1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201
(503) 222-1515

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Answer Affirmative Defense and Request for Contested Case Hearing on Department of Environmental Quality of the State of Oregon v. Fuel Processors, Inc., a Washington Corporation, case No. AWAB-NWR-90-81, on the 3rd day of July, 1990, by causing to be hand delivered a true copy thereof, to:

Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97201



Debra A. Olson
Of Attorneys for Respondent

Attachment 7

DEPARTMENT OF ENVIRONMENTAL QUALITY ①
Request for Analysis

LEGAL Case No. 900199

Location/Site: 11104 SW FRONT Date Sampled: 3-10-90 Date Received in Lab: MAR 12 1990

Collected by: DAVID WALL Fund Code: 1432 Date Reported: MAR 20 1990

Purpose: ANALYSIS Report Data to:

Comments:

Item #	Sampling Point Description (include time)	Sample container according to test(s) requested: Nutrients / Basic	DO / BOD	Metals / Organic	Misc. / Misc.	Test(s) Required
1	S.W. Section of LOT				Z3006	ASBESTOS CONTENT
2	WEST END OF BOILER BUILDING				Z3007	" "
3	NE corner of LOT OUT BUILDING				Z3008	" "
4	" " "				Z3009	" "
5	BOILER Jacket				Z3012	" "
6						

State of Oregon DEPARTMENT OF ENVIRONMENTAL QUALITY RECEIVED MAR 22 1990

Laboratory Comments: AIR QUALITY CONTROL

Contact Sa[illegible]e Tracker for proper sampling containers and pre[illegible]vation procedure. (503) 229-5983

Ex 1-1

DEPARTMENT OF ENVIRONMENTAL QUALITY
Laboratories and Applied Research Division
1712 S.W. 11th Avenue, Portland, OR 97201

LEGAL SAMPLE

Chain of Custody Record

Site Name: 1001 1ST AVENUE E.D. | Laboratory Number: _____

Location: 1001 NW FIRST | Program Code: 1433

Date Sampled: 3-10-90 | Date Received: 3-12-90

Time Sampled: 10:30 AM | Time Received: 3:15 PM

Collected By: DAVID WOLL

Sample Container Information

Container Type/Number	Container Type/Number	Container Type/Number
P.C. 1/2 GAL / Z 3006	/	/
" / Z 3007	/	/
" / Z 3008	/	/
" / Z 3009	/	/
" / Z 3012	/	/
/	/	/

Total Number of Containers Received: 5

Relinquished By: [signature] (signature) | Received By: [signature] (signature)

Initial Placement in Refrigerator # 7-73

Subsequent Out of Laboratory Transfers:

Relinquished By: (time/date)	Received By: (time/date)

7/86 DEQ/LB-106

(COPY FOR PERSON WHO BROUGHT IN THE SAMPLE)

DEPARTMENT OF ENVIRONMENTAL QUALITY LABORATORIES
Analytical Records Report

* LEGAL *** TUESDAY MARCH 20th, 1990

CASE NAME: 900199 11104 S.W. FRONT
SUBMITTER: Wall, David E. COLLECTOR: Wall, David E.
FUND CODE: 1432 Asbestos Control

ITEM #	RESULT	UNITS	TEST
001	S.W. Section of lot		
	03/10/90		
	Attached		Microscopic exam.
002	West end of boiler building		
	03/10/90		
	Attached		Microscopic exam.
003	N.E. Corner of lot outbuilding		
	03/10/90		
	Attached		Microscopic exam.
004	N.E. Corner of lot outbuilding sample 2		
	03/10/90		
	Attached		Microscopic exam.
005	Boiler jacket		
	03/10/90		
	Attached		Microscopic exam.

DEPARTMENT OF ENVIRONMENTAL QUALITY
LABORATORIES AND APPLIED RESEARCH
INORGANIC/NONMETALS SECTION
MICROSCOPIC TEST RESULTS

****

SITE: 11104 SW Front
LABORATORY NO: 900199
PROGRAM CODE: 1432
COLLECTED BY: David Wall
DATE COLLECTED: March 10, 1990
DATE COMPLETED: March 15, 1990
ANALYST: BVJ

==========

ITEM #	CONTAINER	DESCRIPTION
1.	Z3006	Macro: The sample consists of wet, gray, loose material with obvious fiber content. Micro: The sample contains 35% Amosite asbestos. The remainder is the non-fibrous matrix.
2.	Z3007	Macro: The sample consists of a gray plaster-like material and a deteriorated piece of cloth. Micro: The sample contains 25% Amosite asbestos. It also contain 15% plant fibers. The remainder is non-fibrous.
3.	Z3008	Macro: The sample consists of a 1/8" thick, triangular piece of tough, tan material. Micro: The sample contains 80% Chrysotile asbestos. The remainder is non-fibrous binders.
4.	Z3009	Macro: The sample consists of a 1/8" thick piece of stiff, gray material. Micro: The sample contains 85% Chrysotile asbestos. The remainder is non-fibrous binders.
5.	Z3012	Macro: The sample consists of loose, vermiculite-like material. Micro: No Asbestos found. The sample contains vermiculite.

COMMENTS: Results to D. Wall on 3/14/90. BVJ

ASB00199
BVJ/lotus

4-1

SITE NAME: West Coast Adhesive Co.
DATE:20-Mar-90 TIME:3:30 pm PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of residences from south side of demo site. Across the street from site there are five children that play in the area approximately 20 feet from the adhesive plant.

SITE NAME: West Coast Adhesive Co.
DATE:20-Mar-90 TIME:3:30 pm PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of residences from north side of demolition site.

E+2

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1334 PHONE (503) 229-5696

March 21, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P 560 339 588

Fuel Processors, Inc.
Registered Agent
WL Briggs
PO Box 1407
701 Bozarth St.
Woodland, WA 98674

Re: NOTICE OF NONCOMPLIANCE
AQAB-NWR-90-323
Multnomah County

Dear Mr. Briggs:

On March 10, 1990, a representative of the Department conducted an inspection at the former site of West Coast Adhesive Co. located at 11104 NW Front, Portland, Oregon. During the course of this inspection it was found that Fuel Processors, Inc. was contracted to remove all the chemical tanks and the boiler from this site. The process of removing these tanks and the boiler disturbed a large amount of asbestos-containing pipe insulation.

Lab analysis of the pipe insulation showed it to contain 25 to 35% AMOSITE asbestos. Removal of asbestos-containing material must be done by an Oregon licensed asbestos abatement contractor and must be done prior to any demolition work.

The violations committed by Fuel Processors, Inc. employees while salvaging chemical tanks and a boiler are listed below:

Class II violation. OAR 340-25-465(6)(a), remove asbestos-containing materials before any wrecking or dismantling that would break up the materials or preclude access to the materials for subsequent removal.

Class II violation. OAR 340-25-465(15), open storage or accumulation of friable asbestos material or asbestos-containing waste material is prohibited.

Ex 3

Class III violation. OAR 340-25-465(5), written notification of any asbestos abatement project shall be provided to the Department on a Department form. The notification must be submitted by the facility owner or operator or by the contractor in accordance with on of the procedures specified in subsection (a) or (b).

Class of violation pertains to the amount of risk to the public or the environment. Class I is a major risk and Class III is a minor risk.

The Department is very concerned that Fuel Processors, Inc. be able to recognized asbestos-containing material when they encounter it. The business of tank and boiler recovery will bring you into contact with asbestos-containing pipe insulation as well as other asbestos-containing materials on a regular basis. The Department strongly suggests that you get some formal training so that you may more easily recognize suspect asbestos-containing material. Information on training classes may be obtained from the Department.

You need to be aware that violations of the asbestos regulations can lead to civil penalty of up to $10,000 per day per violation. The Department is referring this case to our enforcement section for further investigation and enforcement.

Copies of the above mention rules are enclosed for your information and use. If you have any questions on this matter please contact me at (503) 229-5364.

Sincerely,

David E. Wall
Asbestos Control Analyst
Air Quality Division

DEW:a
ASB\AH3066
Enclosure
cc: Enforcement Section, DEQ
Northwest Region, DEQ
Environmental Clean-up Division, DEQ
Oregon OSHA, Region 1

Dept. of Environmental Quality
RECEIVED
MAR 22 1990
NORTHWEST REGION

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1334 PHONE (503) 229-5696

March 21, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P 560 339 587

West Coast Adhesive Co.
Registered Agent
William Dubs
11104 NW Front
Portland, OR 97231

Re: NOTICE OF NONCOMPLIANCE
AQAB-NWR-90-324
Multnomah County

Dear Mr. Dubs:

On March 10, 1990, a representative of the Department conducted an inspection of West Coast Adhesive Co. located at 11104 NW Front, Portland, Oregon. During the course of this inspection it was found that several lengths of asbestos-containing pipe insulation had been disturbed and piled around the site by Fuel Processors, Inc. Your company contracted with Fuel Processors, Inc. to remove and/or salvage chemical tanks and the boiler on the site.

This is a Class III Violation of the Department's asbestos regulations. OAR 340-33-030(2) states that an owner or operator of a facility shall not allow any persons other than those employees of the facility owner or operator who are appropriately certified or a licensed asbestos abatement contractor to perform an asbestos abatement project in or on that facility. Facility owners and operators are not required to be licensed to perform asbestos abatement projects in or on their own facilities.

Class of violation pertains to the amount of public and environmental risk. A Class I is a major risk and a Class III is a minor risk.

Please be aware that violations of the Department's asbestos regulations can lead to civil penalty of up to $10,000 per day per violation. In the future the Department expects you to conform to all the asbestos regulations.

Ex 4

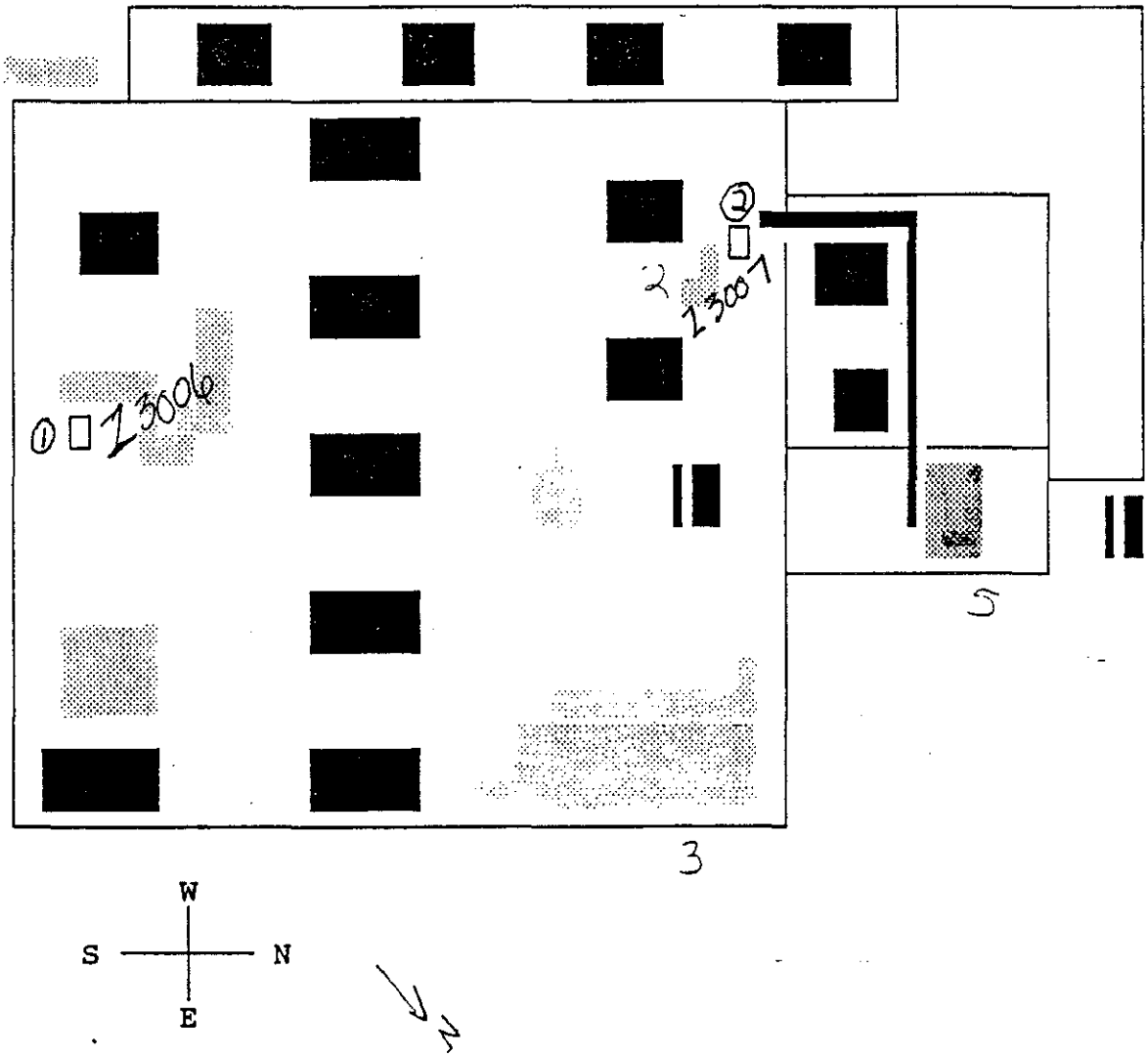
Copies of the above mentioned rules are enclosed for your information and use. If you have any questions on this matter please contact me at (503) 229-5364.

Sincerely,

David E. Wall
Asbestos Control Analyst
Air Quality Division

DEW:a
ASB\AH3065
Enclosure
cc: Enforcement Section, DEQ
Northwest Region, DEQ
Environmental Clean-up Division, DEQ
Oregon OSHA, Region 1

West Coast Adhesive Co.



Asbestos Contamination Sites.....

Large Tanks.....

Small Tanks.....

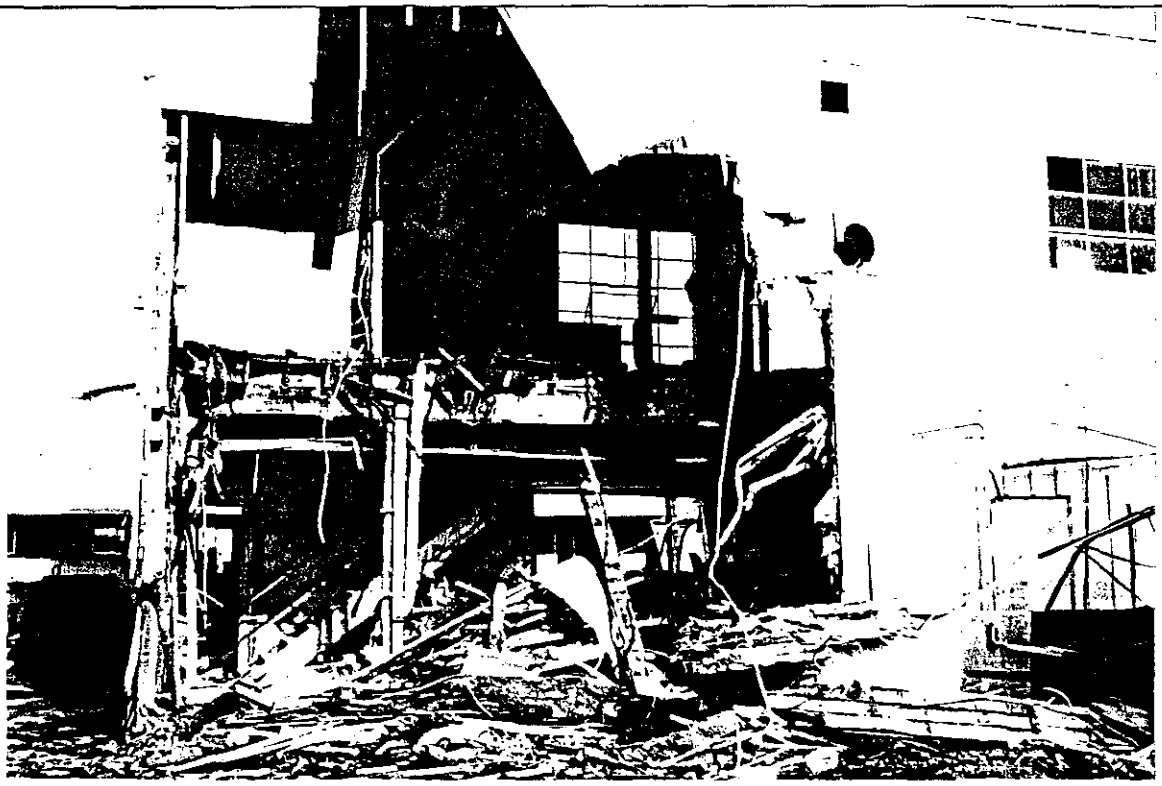
Asbestos Pipe Line.....

Asbestos Sampling Sites.....

Non Asbestos Insulated Boiler.....

Ex5

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: View of reactor building take from the south side of the tank farm area.

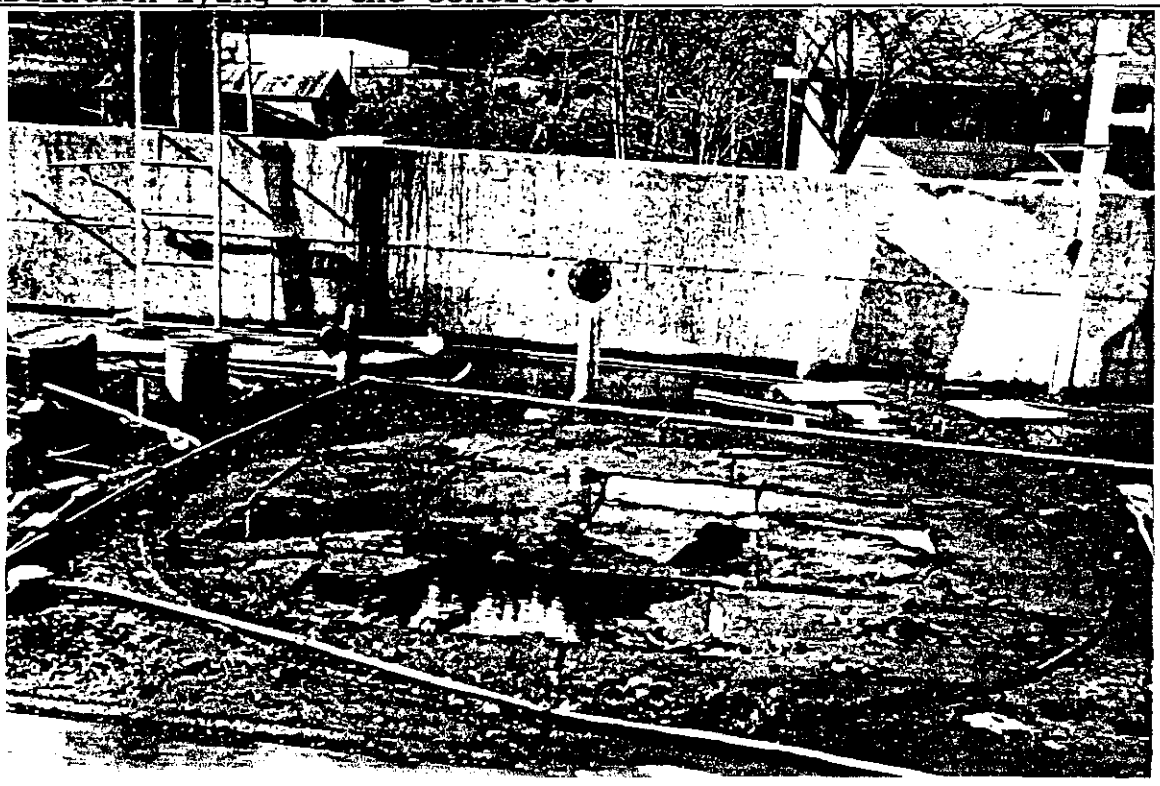


SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER: DEWall JOB#: 6508
COMMENTS: Sample point south side of tank farm area mag type pipe insulation.

Exh

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER:DEWall JOB#:6508
COMMENTS: Sample point in reactor building. West end of main pipe from boiler room.

SITE NAME: West Coast Adhesive Co.
DATE:10-Mar-90 TIME:10:15am PHOTOGRAPHER:DEWall JOB#:6508
COMMENTS: Facing away from reactor building toward the middle of the tank farm. Shows tank placement and small amount of pipe insulation lying on the concrete.



Ex 7

RICHARD H. KRAUSE

HAZCON, Inc.
9500 S.W. Barbur Blvd.
Suite 100
Portland, Oregon 97219
(503) 244-8045

EMPLOYMENT

1986-Present HAZCON, INC., Portland, Oregon
President
Formed Industrial Hygiene service corporation to provide occupational and environmental health management services; Instructor in Approved Washington and Oregon State Asbestos training courses, manages staff of Certified Industial Hygienists, Industrial Hygienists, and Industrial Hygiene Technicians in the field and laboratory.

1985-1986 JAMES L. GROVES COMPANY, Portland, Oregon
Assistant Manager
Assisted in management of the H2M Division, provided industrial hygiene sampling and analytical services to clients, marketed for new clients, arranged seminars, participated in professional organizations and regulatory actions, developed and presented training programs, developed, implemented and participated in asbestos control programs and performed numerous industrial hygiene surveys of industrial, institutional, and governmental facilities.

1980-1985 SAIF CORPORATION
Industrial Hygiene Manager
Duties included managing four Industrial Hygiene Consultants, consulting with insureds about the recognition evaluation and control of occupational health hazards, evaluating occupational disease worker's compensation claims and providing expert witness testimony at claims hearings.

1977-1980 STATE OF OREGON, ACCIDENT PREVENTION DIVISION
Health Compliance Officer
Responsible for conducting industrial hygiene inspections of work places in Oregon to determine compliance with the Oregon Safe Employment Act. Reports were prepared describing violations of standards and work place conditions observed.

EDUCATION

M.S. in Public Health, Industrial Hygiene and Safety, University of Washington
B.S. in Microbiology, University of Washington

PROFESSIONAL ORGANIZATIONS

American Industrial Hygiene Association American Academy of Industrial Hygiene
American Society of Safety Engineers

CERTIFICATIONS

Comprehensive Practice of Industrial Hygiene by
American Board of Industrial Hygiene
Certified Safety Professional

Ex 8

HEALTH HAZARD CONTROL SERVICES
HAZCON INC.

RECEIVED
OCT 0 3 1990
BOGLE & GATES

Debra Olson
Bogle & Gates
222 SW Columbia
Portland, Oregon 97201

Dear Ms. Olson:

At your request, I have performed a factual investigation regarding the DEQ notice of violation (Case No. AWAB-NWR-90-81) against Fuel Processors, Inc.

As a part of this investigation, I visited the Department of Environmental Quality offices to review their files, interviewed Mr. Bill Briggs, Mr. Dale Poor and Mr. Dan Goodhue of Fuel Processors, Inc., Mr. Bill Dubbs of West Coast Chemicals, and Mr. Jim Barnes of Cascade Industrial Maintenance, obtained information from the National Weather Service, and visited the cleared site. My findings are as follows:

The initial inspection of the site was conducted by Mr. Dave Wall, Asbestos Control Analyst of the Air Quality Division.

Upon close review, several questions arise which serve to raise doubt about the degree of hazard presented by the actions of Fuel Processors, Inc.

The first question involves the actual amount of friable asbestos debris that was present.

The DEQ photos show large piles of insulation at the site. The bulk samples collected by Mr. Wall included two (Nos. 1 & 2) that appeared to be from pipe insulation. These contained amosite asbestos. The two other samples (Nos. 3 & 4) contained chrysotile asbestos and consisted of "tough," "stiff" materials. These likely may have been gasket materials of low friability. In my opinion, to establish the actual amount of asbestos materials in these piles, more samples should have been collected. This would have reduced possible sampling bias resulting from the natural tendency to only sample those materials with the highest potential for asbestos content.

In conversations with Mr. Dubbs I learned that he estimated that 60-70% of the pipe insulation in this plant had been replaced since his arrival in 1977. Non-asbestos pipe insulation materials can look identical to older asbestos containing materials, particularly when piled in a dirty, soaking wet pile of demolition debris. It is probable that only a small amount of asbestos material was present in the photographed piles.

The second question involves the condition of the material as it was taken off of the pipes. The material at the time of the inspection was obviously saturated with water as shown in the DEQ photographs.

I spoke with Dan Goodhue (the person who actually removed the insulation) about the condition during the removal. He stated the insulation was removed later in the demolition time frame from 2/26 to 3/10 and was saturated on the pipes as well as when it was in piles on the ground. In light of this information, the potential for airborne exposure was greatly lessened.

9500 SOUTHWEST BARBUR BOULEVARD
SUITE 100
PORTLAND, OREGON 97219
503/244-8045

Ex 9

I discussed the weather conditions with the National Weather Service for this time period. This information is consistent with Mr. Goodhue's observations of the wetness.

Date	Rainfall	Wind
2/26	None	11 mph East
2/27	None	18 mph East
2/28	None	11 mph East
2/21	None	6 mph South East
3/02	Trace	6 mph South East
3/03	.52 inches	10 mph South
3/04	.24 inches	8 mph East South East
3/05	.02 inches	8 mph South East
3/06	.14 inches	8 mph South
3/07	.45 inches	11 mph South
3/08	.02 inches	14 mph South East
3/09	.33 inches	14 mph South East
3/10	.28 inches	10 mph South East

The third question involves the exact proximity of children playing and the likelihood of exposure from wind-driven asbestos dust.

Mr. Wall's report mentions children playing approximately 20 feet from the plant. The final DEQ Notice of Penalty refers to children being 20 feet from the asbestos removal. From my observations of the site and inspection of the maps, the two statements are not consistent. A more accurate distance (as measured on the aerial photographs) from removal to children would be at least 60 - 70 feet. Also, as previously mentioned, the material was likely soaked with water as it was removed and it is therefore unlikely that asbestos fibers would have become airborne as a result of the removal activities. In addition, the wind direction during the days when the asbestos was removed would not have been toward the closest houses where DEQ has alleged children were playing.

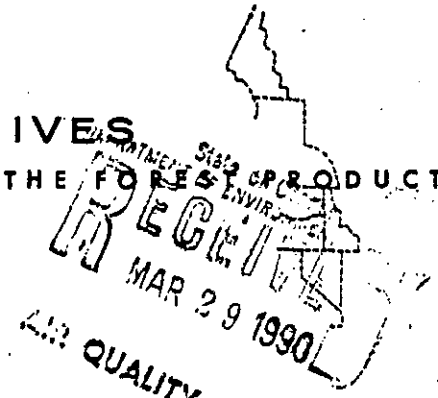
In my opinion, the hazard alleged in the final DEQ notice of penalty exceeds the hazard associated with actual conditions at the site during the period in question.

Sincerely,

Richard H. Krause, CIH

RHK/jl

WEST COAST ADHESIVES
JOB-TESTED ADHESIVES FOR THE FOREST PRODUCTS INDUSTRIES
Area Code 503 286-3515
11104 N. W. FRONT AVENUE
PORTLAND, OREGON 97231



3-19-90

MR. DAVID E. WALL
ASBESTOS CONTROL ANALYST
AIR QUALITY DIVISION
PROGRAM OPERATIONS SECTION
DEPARTMENT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE
PORTLAND, OR 97204

DEAR MR. WALL:

MOST RECENTLY, WEST COAST ADHESIVES SOLD ALL OF ITS PLANT EQUIPMENT TO OIL RE-REFINERS CO., INC. OF PORTLAND, OR. DURING THE NEGOTIATION AND ULTIMATE SALE OF THE EQUIPMENT, NO DISCUSSION OF THE POTENTIAL PRESENCE OF ASBESTOS INSULATION AROUND PIPING WAS DISCUSSED WITH BILL BRIGGS PRESIDENT OF OIL RE-REFINING. IT WAS SIMPLY A MATTER IF NOT THINKING ABOUT THE POSSIBILITY OF ASBESTOS BEING PRESENT. IN RETROSPECT, I SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF OLD ASBESTOS INSULATION BEING PRESENT, BUT THE IDEA DID NOT OCCUR TO ME. THIS ESPECIALLY TRUE WHEN THE FINAL SALE WAS COMPLETED OF 1-31-90.

SOME WEEKS PRIOR TO THE SALE (AROUND 1-6-90) MR. BRIGGS HAD ORIGINALLY EXPRESSED INTEREST IN THE BOILER ONLY. AT THAT TIME MR. BRIGGS COULD HAVE INQUIRED ABOUT THE POSSIBLE PRESENCE OF ASBESTOS INSULATION AROUND THE BOILER. I DO NOT REMEMBER THIS POSSIBILITY, BUT IT COULD HAVE BEEN MENTIONED. OTHER THAN THAT I DID NOT DISCUSS THE POSSIBILITY OF ASBESTOS BEING PRESENT. I DON'T BELIEVE THAT EITHER PARTY WAS OPENLY AWARE THAT A ASBESTOS PROBLEM EXISTED.

VERY TRULY YOURS.
William Duke
GENERAL MANAGER

EXHIBIT

BOGLE & GATES

LAW OFFICES

1400 KOIN Center
222 S.W. Columbia
Portland, OR 97201

(503) 222-1515
Fax: (503) 721-3666

DEBRA A. OLSON

Seattle
Anchorage
Bellevue
Tacoma
Washington, D.C.
Yakima

71173/05224

February 8, 1991

Ms. Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 S.W. Sixth Avenue
Portland, OR 97201

Re: DEQ v. Fuel Processors, Inc.
Contested Case No. AWAB-NWR90-81

Dear Ms. Zucker:

Respondent Fuel Processors, Inc. ("Respondent") submits this letter in response to your invitation for comments regarding the issue of whether a Hearings Officer has the authority to order an award for violations different than those violations alleged in the DEQ's pleadings if DEQ has failed to meet the burden of proof required for the violations contained in the pleadings. It is not within the discretion of the Hearings Officer to issue an Order for violations other than those actually plead by DEQ.

On or about May 24, 1990 Respondent received a Notice of Assessment of Civil Penalty (the "Notice") for two alleged Class I major violations under OAR 340-12-050(1)(i) and (j). Respondent requested a contested case hearing to resolve these issues, and also pursued informal resolution of this matter with DEQ.

The Administrative Procedures Act does not provide guidance on this issue and we must refer to the Rules of Civil Procedure for guidance. Under ORCP 23B, courts are given discretion to impose liability for offenses not raised in the pleadings "when issues not raised by the pleadings are tried by express or implied consent of the parties." This provision does not provide the Hearings Officer the latitude in this matter to amend DEQ's pleadings, because at no time during the hearing did DEQ present any evidence to establish a class or magnitude of violation other than those contained in the DEQ pleadings, and DEQ did not request that the Hearings Officer consider any violations other

than those contained in the Notice. At the hearing, the Department focused solely on establishing liability for Class I major violations. The Department clearly established, both in its pleadings and in settlement discussions with Respondent, that the issues addressed at the hearing would include only the Class I major violations contained in the Notice. The parties did not, either expressly or impliedly, try any theories of liability other than the violations alleged in DEQ's pleadings. DEQ cannot now be allowed to take advantage of theories of liability which it earlier rejected. See Georgeson v. State of Oregon, 75 Or App 213, 216 (1985) (tort claimant, who had earlier opportunity to replead defective notice, and instead chose to plead a different theory of notice, was denied further opportunity to replead). It was incumbent upon DEQ to amend its pleadings if DEQ intended the Respondent Hearings Officer to address violations other than those outlined in the Notice. At no time before or during the hearing did DEQ attempt to amend its pleadings to include a different class or magnitude of violation. DEQ cannot, after the fact, rely upon the Hearings Officer to remedy DEQ's failure to amend the pleadings. If an Order is issued imposing liability for any violations other than those actually plead in the DEQ Notice, Respondent intends to pursue its rights to appeal such an Order to the Environmental Quality Commission and/or the Oregon Court of Appeals.

Notwithstanding the above, Respondent also believes that the Department has failed to meet its burden under Violation No. 2 of the Notice of proving a violation of OAR 340-12-030(j), which provides that:

> "Visible emissions of asbestos during an asbestos abatement project or during collection, processing, packaging, transportation, or disposal of asbestos-containing waste material is a Class I violation."

DEQ did not present any evidence at the hearing regarding visible asbestos emissions allegedly created by Respondent. For this reason, Violation No. 2 of the Notice must be dismissed.

Respondent believes that DEQ failed at the contested case hearing to meet its burden of proving that Respondent committed the Class I major violations alleged in the Notice. The Oregon Administrative Procedure Act requires a determination by the Hearings Officer in favor of the Respondent.

Thank you for allowing us to comment on this issue. If you have any questions, please do not hesitate to contact me.

Very truly yours,

BOGLE & GATES

Debra A. Olson

DAO/rln
cc: Arnold V. Silver
[48\cl\dao\fpi\zucker.L01]

DAVE FROHNMAYER
ATTORNEY GENERAL

JACK L. LANDAU
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
1515 SW 5th Avenue
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Portland, Oregon 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

2/15/91

February 12, 1991

Linda Zucker
Hearing Officer
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

Re: DEQ v. Fuel Processors, Inc.

Dear Ms. Zucker:

I received a copy of a letter to you from Ms. Olson dealing with your authority to enter an order for a violation different than one alleged in the notice if DEQ failed to meet its burden of proof for the alleged violations. I paraphrased the sentence because it was somewhat lengthy and difficult to grasp. Certainly we agree that if the Department fails to establish a violation, it fails to prove conduct resulting in assessment of a civil penalty. I do not recall the Hearing Officer asking the specific question. I do recall an inquiry from the Hearing Officer relating to DEQ classification systems. If the Hearing Officer has a specific question in mind it might be helpful to counsel to reduce it to writing for briefing. In the meantime, the Department feels Ms. Olson is confused in her analysis.

The confusion may result from not distinguishing between the Department's ability to assess a penalty and the amount of such penalty. The Hearing Officer may reduce such amount based upon new information coming in at the hearing. See OAR 340-11-132(5)(a)(A)(B). The case is not dismissed however.

Second, Ms. Olson refers to Violation No. 2 of the notice claiming the Department failed to prove a violation of OAR 340-12-030(j) dealing with visible emissions, and asks this allegation be dismissed. However, the Department did not

allege as Violation No. 2, a Violation of OAR 340-12-030(j). Violation No. 2 as alleged by the Department is a violation of OAR 340-25-465(15). (See Notice, p. 2.) Violation No. 2 is given a classification based on OAR 340-12-050(1)(j) (storage). (See exhibit.)

I do not believe the Hearing Officer invited legal argument and further I am of the opinion that counsel had not raised any issue for the Hearing Officer's evaluation.

Sincerely,

Arnold B. Silver
Assistant Attorney General

ABS:dld
5870H
cc: Debra Olson

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
	)	NO. AQAB NWR 90 81

BACKGROUND

On May 24, 1990, DEQ notified Fuel Processors, Inc., that it was liable for a $12,000 civil penalty for failing to remove friable asbestos materials before dismantling a facility and for openly storing or accumulating friable asbestos materials in violation of OAR 340-25-465(6) and (15). The amount of the penalty was predicated on DEQ's view that the violations created a "likelihood for public exposure to asbestos," were of major magnitude, and were negligent.

Fuel Processors admitted removing tanks and the boiler, generally denied the remainder of the allegations in DEQ's notice, and affirmatively alleged failure to state a claim for relief, failure to plead sufficient facts, and failure to provide notice of enforcement action and intent to assess a penalty. Fuel Processors also challenged the penalty amount for deficiencies in procedure and for factual accuracy and sufficiency.

A hearing was conducted on December 13, 1990. Fuel Processors was represented by Debra A. Olson, its attorney. DEQ was represented by Arnold Silver, Assistant Attorney General.

Post hearing briefing concluded on February 14, 1991.

ISSUES

Whether Fuel Processors, Inc. violated OAR 340-25-465(6) and (15) and, if so, whether $12,000 is the appropriate penalty for these violations.

OFFICIAL NOTICE

I take official notice of ORS 468.877 which provides:

> **468.877 Findings.** The Legislative Assembly finds and declares that:
>
> (1) Asbestos-containing material in a friable condition, or when physically or chemically altered, can release asbestos fibers into the air. Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are a danger to the public health.
>
> (2) There is no known minimal level of exposure to asbestos fibers that guarantees the full protection of the public health.
>
> (3) Asbestos-containing material found in or on facilities or used for other purposes within the state is a potential health hazard.
>
> (4) The increasing number of asbestos abatement projects increases the exposure of contractors, workers and the public to the hazards of asbestos.
>
> (5) If improperly performed, an asbestos abatement project creates unnecessary health and safety hazards that are detrimental to citizens and to the state in terms of health, family life, preservation of human resources, wage loss, insurance, medical expenses and disability compensation payments.
>
> (6) It is in the public interest to reduce exposure to asbestos caused by improperly performed asbestos abatement projects through the upgrading of contractor and worker knowledge, skill and competence.

FINDINGS OF FACT

Between February 26, 1990 and March 9, 1990, Fuel Processors

dismantled and removed tanks and a boiler from a building in Portland's northwest industrial area. At the time of the work, the building was being torn down by a demolition contractor which had removed one wall of the building to facilitate removal of the tanks and boiler. The site had been the object of environmental scrutiny because of the presence of phenols. Environmental remediation contractors had breached some pipe lines and "opened" all tanks.

A sample of material disturbed by Fuel Processors during dismantling contained 35% wet friable amosite asbestos. The asbestos material was wet when disturbed. Wet asbestos material is not likely to become airborne. The material was in a concrete bermed area in which rainwater accumulated until removed by pumping. The sample was taken from material which was accumulated uncovered.

The material was in a "medium-large" pile. Two thirds of the material in the pile appeared similar to the sampled material; however, the presence of asbestos cannot be determined without laboratory analysis. Since 1977, 60-70% of the facility's pipe insulation material had been replaced.

There were two residences within 60-70 feet of the asbestos and within 20-25 feet of the property boundary. On one occasion children were seen playing in the vicinity. There was a possibility of public exposure to asbestos.

In evaluating the likelihood of public exposure to asbestos it is appropriate to consider the condition of the materials,

degree of friability, degrees of wetness, direction of wind and proximity of people.

Fuel Processors is in the business of recovering used oils and converting them to fuel. From time to time in the course of its business, Fuel Processors encounters asbestos. Fuel Processors inquired about the presence of asbestos on this site and was told that none was present.

Fuel Processors cooperated with DEQ by answering all questions asked by DEQ and by providing all statements requested by DEQ.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. Between February 26, 1990 and March 9, 1990, Fuel Processors violated OAR 340-25-465(6)(a) and 340-25-465(15) by dismantling equipment without first removing friable asbestos material and by openly storing friable asbestos material. Consequently, Fuel Processors is liable for a civil penalty.

3. The case record establishes Class Two violations of moderate magnitude followed by cooperative conduct.

4. Application of the penalty formula to the facts proved at hearing produces a $1,600 penalty.

OPINION

DEQ proved the alleged violations by proving that during an asbestos abatement project Fuel Processors handled friable asbestos-containing material from pipes and that Fuel Processors

openly stored asbestos-containing waste material. In determining the amount of the penalty for each violation, DEQ relied on a penalty schedule matrix contained in OAR 340-12-042, on the determination procedure set out in OAR 340-12-045, and on the classification list provided by OAR 340-12-050.

Classification

Applying the classification list set out in OAR 340-12-050, DEQ charged Fuel Processors as follows:

VIOLATION NO: 1. (Failing to remove asbestos prior to dismantling the tanks and boiler).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(i)* because the violation of the work practice regulation resulted in the likelihood for public exposure. Residences are located and children were playing within 20 feet of the property on which the asbestos was disturbed and the Respondent's activities created a likelihood for public exposure to asbestos.

VIOLATION NO: 2. (Open storage and accumulation of asbestos-containing waste material).

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(j) because the storage of asbestos-containing waste material created the likelihood for public exposure to asbestos. Residences are located and children were playing within 20 feet of he property on which the asbestos was openly stored. The piles of asbestos-containing insulation on the property were within a close enough proximity to the residences that the activity created the likelihood for public exposure. Notice of Assessment, Exhibits 1 and 2.

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* Cited provisions of OAR Chapter 340 Division 12 were renumbered but not otherwise changed on March 30, 1990.

Classification is based on risk of harm. As cited in this case, a Class One violation is a:

> Violation of a work practice requirement which results in or creates the likelihood for public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(1)(i).*
>
> or
>
> Storage of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which results in or creates the likelihood for public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(1)(j).

Their Class Two counterparts are:

> Violation of a work practice requirement for asbestos abatement projects which are not likely to result in public exposure to asbestos or release of asbestos into the environment... OAR 340-12-050(2)(h).
>
> and
>
> Improper storage of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which is not likely to result in public exposure to asbestos or release of asbestos into the environment...OAR 340-12-050(2)(i).

To prove Class One violations, DEQ was required to show that the violations occurred under the circumstances alleged and created a likelihood of public exposure to asbestos.

Condition of the material, degree of friability, degree of wetness, wind direction and proximity to people affect the likelihood of public exposure. DEQ considered the proximity of people. As alleged, residences and people were approximately 20 feet from the property boundary. However, they were 60 - 70 feet

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* DEQ did not allege action resulting in or creating the likelihood of release of asbestos into the environment.

from the asbestos-containing material. The case record establishes that the only asbestos material clearly tied to Fuel Processors's activities had a significant asbestos content but was wet when disturbed and wet when tested. Moreover, the weather and the site's disposition to collect water make it more likely than not that the material was wet between disturbance and testing. Because wet asbestos is unlikely to become airborne, the facts proved establish only a possibility, not a likelihood, of public exposure to asbestos as a result of the violations.

A finding of possible public exposure supports a Class Two violation. Fuel Processors contends that because DEQ alleged a likelihood of public exposure, it cannot exact any penalty when the proof establishes only possible exposure. Agency rules suggest otherwise. OAR 340-11-132(5) contemplates adjustment of penalties where DEQ fails to establish some or any of the facts regarding the violation, or where new information is provided which was not initially considered by the Director. The civil penalty calculation may be adjusted and the penalty reduced to conform to the matters proved.

MAGNITUDE

According to agency rules "'Magnitude of the Violation' means the extent of a violator's deviation from the Commission's and Department's statutes, rules, standards, permits, or orders, taking into account such factors as, but not limited to, concentration, volume, duration, toxicity, or proximity to human

or environmental receptors. Deviations are categorized as major, moderate or minor." OAR 340-12-030(11).

DEQ characterized the magnitude of Fuel Processor's violations as major, relying on the following allegations:

Violation No. 1:	Failure to remove asbestos prior to dismantling the tanks and boiler).
Magnitude:	The magnitude of the violation is major. The Respondent disturbed material containing up to 35% amosite asbestos and 85% chrysotile asbestos from pipes which were connected to the tanks and boiler. Once removed from the pipes, the asbestos material was accumulated in several large piles on the property.
Violation No. 2.	(Open storage and accumulation of asbestos-containing waste material).
Magnitude:	The magnitude of the violation is major. The Respondent stored asbestos-containing pipe insulation in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained up to 35% amosite asbestos and chrysotile asbestos. Notice of Assessment, Exhibits 1 and 2.

The two elements considered by DEQ in determining the magnitude of the violation were the quantity of asbestos material and its concentration.

DEQ did not prove that Fuel Processors stored "several large piles" of asbestos material and did not prove the storage of chrysotile asbestos.

DEQ acknowledged it had no way of knowing whether someone from Fuel Processors had disturbed any of the accumulated asbestos containing material, other than the material contained

in the wet sample Z 3006. Both a demolition contractor and environmental contractors had engaged in work which could have been responsible for the accumulations. Moreover, the replacement since 1977 of a significant amount of material inhibits an inference that untested material had asbestos content. Because the case proof did not conform to the information considered in characterizing the magnitude as major, a reconsideration of magnitude is necessary.

DEQ did prove that Fuel Processors failed to remove and openly stored material containing 35% friable amosite asbestos in an amount that was "medium-large." Because even a small amount of friable asbestos is a potential hazard the volume and toxicity in this case establish violations of moderate magnitude.

NEGLIGENCE

DEQ alleged that Fuel Processors "was negligent in openly accumulating the asbestos-containing waste material on the property" and "was negligent in failing to determine whether the material was asbestos prior to removing the insulation from pipes." Notice of Assessment, Exhibits 1 and 2. These allegations simply restate the violations. They do not disclose the reasons the violations are considered culpable as negligence. While administrative rules define the behavior which will characterize violation as "flagrant" or "intentional", they provide no definition of negligence. OAR 340-12-030(7) and (9). The combination of this failure and the failure to identify the negligent behavior apart from commission of the violation itself,

deprives the reviewer of a standard against which to measure the record and precludes a finding of negligence. See, DEQ v Excel Environmental, Inc., May 25, 1990.

COOPERATIVENESS

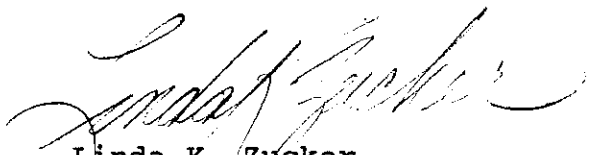
ORS 468.130(2)(g) directs the Commission to consider a violator's cooperativeness and efforts to correct the violation. Both attitude and conduct must be considered. See, DEQ v Thatcher Company, December 7, 1990. The record does not disclose any efforts to correct the violation. The record does establish cooperative conduct. Fuel Processors requested mitigation of the penalty for cooperativeness and is entitled to that adjustment.

OTHER DEFENSES

Fuel Processors did not plead or prove any exceptions to the work practices requirements. Except for the matters discussed, Fuel Processors did not establish the facts or defenses raised in its answer.

Dated this 20th day of May, 1991.

ENVIRONMENTAL QUALITY COMMISSION



Linda K. Zucker
Hearings Officer

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	FINAL ORDER AND JUDGMENT NO. AQAB NWR 90 81

The Environmental Quality Commission, through its hearings officer, orders that Respondent, Fuel Processors, Inc., is liable to the State of Oregon in the sum of $1,600 and that the State have judgment for and recover the amount pursuant to a civil penalty assessment dated May 24, 1990. Review of this order is by appeal to the Environmental Quality Commission pursuant to OAR 340-11-132. A request for review must be filed within 30 days of the date of this order.

Dated this 20th day of May, 1991.

ENVIRONMENTAL QUALITY COMMISSION

Linda K. Zucker
Hearings Officer

NOTICE: If you disagree with this Order you may request review by the Environmental Quality Commission. Your request must be in writing directed to the Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204. The request must be <u>received</u> by the Environmental Quality Commission within 30 days of the date of mailing or personal service of Order. If you

do not file a request for review within the time allowed, this order will become final and thereafter shall not be subject to review by any agency or court.

A full statement of what you must do to appeal a hearings officer's order is in Oregon Administrative Rule (OAR) 340-11-132. That rule is enclosed.

7/19/91

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department,	)	No. AQAB-NWR-90-81
v.	)	NOTICE OF APPEAL
FUEL PROCESSORS, INC., Respondent.	)	

Department requests that the Environmental Quality Commission review Hearings Officer Linda K. Zucker's Findings of Fact and Conclusions of Law and Final Order and Judgment dated May 20, 1991.

ARNOLD B. SILVER, OSB No. 58088
Assistant Attorney General
Of Attorneys for Department of
Environmental Quality

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 DEPARTMENT EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT

The Department excepts to the hearing officer's Final Order:

1. Reclassifying and reducing the Department's classification of the assessed civil penalties from class one violations to class two violations:

2. Reducing the Department's finding that Respondent's violations were of major magnitude to moderate magnitude.

3. Finding no basis for concluding the violations by respondent were culpable as negligence.

4. Finding that respondent engaged in cooperative conduct to correct the alleged violations.

5. Reducing the total amount of civil penalty imposed against Respondent from $12,000 to $1,600.

Respectfully submitted,

ARNOLD B. SILVER
Assistant Attorney General
Of Attorneys for the Department

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FUEL PROCESSORS, INC., Respondent.	)	No. AQAB-NWR-90-81 DEPARTMENT OPENING BRIEF

I.

BACKGROUND OF CASE AND APPEAL

On May 24, 1990, the Department assessed a $6,000 civil penalty against Respondent for failing to remove insulation containing asbestos materials from pipes connected to tanks and a boiler prior to dismantling and removing such fixtures in violation of OAR 340-25-465(6) (violation 1) and a $6,000 civil penalty for openly storing asbestos-containing waste material in violation of OAR 340-25-465(15) (violation 2). These two penalties totaled $12,000 and were arrived at by the Department utilizing the civil penalty formula codified by Commission rule.

The Department found that the base penalty for violation 1 was $5,000 because it was a Class I major magnitude violation in the matrix listed in OAR 340-12-040(1). This base amount was increased by $1,000 because the Department found that the cause of the violation was Respondent's negligence. Similarly, the Department found that the base penalty for violation 2 was $5,000 because it was a Class I major magnitude violation in

the matrix listed in OAR 340-12-042(1). Again, this base amount was increased by $1,000 because the Department found that the cause of violation was Respondent's negligence.

Respondent requested and was granted a hearing regarding the Department's assessment of civil penalty. The Hearing Officer in making her final order reduced the Department's assessment of civil penalty from $12,000 to $1,600. The Department believes the hearing officer reduction was in error.

II.

REASONS FOR APPEAL

There are four Department grounds for appealing the Hearing Officer's order to the commission:

1. The Hearing Officer erred when she reduced the class of violations found by the Department from Class I to Class II.

2. The Hearing Officer erred when she reduced the magnitude of the violations found by the Department from "major magnitude" to "moderate magnitude."

3. The Hearing Officer erred when she found that the violations of asbestos rules by Respondent were not negligent.

4. The Hearing Officer erred when she found that Respondent engaged in cooperative conduct.

Each of these grounds cited by the Department for appeal will be discussed separately.

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III.

REDUCTION OF THE CLASS OF THE VIOLATIONS

FROM CLASS I TO CLASS II WAS IN ERROR

The Department found that Respondent's failure to remove asbestos-containing insulation from pipes prior to engaging in its dismantling process and storage of the resulting friable asbestos-containing waste material "created the likelihood for public exposure to asbestos." This finding made these types of violations Class 1 violations. The Hearing Officer, however, concluded that the evidence only supported a finding that the violations resulted in Class II violations because they were "not likely to result in public exposure to asbestos." She arrived at this conclusion because she found that residences and people were approximately 60-70 feet from the asbestos-containing material and not approximately 20 feet as alleged; that the asbestos-containing material was wet when disturbed and wet when tested (Order, p. 3 ls. 9-14; p. 3 ls. 21-24; p. 6 ls. 22-23 and p. 7 ls. 3-4). The Hearing Officer was clearly in error in reaching this conclusion.

A. Distance

Department's witness, Dave Wall, testified two residences were directly across the street to the west of the site with a business to the northwest of the site (Tr 22). He further testified the residences were approximately 60 feet from the area where the asbestos was disturbed, and 20-25 feet from the site proper (Tr 22). Witness Wall, on March 10, 1990, also

observed several children playing across the street from the site at the time of his inspection (Tr 23). Witness Wall was asked: "Do you believe that the removed asbestos-containing pipe insulation and the storage of those materials could have created the likelihood of public exposure to asbestos?" (Tr 23) Witness Wall stated, in response to this question: "Yes, I do!" (Tr 23)

He elaborated on this answer by explaining a likelihood of public exposure was created by the proximity of the people living in the area to the asbestos; that the salvage operation went on for a long period of time; and the lack of rain occurring during the total salvage operation (Tr 23 and 32).

Witness Wall further testified that the fact people were 60 feet from the salvage operations rather than 20-25 feet did not diminish the likelihood that they could be exposed to asbestos fibers (Tr 28).

The Hearing Officer either disregarded, ignored or did not hear or read the foregoing testimony. This evidence clearly establishes that there was a likelihood for public exposure to asbestos fibers by persons residing or playing in the vicinity of Respondent's salvage operations.

B. Wetness

Whether or not asbestos-containing material is sufficiently wet is of significant importance to this case. If the material is sufficiently wetted, it mitigates against asbestos fibers becoming airborne and exposing members of the public to health

hazards. On the other hand, if the material is not sufficiently wetted it increases the likelihood of public exposure to asbestos fibers.

Witness Wall's testimony about whether the asbestos-containing material was wet commences at the bottom of page 12 of the transcript.

Witness Wall testified he examined the pipe insulation accumulated at the site. He testified that piles in certain areas of the site were sitting in water and thus wet, however, there were other sections of the pipe insulation strewn across the slab that were not in water and were dry (Tr 13). Respondent did not wet any of the material. Any wetness resulted from rainfall (Tr 15). Thus, the Hearing Officer in concluding that the material was "wet," had to rely on evidence about sporadic rainfall and not on any evidence that Respondent made a conscious effort to intentionally wet the material to prevent migration of airborne asbestos fibers. In fact, Witness Wall specifically testified that not all of the material was sufficiently wet to prevent asbestos fibers (Tr 15). Witness Wall further testified that rainfall is not an acceptable industrial standard for wetting asbestos insulation (Tr 15). Rainfall cannot adequately wet the asbestos-containing material while it is being removed (Tr 16-17). Further, Witness Wall pointed out that a certain type of asbestos will not retain water and even asbestos that has been wetted will nonetheless allow asbestos fibers to

become airborne (Tr 17). This type of asbestos was present at the site.

Witness Wall testified that pipe insulation remaining in a covered building after removal of the tanks and boiler by Respondent was exposed and was not wet (Tr 21).

The Hearing Officer found that the material sampled by Mr. Wall was wet when disturbed (Order, p. 3 ls. 10-11); and was wet when disturbed and when tested (Order, p. 10-11, ls. 3-4).

There is absolutely no evidence supporting the Hearing Officer's finding and conclusion. Witness Wall did not testify the sample taken was wet nor that the asbestos material was wet when disturbed. In fact, he testified to the contrary.

Nor does the testimony of Respondent's chief witness, Krause, assist the Hearing Officer in reaching this unsupported conclusion.

Witness Krause did not actually see the piles of material at the site that are claimed to be wetted (Tr 8). Witness Krause based his conclusion that the material was wet on Respondent's employee's testimony (Tr 89). The witness further confirmed it would be to Respondent's advantage to tell him the material was wet (Tr 89).

Witness Krause, as well as the Department, relied on meteorological data taken at the Portland airport. The rainfall amounts are measured at the airport and are not measures of rainfall in other parts of the city (Tr 93-94).

The airport is located on NE Marine Drive, on the Columbia River while the site in question is in northwest Portland. The amount of rainfall at the northwest site is totally unknown by Witness Krause. His testimony that asbestos-containing material at the site was possibly wet was based on conversation with Respondent's employees (Tr 95).

Respondent conducted salvage operations between February 26, 1990, and March 9, 1990. Witness Krause acknowledged the meteorological data he looked at shows no rain on February 26, 27, 28 and March 1, 1990. In fact, there was no rain from the 20th of February. Only a trace of rain shows on March 2 (Tr 97). The witness further points out if the salvage operations took place on the days there was no rain, it would increase the likelihood of public exposure to asbestos fibers (Tr 97-98 and 99). To sum up, Witness Krause does not know if the asbestos waste material was wet (Tr 99).

IV.

MAGNITUDE

The Hearing Officer apparently misconstrued the evidence in this case regarding the issue of the "magnitude" of the violations. Her decision was seemingly based on perceived semantic distinctions between "several piles," "large piles" and a "medium-large pile" of asbestos-containing material (ACM).

The Department did characterize the magnitude of Respondent's violations as major. The Department concluded that for violation 1, the violation was major because

Respondent disturbed material containing up to 35 percent amosite asbestos and 85 percent chrysotile asbestos from pipes which were connected to tanks and boilers. Once removed, the ACM was accumulated in several large piles on the property. The Department thus found the "disturbing" and "accumulating in several large piles" was a violation of major magnitude.

The Department concluded that for violation 2, the violation was major because the respondent stored ACM (pipe insulation) in numerous large piles throughout the site. Laboratory analysis of the material confirmed that the material contained a high percentage of asbestos. The samples traced to Respondent confirmed the asbestos was of the amosite form.

The Hearing Officer found that Department sampled a "medium-large" pile (Order p. 3, l. 16). Her opinion further concluded that the Department did not prove Respondent stored several large piles of asbestos material and also did not prove the storage of chrysotile asbestos (Order p. 8 ls. 21-23). However, she subsequently stated the Department did prove that Respondent failed to remove and openly stored material containing 35 percent friable amosite asbestos in an amount that was "medium-large." She correctly concludes that even a small amount of friable asbestos is, at least, a potential hazard (Order p. 9 ls. 12-13). However, she limits the magnitude to moderate.

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The Department believes the Hearing Officer misconstrued the evidence in this case regarding the issue of the magnitude of the violations.

Witness Wall testified that while on site, he talked to two of Fuel Processor's employees, Dan Goodhue and Dale Poor. These employees informed Mr. Wall that they salvaged tanks and a boiler. Witness Wall then asked them if they pulled the insulation off the pipes while they were salvaging those tanks and the reply was that they did (Tr 7-8).

Witness Wall honestly states he did not see Respondent do the actual removal of the tanks and boilers, but that the result of the salvage operation was pipe insulation in piles strewn over a good portion of the slabs where most of the tanks were located (Tr 8). Thus, Respondent admits pulling the insulation of the pipes and Wall testifies the pipe insulation was in piles strewn over a good portion of the area. Wall again states at the time of his inspection the pipe insulation was in a large number of piles on the site. (Tr 8-9).

Witness Wall took five samples of the pipe insulation that Respondent removed from pipes. Four of the samples were positive for asbestos material (Tr 9 and 11). Two samples were taken from the tank area, one sample from the boiler and two from sheds north of the site (Tr 10). The samples showed two different percentages and two different types of asbestos; 25-35 percent of amosite asbestos and 85 percent chrysotile asbestos (Tr 11). Witness Wall explains his sampling procedure

beginning on page 47 of the transcript. Witness Wall did not claim Respondent was responsible for the material in the shed giving rise to the sample (Tr 49). A third sample was taken from material surrounding a boiler. It did not contain asbestos (Tr 50). Witness Wall testifies that two of the five samples containing asbestos are directly attributable to the salvage operations of Respondent (Tr 50). These samples are sample No. 1; Z3006 and sample No. 2; Z3007 (Ex 1-4; Tr 52 and 54). These samples contained 35 percent and 25 percent amosite asbestos respectively (Ex 1-4). Amosite asbestos does not retain water and disturbing it allows airborne asbestos fibers to migrate through the ambient air and remain in the air for long periods of time (Witness Wall, Tr 17). Slight rainfall, in particular, would have no effect on migration of amosite asbestos (Witness Wall, Tr 13-17).

The error committed by the Hearing Officer regarding the issue of the magnitude of the violations can be summarized as a voyage into a semantical sea of nuances.

Respondent's employees admitted they pulled off the insulation from pipes. This insulation was in various size accumulations scattered around the site. These were not neat, orderly, planned, discrete piles of a workman's work product. The material was scattered all over. Some accumulations were large, some small, some medium-large. The accumulated piles were not separated by a river, a building, a fence or natural contours. More than likely the piles were interconnected. Two

samples taken from different locations on site proved positive for amosite asbestos, the type of asbestos most resistant to wetting by water. The Hearing Officer's Order suggests, but does not expressly so state, that the Department must sample every accumulation of material on site to determine if everything therein is asbestos. Such a conclusion is absurd and could result in thousands of samples. Instead, it is more reasonable to find that all of the material was asbestos contaminated. Frankly, if only one sample from a "medium-large pile," as the Hearing Officer found, proved positive for amosite asbestos, it should be sufficient to sustain a violation of major magnitude because of its toxicity and concentration. The simple reason is that:

> Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are a danger to public health.
>
> There is no known minimal level of exposure to asbestos fibers that guarantees the full protection of the public health.

ORS 468.877: Legislative Findings.

V.

NEGLIGENCE

The Department made a causal finding for violation 1 that Respondent was negligent in failing to determine whether insulation on pipes was asbestos, prior to the insulation's removal. The Department again made a causal finding for

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violation 2 that Respondent was negligent in openly accumulating asbestos-containing waste material on site.

The Hearing Officer's decision is strangely silent about her basis for concluding Respondent was not negligent. The Hearing Officer made no conclusions of law about this issue (Order p. 4). The Findings of Fact are also largely silent about this question. The only finding remotely applicable to the issue is a terse statement that [respondent] "* * * inquired about the presence of asbestos on this site and was told that none was present." [Order p. 4 ls. 5, 6, 7.] It is, however, difficult to know what issue this finding is supposed to be related to in the order. The Hearing Officer does get around to discuss the negligence issue in her "opinion" (Order pp. 9-10). However, without appropriate findings and conclusions of law, both Department and Respondent are at a disadvantage to make a rational nexus between findings, conclusions and opinion.

In essence, the Hearing Officer opines that the Department only restated the alleged violations and did not disclose the reasons the violations are considered culpable as negligence. She further argues that the Commission's rules do not define negligence. The failure to define negligence and the negligent behavior deprives the reviewer of a standard against which to measure the record and precludes a finding of negligence. The Hearing Officer is wrong. ORS 468.130 provides that in imposing a penalty pursuant to the schedule adopted under the

statutory framework that the Commission shall consider several factors, including whether the cause of the violation was an unavoidable accident, negligence or an intentional act. ORS 468.130(2)(f). The notice alleging the violations includes a "short and plain statement of the matters asserted or charged." ORS 468.135(1)(b).

The Court of Appeals has construed the term "negligence" as an inexact term. Pratt v. Real Estate Div., 76 Or App 488, 492 (1985). Inexact terms comprise a complete expression of legislative policy, and the Commission's responsibility is to interpret the term consistent with that policy, which can occur through contested case orders. Negligence within the statutory framework of ORS chapter 468 clearly indicates that it was intended to embody a complete expression of legislative meaning. Because the scope of the term is limited to conduct contemplated by ORS chapter 468, the legislature made a complete expression of its meaning. All that is left for the Hearing Officer to do is apply the term consistent with its meaning. Pratt, at p. 493. The Hearing Officer erroneously concluded that the Commission must define the inexact term "negligence" by rule.

The Hearing Officer states the Department did not disclose the reasons the violations are considered culpable as negligence. However, the notice and exhibits do disclose the Department's reasoning leading it to conclude respondent was negligent. Prior to discussing this reasoning, it is important

to stress, the Oregon Administrative Procedure Act (APA), is intended to provide a fair, impartial procedure for fact finding in contested cases. The APA is designed so that its major components of rulemaking and contested cases can be administered by laypersons and not lawyers. The legislature consciously designed a "roadmap" for laypersons to follow and avoided creating a "judicialized" system of procedure. The Department followed this roadmap and provided Respondent with notice and exhibits alleging the violations in a "short and plain statement of the matters asserted." The Hearing Officer apparently desires the Department staff to produce legal documents in the form of circuit court pleadings. The Department is not required to do so. The notice and exhibits are not for the convience of the Hearing Officer. They are for the purpose of furnishing reasonable notice of the matters charged to the Respondent. The Department has complied with the requirements of notice to Respondent. The Hearing Officer has to only look to the notice and exhibits as the four-corners of the Department's allegations to find its reasoning.

The Department found Respondent negligent by failing to determine whether insulation on pipes contained asbestos prior to removing the insulation and was negligent in openly accumulating asbestos-containing waste material. The Department supplied its reasoning in its assignment of the classification of the violation. This reasoning was that a failure to determine whether insulation contained asbestos,

prior to the insulation's removal is negligent because this conduct resulted in the likelihood of public exposure to asbestos (Ex 1 to Notice of Civil Penalty). Similarly, storage of asbestos-containing waste material was negligent because it was reasonably foreseeable that such storage created the likelihood for public exposure to asbestos (Ex 2 to Notice of Civil Penalty). While it may be more convenient for the Hearing Officer to have the Department's reasoning for finding negligence set forth in one paragraph, it is not legally required to do so. The rationale for concluding Respondent was negligent was set forth in a short and plain statement within the four corners of the notice and exhibits served upon Respondent and before the Hearing Officer and is sufficient to conclude that Respondent was negligent in committing the violations.

VI.

COOPERATIVENESS

The Department found that Respondent was neither cooperative nor uncooperative in correcting the violations and neither aggravated or mitigated the base penalty for this factor. The Hearing Officer concluded that ORS 468.130(2)(g) directs the Commission to consider a violators cooperativeness and efforts to correct a violation. She further opined both attitude and conduct must be considered. She then concludes the record does not disclose any efforts to correct the

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violation but that there was "cooperative conduct." (Order p. 10 ls. 5-12.)

The only cooperative conduct of Respondent cited by the Hearing Officer is that it answered questions by Department and provided statements required by Department (Order p. 4 ls. 8-9). The Hearing Officer's analysis is wrong and rewards passive or nonbehavior of a violator. The conclusion also is in conflict with both ORS 468.130(2)(g) and OAR 340-12-045(1)(f). ORS 468.130 provides the Commission shall consider certain factors including: the violator's cooperativeness and efforts to correct the violation. ORS 468.130(2)(g). This statutory subsection is phrased in the conjunctive "and"; not the disjunctive "or." In order for the Commission to consider this factor the violator must be both cooperative and expend efforts to correct the violation. If one of the elements of cooperativeness and efforts is missing, the violator is not entitled to a reduction in penalty. Since their were no efforts expended to correct the violation, Respondent is not entitled to a reduction.

The Hearing Officer's conclusion also conflicts with the Commission's rule regarding this factor. OAR 340-12-045(1)(F). This rule defines the factor to be considered by the Commission as: "* * * the violators cooperativeness in correcting the violation."

The Hearing Officer found that Respondent did nothing to correct the violation, but then disregarded the rule and

granted a reduction in penalty anyway. This conclusion flies in the face of articulated commission policy and is clearly wrong.

SUMMARY

The Hearing Officer was in error when she reclassified and reduced the Department's classification of the assessed civil penalties from Class I violations to Class II violations. The Hearing Officer was in error when she reduced the Department's finding that Respondent's violations were of major magnitude to moderate magnitude.

The Hearing Officer was in error when she concluded there was no basis for finding that Respondent's conduct was culpable as negligence. The Hearing Officer was in error when she found that Respondent engaged in cooperative conduct in correcting the alleged violations.

The civil penalty imposed by the Department in the amount of $12,000 should be imposed by the Commission and the Hearing Officer's reduction of such civil penalty to the sum of $1,600 should be vacated.

Respectfully submitted,

Arnold B. Silver
Assistant Attorney General
Of Attorneys for the Department

CERTIFICATE OF SERVICE BY MAIL

I certify that on September 24, 1991, I served the foregoing DEPARTMENT OPENING BRIEF, DEPARTMENT EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT, and ENVIRONMENTAL QUALITY COMMISSION FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Debra Ann Olson
Attorney At Law
Bogle & Gates
1400 KOIN Center
222 SW Columbia
Portland, OR 97201

ARNOLD B. SILVER #58088
Assistant Attorney General
Of Attorneys for Department

1 - CERTIFICATE OF MAILING
(dld 0452N)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department,	)	No. AQAB-NWR-90-81
v.	)	ENVIRONMENTAL QUALITY COMMISSION FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER
FUEL PROCESSORS, INC., Respondent.	)	

This case is before the Environmental Quality Commission on the appeal by the Department of Environmental Quality of the Hearing Officer's Order dated May 20, 1991, finding that Respondent violated certain Commission rules but reducing the civil penalties imposed by the Department from $12,000 to $1,600.

This appeal was considered by the Commission on _____ in _____, Oregon. After considering the record in this case and hearing argument of counsel, the Commission enters the following decision. The Commission adopts the background and issues as stated by the Hearing Officer in her order and also takes official notice of ORS 468.817 as taken by the Hearing Officer. The Commission additionally adopts the Hearing Officer's conclusion that Respondent did not establish the facts or defenses raised in its answer.

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I. Classification of Civil Penalties

A. Findings of Fact

1. OAR 340-25-465(6) requires specific work practices to be employed while conducting an asbestos project to prevent emissions of particulate asbestos material into the ambient air. Unless friable asbestos materials are adequately wetted, a person must remove friable asbestos material before any wrecking or dismantling is commenced because such conduct would break up the asbestos materials and cause them to be emitted into the ambient air.

2. OAR 340-25-465(15) prohibits a person from the open storage or accumulation of friable asbestos material or asbestos-containing waste materials (ACWM).

3. Under former Commission rule OAR 340-12-050(1)(l), the failure to remove friable asbestos materials before any wrecking or dismantling is undertaken is a Class I violation if there is a likelihood for public exposure.

4. Additionally, under former Commission rule OAR 340-12-050(1)(j), the open storage or accumulating of friable asbestos material or ACWM is also a Class I violation if there is a likelihood for public exposure.

5. Respondent engaged in a dismantling project on another person's property to salvage tanks and a boiler connected to the real property for use in Respondent's business operations.

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6. Respondent did not remove friable asbestos materials in pipe insulation connected to tanks and boilers prior to engaging in its salvage operations.

7. Respondent did not adequately wet friable asbestos materials prior to their removal and further, did not engage in any wetting operations at all.

8. Respondent removed the ACWM resulting from the salvage operations and stored or accumulated such materials in several piles throughout the site of the dismantling operations.

9. Respondent did not adequately wet the ACWM being stored or accumulated and further, did not engage in any wetting operations at all.

10. Samples taken from the ACWM and analyzed showed that the materials contained 25-35 percent amosite asbestos. The materials were friable which means that it can be easily crushed by hand pressure to release asbestos fibers into the ambient air.

11. The samples were not wet when taken by Department staff or when they were tested.

12. Respondent conducted its salvage operations between February 26, 1990, and March 9, 1990. Official records at the National Climatic Data Center, as shown by an official publication of the National Oceanic and Atmospheric Administration (NOAA) show the following precipitation for relevant dates in February and March 1990 as measured at Portland International Airport, 5420 NE Marine Drive, Portland.

February

a)	22	0.00
b)	23	0.00
c)	24	0.00
d)	25	0.00
e)	26	0.00
f)	27	0.00
g)	28	0.00

March

a)	1	0.00
b)	2	0.00
c)	3	0.52
d)	4	0.24
e)	5	0.02
f)	6	0.14
g)	7	0.45
h)	8	0.02
i)	9	0.33

The Commission takes official notice of this publication.

13. There was no precipitation for four days prior to Respondent's salvage operations (February 22-25).

14. There was no precipitation for the first four days of Respondent's salvage operations and only a trace on the fifth day (Feb. 26-March 1 and 2).

15. Some precipitation occurred between March 3 and March 9. However, most of this precipitation was not heavy precipitation.

16. The site where Respondent conducted its salvage operations was free of rainfall for four days prior to engaging in salvage operations and four days after such operations were commenced. This combination of days clearly shows the ACWM removed by Respondent was not wetted by rain during the period of time of salvage. Further, the rainfall that did occur

during the remainder of the days' salvage operations were engaged in was not sufficient to adequately wet the ACWM.

17. Natural rainfall is not an accepted industry or Department standard for adequately wetting asbestos waste materials, because it is subject to the whim and fancy of nature. Wetting agents must be directly applied to asbestos materials during removal to prevent fiber migration.

18. Amosite asbestos, a type of asbestos that Respondent failed to remove prior to its salvage operations does not retain water well and can still migrate into the ambient air, even when wetted. Assuming it rained throughout the total period of time Respondent conducted its operations, the asbestos-containing material would not have been adequately wetted to prevent its migration into the ambient air.

19. Several residences and a small business were in near proximity to the salvage operations of Respondent. Children were playing in the street adjacent to the salvage operations site. The residences, business and children were approximately 20-25 feet from the property line where the salvage operations were conducted and approximately 60-70 feet from the actual site of the salvage operations.

20. Whether human receptors were 20 feet or 70 feet from the salvage operations is not significant. The residences, business and children were in close enough proximity to the asbestos-containing material resulting from Respondent's dismantling operations and Respondent's subsequent

accumulation and storage of such material to produce a likelihood of public exposure to the human receptors.

B. Ultimate Finding of Fact

1. Likelihood for public exposure is more than a potential for public exposure, but is a probability for public exposure. Respondent's salvage operations resulted in a likelihood for public exposure to asbestos.

2. The number of days without rainfall preceding Respondent's salvage operations; the large amount of asbestos material present on site; lack of significant rainfall during said operation; and lack of engineering controls used combined with the fact the asbestos on site was amosite asbestos created the likelihood of public exposure for human receptors within 70 feet from Respondent's salvage operations.

C. Conclusion of Law

Respondent's failure to remove amosite asbestos-containing waste material (ACWM) from pipes prior to dismantling tanks and boilers and the open storage or accumulation of such material are Class I violations under OAR 340-12-050(1)(i) and (1)(J).

II.

Magnitude of Civil Penalties

A. Findings of Fact

1. Respondent failed to remove asbestos-containing waste material "ACWM" prior to dismantling operations. This dismantling took place over several days.

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2. ACWM was strewn about and accumulated on the salvage site by Respondent. Some of this material accumulated in various pile sizes. There was no orderly disposition of the ACWM by Respondent, and such material was scattered haphazardly around the site.

3. The removal and storage of the asbestos-containing waste material was performed by Respondent and not third parties.

4. The asbestos-containing pipe installation within site buildings was not replaced by non-asbestos-containing pipe insulation by the property owner.

5. The accumulation of ACWM and its storage on the site was in close proximity to human receptors. The exact volume of the ACWM could not be determined. However, whether it was scattered around the site; in one medium-large pile or several large piles is not significant.

6. Asbestos is a human health hazard. There is no known safe miminum level of human exposure to asbestos fibers that guarantees the full protection of the public health. The toxicity of asbestos in its amosite form is all the more dangerous because this form of asbestos does not retain water well to retard its airborne migration. A concentration of 25-35 percent amosite asbestos was found at the site resulting from Respondent's salvage operations.

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B. Ultimate Finding of Fact

Respondent's failed to remove ACWM from pipes prior to dismantling tanks and a boiler and stored and accumulated such materials containing amosite asbestos waste materials in close proximity to human receptors.

C. Conclusion of Law

Respondent's failure to remove asbestos-containing waste materials from pipes prior to dismantling tanks and a boiler and the open storage of 35 percent friable amosite asbestos on the site, whether strewn about or accumulated in several large piles or in a medium-large pile, are violations of major magnitude.

III.

Negligence

The Commission is of the opinion that findings of fact are unnecessary regarding the issue of negligence because the question is more in the nature of one of law rather than fact. The following conclusions of law are made.

Conclusions of Law

1. The Commission is not required to define negligence by rule for violations within the statutory framework of ORS chapter 468 governing this case. Pratt v. Real Estate Division, 76 Or App 483 (1985). Its context within the statutory framework indicates that it was intended to embody a complete expression of legislative meaning, that can be applied to contested case proceedings.

ORS chapter 468 was not enacted to codify tort law. The term negligence has a common meaning and it is that meaning that the legislature intended for the Department and Commission to utilize.

2. ORS 468.135(1)(a) requires the Department to state in its notice the particular sections of the rule involved in the case.

3. Both ORS 468.135(1)(b) and ORS chapter 183, the Administrative Procedures Act (APA) requires the Department to provide Respondent with a notice setting forth a short and plain statement of the matters charged or asserted. The question is whether a notice setting forth a short and plain statement of the matters charged or asserted was furnished to Respondent and not whether such allegations were in one neat paragraph.

4. The Department reasonably identified the rules involved in this case and what it considered to be Respondent's negligent conduct and furnished Respondent due notice of such conduct and of the rules considered to be violated. Respondent's openly accumulating asbestos-containing waste material on site was negligent because in accumulating such material it was reasonably foreseeable that it would create the likelihood for public exposure to asbestos. Respondent's failure to determine whether material was asbestos-containing material prior to its removal from pipes was negligent because it was reasonably foreseeable that it would create the

likelihood of public exposure to asbestos. In sum, Respondent's conduct unreasonably created a foreseeable risk of exposure to asbestos by members of the public. Foreseeability in the context of ORS chapter 468 refers to generalized risks rather than the mere predictability of the actual sequence of events. Respondent's conduct produced a risk of harm to the public which could reasonably be foreseen by Respondent.

IV.

Cooperativeness

The Commission is of the opinion that findings of fact are largely unnecessary regarding the issue of cooperativeness, because the question is more in the nature of one of law rather than fact. The Commission does find and agrees with the Hearing Officer that the record does not disclose any efforts by Respondent to correct the violations. The Commission makes the following conclusions of law.

Conclusions of Law

1. ORS 468.130(2)(g) required the Commission to consider the violator's cooperativeness and efforts to correct the violation when the Commission imposes a civil penalty. The statutory subsection is phrased in the conjunctive "and" so that both cooperativeness and efforts must be present before the factor can be considered. The factor is not phrased in the disjunctive "or" to allow the Commission to consider either cooperativeness or efforts. Respondent did not engage in any efforts to correct the violation.

2. Commission rules provide that when determining the amount of civil penalty to be assessed for any violation certain procedures are to be applied. OAR 340-12-045. Subparagraph 340-12-045(1)(c)(F) states the violator's cooperativeness in correcting the violation shall be considered. This rule requires the violator to perform or engage in affirmative conduct or acts to correct the violation. Respondent's answering questions is not the performance or engaging in affirmative conduct. At most it was a passive response. Respondent is not entitled to an adjustment based on this factor in the imposition of the civil penalties by the Department.

Opinion

This matter is before us on the appeal of the Department. The appeal relates to the amount of the penalty to be imposed for the violations rather than whether the violations were committed by Respondent. We agree with the Hearing Officer that the violations were proved and that Respondent failed to remove friable asbestos materials prior to dismantling a facility and for openly storing or accumulating friable asbestos in violation of OAR 340-25-465(6) and (15).

The Commission disagrees with the Hearing Officer in the interpretation of the evidence and certain conclusions of law in this case. In some instances, a rational nexus between findings and conclusions is not made totally clear. A review of the record discloses a disagreement over evidence between

Department and Respondent's witnesses. However, the Commission does not want to decide this case based upon the selection of a winner between a "battle of experts." Instead, the evidence indicates a different view of the case to the Commission than to the Hearing Officer.

The $12,000 civil penalty imposed against Respondent, was, as recited by the Hearing Officer, predicated on the Department's view that the cited violations 1) created a likelihood for public exposure to asbestos 2) were of major magnitude and 3) were negligent. In addition, the Department found no basis for finding that Respondent was cooperative and entitled to a reduction in penalty. However, the Hearing Officer did so find.

The Commission does not find that the asbestos-containing material disturbed by Respondent during dismantling was wet. The Commission also does not find any evidence that such material was wet when sampled and tested. Respondent did not intentionally attempt to wet the material during salvage operations as required by Commission rules but instead claims rainfall adequately wetted the material. The Commission does not find this claim convincing. While acts of God are many different things to many people, Respondent cannot rely on such acts of God, in the form of rain to excuse it from liability. The number of days preceding Respondent's salvage operations without rainfall, and the number of days during such operations without rainfall, together with the minimum reported rainfall

during the remainder of days of salvage indicates the asbestos material was dry, or minimally wet.

Additionally, the fact that the asbestos was in the form of amosite asbestos which does not retain water mitigates against a conclusion that asbestos fibers would not become readily airborne. The fact the human receptors to the site were 60 to 70 feet from the salvage operations rather than 25-30 feet does not alter the likelihood of public exposure of asbestos fibers to the human receptors. Respondent's witness neither inspected the site during salvage operations, observed the asbestos materials at the time of salvage nor conducted any tests of the material. Department's witnesses were on scene and had hands on contact with Respondent's employees, the asbestos waste on site and subsequent removal of such waste by licensed asbestos contractors. We find Department witnesses more persuasive regarding the nature of the salvage operations find the condition of the asbestos waste materials than Respondent's after-the-fact expert.

There was considerable discussion in this case about the volume of ACWM; whether it was several large piles; piles scattered about or a medium-large pile. Certainly, the volume of the asbestos waste material bears upon its magnitude. The evidence, while not clear in this regard, demonstrates at least what is characterized as a "medium-large" pile (perhaps a large medium pile!) Semantics aside, a medium-large pile of asbestos-containing material is a sufficient volume in our mind to

conclude that the magnitude is major when it is combined with the toxic elements of amosite asbestos. The inability of amosite asbestos to retain water, and its proximity to human receptors is of major magnitude in the Commission's opinion.

Respondent on one hand claims it knows nothing about asbestos and on the other hand makes a production over its efforts to determine whether asbestos was present on site. These efforts are claimed by Respondent to be limited to asking the owner of the site whether asbestos was present on site. The answer by the owner was either "no" or that he could not recall the question. However, the written contract between Respondent and the owner does not disclose any mention of asbestos or whether the site was free therefrom, and in fact, makes it clear that Respondent assumed the risk of environmental concerns found on site.

Respondent has engaged in previous salvage operations and given today's modern knowledge of the dangers of asbestos in buildings and on industrial equipment, it is reasonable to conclude that Respondent should have reasonably foreseen that asbestos may be present and that its salvage operations could disturb asbestos-containing materials in the proximity of human receptors. Respondent suggested third parties may have been responsible for work on the site. However, Respondent did not produce such parties as witnesses. This testimony was more speculation than evidence that these third parties may have been responsible for the asbestos waste materials.

Finally, we believe the Hearing Officer erred in her interpretation of negligence within the context of ORS chapter 468 and in finding Respondent was cooperative in this case. We conclude to the contrary.

ORDER

Respondent is liable to the State of Oregon in the sum of $12,000 and that the state have judgment for and recover the amount pursuant to a civil penalty assessment dated May 24, 1990.

DATED this _____ day of _____, 1991.

ENVIRONMENTAL QUALITY COMMISSION

_____

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
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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. FUEL PROCESSORS, INC., Respondent.	No. AQAB-NWR-90-81 RESPONDENT'S RESPONSE TO DEPARTMENT'S OPENING BRIEF

Respondent, Fuel Processors, Inc., responds to the Department's Opening Brief as follows:

I.

The Hearings Officer carefully and completely reviewed all evidence submitted by the parties at hearing and correctly concluded that the civil penalty which was assessed by the Department against Respondent should be reduced to $1,600.

The Department used the civil penalty matrix in assessing a civil penalty of $12,000. The Department classified the alleged violations as Class I violations based upon the Department's allegation that Respondent had created a likelihood of public exposure to asbestos. The Department alleged the violations were of a major magnitude because of the quantity and concentration of materials. Applying those factors to the civil penalty matrix resulted in the Department's base penalty of $5,000 per alleged violation. The Department further increased the penalty by $1,000 per alleged violation based on the Department's allegation that Respondent's actions were negligent.

The Hearings Officer found: 1) Respondent's actions did not create a likelihood of public exposure and reclassified the violations from Class I to Class II; 2) the violations were not of major magnitude, but were of moderate magnitude; and 3) the proof did not establish that Respondent was negligent. Moreover, the Hearings Officer declared that Respondent had cooperated with the Department and accordingly reduced the civil penalty.

A. RECLASSIFICATION OF THE ALLEGED VIOLATIONS BY THE HEARINGS OFFICER FROM CLASS I TO CLASS II AND FROM MAJOR TO MODERATE WAS APPROPRIATE

1. Reclassification of Violation

The Hearings Officer reviewed all evidence presented by the parties at the hearing and properly concluded that the alleged violations, if proved, were more appropriately classified as Class II than Class I because the violations did not create a likelihood of public exposure to asbestos. The evidence produced at hearing demonstrated a strong basis for the Hearings Officer's conclusion. In fact, given the evidence submitted at hearing, the Hearings Officer had no choice but to conclude that the violations were Class II, not Class I, violations.

David Wall, the Department's witness, visited the site, generated reports on his visits to the site, and on March 21, 1990, sent a Notice of Non-Compliance to Respondent which alleged that Respondent had committed only Class II and Class III violations. At the time Mr. Wall generated that letter, he had been to the site twice and had received the DEQ laboratory test results (Tr. 30). It was only after discussions with the DEQ Enforcement Section that Mr. Wall increased the classification of the violations (Tr. 30). Mr. Wall received no new factual information before he made the upward adjustment in the classification of the violations.

Exhibit 1 to the Notice of Civil Penalty Assessment dated May 24, 1990, stated that the Department classified the violation as Class I because residences were located, and children were playing, within 20 feet of the property on which the alleged asbestos was disturbed which created a likelihood of public exposure. Respondent disputed those contentions at the hearing on two grounds: First, that the Department was incorrect in its allegation of distance; and, second, that the suspect material was wet and was, therefore, not likely to become airborne. Substantial evidence was presented at the hearing on these issues.

a. Distance

During the hearing, the Department's only witness, David Wall, stated that the residences were actually 60 feet from the work site (Tr. 22). On page 4 of its Brief, the Department mischaracterizes Mr. Wall's testimony by asserting that Mr. Wall testified that people 60 feet from the salvage operations rather than 20 to 25 feet would not have a diminished likelihood of exposure to asbestos. Mr. Wall was never asked to compare the difference in likelihood of exposure between people at 20 to 25 feet and people at 60 feet distance.

Mr. Richard Krause (resume attached, Hearing Exhibit No. 8, Tr. 73), a Certified Industrial Hygienist with extensive experience in the industrial hygiene field, performed a thorough independent investigation into this matter, and generated a detailed report (attached - Hearing Exhibit 9, Tr. 74). Mr. Krause has worked for SAIF Corporation and the State of Oregon as an industrial hygienist, and currently teaches classes for asbestos workers and asbestos supervisors for the State of Oregon and State of

Washington asbestos programs. Mr. Krause testified that it was his expert opinion that there was not a likelihood for public exposure to asbestos fibers as a result of Respondent's activities at the site (Tr. 87).

Mr. Krause's report also stated that the wind direction at the site, as indicated by the National Weather Service report, was not in the direction of the area where DEQ alleged that children were playing, which further supports the Hearings Officer's finding that there was not a likelihood of public exposure to airborne asbestos fibers. During the hearing, David Wall stated that likelihood of exposure to asbestos fibers could be affected by wind direction and weather, but Mr. Wall did not confirm the wind direction or weather at the site (Tr. 59).

b. Moisture Content

Wet asbestos is not likely to migrate through the air and, consequently, would not create a likelihood of public exposure to asbestos fibers.

Notwithstanding, the Department's claims, there is an abundance of evidence in the record supporting the Hearings Officer's finding that Sample No. 1 was wet. The Department was able to connect Respondent's activities with only one pile of material out of the many piles of materials at the site (See Hearings Officer's Findings of Fact, page 9). Sample No. 1 was taken from that one pile. That sample is shown on the DEQ laboratory report as Sample Z3006 (Tr. 52). As shown by the pictures taken by Mr. Wall and the description of the sample from the DEQ laboratory report, Sample No. 1 was wet when it was taken from the site by Mr. Wall and it arrived at the laboratory still wet. Wilmar Briggs, President of Respondent, Fuel Processors, Inc., testified that the concrete area

constantly had water in it and had to be pumped out (Tr. 109). David Wall testified that he saw puddles of water accumulated in the concrete bermed area (Tr. 46) and there were piles of materials in certain areas of the site that were actually sitting in water (Tr. 13). The Hearings Officer correctly concluded that Sample No. 1 was wet when taken by Mr. Wall.

The Department would have the Commission believe that the Hearings Officer "disregarded, ignored and did not hear or read" Mr. Wall's testimony on these issues. Yet, it is clear that the Hearings Officer reviewed the entire record, including Mr. Wall's testimony, and properly concluded there was not a likelihood of public exposure to asbestos. Not only did the Department fail to meet its burden of proof on this issue, but the Respondent presented extensive evidence which strongly refuted the Department's allegation of a likelihood of public exposure.

The Hearings Officer correctly found that the evidence presented at the hearing did not establish a likelihood of public exposure to asbestos.

2. Reduction of Magnitude of Violation

The Hearings Officer also correctly reduced the magnitude of the violation from major to moderate based on the evidence, or lack thereof, presented regarding the volume and toxicity of materials handled by Respondent.

a. Volume

The Department admits on page 8 of its Brief that Sample No. 1 was taken from the only material which Mr. Wall could testify had been handled by Respondent. The Department based its allegation of a violation of major magnitude on Mr. Wall's

assumption that all materials he saw piled on the site had been placed there by Respondent. That assumption was incorrect. Mr. Wall did not actually see Respondent's employees remove tanks or boilers at the site (Tr. 8) and he did not even ask Respondent's employees to point out exactly which materials they had handled at the site (Tr. 33). In addition, Mr. Briggs testified that there had been other demolition contractors working at the site (Tr. 106-107).

b. Toxicity

Mr. Krause stated that, in his expert opinion, Mr. Wall did not follow a protocol which Mr. Krause would have followed to determine the amount of asbestos materials at the site (Tr. 82-83). Mr. Wall conceded that it was not his concern during the inspection to ascertain the amount of asbestos on the site, but rather to simply ascertain the presence of asbestos at the site (Tr. 61). Mr. Wall and Mr. Krause agreed that the only way to determine whether materials contain asbestos is through laboratory sampling (Tr. 62-63, and 83). Mr. Wall assumed, however, without such testing, that materials at the site which looked similar had a similar asbestos content. Mr. Krause testified that 60 to 70 percent of the materials at the site had been replaced since 1977, and after 1977 asbestos-containing insulation materials were not used in the United States (Tr. 81). That testimony refutes Mr. Wall's assumptions regarding the homogenous asbestos content of materials at the site.

The only conclusion the finder of fact can reasonably make is that Mr. Wall's testimony was replete with assumptions not based on fact. Yet, on page 9 of its Brief, the Department attempts to restate Mr. Wall's assumptions as fact, and again mischaracterizes

the evidence which was presented at the hearing. Respondent's employees did admit that they pulled some insulation from pipes at the site. They did not, however, tell Mr. Wall that they had handled all of the materials contained in the concrete bermed area.

The Department's criticism of the Hearings Officer's "voyage into a semantical sea of nuances" with regard to the issue of magnitude is not appropriate. In fact, the Hearings Officer was compelled by the only evidence available in the record to adopt the term "medium-large" in describing volume, as that term was the only measurement presented by the Department's witness as to the amount of materials from which Sample No. 1 was taken (Tr. 53). When asked again, under cross-examination, to quantify the materials in the pile associated with Sample No. 1, Mr. Wall concluded that he did not know if he could speculate on that (Tr. 57). If the Department wanted the Hearings Officer to be more specific than "medium-large" in her discussion regarding the volume of materials at the site, the Department should have presented more specific and detailed evidence on that issue by instructing or training its inspector to perform more accurate measurements of the materials which the Department alleged were handled by Respondent.

The Hearings Officer carefully reviewed the evidence submitted by the parties, correctly concluded that the evidence did not support a finding of major magnitude, and correctly reduced the magnitude from major to moderate.

II. THE HEARINGS OFFICER CORRECTLY CONCLUDED THERE WAS NO BASIS FOR A FINDING THAT RESPONDENT WAS NEGLIGENT

The Hearings Officer was also correct in concluding that the Department did not provide a basis for a finding that Respondent's acts were negligent. In addition to failing to properly provide a standard for the Hearings Officer to use in deciding whether

Respondent was negligent, the Department also failed to provide a factual basis for that allegation. Respondent provided extensive evidence which established that Respondent was not negligent.

Respondent attempted to ascertain whether asbestos was present at the site. On one of the days Mr. Briggs was on the property, there were consultants from two different environmental companies at the site (Tr. 106). Mr. Briggs also testified that, when he asked Mr. Dubbs, the lessee of the real property and the owner of the subject equipment and insulation, if there was any asbestos on the piping or equipment, Mr. Dubbs replied that there was not (Tr. 108-109). Mr. Briggs reasonably relied upon Mr. Dubbs' representations as he had no basis to suspect anything less than honesty and there appeared to be a factual basis for Mr. Dubbs' representation due to the presence of the consultants. Mr. Richard Krause also testified that the actions taken by Mr. Briggs in determining whether asbestos was present at the site were reasonable (Tr. 86). In response, the Department offered nothing.

The Hearings Officer correctly concluded that there was no basis to conclude that Respondent had been negligent in its actions and correctly reduced the civil penalty.

III. THE HEARINGS OFFICER CORRECTLY CONCLUDED THAT RESPONDENT COOPERATED WITH DEQ

The Hearings Officer correctly concluded that a reduction of the Civil Penalty should be made for Respondent's cooperativeness with DEQ. Mr. Wall testified that Respondent's employees cooperated fully with him when he visited the site, and continued to assist the Department through written statements and follow-up letters (Tr. 63-64). Again, there was no evidence to the contrary. The Hearings Officer correctly reduced the

civil penalty based on her finding that Respondent cooperated with the Department in this matter.

SUMMARY

Respondent requests that the Commission carefully consider all of the evidence submitted at the hearing, and not rely upon what the Department believes or wishes it had submitted. The burden of presenting evidence to support a fact or position in a contested case rests on proponent of the fact or position. ORS 183.450(2). The parties attended a hearing on December 13, 1990, to present all evidence for the record. The Commission's Hearings Officer observed the witnesses, examined the evidence, and generated the Hearings Officer's Findings of Fact and Conclusions of Law and Final Order dated May 20, 1991. The Department asks the Commission to disregard the Hearings Officer's conclusions. When the Commission completed its review of the hearing record, it must concur with the Hearings Officer's Findings, Conclusions, and Final Order.

Respectfully submitted,

Debra Olson Soren, OSB# 86256
Of Attorneys for Respondent

RICHARD H. KRAUSE

HAZCON, Inc.
9500 S.W. Barbur Blvd.
Suite 100
Portland, Oregon 97219
(503) 244-8045

EMPLOYMENT

1986-Present HAZCON, INC., Portland, Oregon
President
Formed Industrial Hygiene service corporation to provide occupational and environmental health management services; Instructor in Approved Washington and Oregon State Asbestos training courses, manages staff of Certified Industial Hygienists, Industrial Hygienists, and Industrial Hygiene Technicians in the field and laboratory.

1985-1986 JAMES L. GROVES COMPANY, Portland, Oregon
Assistant Manager
Assisted in management of the H2M Division, provided industrial hygiene sampling and analytical services to clients, marketed for new clients, arranged seminars, participated in professional organizations and regulatory actions, developed and presented training programs, developed, implemented and participated in asbestos control programs and performed numerous industrial hygiene surveys of industrial, institutional, and governmental facilities.

1980-1985 SAIF CORPORATION
Industrial Hygiene Manager
Duties included managing four Industrial Hygiene Consultants, consulting with insureds about the recognition evaluation and control of occupational health hazards, evaluating occupational disease worker's compensation claims and providing expert witness testimony at claims hearings.

1977-1980 STATE OF OREGON, ACCIDENT PREVENTION DIVISION
Health Compliance Officer
Responsible for conducting industrial hygiene inspections of work places in Oregon to determine compliance with the Oregon Safe Employment Act. Reports were prepared describing violations of standards and work place conditions observed.

EDUCATION

M.S. in Public Health, Industrial Hygiene and Safety, University of Washington
B.S. in Microbiology, University of Washington

PROFESSIONAL ORGANIZATIONS

American Industrial Hygiene Association American Academy of Industrial Hygiene
American Society of Safety Engineers

CERTIFICATIONS

Comprehensive Practice of Industrial Hygiene by
American Board of Industrial Hygiene
Certified Safety Professional

ATTACHMENT TO RESPONDENT'S BRIEF HEARING EXHIBIT 8, TR. 73.

HEALTH HAZARD CONTROL SERVICES
HAZCON INC.

RECEIVED
OCT 0 3 1990
BOGLE & GATES

Debra Olson
Bogle & Gates
222 SW Columbia
Portland, Oregon 97201

Dear Ms. Olson:

At your request, I have performed a factual investigation regarding the DEQ notice of violation (Case No. AWAB-NWR-90-81) against Fuel Processors, Inc.

As a part of this investigation, I visited the Department of Environmental Quality offices to review their files, interviewed Mr. Bill Briggs, Mr. Dale Poor and Mr. Dan Goodhue of Fuel Processors, Inc., Mr. Bill Dubbs of West Coast Chemicals, and Mr. Jim Barnes of Cascade Industrial Maintenance, obtained information from the National Weather Service, and visited the cleared site. My findings are as follows:

The initial inspection of the site was conducted by Mr. Dave Wall, Asbestos Control Analyst of the Air Quality Division.

Upon close review, several questions arise which serve to raise doubt about the degree of hazard presented by the actions of Fuel Processors, Inc.

The first question involves the actual amount of friable asbestos debris that was present.

The DEQ photos show large piles of insulation at the site. The bulk samples collected by Mr. Wall included two (Nos. 1 & 2) that appeared to be from pipe insulation. These contained amosite asbestos. The two other samples (Nos. 3 & 4) contained chrysotile asbestos and consisted of "tough," "stiff" materials. These likely may have been gasket materials of low friability. In my opinion, to establish the actual amount of asbestos materials in these piles, more samples should have been collected. This would have reduced possible sampling bias resulting from the natural tendency to only sample those materials with the highest potential for asbestos content.

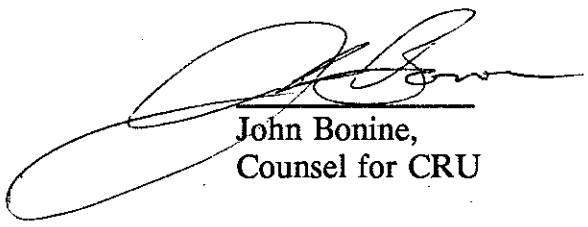
In conversations with Mr. Dubbs I learned that he estimated that 60-70% of the pipe insulation in this plant had been replaced since his arrival in 1977. Non-asbestos pipe insulation materials can look identical to older asbestos containing materials, particularly when piled in a dirty, soaking wet pile of demolition debris. It is probable that only a small amount of asbestos material was present in the photographed piles.

The second question involves the condition of the material as it was taken off of the pipes. The material at the time of the inspection was obviously saturated with water as shown in the DEQ photographs.

I spoke with Dan Goodhue (the person who actually removed the insulation) about the condition during the removal. He stated the insulation was removed later in the demolition time frame from 2/26 to 3/10 and was saturated on the pipes as well as when it was in piles on the ground. In light of this information, the potential for airborne exposure was greatly lessened.

9500 SOUTHWEST BARBUR BOULEVARD
SUITE 100
PORTLAND, OREGON 97219
503/244-8045

Signed this 30 day of March, 1992,



John Bonine,
Counsel for CRU

Alec Arago
Mark Chernaik
Jason Eisdorfer,
Legal Interns

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
MAR - 9 1992
OFFICE OF THE DIRECTOR

APPENDIX A

British Columbia Organochlorine Regulation
(B.C. Reg. 13/92)
Mandating Zero Pulp Mill
AOX Discharge by 2002;
Adopted January 17,
1992

ENVIROFLASH Fraser & Beaty Newsletter
Explaining Requirements of
the Regulation

British Columbia Ministry of Environment
News Release Covering Minister
Cashore's Adoption of the
Regulation; January 16,
1992

Victoria Times Colonist Article
of January 17, 1992 Reporting
on Passage of Regulation

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. *Approved and Ordered*

Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that

(a) B.C. Reg. 470/90, the Pulp Mill and Pulp and Paper Mill Liquid Effluent Control Regulation, be amended as set out in the attached Schedule,

(b) sections 1 to 5 and 7 to 9 come into force on January 17, 1992,

(c) that portion of section 6 which enacts section 8.1 (1) and (3) of B.C. Reg. 470/90 comes into force on January 17, 1992, and

(d) that portion of section 6 which enacts section 8.1 (2) and (4) of B.C. Reg. 470/90 comes into force on July 1, 1992.

Minister of Environment, Lands and Parks

Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made

Act and section: Waste Management Act, section 35 (2)

Other (specify):

January 15, 1992 /92/37/clf

SCHEDULE

1. *Section 1 of B.C. Reg. 470/90, the Pulp Mill and Pulp and Paper Mill Liquid Effluent Control Regulation, is amended*

(a) by renumbering it as section 1 (1),

(b) by repealing the definitions of "CBPROD", "EFF", "PROD" *and* "96 h LC50 toxicity" *and substituting the following:*

"CBPROD" means, subject to subsection (2), the 90th percentile of the daily production rate of bleached pulp produced from an on-site bleach plant with the use of chlorine or chlorine compounds, or both chlorine and chlorine compounds, expressed as ADt, determined by the use of statistical methods, and using a period of time approved by the manager for determination of the 90th percentile of the rate of chlorine or chlorine compounds bleached pulp production;

"EFF" means, subject to subsection (2), the 90th percentile of the rate of effluent, expressed as m^3/day, including any sanitary effluent combined with process effluent, discharged from a pulp or paper or pulp and paper mill, determined by the use of statistical methods, and using a period of time approved by the manager for determination of the 90th percentile of the rate of discharge of effluent;

"PROD" means, subject to subsection (2), the 90th percentile of the daily production rate of a pulp or paper or pulp and paper mill, expressed as ADt, determined by the use of statistical methods, and using a period of time approved by the manager for determination of the 90th percentile of the rate of production;

"96 h LC50 toxicity" means the calculated concentration of effluent that is lethal to 50% of the test fish (rainbow trout (Oncorhynchus mykiss)) during a 96 hour exposure. *and*

(c) by adding the following subsection:

(2) If there is an insufficient number of days of production to perform a valid 90th percentile calculation of CBPROD, EFF or PROD, the manager may use the mill's chlorine or chlorine compound bleached pulp production design figure, effluent flow design figure or production design figure respectively as values for CBPROD, EFF or PROD until such time as these parameters may be calculated in accordance with subsection (1).

2. *Section 2 is amended*

(a) in subsection (1) by striking out "Subject to subsection (6)," *and substituting* "Subject to subsections (7) and (8)," *and by striking out* "uses chlorine to bleach the pulp," *and substituting* "uses chlorine or chlorine compounds to bleach the pulp,".

(b) in subsection (3) by striking out "Subject to subsections (4) and (6)," *and substituting* "Subject to subsections (4) and (7),",

(c) in subsection (4) by adding "and the existing pulp mill operation of Western Pulp Inc. located at Port Alice" *after* "located at Port Alberni", *and*

(d) by repealing subsections (6) and (7) and substituting the following:

(6) The existing pulp mill operation of Western Pulp Inc. located at Port Alice shall not, on and after the date specified in Column 4 of Schedule 1 opposite that permittee and location, discharge effluent into the environment from its pulp mill operation unless the effluent is equal to or better than the quality requirement specified in Column 5 of Schedule 2.

(7) Subsections (1) and (8) do not apply to the pulp and paper mill operation of Howe Sound Pulp and Paper Limited located at Port Mellon, and the provisions of Permit PE-1149, amended on November 16, 1990 pursuant to the Act, shall apply.

(8) Subsection (1) does not apply to the existing pulp mill operation of Western Pulp Inc. located at Port Alice.

(9) The existing pulp mill operation of Western Pulp Inc. located at Port Alice shall not, on and after the date specified in Column 2 of Schedule 1 opposite that permittee and location, discharge effluent into the environment from its pulp mill operation if the AOX concentration in the effluent, in mg of AOX per litre of effluent, exceeds the concentration determined by the following equations:

(a) $\underset{\text{(mg AOX/litre of effluent)}}{\text{Monthly average effluent AOX concentration}} = 1.0 \left(\frac{\text{kg AOX}}{\text{ADt}}\right) \times \frac{\text{CBPROD}}{\text{EFF}} \times 1000$

(b) $\underset{\text{(mg AOX/litre of effluent)}}{\text{Maximum effluent AOX concentration}} = 1.5 \left(\frac{\text{kg AOX}}{\text{ADt}}\right) \times \frac{\text{CBPROD}}{\text{EFF}} \times 1000$

3. *Section 4 is amended*

(a) by repealing subsection (1) and substituting the following:

(1) Subject to subsections (4) and (5), for the purpose of collecting samples for BOD_5, TSS and AOX determination, each permittee at a location specified in Column 1 of Schedule 1 must,

(a) commencing within 90 days following the date specified in Column 4 of Schedule 1, or

(b) where no date is specified in Column 4 of Schedule 1, commencing within 90 days after this subsection comes into force,

collect data for 13 consecutive months for a scientific evaluation to determine the relationship between the 3 sampling methods described in subsection (2), , *and*

(b) by adding the following subsection:

(5) A permittee is exempt from the requirement to conduct an evaluation under this section if the director has specified a commencement date for phase II compliance sampling and has established the compliance sampling method under section 5 (4).

4. *Section 5 is amended*

(a) by repealing subsection (1) (c) and substituting the following:

(c) continuous or daily grab for temperature; , *and*

(b) by repealing subsection (5) and substituting the following:

(5) Each permittee must submit to a manager monitoring data collected under subsections (1) to (4) within 30 days of the end of the month in which the data is collected.

5. *Section 6 is amended*

(a) by repealing subsections (1) and (2) and substituting the following:

(1) Notwithstanding the terms and conditions of a permit issued under section 8 of the Act, a permittee at a location specified in Column 1 of Schedule 3 shall not, from the day this subsection comes into force to the expiry date specified in Column 3 opposite that permittee and location, discharge effluent into the environment where

(a) the flow, BOD_5, TSS or temperature of the effluent is greater than the requirements specified in Column 2 opposite that permittee,

(b) the 96 h LC50 toxicity or dissolved oxygen (DO) concentration of the effluent is less than the quality requirement specified in Column 2 opposite that permittee, or

(c) the pH range of the effluent is outside the range specified in Column 2 opposite that permittee. , *and*

(b) by adding the following subsections:

(2) If a permittee is implementing water conservation measures which will result in the actual effluent flow being less than the allowable flow shown in Column 2 of Schedule 3 for that permittee, a manager

may allow an increase in the concentration of BOD_5 or TSS shown in Column 2 provided that at no time will the actual loading of BOD_5 and TSS, calculated by multiplying the actual daily flow by the actual concentration of BOD_5 or TSS in the effluent, exceed the equivalent allowable loading determined by multiplying the flow by BOD_5 or TSS on Schedule 3.

(4) If, in the opinion of a manager, a permittee at a location specified in Column 1 of Schedule 1 is unable to comply with a requirement of this regulation because of

(a) an act of God or natural disaster,

(b) an act of war, terrorism or vandalism,

(c) a labour dispute or work stoppage, or

(d) an unforeseen mechanical breakdown,

the manager may, in writing, grant a waiver from all or part of this regulation for a period not exceeding 90 days.

(5) The power under subsection (4) may be exercised only once in respect of the same incident.

6. *The following section is added:*

Plan required by June 30, 1992

8.1 (1) Every permittee that operates a pulp mill or pulp and paper mill which uses chlorine or chlorine compounds to bleach pulp shall, on or before June 30, 1992, submit to the director a plan and time schedule which will enable the Lieutenant Governor in Council to amend B.C. Reg. 470/90 to ensure the elimination of AOX produced in the bleaching process from liquid effluent discharged into the environment.

(2) Every permittee that operates a pulp mill or pulp and paper mill which uses chlorine or chlorine compounds to bleach pulp shall

(a) meet a discharge limit of a monthly average of 1.5 kg of AOX/ADt on or before December 31, 1996, and

(b) eliminate AOX produced in the bleaching process on or before December 31, 2002.

(3) A permittee under subsection (2) is exempt from the requirement to meet the discharge limit of a monthly average of 1.5 kg AOX/ADt on or before December 31, 1996 if that permittee

(a) on or before June 30, 1992 submits to the director a plan and time schedule for the elimination of AOX produced in the bleaching process on or before December 31, 2000, and

(b) receives written confirmation from the director that the submitted plan and time schedule is acceptable.

(4) A permittee under subsection (3) whose plan and time schedule is confirmed shall eliminate AOX produced in the bleaching process on or before December 31, 2000.

7. *Schedule 1 is amended*

(a) in the heading of Column 2 by striking out "under section 2 (1)" *and substituting* "under section 2".

(b) in item 18, Column 2, by striking out "—" *and substituting* "Dec. 31, 1994;".

(c) in item 18, Column 3, by striking out "—" *and substituting* "Sept. 30, 1994;", *and*

(d) in item 18, Column 4, by striking out "—" *and substituting* "Dec. 31, 1995".

8. Schedule 2 is repealed and the following substituted:

(b) receives written confirmation from the director that the submitted plan and time schedule is acceptable.

(4) A permittee under subsection (3) whose plan and time schedule is confirmed shall eliminate AOX produced in the bleaching process on or before December 31, 2000.

7. *Schedule 1 is amended*

(a) in the heading of Column 2 by striking out "under section 2 (1)" and substituting "under section 2",

(b) in item 18, Column 2, by striking out "----" and substituting "Dec. 31, 1994;"

(c) in item 18, Column 3, by striking out "----" and substituting "Sept. 30, 1994;", and

(d) in item 18, Column 4, by striking out "----" and substituting "Dec. 31, 1995".

8. Schedule 2 is repealed and the following substituted:

SCHEDULE 2

(Section 8)

Column 1	Column 2	Column 3 Quality Requirements		Column 4 - Special Quality Requirements MacMillan Bloedel Ltd. - Port [illegible]		Column 5 - Special Quality Requirements Western Pulp Inc. - Port Alice	
Characteristic	Units	Monthly Average*	Daily Max.	Monthly Average*	Daily Max.	Monthly Average*	Daily Max.
TSS	mg/ℓ	$11.25 \times \frac{\text{PROD}}{\text{EFF}} \times 1000$	$18.75 \times \frac{\text{PROD}}{\text{EFF}} \times 1000$	$\frac{6922}{\text{EFF}} \times 1000$	$\frac{10154}{\text{EFF}} \times 1000$	$\frac{10350}{\text{EFF}} \times 1000$	$\frac{17450}{\text{EFF}} \times 1000$
BOD_5	mg/ℓ	$7.5 \times \frac{\text{PROD}}{\text{EFF}} \times 1000$	$7.5 \times \frac{\text{PROD}}{\text{EFF}} \times 1000$	$\frac{1383}{\text{EFF}} \times 1000$	$\frac{3841}{\text{EFF}} \times 1000$	$\frac{3612}{\text{EFF}} \times 1000$	$\frac{3623}{\text{EFF}} \times 1000$
Acute Toxicity - 96 h LC_{50} toxicity	% effluent volume	100%	100%	100%	100%	100%	100%

* Monthly average value is the arithmetic average of the test values collected during the calendar month.

FRASER&BEATTY
Barristers and Solicitors

ENVIROFLASH

Volume 5 *February, 1992*

BRITISH COLUMBIA - PULP MILL/AOX DISCHARGE LEVELS

by Colin McIver - Vancouver

On January 17, 1992 the British Columbia Government enacted a regulation amending the existing requirements with respect to discharge levels of dioxins and other chlorinated organic compounds (commonly referred to as "AOX") by pulp and paper mills in British Columbia. The introduction of B.C. Reg. 13/92 fulfills a campaign promise by the New Democratic Party to enact legislation requiring those pulp and paper mills which use chlorine or chlorine compounds to eliminate the discharge of AOX produced in the bleaching process. The previous Social Credit administration had proposed stricter standards but deferred the introduction following intense lobbying by the pulp and paper industry.

The existing Pulp Mill and Pulp and Paper Mill Liquid Effluent Control Regulation (B.C. Reg. 470/90) required pulp and paper mills to limit their monthly effluent average AOX concentrations discharge levels to 2.5 kg per air-dried tonne (kg/ADt) by specific dates depending on the mill involved. B.C. Reg. 13/92 provides for the following changes:

1.0 **Plan Required**

Certain provisions of B.C. Reg. 13/92, which come into force January 17, 1992, amend B.C. Reg. 470/90 so as to require each permit holder who operates a pulp mill or a pulp and paper mill which uses chlorine or chlorine compounds to bleach pulp to submit to the director, on or before June 30, 1992, a plan and time schedule for the elimination of AOX produced in the bleaching process from liquid effluent discharged into the environment.

2.0 **Lower Discharge Levels**

2.1 B.C. Reg. 13/92 also contains provisions coming into force on July 1, 1992, which require every permit holder to meet the monthly average discharge limit of 1.5 kg of AOX/ADt on or before December 31, 1995 and to eliminate AOX produced in the bleaching process on or before December 31, 2002.

2.2 An exemption from the December 31, 1995 deadline for an AOX discharge level of 1.5 kg/ADt is permitted for permit holders who propose an accelerated schedule, acceptable to the director of waste management, to completely eliminate AOX produced in the bleaching process on or before December 31, 2000.

2.3 Finally, B.C. Reg. 13/92 provides that if, in the opinion of a manager, a permit holder is unable to comply with the Regulation because of an act of God or natural disaster; an act of war, terrorism or vandalism; a labour dispute or work stoppage; or an unforeseen mechanical breakdown, the regional waste manager may grant a waiver from the Regulation for a period not exceeding 90 days.

3.0 Consultation Process

The Minister of Environment has appointed Dr. Gerald Cormick to assist the Ministry of Environment with the consultation process that the Ministry intends to facilitate during the five month period between January and July, 1992. During this period, the Provincial Government plans to discuss the programme with, among others, representatives from the pulp and paper mill industry, labour, environmental groups, first nations and commercial fishing groups.

Although the requirement to meet the new standards is not going to be enacted until July 1, 1992, the pulp industry is now faced with looming deadlines to meet the strictest regulations imposed anywhere in Canada for the discharge of AOX. The consultation process in the ensuing months should prove interesting, particularly as the industry is experiencing severe economic difficulties.

WHEN IT COMES TO CLEANING UP THE ENVIRONMENT GLOBE '92 IS GETTING DOWN TO BUSINESS

Business and the environment. The two often meet in a context of conflict and confrontation. And with extensive changes in environmental policy and legislation being announced almost daily, the conflict promises to become even more widespread - and misunderstood. That's why anyone involved in attempting to resolve the conflict should plan to attend GLOBE '92.

GLOBE '92 is North America's largest international integrated Trade Fair and Conference on Business and the Environment. The event takes place March 16 - 20 in Vancouver, B.C. More than 350 speakers and 3,500 delegates from 80 countries will take part in the Conference.

The GLOBE '92 Conference Policy and Legislation stream - one of 12 streams - is co-chaired by Michael Jeffery, Q.C. of Fraser & Beatty. This stream examines the role of national and international legislation and policy in improving environmental protection. The focus is on measuring progress on making policy and legislation more effective and highlighting future priorities.

Policy and legislation sessions will be held at the Vancouver Trade and Convention Centre on Tuesday, March 17 from 8:30 a.m. to 3:15 p.m. and on Wednesday, March 18 from 8:15 a.m. to 11:30 a.m.

For registration information, contact:

GLOBE '92
Suite 601
535 Thurlow Street
Vancouver, B.C. CANADA
V6E 3L6
Tel: (604) 666-8020
Fax: (604) 666-8123

This newsletter is not intended to provide legal advice, but to keep our clients abreast of changes in legislation. If you would like more detailed information regarding any subject addressed herein, please contact any of our Environmental lawyers listed on the back of this newsletter.

For more information on this matter please feel free to contact Michael Jeffery or any of the members of the Environmental Law Group.

Members of our Environmental Law Group are:

Practice Group Head:

Michael I. Jeffery, Q.C. TOR. (416) 361-2391

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Janet L. Bobechko	TOR.	(416) 367-6751	M. Catherine Osborne	TOR.	(416) 862-3468
Clayton W. Caverly	VAN.	(604) 687-4460	Norman A. Ross	TOR.	(416) 863-4690
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Province of British Columbia

JAN 23 1992

NEWS RELEASE

Ministry of Environment, Lands and Parks

January 16, 1992

1992:ELP07

Cashore Unveils New Regulations to Eliminate AOX from Pulp Mill Effluents

VICTORIA — Environment, Lands and Parks Minister John Cashore announced today tough new regulations that will virtually eliminate chlorinated organic compounds (AOX) in pulp mill effluent over the next decade.

"The protection of our fragile environment is paramount," said Cashore.

"I am putting the pulp mill industry on notice that our government is launching a comprehensive program that is targeting a zero discharge of dioxins and other AOX compounds by the year 2002 or earlier.

"These new pulp mill regulations — the most stringent in Canada — are tough but fair.

"Pulp mill pollution has been a serious problem in this province and British Columbians from all walks of life are deeply concerned about this issue.

"The program we are announcing today is designed to work cooperatively with all sectors of society to ensure that we adequately protect our environment in an economically sound fashion."

Cashore noted that while the pulp mill industry has made significant improvements in the levels of pollution in their effluents over the last number of years, the presence of any AOX in the long term is unacceptable.

(more)

"It is important that firm timetables be established for each mill," said Cashore.

The minister stated that the regulations will be implemented in two stages. The first stage, effective January 17, 1992, states that each pulp mill that uses chlorine to bleach pulp must submit to the ministry, on or before June 30, 1992, a time schedule to ensure the elimination of AOX produced in the bleaching process from liquid effluent discharged into the environment.

The second phase of the regulations, which will be enacted on July 1, 1992, states that each pulp mill that uses chlorine to bleach pulp:

- must meet a discharge limit for AOX of 1.5 kg per air dried tonne (kg/ADt) of pulp produced on or before December 31, 1995;

- must eliminate AOX produced in the bleaching process on or before December 31, 2002; and

- is exempt from the December 31, 1995 deadline for an AOX level of 1.5 kg/ADt if they can propose an accelerated schedule to completely eliminate AOX produced in the bleaching process on or before December 31, 2000.

"To ensure each mill meets the five-month deadline for a firm plan to eliminate AOX, we intend to carry out an extensive consultation process. This process will include representatives from industry, labour, environmental groups, first nations, commercial fishing groups and others.

(more)

"In order to better achieve our ultimate goal of zero discharge of AOX, I have delayed implementing the new effluent standards until July 1, 1992. In this way, we are allowing constructive and innovative solutions to emerge from the consultation and consensus-building process. It is our expectation that this will help us significantly in meeting our objective.

"I have appointed Dr. Gerald Cormick to assist the ministry with this consensus-building process. Dr Cormick has been involved in mediation, negotiation and consensus building for a number of major issues in British Columbia and the northwestern United States. He was one of the key architects of the internationally-recognized Regulatory-Negotiations process in the U.S.

"We have married the toughest pulp mill effluent regulations in Canada with the fairest consultation process," said Cashore.

The minister also released the province's second Pulp Mill Effluent Status Report. The report covers the period April 1, 1991 through August 31, 1991 and outlines the progress mills have made in complying with a schedule of upgrading under provincial effluent regulations announced in December 1990. At that time, the standard was set at 2.5 kilograms per air-dried tonne (kg/ADt) of AOX.

Of the 23 mills to which the pulp mill effluent regulations apply:

- 11 mills were in compliance with discharge levels;
- 10 were in minor noncompliance with effluent discharge levels;
- two mills were in significant noncompliance with effluent discharge levels and are projecting that the start-up of secondary treatment facilities will be six-to-nine months late for each mill.

(more)

The minister also noted that a compliance schedule has been determined for the previously unscheduled Western Pulp mill at Port Alice which will result in the mill reducing its AOX effluent to 1.0 kg/ADt or less by December 31, 1995.

"These new regulations will not only safeguard our precious environment but contribute to the long-term betterment and economic viability of the pulp mill industry in British Columbia," said Cashore.

- 30 -

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Scene
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Pulp mills get dioxin orders

Richard Watts
Times-Colonist staff

B.C. pulp mills must eliminate chlorine compounds from their effluents by the year 2002 under guidelines unveiled Thursday by Environment Minister John Cashore.

The new regulations were noted will delight by the environmental group Greenpeace, which has been campaigning hard for zero discharge of chlorinated organic compounds.

But industry officials reacted with early disbelief over whether the goals outlined are necessary.

Cashore said the new regulations will put a discharge limit for chlorinated organics at 1.5 kilograms per tonne of pulp produced by the end of 1995.

And pulp mills must eliminate chlorine compounds entirely from their effluent by the end of 2002.

Also, pulp mills which can completely eliminate chlorine compounds before 2002 will be exempt from the 1995 deadline.

"I am putting the industry on notice," said Cashore.

He estimated the more stringent regulations will cost B.C.'s 23 pulp mills between $20 million and $60 million per mill.

The government set a June 30 deadline for a time schedule from each mill on how it will meet the new regulations.

The government will initiate a series of consultation meetings between the industry, labor, environmental groups, native groups and commercial fishermen to ensure each mill complies with the June 30 deadline.

"I'm putting the industry on notice," says Environment Minister John Cashore, right, but Council of Forest Industries spokesman Brian McCloy says the new regulations will put the B.C. pulp industry at a competitive disadvantage with Eastern Canada, the U.S. and the Scandinavian countries. "We will collectively have the cleanest pulp mills in the world," adds McCloy.

The proposals are similar to ones Bill Cashore introduced when sitting in Opposition.

"I'm keeping my personal promise, as expressed in my private member's bill, on the elimination of organochlorines," he said before details on the plan were unveiled.

There are six pulp mills on Vancouver Island. Fletcher Challenge has one in Crofton, and one in Campbell River. MacMillan Bloedel has mills in Nanaimo and Port Alberni. Canadian Pacific Forest Products has one in Gold River and Western Pulp Inc. has one in Port Alice.

Premier [illegible] requires

PULP MILLS A2

Rich must pay '$150 billion a year to save environment'

Reuter

BRUSSELS, Belgium — The world's wealthy countries may need to spend up to $150 billion US a year if they're serious about stopping environmental destruction, says the Canadian organizer of the UN-sponsored Earth Summit.

Maurice Strong, chief organizer of the first world summit on environment and development, said Thursday more than 150 industrial and Third World states are unlikely to agree to the huge sum when they meet in June but accomplishments of that scale are needed.

"Despite some serious alarm conditions in the global environment have continued to deteriorate," Strong told a news conference in Brussels.

The Winnipeg native has been working for two years to prepare the summit in Rio de Janeiro, where the main delegates will be [illegible]

Soccer guideline spoiling [illegible] fun

01-17-92 14:27 GORDON BALL 559 P02

01-17-92 14:28 GORDON BALL 555 P03

...chemicals be changed to make fighting inflation the official priority of the central bank.

Committee members from all three main provincial arts organizations, saying statistics for the fourth quarter haven't been released yet.

"The economy was sure heading ... sign that lower interest rates on mortgages were giving the economy a boost.

PULP MILLS Continued from A1

...pulp mills to produce no more than 2.5-kg of chlorine compound for tonne of pulp produced.

Chlorine, or chlorine compounds, is used in the bleaching of pulp fibres. But when released into the environment the substances can combine to make toxic compounds like dioxins. Contamination from these compounds has forced the closure to harvesting of shellfish beds all around the coast and Vancouver Island.

The industry lobbied hard for the present 2.5-kg limits when the previous Social government were planning on bringing in a 1.5-kg limit.

But after some last-minute talks with former premier Bill Vander Zalm, the 2.5 limit was announced. Vander Zalm's environment minister, John Reynolds, resigned from cabinet over the move.

Greenpeace pulp and paper campaigner Lynne Jamieson said the new regulations and timetable will not only help the environment but also put the B.C. pulp and paper industry in a more competitive business position.

Jamieson noted that major purchasers of paper products, like Time with a weekly circulation of 5.4 million, have announced the magazine will be printed on chlorine-free paper as soon as the product is available.

"It is great to see the B.C. government has made the WRONG on the wall and is going to push the industry into being more competitive," she said.

But Brian McCloy, manager of the environment for the Council of Forest Industries, said if chlorine-free pulp is in such a demand, why aren't American producers leaping to make it?

McCloy also noted Howe Sound Pulp and Paper Ltd. will start producing chlorine free pulp in the near future in response to market demands.

"It will be interesting to see if they can get a premium on their product ... It's more expensive to produce," said McCloy.

He said no scientific evidence exists for forcing the industry to go below 2.5-kg limit. Meeting the new limits will cost about 3800 million over and above the $1 billion the industry is already spending on pollution control.

Also, the new regulations will put the B.C. pulp industry at a non-partisan disadvantage with Eastern Canada, the U.S. and the Scandinavian countries.

"We will collectively have the cleanest pulp mills in the world," said McCloy.

If there was one piece of good news for the pulp industry McCloy said it is in the consultative meetings announced by Cashore.

McCloy said the industry would like to have a system, closer to the Swedes, whose mills are expected to meet their pollution limits after the discharges have been averaged over an entire year. In B.C. the average must be met over a month.

"That's the one silver lining in all this," he said.

DISCRIMINATION Continued from A1

...the girls uncomfortable. They are good players."

This year the team has a good ... precisely the problem in the smaller communities."

Lidstard said his advice to ... for everyone but this is a small-town situation and our girls want to play on the team. It's not ... almost since the Second World War," said Royal Bank assistant chief economist Earl Sweet in an update of the bank's economic outlook.

The original report was released before Christmas and stated that GDP growth would be about 2.5 per cent.

"Given the very low levels of business and consumer confidence in Canada and the hesitant recovery in the U.S., there is a 15 per cent chance that Canada's economic performance in 1992 could be considerably worse than indicated," Sweet warned.

There are, however, a few positive signs out there for the beat-up economy, Sweet added.

"If expert inflation and interest rates to continue their downward trend during the next several months. This decline in rates should set the stage for a healthier rebound in economic activity later in 1992 and 1993."

FOR THE RECORD

Our apologies are extended to our readers and Dial-a-Win game players. Numbers published in Thursday's newspaper were repeated from Wednesday in error. In order to compensate our players, we will award double the cash prizes in game #2.

The toll-free telephone number for the Canadian Cancer Society's information line is 1-888-939-3333.

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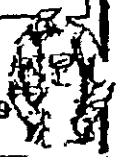

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APPENDIX B

New York Times Article of February 13, 1992
Reporting President Bush's Decision
to Ban CFC Production
by 1995

San Francisco Chronicle Article of February 4, 1992
Reporting NASA Discovery of Northern Hemisphere
Ozone Hole and NASA Chief Scientist's Call
for the **Elimination of all Chlorine**
Compounds Production.

Excerpt of Clean Air Act, 42 U.S.C. § 7671
Showing that carbon tetrachloride is a
potent ozone-depleteing compound.

Excerpt of Chemosphere Article, 1988
"A Review of the Nature and Properties of
Chemicals Present in Pulp Mill Effluents"
Suntio, et al., Chemosphere, 17(7):1249-1290
Showing that carbon tetrachloride is produced
by bleached kraft pulp mills.

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February 13, 1992, Thursday, Late Edition - Final

SECTION: Section B; Page 16; Column 1; National Desk

HEADLINE: Bush Orders End to Manufacture Of Ozone-Harming Agents by '96

BYLINE: By KEITH SCHNEIDER, Special to The New York Times

DATELINE: WASHINGTON, Feb. 11

BODY:

In response to new evidence that the earth's atmospheric ozone shield may be weakening over parts of the United States, President Bush today ordered American manufacturers to end by Dec. 31, 1995, virtually all production of chemicals that destroy ozone.

The policy, authorized under a provision of the 1990 Clean Air Act, takes effect immediately. Last Friday the Bush Administration reversed its opposition to such a plan and backed a Senate proposal to phase out the production of the chemicals as soon as possible, rather than by 2000.

The action today not only affects a dozen chemical companies and thousands of manufacturing workers across the country, but also puts enormous pressure on makers of automobile air conditioners, computer equipment, fire prevention systems and refrigerators and other industrial users of the chemicals to redesign their equipment. The chemicals are chlorofluorocarbons, or CFC's, halons, methyl chloroform and carbon tetrachloride.

"It's a substantial step, one that we believed was warranted by the scientific evidence, but nevertheless still a big job for us," said Kevin Fay, the executive director of the Alliance for Responsible CFC Policy, a coalition of users and producers of the chemicals.

The new policy was formulated by a committee of top Administration officials including William K. Reilly, the Administrator of the Environmental Protection Agency; Michael R. Deland, the chairman of the President's Council on Environmental Quality, and Samuel K. Skinner, the White House chief of staff.

"There is a scientific consensus that these chemicals are destructive to ozone in the atmosphere," Mr. Reilly said today in an interview, "and this Administration has a record of responding quickly to that threat."

Experts with several of the nation's prominent environmental

groups praised the action but said more aggressive steps were necessary to halt the deterioration of the ozone layer.

"This is a modest step in the right direction but not all that is required to protect the ozone layer," said David Doniger, a lawyer at the Natural Resources Defense Council in Washington. "What we've asked the Environmental Protection Agency to do under the Clean Air Act is to phase out halons immediately. We asked that methyl chloroform be eliminated by beginning of next year. And we want CFC production to be eliminated by the end of 1994. That is what Germans have already announced, and we should at least match them."

The effects of the loss of ozone are to increase ultraviolet radiation that reaches the earth's surface and may result in rates of skin cancer and cataracts. Other scientists have hypothesized that rates of growth of plants and other organisms may also be affected.

The President's order affects a family of chlorine- and bromine-based chemicals, widely used as solvents, refrigerants and fire retardants and as feedstocks for other chemicals. Developed in 1931 by the General Motors Corporation, they were considered among the most useful compounds ever invented.

But as early as 1974, chemists at the University of Michigan and the University of California at Irvine recognized that hundreds of millions of pounds of the compounds were escaping and accumulating in the atmosphere every year. The chemists found that sunlight broke up the CFC molecules and that the freed chlorine atoms were capable of destroying ozone in the upper atmosphere.

Last week the National Aeronautics and Space Administration made public preliminary data gathered by high-altitude aircraft and satellites that showed the highest levels ever found in the upper atmosphere of chlorine monoxide, the active compound that destroys ozone. That finding followed a succession of announcements in the last year showing that the man-made chlorine was responsible for ozone losses in the upper atmosphere outside of the polar regions in the middle latitudes, including the United States.

1ST STORY of Level 1 printed in FULL format.

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The San Francisco Chronicle

FEBRUARY 4, 1992, TUESDAY, FINAL EDITION

SECTION: NEWS; Pg. A1

LENGTH: 1042 words

HEADLINE: Scientists Discover Huge Increase In Threat to Ozone
NASA research focused on Arctic Circle

BYLINE: David Perlman, Chronicle Science Editor

KEYWORD: OZONE; ARCTIC CIRCLE; STRATOSPHERE

BODY:

Man-made chemicals destroying Earth's protective ozone layer have reached the most intense levels ever recorded in the upper atmosphere -- providing evidence that a cancer-causing ''ozone hole'' far worse than predicted could form this winter and spring, scientists reported yesterday.

Teams of airborne investigators flying nearly 15 miles into the stratosphere above the Arctic Circle, aided by an orbiting satellite and a fleet of instrumented balloons, have been measuring the chemical buildup since October, and their news is bad indeed.

''We should be frustrated and alarmed,'' said Estelle Condon, an atmospheric chemist at the National Aeronautics and Space Administration's Ames Research Center in Mountain View who is project manager of the space agency's six-month expedition. ''We're facing a very uncertain future.''

''Everyone should be alarmed about this,'' said Michael J. Kurylo, manager of NASA's upper atmosphere research program in Washington, D.C. ''We are seeing conditions primed for ozone destruction. It's far worse than we thought.''

Kurylo reported that the expedition's instruments have detected concentrations of chlorine monoxide -- the major culprit in ozone destruction -- at levels so high that they will probably devour the ozone layer at a rate of of 1 to 2 percent a day later this winter.

Only two weeks ago, he said, a converted spy plane flying over New England and Eastern Canada detected the highest level of ozone-destroying chlorine monoxide ever measured anywhere around the globe.

If the annual ''vortex'' of frigid air spinning around the Arctic Circle this winter remains in place as expected to trap the highly reactive chlorine compound, Kurylo said, the northern ozone layer could be depleted this spring by 30 to 40 percent.

By comparison, the major ''ozone hole'' first detected over Antarctica barely a dozen years ago has been growing larger and persisting longer ever since. In Australia, the government issues daily warnings to avoid the sun's damaging ultraviolet rays.

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WIDENING EXTENT OF DAMAGE

Already the NASA's new Upper Atmosphere Research Satellite has detected areas of depleted ozone as far south as the Caribbean, and European scientists operating their own airborne expedition in the stratosphere from Stavanger, Norway, reported yesterday that their planes have detected dangerously high levels of ozone-eating chemicals in the sky over London, Moscow and Amsterdam, as well as throughout the region north of the Arctic Circle.

''The calculated concentrations of active chlorine are large enough to be causing ozone destruction already over a wide area,'' said John Pyle of Cambridge University, coordinator of the European project.

Without the ozone layer to shield Earth's surface from ultraviolet rays, humans can suffer a dangerous increase in skin cancers, eye cataracts and damage to the immune system. The rays can also blind animals, destroy crop plants and wipe out surface concentrations of microscopic plankton in the ocean, which form the basis of the global food chain.

REACTION WITH OZONE

The principal causes of the ozone layer's annual destruction are man-made chemicals containing chlorine and bromine that rise into the stratosphere and separate into highly reactive elements. These combine with the ozone and wipe it out as the sun provides the energy for chemical reactions.

By far the worst culprits are compounds called chlorofluorocarbons or CFCs, which are used as refrigerants, industrial cleaners and in other chemical processes. Many of the world's industrial nations have agreed to end CFC production by the year 2000.

James Anderson, a Harvard physicist and chief scientist for the NASA-sponsored stratosphere project, said the new findings underscore the urgency of the effort to end production of all compounds containing chlorine and bromine -- not just CFCs, but also carbon tetrachloride, methyl chloroform and the bromine compounds still used in many countries for leaded gasoline.

Even that will not be enough, the scientists agreed, because the dangerous chemicals will persist in the stratosphere for many years. ''The probability of forming an ozone hole each year is very high for the decade to come,'' Anderson said.

NEW HAZARDS

Two new findings have added another degree of hazard to the ozone problem, the NASA scientists said yesterday.

One was last year's eruption of Mount Pinatubo in the Philippines, which poured sulphur particles into a belt of the upper atmosphere stretching around the world. As well as causing the intense red sunsets many regions have seen in recent months, the sulphur particles are also helping to cause ozone-thinning reactions over the tropics, Kurylo said.

There has also been an unexplained decrease in the nitrogen oxides reaching the stratosphere. These compounds, a major cause of smog, would normally

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suppress the ozone-depleting effects of chlorine and bromine. Now, however, they cannot do their neutralizing job. ''The atmosphere's immune system,'' said Anderson, ''is less sturdy than we thought.''

Normally, before being released publicly, findings of hazards like those reported yesterday would await completion of the mission, which has another month to run, and a period of bureaucratic backing and filling. But the scientists stressed yesterday that what they have found calls for urgent decision-making by Congress and government regulators.

In addition to NASA scientists, the U.S. investigation of the Northern Hemisphere's ozone involves researchers from the National Oceanic and Atmospheric Administration, from a chemical industry group seeking to resolve the CFC issue, and from several universities. A European consortium is manning the planes and flying the high-altitude balloons from Norway.

TRACKING NORTHERN HEMISPHERE OZONE LAYER

Space agency aircraft flying high over the earth's northern regions have found alarming levels of chemicals in the stratosphere that destroy the earth's ozone layer, and scientists warn that a dangerous 'ozone hole' is likely later this winter over densely populated areas of the United States, Canada and Europe.

Source: NASA

CHRONICLE GRAPHIC

GRAPHIC: GRAPHIC, MAP,TRACKING NORTHERN HEMISPHERE OZONE LAYER , CHRONICLE GRAPHIC

SUBJECT:
ATMOSPHERE; SCIENCE; ENVIRONMENT; EARTH; INCREASE; RESEARCH; CHEMICALS; AIR POLLUTION

NAME:
ozone hole; National Aeronautics and Space Administration; Ames Research Center; NASA; Nati

TABLE 1

Substance	Ozone-depletion potential
chlorofluorocarbon–11 (CFC–11)	1.0
chlorofluorocarbon–12 (CFC–12)	1.0
chlorofluorocarbon–13 (CFC–13)	1.0
chlorofluorocarbon–111 (CFC–111)	1.0
chlorofluorocarbon–112 (CFC–112)	1.0
chlorofluorocarbon–113 (CFC–113)	0.8
chlorofluorocarbon–114 (CFC–114)	1.0
chlorofluorocarbon–115 (CFC–115)	0.6
chlorofluorocarbon–211 (CFC–211)	1.0
chlorofluorocarbon–212 (CFC–212)	1.0
chlorofluorocarbon–213 (CFC–213)	1.0
chlorofluorocarbon–214 (CFC–214)	1.0
chlorofluorocarbon–215 (CFC–215)	1.0
chlorofluorocarbon–216 (CFC–216)	1.0
chlorofluorocarbon–217 (CFC–217)	1.0
halon–1211	3.0
halon–1301	10.0
halon–2402	6.0
carbon tetrachloride	1.1
methyl chloroform	0.1
hydrochlorofluorocarbon–22 (HCFC–22)	0.05
hydrochlorofluorocarbon–123 (HCFC–123)	0.02
hydrochlorofluorocarbon–124 (HCFC–124)	0.02
hydrochlorofluorocarbon–141(b) (HCFC–141(b))	0.1
hydrochlorofluorocarbon–142(b) (HCFC–142(b))	0.06

Table I

Properties of chemicals present in pulp mill effluents

Chemical name	Formula	(C + CL) no. N	M.W.	Melting Point deg C	Fugacity ratio, F at 25°C	Dissociation constant pKa
3-Chloro-4-dichloromethyl-5-hydroxy-2(5H)-furanone	C5H3O3CL3	8	217.44			
Dichloroacetic acid methyl ester	C3H4O2CL2	7	142.97			
Chloroacetic acid ethyl ester	C4H7O2CL	5	122.55			
Dichloroacetic acid ethyl ester	C4H6O2CL2	6	157			
Trichloroacetic acid ethyl ester	C4H5O2CL3	7	191.44			
Dichloromethane	CH2CL2	3	84.93	-95.1	1	
Chloroform	CHCL3	4	119.38	-63.5	1	
Carbon tetrachloride	CCL4	5	153.82	-22.99	1	
Bromodichloromethane	CHBrCL2	3	163.83	-57.1	1	
Dibromochloromethane	CHBr2CL	3	208.3	<-20	1	
1,2-Dichloroethane	C2H4CL2	4	98.97	-35.36	1	
1,1,1-Trichloroethane	C2H3CL3	5	133.41	-32	1	
1,1,2,2-Tetrachloroethane	C2H2CL4	6	167.86	-44	1	
Trichloroethene	C2HCL3	5	131.4	-73	1	
Tetrachloroethene	C2CL4	6	165.83	-19	1	
Tetrachloropropene (3 isomers)	C3H2CL4	7	179.86			
Pentachloropropene	C3HCL5	7	214.31			
Dichloropropadiene	C3H2CL2	5	108.95			
Trichloropropadiene	C3HCL3	6	143.4			
Tetrachloropropadiene	C3CL4	7	177.84			
Trichlorobutatriene (2 isomers)	C4HCL3	7	155.41			
Tetrachlorobutatriene	C4CL4	8	189.86			
Pentachlorobutadiene (2 isomers)	C4HCL5	9	226.32			
Methyl chlorobutene (5 isomers)	C5H9CL	6	104.58			
Tetrachlorocyclopentadien	C5H2CL4	9	203.88			
Hexachlorohexatriene (5 isomers)	C6H2CL6	12	286.8			
Heptachlorohexatriene (2 isomers)	C6HCL7	13	321.24			
Toluene	C7H8	7	92.13	-95	1	
Benzene	C6H6	6	78.12	5.53	1	
Chlorobenzene	C6H5CL1	7	112.56	-45.6	1	
1,2-Dichlorobenzene	C6H4CL2	8	147	-17	1	
1,3-Dichlorobenzene	C6H4CL2	8	147	-24.7	1	
1,4-Dichlorobenzene	C6H4CL2	8	147.01	53.1	0.53	
1,2,3-Trichlorobenzene	C6H3CL3	9	181.45	53	0.53	
1,2,4-Trichlorobenzene	C6H6CL3	9	181.5	16.95	1	
1,3,5-Trichlorobenzene	C6H6CL3	9	181.5	64	0.41	
1,2,3,4-Tetrachlorobenzene	C6H2CL4	10	215.9	47.5	0.6	
1,2,3,5-Tetrachlorobenzene	C6H2CL4	10	215.9	54.5	0.51	
1,2,4,5-Tetrachlorobenzene	C6H2CL4	10	215.9	140	0.073	
Pentachlorobenzene	C6HCL5	11	250.3	86	0.23	
Hexachlorobenzene	C6CL6	12	284.8	230	0.0094	
Ethyl benzene	C8H10	8	106.17	-94.97	1	
o-Cymene	C10H14	10	134.22	-71.5	1	
p-Cymene	C10H14	10	134.22	-67.9	1	
Chloro-p-cymene	C10H13CL	11	168.67			
Chloro-p-cymene (1)	C10H13CL	11				
Chloro-p-cymene (2)	C10H13CL	11				

APPENDIX C

U.S. Fish & Wildlife Service Memorandum
of January 9, 1992 Calling for the
Elimination of Dioxin Discharges
into the Columbia to Protect
Lower River Bald Eagles

Oregonian Article of January 19, 1992
Reporting U.S. Rep. Ron Wyden's
Call for Comprehensive Action
in Response to USFW Call

United States Department of the Interior
FISH AND WILDLIFE SERVICE

911 N.E. 11th Avenue
Portland, Oregon 97232-4181

MEMO RELEASED BY RON WYDEN

JAN 9 1992

Memorandum

To: Director, Fish and Wildlife Service
Washington, D.C.

From: Regional Director, Region 1
Portland, Oregon

Subject: Columbia River Total Maximum Daily Load Litigation

In fiscal year 1991, the Environmental Protection Agency (EPA) established a total maximum daily load (TMDL) for dioxin levels in the Columbia River. In establishing this TMDL, the EPA requested an informal section 7 consultation with the Service on impacts to bald eagles along the Columbia River Estuary. In the informal consultation, the Service commended EPA on its efforts to reduce dioxin discharges to the Columbia River. However, we also recommended that EPA strive towards limiting permits to zero discharge because of the longevity of organochlorine contaminants and the possible impacts to fish and wildlife. We indicated that there was a potential for dioxins discharged in the river to bioaccumulate to harmful levels in upper trophic level species, such as bald eagles. However, we could not adequately determine if eagles in the lower river were impacted without further information. Information required in this type of evaluation would include data on dioxin concentrations in eagles or eggs of eagles nesting along the lower river.

Because of our concerns, EPA did provide some funds for collection and chemical analysis of eggs of bald eagles and other fish-eating birds. They also are analyzing five bald eagle eggs at their Duluth laboratory in Minnesota. Only a portion of these analyses has been completed. These limited analyses do show some elevated concentrations of dioxin in bald eagles and other fish-eating birds.

Formal Section 7 Consultation on this issue has not been requested by EPA. We have worked closely with EPA, Region X, through on-going informal consultations on this issue and the need for a formal consultation. Since a formal consultation has not been completed, we can not state that 'there will not be any adverse impacts to bald eagles from the current dioxin TMDL'. Although we have very limited data to complete a formal consultation, the information we do have indicates the need to initiate consultation. The EPA has been working with us to complete the remaining eagle egg analyses prior to initiating the formal consultation.

Attachments

MARVIN L. PLENERT

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METRO

JANUARY 19, 1992

Lawmaker sees fight over dioxin

☐ Rep. Ron Wyden releases a memo that calls for mills to stop dumping the chemical into the Columbia River

By PAUL KOBERSTEIN
of The Oregonian staff

Another "jobs vs. environment" struggle looms in the Northwest — this time involving bald eagles and dioxin-emitting pulp mills, U.S. Rep. Ron Wyden said Saturday at a congressional hearing in Portland.

The U.S. Fish and Wildlife Service has asked the Environmental Protection Agency to eliminate all dioxin discharges from pulp mills into the Columbia River, according to an internal memo dated Jan. 9. The memo was released Saturday by Wyden, a Democrat.

The service believes dioxin pollution is harming bald eagles along the Columbia River Estuary. The eagles are listed as threatened under the Endangered Species Act.

Dioxin is an unwanted byproduct of the bleaching process used in eight pulp mills on the Columbia. Dioxin, one of the most carcinogenic chemicals known to man, was found in fish samples downstream from these mills. The EPA set a cap on dioxin discharges at an extremely low level, and mills have spent millions of dollars in efforts to meet that cap.

Industry officials, however, say the cap is 500 times more stringent than necessary to protect human health.

But the Fish and Wildlife Service would reduce those discharges to zero in light of newly found dangers to bald eagles.

Canadian mills on the Columbia release dioxin in higher concentrations than the EPA allows. The EPA is working with Canadian officials to reduce discharges.

The Sierra Club Legal Defense Fund recently sued the EPA in federal court over its dioxin standard. The suit contends the EPA violated the Endangered Species Act by failing to consult with the Fish and Wildlife Service about the impact of dioxin releases on the threatened eagles.

Marv Plenart, western regional director of the service, said in the Jan. 9 memo to Director John Turner that the agency intends to enter formal consultation proceedings with the EPA as provided by the Endangered Species Act.

One outcome of those proceedings could be a determination that dioxin emissions will be prohibited at some future date, Wyden said.

"The Northwest has too much at stake in the river to let this turn into another quagmire of litigation," Wyden said, referring to legal battles over the northern spotted owl and native salmon. "It's time to stop treating

Please turn to DIOXIN, Page C11

Dioxin: Frozen shells await tests

■ Continued from Page C5

the Columbia as if it was the backside of the moon and act now to preserve it for future generations."

Plenart testified at the hearing that new studies show a significant number of bird eggs along the river have elevated levels of dioxin. The eggs include those of two bald eagle eggs.

The eggs were collected in 1991. Three other bald eagle eggs collected in 1986 and 1987 showed smaller dioxin concentrations. Plenart said more data are needed to say the trend is toward increased dioxin levels. The Fish and Wildlife Service said many more eagle shell samples are in freezers, awaiting funding to pay for the costly laboratory analysis for dioxin.

Plenart said data from the late 1980s linked poor reproductive success of bald eagles and significant eggshell thinning with high levels of DDE, another toxic pollutant in the Columbia. Eagles in the Lower Columbia were half as productive as eagles nesting elsewhere in the Northwest between 1987 and 1991.

The results prompted testing of eagles for dioxin.

Asked whether he thought dioxin contributed to eagles' reproductive problems, Plenart replied: "There's no question about it."

Wyden said a state and federal programs fails to address the Columbia's pollution problems in a comprehensive way. The program, a cooperative bi-state study group involving Oregon, Washington, the EPA and industry groups, does not evaluate pollution problems above the Bonneville Dam, where much of the dioxin and other pollution enters the river.

> ***"You can't get an understanding of the lower river without a complete study of the upper river."***
>
> — Rep. Ron Wyden

"I don't see how the bi-state program can get the big picture," Wyden said. "You can't get an understanding of the lower river without a complete study of the upper river."

In addition, the program is short on money, is analyzing only a limited number of water samples, and has no goals for long-range management of the river, said Nina Bell, the study group's co-chairwoman.

"We would not be in such a bad position if it were not for the lack of interest the states and EPA have historically shown in the Columbia River," said Bell, executive director of Northwest Environmental Advocates, a Portland-based public interest group.

But Llewellyn Matthews, a spokeswoman for the Northwest Pulp and Paper Association, an industry group, said the bi-state study is producing "high-quality scientific information."

In addition, she said studies indicate dioxin levels in the Columbia are declining and that eagle populations in the lower river are stable and recovering.

"There has been no scientifically documented linkage between low levels of dioxin in bird eggs and reproductive failure," she said.

APPENDIX D

Teratology Article of 1990
"A Critical Review of the Developmental Toxicity
and Teratogenicity of 2,3,7,8-Tetrachlorodibenzo-p-Dioxin:
Recent Advances Toward Understanding the Mechanism"
Couture, et al. Teratology, 42:619-627

TERATOLOGY 42:619–627 (1990)

A Critical Review of the Developmental Toxicity and Teratogenicity of 2,3,7,8-Tetrachlorodibenzo-p-Dioxin: Recent Advances Toward Understanding the Mechanism*

LAURIE A. COUTURE, BARBARA D. ABBOTT, AND LINDA S. BIRNBAUM
Experimental Toxicology Branch, National Institute of Environmental Health Sciences, Research Triangle Park, North Carolina 27709; Curriculum in Toxicology, University of North Carolina, Chapel Hill, North Carolina 27514 (L.A.C.); Developmental Toxicology Division (B.D.A.), Environmental Toxicology Division (L.S.B.), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711

ABSTRACT A specific teratogenic response is elicited in the mouse as a result of exposure to 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD; dioxin). The characteristic spectrum of structural malformations induced in mice following exposure to TCDD and structurally related congeners is highly reproducible and includes both hydronephrosis and cleft palate. In addition, prenatal exposure to TCDD has been shown to induce thymic hypoplasia. These three abnormalities occur at doses well below those producing maternal or embryo/fetal toxicity and are thus among the most sensitive indicators of dioxin toxicity. In all other laboratory species tested, TCDD causes maternal and embryo/fetal toxicity but does not induce a significant increase in the incidence of structural abnormalities even at toxic dose levels. Developmental toxicity occurs in a similar dose range across species; however, mice are particularly susceptible to development of TCDD-induced terata. Recent experiments using an organ culture were an attempt to address the issue of species and organ differences in sensitivity to TCDD. Human palatal shelves examined in this in vitro system were found to approximate the rat in terms of sensitivity for induction of cleft palate. Investigators have suggested that altered regulation of growth factors and their receptors may involve inappropriate proliferation and differentiation of target cells, ultimately producing TCDD-induced terata. Why the teratogenic effects of TCDD are so highly species and tissue specific, and which animal species most accurately predicts the response of the human embryo/fetus, at the levels of exposure experienced by humans, still remains to be clarified.

TCDD (Fig. 1), a chemical with no known industrial use, is a ubiquitous environmental contaminant. This polychlorinated aromatic hydrocarbon is a by-product formed during the production of chlorinated phenols and their derivatives, such as phenoxy acid herbicides (Firestone et al., '72). Dioxin is also produced as a pyrolysis product during high-temperature combustion processes (Rappe et al., '83) and is formed during the chemical bleaching of pulp (EPA, '87). TCDD is one of 75 possible polychlorinated dibenzo-p-dioxin isomers and is a member of a class of structurally related polyhalogenated aromatics, including the halogenated dibenzodioxins, dibenzofurans, biphenyls, and naphthalenes. Within this class of structurally related chemicals, TCDD is the most toxic (reviewed in EPA, '85). Toxic potency has been demonstrated to be asso-

Received March 15, 1990; accepted July 11, 1990.

Address reprint requests to Dr. Linda S. Birnbaum, Environmental Toxicology Division, Health Effects Research Laboratory (MD-66), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711.

*This document has been reviewed in accordance with U.S. Environmental Protection Agency policy and approved for publication. Mention of trade names or commercial products does not constitute endorsement or recommendation for use.

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APPENDIX E

Canfor Corporation
News Release of November 1, 1991 Covering
First Production of Chlorine-Free Bleached Pulp in Canada
Showing That There is a Growing Demand for
Chlorine-Free Pulp

British Columbia Ministry of Environment
News Release Covering Minister
Cashore's Adoption of the
Regulation; January 16,
1992

CANFOR **News Release**

November 1, 1991

For immediate release

Canada's first chlorine-free kraft pulp produced at Port Mellon mill

Vancouver, B.C. - Canada's first chlorine-free softwood kraft pulp has been produced in a week-long test conducted by Canfor and Howe Sound Pulp and Paper Limited at HSPP's Port Mellon pulp mill. The trial production run will determine if a process developed by Canfor can be used to produce a marketable pulp without bleaching with chlorine in any form, thereby virtually eliminating chlorinated organics (AOX) from the mill's effluent.

HSPP, which is equally owned by Canfor Corporation and Oji Paper Co., Ltd., is in the final stages of a $1.3 billion modernization and expansion project that included $114 million for environmental protection technology.

"The mill's effluent permit has the lowest AOX levels in the province, at 1.5 kilograms per tonne of production," says Bill Hughes, president of HSPP. "In fact, we have been operating at levels between 0.5 and 0.7 kilograms. It depends on what products our customers, who are mostly papermakers, want. And that depends on what their customers, the public, want."

Hughes says there seems to be a growing demand for chlorine-free pulp, especially in Germany, so Canfor and HSPP are trying to produce a product for that market. Eliminating all forms of chlorine will virtually eliminate AOX.

AOX is created when organic material, such as the wood fibre used in pulp production, is exposed to chlorine in processes such as the one used to bleach the pulp white. Unbleached pulp has limited uses since it is brown in color and has impurities. The question that has plagued the industry is how to produce a marketable bleached pulp without using chlorine or compounds such as chlorine dioxide, while preserving the pulp's strength and other characteristics.

HSPP and Canfor believe they have the answer. The companies have spent a million dollars modifying the mill just for this week's test. That amount is in addition to the cost of actually operating the mill, and the cost of the research done by Canfor's new Research and Development Centre in Vancouver.

How is it done? Hughes and the man responsible for developing the process, Dr. Rodger Beatson, Canfor's Research Scientist, are cautious about providing details.

Beatson says, "We're using a combination of existing processes plus something we've developed to give us a better end product. And the results are very, very encouraging."

Hughes and Beatson both acknowledge that the mill is using extended cooking, and bleaching with oxygen and hydrogen peroxide to whiten the pulp but they won't say what else is involved.

...2

The results? The pulp is white but off-white rather than bright white. Is it usable? They think so but that depends on their customers. Quantities of the pulp are being sent to selected customers in Europe to confirm its suitability for manufacturing marketable paper products.

If the customers are pleased, will HSPP switch over to full production? It's not quite that simple, says Hughes.

"This is just a mill trial to test the process. It's certainly a quantum leap from a lab test and the million plus dollars we've spent shows we're serious about producing chlorine-free pulp. However, it will take additional capital and more than a year's work to convert this mill for full production. And we will only do that when we are certain we can make a high quality product, consistently, and sell it at a reasonable price."

"We also have to study the environmental impact of the new process," Hughes added.

According to Beatson, the Canfor-developed, chlorine-free technology could eventually be used at Canfor's Prince George Pulp and Paper Mills, located in Prince George B.C. He noted that a significant additional capital investment would be required to convert those mills. Using technology installed earlier this year, mainly for chlorine-dioxide substitution, the Prince George mills are also operating with average AOX levels below one kilogram per tonne of production.

Beatson noted that between HSPP and Canfor's Prince George mills, chlorinated organics have been reduced by over 75 per cent. He added that this action is consistent with a corporate commitment to reduce the overall environmental impact of the companies' operations and products.

Only a very few other companies in the world - none in Canada - are doing production trials on chlorine-free kraft pulp, according to Hughes. Even fewer companies produce HSPP's type of product, softwood kraft pulp, which is prized by papermakers for its excellent properties.

- 30 -

Released by D.J. Mawhinney
General Manager, Corporate Communications Services

For information contact W.I. Hughes
President, Howe Sound Pulp and Paper Limited
Phone (604) 884-5223

Province of British Columbia

JAN 2 9 1992

NEWS RELEASE

Ministry of Environment, Lands and Parks

January 16, 1992

1992:ELP07

Cashore Unveils New Regulations to Eliminate AOX from Pulp Mill Effluents

VICTORIA — Environment, Lands and Parks Minister John Cashore announced today tough new regulations that will virtually eliminate chlorinated organic compounds (AOX) in pulp mill effluent over the next decade.

"The protection of our fragile environment is paramount," said Cashore.

"I am putting the pulp mill industry on notice that our government is launching a comprehensive program that is targeting a zero discharge of dioxins and other AOX compounds by the year 2002 or earlier.

"These new pulp mill regulations — the most stringent in Canada — are tough but fair.

"Pulp mill pollution has been a serious problem in this province and British Columbians from all walks of life are deeply concerned about this issue.

"The program we are announcing today is designed to work cooperatively with all sectors of society to ensure that we adequately protect our environment in an economically sound fashion."

Cashore noted that while the pulp mill industry has made significant improvements in the levels of pollution in their effluents over the last number of years, the presence of any AOX in the long term is unacceptable.

(more)

"It is important that firm timetables be established for each mill," said Cashore.

The minister stated that the regulations will be implemented in two stages. The first stage, effective January 17, 1992, states that each pulp mill that uses chlorine to bleach pulp must submit to the ministry, on or before June 30, 1992, a time schedule to ensure the elimination of AOX produced in the bleaching process from liquid effluent discharged into the environment.

The second phase of the regulations, which will be enacted on July 1, 1992, states that each pulp mill that uses chlorine to bleach pulp:

- must meet a discharge limit for AOX of 1.5 kg per air dried tonne (kg/ADt) of pulp produced on or before December 31, 1995;

- must eliminate AOX produced in the bleaching process on or before December 31, 2002; and

- is exempt from the December 31, 1995 deadline for an AOX level of 1.5 kg/ADt if they can propose an accelerated schedule to completely eliminate AOX produced in the bleaching process on or before December 31, 2000.

"To ensure each mill meets the five-month deadline for a firm plan to eliminate AOX, we intend to carry out an extensive consultation process. This process will include representatives from industry, labour, environmental groups, first nations, commercial fishing groups and others.

(more)

"In order to better achieve our ultimate goal of zero discharge of AOX, I have delayed implementing the new effluent standards until July 1, 1992. In this way, we are allowing constructive and innovative solutions to emerge from the consultation and consensus-building process. It is our expectation that this will help us significantly in meeting our objective.

"I have appointed Dr. Gerald Cormick to assist the ministry with this consensus-building process. Dr Cormick has been involved in mediation, negotiation and consensus building for a number of major issues in British Columbia and the northwestern United States. He was one of the key architects of the internationally-recognized Regulatory-Negotiations process in the U.S.

"We have married the toughest pulp mill effluent regulations in Canada with the fairest consultation process," said Cashore.

The minister also released the province's second Pulp Mill Effluent Status Report. The report covers the period April 1, 1991 through August 31, 1991 and outlines the progress mills have made in complying with a schedule of upgrading under provincial effluent regulations announced in December 1990. At that time, the standard was set at 2.5 kilograms per air-dried tonne (kg/ADt) of AOX.

Of the 23 mills to which the pulp mill effluent regulations apply:

- 11 mills were in compliance with discharge levels;
- 10 were in minor noncompliance with effluent discharge levels;
- two mills were in significant noncompliance with effluent discharge levels and are projecting that the start-up of secondary treatment facilities will be six-to-nine months late for each mill.

(more)

The minister also noted that a compliance schedule has been determined for the previously unscheduled Western Pulp mill at Port Alice which will result in the mill reducing its AOX effluent to 1.0 kg/ADt or less by December 31, 1995.

"These new regulations will not only safeguard our precious environment but contribute to the long-term betterment and economic viability of the pulp mill industry in British Columbia," said Cashore.

- 30 -

CONTACTS:

Dr. Jon O'Riordan 387-9877
Assistant Deputy Minister
Environmental Management Department
Ministry of Environment, Lands and Parks
Victoria, B.C.

Harry Vogt, A/ Director 356-6028
Industrial Waste and Hazardous Contaminants Branch
Ministry of Environment, Lands and Parks
Victoria, B.C.

Western Environmental Law Clinic

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Michael D. Axline
John E. Bonine
Attorneys

Kathryn Cannon
Office Manager

February 14, 1992

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
FEB 18 1992
OFFICE OF THE DIRECTOR

Mr. Fred Hansen
Director
Oregon Department of Environmental Quality
811 S.W. Sixth
Portland, OR 97204

Re: NPDES Permit Nos. 3754-J, 100715

Dear Mr. Hansen:

Please note the changes marked in handwriting on pages 4 and 5 of NCAP/CRU's Exceptions filed on Februrary 13, 1992. The corrected pages are attached and have been faxed to all parties.

Sincerely,

John E. Bonine
Attorney for NCAP and CRU

Enclosure
cc: Judge Arno Denecke
All Counsel

Clinic statements do not represent University positions

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EXCEPTIONS: AOX

I. INTRODUCTION: CONTRASTING POLICIES

Two recent government actions affecting the shared Northwest environment stand in glaring contrast.

-> The government of British Columbia on January 17, 1992, ordered bleached kraft pulp mills to eliminate all organochlorine (AOX)[2] discharge within 8-10 years and to reduce AOX to 1.5 kg/ADT (as a monthly average) by 1995.

-> On the other hand, the EQC Hearings Officer on January 2, 1992, proposed to eliminate the regulation that would control AOX discharges -- abandoning even the lax 2.6kg/ADT monthly limit (and 1.5 average ~~monthly~~ yearly limit) proposed by DEQ two years ago.

To put the current proceeding in context, consider the following:

(1) Nearly three years ago, DEQ, using its Best Professional Judgment based on the technology as of 1989, set the annual discharge limit of AOX at 1.5 kilograms per air-dried metric ton of pulp for Oregon mills, and the monthly limit at 2.6.

(2) Washington also set a 1.5kg/AOX standard, and EPA set the same standard for the State of Idaho.

---

[2] Adsorbable Organic Halogens (AOX) is a measuring tool for determining the quantity of organochlorine compounds discharging into the Columbia River and other ecosystems.

(3) Last month, abandoning its previous lax standards of 2.5 kg AOX, British Columbia enacted B.C. Reg. 13/92(6), requiring *zero* discharge of AOX by 2002 and 1.5 monthly by 1995.[3]

In light of the new British Columbia regulations, even DEQ's 1.5/2.6 AOX limit in the permits/ICSs for Boise Cascade and James River, proposed in 1989, is outdated. Oregon regulations that were once at the forefront are falling behind as other governments in the region move forward. Incredibly, the Hearings Officer has proposed a further step backward from the requirements of the Clean Water Act and suggested that the AOX limits not be included in the permit at all.

---

[3] S.1 (1) Every permittee that operates a pulp mill or pulp and paper mill which uses chlorine or chlorine compounds to bleach pulp shall, on or before June 30, 1992, submit to the director a plan and time schedule which will enable the Lieutenant Governor in Council to amend B.C. Reg. 470.90 to ensure the elimination of AOX produced in the bleaching process from liquid effluent discharged into the environment.

(2) Every permittee that operates a pulp mill or pulp and paper mill which uses chlorine or chlorine compounds to bleach pulp shall

(a) meet a discharge limit of a monthly average of 1.5 kg of AOX/ADt on or before December 31, 1995, and

(b) eliminate AOX produced in the bleaching process on or before December 31, 2002.

(3) A permittee under subsection (2) is exempt from the requirement to meet the discharge limit of a monthly average of 1.5 kg AOX/ADt on or before December 31, 1996 if that permittee

(a) on or before June 30, 1992 submits to the director a plan and time schedule for the elimination of AOX produced in the bleaching process on or before December 31, 2000, and

(b) receives written confirmation from the director that the submitted plan and time schedule acceptable.

(4) A permittee under subsection (3) whose plan and time schedule is confirmed shall eliminate AOX produced in the bleaching process on or before December 31, 2000. (Appendix A)

REQUEST FOR EQC ACTION

Meeting Date: March 12, 1992
Agenda Item:
Division: Water Quality
Section: IW & On-Site

SUBJECT:

Minor Change in Wastewater Permit Fee Schedule

PURPOSE:

The Department proposes to revise the wastewater permit fee schedule in order to cover additional general permits proposed to be issued by the Department.

ACTION REQUESTED:

___ Work Session Discussion
___ General Program Background
___ Program Strategy
___ Proposed Policy
___ Potential Rules
___ Other: (specify)

_X_ Authorize Rulemaking Hearing

Proposed Rules (Draft)	Attachment A
Rulemaking Statements	Attachment B
Fiscal and Economic Impact Statement	Attachment C
Draft Public Notice	Attachment D

___ Adopt Rules

Proposed Rules (Final Recommendation)	Attachment ___
Rulemaking Statements	Attachment ___
Fiscal and Economic Impact Statement	Attachment ___
Public Notice	Attachment ___

___ Issue Contested Case Decision/Order

Proposed Order	Attachment ___

___ Other: (specify)

DESCRIPTION OF REQUESTED ACTION:

In order to streamline the permitting process for some minor wastewater permits, the Department has issued general permits for certain categories of sources rather than issuing individual

permits for each source. To date, the Department has issued general permits for 16 separate categories of sources.

The last time the permit fee schedule was revised was June 1991. At that time, a fee category was developed which included each of the general permits issued to date. However, there are no fee categories which cover general permits to be issued in the future. The intent of this rule change is to add a new "catch-all" category for general permits to be added in the near future. In addition, some additional language will be added for additional fees for the general permits when plan review is required or when a site assessment is necessary. This will prevent the need to revise these regulations every time a new general permit is issued. A single category will be made in the annual compliance determination fee schedule which will cover all general permits.

AUTHORITY/NEED FOR ACTION:

___ Required by Statute: _____ Attachment ___
Enactment Date: _____
_X_ Statutory Authority: _____ Attachment _B_
_X_ Amendment of Existing Rule: _____ Attachment _A_
___ Implement Delegated Federal Program:
_____ Attachment ___

___ Other: Attachment ___

_X_ Time Constraints: It is important for this revised fee schedule to be in effect by the time the new general permits are issued.

DEVELOPMENTAL BACKGROUND:

Because of the minor nature of this fee schedule modification, it was thought unnecessary to use an advisory committee. Therefore, the only public input opportunity will be through the public hearing process. Since new categories of general permits may include some subsurface disposal systems, additional fees for site assessments were added. The fees already adopted in the On-Site Sewage rules will be incorporated by reference.

___ Advisory Committee Report/Recommendation Attachment ___
___ Hearing Officer's Report/Recommendations Attachment ___
___ Response to Testimony/Comments Attachment ___
___ Prior EQC Agenda Items: (list)
Attachment ___
___ Other Related Reports/Rules/Statutes:
Attachment ___
___ Supplemental Background Information Attachment ___

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

There is an advantage to issuing general permits for the Department and the public. It reduces significantly the resources necessary to write permits for a number of minor sources. Along with that savings in Department resources, there is a savings in permit fees for the applicant. For example, if a car washing operation can be covered by a general permit, the fees for the general permit under the proposed fee schedule are: $50 filing fee, plus $150 permit processing fee, plus $200 plan review fee, plus $100 annual compliance fee, for a total of $500. If the same source was required to get an individual permit, the costs would be: $50 filing fee, plus $4,000 permit processing fee, plus $1,200 annual compliance fee, for a total of $5,250.

PROGRAM CONSIDERATIONS:

It is important for the program to continue to develop general permits where appropriate. That process should not be bogged down by the requirement to revise the permit fee schedule every time a new general permit is issued. For that reason, an additional category will be added to the fee schedule which will cover any general permit not specifically identified within the schedule.

The current permit processing fees for general permits range from $50 to $150, depending upon the difficulty of the application review. Since future categories of sources to be considered for general permits will likely be of the more difficult variety, the fee for the future categories of general permits will be $150.

Until now, most of the general permits issued required very little if any plan review or site assessment. As the list of categories of sources which might quality for a general permit is expanded, it is obvious that there will be additional Department costs associated with evaluating the permit application. For this reason, some additional fees for plan review and site assessment have been added, which were not necessary until now. There is usually more staff time involved in the review of plans than there is in the review of a general permit application. The fees for the plan review is recommended to be $200. The site assessment fees will be the same as currently promulgated in the On-Site sewage rules.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

The Department considered adding only those categories for general permits which have been issued or proposed to be issued. That would require revising the fee schedule through rule change every time a new general permit is issued.

As an alternative, a separate category for all other general permits, not already specifically identified in the fee schedule, is proposed to be added. To account for the additional expense associated with required plan review or required site evaluation, provisions for these additional fees, when appropriate, have been added to the schedule.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

It is recommended that the Commission authorize the Department to proceed to put the proposed rule changes on public notice and to hold a hearing on the propose fee schedule revisions.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

This fee schedule modification is consistent with past practice. It does not conflict with agency or legislative policy.

ISSUES FOR COMMISSION TO RESOLVE:

We can identify no issues for the Commission to resolve at this time.

INTENDED FOLLOWUP ACTIONS:

As soon as authorization is granted, a hearing will be scheduled to receive testimony on the proposed rule change.

Approved:

Section: Lydia Taylor

Division: Lydia Taylor

Director: _____

Report Prepared By: Charles K. Ashbaker

Phone: 229-5325

Date Prepared: February 11, 1992

cka:Typist)
(File Name/Number)
February 11, 1992
RULE.EQC

PERMIT FEE SCHEDULE

WASTEWATER DISPOSAL PERMITS

NOTE:

The underlined portions of text represent proposed additions made to the rules.

The ~~[bracketed]~~ portions of text represent proposed deletions made to the rules.

340-45-075

(1) **Filing Fee.** Unless waived by this rule, a filing fee of $50 shall accompany any application for issuance, renewal, modification, or transfer of an NPDES permit or WPCF permit, including registration for a General Permit pursuant to OAR 340-45-033 and request for a Special Permit pursuant to OAR 340-14-050. This fee is non-refundable and is in addition to any application processing fee or annual compliance determination fee which might be imposed. The following filing fees are waived:

(a) Small gold mining suction dredges with an intake hose diameter of 4 inches or less.

(b) Small gold mining operations which qualify for General Permit 600, and which can process no more than 5 cubic yards of material per day.

(2) **Application Processing Fee.** An application processing fee shall be submitted with each application. The amount of the fee shall depend on the type of facility and the required action as follows:

(a) New Applications:

(A)	Major industries[1]	$20,000
(B)	Minor industries	$ 4,000
(C)	Major domestic[2]	$ 1,500
(D)	Minor domestic	$ 600
(E)	Agricultural	$ 4,000

(b) Permit Renewals (including request for effluent limit modification):

(A)	Major industries[1]	$10,000
(B)	Minor industries	$ 2,000
(C)	Major domestic[2]	$ 750
(D)	Minor domestic	$ 300
(E)	Agricultural	$ 2,000

(c) Permit Renewals (without request for effluent limit modification):

(A)	Major industries[1]	$ 5,000
(B)	Minor industries	$ 750
(C)	Major domestic[2]	$ 500
(D)	Minor domestic	$ 200
(E)	Agricultural	$ 750

(d) Permit Modifications (involving increase in effluent limitations):

(A)	Major industries[1]	$10,000
(B)	Minor industries	$ 2,000
(C)	Major domestic[2]	$ 750
(D)	Minor domestic	$ 300
(E)	Agricultural	$ 2,000

(e) Permit Modifications (not involving an increase in effluent limits): All categories . . . . . $ 500

(f) Special Permits issued pursuant to OAR 340-14-050 . . . . . $ 250

(g) New General Permits, by permit number:

(A)	100, 400, 500, 600 (over 1500 cubic yards per year), 900, 1000	$ 50
(B)	200, 300, 1300, 1400, 1500, 1600.	$ 100
(C)	1200	$ 150
(D)	**Others not elsewhere specified**	**$ 150**

(E) In addition, the following fees shall be added to categories (A) through (D) when the listed activities are a required part of the application review process:

(i) Disposal system plan review . . . . . $ 200

(ii) For on-site sewage disposal systems, the fees as established in OAR 340-71-140 shall be added.

(3) Annual Compliance Determination Fee Schedule:

(a) Domestic Waste Sources -- Initial and Annual Fee is based on Dry Weather Design Flow, Type of Facility and Applicable Special Fees as follows:

		Fees
(A_1)	Sewage Disposal - 50 MGD or more	$20,860

(A_2)	Sewage Disposal - At least 25 MGD but less than 50 MGD	$14,110
(A_3)	Sewage Disposal - At least 10 MGD but less than 50 MGD	$ 6,610
(B_a)	Sewage Disposal - At least 5 MGD but less than 10 MGD	$ 5,010
(B_b)	Sewage Disposal - At least 5 MGD but less than 10 MGD - Systems where treatment occurs in lagoons that discharge to surface waters	$ 5,010
(C_{1a})	Sewage Disposal - At least 2 MGD but less than 5 MGD	$ 3,285
(A_1)	Sewage Disposal - 50 MGD or more	$20,860
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(C_{2a})	Sewage Disposal - At least 1 MGD but less than 2 MGD	$ 2,210
(C_{2b})	Sewage Disposal - At least 1 MGD but less than 2 MGD - Systems where treatment occurs in lagoons that discharge to surface waters	$ 845
(D_a)	Sewage Disposal - Less than 1 MGD, and not otherwise categorized under Categories E, F, or G .	$ 755
(D_b)	Sewage Disposal - Less than 1 MGD - Systems where treatment occurs in lagoons that discharge to surface waters which are not otherwise categorized under Categories E, F, or G	$ 450
(E)	Sewage Disposal - Systems where treatment is limited to lagoons which do not discharge to surface waters	$ 250
(F)	Sewage Disposal - Systems larger than 20,000 gallons per day which dispose of treated effluent via subsurface means only	$ 260
(G)	Sewage Disposal - Systems less than 20,000 gallons per day which dispose of treated effluent via subsurface means only and other systems required by OAR 340, Division 71 to have a Water Pollution Control Facilities (WPCF) permit	$ 185
(H_1)	Sources determined by the Department to administer a pretreatment program pursuant to federal pretreatment program regulations (40 CFR, Part 403; January 28, 1981) shall pay an additional $1,000 per year plus $335 for each significant industrial user specified in their annual report for the previous year.	

(H_2) In addition to applicable fees specified above, special Annual Compliance Fees for Tualatin Basin Pollution Abatement Activities will be applied to the following permittees until Fiscal Year 1998:

Unified Sewerage Agency - Durham	$26,720
Unified Sewerage Agency - Rock Creek	$22,995
Unified Sewerage Agency - Forest Grove	$ 5,450
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Unified Sewerage Agency - Banks	$ 185
City of Portland - Tryon Creek	$ 910

(b) Industrial, Commercial and Agricultural Sources (Source and Initial and Annual Fee):

(For multiple sources on one application select only the one with highest fee)

(A)	Major pulp, paper, paperboard, hardboard, and other fiber pulping industry	$ 6,000
(B)	Major sugar beet processing, potato and other vegetable processing, and fruit processing industry	$ 6,000
(C)	Seafood Processing Industry:	
	(i) Bottom fish, crab, and/or oyster processing	$ 675
	(ii) Shrimp processing	$ 675
	(iii) Salmon and/or tuna processing	$ 1,200
(D)	Electroplating industry (excludes facilities which do anodizing only):	
	(i) Rectifier output capacity of 15,000 Amps or more	$ 6,000
	(ii) Rectifier output capacity of less than 15,000 Amps but more than 5000 Amps	$ 3,000
(E)	Primary Aluminum Smelting	$ 6,000
(F)	Primary smelting and/or refining of non-ferrous metals utilizing sand chlorination separation facilities	$ 6,000
(G)	Primary smelting and/or refining of ferrous and non-ferrous metals not elsewhere classified above	$ 3,000

(H) Alkalies, chlorine, pesticide, or fertilizer manufacturing with discharge of process waste waters . . . . . $ 6,000

(I) Petroleum refineries with a capacity in excess of 15,000 barrels per day discharging process waste water . . . . . $ 6,000

(J) Cooling water discharges in excess of 20,000 BTU/sec . . . . . $ 3,000

(K) Milk products processing industry which processes in excess of 250,000 pounds of milk per day . . . . . $ 6,000

(L) Major mining operations (over 500,000 cubic yards per year) . . . . . $ 6,000

(M) Minor mining and/or processing operations:

(i) Medium (100,000 to 500,000 cubic yards per year) mechanical processing . . . . . $ 2,000

(ii) Medium using froth flotation . . . . . $ 3,000

(iii) Medium using chemical leaching . . . . . $ 4,000

(iv) Small (less than 100,000 cubic yards per year) mechanical processing . . . . . $ 500

(v) Small using froth flotation . . . . . $ 1,000

(vi) Small using chemical leaching . . . . . $ 2,000

(N) All facilities not elsewhere classified with disposal of process waste water . . . . . $ 1,200

(O) All facilities not elsewhere classified which dispose of non-process waste waters (i.e., small cooling water discharges, boiler blowdown, filter backwash, log ponds, etc,) . . . . . $ 750

(P) Dairies and other confined feeding operations on individual permits . . . . . $ 450

(Q) All facilities which dispose of waste waters only by evaporation from watertight ponds or basins . . . . . $ 450

(R) General permits ~~[100 J, 200 J, 400 J, 500 J, 1000 . . . . . $ 100~~

~~(S) General permit 300 J ..... $ 100~~

~~(T) General permits 900 J, 1200 J, 1300 J, 1400, 1500 J, 1600 ..... $ 100]~~

---

1 *Major Industries Qualifying Factors:*

-1- Discharges large BOD loads; or
-2- Is a large metals facility; or
-3- Has significant toxic discharges; or
-4- Has a treatment system which, if not operated properly, will have a significant adverse impact on the receiving stream; or
-5- Any other industry which the Department determines needs special regulatory control.

2 *Major Domestic Qualifying Factors:*

-1- Serving more than 10,000 people; or

-2- Serving industries which can have a significant impact on the treatment system.

Attachment B

STATEMENT OF NEED FOR RULEMAKING

Pursuant to ORS 183.335(7), this statement provides information on the Environmental Quality Commission's intended action to adopt a rule.

(1) Legal Authority

Oregon Revised Statutes (ORS) 468.065 authorizes the Department to adopt permit fees by rule. The fees are to be based upon the anticipated cost of filing and investigating the application, of issuing or denying the requested permit, and of an inspection program to determine compliance or noncompliance with the permit.

(2) Need for the Rule

The current permit fee schedule, which was adopted pursuant to ORS 468.065, covers only those general permits which the Department had issued up to the time the rules were last modified in June of 1991. Therefore, fees could not be charged for new general permits without modifying the rules. It is proposed to modify the fee schedule to add a category for new general permits not already listed and to add provisions for charging fees for plan review and site assessments which are necessry as part of the application review process.

(3) Principal Documents Relied Upon in this Rulemaking

Oregon Revised Statutes 468.065 **Issuance of permits; content; fees; use.**

Oregon Administrative Rules 340-45-070 **Permit Fees**

Oregon Administrative Rules 340-45-075 **Permit Fee Schedule**

These documents are available for review during normal business hours at the Department's office, 811 SW Sixth, Portland, Oregon.

LAND USE COMPATIBILITY STATEMENT

Land Use Consistency

This increase in fees does not directly affect land use. It does indirectly affect Goal 6 (Air, Water and Land Resources Quality) in that the fees are used by the Department to implement the waste water permit program for regulating the discharge of pollutants and for the improvement of water quality.

cka/Rule.B

Attachment C

FISCAL AND ECONOMIC IMPACT

1. Other State Agencies:

   The proposed fee schedule changes may affect other state agencies which have cause to apply for new general permits not already covered in the current fee schedule.

2. Municipalities such as service districts, cities and counties.

   If the Department was to issue general permit for sewerage systems, which are operated by one these municipal entities, the fee changes proposed may affect them.

3. Small business.

   This change to the fee schedule will add fees which will affect general permits issued by the Department at some future date. Any small business with a wastewater discharge which could be regulated by a new general permit issued by the Department, will be affected by these fee additions. Since the fees associated with general permit are much less than those associated with individual permits, it is of great benefit to small business.

4. All Businesses.

   All businesses with a discharge of wastewater which could be covered by a new general permit, will be affected. Generally there is an advantage to any business to be covered by a general permit. Changing the rule to add a category of fees to cover all general permits not already covered, will allow the Department to continue to develop general permits without the need to add to the permit fee schedule in each instance.

cka/RULE.C

Attachment D

A CHANCE TO COMMENT ON -

WATER QUALITY PERMIT FEE MODIFICATION

Notice Issued: ^C
Comments Due:

WHAT IS PROPOSED:

The Department of Environmental Quality (DEQ) is proposing to add an additional fee category to the wastewater permit fee schedule for general permits, found in Oregon Administrative Rules (OAR) 340-45-075. The added category will provide a permit processing fee for general permits not specifically addressed already in the fee schedule. In addition, in order to keep the fee in the new category to a minimum, some additional provisions are being added which provide an additional fee when plan review or site evaluation is necessary as part of the application review process. By having these separate provisions, the DEQ will not need to have these costs reflected in the new fee category. That way, only those applicants which require plan review or a site evaluation will be required to pay for that service.

WHO IS AFFECTED:

In order to increase the efficiency of the wastewater permitting process, the DEQ has found some advantage to issuing general permit for certain minor source categories. Since the costs to the DEQ are less in this permitting process, the permit fee costs to the applicant are also less. The current fee schedule lists 13 separate general permits for which permit processing fees have been established. The DEQ is considering other categories of minor sources which could also benefit from the issuance of general permits. However, there is currently no category in the fee schedule to address future general permits. So that the DEQ does not have to change the fee schedule every time a new general permit is issued, a new "catch-all" category is proposed which included all general permits not already listed. Since some of the new general permits may require additional DEQ costs, such as those associated with plan review or site evaluation, the proposed modification also has a provision for adding fees for those activities where appropriate. Any facility which could be regulated by a new general permit will be affected by this fee schedule expansion.

NEED FOR RULE CHANGE:

The DEQ is continually looking for categories of sources which could be adequately regulated by general permit. Unless a

"catch-all" category of permit processing fee is included in the fee schedule, the rules will need to revised every time a new general permit is issued.

PROPOSED RULE CHANGES:

In OAR 340-45-075(2)(g) two new categories will be added in the permit processing fees for new general permits, as follows:

(D) Others not elsewhere specified $150

(E) In addition, the following fees shall be added categories (A) through (D) when the listed activities are a required part of the application review process:

(i) Disposal system plan review $200

(ii) For on-site sewage disposal systems, the fees established in OAR 340-71-140 shall be added.

In 340-45-075(3)(b)(R) through (S), all will be combined in (R) as follows:

(R) General Permits $100

WHERE TO FIND OTHER DOCUMENTS:

Copies of the existing fee schedule, revised fee schedule, applicable DEQ rules, and enabling statute are available upon request at the DEQ office, 811 S.W. Sixth, Portland, OR 97204, 5th floor. They may also be viewed at each of the five DEQ Regional Offices, as attached.

PUBLIC PARTICIPATION:

In order to provide an opportunity for public testimony and suggestions regarding the proposed fee schedule changes, a public hearing will be held at the time and place listed below.

The Department solicits comments on this proposal. If you are unable to attend the public hearing, you may send in written comments to:

Mary Lynn
Department of Environmental Quality
811 S.W. Sixth Avenue
Portland, OR 97204

In order to be considered, written comments must be submitted by _____.

Anyone who has questions about the proposed rule changes may call:
Kent Ashbaker 229-5325

REQUEST FOR EQC ACTION

Meeting Date: March 12, 1992
Agenda Item:
Division: Water Quality
Section: IW & On-Site

SUBJECT:

Minor Change in Wastewater Permit Fee Schedule

PURPOSE:

The Department proposes to revise the wastewater permit fee schedule in order to cover additional general permits proposed to be issued by the Department.

ACTION REQUESTED:

___ Work Session Discussion
___ General Program Background
___ Program Strategy
___ Proposed Policy
___ Potential Rules
___ Other: (specify)

_X_ Authorize Rulemaking Hearing

Proposed Rules (Draft)	Attachment A
Rulemaking Statements	Attachment B
Fiscal and Economic Impact Statement	Attachment C
Draft Public Notice	Attachment D

___ Adopt Rules

Proposed Rules (Final Recommendation)	Attachment ___
Rulemaking Statements	Attachment ___
Fiscal and Economic Impact Statement	Attachment ___
Public Notice	Attachment ___

___ Issue Contested Case Decision/Order

Proposed Order	Attachment ___

___ Other: (specify)

DESCRIPTION OF REQUESTED ACTION:

In order to streamline the permitting process for some minor wastewater permits, the Department has issued general permits for certain categories of sources rather than issuing individual

permits for each source. To date, the Department has issued general permits for 16 separate categories of sources.

The last time the permit fee schedule was revised was June 1991. At that time, a fee category was developed which included each of the general permits issued to date. However, there are no fee categories which cover general permits to be issued in the future. The intent of this rule change is to add a new "catch-all" category for general permits to be added in the near future. In addition, some additional language will be added for additional fees for the general permits when plan review is required or when a site assessment is necessary. This will prevent the need to revise these regulations every time a new general permit is issued. A single category will be made in the annual compliance determination fee schedule which will cover all general permits.

AUTHORITY/NEED FOR ACTION:

___	Required by Statute: _____ Enactment Date: _____	Attachment ___
_X_	Statutory Authority: _____	Attachment _B_
_X_	Amendment of Existing Rule: _____	Attachment _A_
___	Implement Delegated Federal Program: _____	Attachment ___
___	Other:	Attachment ___

_X_ Time Constraints: It is important for this revised fee schedule to be in effect by the time the new general permits are issued.

DEVELOPMENTAL BACKGROUND:

Because of the minor nature of this fee schedule modification, it was thought unnecessary to use an advisory committee. Therefore, the only public input opportunity will be through the public hearing process. Since new categories of general permits may include some subsurface disposal systems, additional fees for site assessments were added. The fees already adopted in the On-Site Sewage rules will be incorporated by reference.

___	Advisory Committee Report/Recommendation	Attachment ___
___	Hearing Officer's Report/Recommendations	Attachment ___
___	Response to Testimony/Comments	Attachment ___
___	Prior EQC Agenda Items: (list)	Attachment ___
___	Other Related Reports/Rules/Statutes:	Attachment ___
___	Supplemental Background Information	Attachment ___

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

There is an advantage to issuing general permits for the Department and the public. It reduces significantly the resources necessary to write permits for a number of minor sources. Along with that savings in Department resources, there is a savings in permit fees for the applicant. For example, if a car washing operation can be covered by a general permit, the fees for the general permit under the proposed fee schedule are: $50 filing fee, plus $150 permit processing fee, plus $200 plan review fee, plus $100 annual compliance fee, for a total of $500. If the same source was required to get an individual permit, the costs would be: $50 filing fee, plus $4,000 permit processing fee, plus $1,200 annual compliance fee, for a total of $5,250.

PROGRAM CONSIDERATIONS:

It is important for the program to continue to develop general permits where appropriate. That process should not be bogged down by the requirement to revise the permit fee schedule every time a new general permit is issued. For that reason, an additional category will be added to the fee schedule which will cover any general permit not specifically identified within the schedule.

The current permit processing fees for general permits range from $50 to $150, depending upon the difficulty of the application review. Since future categories of sources to be considered for general permits will likely be of the more difficult variety, the fee for the future categories of general permits will be $150.

Until now, most of the general permits issued required very little if any plan review or site assessment. As the list of categories of sources which might quality for a general permit is expanded, it is obvious that there will be additional Department costs associated with evaluating the permit application. For this reason, some additional fees for plan review and site assessment have been added, which were not necessary until now. There is usually more staff time involved in the review of plans than there is in the review of a general permit application. The fees for the plan review is recommended to be $200. The site assessment fees will be the same as currently promulgated in the On-Site sewage rules.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

The Department considered adding only those categories for general permits which have been issued or proposed to be issued. That would require revising the fee schedule through rule change every time a new general permit is issued.

As an alternative, a separate category for all other general permits, not already specifically identified in the fee schedule, is proposed to be added. To account for the additional expense associated with required plan review or required site evaluation, provisions for these additional fees, when appropriate, have been added to the schedule.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

It is recommended that the Commission authorize the Department to proceed to put the proposed rule changes on public notice and to hold a hearing on the propose fee schedule revisions.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

This fee schedule modification is consistent with past practice. It does not conflict with agency or legislative policy.

ISSUES FOR COMMISSION TO RESOLVE:

We can identify no issues for the Commission to resolve at this time.

INTENDED FOLLOWUP ACTIONS:

As soon as authorization is granted, a hearing will be scheduled to receive testimony on the proposed rule change.

Approved:

Section: Lydia Taylor

Division: Lydia Taylor

Director: _____

Report Prepared By: Charles K. Ashbaker

Phone: 229-5325

Date Prepared: February 11, 1992

cka:Typist)
(File Name/Number)
February 11, 1992
RULE.EQC

PERMIT FEE SCHEDULE

WASTEWATER DISPOSAL PERMITS

NOTE:

The underlined portions of text represent proposed additions made to the rules.

The ~~[bracketed]~~ portions of text represent proposed deletions made to the rules.

340-45-075

(1) **Filing Fee.** Unless waived by this rule, a filing fee of $50 shall accompany any application for issuance, renewal, modification, or transfer of an NPDES permit or WPCF permit, including registration for a General Permit pursuant to OAR 340-45-033 and request for a Special Permit pursuant to OAR 340-14-050. This fee is non-refundable and is in addition to any application processing fee or annual compliance determination fee which might be imposed. The following filing fees are waived:

(a) Small gold mining suction dredges with an intake hose diameter of 4 inches or less.

(b) Small gold mining operations which qualify for General Permit 600, and which can process no more than 5 cubic yards of material per day.

(2) **Application Processing Fee.** An application processing fee shall be submitted with each application. The amount of the fee shall depend on the type of facility and the required action as follows:

(a) New Applications:

(A)	Major industries[1]	$20,000
(B)	Minor industries	$ 4,000
(C)	Major domestic[2]	$ 1,500
(D)	Minor domestic	$ 600
(E)	Agricultural	$ 4,000

(b) Permit Renewals (including request for effluent limit modification):

(A)	Major industries[1]	$10,000
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(D)	Minor domestic	$ 200
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(ii) Shrimp processing	$ 675
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(ii) Medium using froth flotation . . . . . $ 3,000

(iii) Medium using chemical leaching . . . . . $ 4,000

(iv) Small (less than 100,000 cubic yards per year) mechanical processing . . . . . $ 500

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(R) General permits [~~100 J, 200 J, 400 J, 500 J, 1000~~ . . . . . ~~$ 100~~

~~(S) General permit 300 J ..... $ 100~~

~~(T) General permits 900 J, 1200 J, 1300 J, 1400, 1500 J, 1600 ..... $ 100~~]

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1 *Major Industries Qualifying Factors:*

-1- Discharges large BOD loads; or
-2- Is a large metals facility; or
-3- Has significant toxic discharges; or
-4- Has a treatment system which, if not operated properly, will have a significant adverse impact on the receiving stream; or
-5- Any other industry which the Department determines needs special regulatory control.

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-1- Serving more than 10,000 people; or

-2- Serving industries which can have a significant impact on the treatment system.

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Pursuant to ORS 183.335(7), this statement provides information on the Environmental Quality Commission's intended action to adopt a rule.

(1) Legal Authority

Oregon Revised Statutes (ORS) 468.065 authorizes the Department to adopt permit fees by rule. The fees are to be based upon the anticipated cost of filing and investigating the application, of issuing or denying the requested permit, and of an inspection program to determine compliance or noncompliance with the permit.

(2) Need for the Rule

The current permit fee schedule, which was adopted pursuant to ORS 468.065, covers only those general permits which the Department had issued up to the time the rules were last modified in June of 1991. Therefore, fees could not be charged for new general permits without modifying the rules. It is proposed to modify the fee schedule to add a category for new general permits not already listed and to add provisions for charging fees for plan review and site assessments which are necessry as part of the application review process.

(3) Principal Documents Relied Upon in this Rulemaking

Oregon Revised Statutes 468.065 **Issuance of permits; content; fees; use.**

Oregon Administrative Rules 340-45-070 **Permit Fees**

Oregon Administrative Rules 340-45-075 **Permit Fee Schedule**

These documents are available for review during normal business hours at the Department's office, 811 SW Sixth, Portland, Oregon.

LAND USE COMPATIBILITY STATEMENT

Land Use Consistency

This increase in fees does not directly affect land use. It does indirectly affect Goal 6 (Air, Water and Land Resources Quality) in that the fees are used by the Department to implement the waste water permit program for regulating the discharge of pollutants and for the improvement of water quality.

cka/Rule.B

Attachment C

FISCAL AND ECONOMIC IMPACT

1. Other State Agencies:

   The proposed fee schedule changes may affect other state agencies which have cause to apply for new general permits not already covered in the current fee schedule.

2. Municipalities such as service districts, cities and counties.

   If the Department was to issue general permit for sewerage systems, which are operated by one these municipal entities, the fee changes proposed may affect them.

3. Small business.

   This change to the fee schedule will add fees which will affect general permits issued by the Department at some future date. Any small business with a wastewater discharge which could be regulated by a new general permit issued by the Department, will be affected by these fee additions. Since the fees associated with general permit are much less than those associated with individual permits, it is of great benefit to small business.

4. All Businesses.

   All businesses with a discharge of wastewater which could be covered by a new general permit, will be affected. Generally there is an advantage to any business to be covered by a general permit. Changing the rule to add a category of fees to cover all general permits not already covered, will allow the Department to continue to develop general permits without the need to add to the permit fee schedule in each instance.

cka/RULE.C

Attachment D

A CHANCE TO COMMENT ON -

WATER QUALITY PERMIT FEE MODIFICATION

Notice Issued: ^C
Comments Due:

WHAT IS PROPOSED:

The Department of Environmental Quality (DEQ) is proposing to add an additional fee category to the wastewater permit fee schedule for general permits, found in Oregon Administrative Rules (OAR) 340-45-075. The added category will provide a permit processing fee for general permits not specifically addressed already in the fee schedule. In addition, in order to keep the fee in the new category to a minimum, some additional provisions are being added which provide an additional fee when plan review or site evaluation is necessary as part of the application review process. By having these separate provisions, the DEQ will not need to have these costs reflected in the new fee category. That way, only those applicants which require plan review or a site evaluation will be required to pay for that service.

WHO IS AFFECTED:

In order to increase the efficiency of the wastewater permitting process, the DEQ has found some advantage to issuing general permit for certain minor source categories. Since the costs to the DEQ are less in this permitting process, the permit fee costs to the applicant are also less. The current fee schedule lists 13 separate general permits for which permit processing fees have been established. The DEQ is considering other categories of minor sources which could also benefit from the issuance of general permits. However, there is currently no category in the fee schedule to address future general permits. So that the DEQ does not have to change the fee schedule every time a new general permit is issued, a new "catch-all" category is proposed which included all general permits not already listed. Since some of the new general permits may require additional DEQ costs, such as those associated with plan review or site evaluation, the proposed modification also has a provision for adding fees for those activities where appropriate. Any facility which could be regulated by a new general permit will be affected by this fee schedule expansion.

NEED FOR RULE CHANGE:

The DEQ is continually looking for categories of sources which could be adequately regulated by general permit. Unless a

"catch-all" category of permit processing fee is included in the fee schedule, the rules will need to revised every time a new general permit is issued.

PROPOSED RULE CHANGES:

In OAR 340-45-075(2)(g) two new categories will be added in the permit processing fees for new general permits, as follows:

(D) Others not elsewhere specified $150

(E) In addition, the following fees shall be added categories (A) through (D) when the listed activities are a required part of the application review process:

(i) Disposal system plan review $200

(ii) For on-site sewage disposal systems, the fees established in OAR 340-71-140 shall be added.

In 340-45-075(3)(b)(R) through (S), all will be combined in (R) as follows:

(R) General Permits $100

WHERE TO FIND OTHER DOCUMENTS:

Copies of the existing fee schedule, revised fee schedule, applicable DEQ rules, and enabling statute are available upon request at the DEQ office, 811 S.W. Sixth, Portland, OR 97204, 5th floor. They may also be viewed at each of the five DEQ Regional Offices, as attached.

PUBLIC PARTICIPATION:

In order to provide an opportunity for public testimony and suggestions regarding the proposed fee schedule changes, a public hearing will be held at the time and place listed below.

The Department solicits comments on this proposal. If you are unable to attend the public hearing, you may send in written comments to:

Mary Lynn
Department of Environmental Quality
811 S.W. Sixth Avenue
Portland, OR 97204

In order to be considered, written comments must be submitted by _____.

Anyone who has questions about the proposed rule changes may call:
Kent Ashbaker 229-5325

HOLD ON FINAL

DRAFT #1

REQUEST FOR EQC ACTION

Meeting Date: March 12, 1992
Agenda Item: (tba)
Division: ECD
Section: Administration

SUBJECT:

The Oil and Hazardous Materials Emergency Response Plan, a section of the State of Oregon's Emergency Operations Plan.

PURPOSE:

A revision of Oregon's Oil and Hazardous Materials Emergency Response Plan has been prepared by the Emergency Management Division of the Executive Department with the help of the Oregon Emergency Response System Council (OERS Council). This revised plan must be reviewed by the Department of Environmental Quality, certain other government and community committees, and be approved by the Environmental Quality Commission to be the replacement for the existing plan.

ACTION REQUESTED:

___ Work Session Discussion
- ___ General Program Background
- ___ Potential Strategy, Policy, or Rules
- ___ Agenda Item ___ for Current Meeting
- ___ Other: (specify)

___ Authorize Rulemaking Hearing
___ Adopt Rules
- Proposed Rules — Attachment ___
- Rulemaking Statements — Attachment ___
- Fiscal and Economic Impact Statement — Attachment ___
- Public Notice — Attachment ___

___ Issue a Contested Case Order
___ Approve a Stipulated Order
___ Enter an Order
- Proposed Order — Attachment ___

_X_ Approve Department Recommendation
- ___ Variance Request — Attachment ___
- ___ Exception to Rule — Attachment ___
- ___ Informational Report — Attachment ___
- _X_ Other: Replace the 1987 plan with the current update. — Attachment _A_

DESCRIPTION OF REQUESTED ACTION:

Oregon's Oil and Hazardous Materials Emergency Response Plan, commonly referred to by its State of Oregon Emergency Operations Plan sub-section name "ANNEX-O", has been updated to reflect state agencies services and relationships that have changed since the Commission approved the plan on January 23, 1987.

This revised plan must be accepted by the Commission as a replacement for the existing plan. Changes in the plan go beyond routine revisions and describe new roles for some state agencies. The 1985 legislative intent when requiring Commission approval of the plan was to assure concurrence among those affected by the plan about the roles of the state agencies.

AUTHORITY/NEED FOR ACTION:

X	Required by Statute: ORS 466.620	Attachment B
	Enactment Date: Chapter 733, Oregon Laws 1985	
___	Statutory Authority: _____	Attachment ___
___	Pursuant to Rule: _____	Attachment ___
___	Pursuant to Federal Law/Rule: _____	Attachment ___
___	Other:	Attachment ___
___	Time Constraints: (explain)	

DEVELOPMENTAL BACKGROUND:

___	Advisory Committee Report/Recommendation	Attachment ___
___	Hearing Officer's Report/Recommendations	Attachment ___
___	Response to Testimony/Comments	Attachment ___
___	Prior EQC Agenda Items: (list)	Attachment ___
___	Other Related Reports/Rules/Statutes:	Attachment ___
X	Supplemental Background Information:	
	1) 1987 ANNEX - O	Attachment F
	2) History of the revised plan.	Attachment C
	3) Chart of Emergency Plans.	Attachment D
	4) Correspondence regarding concurrence, and record of comments made.	Attachment E

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

Compliance with the Oil and Hazardous Materials Emergency Response Plan (OHMERP) is not required by state law. However in general, states and many political subdivisions are required by federal law to have and use emergency plans (please see attachment E).

State agencies and local government groups engaged in cooperative emergency response activities, such as those covered in the revised OHMERP, will find a realignment of responsibilities for certain types of incidents. The revised plan may require changes in their procedures during emergency situations.

The Department has considered these affects and determined that the level of service available from the state will remain constant though the agency responsible for providing services may be changed.

PROGRAM CONSIDERATIONS:

The Department will be responsible under the revised plan for the post-emergency public health and environmental aspects of hazardous materials incidents. The revised plan does not put the Department in the role of lead agency automatically. The Department will not be responsible for providing on-site management at most emergency incidents, but will provide ongoing technical assistance and eventually direct the cleanup operations.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

1. Participate with the Office of Emergency Management in development of the revised plan and present it for Commission approval.

2. Retain the 1987 approved plan and attempt to provide the services defined in it.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department recommends that the Commission approve alternative 1; Submit a revised plan for approval.

The recommendation will meet legislative requirements and create a plan that is consistent with the current operations of the state agencies in the plan.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

The recommended action is consistent with legislative policy.

ISSUES FOR COMMISSION TO RESOLVE:

Does the revised plan meet the need of the state for emergency response to oil and hazardous materials incidents? Is the revised plan consistent with other plans as required?

INTENDED FOLLOWUP ACTIONS:

The Department will distribute the revised plan to the primary group of persons potentially utilizing the plan. Further, we will arrange with any interested persons a means to obtain copies of the plan.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By:

Phone:

Date Prepared:

(AEW:ew)
(ANN-O.sr/draft 1)
(2/12/92)

ATTACHMENT A

OREGON EMERGENCY OPERATIONS PLAN

OIL AND HAZARDOUS MATERIALS

EMERGENCY RESPONSE PLAN

(For inland spills and non-costal waters)

Prepared by:

Oregon Emergency Management
Oregon Department of Environmental Quality

Reviewed by:

Oregon Emergency Response System Council
Oregon Fire Chief's Association
Oregon's Interagency Hazard Communication Council
Oregon Local Emergency Planning Committee

In Case of Emergency Notify:

9-1-1

and

Oregon Emergency Response System

1-800-452-0311 (In Oregon)
503-378-4124 (out-of-state)

DISCLAIMERS:

1. This plan is a description of the state system for dealing with oil and hazardous materials emergencies. It does not carry the force of law. This is not an operational procedure to be used during an emergency.

2. The phone numbers listed in this plan may be subject to change at any time and need to be verified periodically.

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B. Roles and Responsibilities

PART B

SECTION Page

I. County and City Title III Plans 41.
(list of all plans submitted to LEPC)

II. Related Resource Materials Available From:

Office of State Fire Marshal 378-2885
3000 Market Street NE Salem, Oregon 97310

SFM Hazardous Materials Training Plan
SFM Communication Plan and Procedures
SFM Information Systems Directory
SFM Annual Hazardous Materials Incident Report
SFM Hazardous Substance Annual Survey

Oregon Emergency Management 378-6377
595 Cottage Street NE Salem, Oregon 97310

State of Oregon Emergency Operations Plan
Oregon Emergency Response System Monthly Report
Oregon Emergency Response System Annual Report

Oregon Department of Environmental Quality 229-6305
811 SW Sixth Avenue Portland, Oregon 97204

Oregon Oil and Hazardous Materials Emergency Response Plan
Oregon Oil and Hazardous Materials Spill Contingency Plan for the Oregon Coast, Columbia River and Willamette River to Willamette Falls

2. Governmental entities, while complying with the provisions of this plan, shall not be liable for death, injury, or loss of property except in cases of willful misconduct, gross negligence or bad faith.

ACRONYMS

DEQ - Department of Environmental Quality
ECC - Emergency Coordination Center
EPA - Environmental Protection Agency
EOC - Emergency Operations Center
FEMA - Federal Emergency Management Agency
Hazmat - Hazardous Material(s)
IC - Incident Commander
ICS - Incident Command System
LEPC - Local Emergency Planning Committee
OERS - Oregon Emergency Response System
ODOE - Oregon Department of Energy
OEM - Oregon Emergency Management Division
ODOT - Oregon Department of Transportation
ORS - Oregon Revised Statutes
OSC - On Scene Coordinator
OHD - Oregon Health Division
OSHD - Oregon State Highway Division
OSP - Oregon State Police
PIO - Public Information Officer
PRP - Potentially Responsible Party
RERT - Radioactive Emergency Response Team
RHMRT - (Oregon) Regional Hazardous Materials Response Teams
RRT - (Federal) Regional Response Team
RRTA - Radiological Emergency Technical Assistant
UMDA - Umatilla Army Depot Activity
SERC - State Emergency Response Commission
SFM - State Fire Marshal
USCG - U.S. Coast Guard

PART A, SECTION I

PURPOSE AND SCOPE

The purpose of Oregon's Oil and Hazardous Materials Emergency Response Plan is to describe the statewide system for responding to oil and hazardous materials emergencies. Hazardous materials include radioactive materials and waste as well as chemically hazardous materials and waste and communicable disease agents.

The plan has been developed in cooperation with all levels of government and industry. It covers all incidents involving the spill or release of oil or hazardous materials. The plan describes the typical roles and responsibilities of all responders. It identifies who will be in charge of an incident. It provides guidelines for coordinating local, state, federal, industry and volunteer emergency response resources.

Oregon's Oil and Hazardous Materials Emergency Response Plan has been developed to satisfy ORS 401, 453.347, 466.620 and 469.611 and to meet the requirements of Title III Section 303 of the Superfund Amendments and Re-authorization Act of 1986.

RELATIONSHIP TO OTHER PLANS

This plan is consistent with all county and local plans submitted to the State as part of Section 303 of Title III (see Part B for list of plans) and is a hazard specific part of the Oregon Emergency Operations Plan. It is intended to be consistent with the Federal Government's National and Regional Contingency plans. It is also intended to be consistent with any LEPC developed plan. See "related resource material".

SUMMARY OF THE SYSTEM

Local governments will assume the lead role during the emergency phases of an incident while state and federal agencies will provide local government with technical support and access to hazardous materials teams during the emergency phases of an incident. State or federal agencies shall assume the lead role for directing the cleanup and site restoration. At some incidents federal agencies may request \ be requested to assume incident command and apply federal resources during emergency operations. Private industry is legally responsible for reporting the incident, performing cleanup or hiring a cleanup contractor and disposing of the spilled materials. Volunteer organizations may be requested to provide for; the basic social needs of the victims, some types of environmental cleanup, and some types of wildlife rehabilitation

Section I (cont.)

BACKGROUND

In 1986, ODOE and DEQ were directed to develop a statewide plan for responding to oil and hazardous materials emergencies. Hazardous materials include radioactive materials and waste, as well as chemically hazardous materials and waste, and communicable diseases.

Oregon's Oil and Hazardous Materials Emergency Response Plan which described in detail the State's hazardous materials emergency response system was completed and adopted by the Environmental Quality Commission in January of 1987. The Plan satisfied Oregon Revised Statutes ORS 469.611 (ODOE) and 466.620 (DEQ) and was incorporated as ANNEX O in the State's Emergency Response Plan, replacing the outdated Annex's O and P.

In October of 1986, Congress passed the Superfund Amendments and Re-authorization Act of 1986. The third section of the act, know as Title III requires local governments and industry to work together to develop hazardous materials emergency response plans. Title III also requires the state to set up a SERC to designate local emergency planning districts in the state and appoint local emergency planning committees for each district. The local committees would then develop hazmat plans that focus on chemical hazards in their district. In July of 1987, the SERC designated the entire state as a local planning district and appointed a committee of representatives from all the groups identified in Title III. The State LEPC is composed of approximately 30 members who met for the first time in September 1987 and have continued to meet on a periodic basis. The LEPC has provided guidance to local planners in the form of model local hazmat plans patterned after ANNEX O and a set of local plans review criteria, as well as policy guidance on a number of issues.

As part of its obligations under Title III, the LEPC was required to complete its hazardous materials emergency response plan by October 7, 1988. At its October 1988 meeting the LEPC adopted the existing State Hazardous Materials Emergency Response Plan, ANNEX O. The plan was adopted with the understanding that it would:

1. be revised to describe the present status of hazmat response capability in Oregon.

2. include all the local Title III plans submitted to the LEPC as supplements to the State Plan.

EXCEPTIONS: Incidents not covered by this Plan.

Nuclear Reactor accidents, which are addressed in the Oregon Department of Energy's Trojan Emergency Plan, a part of the State Emergency Operations Plan.

Military Weapons or Weapons Related Materials incidents which will be directed by the U.S. Department of Defense or Energy, with the exception of Umatilla Army Depot Activity (UMDA) which is coordinated by OEM. The ODOE will coordinate local and state assistance.

Under the National Contingency Plan (NCP) spills into Coastal Waters of the United States may be directed by the U.S. Coast Guard and spills to inland waters may be directed by the EPA. The State of Oregon response is addressed in the Oil and Hazardous Materials Spill Contingency Plan for the Oregon Coast, Columbia River, and Willamette River to Willamette Falls. (This zone includes coastal rivers to the head of tide and the Pacific Ocean to the three mile limit, the Columbia River to the Washington State border and the Willamette River to Willamette Falls.) The DEQ will coordinate state assistance to the Coast Guard if requested.

LIMITATIONS

Part A of this plan provides a framework for the State Hazardous Materials Response System. It is not meant to be a functional set of emergency procedures. Specific emergency procedures for each of the county and local planning areas (if other than Oregon LEPC) are contained in Part B of this document if submitted to LEPC. Likewise the hazard assessment portions of the plan and the pre-incident plans required by Title III are contained in the individual county and local plans in Part B. In addition, the State Fire Marshal's Office maintains a statewide computerized database of facilities and the hazardous materials that are stored in those facilities above established thresholds. That information is immediately available to emergency responders through a computerized dial-up system (HAZ-COM telephone number) and by hard copy.

PART A, SECTION II

DEFINITIONS OF KEY TERMS

Emergency Operations Center (EOC) means site from where local, state and federal agencies coordinate off-scene support to on-scene responders.

Emergency Service means those activities provided by state and local government to prepare for and carry out any activity to prevent, minimize, respond or to recover from an emergency.

Hazardous Material (Hazmat) means any element, compound, mixture, solution or substance which, when spilled or released into the air or into or on any land or waters of the state, may present a substantial danger to the public health, safety, welfare or the environment. See also OAR 340 Div. 108, ORS 453.307 (4).

Hazardous Materials Specialists mean individuals who are trained and equipped for hazardous material response. This includes trained individuals from DEQ, State Fire Marshal's Office, members of Hazmat teams and Regional Radiological Technical Assistants (RRTAs) who are trained in radiation response and certified by the Oregon Department of Energy and the Oregon Health Division.

Incident means any event, that results in a spill or release of oil or hazardous materials. Action by emergency service personnel will be required to prevent or minimize loss of life or damage to property and/or natural resources.

Incident Commander (IC) means the one individual in charge at any given time of an incident. During the emergency phases the Incident Commander will usually be an official of the local lead agency. During cleanup and restoration the Incident Commander will normally be a lead state agency official. The Incident Commander will be responsible for establishing a unified command with all on-scene coordinators when unified command is appropriate.

Incident Command Post means the location where field commands are given. The Incident Commander and the OSCs direct the on-scene response from this location.

Incident Command System (ICS) means the combination of facilities, equipment, personnel, procedures, and communications operating with a common command structure.

Lead State Agency means the agency which will coordinate state support to local government. The lead may change from one state agency to another as a particular phase of the incident ends and another begins. In all cases, the Lead State Agency will communicate with the local emergency response agencies concerning any hand-off from state to local government, and final disposition of the incident. State agency response may be telephonically, by radio, teletype or actual presence at the incident.

Oil means gasoline, crude oil, fuel oil, diesel oil, lubricating oil, sludge, oil refuse or any other petroleum-related products. (See also OAR 340-Div. 108)

On Scene Coordinator (OSC) means the individual on-scene responsible for coordinating the resources at each respective level of government. OSC's may include:

- Local On-Scene Coordinator (LOSC)
- State On-Scene Coordinator (SOSC)
- Federal On-Scene Coordinator (FOSC)

Public Information Officer (PIO) means a person designated by the Incident Commander who, in coordination with the lead state agency, provides information to the public and media.

Regional Hazardous Materials Response Team means a team of local emergency responders trained, equipped and organized to respond to oil and hazardous materials incidents in a given geographic area.

Responsible Party means the person or firm who by law is [strictly] liable for clean-up of any spill or release. PRP means potentially liable.

Radiation Emergency Response Team (RERT) is a group composed of individuals from the Oregon Health Division Radiation Control Section. This team will respond to any radioactive materials incident.

Unified Command means the method by which local, state and federal agencies will work with the Incident Commander to:

1. Determine their roles, responsibilities, and objectives for a given incident.

2. Select a strategy to achieve agreed upon objectives.

3. Deploy resources to achieve agreed upon objectives.

PART A, SECTION III

OREGON's FOUR PART EMERGENCY PREPAREDNESS PROGRAM

A. Coordinated Plans and Procedures

Oregon's Oil and Hazardous Materials Emergency Response Plan provides a description of the statewide hazmat response system and outlines the responsibilities of all those who may be involved in a hazardous materials incident. It provides for a coordinated state agency response as well as detailed plans for how each of the counties and cities in the state will respond. The plans have been reviewed for consistency and will be exercised and updated periodically as needed.

B. Trained Personnel

The goal of Oregon's hazardous materials training system is to organize and coordinate the development and delivery of cost effective, quality hazardous materials training and education opportunities for all who need training in the state. The program will consist of providing basic hazmat training to all who need it and to provide discipline specific hazmat training to identified target groups. A hazardous materials proficiency series consisting of specific qualification levels will be provided for first responders. The hazmat training program is coordinated through the State Fire Marshal's Office.

C. Regional Hazardous Materials Response Teams

To ensure a reasonable emergency response time to all parts of the state, a system of state funded regional hazardous materials response teams consisting of highly trained individuals has been developed. The teams are equipped and trained by the state and manned for the most part by individuals from local fire departments and other emergency providers. Their bases of operation are in Gresham/Multnomah Co., Portland, Tualatin Valley, Linn-Benton Counties, Eugene, Klamath Falls, Coos Bay/Douglas Co., and Redmond. Southern Oregon and eastern Oregon teams are expected in the future. (See attachment 1 for a map of the response regions which lists the team leaders and the contact telephone numbers).

D. Hazardous Materials Information

A computerized call up system has been developed by the Office of the State Fire Marshal. The system provides data on the location and type of hazardous materials stored around the state. It also provides technical information on various hazardous materials and guidance on emergency response procedures.

Other information on hazardous materials can be obtained from state and federal agencies and industry (See Section IVD, Technical Assistance).

This plan together with the information system, the training program and the regional teams is designed to insure that all emergency responders are adequately prepared for hazmat incidents.

PART A, SECTION IV

Key Elements of Oregon's Emergency Response System

A. Notifications

1. Local Notification - shall be through 9-1-1.

2. State Notification - Most incidents, depending on quantity and type, that involve oil or hazardous materials must be reported by the spiller to the Oregon Emergency Response System (OERS) 1-800-452-0311 (out of state 503-378-6377) (Refer to OAR Chapter 340 Division 108). Local agencies are also requested to notify OERS. OERS is managed by the Oregon Emergency Management Division. Depending on the type of incident the OERS duty officer will notify the appropriate lead state agency and other agencies as necessary.

3. Federal Notification - Some spills, depending on quantity and type of material spilled, also require the spiller to notify federal agencies (40 CFR Part 302, Table 302.4). Notification shall be through the National Response Center (NRC) 1-800-424-8802. The NRC is managed by the U.S. Coast Guard.

4. Hazmat Team Notification - Incidents which cannot be controlled by local resources may require the services of a Hazmat Response Team. Notification may be made through OERS.

B. Statewide Emergency Communications

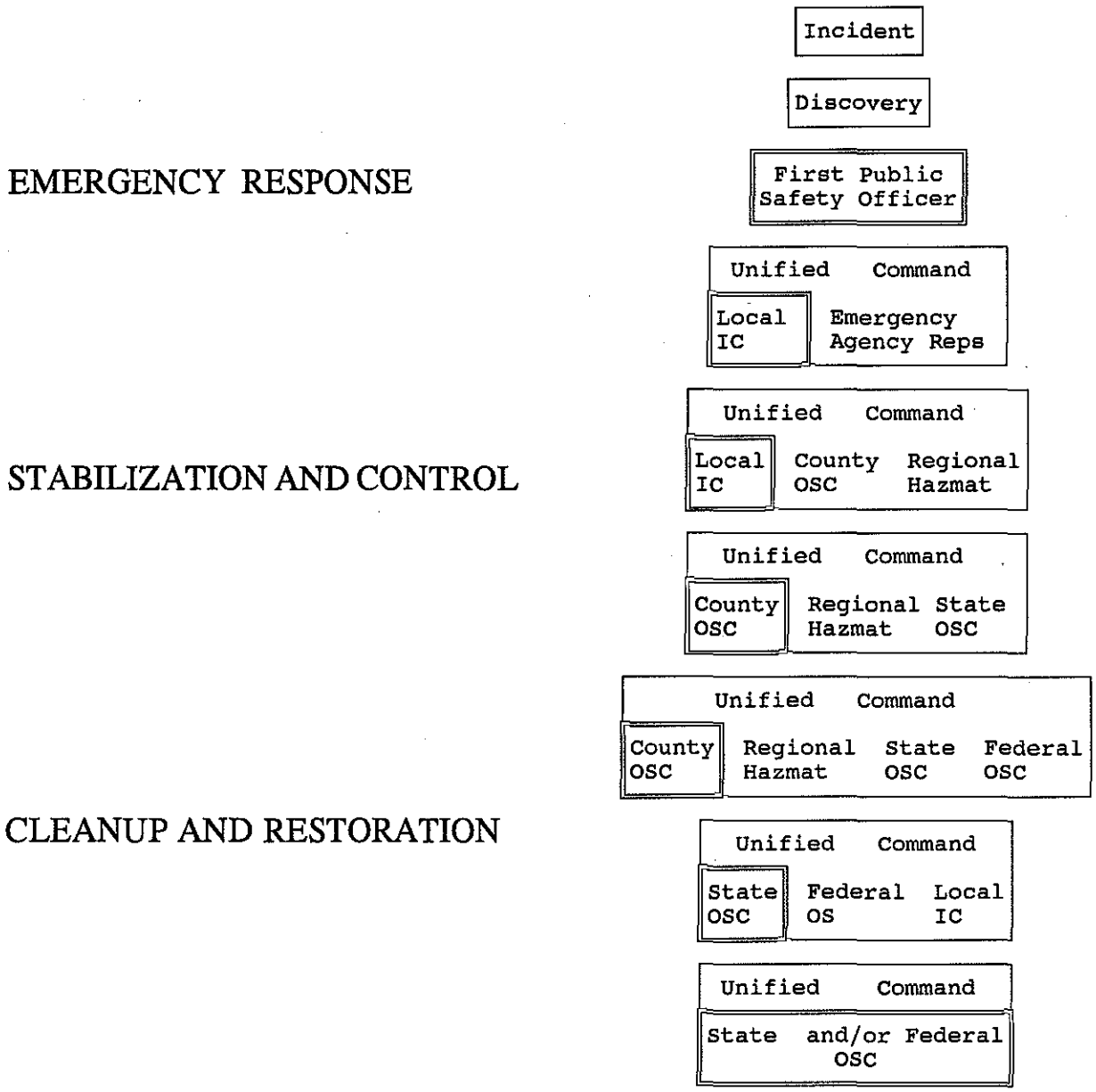
Oregon FIRE NET (VHF frequency 154.280 MHZ) provides a statewide communications network dedicated to assist Oregon's fire services and participating state agencies in coordinating response to fire related activities, response to hazardous materials incidents, and Governor-declared emergencies. It is coordinated by the State Fire Marshal's Office and operated by the Emergency Management Division.

C. Incident Management

1. Emergency Response - A hazardous material incident may involve a variety of local, state, federal and private sector resources. No single agency will have the necessary resources to carry out all response activities. In addition, there may be overlapping authorities and responsibilities. Because speed is so important during an emergency, coordination among the responding agencies is essential. A centralized command structure will be needed. (See Figure I)

Figure 1. INCIDENT MANAGEMENT

The following diagram depicts the command structure described in Section IV.B. The double outlined box indicates the Incident Commander. The local on-scene coordinator (LOSC) would be the Incident Commander (IC) unless otherwise designated. For a minor incident this structure may not proceed beyond the fourth box. For a major incident the command structure builds during the emergency phase as various agencies and levels of government arrive on scene. The structure decreases as the incident is controlled.



Section IV, Part C. 1. Emergency Response (continued)

a. Incident Command

The first public safety official on scene will assume incident command. The person will:

(1) Assess the situation.
(2) Activate the local emergency response system.
(3) Initiate actions to protect the public.

b. Local Incident Command

The lead local emergency response agency predesignated in local plans shall:

(1) Assume incident command upon arriving on scene.
(2) Designate a local on-scene coordinator (LOSC) for local resources.
(3) Establish an appropriate incident command post.
(4) Be in charge of and responsible for all emergency response operations. (See Sections 5B and 7B).

c. Unified Command

The Incident Commander will also set up a unified command system if more than one level of government is involved. All on-scene coordinators (OSCs) shall have a representative at the command post who will work with the Incident Commander. (See Figure 1).

d. Change of Command

Incident Command will remain at the local level until emergency operations which include stabilization and control activities are completed unless:

(1) The local resources are overwhelmed and the Incident Commander requests one of the other on-scene coordinators to assume control.

(2) The incident occurs in areas of federal jurisdiction, such as defense installations or United States waters, in which case, the federal government will be the Incident Commander. (Section 105, CIRCLA).

(3) If necessary, Oregon statute grants the Governor authority to assume command of emergency operations (ORS469.671 and ORS401.115)

Section IV, Part C (cont.)

2. Stabilization and Control

Under most circumstances, the incident command will remain at the local level during the stabilization and control phase of a response. If requested, a state or federal agency could assume control. Several levels of government may be involved in this phase. The Incident Commander and OSCs are expected to work within a unified ICS.

3. Cleanup and Restoration

a. State Incident Command

Once the emergency is over, local responders expect to return to normal duties. At a mutually agreed upon time, the local Incident Commander would usually turn command over to the lead state agency who will then direct cleanup and restoration. Local agencies may need or choose to remain involved. Command could remain at the local level, however if a local government undertakes or contracts for cleanup. They may be held responsible for costs.

Cleanup and restoration activities include:

(1) Compliance with cleanup standards
(2) Restoration of environment and site
(3) Investigation of cause
(4) Assessment of damages
(5) Enforcement actions
(6) Cost recovery

b. Federal Command

The federal on-scene coordinator (FOSC) could also assume command if requested by the state or if the incident occurs in an area under federal jurisdiction (See 1,d above).

D. Emergency Operations Centers (EOCs).

During major incidents, the heads of local and state agencies will meet at EOCs to coordinate their off-scene support to on-scene operations. The federal government can activate the Regional Response Team (RRT) to coordinate federal off-scene support. The RRT is composed of representatives from all affected federal agencies and states in the region.

Section IV, Part D, EOC's (cont.)

1. The local EOC will be activated by the head of local government in coordination with their emergency manager.

2. The State EOC will be activated by the Governor or by the Administrator of the Emergency Management Division in coordination with the state OSC. The State EOC is located at the Oregon Emergency Management Division office at 595 Cottage Street NE in Salem.

3. The Federal Regional Response Team (RRT) will be activated by the chairman of the RRT when there is a major incident or upon request from the FOSC or a member of the RRT. The Regional Response Team is based in Seattle.

E. Technical assistance.

Assistance from state and federal agencies will be provided to on-scene responders. It would usually be in the following sequence:

1. By the lead State Agency who will contact the local Incident Commander.

   Lead State Agencies are:

   DEQ - for oil and chemically hazardous materials incidents. Can provide information on chemical characteristics, environmental effects, control,cleanup and disposal of hazardous materials. (For details, see page 21) Contact through OERS at 1-800-452-0311.

   OHD - for all incidents involving hazards to human beings and for all communicable disease agents. Can provide information on public health effects of hazardous materials including chemical, radiological, physical and biological hazards. (See page 23) Contact through OERS at 1-800-452-0311.

   ODOE - for radioactive materials transportation incidents (See page 22) Contact through OERS at 1-800-452-0311.

   SFM - For information and guidance on the presence and quantities of hazardous materials at fixed sites, characteristics and hazards of the materials and appropriate control techniques. (For details, see page 21) Contact through OERS at 1-800-452-0311.

Section IV, Part E

2. By Other State Resources

a. The Poison Control Center at 1-800-452-7165 outside Portland or 225-8968 in the Portland area provides 24 hour toxicological information and medical treatment advice to on-scene responders.

b. The Pesticide Analytical Response Center (PARC) at 378-3793 provides information on pesticide related health (not treatment related) and environmental exposure from drift or contaminated water. Contact through OERS after hours, 1-800-452-0311.

c. The Public Utility Commission for information on motor carrier and rail shipments of hazardous materials at 378-6204. Contact through OERS after hours, 1-800-452-0311.

3. By locally available specialists.

This includes Hazardous Material Specialists and Regional Radiological Technical Assistants.

4. By Regional Hazardous Materials Response teams who have access to extensive computer and print libraries on hazardous materials and control methods.

5. By the State Radiation Emergency Response Team.

6. By Federal specialists.

a. For incidents involving radioactive materials, response teams may be dispatched from the US Department of Energy, Richland Operations, or from adjacent states. The Oregon DOE or Health Division will activate this help.

b. For oil or hazardous materials spills on U.S. waters, in the coastal zone, the US Coast Guard will respond directly. It will provide the Federal OSC and the Incident Commander. For spills on inland waters, the EPA may provide an OSC and Incident Commander. The state will notify the Coast Guard and EPA of all spills on U.S. waters. The lead state agency will coordinate state support and provide technical assistance to the Federal OSC. Local agencies will provide emergency functions such as fire suppression and emergency medical help. Hazmat Teams will provide limited assistance upon request. Contact through the National Response Center at 1-800-424-8802.

Section IV, Part E Technical Assistance (cont.)

c. For technical advice about the effects of specific materials on public health, the Agency for Toxic Substances and Disease Registry provides 24 hour service at 1-404-452-4100.

d. Several agencies within the Federal government can also provide technical support for both inland and coastal spills (see Section V).

F. Special Technical Assistance.

For certain types of hazardous materials incidents assistance is available from industry:

1. CHEMTREC is an off-scene 24 hr. emergency information service operated by the Chemical Manufacturers Association Chemical Transportation Emergency Center. 1-800-424-9300. CHEMTREC can supply chemical and safety data as well as contacts to product manufacturers. It can activate a number of industry based response actions including:

a. The CHLOREP team for chlorine incidents which is currently fielded by the Atochem Corporation in Portland (228-7655).

b. CHEMNET - An industry-wide mutual aid program activated by the shipper.

c. Response teams for Pesticides, Hydrogen Cyanide, Hydrogen Fluoride, Phosphorus and Liquified Petroleum Gas.

2. The Association of American Railroad's Bureau of Explosives for incidents involving the railroads. 1-800-826-4662 (24 hrs.)

3. Clean Rivers Cooperative, a nonprofit organization of petroleum companies which contracts to control and cleanup oil spills on the lower Columbia and Willamette Rivers.

G. Volunteer Services.

1. American Red Cross - can offer emergency relief in the form of food, shelter and clothing. (See phone book for nearest office).

2. Salvation Army - can provide emergency food, shelter and clothing. (See phone book for nearest office).

Section IV, Part G Volunteer Services (cont.)

3. Amateur Radio Emergency Service - can provide radio communications through a network of amateur radio operators. Contact through local emergency services director/coordinator.

4. Other locally available volunteer services.

H. Coordination of Public Information

The news media can provide an important public service by distributing information about the nature of an incident. Successful emergency operations require accurate and timely public information. Public information will be coordinated between on-scene and off-scene operations. A Public Information Officer (PIO) will be designated by the Incident Commander to issue information about the incident. The PIO will issue information provided by the Incident Commander and in coordination with the lead state agency information representatives. The lead state agency will see to it that the PIO has accurate public health information. The lead state agency will issue information in coordination with the PIO.

I. Financial Assistance

FEDERAL ASSISTANCE

Financial assistance to local governments for performing temporary emergency measures needed to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance, pollutant or contaminant is available under section 123 of CERCLA. EPA has published a regulation under 52 CFR 39396.

Financial assistance to state and local governments for oil spill response related expenses is available under the Federal Oil Pollution Act of 1990. Procedures for collection are being finalized by the US Coast Guard.

STATE ASSISTANCE

Abandoned Chemicals - The Oil and Hazardous Materials Fund may be used by DEQ to contract for emergency removals of materials presenting public health and environmental risk if the owner, property owner, or responsible party is unable to act. This assistance may be on a cost reimbursement basis.

Section IV, Part I Financial Assistance (cont.)

Drug Lab Chemicals - DEQ's Drug Lab Cleanup Fund (requests must come through a law enforcement agency).

Financial reimbursement is also available through the State Fire Marshal's Office for Hazmat Team response within the terms of the response contract.

SECTION V

Responsibilities of Local, State and Federal Agencies, Industry and Volunteer Organizations

A. Specific responsibilities of Local and Regional Responders.

1. Local Agencies

a. Provide personnel who have been trained in Hazmat emergency response.

b. Provide an Incident Commander and establish a command post. Establish a unified command with other government agencies depending on the incident. Activate the local EOC as appropriate.

c. Undertake emergency response actions including:

- Incident Verification
- Notifications
- Initial hazard determination
- Initial measurements to detect concentrations of materials if possible
- Communications
- Life-saving/rescue
- Emergency medical care
- Fire Fighting
- Security (site perimeter, traffic and crowd control)
- On-scene liaison with other parties
- Providing public information
- Evacuation
- Shelter
- Pet and Livestock Care
- Designate Local OSC

These activities are generally shared among local fire, law enforcement, emergency medical, public works, health departments, etc. Refer to PART II of this document for the individual county and local plans.

Section V, (cont.)

2. Regional Hazmat Response Team, RRTA's and Hazmat Specialists.

Under the direction of the Local Incident Commander, and as appropriate in communication with the lead state agency(s), these specialists verify or help establish the following:

- Spill containment.
- Hazard determination.
- Measurements of concentrations of materials.
- Contamination control.
- Control of exposure for emergency workers and the public.
- On-scene liaison.
- Initial decontamination (if necessary).
- Environmental protection measures.
- Support to hospital emergency room (if possible and necessary) for contamination control.

B. Specific Responsibilities of State Agencies

Primary Coordination Agencies

1. Oregon Emergency Management Division (OEM)

a. Maintains 24-hour notification and coordination capability through OERS

b. Notifies lead state agency, other notifications made as needed or upon request

c. Activates, operates and maintains the State's Emergency Operations Center.

d. Provides and/or coordinates state-wide communications systems.

2. Oregon State Police (OSP)

a. Acts as initial Incident Command Agency until local command agency is on scene, or if no local agency is available.

b. Provides law enforcement support including traffic control.

Section V, Part B (cont.)

Primary Response Agencies for Oil and Hazardous Materials

1. Department of Environmental Quality (DEQ)

Provides technical assistance during oil spills and hazardous materials incidents, particularly related to the clean-up phase of the operation.

- Receives notification via OERS.
- Provides technical assistance and advises on necessary protective actions.
- Evaluates the environmental implications of a spill, in coordination with OHD, evaluates possible public health effects.
- Coordinates state support to on-scene personnel in cooperation with OEM.
- Coordinates public information with local PIO.
- Liaison with federal agencies, adjacent states, private industry (shippers, carriers, etc).
- Collects and analyzes water, soil, vegetation or tissue samples.
- Identifies clean-up requirements.
- Works with industry to insure that clean-up/ restoration is done to specified standards.
- If necessary, coordinates with the Governor to exercise the Governor's authority to protect health, safety and the environment.
- Insures that materials are disposed of in appropriate manner.
- Investigates causes and pursues enforcement action.
- Assesses environmental damage.

2. Office of the State Fire Marshal (SFM)

- Provides technical assistance during the initial phases of the incident, including information on materials stored at sites.
- Receives notification via OERS.
- Provides technical assistance and advises on necessary protective actions.
- Authorizes dispatch of Hazmat Regional Response Teams.
- In cooperation with DEQ, considers the environmental implications of spill and control measures.
- In cooperation with OHD and PCC, evaluates possible health effects.
- In cooperation with DEQ and OEM, arranges state agency support to on-scene personnel.
- In cooperation with DEQ, supports dissemination of public information with the local PIO.

- Provides training and planning assistance to fire service agencies, local and state agencies, and other first responders.
- Acts as a liaison with federal agencies, adjacent states, private industry (shippers, carriers, etc).
- Arranges for fire service response to on-scene operations when the Conflagration Act is initiated through the Governor.
- Through field deputies, provides communications, logistics and other support to the local Incident Commander.
- Provides fixed site information on oil and hazardous materials from the Hazardous Materials Data Base.
- Maintains a Hazardous Materials Incident Reporting System.
- Maintains a Fire Service Hazmat Equipment Resource Directory.
- In cooperation with OEM, maintains hazardous materials incident communications through the FIRE NET radio system.

Primary Response Agencies for Radiation Incidents

1. Oregon Department of Energy (ODOE)

a. Is the Lead State Agency for transportation emergencies involving radioactive materials.

- Provides training, drills and exercises.
- Coordinates the distribution of radiation detection equipment.
- Provides coordination of plans and procedures.

b. Acts as Lead State Agency during a transportation specific radiation emergency.

- Receives notification via OERS.
- Assumes the role of Lead State Agency.
- Provides technical assessment and protective action recommendations.
- In cooperation with OEM, coordinates state support operations to on-scene personnel.
- Coordinates release of public information with local PIO.
- Provides liaison with federal agencies, adjacent states, private industry (shippers, carriers, etc).
- Insures that clean-up/restoration from incidents is done to specified standards.
- If necessary, coordinates with the Governor to to exercise the Governor's authority to protect health, safety and the environment.

Section V, Part B (cont.)

2. Oregon Health Division (OHD)

Is the Lead State Agency for radiation emergencies involving fixed sites.

- Receives notification via OERS.
- Assumes the role of Lead State Agency.
- Provides technical assessment and advises on necessary protective actions.
- Coordinates public information with local PIO.
- Provides liaison with federal agencies, adjacent states, private industry (shippers, carriers, etc)
- Insures that clean-up/restoration from a radiation incident is performed.
- Investigates cause.
- Assesses damage.
- Coordinates mortuary services.

State Agencies Capable of Providing Specific Expertise

1. Oregon State Highway Division (OSHD)

a. Notifies OERS and local emergency response agencies if OSHD is first on the scene.

b. Closes state highways and re-routes traffic when requested and necessary.

c. Provides personnel and barricades to implement a closure and detour.

d. Will direct spiller to start immediate clean-up if incident occurs on state highways.

2. Oregon State Parks and Recreation Department (OSPRD)

a. Notifies OERS and local emergency response agencies if first on the scene.

b. For an incident affecting a state park, ocean shore, or state scenic waterway OSPRD personnel assist other agencies in crowd/traffic control and provide equipment and facilities as available.

3. Oregon Department of Fish and Wildlife (ODFW)

a. Notifies OERS and local emergency response agencies if first on the scene.

Section V, Part B, ODFW (cont.)

b. Responds to incidents that could degrade land or water to the point that fish or wildlife would be adversely affected, or their habitat degraded or destroyed.

c. Evaluates and documents the impact on fish and wildlife and assesses monetary damages against the responsible party for losses of fish, wildlife or habitat.

d. Provides advice, counsel, and logistical support to other agencies as available.

4. Oregon Department of Forestry (ODF)

a. Notifies OERS and local emergency response agencies if first on the scene, or upon receiving a report from a forest operator.

b. In emergency response situations, ODF personnel act as first responders, awareness level as defined by Oregon OSHA rules.

c. Ensures that an operator/landowner takes initial remedial action on pesticide and oil spills if the spill occurs on lands regulated under the Oregon Forest Practices Act, and will communicate subsequent clean-up direction to operators as provided by the DEQ.

d. If requested by the Lead State Agency, the ODF is capable of mobilizing a substantial response organization to provide support to emergency responders (radio systems, dispatch and command center trailers, public information personnel, kitchens and other support services).

e. ODF will respond directly as a landowner to any incident on lands managed by the ODF.

5. Public Utility Commission (PUC)

The PUC has specific responsibilities related to motor carrier, railroad and air transportation incidents. PUC will investigate transportation incidents after the scene has been stabilized.

6. Oregon Department of Agriculture (ODA)

a. Provides some technical information on pesticides and fertilizers.

b. Evaluates the adverse impact of an accident on agricultural resources (crops and dairy products).

c. Provides laboratory analysis capability.

7. Oregon Occupational Safety and Health Agency (OR-OSHA)

OR-OSHA investigates injuries and fatalities.

8. Oregon Military Department (OMD)

OMD comprises both Army and Air National Guard units assigned to the State of Oregon. In a major incident OMD could provide site security, administer first aid, care for evacuees, transport personnel, and assist in the recovery, identification and disposition of the deceased.

9. Oregon State University (OSU)

a. Provides training in toxicology, chemistry and other technical fields related to hazardous materials.

b. OSU can provide a wide variety of expertise on a non-emergency basis.

c. Operates the Extension Toxicology Network and the Oregon Toxicology Information Center which can provide specific toxicological information. This service can be accessed through PARC.

C. Specific Responsibilities of Federal Agencies

Technical assistance for oil spills and hazardous material incidents is available from a variety of Federal Agencies. The following section briefly summarizes their roles as outlined in the National Contingency Plan.

Primary Federal Agencies

1. The United States Coast Guard (USCG) provides:

a. Expertise and management of Federal Programs in domestic/international fields of port safety and security, maritime law enforcement, ship navigation, safety of vessels and marine facilities. b) Pre-designated federal on-scene coordinator (FOSC) for the coastal zone if a federal response is required.

b. Continuously manned facilities which can be used for command, control, and surveillance of oil discharges and hazardous substance releases occurring in the coastal zone.

2. The Environmental Protection Agency (EPA) provides:

a. Expertise on environmental effects of oil discharges or releases of hazardous substances, pollutants, or contaminants and environmental pollution control techniques.

b. Predesignated on-scene coordinator (FOSC) for the inland zone if a federal response is required.

c. Scientific support coordinator for responses in inland areas.

3. The Department of Defense (DOD) assumes incident command if an incident involves defense related materials It acts as the lead response agency within the designated National Security Area.

4. The Department of Energy (USDOE) provides assistance to the FOSC and Incident Commander during radiation incidents. Help is available from their Richland Operations Office.

Other Federal Agencies

1. The Department of Transportation (DOT) offers expertise in the requirements for packaging, handling and transporting regulated hazardous materials.

2. The Department of Agriculture (USDA) provides expertise in managing agricultural, forest, and wilderness areas. USDA's Soil Conservation Service provides predictions of the effects of pollutants on soil and their movements over and through soil.

3. The Department of Commerce (DOC), through National Oceanic and Atmospheric Administration (NOAA), provides:

a. Scientific expertise on living marine resources and their habitats.

b. Scientific Support Coordinator (SSC) who will coordinate scientific support for responses and contingency planning in coastal and marine areas. They can assess hazards that may be involved,

predict movement and dispersion of oil and chemicals through trajectory modeling and provide information on sensitive coastal environments.

c. Information on actual and predicted hydrologic, and oceanographic conditions for marine, coastal, and inland waters. They can provide charts and maps, including tide and circulation information for coastal and territorial waters and for the Great Lakes.

d. Information on actual and predicted meteorological conditions through the National Weather Service.

4. The Army Corps of Engineers has specialized equipment and personnel for maintaining navigation channels, removing navigation obstructions and maintaining hydroelectric facilities.

5. The U.S. Navy is knowledgeable in ship salvage, shipboard damage control and diving. It has an extensive array of specialized equipment and personnel that can be used for collection, containment and removal of pollution materials.

6. The Department of Health and Human Services (HHS) is responsible for providing assistance on all matters related to the assessment of health hazards at a response, and protection of both response workers and the public's health. Includes the Agency for Toxic Substances and Disease Registry (ATSDR) which provides advise to health care providers in cases of public health emergencies and coordinates assistance from the Center for Disease Control (CDC), NIOSH and the FDA.

7. The Federal Emergency Management Agency (FEMA):

a. Provides advice and assistance to the OSC on coordinating civil emergency planning and mitigation efforts with other federal agencies, state and local governments, and the private sector.

b. In the event of a major disaster declaration or emergency determination by the President, FEMA will coordinate all federal disaster or emergency actions with the FOSC.

8. The Department of the Interior (DOI) has jurisdiction over the National Park System, National Wildlife Refuges and Fish Hatcheries, forest and grazing lands, and certain

water projects in western states. In addition, bureaus and offices have relevant expertise as follows:

a. Fish and Wildlife Service: Fish and wildlife, including endangered and threatened species, migratory birds, certain marine mammals; habitats, resource contaminants; laboratory research facilities.

b. Geological Survey: Geology, hydrology (groundwater and surface), and natural hazards.

c. Bureau of Land Management: Minerals, soils, vegetation, wildlife, habitat, archeology, wilderness, hazardous materials, etc.

d. Minerals Management Service: Manned facilities for Outer Continental Shelf oversight.

e. Bureau of Mines: Analysis and identification of inorganic hazardous substances.

f. Office of Surface Mining: Coal mine wastes, land reclamation.

g. National Park Service: Biological and general natural resources expert personnel at Park units.

h. Bureau of Reclamation: Operation and maintenance of water projects in the west; engineering and hydrology; and reservoirs.

i. Bureau of Indian Affairs: Coordination of activities affecting Indian lands.

j. Office of Territorial Affairs: Assistance in implementing the National Contingency Plan in American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

9. The Department of Labor (DOL), through the Occupational Safety and Health Administration (OSHA), provides the OSC with advice, guidance, and assistance on:

a. Hazards to workers involved in removal or control of oil discharges and hazardous materials releases.

b. The precautions necessary to reduce risk to worker health and safety.

D. Responsibilities of Indian Nations

Indian tribes have sovereign governmental powers within federally recognized reservations. If resources are available they will respond to incidents that occur on their reservations. The tribes should familiarize themselves with this plan and make their plan consistent with state and local plans.

a. Confederated tribes

Warm Springs	Police Chief	553-1161
	BIA	553-1121
Umatilla	Police Chief	278-0550
	BIA	276-3811
Siletz		444-2679
		444-2532
Burns-Paiute		573-2088
		573-2793
Grand Ronde		879-5215
Cow Creek-Band of the Umpauas		672-9405
		839-4635
Coos Bay		746-2265
		267-5454
Chemawa Indian School		399-5721
		399-5755

E. Responsibilities of Adjacent States

The agencies responsible for hazardous material incidents in Idaho, Washington, Nevada and California are:

1. Washington

   a. Department of Ecology - lead state agency for spill response and cleanup. (206) 459-6803.

   b. Department of Emergency Management - lead agency for notification and coordination. (206) 753-5990 out of state or 800-262-5990 in state.

Section V, (cont.)

2. Idaho

a. Division of Environment - lead state agency for coordination of spill response. (208) 334-5879.

b. Emergency Medical Services - lead agency for notification. 24 hour number: (800) 632-8000 in state or (208) 334-2241 out of state.

3. California

a. Office of Emergency Services - lead agency for notification and coordination. (800) - 852-7550 in state, (916) 427-4341 out of state.

b. California Highway Patrol - lead state agency for response to incidents on all freeways and state owned highways. (916) 445-2211.

4. Nevada

a. Division of Emergency Management - lead state agency for notification and coordination. 24 hour number (702) 885-5300. Day number (702) 885-4240.

b. Divisions of Environmental Protection - lead state agency for hazardous materials incidents (702) 885-5872.

F. Responsibilities of Industry

1. Title III Section 303 of SARA requires private industry to work with the state and local governments to plan for hazardous materials incidents that could occur at their facilities. Private industry is responsible for seeing that their emergency operations plans are consistent with this plan and with local plans. To facilitate this coordination, industry has sponsored local planning groups known as CAER (Community Awareness and Emergency Response) committees in a number of areas in the state.

2. Private industry is responsible for responding to emergencies as required by law unless otherwise directed by the government agency with jurisdiction to enforce the applicable law. Private industry is responsible for cleanup and site restoration when required to do so by law (or when industry in its discretion decides to do so).

Section V, Part F, (cont.)

3. When requested and if possible, private industry will provide expertise and resources to local and/or state government to help mitigate the effects of a hazardous materials incident. Private clean-up contractors can provide resources, equipment and knowledge on the removal and disposal of contamination.

G. Volunteer Organizations

Volunteer organizations such as Red Cross, the Salvation Army and Amateur Radio Operators can provide public assistance in the form of food, clothing, shelter and communications during incidents where the public welfare is affected. Refer to the County and Local Plans in PART II of this document for details on volunteer capabilities. Refer also to the individual plans of the volunteer agencies in their respective geographic area.

SECTION VI

Categorization of Emergencies by Severity

The following section categorizes oil and hazardous materials incidents by the severity of the threat to public health or the environment. Five types of emergencies are defined by increasing severity. The actual severity of an incident is dependent on the amount of material spilled, the location, the toxicity of that material and potential for exposure. Thus a spill involving thousands of gallons of a material with low toxicity could be a minor incident if it poses no public health or environmental threat. On the other hand, a small spill of an extremely toxic material, or a spill in a very sensitive location, could be a major incident if people are exposed or the environment is severely threatened.

The type and level of emergency response is dependent on the severity of the incident. These are described below. Section VII depicts the responsibilities of the various responders and the activities that must be performed during each of the 5 types of incidents.

Types of Incidents

A. Unusual Incident

An event which is out of the ordinary. No oil or hazardous materials are released. Public health and safety may be threatened.

Examples:

1. Mechanical breakdown of a vehicle carrying high-level radioactive shipment, Class A explosives or highly toxic materials requiring it to be parked at one location for a long period of time.

2. Fire at a facility storing or utilizing hazardous materials. The materials not initially involved in the fire.

3. Abandoned drums discovered, no release.

B. Minor Incident

An incident involving the spill or release of a small amount of oil or hazardous materials. Public health, safety and environment are not immediately threatened. A potential exists for the incident to escalate.

Examples:

1. Vehicle or fixed site incident with a small spill or release of oil or hazardous materials.

2. Discovery of abandoned oil or hazardous materials with a small spill or release of products.

3. Vehicle accident with a potential release of radioactive materials.

4. Fire or explosion involving small quantities of oil or hazardous materials.

C. Medium Incident

An incident resulting in a localized release of oil or hazardous materials (i.e., within several hundred feet). The health and safety of people and emergency workers in the immediate area may be threatened if protective actions are not taken. A probable environmental impact exists. It may involve activation of the Oregon Emergency Operations Plan.

Example:

1. Accident involving transport of oil or hazardous materials which results in release of substance to air, ground or water in amounts sufficient to pose threat to public health or the environment.

2. Package or container containing radioactive materials crushed or damaged during handling.

3. A fire or explosion at a facility which utilizes hazardous material.

4. An incident which results in a significant amount of uncontrolled radioactive material.

5. Discovery of abandoned oil or hazardous materials being released to environment and posing a threat to public health or the environment.

D. Major Incident

An incident resulting in a spill or release of oil or hazardous materials which requires evacuation or sheltering of nearby residents or businesses or which causes a serious environmental threat. It will probably involve activation of the Oregon Emergency Operations Plan.

Section VI, Part D (cont.)

Example:

1. Truck, rail or fire incident with radiologically contaminated smoke or toxic fumes.

2. Shipping accident resulting in a large release of oil or hazardous materials to a waterway.

3. Radioactive material directly involved in fire or explosion at a fixed facility, resulting in spread of material, or significant accidental exposure to radiation.

4. A fixed facility or transport incident resulting in a major release of toxic fumes to air or hazardous materials to public waters used for drinking water or important to fish and wildlife or other beneficial uses. Results in serious public health and/or environmental impacts.

E. Security Incident

Threatened or actual sabotage or demonstration of civil disobedience. Security events are further classified as follows:

1. Blockage of a shipment of hazardous materials.

2. Threatened or actual sabotage to the shipment.

SECTION VII

Response Activities Dependent on Incident Severity

The severity of an incident directly affects:

A. The kind of response that is needed.

B. The number of agencies and levels of government that must respond.

C. The roles and responsibilities of those that do respond.

A minor incident may involve only local government emergency responders and a simple command organization. A major incident may involve many responders from different levels of government who can provide specialized expertise or resources. Such an incident requires a unified command structure. An incident may escalate into a major one or decrease to a minor one as more information becomes available about its severity.

The following section takes each of the 5 types of incidents and depicts the incident management structure and the typical roles and responsibilities of the various responders.

D. Typical Roles and Responsibilities

1. UNUSUAL INCIDENT

An event which could or does involve hazardous materials. No materials are released but a potential public health and safety threat exists. The situation would normally be handled by local emergency response crews with standard emergency equipment. If the situation escalates, outside assistance might be needed.

Roles and Responsibilities

On Scene	Off Scene
RESPONSIBLE PARTY - Notified 9-1-1 - Acts to resume normal operations	RESPONSIBLE PARTY - Acts to resume normal operations
LOCAL AGENCIES - Assures public safety - Assists responsible party - Coordinates public information	LEAD STATE AGENCY(S) -Assists responsible party and provides technical if needed.

2. MEDIUM INCIDENT

An incident resulting in a localized spill or release of oil or hazardous materials (i.e., within several hundred feet). The health, and safety of people and emergency workers in the immediate area may be threatened if protective actions are not taken. A probable environmental impact exists. It may involve activation of the Oregon Emergency Operations Plan. The situation will require state technical assistance and a Regional Hazmat team which can provide specialized equipment and expertise.

Roles and Responsibilities

On Scene	Off Scene
FIRST PUBLIC SAFETY OFFICER	LOCAL EMERGENCY MANAGEMENT
- Notifies 9-1-1 - Assumes initial command	- Provides support to on scene operations
- Assesses the hazard - Activates local emergency response system - Initiates actions to protect the public	- Sets up EOC if necessary
LOCAL INCIDENT COMMANDER - Assumes command upon arriving on scene - Responsible for: - rescue - emergency medical - fire suppression - security (traffic/crowd control)	RESPONSIBLE PARTY - Provides operational support - Provides information about materials
- notifications - communications - on-scene liaison - public information - hazard determination - initial protective actions - decontamination control	LEAD STATE AGENCY - Provides technical support to incident commander if necessary - Coordinates with local agencies to provide public information - Coordinates with responsible party to assure cleanup - Contracts for cleanup if no responsible party
RESPONSIBLE PARTY - Notifies OERS and NRC (if necessary) - Provides support to Incident Commander - Cleans up or contracts for cleanup - Acts to resume normal operations	

3. MAJOR INCIDENT

An incident resulting in a spill or release of oil or hazardous materials that requires the evacuation or sheltering of nearby residents or businesses or that is a serious environmental threat. It will probably involve activation of the Oregon Emergency Operations Plan. The situation will require state technical assistance, a Regional Hazmat Team, and if needed, Federal assistance.

Roles and Responsibilities

On Scene	Off Scene
FIRST PUBLIC SAFETY OFFICER - Notifies 9-1-1	LOCAL EMERGENCY MANAGEMENT
- Assumes initial command	- Provides support to on scene operations
- Assesses the hazard	
- Activates local emergency response system	- Set up EOC if necessary
- Initiates actions to protect the public	RESPONSIBLE PARTY
LOCAL INCIDENT COMMANDERS	- Provides operational support to on-scene responders
- Assumes command upon arriving on scene	- Provides information about materials
- Responsible for: rescue emergency medical fire fighting	LEAD STATE AGENCY - Provides technical support to Incident Commander if necessary
security (traffic/crowd control)	- Coordinates with local agencies to provide public information
notification communications	- Coordinates with responsible party to assure cleanup
on-scene liaison public information hazard determination initial protective actions decontamination control	- Contracts for cleanup if no responsible party.
	STATE EMERGENCY MANAGEMENT - Provides support to on scene operations if needed - Activate state EOC if needed

RESPONSIBLE PARTY

- Notifies OERS and NRC (if necessary)
- Provides support to Incident Commander
- Clean up or contracts cleanup
- Acts to resume normal operations

LOCAL HOSPITAL

- Treats injured
- Maintain contamination control procedures

5. SECURITY INCIDENT

Threatened or actual sabotage incident or a civil disobedience or demonstration event are further classified as follows. The situation would normally involve local emergency response crews and law enforcement agencies.

Roles and Responsibilities

On Scene

LOCAL AND STATE LAW ENFORCEMENT

- Responsible for:
  notifications
  protection of shipment
  crowd and traffic control
  guidance for unnecessary delay
  liaison with shipper
  (defense related)

RESPONSIBLE PARTY

- Supports law enforcement

Off Scene

LEAD STATE AGENCY

- Provides technical assistance to law enforcement agencies about nature of shipment

Threatened or Actual Sabotage to Shipment or Material

LOCAL AND STATE LAW ENFORCEMENT

- Responsible for:
  notifications , (including OERS)
  protection of shipment
  investigation and arrests of saboteurs
  avoidance of unnecessary delay with federal law enforcement agencies

LOCAL INCIDENT COMMANDER

- Responsible for on-scene operations as necessary and possible
  Initiates emergency response plan

LEAD STATE AGENCY

- Technical assistance to on-scene operations

- Initiates state emergency response plan (if necessary)

PART B

Reserved space for County and City Title III Plans

copies of these plans are available
from the LEPC and can be requested
through the Office of State Fire Marshal

Attachment C
Agenda Item ___
9/19/91 meeting

HISTORY OF THE PLAN

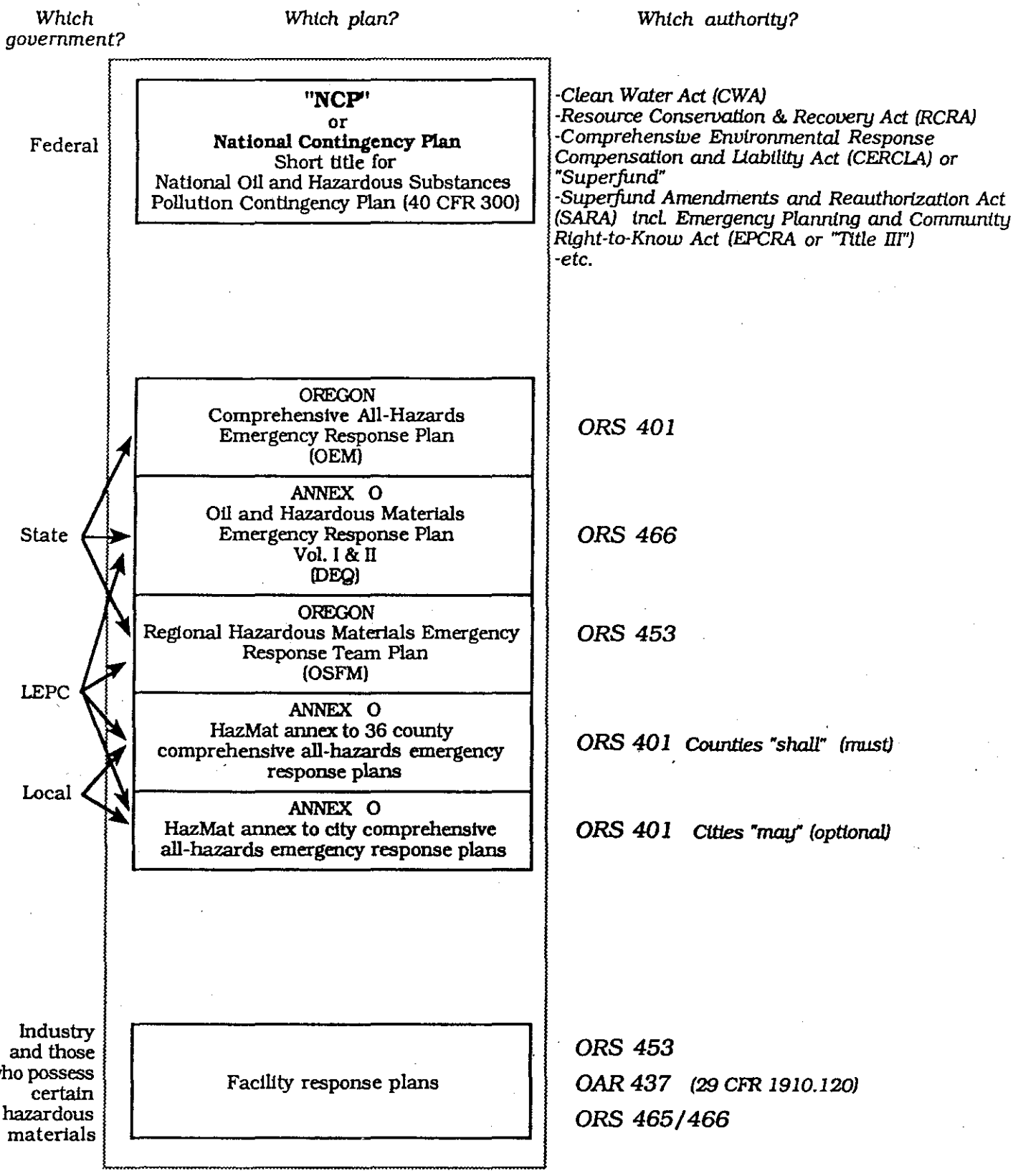
The revised Oil and Hazardous Materials Emergency Response Plan (OHMERP) is only one part in a set of plans maintained by the Executive Department's Emergency Management Division (EMD). Emergency plans of this format covering a variety of possible disasters were developed in 1984. Early emergency plans by the state agencies (developed while acting as the Hazardous Materials Emergency Response Council) evolved into the annex-o of the Oregon Emergency Operations Plan. The Environmental Quality Commission (EQC) was directed by the legislature (ORS 466.620) to review and approve the plan in 1985.

Important improvements over previous plans at that time included clarification of agency roles, and information about how to best use the plan. One of the issues addressed by annex-o was the need for proper training of emergency responders. This need has been focused on by the Office of the State Fire Marshal (OSFM). The OSFM received authority from the 1989 legislature to establish a network of Hazardous Materials Response Teams (Haz-Mat Teams). This network is nearly complete. The potential of the teams to improve Oregon's ability to resolve emergencies is significant. The current revision of the Oil and Hazardous Materials Emergency Response Plan recognizes the need to have the OSFM directly involved in the dispatch and control of these teams. The Department of Environmental Quality's (DEQ) position as lead agency has been replaced in situations where OSFM would be more effective.

ATTACHMENT D

Hazardous Materials Emergency Response Plans

(all plans to be coordinated)



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